



# Guide to Procedural Fairness in the Mental Health Tribunal

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# Summary of Guide<sup>1</sup>

The *Mental Health and Wellbeing Act 2022* (the Act) provides that the Mental Health Tribunal (the Tribunal) is bound by the rules of procedural fairness. Procedural fairness comprises two principal rules, namely the hearing rule and the bias rule.

## Hearing rule

The hearing rule requires that a person whose interests are affected by a Tribunal decision must be given a reasonable opportunity to put their case to the Tribunal before the Tribunal hands down its decision. Tribunal divisions play a key role in ensuring that the hearing is fair, and supported by related administrative policies and procedures.

Key aspects of the hearing rule include:

- giving participants reasonable notice of a hearing and the issues to be determined (2.1)
- giving participants adequate time to prepare for a hearing (2.2)
- respecting patients' entitlement to an oral hearing, representation and interpreters (2.3)
- giving participants the opportunity to respond to 'adverse material' (2.4)
- ensuring that decisions are based on relevant information which supports the conclusions reached (2.5)
- ensuring that participants are given sufficient opportunity to put their case (2.6)
- disclosing, where appropriate, any specialist expertise and knowledge on which members are planning to rely (2.6.4) and
- encouraging participation if a party is unrepresented (which in practice is most participants) (2.6.5).

## Bias rule

It is a central requirement of procedural fairness that a Tribunal should be impartial, open to persuasion and able to judge cases on their merits. Bias, which means the absence of impartiality, can be either actual or apprehended and can arise from a range of different circumstances which are set out in this guide. 'Apprehended' or perceived bias is the form of bias most commonly claimed.

The test for apprehended bias is: *would a fair-minded lay observer reasonably apprehend (in the sense that there is a real and not remote possibility) that a member might not bring an impartial mind to the hearing?*

A range of different potential bias scenarios are outlined in the body of this guide. They include:

- disqualifying interest or association (see 3.4.1)
- disqualifying conduct (bias by conduct or prejudice) (see 3.5) and

- extraneous information or ex parte dealings (see 3.6).

This guide also outlines the concepts of disclosure, objection and waiver (see 3.7-3.8) and what the Tribunal should do when a member is disqualified (3.9).

### Procedural fairness is context-specific

It is important to remember that the rules of procedural fairness are context specific. They are flexible and variable, depending on the nature of the particular court or tribunal. In other words, procedural fairness calls for a tailored approach. Applying procedural fairness principles without any attempt to adapt them to the context of the Tribunal could ironically result in hearings that are not procedurally fair. This guide gives examples of how procedural fairness principles can be tailored to Tribunal hearings.

### Procedural fairness issues most likely to arise in Tribunal hearings

Issues relating to procedural fairness may be identified by the Tribunal itself (for example a member realises they have a prior professional association with a patient) or a party may raise the issue (for example a patient states they did not receive the hearing report prior to the hearing). It is also possible that a claim that the requirements of procedural fairness have not been met could be made during or after the hearing (for example an assertion or allegation that a member's comments and behaviour indicate 'pre-judgment').

Based on our experience, the most likely issues or concerns related to procedural fairness that arise in the context of Tribunal hearings are where:

- a patient has not received any or adequate access to relevant documents prior to the hearing (a potential breach of the hearing rule principle that patients be given adequate time to prepare for a hearing)
- the written and oral evidence before the Tribunal is inadequate for the Tribunal to make a decision (a potential breach of the hearing rule principle that decisions are based on relevant information that supports the conclusions reached) and
- there is a potential issue of perceived or apprehended bias (for example on the grounds that a member previously worked at a service that is now treating the patient).

These scenarios and options for managing them are discussed in the body of this guide but, for convenience, summaries taken from the later sections of this guide are also extracted in the text boxes below.

#### **Options available to the Tribunal where the patient has not received adequate access to documents prior to a hearing**

As a first step, reiterate to the treating team that the patient has the right under section 373(1) of the Act to have access to any documents in the possession of the mental health service in connection with the proceeding at least two business days before the hearing.

The Tribunal's approach to access to documents including our expectations for providing documents to the patient, and the consequences of failure to provide access to documents, is set out in [Practice Note 4 Access to Documents in Mental Health Tribunal hearings and applications to deny access to documents](#) .

The Practice Note and related frequently asked questions are available on the [Tribunal's website](#). With the exception of documents that are the subject of an application to deny access to documents, as a minimum, services should give patients a copy of the report prepared for the hearing, and confirm the patient's wishes about accessing other documents on the clinical file.

Bear in mind, however, that access to documents is context-specific and requires a flexible approach depending on the circumstances. For instance, if an ECT application is listed for an urgent hearing, it will often not be possible to provide the hearing report to the patient two business days before the hearing and a shorter period would be acceptable.

Where access has not been provided, the following options are available to the Tribunal and these should be discussed with the parties – naturally the views of the patient will be the most critical.

### **1. Proceed on the day and conduct the hearing in a manner that recognises and responds to the patient's lack of access**

As noted above, access to documents is context-specific and requires a flexible approach depending on the circumstances of the case. The first step is to explore whether the lack of access to documents can be ameliorated on the day of the hearing. Any options identified should be discussed with the patient (and any representative) as to whether this would be acceptable to them.

For example, is it possible to delay the commencement of the hearing for a short time to give the patient (and any representative) an opportunity to read the hearing report?

Alternatively, is it possible to conduct the hearing in a way that acknowledges that the patient has not received adequate access to the relevant documents? This may include asking the treating team to outline the content of the report in detail, and the Tribunal exploring aspects of the report and, if relevant, the clinical file, in more detail than would otherwise be needed if the patient (and any representative) had read the materials in advance. This option may be appropriate if the patient wants the hearing to proceed without any further delay.

### **2. Adjourn the hearing**

If the division considers that the patient's lack of access cannot be rectified by conducting the hearing in a manner that recognises and responds to the patient's lack of access, consider whether an adjournment is appropriate and possible. The Tribunal's power to adjourn hearings is subject to limitations. The Tribunal can only adjourn a hearing and extend a treatment order or temporary treatment order (TTO) pursuant to section 374 of the Act if it is satisfied 'exceptional circumstances' exist. The duration of the treatment order or temporary treatment order can only be extended once for a maximum of 10 business days. ECT hearings can only be adjourned to a date that is no more than 5 business days after the date the application was received. (For more on adjourning (urgent) ECT hearings see the Guidelines for ECT hearings and Orders under [guides, polices and procedures](#) on the Tribunal's website.)

In determining whether exceptional circumstances exist, the Tribunal must consider the facts of the case in light of the Act and its purpose, as well as the interests of the parties involved.

Given the strict timelines imposed by the Act and the limited adjournment powers, there may be times when the Tribunal is unable to adjourn the hearing and must proceed with the hearing in order to comply with the Tribunal's statutory duties even if this means proceeding in less than

ideal circumstances. In the case of treatment order hearings, the ability of a person to subsequently apply to the Tribunal for revocation of a TTO or TO under section 206, without the same time constraints, ensures that they are able to have a further opportunity to challenge the order.

### **3. Addressing systemic issues**

This is not so much an alternative as an additional issue that should be considered. If members identify that a particular service regularly fails to provide its patients adequate access to documents, they could recommend to the Tribunal's principal registrar team that this be taken up with the service concerned.

#### **Quality of evidence – dealing with inadequate evidence**

- While no party bears a legal onus of 'proving its case,' in practice the Tribunal relies on the oral and written information the service provides to ensure its decisions are based on relevant and logically probative information that support the conclusions reached (in accordance with the rules of procedural fairness).
- The Tribunal has set out its expectations regarding hearing reports and hearing attendance requirements in its Rules and Practice Notes.
- Sometimes the Tribunal does not have adequate information to be satisfied of the relevant criteria. In such cases, there are various options open to the Tribunal, including adjourning the hearing or revoking the Order to which the patient is subject to (or refusing the application before it).
- It is not possible to make a short Order to manage scenarios where the service has provided incomplete or insufficient information to demonstrate the criteria are met

## Handling claims of apprehended bias

Despite the test for apprehended bias being high and difficult to satisfy, whenever members become aware that they have had prior contact or dealings with a patient (in previous Tribunal hearings or a different context) the first step will usually be for the members to discuss it as a division. It is open to the division to decide the matter themselves without raising it with the parties if the connection is so remote that the test for apprehended bias clearly isn't met (for example, the connection is nothing more than a member having worked at a service 10 years ago).

However, pro-active disclosure can be an effective way to manage any potential concerns a person may have about apprehended bias. If the connection is such that the division forms the view that there is a 'live question' about apprehended bias (for example, a member provided a second opinion in relation to the patient two years ago) the issue should be raised with the parties at the beginning of the hearing, and they should be invited to express their views.

The parties' views are not determinative. After confirming the parties' views, the division should then make its own decision on whether the test is met, taking those views into account. Even where a patient does not attend their hearing disclosure is appropriate so that the issue is noted. In the event concerns are raised after the hearing, the Tribunal will be able to demonstrate it turned its mind to the matter before proceeding.

When a patient raises a concern of bias the following steps can be followed:

1. Approach the discussion bearing in mind that you can only disqualify yourself when the test for apprehended bias is satisfied. Adopting too generous an approach to such matters, while well intended, can compromise the effective operation of the Tribunal.
2. Remind the parties that Tribunal members come to the hearing with an impartial mind and each hearing is a new or fresh hearing and is not based on any prior hearing outcome.
3. Explain to the parties that adjournments are subject to restrictions under the Act and that a mere allegation of bias will not justify an adjournment.
4. If a legal representative is involved, explain that an allegation of bias must be accompanied by submissions on the applicable law. If there is no legal representative involved, ask the patient (or other party) to explain why they think you are biased.
5. After hearing from the person or their representative the members of the division then need to consider whether the reasons given and the circumstances of the case meet the legal test for apprehended bias – that is, on the basis of the facts in the matter before you, *would a fair-minded lay observer reasonably apprehend (in the sense that there is a real and not remote possibility) that you might not bring an impartial mind to the hearing?* This is an objective test for the Tribunal to decide. Importantly, the views of the hearing participants are not determinative.
6. If you decide the test for apprehended bias is not satisfied and therefore proceed with the hearing, remind the patient / representative of their right to seek a further Tribunal hearing, or a review by VCAT, if they are dissatisfied with the Tribunal's decision on the substantive issues involved in the hearing.

7. If you decide the test for apprehended bias is satisfied consider adjourning the hearing if this is possible, having regard to the guidance provided for the relevant hearing type in the *Mental Health Tribunal Hearings Manual*. However, if this is not possible, and registry confirm a matter cannot be transferred to another division (which will rarely be possible at short notice), consider relying on the doctrine of necessity (see 3.9.1) to hear and determine the matter. If you do proceed on the basis of necessity and the decision involves making an order, consideration should also be given to making the duration of the order relatively short if that option is available. Making an order for a short duration is only available to the Tribunal if one of the hearing triggers is a 28-day TTO hearing, or an application for a further treatment order by the authorised psychiatrist.
8. For the purposes of a possible statement of reasons request, the legal member should keep a note of the efforts of the division and registry staff to identify alternative means of hearing the matter. You should also remind the patient about their options if they are unhappy with the decision. It is also a good idea to advise them they can seek legal advice and advocacy support.



# Part 1: Introduction

The Mental Health Tribunal (the Tribunal) is not legalistic or adversarial in nature. It operates on an inquisitorial model. It may therefore seek any information it sees as necessary to make a just decision. It may make inquiries of hearing participants, or of other people, call for documents, question participants and even call as witnesses people other than those suggested by the parties. It may receive or call for further information until the time that it reaches its decision.

The inquisitorial nature of the Tribunal is articulated in section 362 of the Act as follows:

*The Tribunal –*

- (a) is not bound by the rules of evidence; and*
- (b) is bound by the rules of procedural fairness; and*
- (c) may inform itself on any matter as it sees fit; and*
- (d) must conduct each proceeding as expeditiously and with as little formality and technicality as the requirements of this Act, the regulations and rules and a proper consideration of the matters before it permit.*

Section 362(1)(b) makes it explicit that the Tribunal is bound by the rules of procedural fairness, sometimes referred to as 'natural justice'.<sup>2</sup> Procedural fairness is central to the right to a fair hearing which is enshrined in section 24 of the *Charter of Human Rights and Responsibilities Act 2006 (Vic)*.<sup>3</sup>

Procedural fairness comprises two key rules, namely:

***The hearing rule:*** *a person or body having power to decide a matter must give the affected persons an opportunity to state their case; and*

***The bias rule:*** *the decision-maker must be impartial and have no personal stake or interest in the matter to be decided.*<sup>4</sup>

The rules of procedural fairness are flexible and variable depending on the nature of the particular court or tribunal. As the Council of Australasian Tribunals (COAT) Practice Manual notes:

*Caution should be exercised in treating prior judicial decisions on the hearing rule as precedents. The rule cannot be reduced to a code of legal rules for categories of decisions. Its content is variable and requires particularised assessment. The specific requirements of the rule depend on the legislative provisions, the nature of the decision to be made, the subject matter of the case and all the circumstances.*<sup>5</sup>

For example, the rules of procedural fairness also apply to adversarial courts but operate differently. According to the COAT Practice Manual:

*The rules [of procedural fairness] have an inbuilt flexibility that allows them to be applied in ways that take account of the differences in the composition and function of tribunals.*<sup>6</sup>

Similarly, the principles of procedural fairness may also differ between different types of tribunals. As a judge in a case cited in the Administrative Review Council's Guide to Standards of Conduct for Tribunal Members (ARC Guide) stated:

*There are... no words which are of universal application to every kind of enquiry and every kind of domestic tribunal. The requirements of natural justice must depend on the circumstances of the case, the nature of the inquiry, the rules under which the tribunal is acting, the subject matter being dealt with and so forth.<sup>7</sup>*

## 1.1 Procedural Fairness and the Mental Health Tribunal Competency Framework

Not only is procedural fairness required by the Act but several important aspects of the duty to ensure hearings are procedurally fair are captured in the competencies and performance indicators in the Competency Framework for Tribunal members. The Competency Framework provides a guide to both newly appointed and experienced Tribunal members to the full range of critical abilities and qualities expected of them.

For example, under Part D (Conduct of Hearings) key competencies and performance indicators include:

- conducts the hearing in a manner that establishes and maintains the independence and authority of the Mental Health Tribunal and enables meaningful participation by all involved in hearings
- manages the hearing process to facilitate the fair and timely determination of the matter
- understands and applies the principles of procedural fairness
- maintains a proper balance between supporting those appearing at hearings to participate fully and the impartiality of the Tribunal
- able to give practical effect to the rules of procedural fairness in the Tribunal context, e.g. managing each party's attendance, non-attendance, representation and access to documents
- ensures that each participant in hearings is properly heard and promotes a dialogue between participants
- uses the power to adjourn effectively and minimizes delays and irrelevancies.

Similarly, performance indicators under Part G (Professionalism and Integrity) include:

- recognises and discloses potential or perceived conflicts of interest
- avoids any perception of bias by avoiding language or conduct that might give rise to the perception of an absence of impartiality
- remains and appears impartial between participants, whether individuals, professionals or public bodies.

## Part 2: The Hearing Rule

A person whose interests are affected by a proposed decision must be given a reasonable opportunity to put their case to the decision-maker before the decision is made. The hearing rule covers a range of matters which are outlined below.

### 2.1 Giving reasonable notice of a hearing and the issues to be determined

The procedural fairness requirement to give reasonable notice of a hearing and the issues to be determined is reflected in section 371 of the Act. That provision requires the Tribunal to provide written notice of the hearing 'as soon as practicable.' Notice must be given to certain persons, including the person who is the subject of the proceeding and the psychiatrist treating them. This rule is related to giving participants adequate time to prepare for a hearing (see below).

This requirement is also closely related to the Tribunal's aim to facilitate active participation in hearings as part of a 'solution-focused' approach (see the [Guide to Solution-Focused Hearings in the Mental Health Tribunal](#)). It is worth noting that facilitating participation is not confined to the approach members take in hearings. In order to be able to prepare for the hearing and participate more fully in it, participants need to know about the hearing and what to expect during it. In this sense, the Notice of Hearing and documents included with it (such as information sheets) are an important first step in facilitating participation in hearings as well as a vital component of ensuring procedural fairness. The Notice of Hearing also includes an explanation that the Tribunal will have to make a decision without the patient if they do not participate in the hearing.

### 2.2 Giving participants adequate time to prepare for a hearing

Section 373(1) of the Act requires designated mental health services to give persons who are the subject of proceedings access to any documents in their possession in connection with the proceeding at least two business days before the hearing.<sup>8</sup> The Tribunal's approach to access to documents including our expectations for providing documents to the patient and the consequences of failure to provide access to documents is set out in [Practice Note 4 Access to Documents in Mental Health Tribunal hearings and applications to deny access to documents](#) (see this practice note as well as a summary and frequently asked questions on the Tribunal's website).

It is important to note that this rule is context-specific and members should adopt a flexible approach depending on the circumstances. For instance, if an ECT application is listed for an urgent hearing, it will often not be possible to provide the hearing report to the patient two business days before the hearing and a shorter period would be acceptable. In the context of urgent ECT hearings the condition of the patient might also preclude, or significantly limit, the extent to which it is possible for the treating team to provide the report and meaningfully discuss it with the patient prior to the hearing.

Finally, in any matter the patient's view about any failure to provide access will be relevant. For example, in some cases the patient may not have wanted to access their clinical file or read the report, and they may be keen for the hearing to go ahead without further delay. In such situations, it may be appropriate to adopt some of the steps referred to in the next section.

## 2.2.1 Where the patient has not had adequate access to documents

The following boxed text outlines options for how divisions of the Tribunal can handle situations where the person who is the subject of the hearing has not been provided with access to documents before their hearing as they are entitled to be under the Act.

### **Options available to the Tribunal where the patient has not received adequate access to documents prior to a hearing**

As a first step, reiterate to the treating team that the patient has the right under section 373(1) of the Act to have access to any documents in the possession of the mental health service in connection with the proceeding at least two business days before the hearing.

The Tribunal's approach to access to documents including our expectations for providing documents to the patient and the consequences of failure to provide access to documents is set out in Practice Note 4 Access to documents in Mental Health Tribunal hearings and applications to deny access to documents.

The Practice Note and related frequently asked questions are available on the [Tribunal's website](#). With the exception of documents that are the subject of an application to deny access to documents, as a minimum, services should give patients a copy of the report prepared for the hearing and confirm the patient's wishes about accessing other documents on their clinical file.

Bear in mind, however, that access to documents is context-specific and requires a flexible approach depending on the circumstances. For instance, if an ECT application is listed for an urgent hearing, it will often not be possible to provide the hearing report to the patient 2 business days before the hearing, and a shorter period would be acceptable.

Where access has not been provided, the following options are available to the Tribunal and these should be discussed with the parties – naturally the views of the patient will be the most critical.

#### **1. Proceed on the day and conduct the hearing in a manner that recognises and responds to the patient's lack of access**

As noted above, access to documents is context-specific and requires a flexible approach depending on the circumstances of the case. The first step is to explore whether the lack of access to documents can be ameliorated on the day of the hearing. Any options identified should be discussed with the patient (and any representative) as to whether this would be acceptable to them.

For example, is it possible to delay the commencement of the hearing for a short time to give the patient (and any representative) an opportunity to read the hearing report?

Alternatively, is it possible to conduct the hearing in a way that acknowledges that the patient has not received adequate access to the relevant documents? This may include asking the treating team to outline the content of the report in detail, and the Tribunal exploring aspects of the report and, if relevant, the clinical file, in more detail than would otherwise be needed if the patient (and any representative) had read the materials in advance. This option may be appropriate if the patient wants the hearing to proceed without any further delay.

## 2. Adjourn the hearing

If the division considers that the patient's lack of access cannot be rectified by conducting the hearing in a manner that recognises and responds to the patient's lack of access, consider whether an adjournment is appropriate and possible. The Tribunal's power to adjourn hearings is subject to limitations. The Tribunal can only adjourn a hearing and extend a treatment order or temporary treatment order (TTO) pursuant to section 374 of the Act if it is satisfied 'exceptional circumstances' exist. The duration of the treatment order or temporary treatment order can only be extended once for a maximum of 10 business days. ECT hearings can only be adjourned to a date that is no more than 5 business days after the date the application was received. (For more on adjourning (urgent) ECT hearings see the Guidelines for ECT hearings and Orders under the [guides, policies and procedures tab](#) of the Tribunal's website.)

In determining whether exceptional circumstances exist, the Tribunal must consider the facts of the case in light of the Act and its purpose, as well as the interests of the parties involved.

Given the strict timelines imposed by the Act and the limited adjournment powers, there may be times when the Tribunal is unable to adjourn the hearing and must proceed with the hearing in order to comply with the Tribunal's statutory duties even if this means proceeding in less than ideal circumstances. In the case of treatment order hearings, the ability of a person to subsequently apply to the Tribunal for revocation of a TTO or TO under section 206, without the same time constraints, ensures that they are able to have a further and opportunity to challenge the order.

## 3. Addressing systemic issues

This is not so much an alternative as an additional issue that should be considered. If members identify that a particular service regularly fails to provide its patients adequate access to documents, they could recommend to the Tribunal's principal registrar team that this be taken up with the service concerned.

## 2.3 Entitlement to an oral hearing, representation and interpreters

The right of the person who is the subject of the proceeding to appear before the Tribunal at the hearing and to be represented 'by any person authorised to that effect' is enshrined in section 365(1) and (3) of the Act.

However, the Tribunal also has the power to exclude any person from the hearing if they are behaving in a manner that is disruptive to the hearing: section 365(2). The power to exclude participants from the hearing should be exercised cautiously. Often a warning that the Tribunal may exclude a person if the disruptive behaviour continues will lead to either an improvement in behaviour or a decision on the part of the disruptive person to leave the hearing voluntarily. This power extends to excluding the patient from the hearing room (whether virtual or in-person) when delivering oral reasons for decision if there are there are reasonable concerns about aggressive or threatening behaviour.<sup>9</sup> See, further, 3.6.1.

Section 366 of the Act provides that parties may be assisted by 'an interpreter or another person necessary or desirable to make the hearing intelligible to that party.' However, section 366(3) provides that the Tribunal may direct that a hearing under the Act continue without the

assistance of an interpreter if it is satisfied that it is appropriate in the circumstances. Tribunal staff arrange for an interpreter to be present when needed by the patient (or their support person/s) but it is the responsibility of the mental health service to advise the Tribunal of this need prior to the hearing.<sup>10</sup>

## 2.4 Participants to be given the opportunity to respond to ‘adverse material’

Ensuring that a participant has the opportunity to respond to relevant adverse material (for example, in the case of patients, adverse material would be material that would tend to show that they meet the compulsory treatment criteria in the Act) is an important aspect of the hearing rule.<sup>11</sup> This principle is related to the general duty to ensure that parties have sufficient opportunity to put their case (see below).

It is worth noting that this is an area in which traditional procedural fairness terminology does not quite ‘fit’ the context of the Tribunal. Using terminology such as ‘opportunity to respond to adverse material’ may conjure up an adversarial atmosphere where hearing participants are ‘combatants’ who want diametrically opposed outcomes. However, this is not the case in Tribunal hearings and an adversarial, court-like atmosphere is obviously contrary to the inclusive, participatory, solution-focused approach to hearings that the Tribunal seeks to adopt.

In short, complying with procedural fairness principles is essential but it is also important to adapt them to the context of the Tribunal. The boxed text below gives an example of how members might ensure that patients have an opportunity to respond to any relevant adverse material in a Tribunal hearing.

### **Ensuring that patients have an opportunity to respond to any relevant ‘adverse material’**

Listing and asking a person to comment on every symptom and event reported as part of the treating team’s case for compulsory treatment would detract from solution-focused hearings and give rise to potentially distressing hearings. This is not to suggest that this aspect of procedural fairness does not apply to Tribunal hearings, but rather that it needs to be complied with in an appropriate way. For instance, asking compulsory patients to comment on a broad summary provided by the representative of the treating team – or a member of the Tribunal – will often be sufficient. Questions can also strike an appropriate balance between being transparent and unnecessarily invasive. For example:

*‘From what your doctor says in the report it seems before coming to hospital you were very upset / very frightened / doing some things you don’t normally do – can you tell us what you remember from that time?’*

*‘Your doctor believes you have a mental illness because xxx. What do you think about that?’*

If a patient is particularly concerned about a specific issue, exploring that more directly will be necessary and appropriate. For example:

*‘You told us that you have never heard commands from the TV. However, the nursing notes state that only five days ago you told staff that you were acting in a particular way because the TV told you to. What can you tell us about that?’*

It would not be acceptable for a member simply to note the information in the nursing notes without asking the patient about it and then during deliberation, say to the other members that they should not believe the patient because the notes on the file indicate something different.

If members form a provisional view about a matter, it is helpful to communicate this in the course of the hearing. This promotes the purpose of the hearing rule by alerting the parties to what a member is thinking, and giving them an opportunity to persuade them to take another view.

Expressing provisional views is also discussed under the bias rule (see section 3.5.2). Examples of how a member might express provisional views is given below.

### **Giving participants opportunity to respond to a provisional view**

Member to treating team representative:

*'I've read your report but I'm not entirely clear about why you think there is no less restrictive means available to enable X to be treated (including why they can't be treated on a voluntary basis). This is one of the criteria we need to consider under the Act. Based on the information you have provided so far, it would be difficult to conclude X can't be treated voluntarily. Is there anything you can or want to add?'*

Member to patient:

*'You've told us you're willing to take medication but at the same time you've also told us you don't think medicine helps you. I don't quite understand why you would take medication if you think it doesn't help?'*

## **2.5 Ensuring that decisions are based on relevant information that supports the conclusions reached**

Ensuring that decisions are based on 'relevant and logically probative information (probative information is that which tends logically to prove that which it asserts)' <sup>12</sup> is an important part of the hearing rule. In the Tribunal context, alongside the views of the patient, and ideally their carer and nominated support person, the oral evidence of the treating team, the relevant hearing report and clinical documents outlined in [Practice Note 4](#) are principal sources of written information on which the Tribunal relies in determining whether the compulsory treatment criteria or relevant ECT criteria apply.

The obligation to ensure that decisions are based on relevant and logically probative information should not be confused with importing the rules of evidence (which do not apply in Tribunal hearings). In particular, it does not impose a burden of proof on the treating team. However, the treating team does bear a practical responsibility for providing the Tribunal with evidence upon which it can make a decision (see below).

In order to comply with the requirement to ensure that decisions are based on relevant information which supports the conclusions reached, it is important that the relevant hearing report (such as the report for hearings about a Treatment Order) and details of treatment be of sufficient quality and that the members of the treating team present at the hearing know the patient sufficiently well. On the other hand, how well the treating team representative should

know the patient will depend on the circumstances of the case. For example, a treating team can only be expected to have relatively limited knowledge of a person who is engaging with mental health services for the first time.

### 2.5.1 Quality of evidence – dealing with inadequate evidence

- While no party bears a legal onus of ‘proving its case,’ in practice the Tribunal relies on the oral and written information the service provides to ensure its decisions are based on relevant and logically probative information that support the conclusions reached (in accordance with the rules of procedural fairness).
- The Tribunal has set out its expectations regarding hearing reports and hearing attendance requirements in its [Rules and Practice Notes](#).
- Sometimes the Tribunal does not have adequate information to be satisfied of the relevant criteria. In such cases, there are various options open to the Tribunal, including adjourning the hearing or revoking the Order to which the patient is subject (or refusing the application before it).
- It is not possible to make a short Order to manage scenarios where the service has provided incomplete or insufficient information to demonstrate the criteria are met.

Sometimes the Tribunal may have concerns that the information before it is inadequate. This may arise because:

- the hearing report has not been provided or is inadequate / incomplete and / or
- no one from the treating team attends the hearing or those that do attend do not know the patient sufficiently and / or cannot provide the information the Tribunal needs to make a decision.

In this section we set out the standard of proof that the Tribunal must apply to the evidence; the hearing report and hearing attendance requirements as well as what divisions can do when they have insufficient evidence before them.

#### Standard of proof

The Tribunal is inquisitorial in nature and can inform itself on any matter as it sees fit (section 362(1)(c)). Importantly, no party (including the service) bears the legal onus of ‘proving its case’.<sup>13</sup> At the same time as noted above, the Tribunal is bound by the rules of procedural fairness and a key rule of procedural fairness is that decisions are based on ‘relevant and logically probative information that support the conclusion reached.’

On a practical level the service needs to provide information and evidence to support the making of a treatment order (or other type of Order being considered by the Tribunal).<sup>14</sup> This is because the Tribunal has limited time to conduct its own inquiries (for example, reviewing the clinical file) and relies on the hearing report and oral evidence provided by the treating team to inform its decision.

The civil standard of proof described by Dixon J in *Briginshaw v Briginshaw*<sup>15</sup> applies in Tribunal hearings. In *PBU & NJE v Mental Health Tribunal*, Bell J approved VCAT’s description of that standard which was as follows:



*The standard requires a tribunal to actually be persuaded that a fact in issue exists. It must consider the seriousness of the matter at hand and the gravity of the consequences flowing from a particular finding and determine whether the matters in issue have been proven to its reasonable satisfaction. That state of satisfaction is not likely to be reached based on uncertain proofs of evidence or whether findings are reached by drawing indirect inferences.<sup>16</sup>*

Bell J added (at [205]) that he did:

*...not see any practical difference between the requirement that necessity for interfering with human rights be 'convincingly shown,' on the one hand, and establishing that necessity according to the enhanced civil standard of proof described by Dixon J in *Briginshaw*, on the other.*

*In both cases, a finding is made having regard to the gravity of that issue, namely the fundamental human rights of the person to self-determination, to be free of non-consensual treatment and to personal inviolability. This is also consistent with the requirement in s7(2) of the Charter that reasonable limits on human rights be 'demonstrably justified.'*

## **Requirement to provide a hearing report**

The Mental Health Tribunal Rules 2023 are the key source of the requirement to provide a hearing report. The Rules state that the hearing report must be in the form specified in the applicable Practice Note issued for the purposes of providing, making and giving hearing reports. The Tribunal has provided templates for services to use.

The Rules and the Practice Notes are available on our website under the [rules and practice notes tab](#).

## **Attendance requirements**

The Tribunal's attendance requirements are articulated in Practice Note 1: Applications, Reports and attendance requirements: see the [rules and practice notes](#) tab.

## **Attending medical officer must have direct and sufficient knowledge of patient**

At a minimum, services must ensure a medical officer with relevant experience as well as direct and sufficient knowledge of the patient is available to provide information to the Tribunal.

How well the treating team representative(s) should know the patient will obviously depend on the circumstances of the case. For example, a treating team can only be expected to have relatively limited knowledge of a person who is experiencing their first episode of mental illness and / or treatment provided by a public mental health service.

## **Consultant psychiatrist must be available**

In preparing for a Tribunal hearing, a treating team should have regard to the complexity of a particular matter. If the circumstances of a particular case are complex, the treating psychiatrist should attend.

The Tribunal recognises that complexity cannot always be predicted and questions may arise on the day of the hearing. As such the treating psychiatrist needs to be available to contribute to a hearing in the event that issues arise requiring their input. If it is not possible for the treating psychiatrist to be available, the Tribunal requires another senior clinician with sufficient

knowledge of the individual patient's current circumstances and treatment plan to attend in their place.

### **Case manager attendance encouraged**

The Tribunal also strongly encourages the attendance of case managers as their perspective and input is invaluable.

### **2.5.2 Where treating team has not provided adequate evidence**

Cases may still arise where the report and the treating team do not provide adequate information to allow the Tribunal to meaningfully assess whether the criteria or other relevant statutory test apply to a particular patient. This is problematic because, as stated above, ensuring that decisions are based on relevant and logically probative information is an important aspect of the 'hearing rule' of procedural fairness.

In such cases, as a primary decision-maker, the Tribunal cannot make an Order (not even an Order of short duration).

In summary, the options are:

- if possible, stand the matter down until later the same day (for example when a particular treating team member may be available – noting this option may be less possible with teleconference or VC-hearings) or
- adjourn the hearing (if possible and appropriate) or
- if there is insufficient information to be satisfied of a criterion, revoke the Order or refuse to grant the ECT application.

In some cases, revoking the Order or refusing to grant the application will be the only option available to the Tribunal (for example, if the treatment order or TTO has already been extended once for a period of 10 business days under section 374(2) and standing down the hearing is not possible).

Orders of short duration cannot be made to manage scenarios where a service has provided incomplete or insufficient information to demonstrate the criteria are met. The Tribunal cannot make an Order if the criteria are not satisfied. This is explored further below.

### **The option of making an Order of short duration**

If the compulsory treatment criteria are met, the Tribunal can only make a new Order in hearings where the trigger is or includes a temporary treatment order or an application by the authorised psychiatrist for another treatment order. If the only hearing triggers are either or both a patient application to revoke the order or a variation of a community treatment order to an inpatient treatment order the Tribunal has no power to make a new treatment order and set a new duration. If the patient continues to be a compulsory patient the remaining duration of their order will be the duration of the order that is the subject of the hearing.

In cases where the Tribunal does have the power to make a new order, it can only do so if it is satisfied that the criteria for compulsory treatment apply to the patient who is the subject of the hearing. Accordingly, orders of short duration cannot be made if the division is not satisfied the criteria are met, including for example, where the evidence provided at a hearing is incomplete or inadequate. A short order will be appropriate if the Tribunal forms the view that:

- compulsory treatment is only needed for a relatively short period
- where the Tribunal is satisfied the criteria for compulsory treatment are met at the time of the hearing, but there is incomplete information about proposed treatment and more information is needed for treatment beyond the brief duration of the Order or
- there are reasons to consider the question of the need for extended compulsory treatment at a future hearing.

It is critical to bear in mind that short Orders cannot be made to manage scenarios where incomplete or inadequate information has been provided to demonstrate the criteria for compulsory treatment are met: the Tribunal cannot make an Order if the criteria are not satisfied.

While the Act only specifies the maximum duration of orders, if making an order of short duration, the Tribunal needs to keep in mind the overall scheme of the Act, including the requirement that an application for a further treatment order must be made at least 10 business days before the expiry of a patient's current Order. Short treatment orders do not automatically bring a matter back before the Tribunal – a short Order will expire and compulsory treatment will cease unless the authorised psychiatrist makes an application to the Tribunal. Accordingly, if the Tribunal does opt to make an Order of short duration, the shortest duration should be three weeks. This is to enable sufficient time for the treating team to review the circumstances of the patient to decide whether or not to apply for another Order, to make any application and for that hearing to be scheduled before the Order expires. For the avoidance of doubt, the three-week minimum guideline does not apply to cases where the Tribunal has all the information it needs but forms the view that compulsory treatment is needed for a very short period.

## **2.6 Ensuring that participants are given sufficient opportunity to put their case**

A number of issues may arise with respect to the Tribunal's duty to ensure that a party is given sufficient opportunity to put their case, including those set out below. This rule is also related to other aspects of the hearing rule, such as ensuring that participants are given the opportunity to respond to adverse information and giving them adequate time to prepare for the hearing.

This is another area where the traditional terminology of procedural fairness is not a good 'fit' with the Tribunal: it calls for a tailored approach (see, for example, boxed text below 'Disclosing personal observations in the hearing').

### **2.6.1 Setting limits**

Generally a tribunal can fix time limits or can limit the subject matter of questions. These limits cannot be arbitrary but must be fixed by reference to the issues in a particular case. Importantly, tribunals must give participants sufficient opportunity to present all material that is relevant to the issues to be determined.<sup>17</sup>

While it is important to give participants sufficient opportunity to present the material that is relevant to the issues to be determined, this does not extend to giving participants a much longer hearing (unless previously arranged by way of special fixture). Allocating much more time for one hearing will likely mean that the time for other hearings is truncated (which may

give rise to the argument that the hearing rule was breached because there was insufficient time to explore the relevant issues in those hearings).

Allowing participants the space to speak and listening to what they say is also an important aspect of solution-focused hearings. There may be times when limiting or interrupting participants may be necessary in order to get through the scheduled hearings for the day. However, these techniques can detract from effective communication with participants because they may indicate a lack of interest in what participants have to say. It is therefore important to be aware of the potential negative effects of these techniques and to use them carefully. For guidance on alternatives to 'blocking' comments (such as 'that's not relevant to our decision') see the [Guide to Solution-Focused Hearings in the Mental Health Tribunal](#).

### 2.6.2 Cross-examination of witnesses

There is no general right to cross examine participants in hearings<sup>18</sup> and the formal court-room technique of cross-examination will not generally be consistent with the solution-focused approach to hearings. (This does not mean that the Tribunal cannot allow informal discussion and questioning among hearing participants to clarify issues.)

### 2.6.3 Personal observations

If a Tribunal forms a view about a matter in issue based on personal observation at a hearing, that matter must be put to a participant if it is adverse to their case, so that they have an opportunity to respond.<sup>19</sup> This is a further aspect of procedural fairness that applies to Tribunal hearings but needs to be implemented appropriately and sensibly.

#### **Disclosing personal observations in the hearing**

If a person appears to be very thought-disordered and they are speaking in a rambling or incoherent manner, putting to them that they seem disordered is inappropriate. Asking a small number of possibly closed questions, or making one or two attempts to clarify what they are saying, would be sufficient. If a person is very guarded or withdrawn, again putting this to them is inappropriate. Reminding them that the Tribunal really wants to know what they think about the issues being discussed is one way of responding to this type of presentation.

However, in some instances asking the person whether your impression of how they are may be appropriate and helpful. For example, you might ask:

*'You seem quite 'up' today – is this how you're feeling / have you been feeling like this for a while?'*

Seeking the view of others is also a means by which the Tribunal can be transparent about what it is taking from a person's presentation on the day – for example asking a case manager whether the way a person is in the hearing is how they tend to be most of the time.

If what members are observing in the course of a hearing is simply congruent with what has been referred to in the report prepared by the treating team, there is less, if any, need to separately identify and discuss this. For example, if a report states that the patient's mood is lowered and they are having difficulty attending to their self-care, then that issue is disclosed by virtue of the report. If the person disputes the report, but they do appear to members to be somewhat flat and not attending to their self-care, it may then be necessary for members to gently convey this to the person.

## 2.6.4 Using specialist expertise, knowledge (relevant to hearing and bias rules)

To what extent can the Tribunal rely on its own specialist expertise and knowledge? Tribunal members using their own knowledge can raise issues of prejudgment under the bias rule and disclosure obligations under the hearing rule.<sup>20</sup> This may seem unusual given that members are appointed for their expertise and experience. According to the COAT Practice Manual:

*An expert tribunal is entitled to draw upon its general expertise and experience when evaluating the evidence and reaching its conclusions, and does not have to disclose its knowledge.<sup>21</sup>*

However, the COAT Practice Manual continues:

*An apprehension of bias will more readily arise where the tribunal relies on particular rather than general information. Where the tribunal proposes to rely upon particular factual information known to it or discovered through its own investigations [or observations] and the information is prejudicial to the interests of a party, the tribunal should disclose the information to the parties and give them an opportunity to respond to it.<sup>22</sup>*

Therefore, members need not disclose general knowledge gained from professional training and associations but should give participants an opportunity to respond to any particular knowledge (particularly if it contradicts or is omitted in the materials before the Tribunal) which will inform their decision. For example, 'if the tribunal relies on information that is from an identifiable source such as a medical journal, the source as well as the information should be disclosed.'<sup>23</sup> This is not to suggest that hearings need to become a forum to debate research findings. However, where something is unclear or questionable, it should be raised.

### Using specialist expertise and knowledge

Psychiatrist member to the representative from the treating team:

*'A has told us that one of the reasons she finds it difficult to continue taking medication is the weight gain it causes. This is an acknowledged side-effect of X. Can you tell us if anything is being planned as part of A's treatment to address this?'*

*'It seems ECT is being proposed very early in the admission of someone for a relapse of psychotic symptoms – can you elaborate on the rationale for this approach?'*

## 2.6.5 Unrepresented parties and participation generally

Unrepresented participants' right to be heard may require a more proactive response from Tribunal members. However, there is a counter responsibility to ensure that such a response does not give rise to an apprehension of bias.<sup>24</sup>

In practice, most patients in Tribunal hearings are not legally represented and treating team members are almost never legally represented. Ensuring that all parties have the opportunity to participate in hearings is one of the key elements of solution-focused hearings. Ensuring active participation is important not only because it gives the participants the feeling that they are being treated with dignity and respect but also because, by actively engaging in hearings, participants are able to state their views more effectively, thereby promoting a legally correct outcome.<sup>25</sup> See the [Guide to Solution-Focused Hearings in the Mental Health Tribunal](#).

## Part 3: The Bias Rule

The rationale for the second limb of procedural fairness, namely the bias rule, is set out in the following passage in the Council of Australasian Tribunals (COAT) Practice Manual:

*A central requirement of administrative justice is that the decision-maker should be impartial and disinterested, so that they are open to persuasion and able to judge the case on its merits. Freedom from bias is also necessary to maintain public confidence in the tribunal and acceptance of its decisions.<sup>26</sup>*

Bias, which ‘connotes the absence of impartiality,’<sup>27</sup> can be either actual or apprehended (see explanation of the difference below in 3.2 and 3.3) and can arise from a range of different circumstances. In one High Court decision,<sup>28</sup> Deane J identified four main categories of cases in which bias can disqualify members which are summarised in the COAT Practice Manual as follows (emphasis added):

*Disqualifying interest*, where the decision-maker has a pecuniary or other personal interest in the decision outcome. This is also referred to as having a conflict of interest.

*Disqualifying conduct*, where the decision-maker’s conduct in the course of the proceedings or outside the hearing gives rise to an apprehension of having prejudged the issue to be decided. This kind of bias may also amount to a breach of the hearing rule.

*Disqualifying association*, where the appearance of bias arises from the decision-maker’s association or relationship with a person interested in the proceedings.

*Disqualification by extraneous information*, where the decision-maker has knowledge of some damaging information outside the proceedings.<sup>29</sup>

These categories, and more specific instances of them that may arise in Tribunal hearings, are discussed below.<sup>30</sup>

### 3.1 Consequences of bias

In cases where the legal test has been satisfied, bias, whether actual or apprehended, will disqualify a member from hearing a matter unless the member discloses the relevant circumstances to the parties and the parties waive their right to object.<sup>31</sup> Disclosure and waiver are explained further in later sections of this guidance.

#### **Three-member panels – apprehended bias of one member ‘taints’ the panel**

One strength of three-member divisions is that members may be able to assist each other in avoiding perceptions of bias. There is some uncertainty in the legal authorities as to whether, and in what circumstances, the bias of a single member will disqualify the entire division. For this reason, it is preferable that the entire panel should be reconstituted if bias by one member is found.<sup>32</sup>

## 3.2 Actual bias

To establish actual bias, a party must prove that a decision-maker was actually prejudiced against them.<sup>33</sup> As noted in the COAT Practice Manual for Tribunals, actual bias ‘requires proof to a “high probability” that the decision maker brought a closed mind to the issues to be decided or had prejudged them’.<sup>34</sup> The High Court has described actual bias as:

*The state of mind ... so committed to a conclusion already formed as to be incapable of alteration, whatever evidence or arguments may be presented.*<sup>35</sup>

As it is difficult to prove actual bias, it is far more common for parties to claim perceived or ‘apprehended’ bias.<sup>36</sup> For this reason, apprehended bias is the focus of this guidance.

## 3.3 Apprehended bias

The legal test and the rationale for the rule against apprehended bias was summarised in the leading High Court case of *Ebner v The Official Trustee in Bankruptcy (Ebner)*<sup>37</sup> as follows:

*...[A] judge is disqualified if a fair minded lay observer might reasonably apprehend that the judge might not bring an impartial mind to the resolution of the question that the judge is required to decide. That principle gives effect to the requirement that justice should both be done and be seen to be done, a requirement which reflects the fundamental importance of the principle that the tribunal be independent and impartial.*<sup>38</sup>

### Summary of applicable test

In other words, the question members must ask themselves in determining whether there is apprehended bias is:

Would a fair-minded lay observer reasonably apprehend (in the sense that there is a real and not remote possibility)<sup>39</sup> that a member might not bring an impartial mind to the hearing?

Key aspects of the test are set out below.

### 3.3.1 Three-step test

The test effectively consists of the following three steps:

- identifying the matter that might lead a member to decide the case other than on its legal and factual merits<sup>40</sup>
- articulating a ‘logical connection between the matter and the feared deviation from the course of deciding the case on its merits.’<sup>41</sup> (It is only through articulating a logical connection that one can assess the reasonableness of the asserted apprehension of bias)<sup>42</sup> and
- assessing whether, ‘having regard to the identified matter and its logical connection with the case being decided other than on its merits, a fair-minded observer might reasonably apprehend that the case may not be decided impartially.’<sup>43</sup>

### **Example of lack of connection between the conduct complained of and the feared failure to decide a case impartially**

In a Victorian case it was held that the plaintiff had drawn no connection between the Magistrate's 'rudeness, abruptness and unwillingness to listen' and a predisposition or prejudice against his case.<sup>44</sup> Without establishing this logical connection, this behaviour would not, by itself, justify a claim of apprehended bias. (However, there are cases where such conduct may constitute apprehended bias: see 3.5.1 and 3.5.2).

### **3.3.2 Test is objective**

The test is objective: It is directed to how the conduct appears to the fair-minded lay observer, not to whether there is actual bias. This means there is no need to predict how a particular member will in fact approach a hearing or to attempt to inquire into the member's actual thought processes.<sup>45</sup>

Further, the reasonable apprehension test is one of *possibility* (real and not remote) rather than *probability*.<sup>46</sup> In other words, would a fair-minded lay observer think that there is a real and not remote possibility that a member might not bring an impartial mind to the hearing?

### **3.3.3 The fair-minded lay observer**

The 'fair-minded lay observer' mentioned in the test is taken to have a broad knowledge of the facts but not a detailed knowledge of the law or the character or the ability of the relevant decision-maker.<sup>47</sup>

However, they are 'taken to understand the dynamics of modern judicial practice'. This includes an understanding that modern judges 'are not expected to wait until the end of a case before they start thinking about the issues, or to sit mute while evidence is advanced and arguments are presented.'<sup>48</sup>

This is even truer of members of inquisitorial, informal and solution-focused tribunals such as the Tribunal. Such members are expected to play an active role in facilitating hearings and encouraging participation: see [Guide to Solution-focused Hearings in the Mental Health Tribunal](#). See, also, 3.5.2 – 'Expression of provisional or tentative views does not offend the bias rule.'

A recent case confirmed that:

*The reasonableness of any suggested apprehension of bias must be considered in the light of ordinary judicial practice and procedure, the nature of the functions performed by the decision-maker and the particular statutory context*<sup>49</sup>

It was held that, in relation to the Coroners Court, 'regard must be had to its inquisitorial nature and the statutory departures from the judicial paradigm.'<sup>50</sup>



### 3.3.4 Members should not disqualify themselves simply because a party demands it

Before exploring the scenarios that could amount to bias, it is worth highlighting a situation that does not, namely: a request that a member be disqualified without any, or without adequate, justification.

In the context of the Tribunal, such a request is most commonly made where a Tribunal member has previously sat on a hearing involving the same patient. This scenario is explored further in paragraph 3.4.1.

Passages from the High Court's decision in *Ebner* highlight that parties cannot 'pick and choose' the judges hearing their case:

*Judges have a duty to exercise their judicial functions when their jurisdiction is regularly invoked and they are assigned to cases in accordance with the practice which prevails in the court to which they belong. They do not select the cases they will hear, and they are not at liberty to decline to hear cases without good cause. Judges do not choose their cases; and litigants do not choose their judges. If one party to a case objects to a particular judge sitting, or continuing to sit, then that objection should not prevail unless it is based on a substantial ground for contending that the judge is disqualified from hearing and deciding the case.<sup>51</sup>*

This does not mean that a member cannot decline to hear a case unless they have concluded that the legal test for apprehended bias is definitely satisfied. If there is a real doubt, it may be prudent for a member to decide not to sit as part of the panel.<sup>52</sup> However, as the High Court observed:

*[I]f the mere making of an insubstantial objection were sufficient to lead a judge to decline to hear or decide a case, the system would soon reach a stage where, for practical purposes, individual parties could influence the composition of the bench. That would be intolerable.<sup>53</sup>*

Some of the principles outlined by Kirby J in another case are also worth highlighting here:

- (a) *Judges by their training and experience are able to bring a detached mind to the task in hand;*
- (b) *Judges should not too readily accede to applications for disqualification; otherwise litigants may succeed in effectively influencing the choice of the judge in their own cause;*
- (c) *Judges should resist being driven from their courts by the conduct or assertion of parties, including assertions of actual or imputed bias.<sup>54</sup>*

Similarly, the COAT Practice Manual offers the following guidance:

*The fact that one or more of the parties has an actual suspicion that the member is biased does not satisfy the test for apprehended bias. The test is an objective one, requiring consideration of what a fair-minded observer would reasonably apprehend.*

*The member should consider all the circumstances, including the stage of proceedings at which objection is taken, and any costs and delays that might result.*

*Courts have cautioned judges and tribunal members not to acquiesce too readily to applications for them to stand down, since this can cause hardship to parties, particularly if the matter is part heard. To stand down when there are no legal grounds for disqualification may even amount to an abdication of the member's duty. The member may also consider whether standing down*

*without sufficient grounds would encourage tactical objections and abuse of process in other cases.*<sup>55</sup>

### **3.3.5 Members who have previously sat on matters involving the same patient**

Occasionally, a member or the Tribunal registry may receive a request from a patient or their legal representative that a certain member not sit on a particular division of the Tribunal or they will seek an adjournment because the member in question has previously sat on a hearing involving the patient. This request may be accompanied by an allegation of apprehended bias, particularly if the member was part of a panel which made a treatment order that the patient opposed.<sup>56</sup>

It is important to note that the apprehension in question in the test for apprehended bias is not an apprehension that the decision-maker will decide the case adversely to a particular party but rather *an apprehension that a judge will not decide the case impartially.*<sup>57</sup>

Stuart Morris QC, former President of the Victorian Civil and Administrative Tribunal (VCAT), refers to case law to this effect in his article 'Apprehension of Bias' and notes:

*...[T]he fact that the outcome of a repeat appeal [a member or members who have heard a similar case involving the same parties] might be thought to be predictable if heard by the same member or members who heard the initial appeal is not a basis for disqualification.*<sup>58</sup>

Unless the test for apprehended bias is satisfied members should not disqualify themselves for this reason. See, also, 'Handling claims of apprehended bias' (3.10).

## **3.4 Types of potentially disqualifying factors or 'bias scenarios'**

A number of scenarios in which bias may arise – based broadly on the four main categories identified by Deane J cited in the first section of this guide – are explored below. In each of these situations, the same test for apprehended bias applies, namely: in this situation, would a fair-minded lay observer reasonably apprehend (in the sense that there is a real and not remote possibility) that a member might not bring an impartial mind to the hearing?

Whichever situation of potential bias arises, members should always have regard to the section of this guidance which explores the general test for apprehended bias.

### **3.4.1 Disqualifying interest (conflict of interest) or association**

The first category of bias identified by Deane J (and summarised above) is where a tribunal member has a pecuniary or other personal interest in the decision outcome. This is referred to as a disqualifying interest or a conflict of interest.<sup>59</sup>

Cases involving a member who has a direct pecuniary or proprietary interest in a hearing are unlikely to arise in the context of the Tribunal. A conflict of interest by reason of an association with a party, representative or other participant in the hearing will be the more common scenario. Closely related to this type of conflict of interest is the third category of bias identified by Deane J and summarised above, namely disqualifying associations (where the appearance of bias arises from the decision-maker's association or relationship with a person interested in the proceedings). For this reason, these categories are examined together in this guide.

### 3.4.2 Internal Tribunal procedures designed to minimise the risk of a claim of bias by association

The Tribunal has developed internal procedures to minimise the risk that matters will be listed before a member if the member has declared a prior professional association with a patient or health service which could give rise to a claim of apprehended bias. The Tribunal requires members' regular cooperation to identify such conflicts.

In essence, the procedures are directed at identifying members' treatment or representation of patients that is: 1) current or in the recent past; and 2) substantial (for example involved a number of contacts and/or took place over a lengthy period) as it is these relationships that are most likely to give rise to a claim of apprehended bias.

#### **Most common type of professional association between members and patients**

The members who are most likely to have had substantial contact with patients in a professional capacity are: psychiatrist and registered medical practitioner members who treat or have recently treated patients, and legal members who have recently acted for patients.

In addition, some community members (such as those who have been case workers or psychologists) may also have had recent professional contact with patients.

### 3.4.3 Personal or professional relationships with participants

It is important to note that not all associations with hearing participants will give rise to a reasonable apprehension of bias. As the COAT Practice Manual notes:

*Much depends upon the nature, duration, and closeness of the relationship. What must be assessed is the capacity of the relationship to influence the outcome.<sup>60</sup>*

While there are few hard and fast rules, it is clear that the relevant relationship must be substantial. As observed in one case:

*...a reasonable apprehension of bias may exist where the presiding judge has a substantial personal relationship with a party to, or a person involved in, proceedings or a substantial personal relationship with a member of the family of that party or person. But absent such relationships or others like them, it is absurd to suggest that a reasonable apprehension of bias can exist merely because a person involved in the proceedings comes from a city where the judge once practised professionally or because the judge may have had professional dealings with that person in the course of professional practice.<sup>61</sup>*

The Council of Chief Justices of Australia and New Zealand's Guide to Judicial Conduct, referred to in the COAT Practice Manual, provides a useful guide as to the type of relationships that give rise to a reasonable apprehension of bias.<sup>62</sup> Some of the relevant principles with respect to relationships – professional and personal – with parties are set out below.

## Relatives

Where the member's relationship to a party (or the spouse of a party) is in the first degree (i.e. parent, child, sibling, spouse or domestic partner), the member should not sit.<sup>63</sup>

Where the member's relationship to a party is in the second degree (grandparent, grandchild, in-laws of the first degree, aunts, uncles, nephews, nieces), the member 'should not sit unless the matter is uncontested or of a minor procedural nature, or the principle of necessity applies.'<sup>64</sup> In the context of the Tribunal, it is difficult to see how these exceptions would apply; as a general rule, members should therefore disqualify themselves from hearing cases involving second-degree relatives.

## Friendships

Personal friendship with a party is a 'compelling reason for disqualification, but mere acquaintance is not.'<sup>65</sup> In such cases members should consider whether to disqualify themselves or to disclose the relationship to the parties (see separate guidance on disclosure and waiver below in 3.7 and 3.8).

## Current or recent business or professional associations

Generally, members who have a current or recent business or professional association with parties should not sit on hearings involving those parties.<sup>66</sup> An example is that psychiatrists who work in the public system should not sit on hearings at their workplace where they have a close, current professional relationship with a party or delegate. However, such an association with other participants in the hearing (for example, carers or other support people) may not necessarily be grounds for disqualification (but should be disclosed – see separate guidance on disclosure and waiver below in 3.7 and 3.8).<sup>67</sup>

## Past professional associations with legal representatives

Friendship or past professional association with a legal representative is not a sufficient ground for disqualification (except in rare instances) as the following passage from a High Court decision highlights:<sup>68</sup>

*[O]rdinarily interaction (social or otherwise) between a practising lawyer who becomes a judge and other members of the legal community in that city does not itself give rise to an apprehension of bias if one of those members is involved in proceedings before the judge. Cases might arise where the conventional rules that govern such professional associations have been exceeded and require the judge to disqualify himself or herself.*

Members who have previously worked for Victoria Legal Aid (VLA) or the Mental Health Legal Centre (MHLC) need not disqualify themselves merely because of their association with VLA or MHLC lawyers currently appearing before the Tribunal.

## Psychiatric treatment of compulsory patients

Unsurprisingly, the relationship between psychiatrist and registered medical practitioner members and patients they have treated is not covered in the general text books, manuals and leading cases on bias.

As noted earlier internal procedures have been developed to minimise the risk of members being listed to hear such cases to avoid any question of possible bias arising. However, it is

nevertheless possible that a member will be listed to sit on a hearing involving a patient they have recently treated. If that occurs, the general test for bias applies.

### **Psychiatrist and registered medical practitioner members (or community members in clinical roles) and former patients**

As noted above, whether a fair-minded lay observer would reasonably apprehend that a member might not bring an impartial mind to the hearing will depend on the nature, duration and closeness of the association and the capacity of the association to influence the outcome of the hearing.<sup>69</sup>

It is useful to consider the following factors:

- When and what was the extent of the contact?
- Does the member treat the patient now or did they treat them in the past (and if so, how long ago?)
- Was the member's involvement minor / one-off (for example, giving a second psychiatric opinion several years ago) or was it more extensive (for instance, were they the patient's treating doctor for a number of years?)

Certainly, psychiatrist and registered medical practitioner members should not sit on cases involving patients whom they currently treat. Similarly, an apprehension of bias would arguably be compelling in cases in which a psychiatrist member has treated a patient in the recent past over many months or years, particularly if it encompassed prior involvement in Tribunal hearings (such as preparing or signing reports or attending hearings) or treatment that is still an issue in the current hearing.

However, whether the test for apprehended bias would be made out in cases involving a member who saw a patient once or twice several years ago is doubtful at best.

Whatever the degree of past contact, it would be prudent for the member to disclose the fact that they once treated the patient and discuss whether the parties are comfortable with them hearing the case (see guidance on disclosure and waiver in 3.7 and 3.8). Note that, even if the parties do not want the member to hear the case, this does not automatically mean that the member should disqualify themselves from the hearing. The relevant legal test still needs to be applied. See 'Handling claims of apprehended bias' in 3.10.

In addition, if the member sits, they should be very careful about what evidence they are relying on, particularly if there is 'adverse material' gained from their knowledge of the patient historically. In such situations it would be important that the member is diligent in putting that information to the patient – such as their attitude to particular treatment in the past or particular risks when unwell.

### **Tribunal members attending hearings as treating team members**

The Tribunal has a small number of members who also work with patients in clinical mental health services such as psychiatrist members who work as consultant psychiatrists; registered medical members who work as medical officers; and community members who work as case managers or in other clinical roles. In this capacity they sometimes attend Tribunal hearings as members of the treating team. The question has been raised as to how these members' dual roles should be addressed (if at all) at hearings.

This situation should be managed proactively, and disclosure is best practice. In this situation, disclosure may minimise the risk of a loss of trust in the treating team, hearing process and a possible bias allegation that may result if the patient finds out after the hearing that their treating team member is also a Tribunal member. On the other hand, disclosure for the first time during a hearing may be inappropriate and counter-therapeutic in a situation where the patient is very unwell and agitated.

For this reason, the preferred approach is that Tribunal members who also work with patients in clinical mental health services disclose this fact to the patient before the hearing and that, if the patient is attending, the Tribunal division should confirm this at the hearing. If the division does not confirm the clinical member's dual role at the beginning of the hearing (for example, because the members do not know the clinician is also a Tribunal member) we recommend that the clinician member confirms their dual role to the hearing participants. We believe that this approach strikes an appropriate balance between informing the patient while minimising the risk of causing anger and distress if the clinician's other role as a Tribunal member is revealed for the first time during the hearing.

### **Previous legal representation of compulsory patients**

The High Court case of *Bienstein v Bienstein*<sup>70</sup> establishes the general principle that a judge is not disqualified from hearing a matter merely because they appeared for a party as an advocate in the past. However, in the same decision the High Court noted that, 'when [previous] advice given by the legal adviser is an issue in the [current] proceedings... a reasonable apprehension of bias can arise.'<sup>71</sup>

### **Guidance for legal members who have previously represented patients or other hearing participants**

The effect of these principles is as follows: if a legal member has acted for or provided advice to a patient or another participant in the hearing in a different context (i.e. not in a Mental Health Tribunal hearing), the issue of apprehended bias is unlikely to arise. However, where a member has previously represented a compulsory patient before the Tribunal, it is reasonable to assume that the current Tribunal hearing will raise similar issues and that apprehended bias may well be a 'live issue.'

Once again, internal procedures should minimise the risk that matters will be listed before a member if the member has declared that they have recently represented a patient in the Tribunal. However, should a legal member nevertheless be listed to hear a case involving such a patient, the general test for bias will again apply.

Whether a fair-minded lay observer would reasonably apprehend that the member might not bring an impartial mind to a hearing will depend on factors such as how often and how long ago the legal member represented the patient in the past. As with other potential bias scenarios, the more recently the member represented the patient the more likely it is that the test for apprehended bias will be met; however, time is not the only consideration.

Even if the legal member is comfortable sitting, once again, it would be prudent to disclose the fact that the legal member has previously represented the patient and to discuss whether parties are comfortable with the member sitting.

Note that, even if the parties do not want the legal member to hear the case, this does not automatically mean that the member should disqualify themselves from the hearing. The relevant legal test still needs to be applied. See 'Handling claims of apprehended bias' in 3.10.

### 3.4.4 Interests and associations – politics

Past or current political affiliations have rarely been the basis for the disqualification of judges.<sup>72</sup> However, according to the ARC Guide, ‘it appears well settled that partisan political activity in relation to issues of public controversy is not considered appropriate’ as it may result in the perception of partiality or bias.<sup>73</sup>

On the other hand, as the Tribunal is a specialist jurisdiction which deals with a reasonably narrow range of issues, some involvement in partisan political activity may be acceptable. The ARC Guide contains the following guidance:<sup>74</sup>

*...[S]ome partisan political activity might be acceptable for a tribunal member, as long as it does not bring the member into disrepute, is not directly related to the work of the tribunal and does not impinge upon perceptions as to the impartiality of the member and/or the tribunal. In determining the answers to these questions, some of the matters to which a tribunal member should have regard include: the type of political activity, the level of involvement of the official in this activity, the nature of the tribunal, the position and level of the tribunal member in both the tribunal and the political organisation, and the ability of the person to continue to carry out tribunal activities with impartiality.*

Members proposing to engage in political activity should discuss their plans with the President.

### 3.4.5 Interests and associations – community and other organisations

Like many other specialist tribunals, Tribunal members are often drawn from the field of interest in which the Tribunal operates, namely mental health practice, law and policy.<sup>75</sup> This means that members are frequently members of social, community or professional organisations that also have an interest in tribunal proceedings.<sup>76</sup>

In most cases, membership of such organisations will be unproblematic. As the ARC Guide observes:

*It is impractical to require members to cancel all their memberships and, indeed, some wider involvement may coincide with a member’s obligation to keep up to date on relevant issues and to provide the tribunal with the benefit of their particular knowledge or expertise.<sup>77</sup>*

On the other hand, members who participate in such organisations ‘should consider the potential for bias or conflict arising from their own activities or those of the organisation.’<sup>78</sup> As with other potential bias categories, members should consider the key question: would the fair-minded lay observer reasonably apprehend that, as a result of the member’s association with an organisation, the member might not bring an impartial mind to the hearing?

Members should discuss any proposed involvement in community or other organisations in the mental health field with the President.

### 3.4.6 Public speaking, teaching, writing

Members engaging in public speaking, teaching and writing on topics closely related to the work of the Tribunal 'should ensure that their participation does not create an opportunity for a reasonable apprehension of bias or otherwise affect the integrity and reputation of the tribunal.'<sup>79</sup>

Once again, members should discuss any public speaking, teaching or writing on topics closely related to the Tribunal with the President.

## 3.5 Disqualifying conduct: Bias by conduct (or prejudice)

The COAT Practice Manual describes bias by conduct or prejudice as follows:

*Tribunal members may, by their words or conduct in tribunal processes or their activities outside the tribunal, engender a reasonable apprehension that they have prejudged an issue to be adjudicated, and are not open to persuasion.*<sup>80</sup>

Some of the more common ways in which members' conduct could give rise to a claim of apprehended bias are discussed below.

### 3.5.1 Avoiding the perception of 'pre-judgment'

Prejudgment means that a decision maker has an opinion on a matter that needs to be decided afresh in the case, and the member applies their opinion to the matter without giving the matter fresh consideration in light of the facts or the information presented by the parties in the hearing.<sup>81</sup> An allegation of bias by prejudice must be 'distinctly made and clearly proved'.<sup>82</sup>

It is inevitable that members will form views about participants (particularly legal representatives and medical staff) who appear regularly before the Tribunal.<sup>83</sup> However, the mere fact that a member may hold a view about a particular participant does not mean that the member is disqualified from hearings in which that participant is involved.<sup>84</sup> Provided that the member does not make comments indicating prejudice, the member is not disqualified from hearing the matter.<sup>85</sup>

What type of conduct or comments may indicate prejudice? Once again, the COAT Practice Manual provides a useful guide.

*A reasonable apprehension of bias may arise from hostility, sarcasm or aggression shown by a tribunal member towards a party, or the representative or witness for a party, in the course of the hearing... A tribunal may need to test the evidence by questioning witnesses and directing their attention to any inconsistencies in the evidence. Where a party is self-represented, care should be taken to ensure that this is not done in a manner that intimidates or overbears the witness. For example, constant interruptions, expressions of disbelief or aggressive questioning by the tribunal might give rise to a reasonable apprehension that the tribunal has taken sides or has prejudged the issue...Flippant remarks in poor taste made by a member about the subject matter of the proceedings may also give rise to apprehended bias. For example, it was alleged that a member hearing a civil claim for defective construction of a fence had publicly referred to it as 'the case of the shonky fence.' Byrne J found that the allegation was unfounded, but if it had occurred it would meet the test for bias.*<sup>86</sup>

Apart from potentially giving rise to apprehended bias, the type of conduct described above would be the antithesis of the solution-focused approach to hearings described in the [Guide to Solution-Focused Hearings in the Mental Health Tribunal](#).



## Mental Health Tribunal context

In the Tribunal context members who sit at the same mental health service regularly may encounter the same treating team members in hearings. If members form a negative view about a certain treating team member in a hearing, expressing frustration about the same treating team member in a later hearing could lead to the perception of prejudgment.

For the same reason, members should take care not to praise treating team members based on a prior perception of their reports or contribution to hearings. The same professional approach should be adopted for legal representatives who regularly appear before the Tribunal and may be known to Tribunal members.

### Avoiding comments on participants which may indicate prejudgment

*Problematic:* ‘Doctor, I told you in previous hearings on several occasions that your reports did not allow us to assess the criteria in the Act. I’m frustrated because yet again you’ve provided us with an overly brief and superficial report.’

*Problematic:* ‘Doctor, I’ve read many of your reports and they are uniformly excellent. I must say it’s always been hard to find fault with your conclusions.’

Statements suggesting preconceived views about treating team staff, legal representatives or any other expert participants in hearings should also be avoided in statements of reasons.<sup>87</sup>

### Case law example of comments indicating bias

In the case of *Vakauta v Kelly* the High Court found that comments made by the judge in the hearing and in the judgment would cause a reasonable apprehension on the part of a lay observer that the judgment was affected by bias.<sup>88</sup>

In that case the judge referred to the expert medical witnesses as ‘that unholy trinity,’ commenting that they came from the ‘usual panel of doctors who think you can do a full week’s work without any arms or legs.’<sup>89</sup> The High Court found ‘derogatory and wide sweeping references’ to one particular doctor to be particularly problematic. These comments included the following: ‘His evidence, which was as negative as it always seems to be – and based as usual upon his non-acceptance of the genuineness of any plaintiff’s complaints of pain.’<sup>90</sup>

## 3.5.2 Expression of provisional or tentative views does not offend the bias rule

The expression of tentative views by members does not manifest prejudgment (and therefore bias). Indeed, the expression of such views may be helpful to participants and promote ‘the purpose of the hearing rule by alerting the parties to what the tribunal is thinking, and giving them an opportunity to persuade the tribunal to take another view.’<sup>91</sup>

In *Disqualification for Bias*, John Tarrant indicates that tribunal members have greater latitude in formulating and expressing tentative views than judges in the more formal, adversarial court setting:

*It has long been recognised that members of tribunals are permitted to form tentative views in relation to a matter at an earlier time than a judge is permitted to do so in relation to a trial. A tribunal member may form tentative views some time before a hearing even commences.*<sup>92</sup>

On the other hand, as the COAT Practice Manual for Tribunals points out:

*Care should, however, be taken when expressing a provisional view, or exposing weaknesses in a party's case, that the tribunal does not give the impression of having made up its mind before the hearing has finished.*<sup>93</sup>

Whatever their preliminary view may be, it is important that members give participants sufficient time to advance their submissions: failure to do so may breach both the hearing and the bias rule.

Quite apart from potentially giving rise to a claim of apprehended bias, pre-emptive 'judgment' in a hearing without hearing from participants or only hearing from them 'under sufferance' (see example below) would also conflict with the solution-focused approach to hearings that the Mental Health Tribunal seeks to adopt: see the [Guide to Solution-focused Hearings in the Mental Health Tribunal](#).

#### **Example of prejudgment rather than expression of provisional view**

An example of where the High Court held that a judge's comments indicated prejudgment rather than a provisional view was *Antoun v R*.

In that case, the trial judge indicated that an application would be refused before even hearing submissions. The views he expressed on several occasions during the trial were not tentative but rather 'were stated peremptorily, repeated emphatically and given force by later remarks and actions.'<sup>94</sup> Despite the fact that the trial judge later heard the arguments for the application, the fact that these were apparently heard under sufferance and rejected immediately, meant that the trial judge's conduct presented an appearance of prejudgment.

### **3.6 Bias and extraneous information or ex parte dealings**

The final category of bias identified by Deane J referred to above is bias by extraneous information or ex parte dealings. This refers to communications between members and hearing participants in the absence of all the participants.

An example of apprehended bias by extraneous information is the case of *CNY17 v Minister for Immigration and Border Protection* where a majority of the High Court held that the appellant had been denied procedural fairness because irrelevant and prejudicial information about him had been provided to the decision maker, without the appellant's knowledge.<sup>95</sup>

It is worth noting that this category may extend to informal communication. As the ARC Guide observes:

*Although the member and the party may be talking about no more than the football, the 'meeting' could be perceived by others as relating to an exchange of information about the case at hand. Even something as innocuous as taking a break from proceedings by the entrance to the building and coincidentally talking to others, some of whom might be witnesses in the matter being heard, could give rise to such a perception.*<sup>96</sup>

One way in which the perception of bias might be avoided in Tribunal context is in the boxed text below.

**For in-person hearings: Ask participants to wait outside the hearing room until all participants have arrived**

It is good practice to ask any participants to wait outside the hearing room until all participants who have indicated that they will attend the hearing have arrived. This avoids the perception that the Tribunal has heard from one participant in the absence of others (even if members are just engaging in 'chit-chat' with those present while waiting for others to arrive).

**For online hearings: when waiting for participants to enter the online hearing (meeting), keep conversation to a minimum**

In the context of online hearings, members should remain professional and avoid engaging in conversation with hearing participants until the hearing starts. This is particularly important if not all participants have joined the hearing.

### 3.6.1 Exception – Tribunal may exclude disruptive persons

An exception to the rule against ex parte dealings is contained in section 365(2) which provides that the Tribunal may exclude any person (including a person who is the subject to the proceeding) if that person is behaving in a manner that is disruptive to the hearing of the matter. This extends to excluding the patient from the hearing room (whether virtual or in-person) when delivering oral reasons for decision if there are concerns about how they will react when they hear the decision due to their aggressive or threatening behaviour.

The right to exclude a disruptive person needs to be balanced against:

- the requirement to have regard to the views and preferences of the patient, carer, nominated person and others specified in the *Act to the extent that is reasonable in the circumstances*
- the right in section 365(3) which allows patients to be represented before the Tribunal by any person authorised to that effect by the person who is the subject of the proceeding
- the general rule in section 365(1) that the person who is the subject of the proceeding has the right to appear before the Tribunal (which is consistent with the rule of procedural fairness that persons whose interests are affected by a decision must be given a reasonable opportunity to put their concerns to the decision maker before a decision is made).

Accordingly, the power to exclude participants should be exercised cautiously. Often a warning that the Tribunal may exclude a person if the disruptive behaviour continues will lead to either an improvement in behaviour or a decision on the part of the disruptive person to leave the hearing voluntarily. However, if the Tribunal needs to rely on section 365(2) to exclude a participant from the hearing, it is preferable that the Tribunal explicitly states this during the hearing.

**The Tribunal can exclude the patient from the room when delivering oral reasons for its decision**

In addition, in exceptional circumstances where the person indicates distress, frustration or there are indications that they are particularly vulnerable and may react negatively to the decision, the division may decide that it is appropriate for the decision to be delivered to them later, in a different way (by their case manager for example). While this is a departure from the

usual processes and expectations it is worth noting that section 377(2) does not specify that oral reasons must be given to the patient, only that they must be given at the conclusion of the hearing. As stated earlier in this guide, the rules of procedural fairness are flexible and variable depending on the nature of the Tribunal and the circumstances. In cases where the patient participates in the hearing but has left the hearing before the reasons for the determination are given the Tribunal has complied with the key aspects of the hearing rule of procedural fairness, namely ensuring patients have an adequate opportunity to put their case and respond to adverse material.

This material is covered in more detail in the resource Guidelines for Conducting Hearings.

## 3.7 Disclosure

### 3.7.1 Purpose of disclosure

The purpose of disclosure is to make parties aware of any matter that could give rise to a claim of apprehended bias so that they can consider it and express their opinion on whether they are comfortable with the member sitting on the hearing. Once again, even if the parties do not want the member to hear their case, this does not automatically mean that the member should disqualify themselves from the hearing. The relevant legal test still needs to be applied. See 'Handling claims of apprehended bias' (3.10).

A failure to disclose a relevant matter may be one of the factors giving rise to a reasonable apprehension of bias.<sup>97</sup>

### 3.7.2 What should be disclosed?

According to the leading High Court case of *Ebner*:

*As a matter of prudence and professional practice, judges should disclose interests and associations if there is a serious possibility that they are potentially disqualifying...*

*It is, however, neither useful nor necessary to describe this practice in terms of rights and duties...<sup>98</sup>*

Even though, as the above quotation from *Ebner* makes clear, disclosure is not a legal duty, it is prudent for Tribunal members to adopt the more scrupulous approach suggested in the ARC's Guide:

*As a matter of good practice, disclosure should be required at a relatively low level, that is, members should disclose anything to the parties which they consider might have a bearing on their impartiality.<sup>99</sup>*

As noted in the COAT Practice Manual for Tribunals:

*Disclosure may also be appropriate in a case where the member thinks there is no reason for disqualification, but apprehends that failure to disclose may lead to a subsequent complaint.<sup>100</sup>*

In the Tribunal context, the first step will usually be for members to discuss the issue as a division. It is open to a division to decide the matter for themselves without raising it with the parties if the connection is so remote that the test for apprehended bias clearly is not met – for example, the connection is nothing more than a member having worked at a service 10 years ago.

Where the connection is such that the division forms the view that there is a ‘live question’ about apprehended bias (for example, the member provided a second opinion in relation to the patient two years ago), the issue should be raised with the parties and they should be invited to express their view. However, as noted above, the parties’ views are not determinative. After confirming the views of the parties the division should make its own decision on whether the test is met, taking those views into account. For further guidance see ‘Handling claims of apprehended bias’ below in 3.10.

### 3.8 Objection and Waiver

If a member discloses a previous connection or other matter that could found an apprehended bias claim, the Tribunal should then invite those parties attending the hearing to express their views.<sup>101</sup> In particular, the Tribunal should ask parties whether they wish to object to the member sitting on the hearing or waive objection<sup>102</sup> rather than rely on any ‘implied’ waiver.<sup>103</sup>

Even if the parties consent to the member sitting, such consent is not the determining factor. According to the COAT Practice Manual:

*Even if the parties waive objection, the member may decide not to sit if they consider that disqualification is the proper course.<sup>104</sup>*

This is particularly the case given that there will always be hearings in which the patient opts not to participate and therefore cannot be consulted. By the same token, if the parties object to the member sitting, this does not automatically mean that the member should disqualify themselves from the hearing. The relevant legal test still needs to be applied.

### 3.9 What the Tribunal should do when a member is disqualified

Unfortunately, there may be cases when, despite procedures designed to avoid it happening, members will find matters listed before them which, having regard to this guide, it is not appropriate for them to hear.

In such cases, the options available include:

- adjourning the hearing if it is possible and appropriate to do so (see guidance with respect to adjournments of different hearing types in the Mental Health Tribunal Hearings Manual)
- relying on the doctrine of necessity to hear the matter (see below).

#### 3.9.1 The doctrine of necessity

The doctrine of necessity ‘recognises that in some cases a tribunal or member must be allowed to proceed despite an appearance of bias, if the tribunal would otherwise be unable to perform its statutory function’<sup>105</sup> An example in the COAT Practice Manual is:

*If the tribunal could not find enough members to constitute a panel, a member who would otherwise be disqualified for bias may take part in the decision. This might occur, for example, where all the members available have received and read an email message from party A that makes prejudicial statements about party B, and party B does not waive objection.<sup>106</sup>*

An example in the Tribunal might be if it is not possible to reconstitute the Tribunal with a replacement member to hear an ECT application within the relevant statutory timelines.

Another example may be where a patient's treatment order hearing has already been adjourned with an extension of their order. In either scenario the Tribunal may need to rely on the doctrine of necessity to conduct the hearing in accordance with its statutory obligations.

Both of these instances appear to be in accordance with advice and views of expert commentators that the doctrine of necessity should only be relied on as a last resort when all other options have been exhausted.<sup>107</sup>

In addition, if the Tribunal proposes to rely on the doctrine of necessity to hear and determine the matter, and the final decision is to make an order, it may be appropriate to consider making an order of short duration. For the purposes of a possible statement of reasons request, the legal member should keep a note of the efforts of the division and registry staff to identify an alternative means of hearing the matter.

### 3.10 Summary of how to handle claims of apprehended bias

Below is a step-by-step guide to handling claims of apprehended bias which was also extracted in the introduction to this guide.

#### **Handling claims of apprehended bias**

Despite the test for apprehended bias being high and difficult to satisfy, whenever members become aware that they have had prior contact or dealings with a patient (in previous Tribunal hearings or a different context) the first step will usually be for the members to discuss it as a division. It is open to the division to decide the matter themselves without raising it with the parties if the connection is so remote that the test for apprehended bias clearly isn't met (for example, the connection is nothing more than a member having worked at a service 10 years ago).

However, pro-active disclosure can be an effective way to manage any potential concerns a person may have about apprehended bias. If the connection is such that the division forms the view that there is a 'live question' about apprehended bias (for example, a member provided a second opinion in relation to the patient two years ago) the issue should be raised with the parties at the beginning of the hearing, and they should be invited to express their views.

The parties' views are not determinative. After confirming the parties' views, the division should then make its own decision on whether the test is met, taking those views into account. Even where a patient does not attend their hearing disclosure is appropriate so that the issue is noted. In the event concerns are raised after the hearing the Tribunal will be able to demonstrate it turned its mind to the matter before proceeding.

When a patient raises a concern of bias the following steps can be followed:

1. Approach the discussion bearing in mind that you can only disqualify yourself when the test for apprehended bias is satisfied. Adopting too generous an approach to such matters, while well intended, can compromise the effective operation of the Tribunal.
2. Remind the parties that Tribunal members come to the hearing with an impartial mind and each hearing is a new or fresh hearing and is not based on any prior hearing outcome.
3. Explain to the parties that adjournments are subject to restrictions under the Act and that a mere allegation of bias will not justify an adjournment.

4. If a legal representative is involved, explain that an allegation of bias must be accompanied by submissions on the applicable law. If there is no legal representative involved, ask the patient (or other party) to explain why they think you are biased.
5. After hearing from the person or their representative the members of the division then need to consider whether the reasons given and the circumstances of the case meet the legal test for apprehended bias – that is, on the basis of the facts in the matter before you, *would a fair-minded lay observer reasonably apprehend (in the sense that there is a real and not remote possibility) that you might not bring an impartial mind to the hearing?* This is an objective test for the Tribunal to decide. Importantly, the views of the hearing participants are not determinative.
6. If you decide the test for apprehended bias is not satisfied and therefore proceed with the hearing, remind the patient / representative of their right to seek a further Tribunal hearing, or a review by VCAT, if they are dissatisfied with the Tribunal's decision on the substantive issues involved in the hearing.
7. If you decide the test for apprehended bias is satisfied consider adjourning the hearing if this is possible, having regard to the guidance provided for the relevant hearing type in the *Mental Health Tribunal Hearings Manual*. However, if this is not possible, and registry confirm a matter cannot be transferred to another division (which will rarely be possible at short notice), consider relying on the doctrine of necessity (see 3.9.1) to hear and determine the matter. If you do proceed on the basis of necessity and the final or substantive decision involves making an order, consideration should also be given to making the duration of the order relatively short if that option is available. Making an order for a short duration is only available to the Tribunal if one of the hearing triggers is a 28-day TTO hearing, or an application for a further treatment order by the authorised psychiatrist.
8. For the purposes of a possible statement of reasons request, the legal member should keep a note of the efforts of the division and registry staff to identify alternative means of hearing the matter. You should also remind the patient about their options if they are unhappy with the decision. It is also a good idea to advise them they can seek legal advice and advocacy support.

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<sup>1</sup> This Summary of Guide does not contain endnotes. All the information contained here is in the body of the text which contains full endnotes.

<sup>2</sup> According to the Council of Australasian Tribunals (COAT) *Practice Manual for Tribunals*, 5<sup>th</sup> edition, March 2020 (COAT Practice Manual), 'Australian law now prefers the term *procedural fairness* because it 'more aptly conveys the notion of a flexible obligation to adopt fair procedures which are appropriate and adapted to the circumstances of the particular case,' 3.2.1.

<sup>3</sup> See Charter of Human Rights - Guidelines for Legislation and Policy Officers in Victoria, 152, available at <https://www.justice.vic.gov.au/charter-of-human-rights-guidelines-for-legislation-and-policy-officers-in-victoria>.

<sup>4</sup> COAT Practice Manual, above n 2, 3.2.1 (formatting changed and emphasis added).

<sup>5</sup> *Ibid*, 3.3.3.

<sup>6</sup> *Ibid*, 3.5.1.

<sup>7</sup> Lord Justice Tucker in *Russell v Duke of Norfolk* [1949] 1 All ER 109, 118 (CA), cited in Administrative Review Council, *A Guide to Standards of Conduct for Tribunal Members*, revised August 2009 (ARC Guide), 18.

<sup>8</sup> However, this is subject to any application to deny access to documents made under section 191(2) to have access to certain documents denied if the authorised psychiatrist is of the opinion that disclosure of the information in the document may cause serious harm to the person or another person.

<sup>9</sup> We take the view that the power in section 365(2) extends to delivering the decision immediately following the hearing. It is unlikely that Parliament intended the Tribunal to have the power to exclude a disruptive person during the hearing but intended it to have to bring the person back into the room (including virtual hearing room) to deliver oral reasons for the decision. See, further, 3.6.1.

<sup>10</sup> See the Guide for Interpreters at Mental Health Tribunal hearings under [guides, policies and procedures](#) on the Tribunal's website.

<sup>11</sup> COAT Practice Manual, above n 2, 3.3.1.

<sup>12</sup> For information to be 'logically probative', it must be relevant and reliable. *Ibid*, 3.3.3 and 5.7.

<sup>13</sup> *PBU & NJE v Mental Health Tribunal* [2018] VSC 564, [202].

<sup>14</sup> *PBU & NJE v Mental Health Tribunal* [2018] VSC 564, [202]: '... a practical onus rested upon the authorised psychiatrist, as the applicant, to present evidence and information sufficient to enable VCAT to attain that state of satisfaction.'

<sup>15</sup> *Briginshaw v Briginshaw* (1938) 60 CLR 336, 362-3 ('Briginshaw').

<sup>16</sup> *PBU & NJE v Mental Health Tribunal* [2018] VSC 564, [204].

<sup>17</sup> COAT Practice Manual, above n 2, 3.3.3 and 3.5.2.

<sup>18</sup> *Ibid*, 5.6.2.

<sup>19</sup> *Ibid*, 3.5.2

<sup>20</sup> *Ibid*

<sup>21</sup> *Ibid*.

<sup>22</sup> *Ibid*.

<sup>23</sup> *Ibid*.

<sup>24</sup> ARC Guide, above n 7, 19.

<sup>25</sup> Fleur Beaupert, 2006, 'Aspects of mental health tribunal processes that may impact on their 'therapeutic' potential,' A paper presented to the Third International Conference on Therapeutic Jurisprudence, Perth, Western Australia, 7-9 June 2006, 1-24, 13, summarising Ian Freckleton, 2003, 'Involuntary Detention Decision-Making, Criteria and Hearing Procedures: An opportunity for therapeutic jurisprudence in action' in K Diesfeld and I Freckleton (eds), *Involuntary Detention and Therapeutic Jurisprudence: International Perspectives on Civil Commitment*, Aldershot, Hampshire, Ashgate, 293-337, 313.

<sup>26</sup> COAT Practice Manual, above n 2, 3.4.

<sup>27</sup> *Ebner v The Official Trustee in Bankruptcy* [2000] 176 ALR 644, 650.

<sup>28</sup> *Webb v R* (1994) 181 CLR 41, 67-68.

<sup>29</sup> COAT Practice Manual, above n 2, 3.4.2 (bullet points removed).

<sup>30</sup> Specific instances include: where a Tribunal member has sat on a panel involving the same patient before; where a psychiatrist or registered medical practitioner member has treated a patient previously or where a legal member has acted for a patient previously.

<sup>31</sup> COAT Practice Manual, above n 2, 3.4.3.1.

<sup>32</sup> *Ibid*, 3.4.1.

<sup>33</sup> ARC Guide, above n 7, 22.

<sup>34</sup> COAT Practice Manual, above n 2, 3.4.1. For a recent example where a tribunal engaged in actual bias see: *Jetpoint Nominees Pty Ltd v Lee* [2021] WASAT 10. In that case, the Western Australia State Administrative Tribunal (WASAT) held that the original Tribunal engaged in conduct that demonstrated actual bias against the applicant due to the original Tribunal's 'frequent and, in many cases, unnecessary interruptions during cross examination of a witness. The WASAT also held the original Tribunal breached the hearing rule by denying the applicant an opportunity to know the case against it and failed to give the applicant an opportunity to present its case.

<sup>35</sup> *Minister for Immigration and Multicultural Affairs v Jia* (2001) 205 CLR 507, 532 per Gleeson and Gummow J, cited in ARC Guide, above n 7, 22. See also *Laws v Australian Broadcasting Tribunal* (1990) 170 CLR 70, 100.



<sup>36</sup> ARC Guide, above n 7, 23. On the other hand, one author points out that ‘this may not be the situation with self-represented litigants who may have the capacity to interpret normal hearing room interchanges or other actions as evidence of bias.’ Doug Humphries, Principal Member, Veterans’ Review Board, ‘Bias: Some Practical Issues in Tribunals’, *Thirteenth AIJA / COAT Annual Tribunal’s Conference*, Brisbane 10-11 June 2010, 1.

<sup>37</sup> *Ebner v The Official Trustee in Bankruptcy* [2000] 176 ALR 644. Affirmed in cases including *Concrete Pty Ltd v Parramatta Design & Developments Pty Ltd* (2006) 231 ALR 663, 689, *Bienstein v Bienstein* (2003) 195 ALR 225, 231.

<sup>38</sup> *Ebner v The Official Trustee in Bankruptcy* [2000] 176 ALR 644, 647.

<sup>39</sup> *Ibid.*

<sup>40</sup> *Ibid.*, 648.

<sup>41</sup> *Ibid.*

<sup>42</sup> Stuart Morris QC, former President of the Victorian and Administrative Tribunal, ‘Apprehension of Bias,’ A paper delivered at the *Australasian Conference of Planning and Environment Courts and Tribunals*, on 14 September 2006, at King Fisher Bay, Fraser Island, Queensland, 3.

<sup>43</sup> *Ibid.*, 4. In the High Court decision, *Isbester v Knox City Council* [2015] HCA 20, Gageler J at [59] stated that the apprehended bias test in an administrative context involved three analytical steps, “Step one is identification of the factor which it is hypothesised might cause a question to be resolved otherwise than as a result of a neutral evaluation of the merits. Step two is articulation of how the identified factor might cause that deviation from a neutral evaluation of the merits. Step three is consideration of the reasonableness of the apprehension of that deviation being caused by that factor in that way.’

<sup>44</sup> *Waddington v Magistrates’ Court of Victoria and Kha* (no. 2) [2013] VSC 340 per Emerton J, [55]. A similar conclusion was reached in *Victoria Police Special Operations Group Operators 16, 34, 41 and 64 v Coroners Court of Victoria* [2013] VSC 246 where it was held that there was no logical connection between the over-familiar and over-zealous approach of the Coroner (including sarcastic and flippant comments that were distracting and unhelpful) and the prospect that she would decide the matter impartially.

<sup>45</sup> *Forge v Australian Securities and Investments Commission* [2006] HCA 44, [67] per Gummow, Hayne and Crennan JJ. See also *Victoria Police Special Operations Group Operators 16, 34, 41 and 64 v Coroners Court of Victoria* [2013] VSC 246, [39]: ‘... the application of the test of reasonable apprehension of bias avoids any need for a court to attempt an analysis of the likely or actual thought processes of the decision-maker.’

<sup>46</sup> *Ebner v The Official Trustee in Bankruptcy* [2000] 176 ALR 644, 647.

<sup>47</sup> *Johnson* (2000) 201 CLR 488, 493; *Victoria Police Special Operations Group Operators 16, 34, 41 and 64 v Coroners Court of Victoria* [2013] VSC 246, [41], *AJH Lawyers Pty Ltd v Careri* (2011) 34 VR 236.

<sup>48</sup> *AJH Lawyers Pty Ltd v Careri* (2011) 34 VR 236, [23], quoting *Johnson* (2000) 201 CLR 488, 493. See also *Concrete* (2006) 229 CLR 577, 690 which also quotes *Johnson* on this point.

<sup>49</sup> *Victoria Police Special Operations Group Operators 16, 34, 41 and 64 v Coroners Court of Victoria* [2013] VSC 246, [45].

<sup>50</sup> *Ibid.*

<sup>51</sup> *Ebner v The Official Trustee in Bankruptcy* [2000] 176 ALR 644, 650. Cited with approval in *AJH Lawyers Pty Ltd v Careri* (2011) 34 VR 236, 348. See also *Antoun v R* (2006) 224 ALR 51, 60 per Kirby J: ‘... this court has “loudly and clearly” expressed a corrective against any view that a judge should too readily accept recusal because a party has demanded it. In the administration of justice in Australia, the parties do not (at least normally) have an entitlement to choose among the judicial officers who will conduct the trial. This principle has been reasserted and applied in many cases.’

<sup>52</sup> *Ebner v The Official Trustee in Bankruptcy* [2000] 176 ALR 644, 650.

<sup>53</sup> *Ibid.*

<sup>54</sup> *Australian National Industries Ltd v Spedley Securities Ltd* (1992) 26 NSWLR 411, 417-18.

<sup>55</sup> COAT Practice Manual, above n 2, 3.4.9.3.

<sup>56</sup> Former VCAT President, Stuart Morris QC, notes that in such cases a claim of bias is sometimes based on the allegation that a member or members are in possession of extraneous information, the fourth of the main categories of bias identified by Deane J in *Webb v R* (1994) 181 CLR 41, 67-68, which are summarised earlier in this guide.

<sup>57</sup> *AJH Lawyers Pty Ltd v Careri* (2011) 34 VR 236. See, also, Morris, above note 42, 8: ‘The ground of disqualification is a reasonable apprehension that the judicial officer will not decide the case impartially or without prejudice, rather than that he or she will decide the case adversely to a party. Hence the fact that the outcome of a repeat appeal might be thought to be predictable if heard by the same member or members who heard the initial appeal is not a basis for disqualification.’

<sup>58</sup> Morris, above n 42, 8.

<sup>59</sup> *Webb v R* (1994) 181 CLR 41, 74-75 per Deane J, cited in COAT Practice Manual, above n 2, 3.4.4.2.

<sup>60</sup> COAT Practice Manual, above n 2, 3.4.6.

<sup>61</sup> *Bienstein v Bienstein* (2003) 195 ALR 225, 232.

<sup>62</sup> COAT Practice Manual, above n 2, quoting the Council of Chief Justices of Australia and New Zealand *Guide to Judicial Conduct* (3<sup>rd</sup> edition, 2017, the Australian Institute of Judicial Administration Incorporated, Victoria) 3.4.6.

<sup>63</sup> *Ibid.*

<sup>64</sup> *Ibid.*

<sup>65</sup> *Ibid.*

<sup>66</sup> *Ibid.*

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- <sup>67</sup> Ibid.
- <sup>68</sup> *Bienstein v Bienstein* (2003) 195 ALR 225, 232.
- <sup>69</sup> COAT Practice Manual, above n 2, 3.4.6.
- <sup>70</sup> *Bienstein v Bienstein* (2003) 195 ALR 225; see Morris, above n 41, 5.
- <sup>71</sup> *Bienstein v Bienstein* (2003) 195 ALR 225, 232.
- <sup>72</sup> ARC Guide, above n 7, 29.
- <sup>73</sup> Ibid.
- <sup>74</sup> Ibid, 30.
- <sup>75</sup> Ibid.
- <sup>76</sup> Ibid.
- <sup>77</sup> Ibid.
- <sup>78</sup> Ibid, 31, quoting the Canadian *General Principles of Conduct for Members of Federal Administrative Tribunals: Canadian Tribunal Heads' Code of Conduct Steering Committee's General Principles of Conduct for Members of Federal Administrative Tribunals, A Guide with Examples and Advice*, June 1999, 20.
- <sup>79</sup> Ibid.
- <sup>80</sup> COAT Practice Manual, above n 2, 3.4.5.
- <sup>81</sup> Ibid.
- <sup>82</sup> *Minister of Immigration and Multicultural Affairs v Jia Legeng* (2001) 205 CLR 507 [69] (Gleeson CJ and Gummow J).
- <sup>83</sup> *Vakauta v Kelly* (1989) 87 ALR 633, 634; COAT Practice Manual, above n 2, 3.4.5.2.
- <sup>84</sup> *Vakauta v Kelly* (1989) 87 ALR 633, 634.
- <sup>85</sup> COAT Practice Manual, above n 2, 3.4.5.
- <sup>86</sup> Ibid, 3.4.5.3. Case referred to is *Keirl v Kelson* [2004] VSC 224 (Unreported, Supreme Court of Victoria, Byrne J, 27 August 2004), [12]. See also *SZRUI v Minister for Immigration, Multicultural Affairs and Citizenship* [2013] FCAFC 80, where it was accepted that “the exchanges that occurred when well beyond a mere expression of reservation...the exchanges exposed the Tribunal member expressing a concluded view before the entirety of the hearing had even concluded that she [did not] believe any of that”.
- <sup>87</sup> See, for instance, *Vakauta v Kelly* (1989) 87 ALR 633, where the court found that ‘derogatory and wide-sweeping references’ to an expert witness in a judgment, combined with comments made during the trial, amounted to apprehended bias.
- <sup>88</sup> Ibid, 636.
- <sup>89</sup> Ibid.
- <sup>90</sup> Ibid.
- <sup>91</sup> COAT Practice Manual, above n 2, 3.4.5.1. See, also, *Bienstein v Bienstein* (2003) 195 ALR 225, 232: ‘This court held in *Re Keely; Ex parte Ansett Transport Industries* [(1990) 94 ALR 1] that the expression by a judge of tentative views during the course of argument as to matters on which the parties are permitted to address full argument manifests no partiality or bias. This approach has been confirmed and applied in many cases.’ Stuart Morris QC states that the expression of tentative views ‘actually enhances procedural fairness by alerting the parties to the thoughts of the tribunal and providing them with an opportunity to persuade the tribunal to adopt a different course.’ Morris, above n 41, 7.
- <sup>92</sup> John Tarrant, *Disqualification for Bias*, The Federation Press, 2012, 262.
- <sup>93</sup> COAT Practice Manual for Tribunals, above n 2, 3.4.5.1.
- <sup>94</sup> *Antoun v R* (2006) 224 ALR 51, 60.
- <sup>95</sup> *CNY17 v Minister for Immigration and Border Protection* [2019] HCA 50.
- <sup>96</sup> ARC Guide, above n 7, 25.
- <sup>97</sup> COAT Practice Manual, above n 2, 3.4.9.1, based on *Ebner v Official Trustee in Bankruptcy* [2000] 176 ALR 644, 660: ‘A failure to disclose is relevant (if at all) only because it may be said to cast some evidentiary light on the ultimate question of reasonable apprehension of bias.’
- <sup>98</sup> *Ebner v The Official Trustee in Bankruptcy* [2000] 176 ALR 644, 659-660.
- <sup>99</sup> ARC Guide, above n 7, 27.
- <sup>100</sup> COAT Practice Manual, above n 2, 3.4.9.2.
- <sup>101</sup> Ibid, 3.4.9.3.
- <sup>102</sup> Ibid.
- <sup>103</sup> The ARC Guide (cited in the COAT Practice Manual, above n 2, at 3.4.9.3 notes that: ‘Although as a matter of law waiver may be implied, it is suggested that it is a tribunal member’s responsibility expressly to raise the question of consent with the potentially prejudiced party.’
- <sup>104</sup> COAT Practice Manual, above n 2, 3.4.9.3.
- <sup>105</sup> Ibid, 3.4.4.3.
- <sup>106</sup> Ibid.
- <sup>107</sup> Victorian Government Solicitor’s Office, VGSO Seminar Series, *Administrative Decision-Making – Delegations and Avoiding Bias*, March 2008, 13.