Health Professional Councils Authority

LEGAL PRACTICE NOTE No. 5

Bias and apprehended bias

Councils are frequently required to select professional and lay members to sit as members of decision making bodies that are responsible for adjudicating on complaints (Tribunals and Professional Standards Committees); making judgements about professional performance (Performance Review Panels); assessing a practitioner's health (Impaired Registrants Panels); and taking urgent interim action (s.150 delegates).

Given the importance of those decision making functions and the potentially far reaching impact of any decision it is important that the members make their decisions impartially and without bias. It is equally important that justice is not only done, but seen to be done. In this regard, a *perception or apprehension* of bias can be as damaging to the credibility of the decision making process as the existence of *actual* bias.

The Macquarie Concise Dictionary defines "bias" as:

> *A particular tendency or inclination, especially one which prevents unprejudiced consideration of a question.*[1]

Bias can be actual or apprehended and may arise from the conduct of a hearing member; from the hearing member's personal associations; or from the method adopted in the decision-making process including use of extraneous information.[2] Apprehension of bias can also arise from circumstances in which a decision maker has a conflict, or potential conflict of interest.[3]

The actual or apprehended bias of a single member involved in the decision making process can taint the decision of the hearing panel.

Actual bias

Actual bias on the part of a decision maker is a matter of fact, either the decision maker is biased or not. Proving actual bias is difficult and requires the person asserting it to prove the decision maker is prejudiced against them.

Apprehended bias

Complaints of apprehended bias are far more common than complaints of actual bias because the former can be inferred and do not have to be proven.

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[1] *Macquarie Concise Dictionary*, Fourth Edition, the Macquarie Library Pty Ltd, 2006.
[2] See for instance *Webb v The Queen* (1994) 181 CLR 41 at 74, referred to in the majority judgment of Gleeson CJ, McHugh, Gummow and Hayne JJ in *Ebner v the Official Trustee in Bankruptcy; Clenae Pty Ltd v ANZ Banking Group* (2000) 205 CLR 337, at paragraph 24.
[3] For a general discussion of conflict of interest see, AHPRA Legal Practice Note 14, Conflict of Interest and how it Applies to the National Law http://www.ahpra.gov.au/Publications/legal-practice-notes.aspx

The test for apprehended bias is objective and relates to the possibility, not the probability, of bias. The High Court has put the test as whether:

> *…a fair minded lay observer might reasonably apprehend that the judge might not bring an impartial mind to the resolution of the question the judge is required to decide. ..*
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> *.. Deciding whether a judicial officer (or juror) might not bring an impartial mind to the resolution of a question that has not been determined requires no prediction about how the judge or juror will in fact approach the matter. The question is one of possibility (real and not remote), not probability.*[4]

In practice the application of this test involves two steps:

> *(a) the party seeking disqualification must identify what it is that might lead the judicial officer to decide the case other than on its legal and factual merits:*
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> and
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> *(b) the party seeking disqualification must then articulate the logical connection between the matter suggesting bias and the feared deviation from the course of deciding the case on its merits.*[5]

In other words, the person alleging apprehended bias must establish not only that there is a relevant concern (for instance a personal or professional relationship) but also how that association might logically influence the decision maker, either positively or negatively (for example through family ties, or a history of professional disagreement).

In the case of its application to a statutory tribunal the President of VCAT has put the rule about apprehension of bias as follows:

> *Applied to Tribunal members the governing principle is that a member is disqualified if a fair minded observer might reasonably apprehend that the member might not bring an impartial mind to the resolution of the question that the member is required to decide. The principle gives effect to the requirement that justice should both be done and be seen to be done.*[6]

Application

Subject to the need to accommodate differences between court proceedings and proceedings before other kinds of tribunals, the High Court has made it clear that the rule against bias would be as applicable to a tribunal as it is to a court.[7] However the High Court has also been clear that apprehension of bias cannot be used to frustrate the constitution and functioning of a tribunal if an otherwise biased tribunal member is the only qualified person available to hear the matter.[8] This is referred to as the principle of necessity.

It is also broadly accepted that a judicial officer should not automatically and too readily disqualify himself or herself following a suggestion of apprehended bias.[9]

The appointment of professional members to panels and tribunals will mean it is not unusual for the member to be acquainted with a practitioner who is the subject of the

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[4] *Ebner* paragraphs 6 and 7.
[5] *Gaudie v Local Court of New South Wales and Anor* [2013] NSWSC 1425 at 79
[6] Medical *Board of Australia v Dr. Piesse (Occupational and Business Regulation)* [2011] VCAT 64, at 14
[7] *Ebner v the Official Trustee in Bankruptcy*, at paragraph 4.
[8] *Laws v Australian Broadcasting Tribunal* (1990) 170 CLR 70, per Mason CJ & Brennan J at 39.
[9] *Livesey v New South Wales Bar Association* [1983] HCA 17 at 294; *Johnson v Johnson* [2000] HCA 48 at 504

hearing or with a witness. The acquaintance may constitute an association for the purposes of the first part of the test (above). Where this occurs it is important for the relationship to be disclosed for the purpose of assessing whether it is of kind that might lead an objective fair minded observer to conclude to an apprehension of bias.

The Nursing and Midwifery Tribunal of New South Wales has previously considered an application that the Chairperson of the Tribunal disqualify himself for apprehension of bias (based on prejudgement).[10] In declining to disqualify himself the Chairperson considered the authorities applying to judicial officers and found them to be relevant to Tribunal members.

Similarly the Supreme Court has considered an application that a member of a medical Professional Standards Committee be removed for apprehended bias.[11] The Court found that there was no basis on which a fair minded observer could conclude that the Committee member *might not be open to persuasion and might not bring to the hearing of the complaint a fair and unprejudiced mind.*

In *Medical Board of Australia v Dr. Piesse* the President of VCAT ruled on an allegation of apprehended bias in relation to two medical practitioner members of the Tribunal. The allegation was based on the fact that each had previously been a member of the Medical Practitioners Board of Victoria and that in addition the second practitioner was periodically employed by AHPRA in relation to the assessment of overseas trained medical practitioners. In dismissing the application in respect of the first practitioner the President of VCAT said:

> *I am not persuaded that the application should be granted. Dr Clarke's membership of the MPBV ceased about a decade ago, well before the events giving rise to the current allegations against Dr Piesse and there is no suggestion that Dr Clarke had any involvement in the performance assessment report affecting Dr Piesse. .. past membership of the MPBV does not of itself provide a sufficient basis for the reconstitution of the Tribunal. Indeed such past membership provides the individuals concerned with the type of expertise and specialist knowledge which equips them to undertake the role of a sessional member in cases involving the regulation of the medical profession.*[12]

In granting the application in the case of the second practitioner the President said:

> *I accept .. that Dr Molloy's previous relationship with the Board is not of itself sufficient to warrant a reconstitution decision. .. However, in my view the fact that Dr Molloy is currently employed on a part-time basis by the AHPRA is decisive. It is common ground that there is a close connection between the AHPRA and the Applicant in the substantive proceedings. .. the association between Dr Molloy and an organisation closely connected with the Applicant is sufficient to give rise to a reasonable apprehension that Dr Molloy might not bring an impartial mind to the determination of the substantive application.*[13]

Conclusion

Prior to accepting a nomination, decision makers should carefully consider if any possible basis for apprehension of bias can be identified. The same exercise, including in relation to possible witnesses, should be undertaken when any hearing papers are received.

If grounds for concern are identified, the nominee should seek guidance from the Council's senior legal staff and/or Executive Officer at the earliest opportunity.

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[10] *Health Care Complaints Commission v Gregorio (no 1) [2009] NSWNMT 26.*
[11] *S v NSW Medical Board[2010] NSWSC 663*
[12] at 17
[13] at 18

If after seeking guidance the conclusion is reached that there is no logical connection the interest should nonetheless be disclosed at the outset with the parties being given the opportunity to raise any objections to the hearing member considering the matter. This additional step of procedural fairness enables a decision maker to consider fresh arguments for their disqualification and can act as a bar against the issue of bias being raised later.

Different approaches to the question of apprehended bias may be applied to different types of Council process. For example in circumstances where a matter is being dealt with under s.150 of the Health Practitioner Regulation National Law (NSW) decision makers are required, by s.41O, to take the practitioner's full complaints history, to the extent that it is relevant, into account. Accordingly a more flexible approach to considerations of apprehended bias may be appropriate. The fact that section 150 proceedings are urgent and interim also indicates the adoption of a flexible approach in line with the rule of necessity identified in *Laws v Australian Broadcasting Tribunal*.

Apprehended bias can render a decision void, but with a few simple steps decision makers can guard their decision against being set aside for apprehended bias.

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NOTE:
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