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The Rise and Rise of Tribunals – Engaging Law Students in Tribunal Advocacy

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ABSTRACT

Over the past 30 years there has been a rise in the determination of legal disputes in non-adversarial and less adversarial forums such as tribunals. Tribunals deal with an increasing diversity of legal matters including cases of anti-discrimination, consumer claims and reviewing executive governmental decisions. Traditionally, Australian law schools and higher education practical legal training providers focus on the development of advocacy skills in an adversarial context set in a courtroom. Law students often study compulsory doctrinal courses solely from an adversarial court perspective. Little emphasis is placed on developing skills and knowledge in the practice and procedure of tribunals despite entry level lawyers appearing more frequently in such forums. This paper argues that there is a need for law students to engage in advocacy experiences in tribunal settings as distinct from the courtroom so they can acquire and foster skills to appear in such non-adversarial and less adversarial forums when in legal practice. By engaging expert witnesses, such as medical experts, in simulated tribunal hearings the realism of the advocacy experience for the student is heightened.

THE RISE OF TRIBUNALS IN THE AUSTRALIAN LEGAL SYSTEM

Over the past thirty years tribunals have become a distinctive feature in the Australian civil legal landscape. There are tribunals operating in all Australian states and territories and at the Commonwealth level. They deal with a variety of matters including as primary decision makers in cases of anti-discrimination, consumer claims, mental health, tenancy, professional discipline and guardianship. They also deal with the review of executive governmental decisions such as the refusal to issue migration visas, claims for asylum protection, access to public documents and licensing cases. Tribunals are able to draw on legal and non-legal members who have particular expertise in a variety of fields and are designed to be more accessible and 'user friendly' for consumers than the formal court system.

Tribunals deal with an ever increasing number of civil disputes. In 2011/2012 the NSW Consumer Trader and Tenancy Tribunal, a tribunal which made decisions regarding a diverse range of consumer disputes, received around 65,000 applications for determination and held over 76,000 hearings across NSW.[1] This number represented around a 10% increase in applications lodged during the previous year. Similarly, in 2011/2012 the Victorian Civil and Administrative Tribunal recorded a sizeable increase in applications

[1] NSW Consumer, Trader and Tenancy Tribunal Annual Report 2011-2012. The Tribunal received 58,808 applications during 2010-2011 as reported in the NSW Consumer, Trader and Tenancy Tribunal Annual Report 2010-2011. The Consumer, Trader and Tenancy Tribunal has been replaced by the New South Wales Civil and Administrative Tribunal, Consumer and Commercial Division, from 1 January 2014.

lodged over the previous year.[2] Further, the rise in the numbers and types of tribunals has seen the establishment of a peak body, the Council of Australasian Tribunals, which is designed to facilitate the dissemination of information and views between tribunals.[3]

Tribunals have been described as bodies which are court substitutes that carry out a mix of judicial and non-judicial functions.[4] While tribunals are sometimes referred to as being inquisitorial in nature, there is some resistance to adopting such a characterisation for Australian tribunals. Bedford and Creyke contend that Australian tribunals should not be categorised as inquisitorial in their operation as they do not possess all of the features of a typical civil law inquisitorial body and exhibit a range of practice approaches from the heavily investigative to adversarial.[5] King, Freiberg, Batagol and Hyams opine that "the variability of Australian tribunals' compliance with adversarial, non-adversarial and inquisitorial paradigms renders it difficult to categorise tribunals as one or the other."[6] They employ the term 'non-adversarial justice' when describing the role of administrative tribunals in the Australian legal framework.

[2] Victorian Civil and Administrative Tribunal Annual Report 2011-2012.
[3] Council of Australasian Tribunals, Memorandum of Objects of State and Territory Chapters, www.coat.gov.au/about/constitution-and-memorandum-of-objects.html, accessed 28 August 2013.
[4] N. Rees, Procedure and Evidence in Court Substitute Tribunals, 28 Australian Bar Review, 2006, 41.
[5] N. Bedford and R. Creyke, Inquisitorial Processes in Australian Tribunals, The Australian Institute of Judicial Administration, Melbourne, 2006, 18.
[6] M. King, A. Freiberg, B. Batagol, R. Hyams, Non-Adversarial Justice, Federation Press, Leichhardt, 2009, 198.

Although tribunals vary in the way that their proceedings are conducted, they can and do differ from a traditional adversarial approach. In some tribunals its membership actively question witnesses and parties attending a hearing. This can involve the member informing the parties as to the procedure that the hearing will follow, identifying the key issues and ensuring that the parties have a reasonable opportunity to present their case.[7] Legislators have armed tribunals with the power to operate in a quick, informal, cheap and flexible fashion,[8] while many tribunals are not bound by the rules of evidence.[9] This does not necessarily mean that the rules of evidence are not to be taken into account by a tribunal in determining whether or not information or a document is admissible, but there is no strict application of the evidentiary rules in some tribunal proceedings. Many tribunals can inform themselves on any matter in the manner that they think fit and the procedure by which a tribunal conducts its proceedings can vary and does not necessarily follow a set or rigid procedure.[10]

While a tribunal can refuse to allow an applicant or party to be legally represented in the proceedings,[11] legal practitioners can seek leave to appear for parties in some tribunal hearings and some tribunals do not place

[7] Statutory provisions dealing with this include s38(5) Civil and Administrative Tribunal Act 2013 (NSW).
[8] s36(1) Civil and Administrative Tribunal Act.
[9] s38(2) Civil and Administrative Tribunal Act, s151 Mental Health Act 2007 (NSW), s98 Victorian Civil and Administrative Tribunal Act 1998 (Vic), s311E Migration Act 1958 (Cth).
[10] s38 Civil and Administrative Tribunal Act, s62 Victorian Civil and Administrative Tribunal Act, s311E Migration Act.
[11] s366B Migration Act.

restrictions at all on the appearance of lawyers.[12] Sometimes there can be limited or no tribunal practice directions or practice notes so it can be difficult for a lawyer inexperienced in appearing before a particular tribunal or in tribunal jurisdictions generally to have a proper understanding as to the way in which a tribunal hearing will likely be conducted. Further, while a lawyer might not be appearing in an actual tribunal hearing they can be called upon to advise a client as to the procedure the tribunal will likely adopt to deal with an application, the format of the hearing, anticipate the questions that will be asked and generally advise the client as to the best way to prepare for the hearing. In order for a lawyer to professionally advise a client about tribunal processes or appear in tribunal proceedings they need to have sufficient familiarity with a tribunal's non-adversarial and less adversarial processes and the manner in which tribunals conduct their proceedings and make determinations.

LAW STUDENT ADVOCACY SKILLS TRAINING

In the advocacy training of law students, non-adversarial and inquisitorial approaches and the use of tribunal decisions can take a 'back seat' to formal

[12] s45 Civil and Administrative Tribunal Act, s154 Mental Health Act, s62 Victorian Civil and Administrative Tribunal Act. It is difficult to obtain details as to the precise number of legal representatives appearing in tribunal proceedings. In the NSW Guardianship Tribunal Annual Report 2010-2011there were 1,311 procedural hearings which included applications for leave for a party to be legally represented. In 2011/12 the NSW Mental Health Review Tribunal conducted 13,501mental health inquiries where a significant number of persons appearing at the inquiry had a legal practitioner representing them. Section 32 Administrative Appeals Tribunal Act 1975 (Cth) allows legal representation of a party without having to seek leave of the tribunal.

trial and appellate court cases. Moot court hearings typically involve advocacy in appellate jurisdictions and trial hearings and there is little focus on developing advocacy skills in the informality and flexibility of tribunal proceedings. In criminal law and procedure courses students become familiar with the formal prosecution requirements when a defendant is charged by the police and the case is pursued through the criminal justice system. In their law degree students might take part in a court observation program where they see first-hand the role of legal practitioners appearing in a defended criminal hearing. This entails a prosecutor and defence lawyer undertaking most of the questioning of witnesses in the hearing or trial while the judicial officer presiding over the case generally does not pursue detailed questioning of witnesses. Students observe there are formal procedures in place where witnesses give evidence in examination in chief and cross examination, see the rigid structure of criminal proceedings and the strict application of the rules of evidence. There are similar procedures in many civil court hearings where there is heavy use of court pleadings, the application of the formal evidentiary rules and interlocutory procedures such as the discovery of documents. By contrast, as many tribunals are not bound by the rules of evidence, operate in an informal and flexible manner and the role of the legal representative and decision maker can differ from adversarial court hearings, law students need to have opportunities to develop advocacy skills and specialised knowledge in tribunal forums.

SIMULATIONS IN THE LAW SCHOOL CURRICULUM

Experiential learning is considered to be a vital component in the learning process of the practice of law.[13] One type of experiential learning used in law schools is simulation. Simulations can involve a student taking on the role of a lawyer in a hypothetical case in a controlled situation under the proper supervision of an experienced academic or lawyer.[14] Ferber employs the term simulation in circumstances where a student is required to perform a lawyering activity utilising a mock scenario which matches a real-life situation and there is sufficient time allocated for the student to perform the learning activity.[15] An arranged simulated hearing provides an opportunity for a student to receive constructive feedback in a timely manner and to reflect on their advocacy performance. The use of student reflection and debriefing in simulations has been referred to in a recent study of clinical legal education in Australian law schools.[16]

Simulations can engage students in active learning by developing their problem solving skills and strategies to deal with client matters. Chavkin promotes the merits of simulation as an important component in the

[13] A. Chay and F. Gibson, Excellence and Innovation in Legal Education, Clinical Legal Education and Practical Legal Training, Lexis Nexis Butterworths, 2011, Chapter 18, 502.
[14] E. S. Milstein, Clinical Legal Education in the United States: In-House Clinics, Externships and Simulations, Journal of Legal Education, vol 51, no 3, September 2001, 376.
[15] P.S. Ferber, Adult Learning and Simulations – Designing Simulations to Educate Lawyers, 9 Clinical Law Review, 418.
[16] A. Evans, A. Cody, A. Copeland, J. Giddings, M.A. Noone and S. Rice, Best Practices Australian Clinical Legal Education, September 2012, www.cald.asn.au/assets/lists/Resources/Best_Practices_Australian_Clinical_Legal_Education_Sept_2012.pdf, 13.

development of persuasive advocacy skills in students. He argues that students should participate in simulated advocacy cases where they can build their skills and develop values in a setting where no one is damaged by their errors while at the same time providing an opportunity for students to engage in some risks which they would not ordinarily be able to experience if the student was formally acting for a 'live' client and their client's interests could potentially be jeopardised.[17] Stuckey maintains that simulated hearings enable students to gain insight into their personal and professional strengths and weaknesses, enhance their skills in identifying and dealing with professional conduct dilemmas and foster the development of the necessary skills and values in a legal professional.[18] A simulated hearing can require a student to make the connections between their acquired doctrinal knowledge and practical reality which is an essential skill in thinking as a lawyer.[19] Coupled with this, well-devised simulations provide opportunities for students to be exposed to professional values, develop effective

[17] D. Chavkin, Experience is the Only Teacher: Meeting the Challenge of the Carnegie Foundation Report, Paper presented at the Newcastle Law School, University of Newcastle NSW, 9 August 2007 48-49 as cited in J. Anderson, Identification Evidence – Proof and Doubt: An Experiential Teaching and Learning Strategy to Promote Deep Analytical Understanding Combined with Incremental Development of Practical Legal Skills, Journal of the Australasian Law Teachers Association, 2008, vol 1, 127.

[18] R. Stuckey and others, Best Practices for Legal Education, Clinical Legal Education Association, 2007, 135.

[19] C.K. Gunsalus and J.S. Beckett, Playing Doctor, Playing Lawyer: Interdisciplinary Simulations, 14 Clinical Law Review, 2008, 444. See also R. Park in Appropriate Methods for the Teaching of Legal Skills in Practical Training Courses, Journal of Professional Legal Education, 1990, vol 8, no 2, 177 who argues that simulations provide a realistic place to assess competency.

communication and advocacy skills in a specialised forum and participate in collaborative student settings.[20]

The use of group simulated hearings gives academics and practical legal training providers the opportunity to provide advocacy experiences to a large number of students without significant resource implications. It is highly unlikely that large numbers of students could have such advocacy experiences with 'live' clients given the number of clients necessary to replicate the simulation and the legislative and ethical restrictions of student appearances in legal proceedings. Group simulations also allow students to develop their advocacy skills within a definite timeframe which coincides with the running of the law course.

As noted, a focus of Australian law schools and practical legal training courses has been the development of advocacy skills in simulated adversarial court trials and appellate moot courts. These hearings can involve students, academics, clinical supervisors and others playing the role of a lay witness in a trial being questioned by law students or they can be set in an appellate jurisdiction where argument and submissions are made to the bench. The format is typically adversarial in nature and follows a formal and expected procedure with limited flexibility. Students should also be exposed to advocacy experiences in non-adversarial, inquisitorial and less adversarial

[20] K. Barton, P. McKellar, P. Maharg, Authentic Fictions: Simulation, Professionalism and Legal Learning, 14 Clinical Law Review, 2007-2008, 184.

hearings set in tribunal forums given the increasing likelihood that lawyers will have contact with clients having matters in those jurisdictions. In fact, entry level lawyers are probably less likely to be appearing in appellate jurisdictions as opposed to tribunals and less adversarial forums.

SIMULATED MENTAL HEALTH TRIBUNAL HEARINGS

The mental health tribunals operating in Australian jurisdictions are independent statutory bodies enacted under legislation which review the decisions made by treating health professionals regarding the involuntary detention of persons in hospital for their treatment and care. The tribunal is required to determine, on the balance of probabilities, whether the detained person has a serious mental illness which causes harm to the person or to others or both and should be detained in hospital.[21] The tribunal is a 'check and balance' on the decision of a health professional to detain a person against their will. It has the legal authority to make orders to continue the involuntary detention of a person in hospital.[22]

Simulated mental health tribunal hearings form part of the practical legal education course at Newcastle Law School, NSW. They are conducted in a final year clinical module which runs over four weeks with seminars, group work and culminating in simulated tribunal hearings. The seminars provide

[21] Ch 6 Mental Health Act (NSW), Part 4, Mental Health Act 1986 (Vic), Part 6, Mental Health Act 1996 (WA).
[22] s37 Mental Health Act (NSW), s36 Mental Health Act (Vic), Part 6, Mental Health Act (WA).

students with substantive knowledge in mental health law, an overview of specialised tribunals and in-depth analysis of the practices and procedures of tribunals. An interdisciplinary approach is adopted in the module with a health professional being invited to speak to the class outlining their perspectives of the tribunal process and the challenges of maintaining a professional and supportive relationship with their patient following a contested tribunal hearing where they give evidence which the patient disputes.

The module has a number of primary learning objectives. Students develop detailed knowledge in a specialised area of law while critically evaluating the access to justice issues which can arise for persons with a serious mental disability. Other objectives include students developing client centred lawyering approaches, fostering strong communication and advocacy skills in an inquisitorial context, generating strategies to deal with issues arising in a hearing and effectively collaborating with peers.

The hearings are set in a mental health tribunal forum so as to give students the opportunity in a short timeframe to develop their knowledge and skills in an area of law that is not overly complex but is challenging. Lawyers can be required in legal practice to be across a previously unfamiliar area of law within a limited period of time to meet the needs of their client. Mental health tribunal hearings are typically around 20-30 minutes in duration and can be modified so that groups of students have specific advocacy roles in the

hearings. This lengthens the simulated hearing time to around 50 minutes. While the hearings are informal in nature they can vary from being less adversarial to more adversarial depending on the evidence, the approaches and personal style of the participants and the composition of the tribunal.

To make a tribunal simulation as realistic as possible it should involve participants who are familiar with its particular procedures and practices. Building on links between the University of Newcastle Legal Centre[23] and the local area health service, psychiatric registrars in training are invited to take part in the simulated hearings. The involvement of the registrars is promoted by the registrars' teaching health professionals as an opportunity to enhance their skills in giving evidence at tribunal hearings through responding to vigorous questioning by eager law students. Having psychiatric registrars, who have expertise in the diagnosis and treatment of mental illnesses, appear as witnesses makes a simulated mental health tribunal hearing more realistic. Their involvement heightens the preparedness of students as they are required to question a real expert and need to be sufficiently familiar with the law and tribunal procedure so as to avoid embarrassment. As Gunsalus and Beckett point out

> "it seems to help our students focus on the fundamentals in ways that simulations involving only law students do not. That is, we find that

[23] The University of Newcastle Legal Centre is conducted by the Newcastle Law School and is an intensive clinical placement site for law students.

> the introduction of complexity to the exercises by adding role-playing clients from other disciplines advances the acquisition of fundamental skills, rather than distracting from them."[24]

The simulated mental health tribunal also provides an opportunity for students to focus on the workings of a specialised tribunal which makes decisions directly affecting the liberty of individuals in a very obvious way. Students in the module have opportunities to consider the barriers that people with a serious mental illness may face in advocating for their rights and interests and the important role of a lawyer in that process.

There a number of distinctive learning opportunities which are offered by the use of a specialised interdisciplinary tribunal. Bliss, Caley and Pettignano refer to the benefits provided by interdisciplinary education as including

> "developing respect and appreciation among the disciplines, teaching team work and collaboration, developing a knowledge-base about other disciplines, teaching communication among disciplines, and teaching other disciplines' rules, beliefs, and ethical principles."[25]

[24] Gunsalus and Beckett, n19, 441-442.
[25] L. Bliss, S. Caley and R Pettignano, A Model for Interdisciplinary Clinical Education: Medical and Legal Professionals Learning and Working Together to Promote Public Health, 18 International Journal of Clinical Legal Education, 153. At 155 the authors refer to the added benefit that students become familiar with the specific terminology used by health professionals.

Additionally, these interdisciplinary approaches are important for new lawyers as they are becoming much more likely to interact with professionals and experts outside the area of law placing their learning in context.[26]

Prior to participating in the simulated hearings arrangements are made for students to attend and observe a 'real' mental health review tribunal hearing at a local psychiatric hospital accompanied by a legal aid solicitor. This provides students with the opportunity to observe a live tribunal in operation and consider the manner and procedure of the tribunal hearing before participating in the simulated hearings. Students accompany the solicitor to the hospital where they meet with the client and observe a client interview. They can then critically reflect on the challenges posed for a lawyer in taking instructions where their client may lack capacity or there is a doubt about their capacity. Students can sometimes be troubled by what they observe. For example, one student who saw a patient in a catatonic state later reflected on the experience causing them some disquiet. An important aspect of the observation program is that there is a proper briefing and debriefing with students both before and following the tribunal hearing which is provided by the solicitor. Prior to the hospital visit students discuss in the seminars the issues and tensions which might arise during a client interview in a psychiatric hospital, the laws regarding access to clinical records, the work of

[26] K.D. Connolly, Elucidating the Elephant: Interdisciplinary Law School Classes, Washington University Journal of Law and Policy, vol 11, 14.

the health professionals in hospital, the role of the lawyer appearing at the mental health tribunal hearing and the tribunal processes.

A number of mock scenarios have been developed for the module following extensive discussions with mental health professionals. These scenarios consist of a medical report from a registrar who then appears for questioning at the simulated hearing. The report is provided to students a week prior to the hearing detailing the facts that the registrar is relying upon to support their case for the subject person to remain in hospital as an involuntary patient. An outline of the client's instructions is given to students. The exercise is based on a client who has the mental capacity to provide instructions notwithstanding their involuntary hospitalisation. Students are supplied with updated facts about the case twenty minutes prior to each hearing in a time frame which mirrors what might happen in legal practice when a lawyer meets with their client just prior to their tribunal appearance and receives further instructions. While the registrar's report is detailed as to the person's mental health condition and the reasons that the person should remain in hospital against their will, the problem is scripted so that there is sufficient uncertainty about some facts to give students ample opportunity to question the registrar about the basis for their opinion. Further, the scenario and client's instructions are designed so that there are conflicting views between the client and the registrar which ensures a contested hearing.

The simulated tribunal is required to determine whether the subject person should continue to remain as an involuntary patient in hospital or be discharged. The client's instruction to the students is that they oppose the application for their continuing detention. Students are divided into groups of five or six with each student allocated a role for the hearing and one of the students playing the role of the client. Students are required to deliver opening and closing addresses, cross examine the registrar on their report and question their client. The client is required to answer questions in accordance with the set instructions provided when being questioned by the student lawyers and tribunal members. The student lawyers and client are able to 'make-up' additional facts provided that they are consistent with the set instructions. Students are to seek instructions from their client when necessary. Time limits are placed on each advocacy role. Students are informed that the tribunal hearings will be conducted in a way that the tribunal thinks fit and it should be expected that the hearings will be conducted informally with a flexible procedure. The tribunal members act in an interventionist way by asking questions of the witnesses and legal representatives and direct the procedure of the hearings. At the end of each hearing the simulated tribunal makes an order regarding the application for detention giving short reasons for its decision. Immediate general feedback is given to the group and individualised student feedback is provided in some circumstances.

Following the hearings students are required to submit a reflective piece of around 1,000 words reflecting on their performance in the simulated hearing, the effectiveness of their group in advocating for their client and their views of the tribunal as a mechanism to make legal decisions. The strengths and weaknesses of the client's case are identified by the student together with an analysis as to the effectiveness of their group's questioning and whether in hindsight they should have asked additional questions or not have pursued a particular line of questioning. Students are also required to discuss the way in which the tribunal conducted the hearing, how they adapted to the tribunal procedure and provide a comparison of the non-adversarial or less adversarial approach of the tribunal with their experiences of the traditional adversarial court model. Any ethical and professional responsibility issues which arise in the simulated hearing are to be discussed and analysed. Students are assessed on a pass/fail basis as to whether they have met the course objectives at a competent level.

It is acknowledged that there are limitations in relying upon student reflections as a basis for evaluating this distinctive advocacy experience. Reflections are not de-identified and sometimes students can tailor their responses in line with what they perceive the lecturer wishes to hear as their written piece forms part of the assessment regime in the course. Nevertheless, they do provide a source of primary material which can be used in a limited way as an evaluation of the tribunal activity itself and flag areas

for further evaluation and research. The student reflections frequently refer to the difficulty in adapting to the informality and flexibility of less adversarial hearings and it is intended to undertake further evaluation of this element. They also refer to the specific challenges of appearing in a tribunal jurisdiction and its less adversarial approach and in working with a simulated client. An on-line survey is to be conducted with the student cohort in an anonymous way to obtain qualitative and quantitative responses to set questions about the tribunal experience taking into account these views. Further, students who have appeared in a simulated tribunal hearing will be invited to participate in a focus group and in its small group discussions respond to more detailed questions posed by a facilitator about the advocacy experience. The survey and focus group responses should enable common views and opinions about the learning activity to be identified and noted.

STUDENT REFLECTIONS ON THE TRIBUNAL EXPERIENCE

One of the constant statements made by students in their reflections is the challenge of appearing in a jurisdiction which is not bound by the rules of evidence. In doing so students often make reference to their exposure of adversarial legal proceedings where there is a strict application of the evidentiary rules. In one simulated hearing the tribunal admitted evidence of a violent incident where the key witness is (deliberately) not available to attend the hearing for questioning. While students objected to a description

of the incident being admitted into evidence the tribunal decided to admit the evidence. In an adversarial court hearing an outline of the incident would likely have been ruled inadmissible on the basis that it is hearsay. Once the details of the incident was admitted into evidence the students showed difficulty in arguing the weight which should be attached to this piece of evidence and how the tribunal should view the evidence.

Conversely, some students failed to draw on their prior study of evidence law to object to technically inadmissible conversations such as privileged communications between the client and lawyer. A tribunal hearing set late in the degree requires students to draw on their earlier studies in law so that they can be effective advocates for their client.

The informal procedure of the tribunal hearing troubled students. The uncertainty as to what evidence might be admitted into the hearing unsettled a number of students. A typical student comment:

> *'I was expecting the tribunal to be informal but I don't think I fully grasped what that would mean in a legal context, where the majority of what I have learnt and experienced has been heavily based on structure and process.'*

The flexible approach of the tribunal hearing posed challenges for students. Students had prepared prior to the hearing a list of questions to be asked but the tribunal interrupted their lines of questioning forcing students to move

away from their scripted questions. In informal group discussions a student reflected that:

> *'I learnt much more about advocacy in terms of being flexible and being able to move away from your set questions as well as what it is like to have things not go your own way.'*

A simulated hearing using expert witnesses is likely to have an impact on a student's approach and performance. The daunting task of questioning a medical registrar was referred to by a number of students. Students found the questioning much more taxing and challenging than they had anticipated despite extensive preparation. Some expressed the view that questioning the registrar was intimidating and that the tribunal had placed undue weight on the answers given by the doctor. Typical student comments included:

> *'I found it off putting and I got frustrated as I had prepared the questions and the doctor did not give the answers that I wanted. I understand that this would happen in a real hearing though.'*
>
> *'At times I think we all felt very stonewalled and didn't expect the psychiatrist to pre-empt our questions as much as she did. I did not expect the doctor to be able to have an answer for every question and that threw me a bit, though I know in real life this would happen. Reflecting on the hearing we entered it with unrealistic expectations. We became fixed on trying to get the*

psychiatrist to admit she might be wrong, when we should have been asking her why they were not trying different approaches to treatment and care.'

A number of professional responsibility issues arose during the hearings. During one hearing a tribunal member asked the student whether they wished to seek an adjournment of the proceedings when the answers being given by the registrar were suggestive of the need for supplementary information before the tribunal could make its determination. The student lawyer readily agreed to seek such an adjournment without conferring with their client. In discussions following the hearing the student indicated that they had considered an adjournment was in the best interests of their client but then noted that they had overlooked their ethical obligation to consult with their client and obtain instructions before making such an application. Failure by the student lawyers to properly consult and seek instructions from their client was referred to by some of the students who played the role of the patient in the hearings. A student playing the role of the client/patient provided an insight into their feelings regarding the experience:

'I did not feel that I was engaged by my legal team, it is very easy to see how clients could be ignored by their lawyer.'

The professional conduct issue as to whether a client hospitalised in a mental health unit has the mental capacity to validly make a legal document arose

during the hearings. The student had submitted in the hearing that their client could execute a power of attorney[27] while a patient in hospital so that their client's financial affairs could be put in order by the attorney. On making this submission the registrar responded that they held serious concerns about the capacity of the client to validly execute an important legal document, such as a power of attorney, while an involuntary patient in hospital. The student referred to this ethical issue in discussions following the hearing stating:

> *'I raised that the client… could execute a power of attorney. I was flummoxed when the doctor said that he did not consider that the client had the mental capacity to execute a power of attorney being an involuntary patient in a psychiatric hospital. I had not considered this before making the submission.'*

A feature of the simulated hearings that had not been anticipated was the apparent concern that students had for the welfare of their client.[28] The hearings also presented challenges for students who were required to act in accordance with their client's instructions even though they may have conflicted with their own personal views as to what orders the tribunal should make.[29] The hearings generated a reaction by students on an

[27] A legal document where a person with the requisite mental capacity indicates who they wish to manage their financial affairs.
[28] Ferber notes that simulations can lead to students identifying issues which were not intended by the simulation which reflects the open-ended use of simulations, n.15, 423.
[29] Background reading for the module includes C. Parker, A Critical Morality for Lawyers: Four Approaches to Lawyers' Ethics, Monash University Law Review, 2004, vol 30, no 1.

emotional level. Some students reflected that they found it difficult to argue their client's instructions to be discharged when they formed the view that it was in the best interests of their client to remain in hospital:

> *'In advocating for the client I was aware that my personal views of what was in the best interests of the client were different to what my client wanted. In order to properly act on their instructions I needed to separate my personal views and advocate purely on the instructions provided to me.'*

The important role and purpose of a mental health tribunal was noted by a number of students in their reflections. A student commented that:

> *'the tribunal is the last bastion for some of society's most vulnerable and fragile members. The tribunal must do its utmost to protect these individuals from the deprivation of their liberty and subjection to treatment...'*

EVALUATION

In most cases students showed a high level of professionalism in preparing and appearing at the simulated hearings. Students acquired detailed knowledge of the mental health laws focusing on the threshold questions to be considered by the tribunal in determining the application for detention. Their problem solving skills were enhanced by questioning the registrar on the strengths of their client's case while formulating strategies to argue that

their client could receive the necessary support and care outside the restrictive hospital setting. Both formal and informal student reflections showed that students had reflected on the appropriate professional values when acting for a client in a mental health setting while developing a critical awareness of the access to justice issues which can arise for persons with a serious mental disability. The involvement of psychiatric registrars likely increased the level of student preparedness for the hearings while at the same time exposing students to experts in other disciplines. The challenges in switching from a familiar adversarial approach to a less adversarial and inquisitorial tribunal forum was a constant theme referred to by students. As the factual scenarios and tribunal questioning provided some uncertainty for students their skills in having to be flexible and adapt to the unfolding narrative were stretched. The practical reality and challenges of appearing for a client in an informal and flexible tribunal hearing was evident in student reflections. Heavily scripted questions prepared prior to the hearing often did not serve the client or student lawyers well. This was particularly evident when the registrars gave evidence which did not assist the group's overall arguments. Using groups of students with specifically defined roles provided collaborative opportunities as students were required to develop team strategies in approaching the questioning of the medical registrars and the making of submissions. Having a student play the role of a patient and then eliciting their responses regarding their interaction with the student lawyers

provided insights for students as to the importance of effectively communicating with clients throughout the proceedings and adopting client centred lawyering approaches. Depriving someone of their liberty and taking away their choice to make autonomous decisions regarding what treatment is to be administered likely resonated in a way different to what would be expected if no-one played the role of a patient in the hearing.

REVIEW

The use of simulation in a tribunal context provides law students with the opportunity to develop their advocacy skills in less adversarial and inquisitorial forums. Such experiences add to the suite of advocacy skills needed by 21st century lawyers. Setting the advocacy hearing in a forum which entry level lawyers may be advising and appearing in is an important addition to the knowledge and advocacy skills base of a law student. Student reflection on the tribunal hearings indicated that there are challenges posed for them when they move from an adversarial approach to a less adversarial style. This challenge should prompt the introduction of tribunal advocacy opportunities for students during their legal training so that they can acquire and develop such skills as they transition into legal practice. The use of expert witnesses provides a realistic aspect to a simulated hearing in exposing students to the challenges of questioning professional witnesses.

There is scope to develop tribunal simulations in other specialist tribunals, such as building and consumer claims, with the engagement of relevant and appropriate experts. A building dispute case can involve a conclave of experts where there is argument over the precise terms of the contract and whether there has been an actual breach. Arguments as to whether the parties have mitigated their loss can also arise. Experts from opposing sides could be involved in a simulated tribunal hearing so that students have the opportunity to cross examine in a commercially focused hearing. A building or engineering discipline within a university may provide a source of experts who could be used. Tenancy and consumer disputes provide opportunities for tribunal simulations dealing with issues such as disputed damage to rental premises and whether goods that have been bought are fit for their purpose and are of merchantable quality. Builders could be called as experts to provide competing evidence assessing the damage to rental premises. The simulation could be devised so that there is significant dispute as to the quantum of damage and loss and arguments raised such as whether the damage was pre-existing. Prior to the simulated hearing students could be involved in shadowing lawyers or tenancy advocates who attend commercial and tenancy tribunal hearings so that they are familiar with the particular nuances of the jurisdiction.

What remains critical is that law students are provided with opportunities to advocate in forums which are non-adversarial or less adversarial in nature so

as to equip them with the requisite skills and techniques that they can draw upon as they transition into the diverse range of legal practice advocacy environments.