Mental Health Tribunal

A Guide to Solution-Focused Hearings in the Mental Health Tribunal

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Use of Dr Michael King's *Solution-Focused Judging Bench Book*

With the permission of Dr Michael S King and the Australasian Institute of Judicial Administration Incorporated (AIJA) and the support of the Legal Services Board of Victoria, this guide to solution-focused hearings in the Mental Health Tribunal draws heavily from Dr King's *Solution-Focused Judging Bench Book* (the Bench Book), which was published by the AIJA and prepared with the assistance of grants from the AIJA and the Legal Services Board.

While the Legal Services Board provided a grant for the Bench Book, the contents of the Bench Book do not represent the work of the Legal Services Board and any statements of fact, law or practice contained within the Bench Book cannot be attributed to the Legal Services Board.

A note about language

There are diverse views on the most desirable or acceptable terms to use when referring to people who access mental health services (and who may receive compulsory treatment). These terms include 'consumers', 'clients', 'services users', 'people with lived experience', 'persons with mental illness' and 'patients'. Wherever possible – for example, where techniques described can apply to Tribunal hearing participants generally – this guide uses the term 'participant'. However, where it is necessary to refer specifically to the person with respect to whom the Tribunal is considering making a compulsory treatment order, this guide generally uses the term 'consumer' or the term 'compulsory patient' (which is a defined term in the *Mental Health Act 2014*).

The Department of Health's *Framework for recovery-oriented practice*, referred to later in this guide, notes that many people do not identify with the term 'carer' and the kind of relationship this term implies. For this reason, this guide employs the broad terms 'support people' or 'support networks' as well as 'carers'.

Foreword

Victoria's new *Mental Health Act 2014* represents a dramatic shift in both the legal framework governing compulsory treatment for severe mental illness and the way in which service providers engage with people who are on compulsory orders. As with many significant reforms, it reflects change that is already occurring while also seeking to be a catalyst for further change.

All entities and individuals that operated under the *Mental Health Act 1986* are being challenged to reflect upon their usual practices to identify those that are positive and must be preserved while, at the same time, reviewing and reforming practices that are no longer contemporary or adequate. The Mental Health Tribunal is no different and must also respond to this challenge.

Fortunately, the practices of the former Mental Health Review Board strongly position the Tribunal to meet this challenge. But the Tribunal is not the Board with a different name; it is a new organisation with recognisable – but far from identical – functions and responsibilities. Both explicitly and implicitly, the new Act envisages the Tribunal as a vastly different entity to the Board.

Some of these changes are formal, including a new structure for the Tribunal, making the Tribunal a primary decision-maker rather than a review body, vesting the Tribunal with an electroconvulsive treatment (ECT) jurisdiction, having the Tribunal absorb the functions of the former Psychosurgery Review Board and making the Tribunal process more central to compulsory treatment through a scheme of strict statutory timelines. Other changes might be described as more cultural in that they concern the broader environment within which the Tribunal must discharge its specific functions. The context of compulsory treatment is now one in which a person's capacity must be assumed and personal autonomy promoted; people must be supported to make decisions for themselves (including decisions with a degree of risk); recovery-oriented practice is to be the norm; and the central importance of carers, support networks and family must be respected.

The Mental Health Review Board had a long history of adherence to informality, avoidance of legalism and 'patient-centred hearings'. These practices were very positive and contributed to the Board successfully resisting the 'creep of legalism' that is often reported over the lifecycle of tribunals. However, in the current context, it is essential for the Tribunal to articulate a more coherent and comprehensive framework to govern how it will perform its functions and approach its decision-making responsibilities. By doing so, we will ensure that our own practices make a meaningful contribution to promoting the objectives and principles of the Act.

Dr Michael King's model of solution-focused judging – set out in his 2009 *Solution-Focused Judging Bench Book* – is an ideal starting point from which to define and develop the approach of the Tribunal. Dr King's Bench Book analyses and applies relevant theory, and combines it with a range of practices and strategies (most, if not all, of which will be familiar to experienced Tribunal members), to provide an invaluable guide to the performance of statutory decision-making functions in a way that preserves and promotes individual autonomy and maximises the potential for positive outcomes.

Adopting this approach can assist the Tribunal to address many of the longstanding challenges that confronted the former Board.

- Service providers frequently comment that time spent on hearings is time spent not treating patients. The new Act rejects this view and makes it clear that Tribunal processes need to be an integrated part of, rather than an awkward adjunct to, a person's experience of treatment and care. However, legislation can only achieve so much in shifting attitudes. Our practices, and how we describe them, must elaborate on how Tribunal hearings can be regarded as an opportunity for constructive and clinically relevant discussions between a compulsory patient and his or her treating team.

- Research – including that conducted by Professor Terry Carney (which is referred to throughout this guide) – demonstrates that compulsory patients' expectations of what should occur in mental health hearings are often not met. The Tribunal is responding to this in a variety of ways, including insisting that hearings must be attended by treating team representatives who know the compulsory patient. In addition, Dr King's solution-focused approach reminds us that every interaction we have with a person, from the first contact with the Tribunal registry to the hearing itself, can have a profound influence on how they experience the process and regard the outcome.

- For some time, the former Board wanted to work with legal representatives to articulate a framework to guide representation in this most particular of jurisdictions. Legal representatives were keen to be part of this process, but a necessary starting point for such collaborative work is for the Tribunal to be clear about our approach in order to determine how advocates might contribute most effectively.

It is important to acknowledge that the often limited and unpredictable amount of time available in hearings was a very real challenge to implementing a solution-focused approach by the former Board. This is likely to be a continuing challenge for the Tribunal. Members frequently need to balance the interests of the person whose hearing is underway with the interests of those waiting for their hearing to commence. There is no 'magic' solution to this, but it is not an impediment to a solution-focused approach.

- A solution-focused approach is not necessarily about having to talk about more issues; frequently, it is about how we discuss and explore issues of relevance. To put this differently: a solution-focused approach can assist Tribunal members and other participants to use finite time to the greatest effect.

- With the Tribunal's higher standards regarding the information that must be provided in reports for hearings, less time will need to be spent on discovering the evidence. This time can be used instead to explore and discuss the evidence in a solution-focused manner.

- It is important to bear in mind that Dr King's work derives from courts where magistrates sit alone – the Tribunal has triple this capacity. This means that a multi-disciplinary approach can be adopted to implement (and augment) a solution-focused approach and the 'workload' associated with such an approach can be shared by Tribunal members, making it more manageable.

This guide should be seen as a starting point that will evolve based on the input of members and our growing understanding of the new Act and the role of the Tribunal. This process will include enhancing the guide by examining the needs of and incorporating strategies for specific groups of consumers, such as Aboriginal and Torres Strait Islander peoples, culturally and linguistically diverse individuals, children and young people and aged consumers.

We are privileged to be charged with the responsibility of establishing and defining this new entity. I commend this solution-focused approach as an invaluable tool for this unique and important time. This is not because such an approach reveals previously unheard of practices, but because it articulates a comprehensive framework of practice. Alongside legally sound decision making, this framework means the Tribunal will promote the dignity and autonomy of people undergoing compulsory treatment – a principle that is central to the new Mental Health Act.

Matthew Carroll

President

30 April 2014

Part 1: Legislative and theoretical background

Chapter 1: Introduction and context

1.1 Why use a solution-focused approach in Mental Health Tribunal hearings?

> [The solution-focused] judging approach is, as far as possible, designed to engage participants in the resolution process and to see them as an important and active partner rather than a silent partner in the process. The bench book uses processes that promote participants having choices and being able to express their views, and having them taken into account and being treated with respect…[1] (Dr Michael King's *Solution-Focused Judging Bench Book).*

At its heart, a solution-focused approach aims to engage participants in hearings as active partners in the discussion and decision-making process of a court or tribunal. This approach is based on the premise that the best outcomes are achieved when participants in these processes are key players in the formulation and implementation of plans to address the underlying issues.

Apart from the fact that they are grounded firmly in contemporary thinking and research, a key justification for using solution-focused techniques is that they complement many of the reforms included in Victoria's new *Mental Health Act 2014*, particularly those reforms that promote the right to autonomy and self-determination and supported decision making. The synergy between a solution-focused approach and this new legislative regime has the potential to achieve positive outcomes for Victorians with severe mental illness.

Promoting a solution-focused approach also recognises that a hearing before the Mental Health Tribunal is not a mere 'procedural adjunct' to a person's treatment and overall experience of the mental health system. Rather, it is an integral and non-negotiable part of that experience.

As discussed in Chapter 2, therapeutic jurisprudence commentators have suggested that practices which undermine the participatory nature of hearings or the dignity of participants can produce negative psychological consequences that may in turn 'exacerbate … mental illness' and 'have a significantly adverse impact on the ability of patients to respond successfully to hospitalisation and treatment'.[2] As a corollary, adopting a solution-focused approach to hearings can contribute to, and potentially enhance, the therapeutic relationship between participants in the hearing.

In summary, in a jurisdiction such as the Mental Health Tribunal, a member's role is not simply about applying the 'black letter' of the law; rather, it is about actively facilitating an approach to hearings that promotes the objectives of the Act, including to promote the recovery of persons who have mental illness and to enable and support persons who have mental illness to participate in decisions about their treatment and recovery. Adopting a solution-focused approach greatly enhances a member's ability to fulfil this broader role.

1.2 Dr Michael King's Solution-Focused Judging Bench Book

This guide to solution-focused hearings in the Mental Health Tribunal is based closely on Dr Michael King's 2009 *Solution-Focused Judging Bench Book* (King's Bench Book or the Bench Book). King's Bench Book provides an invaluable exposition of best-practice solution-focused hearing techniques that can be used not only in so-called 'problem-solving' courts or court programs, such as drug courts and family violence courts, but also in mainstream courts and in specialist civil tribunals such as the Mental Health Tribunal.

1.2.1 Terminology and language

King prefers the term 'solution-focused' to 'problem-solving' as the latter term may imply that courts or tribunals solve participants' problems for them.[3] The term 'solution-focused' reflects the fact that the role of the court or tribunal, and its supporting administrative structures, is more about facilitating dialogue and supporting participants to develop their own solutions. The concept of 'solution-focused' hearings is explored further in Chapter 2.

In addition, this guide generally uses the term 'solution-focused hearings' rather than 'solution-focused judging'. This reflects the fact that many of the techniques described in this guide are broader than the term 'judging' implies.

Wherever possible, particularly where the solution-focused techniques described can apply to hearing participants generally, this guide uses the term 'participants' rather than terms such as 'patients' or 'service users' (see *A note about language* at the start of the guide). This is partly to emphasise one of the main aims of the solution-focused hearings approach – encouraging consumers' participation in hearings – but also to reflect the fact that many of the techniques and strategies in this guide will be used or adapted for use with other participants in hearings. These participants may include carers, family members, significant others and other support people, nominated persons, the treating team and legal and non-legal advocates.

1.2.2 A focus on practical strategies

King's Bench Book focuses on providing practical advice about techniques that judicial officers can adopt in hearings' However, the Bench Book also provides a helpful summary of research and theories that inform the solution-focused approach. While the main concepts are covered in this guide, members who are interested in learning more about the theories underlying solution-focused judging are encouraged to consult King's Bench Book.

1.2.3 Adapting the Bench Book for the Mental Health Tribunal

The Bench Book mainly draws its examples from specialist 'problem-solving' court programs where the key participants are offenders who have opted to participate in the program. However, adopting a solution-focused approach in Mental Health Tribunal hearings should in no way be seen as labelling participants as 'criminal' simply because this approach is commonly used in criminal problem-solving court programs. The core concept of solution-focused hearings is respect for the

participation and the perspective of the person who is central to a hearing. This has universal application rather than being the domain of a particular jurisdiction.

On the other hand, some of the techniques and examples in the Bench Book do not translate readily to the context of the Mental Health Tribunal. Accordingly, some of King's techniques and examples have been omitted or adapted to reflect this fact.

In addition, because the Bench Book effectively 'covers the field' of problem-solving courts and solution-focused techniques, it is over 200 pages long. This guide is an initial attempt to synthesise and tailor the Bench Book to the context of the Mental Health Tribunal and make it more accessible to members and other interested readers.

As part of this tailoring process, one useful and highly relevant source of research that is referred to frequently in this guide is the 2011 publication by Professor Terry Carney and others titled *Australian Mental Health Tribunals: space for fairness, freedom, protection & treatment?*[4]

This guide should also be read alongside the resource developed previously by the former Mental Health Review Board's Professional Development Program Committee to assist members with the fundamental aspects of hearing facilitation. This resource is now incorporated in the Mental Health Tribunal Hearings Manual.

1.2.4 Ongoing review and development of the guide

This guide was developed in consultation with the Members' Advisory Committee of the former Mental Health Review Board. It is intended to be a robust starting point for exploring a solution-focused approach in the new Mental Health Tribunal.

To remain contemporary and relevant, this guide will be reviewed and developed in consultation with Tribunal members over time as our understanding of the new Act – and the Tribunal's role under the Act – evolves and grows. In particular, once the Tribunal is operating, priority will be given to enhancing the guide by examining the needs of specific groups of consumers (for example, Aboriginal and Torres Strait Islander peoples, children and young people, and aged consumers) and incorporating strategies that might be employed to give these consumers a more appropriate, respectful and effective hearing.

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1 Michael S King, 2009, *Solution-focused judging bench book*, Australasian Institute of Judicial Administration Incorporated, Melbourne, 2.

2 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, 4, quoting B J Winick, 'A Therapeutic Jurisprudence Model for Civil Commitment' in K Diesfeld and I Freckelton (eds), 2001, *Involuntary Detention and Therapeutic Jurisprudence: International Perspectives on Civil Commitment*, Aldershot, Hampshire, Ashgate, 23-54.

3 Ibid 5.

4 Terry Carney, David Tait, Julia Perry, Alikki Vernon & Fleur Beaupert, 2011, *Australian Mental Health Tribunals: space for fairness, freedom, protection & treatment?* Law and Justice Foundation of NSW, Adelaide.

Chapter 2: What are solution-focused hearings?

Solution-focused hearings aim to engage participants as active partners in the decision-making process of the relevant court or tribunal. Accordingly, most of the practical strategies outlined in King's Bench Book and this guide are communication techniques, which research and experience have shown support and encourage effective participation in hearings.

The following passages encapsulate the solution-focused approach:

> Solution-focused judging is based on the premise that participants … should be key players in the formulation and implementation of plans to address their underlying issues and associated legal problems.[5]

> Judging in a solution-focused manner involves a more personal approach. The aim is to develop a rapport between judicial officers and participants whereby the judicial officer can use a range of therapeutic judging strategies to support and encourage participants through the change process. The judicial officer takes an interest in participants – their thoughts, feelings, dreams, goals; what is happening in their lives; and their strengths and weaknesses. In interacting with participants, the judicial officer is mindful of avoiding language and forms of interaction that demean or depersonalise the participant.[6]

> The judicial officer should use skills that promote participant trust in the judicial officer, including communication and listening skills and skills that promote participant self-determination, problem-solving and self-efficacy.[7]

> Essentially the approach [is] for the judicial officer to engage with defendants, see them as whole human beings with strengths, weaknesses and solutions, actively involve them in decision making directed at promoting their rehabilitation, take an active interest in and support their progress and, as far as possible, use techniques that promote them developing a solution in the event that a problem arises.[8]

However, the concept clearly extends beyond the summary provided in these extracts and the rest of this guide explores what is meant by a solution-focused approach and how it can be used in the context of the Mental Health Tribunal.

The next section of the guide starts this process of exploration by introducing key concepts and theories that have informed the development of a solution-focused approach. These include (among others) therapeutic jurisprudence, self-determination and autonomy, participation and the idea of an 'ethic of care'

2.1 Therapeutic jurisprudence

Therapeutic jurisprudence studies the effect of the law and legal processes on the wellbeing of people who are affected by them.[9] In the context of Mental Health Tribunal hearings, the people affected could include compulsory patients, carers and other support people, members of the treating team and case managers, as well as tribunal members themselves.

Therapeutic jurisprudence is derived from the behavioural sciences and recognises that, while ideally the law should do no harm, in some cases 'some harm is possible but it may be minimised through the use of therapeutic jurisprudence techniques'.[10] According to King:

> Therapeutic jurisprudence is a mechanism for promoting law reform using wellbeing as the lens through which the law is studied and the behavioural sciences as the source of possible remedies that could be adapted for use within the legal system. It sees a commonality between the law and the behavioural sciences in their interest in the functioning of the human psyche and how healthy behaviour may be promoted.[11]

Therapeutic jurisprudence is said to be the jurisprudential foundation for special intervention or problem-solving courts and it informs the solution-focused approach to hearings. According to King, it does more than suggest some techniques that can be used in hearings:

> [Therapeutic jurisprudence] suggests that there are basic principles associated with motivation and positive behavioural change that are based on empirical research that should inform all judging and advocacy practices in problem-solving courts.[12]

Two of these basic principles are the principles of self-determination and the promotion of procedural justice values. These principles are explored in the following sections, along with other principles informing a solution-focused approach such as participation, ethic of care and holistic approaches.[13]

2.2 Self-determination and autonomy

King states that self-determination or autonomy has been 'regarded as vital for health, motivation and successful action in various traditions and disciplines over hundreds of years'.[14] Self-determination allows participants to choose action that is personally meaningful for them and which they have an internal commitment to perform. Providing this choice can promote participants' motivation, confidence, satisfaction and opportunities to build important life skills.

In the mental health context, improving participants' autonomy is essential for good mental health, as Carney indicates:

> It is important to consider that autonomy and self-management are not only a human right, they are essential pre-requisites to mental health. Institutionalisation and control through CTOs, while they may be necessary for those who are incapable of caring for themselves, or likely to cause harm to others, also have an adverse psychological effect on the person's capacity for independence, dignity, self-confidence and self-regard. Ensuring that the client has a role and understands the process, and that all involved in the process work collaboratively and respectfully with the client in the management of mental illness, is likely to lessen these negative effects.[15]

This conclusion is illustrated in the same publication by the following comment from a Victorian consumer.

> '[P]eople, once they started interacting with the doctors and psychiatrists with their own treatment, they feel more positive, you feel more in control of your own destiny and life, you feel like you are doing something for yourself and you are not just being told what to do.' (Victorian consumer, focus group, v23)[16]

As highlighted in Chapter 3, self-determination and autonomy are also key themes in the new Mental Health Act. This indicates that a solution-focused approach can help

to give full effect to this new legislation and its underlying goal of taking a recovery-oriented approach to the treatment of people with severe mental illness.

Exactly how much the Tribunal can facilitate self-determination and autonomy in individual cases is a matter of degree and will depend on a number of factors, including, for example, the extent to which a person may be experiencing acute symptoms of an illness or the side-effects of treatment at the time of the hearing. However, to the extent possible, the Tribunal will support the autonomy of compulsory patients by encouraging their participation in hearings and facilitating dialogue between them and their treating team.

2.3 Promotion of procedural justice values

The field of procedural justice offers important insights into how members can interact with participants in hearings.[17] Four key components of procedural justice are neutrality, respect, participation and trustworthiness.

Neutrality refers to the duty of members to act independently and free from bias.

Respect in the procedural justice context essentially involves members affirming participants in hearings as competent, equal citizens and human beings.

Participation is about 'giving people the opportunity to explain their situation in circumstances where the person in authority is actually listening to what they say'.[18] It is worth noting that facilitating participation is not confined to the approach members take in the hearing itself. To prepare for the hearing and engage more fully in it, participants need to know about the hearing and what to expect during it. This means that the Notice of Hearing and documents included with it (such as information sheets) will be an important first step in facilitating participation in hearings.

Trustworthiness relates to participants' perceptions of members' motives and whether members truly care about them and demonstrate an 'ethic of care' (for more on this concept, see section 2.4 below).

More information about key aspects of the related concept of procedural fairness (also known as natural justice) – particularly the hearing rule and the bias rule – is provided in the Guide to Procedural Fairness in the Mental Health Tribunal.

2.3.1 Participation

Participation is a theme that echoes throughout this guide and is a key component of solution-focused hearings. King notes that participation means 'being treated with respect and the trustworthiness of the judicial officer' and being able 'to tell one's story to a legal authority who listens and takes what is said into account and/or being involved in shared decision making'.[19]

Participation is important not only because it gives participants the feeling they are being treated with dignity and respect but also because, by actively participating, participants in hearings are able to put forward their position more effectively, improving the prospects of a legally accurate outcome.[20]

The active participation of persons in hearings is also important from a human rights perspective. As Dr Penelope Weller observes:

> From a human rights perspective, participation of the person in all matters and decisions concerning them flows from the recognition that the principles of equality and non-discrimination are universally applicable. People with mental illness or other mental disabilities are therefore entitled to be recognised before the law on the same basis as other people, and are entitled to receive such support and assistance as is necessary to enable them to do so. From a human rights perspective legal decisions that proceed without the participation of the person are suspect.[21]

It is also worth noting that participants are more likely to accept the directions of the Tribunal where they feel that the Tribunal's processes are fair and legitimate: encouraging participation is one way of ensuring that this is the case.[22]

2.4 Ethic of care

The term 'ethic of care' (sometimes referred to as 'ethics' of care[23]) encapsulates the general approach that members take in solution-focused hearings.[24] Grounded in therapeutic jurisprudence's focus on the therapeutic *application* of the law, the concept of an ethic of care is most visible in hearing processes and, in particular, the way different participants relate to each other in hearings.[25]

For example, an ethic of care involves being sensitive to the communication needs of participants.[26] This may include using simple and clear language rather than professional jargon and making several attempts to ensure that participants are aware of the critical issues to be determined at the hearing.[27]

South Australian Deputy Magistrate Andrew Cannon has summarised this approach as follows:

> It is a respectful and proactive engagement with people involved in the court process to pay attention to their needs, rather than a neutral but mechanical and unsatisfying closing of files. It is a more exposed judicial role compared to the relatively mute and remote figure who only pronounces at the end and then in detached language.[28]

2.5 Holistic approaches

In the context of solution-focused hearings, King describes a holistic approach as seeking 'to provide assistance to participants where needed and appropriate in major life domains, such as health …, employment and training, accommodation, financial planning, other life skills, recreation and relationships'.[29] Holistic approaches see participants as 'whole human beings with strengths, weaknesses, threats and opportunities'.[30]

Such an approach is consistent with non-adversarial justice and respecting the human rights of participants, as Weller observes:

> Understanding the compatibility of non-adversarial justice and human rights points to the importance of creating MHRTs that are engaged with a holistic account of the experience of each person who appears before the [tribunal]. More importantly, it provides a solid theoretical grounding for an expansion of tribunal powers.[31]

In the following passage from the Minister's Second Reading Speech it is clear that the Act is intended to promote a holistic approach rather than a narrow focus on the criteria for compulsory treatment:

> The Tribunal is expected to take a holistic approach when it makes determinations and consider a range of factors, including the patient's goals, preferences and aspirations and the views of other people who are significant in the life of the patient, such as the nominated person and carers.[32]

Research by Carney and colleagues also indicates that many participants in hearings prefer a broader discussion that explores not only medical issues but also other aspects of their lives, such as housing circumstances, social networks and general capacity to function socially.[33] Adopting a holistic approach addresses this concern.

2.6 Other approaches

The Bench Book also discusses other approaches and theories that are related to the solution-focused approach to hearings. These are: transformational leadership, creative problem solving and restorative justice.

Members who are interested in learning more about these approaches are encouraged to read Chapter 1 of the Bench Book.

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[5] Michael S. King, 2010, 'Judging in problem-solving courts, indigenous sentencing courts and mainstream courts,' (2010) 19 *JJA* 133, 137.

[6] King Bench Book, above n 1, 157.

[7] Ibid.

[8] Ibid 33. Quotation is from M S King and B Batagol, 2010, 'Enforcer, Manager or Leader? The Judicial Role in Family Violence Courts,' *International Journal of Law and Psychiatry*, Nov-Dec; 33 (5-6): 406-416.

[9] Michael S King, 2008, 'Restorative Justice, Therapeutic Jurisprudence and the rise of emotionally intelligent justice,' *Melbourne University Law Review*, Volume 32, 1096-1126, 1111.

[10] King Bench Book, above n 1, 24.

[11] Ibid.

[12] Ibid 26.

[13] Ibid. King also mentions 'health compliance techniques'. These are discussed briefly in Chapter 6 of this guide.

[14] Ibid. This section is generally drawn from King Bench Book, above n 1, 26-28.

[15] Carney et al, above n 4, 295-296.

[16] Ibid 267.

[17] King Bench Book, above n 1, 28. This section is generally drawn from King Bench Book, 28-35.

[18] Ibid 29.

[19] King, above n 5, 145.

[20] Beaupert, above n 2, 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.

[21] Dr Penelope Weller, 2010, 'Non-adversarial Justice and Mental Health Review Tribunals: a reflexive turn,' presentation delivered at conference on *Non-adversarial Justice Conference: Implications for the Legal System and Society*, Melbourne, 4-7 May 2010, 7.

[22] Ibid.

[23] Beaupert, above n 2, 5.

[24] King Bench Book, above n 1, 29.

[25] Beaupert, above n 2, 5.

[26] Ibid 9.

[27] Ibid.

[28] Quoted in King Bench Book, above n 1, 30.

[29] Ibid 40-41.

[30] Ibid 41.

[31] Weller, above n 21, 13.

[32] Victorian Parliamentary Debates, Legislative Assembly 20/02/2014, 470, 477.

[33] Carney et al, above n 4, 222-224, under the heading 'Including life factors in the evidence'.

Chapter 3: Solution-focused hearings and the new Act

> The Tribunal will take a solution-focused and recovery-oriented approach to hearings. This will place the patient at the centre of the hearing, as an active participant in the discussion and decision-making process. The patient will be supported to discuss their thoughts, views, preferences and goals to enable problem-solving and promote self-determination. The overall goal of these hearings is to support patient progress toward voluntary treatment and recovery. (Second Reading Speech for the Mental Health Bill 2014).[34]

As the above quotation from the Minister's Second Reading Speech indicates, solution-focused hearing techniques complement many reforms in the new Mental Health Act. In fact, the Act effectively requires the Tribunal to modernise and further develop values that were part of the approach of the former Mental Health Review Board, such as conducting informal, non-legalistic and patient-focused hearings. For this reason, the commencement of the new Tribunal is an ideal time to articulate and adopt a framework of solution-focused hearing principles and techniques.

This chapter highlights aspects of the Act and Tribunal practices that might be directly promoted or improved through a solution-focused approach to hearings.

3.1 Self-determination and supported decision making

An October 2012 document foreshadowing the main reforms in the new Act states:

> The government is committed to a legislative framework that promotes recovery-oriented practice in the public mental health service system. This approach to patient wellbeing builds on the strengths of the individual working in partnership with the treating team. It encompasses the principles of self-determination and individualised treatment and care.
>
> Central to these reforms is the establishment of a supported decision-making model in the legislation. This model will enable and support compulsory patients to make decisions about their treatment and determine their individual path to recovery.[35]

This statement of intention was reinforced in the Minister's Second Reading Speech:

> This bill provides a legislative framework that promotes recovery-oriented practice in the Victorian public mental health service system […]
>
> Recovery is about maximising individual choice, autonomy, opportunity and wellbeing during a person's life and accordingly is a self-defined process that is highly individual […]
>
> At the very heart of the bill is a supported decision-making model that will enable patients to make or participate in decisions about their assessment, treatment and recovery and to be provided with the support to do so.[36]

These developments are timely and positive, but they also create a complex challenge (and possibly even a tension) for the Tribunal to navigate. The Tribunal is unambiguously a substitute decision-making body, but it needs to approach this role in a manner that leaves intact the greatest possible scope for the future exercise of personal autonomy and supported decision making by compulsory patients.

Mechanisms and provisions included in the new legislation that enable supported decision making include the presumption of capacity,[37] advance statements,[38] nominated persons[39] and the second opinion scheme.[40]

Solution-focused practices that the Tribunal can adopt to promote these principles or mechanisms include:

- making available accessible resources that provide clear information about the hearing and what to expect, and that will assist participants prepare for their hearing and be better able to convey what it is they want the Tribunal to know and consider
- making every effort to include nominated persons in hearings and confirm whether a person has made an advance statement
- encouraging the participation of carers and other support people in hearings
- according significant weight to the input of a nominated person or the content of an advance statement or, in the event a participant does not have a nominated person or advance statement, flagging these as something they may want to consider and discuss with their treating team in the future
- reminding hearing participants of the second opinion scheme if the discussion in a hearing indicates there is an entrenched disagreement that requires a 'circuit breaker'
- supporting consumers and the treating team in progressing the therapeutic process to include the individual's views and in adopting a holistic treatment approach
- providing a timely decision and order and, if requested, Statement of Reasons.

In addition, many statutory tests the Tribunal is obliged to apply assume or complement supported decision-making principles in that they require the Tribunal to have regard to the patient's own treatment preferences. For example, section 55(2)(a) of the Act, which pertains to Treatment Orders, requires the Tribunal, to the extent that is reasonable in the circumstances, to have regard to 'the person's views and preferences about treatment of his or her mental illness and the reasons for those views and preferences, including any recovery outcomes that the person would like to ac hieve.'

It is clear that a solution-focused approach is related to and can support the key goals of supported decision making – namely to support participants to take responsibility for their own mental health and other challenges, and to actively involve them in Tribunal decision making.

3.2 Inquisitorial and informal nature of the Tribunal

The Mental Health Tribunal is not legalistic or adversarial in nature; rather, it operates on an inquisitorial model. This means that it may seek any information it sees as necessary to make a just decision. It may make inquiries of the participants or of other people, call for documents, question the participants and even call as witnesses people other than those suggested by the parties.

The inquisitorial nature of the Tribunal is articulated in section 181 of the Mental Health Act, which also provides that the Tribunal is not bound by rules of evidence and is expected to 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.'

The inquisitorial and informal nature of hearings gives the Tribunal the scope and flexibility to adopt solution-focused techniques. For example, it may be that a participant wishes to talk about issues that may not be strictly, or may only be tangentially, related to the matters determined by the Tribunal. While solution-focused hearings are not about letting people talk about whatever they wish for as long as they want to, the inquisitorial and informal nature of the Tribunal allows some scope to raise such issues so that a participant's primary concerns are respectfully acknowledged and, if not able to be addressed formally in a hearing, agreement reached about how these issues will be addressed after a hearing. This will enhance the ability of participants to engage in hearings and to feel that their voices are being heard– an essential feature of the solution-focused approach.

Similarly, solution-focused techniques often call for members to play a more active role in hearings than is usual in a traditional court. The intent and provisions of the Mental Health Act and the inquisitorial nature of Tribunal hearings provide a solid justification and foundation for the adoption of such techniques.

Aspects of natural justice or procedural fairness are touched on in this guide. More information about these principles is provided in the Guide to Procedural Fairness in the Mental Health Tribunal.

3.3 Embedding recovery-oriented practice

3.3.1 Difference between clinical and personal recovery

It is clear that the Act promotes 'recovery-oriented practice',[41] but what is meant by this term? The term 'recovery' is used in a range of ways, making its meaning somewhat ambiguous.[42] For example, the term can be used to refer to *clinical recovery*, which is 'primarily defined by mental health professionals and pertains to a reduction or cessation of symptoms and 'restoring social functioning'.[43] In contrast, *personal recovery* 'is defined by the person and refers to an ongoing holistic process of personal growth, healing and self-determination'.[44] In a widely used definition of personal recovery, Anthony describes it as:

> … a deeply personal, unique process of changing one's attitudes, values, feelings, goals, skills, and/or roles. It is a way of living a satisfying, hopeful, and contributing life even within the limitations caused by illness. Recovery involves the development of new meaning and purpose in one's life as one grows beyond the catastrophic effects of mental illness.[45]

The term 'recovery-oriented practice' generally refers to personal recovery. For example, in the Victorian Department of Health's *Framework for recovery-oriented practice*, the term recovery 'is considered an overarching philosophy that encompasses notions of self-determination, self-management, personal growth, empowerment, choice and meaningful social engagement'.[46]

3.3.2 Recovery-oriented practice

The Department of Health's Framework describes recovery-oriented practice as follows:

> The aim of a recovery-oriented approach to mental health service delivery is to support people to build and maintain a (self-defined and self-determined) meaningful and satisfying life and personal identity, regardless of whether or not there are ongoing symptoms of mental illness (Shepherd, Boardman & Slade 2008). Thus a recovery-oriented approach represents a movement

away from a primarily biomedical view of mental illness to a holistic approach to wellbeing that builds on individual strengths (Davidson 2008).

The term 'recovery-oriented practice' describes this approach to mental health care, which encompasses principles of self-determination and personalised care. Recovery-oriented practice emphasises hope, social inclusion, community participation, personal goal setting and self-management. Typically, literature on recovery-oriented practice promotes a coaching or partnership between people accessing mental health services and mental health professionals, whereby people with lived experience are considered experts on their lives and experiences while mental health professionals are considered experts on available treatment services.

For the purposes of this framework, recovery-oriented practice is understood as encapsulating mental healthcare that:

- encourages self-determination and self-management of mental health and wellbeing
- involves tailored, personalised and strengths-based care that is responsive to people's unique strengths, circumstances, needs and preferences
- supports people to define their goals, wishes and aspirations
- involves a holistic approach that addresses a range of factors that impact on people's wellbeing, such as housing, education and employment, and family and social relationships
- supports people's social inclusion, community participation and citizenship.[47]

3.3.3 Recovery-oriented practice and the Mental Health Tribunal

While the Tribunal is not making treatment decisions, the principles of recovery-oriented practice are relevant to many aspects of the Tribunal's role, as the following examples illustrate.

- Recovery-oriented principles are relevant to the Tribunal's consideration of risk – for example, where a person may not regard the presence of some symptoms as a risk to their health, particularly where there are side-effects of treatment to consider. The Department of Health's *Framework for recovery-oriented practice* specifically addresses the issue of risk and states that 'given that a recovery approach involves promoting people's choice, agency and self-management, a degree of risk tolerance … becomes necessary'.[48] Part of this involves 'working within the inherent tension between encouraging 'positive risk taking' and promoting safety'. One aspect of a recovery-oriented approach to risk is to appreciate that consumers may relapse for a range of reasons, not least as part of the pattern of their mental illness. In other words, relapse is possible irrespective of whether a consumer is a compulsory patient.
- The Tribunal's new function under the Act to determine the duration of an order must take into account that the end point of compulsory treatment within a recovery-oriented model focused on personal recovery may be considerably earlier than clinical recovery or a complete clinical resolution of symptoms.

With solution-focused hearings aiming to promote not only autonomy, but also greater collaboration amongst hearing participants, Tribunal processes can promote (or at least not detract from) the potential to realise recovery outcomes.

3.4 Recognition of the central role of carers and support people

The Mental Health Act promotes recognition of and respect for the central role of carers and support people more generally. One very obvious way it aims to do this is through the nominated person mechanism; however, not every compulsory patient will have a nominated person and it cannot be assumed that a nominated person will always be the primary carer.

It is likely that the Tribunal will continue to encounter some of the same challenges as the former Board with regard to the participation of carers in some hearings. The solution-focused model doesn't provide a novel or guaranteed solution for these challenges, but it can assist in reframing them.

In the most simple of terms, a solution-focused approach might change the starting point for the resolution of scenarios involving carers and support people. Rather than initially focusing on privacy and confidentiality (in other words, the reasons why a carer or support person might be precluded from participating), discussion with the individual who is the subject of a Tribunal hearing could commence with an explanation of the positive contribution carers and support people can make (not to persuade them to make a particular decision, but to ensure their decision is informed and that they are they are aware of and understand the implications of their decision).

3.5 Constructive engagement with mental health services

Particularly in the early days of the new Act – as all hearing participants adjust to the very different role and requirements of the Tribunal compared to the former Board – there is likely to be a level of confusion and some tension. The Act is structured in such a way that the Tribunal cannot compromise regarding its requirements, but it can adopt a solution-focused approach to interactions with representatives of treating teams who are participating in hearings.

Even where difficult issues need to be raised (such as inadequate reports or a representative with no or insufficient direct knowledge of the compulsory patient), respectful interactions between the Tribunal and the treating team will ensure the focus remains on the person who is the subject of the hearing and contribute to longer-term improvements in compliance with the Tribunal's requirements and standards.

As part of adopting a solution-focused approach, the Tribunal will also seek to foster hearings where constructive clinical interaction between the compulsory patient (and their carers and support networks) and their treating team is encouraged and, if possible, agreed steps toward autonomy and recovery are sought as the pathway to voluntary treatment.

3.6 Determining the duration of orders

The Tribunal's responsibility to determine the duration of orders is referred to in section 3.3.3 in the context of recovery-oriented practice, but warrants a further mention. This new function opens up an entirely new dialogue between the Tribunal and compulsory patients compared to the former Board.

While the former Mental Health Review Board always encouraged involuntary patients not to look upon outcomes in binary, win-lose terms, it is easy to see why this was a difficult message for people to accept, as they left hearings either on or discharged from an order. Under the new Act, even where the Tribunal is persuaded to make an order, a compulsory patient can still exert influence over the duration of that order. In this context, the discussion about a person's wishes, aspirations, plans and broader circumstances – a discussion that is integral to the solution-focused approach – has wider relevance and the potential to significantly impact hearing outcomes.

The Tribunal's determination of the duration of an order also provides a more transparent and focused framework for a solution-focused dialogue with treating teams regarding the proposed treatment of a compulsory patient. Despite the former Board's role in reviewing treatment plans, there was often reluctance on the part of the treating team to discuss treatment in hearings as this was misunderstood as being beyond the function of the former Board. Under the new Act, it is clear that in order to make meaningful determinations as to the duration of orders, the Tribunal needs an adequate picture of the treatment being proposed by the treating team that addresses both the individual's and the treating team's concerns.

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[34] Victorian Parliamentary Debates, Legislative Assembly, 20/02/2014, 470, 477.

[35] Department of Health, 2012, *A new Mental Health Act for Victoria: summary of proposed reforms*, State Government of Victoria, Melbourne, 3.

[36] Victorian Parliamentary Debates, Legislative Assembly, 20/02/2014, 470, 471.

[37] Mental Health Act, s. 70.

[38] Mental Health Act, Division 3 of Part 3.

[39] Mental Health Act, Division 4 of Part 3.

[40] Mental Health Act, Division 4 of Part 5.

[41] See Victorian Parliamentary Debates, Legislative Assembly, 20/02/2014, 470, 471 and Department of Health, 2014, The Mental Health Bill 2014 – An explanatory guide, State Government of Victoria, Melbourne, 8.

[42] Department of Health, 2011, *Framework for recovery-oriented practice*, State Government of Victoria, Melbourne, 2.

[43] Ibid. Another publication refers to clinical recovery as 'an idea that has emerged from the expertise of mental health professionals, and involves getting rid of symptoms, restoring social functioning, and in other ways 'getting back to normal': Mike Slade, '100 ways to support recovery', 2nd edition, *Rethink Mental Illness*, 2013.

[44] Ibid.

[45] W A Anthony, 1993, 'Recovery from mental illness: the guiding vision of the mental health system in the 1990s', *Innovations and Research* 1993; 2:17-24 as quoted in Slade, above n 43, 8.

[46] Department of Health, 2011, above n 42, 2.

[47] Ibid.

[48] Ibid 3.

Part 2: Practical techniques to promote solution-focused hearings

Chapter 4: Practical communication skills

Communication is a vital component of a solution-focused approach and the basis of supported decision-making and effective participation in hearings. Developing practical techniques to enhance communication is particularly critical in the context of the Mental Health Tribunal, where hearing participants can face significant challenges and barriers in sharing their perspectives and articulating their concerns and wishes.

4.1 Factors affecting communication

A number of factors can affect participants' ability to communicate, not least their mental illness. Participants' current mental state, including the effects of psychosis, dementia or depression, may impact on their ability to communicate in a hearing. For example, delusions may give rise to the potential for misunderstanding and suspicion. Individuals with depression may speak slowly, and with difficulty. People with dementia have impaired cognition; they may confabulate in order to hide their loss of memory.

Moreover, participants are often highly stressed and anxious about their situation and what is going to happen in a hearing. King states that 'anxiety can compromise motivation and cognitive functioning, adversely affecting memory, the ability to express one's thoughts and feelings clearly and language skills'.[49]

Personality factors or other individual differences can also affect communication. For instance, some people are naturally shy and do not tend to speak much even in supportive social environments, much less in Tribunal hearings.

Cultural differences, traditions and mores, as well as a lack of English-language skills, can also affect a participant's ability to participate and the ability of Tribunal members to understand what is being said. The Tribunal or others may overlook the participant's cultural background or misconstrue their cultural norms. This might lead to an inappropriate conclusion about the reasons for a compulsory patient's denial of mental illness or symptoms of such illness, or for a failure to make eye contact during a hearing. It is worth noting that a participant's denial of mental illness may be for cultural reasons: some cultures may ascribe a different meaning to what is happening to a person or to a particular set of circumstances.

Over time, the Tribunal will work with relevant stakeholders to articulate and incorporate into this guide tailored approaches to particular groups such as Aboriginal and Torres Strait Islander peoples, culturally and linguistically diverse consumers, children and young people and aged consumers.

Carney and colleagues confirm that the ability of consumers 'to participate effectively in tribunal hearings depends on their capacity at the time, as well as their understanding of the tribunal's function, their emotional state and the opportunity they are given to contribute'.[50] Sometimes, participants are acutely unwell at the time of

the hearing, which obviously negatively impacts their ability to engage and participate effectively at hearings. This is demonstrated in the following two anecdotes by participants in mental health review hearings.

> 'I didn't have my wits about me. I didn't know what the consequences were or what the ramifications were. I'm not critical of it but I was in no fit state to object to the thing.' (Victorian consumer, v3)[51]
>
> 'Sometimes they can be so acutely unwell that they present themselves quite well initially, and then under the tension of the hearing, or the length of the hearing, they can be their own undoing as well. They can start to say things that make it very clear to the magistrate or the tribunal that they're incredibly unwell. It's a very hard process for them. And it's a big thing. Sometimes they crumble under the pressure.' (NSW social worker, h2)[52]

As the work of the Tribunal inherently involves interacting with individuals who may face multiple impediments to effective communication, members need to employ diverse communication skills and strategies to reduce these barriers.

To understand some of the issues that compulsory patients may be facing, members are encouraged to consult King's Bench Book for detailed and useful information on substance abuse, mental health and family violence.

4.2 Overview of communication techniques

The use of appropriate forms of speech (including language selection), body language and listening skills are important competencies in the solution-focused hearings palette.[53] These skills can help members to engage in a dialogue with participants and gain a clearer understanding of their thoughts, feelings and motivations in relation to their mental health and underlying and related issues.

Most of the communication techniques described in this guide are very well-established techniques in developing good interpersonal skills: experienced members will already be very familiar with them. However, this guide is an opportunity to consider and explore these skills and techniques in the specific context of the Mental Health Tribunal and to link them with a solution-focused approach.

These techniques also help to harness participants' own problem-solving skills to address the issues confronting them.[54] In other words, solution-focused communication skills are about promoting effective and positive communication between members and all hearing participants – not just consumers, but also the treating team, advocates, carers and other support people, and family members.

Carney and colleagues have conducted extensive research on Mental Health Tribunal or Board hearings in a number of Australian jurisdictions, including Victoria. One theme that echoes throughout this work is that effective communication with participants is vital. In particular, the research findings emphasise the importance of interactive communication in which the consumer is the central focus.

> For consumers, communication is not merely about the 'order' but also the 'style' of discussion, such as whether more fluid exchanges between parties may convey a sense that consumers are being excluded, rather than promoting informality and inclusion in the

> process. There were comments that, instead of the communication being restricted to rather mechanical questioning by the tribunal, usually the legal member, there could be more interaction or discussion between other members and the consumer, or between the treating team and the consumer. While obviously desirable, care needs to be taken to keep the focus on the consumer.[55]
>
> […]
>
> Overall, the account that the study team received from consumers, carers and advocates was the importance of communication and collaboration between the consumer and those in power, including the tribunal and the treating teams. While there were positive accounts of tribunal members and others explaining their deliberations and decisions, and listening to the consumers' point of view, the frequently expressed view during fieldwork interviews with consumers interviewed for the study was that consumers felt forced into a passive role, unable to effectively voice their concerns and have those heard and taken into account. It was of concern that some consumers reported that when they spoke in the tribunal hearings they had the impression that the tribunal was not listening. They commonly expressed a perceived inability to communicate and negotiate with the treating teams, and the sense that their prior and current life circumstances were disregarded.[56]

This section of the guide contains practical tips for how members can use speech, body language and language selection to promote a solution-focused approach to hearings. Section 4.3 discusses some core principles behind solution-focused communication skills: turn-taking, connecting, mutual influencing, co-creating outcomes, commitment to the person and the message and self-monitoring. The following sections examine strategies that can be used to promote effective and respectful dialogue (section 4.4), other ways of communication with participants (section 4.5) and speech and the use of language in hearings (section 4.6).

4.3 Core principles of effective communication

4.3.1 Turn-taking

As King states, turn-taking involves giving participants the 'space, encouragement and support to communicate what they wish to say about their thoughts, feelings, behaviour and what is happening in their lives'.[57] It is about demonstrating visibly that members and participants can learn from each other.

In turn-taking, it is particularly important to create the space for participants to speak. For instance, some participants may not respond immediately to questions or opportunities to speak. By quickly 'filling the void' with their own comments, members can potentially miss the opportunity of hearing from some participants.

4.3.2 Connecting

Connecting means that there should be a 'connection between what each party to the dialogue says and what the other party has said'.[58] In other words, connecting is about members demonstrating that they are listening to what the participant has said (and, where appropriate, asking follow-up questions to clarify issues or develop the conversation to gain a better understanding of what is being said).[59]

Connecting is also about recognising that the narrative of consumers can be affected by their mental illness and general confusion or nervousness, and acknowledging and accommodating the difficulties they may experience in communicating at the hearing. Psychiatrist and registered medical practitioner members will have particular

experience and expertise in communicating with consumers and may be best placed to take the lead in the discussion with them.

4.3.3 Mutual influencing

King describes the key elements of mutual influencing as:[60]

- participants and members 'are open to the ideas and suggestions of the other'
- members are 'vigilant to ensure that preconceptions and stereotypes concerning the participant do not influence how communication from a participant is evaluated'
- members recognise that in a hearing there will be multiple sources of 'creative ideas as to how problems can be addressed'.

4.3.4 Co-creating outcomes

Closely related to the concept of mutual influencing is the idea of co-creating outcomes. Co-creating outcomes is about ensuring that participants have a 'genuine role in determining what is to result from the dialogue with the judicial officer'.[61]

4.3.5 Commitment to the person and to the message

Commitment to the message refers to 'knowing what one is talking about, caring about what one says and being sincere'.[62] Commitment to the person involves taking time instead of rushing, being willing to listen carefully (instead of doing all the talking), using language that makes sense to the other person and being open to change after hearing the other person's ideas.[63]

4.3.6 Self-monitoring

Self-monitoring is about being aware of the effect of your communication – both verbal and non-verbal – on others.[64] However, it is important to strike an appropriate balance between seeing how others react to one's approach (and assessing whether it needs to be modified) and too much self-monitoring, which can distract members from communicating and listening effectively.

4.4 Strategies to promote effective and respectful dialogue

> A judicial officer can use questions, statements, requests, single words or non-verbal prompts to promote dialogue with participants.
>
> The judicial officer should take care in framing questions and other responses to avoid anti-therapeutic effects.[65] (King's Bench Book)

Members can use various techniques to promote a constructive dialogue with participants in hearings. Several of these are outlined below.

4.4.1 Use of questions

Questions are a means of 'directing, facilitating or controlling the flow of communication'.[66] It is important for members to be sensitive about the effect that questions can have on their rapport with participants in hearings.

Ideally, questions should make participants 'comfortable and open to sharing [their] thoughts, feeling and experiences'.[67] The emphasis should be less on what is said than on promoting the flow of communication.

Leading questions have limited use in hearings

The form of the question is important. Leading questions – that is, questions that suggest the desired answer such as 'you have problems with your treatment team, don't you?' – should have limited use in hearings. They are not the best means of promoting open communication with participants (although they can be used to confirm participants' evidence or to demonstrate that you are listening).

Open questions are ideal

'Open' questions, particularly questions that use the words 'what' and 'how,' are ideal because these give participants the opportunity to explain matters of concern to them.

The start of a hearing can be a particularly good time to ask such open questions about the participant's wellbeing and what has been happening in their lives as it enables further questioning to be put in a broader context and demonstrates interest in the participant's overall wellbeing.

One technique that can be used in hearings is to choose something in a report submitted to the Tribunal relating to the individual's broader circumstances and ask a question about that particular matter.

'How are you?' 'What has been happening since your last hearing?' 'How have you been coping?'

'I see that you moved house recently. How is your new accommodation working out for you?'

Exercise caution with 'why' questions

It is best to be cautious with 'why' questions: they can make the participant 'defensive and less open to communication as they can be perceived as being a demand for explanation'.[68] The use of 'how' and 'what' questions can be a less confronting way of eliciting information and, if used with appropriate tone of voice and body language, can demonstrate a caring interest in the participant's wellbeing.

Compare 'Why did you stop your medication? or 'Why didn't you keep your appointment with your doctor?'

– with –

'I see that you stopped your medication. / This report mentions you missed an appointment with your doctor. What happened there? / How did that come about?'

Further tips for questioning participants

Further useful tips from King's Bench Book are set out below.[69]

- Deal with each issue in turn rather than jump back and forth between topics (which can be a challenge to participants' cognitive processes).

- Be sensitive as to the nature and number of questions asked: participants should not feel as though they are being 'grilled'.
- Asking the participant for further information can be an effective way of enhancing communication. However, this should not come across as a demand or an order.

4.4.2 Using a single word or phrase and making a statement

Using a single word or phrase can be an effective method of moving the dialogue along. The following example is taken from King's Bench Book.[70]

> Participant: I used ice on Friday. It wasn't good. I've been thinking about what I need to do.
> Magistrate: What do you need to do?
> Participant: What I need to do is stop using.

Effective short prompts include 'yes', 'go on', 'okay' and 'uh-huh'. Nodding is a non-verbal prompt.

Making a statement – most commonly in the form of saying that you do not follow what has been said – can get a participant to elaborate without sounding accusatory.

> 'I am not clear what brought about your relapse' (making a statement) is better than 'Why did you relapse?' ('why' question).

4.5 Other ways of communicating with participants

Apart from using questioning techniques such as those described above, paraphrasing, supporting, analysing, advising in an empowering way and judging are all solution-focused techniques members can use in hearings. These techniques are summarised below.

4.5.1 Paraphrasing

Paraphrasing is using your own words to repeat back to someone else what they have said. It is a communication technique that draws on active listening skills (see Chapter 5).[71]

Paraphrasing can be used to clarify what has been said, to demonstrate that you have been listening and that you care about what the participant thinks and feels. It can help participants to clarify their thoughts and feelings. However, excessive use of paraphrasing might seem artificial or strained.

> J, a 21 year-old part-time student who has deferred her studies, started hearing voices and experiencing other symptoms of schizophrenia about two years ago. J subsequently failed her courses at university due to her preoccupation with her voices and strange thoughts. Her mother, who lives with a mild form of schizophrenia, recognized the illness and took her to the doctor. Since then, J has been in psychiatric care as an outpatient or as an inpatient whenever her condition worsened. She has tried several medications in the past with limited success but recently has noticed an improvement of her symptoms.

J: 'I started hearing the voices again for a while. But they changed my medication and I feel better now'.
Member: 'So, you're feeling better because you changed medication, is that right?'

4.5.2 Supporting

Supporting involves acknowledging and identifying with a person's situation.[72] It may involve expressing empathy, agreement, praise and reassurance. This technique recognises that it can be counter-productive to discount a person's situation or how they feel (for example, through statements such as 'It's not that bad' or 'You'll feel better tomorrow') as these responses can stifle dialogue. Similarly, attributing blame is unlikely to make participants feel motivated to deal with their problems.

A is a 46-year old widowed mother of five children aged between 10 and 23 years with a 15-year history of schizophrenia. She was recently hospitalised when police were called to her home after neighbours had reported that she had been threatening to 'deal with' people in the area whom she believed had been raping her at night and poisoning the food in her fridge.

A: 'I felt terrified when four big men came to my door and took me to hospital like I was a criminal'.
Member: 'I can understand why you would find that experience terrifying. Have you had a chance to talk about it with your doctor?'

K is a 37-year old, divorced father of two with a history of drug abuse and delusional disorder. Until recently he had been unemployed and receiving a disability pension for many years. However, with the assistance of a not-for-profit organisation, he has recently found a part-time job.

K: 'I've started working part-time and it's going well so far'.
Member: 'Well done. What type of work are you doing?'

The importance of positive feedback and the drawbacks of negative feedback

Research by Carney also highlights the important role positive feedback can play in hearings, particularly in giving the decision.[73] Positive feedback may be particularly useful when the Tribunal has determined that compulsory treatment is no longer needed.

As a corollary, as Carney states, 'when the decision is accompanied by negative rather than positive treatment it was reportedly very damaging to the consumer's sense of the fairness of the system and might well have negative therapeutic effects'.[74] The following are hearing participants' comments reported by Carney with respect to negative comments made during hearings.

'[The legal member] proceeded to give a lecture on schizophrenia. I said [T]his person has lived for 18 years with that illness. They don't need your lecture on how it is to live with schizophrenia, what they've got to do'. (NSW community member, m12)

'What happens if someone gets off an order? Is that handled better?
No. When people are discharged it usually ends with a lecture about if they don't follow their treatment, if they don't continue to engage, it's just going to have these dire consequences.

There is usually a lecture after someone is discharged, rather than a 'Congratulations, you deserve it.' I don't think I've heard any member ever say that'. (Victorian advocate, a1) [75]

4.5.3 Analysing: *caution advised*

Analysing is an important function of judicial officers, but care should be exercised in using this technique with participants in hearings, particularly with regard to a participant's personal situation and problems.[76] As King points out:

> A judicial officer's analysis of the personal situation of a participant may be wrong – due to insufficient or inaccurate material before the court or a misunderstanding of that material. Even if it is correct, it may arouse a participant's defensiveness as it could be construed as the judicial officer asserting she [sic] is a better authority on the participant's situation than the participant.[77]

If attempting an analysis or interpretation, the motive should only be to assist others in resolving an issue. This would be consistent with promoting consumers' self-determination, personal goal setting and self-management which are important goals of recovery-oriented practice.

In the context of Mental Health Tribunal hearings, a scenario that might invite analysis is when there is open, perhaps even hostile, disagreement between participants. In such situations:

- 'it is better to offer analysis or interpretation in tentative rather than absolute terms ('Perhaps the reason is…')
- the analysis should have a reasonable chance of being correct
- the analysis should only be offered when the person is likely to be open to it
- the motive to offer the analysis should only be to assist … others in resolving their problems'.[78]

4.5.4 Advising: *caution advised*

As with analysing, caution should be exercised if advising participants. This is because a key aim of a solution-focused approach (and of the new legislation) is to empower participants to make their own decisions with support.[79]

As King points out, continual advice to participants about how to resolve problems does not support participants' self-sufficiency. A further problem is that a member's advice may be considered more 'authoritative' than the participant's own ideas, which means the participant may blame the member if the advice does not 'work'.

If giving advice, it is best to do so tentatively rather than on an absolute basis. This indirect approach places the onus on the participant to talk through the pros and cons and reach a consensus; it is a less risky and more effective technique.

Member: 'What if you were to …? What do you think about that?'

Finally, if a member gives advice, it is important that the advice is accurate, that the participant is open to accepting it and that it is given in a caring manner.[80]

4.6 Speech and use of language

King reminds us that we need to be constantly sensitive to the possible effects of language selection.[81] The Bench Book contains some general rules of thumb, which are summarised below. However, these and other techniques outlined are not 'rules' to be applied rigidly in every case. When communicating with participants in hearings, it remains important to rely on general communication skills, intuition and common sense.

4.6.1 Avoid technical, legal and medical language

Keep language simple and direct (but not so overtly that it comes across as condescending). This approach recognises the fact that participants are intended to play an active and significant role in hearings. Research conducted by Carney and colleagues indicates that board and tribunal members are generally 'aware of the need for plain English, and tailoring language to suit the consumer',[82] as the following quotations illustrate.

> 'For someone with a mental disability you need to keep it very simple, it is about short sentences. It is not about a lot of explanation about the law, it's about being clear about who we are, what our role is, what the role of the Board is and gathering the evidence in that total way, so that it does not get on a train and the train carries the information away, and the person is left beside or behind.' (Victorian legal member, m3)[83]
>
> 'What I try to do is to get some sense of the person I'm talking to and how they would normally interact with other people and then work on those sorts of levels. We certainly are in an environment where there is lots of jargon around so trying to de-jargonise, particularly medical matters, is really important. Making sure people really do understand as best they can what's going on is important. And that varies enormously.' ([former] Victorian MHRB President, m5)[84]

As is clear from the second quotation, one of the greatest challenges in Tribunal hearings is to monitor and manage the use of jargon by clinical participants.

4.6.2 Avoid qualifying positive statements with 'but'

If you are making a positive statement (for example, encouraging a participant) try to avoid using a qualifier that detracts from it.

> 'It is great you stayed off drugs since your last appearance, but you missed an appointment with your counsellor.'[85]
>
> In this example, staying off drugs is significant: the achievement and the missed appointment are two separate matters that should be dealt with separately.

4.6.3 Exercise caution in using 'you'

Using the personal pronoun 'you,' particularly in questions, can seem to attribute responsibility or blame and may place participants on the defensive or make them feel intimidated.[86] The example below shows a more neutral and open way of asking the question without using 'you'.

Problematic: ‘How come you didn’t attend appointments with your case manager last month?’

Better: ‘I’ve been told about some missed appointments with your case manager. What happened there?’

This example does not carry any implication that the participant was at fault and leaves open other possibilities. At the same time, it places on the participant the responsibility to explain the missed appointment.

On the other hand, sometimes using ‘you’ is important, particularly when seeking input from a participant or their involvement in decision making.

Acceptable use of ‘you’:
‘How do you think we should deal with this matter?’
‘What action are you taking/wanting to take to maintain your health / avoid future disputes with your neighbour?’
‘If we decide to grant an order, how long do you think would be reasonable?’

Use of ‘you’ in questions to the treating team also needs to be carefully considered.

‘We need some more information about the treatment and support X will be given so as to decide how long an order should last’ is clearly preferable to ‘You haven’t provided enough information about treatment to enable us to decide the appropriate duration of an order’.

However a ‘you question’ along the following lines could contribute valuable and constructive details regarding next steps: ‘What are some of the changes you would be looking for as an indication an order may no longer be needed?’

4.6.4 Use of ‘we’ and humour

Using the inclusive collective pronoun ‘we’ can promote a feeling of collaboration and the sense that participants are not alone but supported.[87]

‘How do you think we should deal with this issue?’ ‘What do you think we should do?’

Using humour is a normal part of human interaction and can sometimes be appropriate to lighten the atmosphere in hearings. Participants may sometimes be humorous while engaging with the Tribunal – for example, in a self-deprecating way – as a means of dealing with their own difficult situation. However, King reminds us that care should be taken not to use humour at the expense of participants. In addition, it is important to remember that a participant’s use of humour or particular language is not automatically intended as a licence for everyone else to do the same.

[49] King Bench Book, above n 1, 123.

[50] Carney et al, above n 4, 186.

[51] Ibid.

[52] Ibid.

[53] King Bench Book, above n 1, 121.

[54] Ibid.

[55] Carney et al, above n 4, 181-182.

[56] Ibid 272.

[57] King Bench Book, above n 1, 122.

[58] Ibid.

[59] Ibid.

[60] Ibid.

[61] Ibid.

[62] Ibid 122-123, drawing on R B Adler and R F Proctor, 2007, *Looking out, Looking In*, Thomson, 12th edition, 32.

[63] Ibid 123.

[64] Ibid.

[65] Ibid 125.

[66] Ibid. This section generally is drawn from King Bench Book, above n 1.

[67] Ibid.

[68] Ibid 126.

[69] Ibid.

[70] Ibid 127.

[71] This section is drawn from King Bench Book, above n 1, 127-128.

[72] This section is drawn from King Bench Book, above n 1, 128.

[73] Carney et al, above n 4, 237.

[74] Ibid.

[75] Ibid.

[76] This section is drawn from King Bench Book, above n 1, 128-129.

[77] Ibid 129.

[78] This section is quoted from King Bench Book, above n 1, 129, drawing on Adler and Proctor, above n 62, 258 (punctuation altered).

[79] This section is drawn from King Bench Book, above n 1, 129.

[80] King also refers to 'judging' on page 130. However, as he states, it should generally be used to determine whether a person is admitted to or terminated from a program or whether sanctions should be applied: this does not seem relevant to the MHT context.

[81] This paragraph is drawn from King Bench Book, above n 1, 131-132.

[82] Carney et al, above n 4, 178.

[83] Ibid.

[84] Ibid.

[85] King Bench Book, above n 1, 131.

[86] This section is drawn from King Bench Book, above n 1, 132.

[87] This section is drawn from King Bench Book, above n 1, 132.

Chapter 5: Practical listening skills

An ability to listen effectively is the basis of good communication and interpersonal skills generally and an important aspect of solution-focused hearing techniques.[88]

5.1 The positive power of listening

Research shows that participants' satisfaction with the legal process is increased when they feel that the court or tribunal has 'taken their story into account in reaching a decision and treated them with respect'.[89] Good listening skills –and being able to demonstrate to participants that their views and concerns have been heard – are critical to achieving this outcome.

Active listening techniques can help members to engage in therapeutic communication with participants and promote participants' trust in the Tribunal. Conversely, it is important to recognise that 'some forms of behaviour and some environments inhibit the listening process and should be avoided'.[90]

Listening is also the basis for building rapport with participants in hearings. By listening and developing rapport, members can promote participants' recovery by helping them to clarify their thoughts and feelings and solve problems, as well as by treating them as individuals whose ideas, views and concerns are worthy of respect and consideration. [91]

The following passage from King's Bench Book focuses on offenders in problem-solving courts such as drug and family violence courts, but provides a useful illustration of the positive power of listening generally:

> The judicial officer listening is an essential part of the process of validating the party or witness as a citizen worthy of respect, of validating her [sic] self-concept. This has been noted by procedural justice research as important for achieving litigant respect for the court system. For many offenders, the attention from a judicial officer – such as that commonly seen in therapeutic jurisprudence based problem-solving court programs – may be the first time that any authority figure has taken a positive interest in them and been prepared to take the time and adopt the attitude needed to listen to them. The quality of that attention will depend to a large degree on the judicial officer taking an active interest in what the offender has to say about a range of issues including how he [sic] got to be involved in the matter that has brought him to court, how he thinks he can address underlying problems and the challenges that may arise on his road to rehabilitation.[92]

Listening can have several different purposes but relational or empathetic listening is perhaps the most relevant to solution-focused hearings.[93] Members engage in empathetic listening when asking participants to explain the nature of their concerns and issues, how they arose and how they would prefer to address them.

This type of listening can also promote participants' self-determination in that members seek participants' views on the making of orders (or other issues) and take those views into account in reaching their decision. However, the importance of empathetic listening does not override the evaluative function of listening, which is to critically examine the content of what is being said.

For information on the theory of the cognitive, affective and behavioural factors involved in listening and the stages of listening (pre-interaction, interaction and post-interaction), members are encouraged to read Chapter 6 of the Bench Book.

5.2 Ways in which listening can be impaired

The potential therapeutic effect of listening can be impaired in a number of ways:[94]

- *failing to pay attention* – for example, being distracted due to fatigue, boredom, participants' mannerisms or appearance, a busy list, tuning out due to a view that what is being said is irrelevant
- *having expectations about what is going to be said* and not listening to what is actually being said or twisting what is said according to preconceptions about the participant (a form of prejudging)
- *not receiving the message communicated due to misinterpreting what is said* due to members' beliefs, attitudes to life and life experience (a form of prejudging)
- *tribunal environment or processes not conductive to listening* – too much noise, too many cases, too much distance between the participants
- *blocking tactics* (see below)
- *interruption* (see below)
- *multi-tasking* – doing too many tasks at once: for example, reviewing the file and taking notes while listening can divide a member's attention (see section 5.2.1 below).

5.2.1 Note-taking and reading files during the hearing

Some perusal of the files and note-taking in hearings is important, particularly as participants may later request a statement of reasons for the decision. On the other hand, note-taking can potentially detract from interaction with participants (either actual or perceived). King offers this advice:

> Having one's attention on a court file for too long may create the impression that the judicial officer is not giving the participant his [sic] full attention. It could be that note-taking is limited to periods when a participant finishes talking or it is done in stages with the agreement of the participant.[95]

Strategies for note-taking in hearings

A number of strategies can be adopted to achieve a balance between perusing the files and note-taking and giving participants a member's full attention.

Explain that the reason for taking notes is that what the participant is saying is valuable.

Ask whether the participant minds whether you take notes while they are speaking or whether there may be pauses to take notes.[96]

Ensure that not all three members are looking down and taking notes or perusing the files at the same time.

5.3 Non-verbal body language

Non-verbal body language can be important in showing that a listener is receptive to what is being said.[97] Body language reflects a listener's level of engagement: if

someone is really listening, their body language will communicate their interest. If they are merely 'going through the motions', that will also be communicated. Examples of positive and negative body language are given below.

Negative body language
Leaning back on the chair or pushing it away or looking away too often can send the message that a member is uninterested or is creating distance from the participant.

Crossing arms can appear defensive and suggests that members are closed to the message being conveyed.

Engaging in other activities suggests a lack of interest.

Positive body language
Leaning slightly forward shows that a member is receptive and interested.

Turning one's chair to directly face the speaker suggests receptivity.

Looking in the direction that the participant is speaking promotes a sense of openness to receive information from the participant.

Negative body language can give participants the impression that their matter is not important. Two other aspects of non-verbal body language, namely making eye contact and facial expressions, are discussed below.

5.3.1 Eye contact: *exercise caution*

In Western culture, looking a speaker in the eyes may indicate attentiveness, interest and respect. However, other cultures see this differently. For example, in Aboriginal cultures, looking someone directly in the eyes may convey a lack of respect. [98] For this reason, members need to be sensitive to cultural mores while promoting respect.

Even where participants come from a Western culture, there may be cases where too much direct eye contact may hinder rapport. If participants seem to be ashamed, embarrassed, scared, overawed or have low self-esteem, care may need to be taken not to make too much eye-contact.

5.3.2 Facial expressions

Like non-verbal body language, facial expressions can reflect the feelings of the listener and either encourage or hinder communication.[99] For example, a relaxed facial expression conveys receptivity and may encourage participants to speak.

However, it is important that facial expressions be genuine (for example, they should change with the mood of the conversation); otherwise, the message of interest in participants can be undermined.

5.4 Blocking and interrupting: *caution needed*

Blocking is when 'a listener says things that stop the speaker from continuing to speak or from speaking about a preferred topic'.[100]

It is clear from the research conducted by Carney and others that blocking or interrupting can give participants the impression that members are not really listening or taking account of their evidence. One consumer account is provided below.

But they didn't seem to take very much notice of what I said.

What made you think that?
It was just their attitude. I wasn't very happy at all. I felt I wasn't allowed to talk. If I did talk it was just that they were just listening and that was all.

They weren't hearing what you were saying? Is that what you mean?
Yes.

Was that something to do with their body language?
It was just the way that he kept saying 'yes, yes, yes, yes' to me. Sort of interrupting me when I was speaking. Yes we've heard that before from the person who advocated for me. Yet they asked me to speak.[101] (Victorian consumer, v17).

Blocking and interrupting participants may sometimes be necessary to get through the scheduled hearings for the day. However, these techniques can detract from communication with participants as they may indicate a lack of interest in what participants have to say. It is important to be aware of the potential negative effects of these techniques and to use them carefully. Psychiatrist and registered medical practitioner members will have particular skills in focusing, diverting and directing participants.

5.4.1 Exercise caution with blocking comments

Sometimes blocking is unintentional (in other words, without the intention to divert the speaker or terminate the conversation.) Examples include: 'You'll be alright' or 'Don't worry about it'. Use of these sorts of phrases before a participant has finished speaking may suggest that the speaker's feelings are unimportant.

Other blocking techniques include: rejecting a participant's topic, responding to only part of what is said, shifting the topic, referring the speaker to someone else, deferring the conversation and pre-empting communication (for instance: 'There's no time to talk about that now').

Some alternatives to blocking comments are provided below.

Blocking comment	**Possible alternative**
'You'll be alright.' 'Don't worry about that.'	Thank the person for talking about the particular topic, which is clearly important to them. Ask them to now focus on another important matter (a different topic).
'There's no time to talk about that now.'	Be transparent about the limits of a hearing. Explain that the Tribunal needs to ensure that the participant's hearing is finalised and also needs to consider the other people who have a hearing that day.
'That's not relevant to our decision.'	Acknowledge that the issue is not only important, but that it is – from the perspective of the participant – related to their treatment. Clarify that the Tribunal cannot resolve the

issue. Seek an undertaking from the treating team participant regarding when and how the issue will be followed up after the hearing and/or provide advice regarding the correct avenue for following up the issue (for example, the Mental Health Complaints Commissioner).

5.4.2 Interrupt respectfully when necessary

Interrupting participants can break their line of thought and inhibit them from communicating what they are thinking and feeling. The effect can be more pronounced for participants who are already uncomfortable with communicating about sensitive issues.

One option to avoid interrupting a participant is to take a quick note of questions and then raise them once the person has finished speaking. On the other hand, sometimes interruption is necessary. As King notes, 'if a participant engages in a protracted monologue then the judicial officer will need to intervene'.[102] A respectful way to do so is suggested below.

> The solution-focused judicial approach occurs in the context of a dynamic and empathetic interaction between judicial officer and participant. A courteous way of interrupting and getting the dialogue back on track would be to say to the participant: 'You've made several points. I want to make sure I've understood them'.[103]

Participants in hearings may sometimes raise issues that may be best dealt with by other professionals. If possible, members should take a reasonable time to listen to participants' concerns rather than cut them short. As King notes:

> Ideally the judicial officer should hear the participant in full, acknowledge what she [sic] has said, note the participant's concerns and then ask the participant whether she [sic] has considered raising the matter with another professional.[104]

5.5 Active listening

According to King:

> In active listening, the listener provides verbal and non-verbal clues that the listener is attentive, that the information being conveyed is being received, understood and processed, that the listener is alert to feelings that are being conveyed by the speaker and that the listener feels and demonstrates empathy for the speaker. It means laying 'aside your own views and values in order to enter another's world without prejudice'.[105]

For effective communication to occur, including active listening, the atmosphere must be 'non-threatening, non-moralising and non-evaluative'.[106] Only under these conditions will participants feel comfortable and free to be open.

5.5.1 Aspects of active listening

Active listening involves members:[107]

- showing a genuine interest in participants

- listening for the whole message being conveyed – including a participant's life experiences, thoughts, feelings and behaviour – as these all give valuable insight into the participant
- taking in the whole message by listening to the tone of voice, manner of delivery and body language (for example, posture, facial expressions and hand movements)
- listening for participants' strengths, weaknesses and problems
- being aware of any internal filters through which they are interpreting the participant's message (members' own perceptions, beliefs, thoughts, feelings, past experiences, etc.), which will help to prevent these filters distorting what a participant is saying
- outwardly demonstrating that they are listening (see the techniques described earlier in this chapter)
- checking whether a participant needs silence or has finished speaking (for example, by asking if they wish to say anything further or have more time to speak).

5.6 Adopting a flexible approach to listening and communication

The techniques described in this and the preceding chapter can promote a more empathetic, therapeutic interaction with participants in hearings. However, King emphasises that communication and empathetic listening should not be 'conducted according to a fixed formula' and that members should adapt the approach they adopt according to the particular situation.[108] As King observes:

> Interpersonal communication varies according to the circumstances and the personalities, backgrounds and needs of the people involved. People may well vary in what they value in empathetic communication. It is therefore important that judicial officers be sensitive to the individual situation of the participant and what he [sic] is saying and to the uniqueness of the interaction between the bench and each participant.[109]

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[88] King Bench Book, above n 1, 136.

[89] Ibid 135.

[90] Ibid.

[91] Ibid 139.

[92] Ibid 140.

[93] The rest of this section is drawn from King Bench Book, above n 1, 136-138.

[94] This section is drawn from King Bench Book, above n 1, 141-142.

[95] Ibid 139. Also see 142-143.

[96] The first two points are based on King Bench Book, above n 1, 142-143.

[97] This section and the examples are drawn from King Bench Book, above n 1, 143-144.

[98] This section is drawn from King Bench Book, above n 1, 144.

[99] This section is drawn from King Bench Book, above n 1, 144.

[100] Apart from the separately footnoted materials from Carney et al, above n 4, the paragraphs on blocking and interruption are drawn from King Bench Book, above n 1, 145-146.

[101] Carney et al, above n 4, 184.

[102] Ibid 146.

[103] Ibid.

[104] King Bench Book, above n 1, 145.

[105] Ibid 146, drawing on C B Rogers and R E Farson, 1987, 'Active Listening,' in Newman, Danziger and Cohen (eds), *Communication in Business Today*, Houghton Mifflin, 589, 591. This section generally is drawn from King Bench Book, above n 1, 147-148.

[106] Ibid 147.

[107] Drawn from King Bench Book, above n 1, 148-149.

[108] King Bench Book, above n 1, 149.

[109] Ibid.

Chapter 6: Processes and strategies in solution-focused hearings

King's Bench Book contains a number of additional processes and strategies that members can use in hearings. Some of these, such as behavioural contracts[110] and goal setting, may have less relevance in the Mental Health Tribunal setting, at least in the early days of the Tribunal's operation.[111] Others will be useful and these are summarised in the following sections.

Basic solution-focused principles such as voice, validation, respect and promoting self-determination underlie many of the strategies. However, they are not formulas to be applied rigidly. The use of any particular strategy will depend on the circumstances of the particular case.

6.1 Having positive expectations of participants

Having positive expectations of participants can be a useful tool in solution-focused hearings. King's Bench Book points to evidence that 'the expectation that those in authority have in relation to those under their jurisdiction affects the latter's performance'.[112] High, but not unrealistic, expectations of participants – and the use of strategies that demonstrate these expectations – may enhance a participant's self-efficacy (see section 6.2) and ability to address issues, such as non-compliance with medication or taking illicit drugs, which are contributing to the decision to make a compulsory treatment order.

As King observes, participants in problem-solving courts such as Drug Courts often have a 'low self-concept, low self-efficacy and limited expectations concerning their future, which the judicial process and other aspects of the justice system may have helped to perpetuate'.[113] While avoiding drawing direct comparisons with the criminal justice system, it appears reasonable to assume that participants who have experienced severe, unremitting mental illness, and possibly protracted periods of compulsory treatment, might be in a similar position.

For this reason, having positive (but not unrealistic) expectations of participants can be a useful approach to adopt in many cases. This means using strategies that display confidence in participants' abilities, such as adopting active listening techniques, including participants in the decision-making process and supporting self-efficacy. This approach also supports the fundamental principle of the new Mental Health Act: the presumption of capacity on the part of consumers.

On the other hand, it is important to be sensitive to the personal situation of the participant at the time of the hearing. If a participant has recently experienced a sudden traumatic event, it may be 'insensitive and burdensome for the participant' to communicate high expectations of them.[114] This could include a person recovering from a recent episode of psychosis or mania that might have involved uncharacteristic behaviour of a harmful or acutely embarrassing nature.

6.2 Supporting self-efficacy

Self-efficacy is the 'belief in one's ability to function competently'.[115] Research indicates that self-efficacy is 'significantly related to motivation and performance

levels'.[116] People with self-efficacy are likely to meet challenges head on, persisting where those with low self-efficacy may give up. In taking a solution-focused approach to hearings, members should promote participants' self-efficacy as much as possible.

One technique to support self-efficacy is to refer to factors and times when participants were handling things better[117] (for example, when they were taking their medication, living in stable conditions, had a better relationship with their family and so on).

6.3 Using persuasion, facilitating dialogue and exploring possibilities

The Bench Book notes that one way in which a solution-focused approach can promote participants' self-efficacy is to engage in persuasion.[118] However, 'persuasion' is a problematic term in the context of the *Mental Health Act 2014* with its emphasis on individual autonomy and supporting people to make their own decisions about their treatment and determine their individual path to recovery.

Even in other contexts, persuasion is a technique in the solution-focused palette that should be used sparingly. As King observes, consistently trying to persuade a participant to agree with a course of action that is against the participant's expressed views 'is inconsistent with an approach that seeks to promote self-determination and may retard the participant's self-efficacy'.[119] (It is also rarely effective or acceptable to an individual who has been made a compulsory patient.) King advises that judicial officers 'should therefore use persuasion only when needed and in a manner sensitive to issues of self-determination and self-efficacy'.[120]

However, persuasion in a more limited sense of facilitating dialogue and exploring possibilities and options for the future may be an effective technique. Ways of engaging in persuasion in solution-focused hearings include:

- inviting participants in hearings to put forward options and potential ways to resolve differences and encouraging understanding of each other's concerns
- identifying obstacles and resistance and drawing out and highlighting participants' own insights into their problems.

These methods of engagement require members to be open to persuasion themselves (including by the participant) concerning the orders they make. As King observes:

> Participants often have keen insight into their problems and what they need to do and what resources they need in so doing. The solution they have in mind may be more appropriate than other options or be something that can be done along with other options. A judicial officer being open to persuasion in this context affords the participant self-determination and respect – as well as other aspects of procedural justice. It also demonstrates the court's trust in the participant.[121]

Another potentially useful aspect of persuasion is persuading participants of the Tribunal's reasoning. In the context of a new Act, this is particularly relevant vis-à-vis the participant representing the treating team. Generally, the Tribunal will be more persuasive to participants if it acknowledges participants' arguments and reasoning. Other techniques include asking participants for their opinion about an alternative course of action and providing them with reasons for the order made by the Tribunal.

6.4 Motivational interviewing

Motivational interviewing is a method of facilitating and supporting people's motivation to engage in and maintain behavioural change.[122] It has particular relevance in improving medication and treatment compliance, as well as substance use problems. It is often used where a person is ambivalent about change. Essentially, motivational interviewing:

> … aims to facilitate people to assume responsibility for initiating and continuing with the change process. It endeavours to elicit talk about change from people and have them elucidate their reasons for why change should happen instead of imposing upon them the reasons why others think they should change.[123]

According to King, the technique can be used even in short interactions, making it a possibility in Mental Health Tribunal hearings. At the very least, it is useful for members to have some awareness of motivational interviewing processes so they can explain their place in treatment planning.

The five main principles of motivational interviewing – express empathy, develop discrepancy, avoid engaging participants in argument, roll with resistance and promote self-efficacy – are summarised in the following sections. For more detail, members are encouraged to consult Chapter 7 of King's Bench Book.

6.4.1 Express empathy

Expressing empathy requires active listening skills in that it requires 'reflecting back key aspects of what a participant has said' and acknowledging the feelings of the person.[124] It also requires placing oneself in the participant's situation and endeavouring to perceive the situation from their point of view.

6.4.2 Develop discrepancy

Developing discrepancy involves highlighting the inconsistencies between a participant's goals and their behaviour, with the aim of helping the participant to think about the possibility of change and to consider the different options for change.

6.4.3 Avoid engaging participants in argument

If a participant is ambivalent about change, engaging them in argument is unlikely to be productive as it 'may provoke defensiveness and lead to a situation where the person is less open to change'.[125]

6.4.4 Roll with resistance

Resistance is regarded as a natural part of the change process. It lies at the heart of change. Resistance can be due to change being presented too forcefully. Meeting resistance with coercion or paternalism is likely to promote further resistance. Bear in mind that a cause of resistance may be that the person feels they have no control over the situation and is reacting to assert their autonomy.

Some methods to deal with resistance include:

- Reflect back to the person their thoughts or doubts. Often listening to a person empathetically can allow them to clarify those thoughts and may enable them to arrive at their own solution.

- Reframe the situation by acknowledging what the participant has said, but then offer a fresh interpretation of the facts.
- Agree 'with a twist'. Listen to and acknowledge what the person says (reflecting what they think and feel) but then 'reframe the situation with a view to influencing the person's thoughts in the direction of change'.[126]

6.4.5 Promote self-efficacy

This principle refers to supporting the participant's belief in the possibility of change and recognises that the person is an important source of change. As indicated in section 6.2, promoting self-efficacy is a key goal of the solution-focused approach to hearings.

6.5 The use of praise

Where appropriate, praise can be used to recognise achievements and to support motivation and promote self-efficacy.[127] However, it is important that participants know that they deserve praise, otherwise they may view it as gratuitous. In other words, praise should be authentic.

Before praising participants, it can be useful to ask them to describe what happened and how they achieved a particular goal. This helps the person to reflect on the skills they used and allows members to praise the method as well as the outcome.

Examples of praise from King's Bench Book are provided below.

> 'Your rehabilitation plan is comprehensive. It shows good insight, careful planning and problem-solving ability on your part.'
>
> 'Congratulations on your new job[.] You thought about what you wanted, prepared the application carefully and went to the interview well prepared.'[128]

6.6 Personal challenges of solution-focused hearings

King's Bench Book outlines some of the personal challenges facing members in adopting a solution-focused approach.[129]

One of these challenges is that, while rewarding, a solution-focused approach can be stressful. Heightened levels of stress can lead to burnout, compassion fatigue and vicarious traumatisation. As King observes:

> Judging in a therapeutic manner requires the judicial officer to maintain independence and impartiality and to undertake a facilitative role in court, assisting the parties to reach a resolution of their problems in a more therapeutic manner. That may involve parties addressing painful underlying issues. As therapeutic judging means that the judicial officer is sensitive to the feelings of the parties and takes a caring, empathetic approach, it follows that the judicial officer will be more exposed to trauma and suffering expressed by the parties than judging in the traditional manner with distance and remove.[130]

Other causes of stress include high workloads, coping with legislative change and adapting to new technology.

For this reason, it is important that Tribunal members have access to adequate training and professional development, as well as opportunities for participation in peer review. It is also important that Tribunal members maintain an 'ethic of care' towards themselves. King imparts the following advice:

> To protect against the stress involved in such work it is important that judicial officers exercise an ethic of care towards themselves and maintain proper balance in their own lives – attending to positive activities and attitudes that promote their physical and psychological wellbeing and enjoyment of life...[131]

Other ways of dealing with the stresses of solution-focused hearings include:

- taking a few minutes at the end of each hearing day to debrief with other members on the panel
- being available to discuss particularly difficult hearings with colleagues in the days after the hearing
- letting the President, Deputy President or senior members know about particularly challenging hearings so that they can provide support and advice
- accessing the Department of Health's confidential Employee Assistance Program (EAP), which is available to Mental Health Tribunal members and staff.

6.7 Conclusion

There are a number of sound reasons to adopt a solution-focused approach in Mental Health Tribunal hearings. These include the fact that the principles are grounded firmly in contemporary thinking and research and that a solution-focused approach complements key reforms in Victoria's new Mental Health Act, such as the right to autonomy and self-determination and the focus on supported decision making.

However, this guide is not intended to operate as a set of rigid rules to be adopted in all cases: it is a broad approach or 'ethos' that can be used to inform self-reflection on hearing practices rather than a 'script' that must be followed in hearings. In deciding how to use the techniques outlined in this guide, members will still need to rely on their own common sense, intuition and experience.

In addition, this guide is intended to be a starting point for further discussion and development about how solution-focused techniques can be used in hearings of the new Mental Health Tribunal. It is intended to evolve over time in consultation with members. For instance, as Tribunal members develop experience and expertise under the new Act, new examples relevant to the Mental Health Tribunal context may be added and further aspects of King's Bench Book may be adapted and incorporated into the guide. As already noted, an important next step will be working with relevant groups to articulate and incorporate into this guide tailored approaches to particular groups such as Aboriginal and Torres Strait Islander peoples, culturally and linguistically diverse individuals, children and young people and aged consumers.

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[110] King Bench Book, above n 1, 170-171.

[111] The solution-focused hearing approach will be reviewed and expanded in consultation with members as part of the transition to full tribunal service.

[112] King Bench Book, above n 1, 162. This section generally is based on King Bench Book, 162-164.

[113] Ibid 163.
[114] Ibid 164.
[115] Ibid. This section generally is drawn from King Bench Book, above n 1, 164.
[116] Ibid.
[117] Ibid. See discussion of persuasion, 166.
[118] Ibid 166. On persuasion, see also 172-174.
[119] Ibid 174.
[120] Ibid.
[121] Ibid 172.
[122] This section on motivational interviewing is based on King Bench Book, above n 1, 174-177.
[123] Ibid 175.
[124] Ibid 176.
[125] Ibid.
[126] Ibid 177.
[127] Ibid 179. This section generally is based on King Bench Book, above n 1, 179-180.
[128] Ibid 180.
[129] This section is based on King Bench Book, above n 1, 203-207.
[130] Ibid 205.
[131] Ibid 207.