

VICTORIA

**COMPLAINT ABOUT THE MEDICAL
PRACTITIONERS BOARD OF VICTORIA**

**Report
of
Ombudsman Victoria**

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**REPORT
OF
THE OMBUDSMAN VICTORIA**

**Complaint About the Medical Practitioners
Board of Victoria**

TO

The Honourable the President of the Legislative Council

and

The Honourable the Speaker of the Legislative Assembly

I have the honour to present a Report on a complaint about the Medical Practitioners Board of Victoria. The Report is made pursuant to section 25AA(3) of the *Ombudsman Act 1973*.

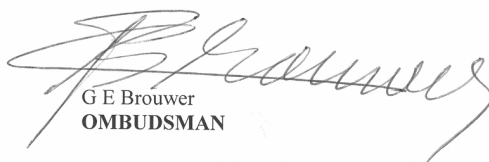

G E Brouwer
OMBUDSMAN

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1 EXECUTIVE SUMMARY

On 30 April 2003 I received a written complaint from Mr A about the actions of the Medical Practitioners Board of Victoria (MPBV). Mr A was dissatisfied with the MPBV's handling of his complaint against Dr B following an informal hearing panel. A panel may hear and determine complaints made about a medical practitioner. Following an investigation of Mr A's complaint, I formed the preliminary opinion that the MPBV had acted unreasonably in this matter.

In the course of my enquiries, the MPBV questioned the jurisdiction of the Ombudsman to investigate the complaint and argued that, even if the Board were of a mind to reconvene the Panel into Dr B's professional conduct, it did not have the power to do so.

I disagreed with the MPBV's assertion that a determination of its Informal Hearing Panel is quasi-judicial and not an administrative action subject to my jurisdiction under the *Ombudsman Act 1973*. In my opinion, if the position taken by the MPBV were to be accepted, it would remove from the Board any accountability for decisions favourable to the medical practitioner. In other words, no decision in which the MPBV cleared a medical practitioner of any wrongdoing could be independently scrutinised.

I was also concerned about the reasons provided by the panel in its analysis of unprofessional conduct as set out in the *Medical Practice Act 1994* (the Act). In my opinion, the MPBV has not adequately explained the basis for the Panel's determination that Dr B has not engaged in unprofessional conduct, and therefore its decision was not reasonably open to it.

Following consideration of my preliminary report, the MPBV has accepted the Ombudsman has jurisdiction over its actions, particularly in relation to a decision of an Informal Hearing Panel. However, based on legal advice from senior counsel the MPBV remains of the view that the MPBV only has power to correct a decision if the original decision was materially affected by jurisdictional error, and that no jurisdictional error is evident in this case. Having considered that advice, I accept that view in this particular case.

The MPBV acknowledged the record of the decision provided by the Panel was insufficient and will ask the Panel to provide fuller reasons.

The MPBV also has agreed to seek input from my office in reviewing its procedures regarding informal and formal hearings. The MPBV has indicated that examples can be incorporated in its general guidelines for panels to provide guidance in the assessment of complaints.

Finally, while the MPBV advises it is not always possible to ensure that all Informal Hearing Panels contain at least one community member, it will ensure a community member is on the Panel whenever that can be arranged.

2 THE COMPLAINT

Mr A alleged that the MPBV failed to address a number of concerns raised in his complaint against Dr B. Specifically, Mr A's complaint to this office was that:

- only one of the issues he had raised was put forward for an informal hearing;
- the MPBV had provided no explanation why other issues were not to be dealt with;
- he was dissatisfied with the reasons provided in its findings; and
- the MPBV had advised him that he had no right of appeal or review.

2.1 Background

On 16 October 2001 the MPBV received a complaint from Mr A concerning the conduct of Dr B. The MPBV conducted a preliminary investigation to determine what action was required. The investigation provided opportunity for the complainant and Dr B to comment on a number of matters.

In April 2002 Mr A raised additional issues with the MPBV. Following further enquiries, the MPBV investigating officer, Dr C, submitted a report that identified issues, summarised the facts, and listed the information relied upon in the report.

The report, dated 29 July 2002, identified Mr A's concerns to be that Dr B:

1. Did not listen to the complainant's story but made decisions about him from the start and then tried to impose views on him;
2. Failed to tell the complainant the diagnosis;
3. Inappropriately and falsely completed an application for disability pension for the complainant without telling him the diagnosis being used;

4. Lied to the complainant about the application form, about the diagnosis made and about the details on the pension application form; and

5. Breached the confidentiality of the complainant by contacting the complainant's previous GP.

The investigating officer recommended an informal hearing be held pursuant to section 25(1)(b) of the Medical Practice Act. The issue identified for hearing was:

That Dr B completed an application form for a disability pension inappropriately and incorrectly.

According to its file notes, the MPBV telephoned Mr A on 20 August 2002 to notify him of the outcome of the preliminary investigation. The note states Mr A was advised:

- that he will shortly receive a letter advising him that an informal hearing is to be held;
- the nature of that hearing;
- that his daughter is also being invited; and
- that the issue for the hearing is for Dr B's behaviour in relation to the application for an incapacity pension.

The note also states:

Mr A asked "what about his other issues?" I replied that they are not on the agenda for the hearing, but that he would receive a letter from the Board explaining its decision. He was not very satisfied with the situation.

On 21 August 2002 Mr A telephoned the MPBV to further discuss the informal hearing. The MPBV investigating officer's notes indicate Mr A was unhappy the other issues he complained of were not to be included for the informal hearing.

I replied that they are not on the agenda for the hearing. I suggested he await the Board's letter giving the outcome of his complaint – if he then was unhappy he could seek a reconsideration.

He asked if there is a higher body than the Board. I mentioned VCAT, and he indicated he was aware of this body.

Mr A asked if the notification of the hearing would indicate what issues would not be on its agenda. I said the letter would likely

contain the issues on the agenda. Mr A appeared to be unsatisfied with the situation.

By letter dated 13 September 2002 to the MPBV, Mr A continued to seek information concerning the MPBV's decision about what issues would be presented at the informal hearing:

A few weeks ago Dr C telephoned and advised me that most complaints I made about the professional conduct of Dr B would not progress to the stage of the informal hearing.

I asked if I could receive in writing the arguments and the decisions reached on those issues raised in my complaint that would not proceed to the informal hearing. He assured me that I would receive this but up to now I have not received anything.

Could you, please, advise me whether Dr C will provide me with the substantiated decisions reached on those parts of my complaint which would not be dealt with at the informal hearing or whether these decisions will be incorporated into the final decision which I will receive following the informal hearing.

In its letter to Mr A of 30 September 2002 the MPBV stated:

A Panel appointed by the Board will consider all the information obtained during the preliminary investigation and at the interview to be conducted with both yourself and Dr B on Thursday 3 October 2002.

Dr C has informed you that an explanation would be provided at the conclusion of the Board's deliberations and that will be done.

An informal hearing was conducted by the MPBV on Thursday 3 October 2002. The Panel's conclusions were provided to the complainant and Dr B by letters dated 31 October 2002. The Panel found Dr B had not engaged in unprofessional conduct pursuant to section 43(1)(b) of the Act.

3 INVESTIGATION

3.1 Initial enquiries

By letter dated 21 May 2003 the Acting Ombudsman sought comments from the MPBV on issues raised by the complaint. The issues were categorised under two headings:

- Policy/Process; and
- The Outcome.

3.1.1 Policy/Process

From the correspondences, the MPBV was aware Mr A sought clarification on why certain issues he raised in his complaint were not to be heard at an informal hearing. The MPBV had advised Mr A it would provide him with an explanation. However it had not done so. The Acting Ombudsman expressed the view that it was reasonable for Mr A to expect the MPBV to explain the reasons why the other issues of his complaint were not to be referred to a hearing.

The Acting Ombudsman also sought the MPBV's comments on its decision not to investigate having regard to section 24(1) of the Act which states:

The Board must investigate a complaint if the complaint concerns the professional conduct of a registered medical practitioner and if the complaint is not to be dealt with by the Health Services Commissioner under section 23 or the Board has not determined the complaint to be frivolous or vexatious.

The MPBV had not assessed Mr A's complaint as frivolous or vexatious. The Acting Ombudsman was, therefore, of the view Mr A was entitled to be given a full and proper account of the basis upon which the MPBV determined to decide that pursuant to section 25(1)(a) of the Act, the investigation into all but one of the issues raised by Mr A would not proceed further. The Acting Ombudsman also noted the failure to provide reasons to a complainant about a decision not to proceed to a hearing had been previously raised with the MPBV.

The Acting Ombudsman noted that the MPBV had also advised Mr A if he was unhappy with the outcome of why certain issues were not being considered at the hearing, he could seek reconsideration. It was not made clear to Mr A how he was to seek reconsideration of the matters not determined at the informal hearing.

3.1.2 The outcome

The Acting Ombudsman noted that the MPBV, in its reasons for decision, summarised Dr B's assessment of her own conduct as:

...paternalistic and out of step with current patient expectations...She can see now that it was the wrong thing to do but at the time believed it to be right.

The Acting Ombudsman expressed the view that, given the acknowledgement of Dr B, it was reasonably open for the MPBV to conclude that the conduct was unprofessional in accordance with section 3(1)(a) of the Act. That section defines unprofessional conduct as:

professional conduct which is of a lesser standard than that which the public might reasonably expect of a registered medical practitioner.

In its reasons for decision, the MPBV panel stated that Dr B was well intentioned. The Acting Ombudsman noted that in defining unprofessional conduct, the Act makes no reference to the intention of the medical practitioner.

3.2 Response of the MPBV

In response, the MPBV advised this office on 23 June 2003 it would:

- provide Mr A with a letter as soon as possible addressing his concerns about the management of his complaint against Dr B; and
- discuss other issues raised by his complaint at its next meeting on 3 July 2003, and provide a response shortly thereafter.

On 8 July 2003 the Executive Officer of the MPBV advised that Mr A's complaint was discussed at the Board meeting of 4 July 2003. However, only seven of twelve MPBV Members had been

present. The Executive Officer wished to discuss these issues with all Board Members and requested extra time to respond.

On 18 August 2003 the MPBV provided this office with a copy of its letter to Mr A dated 4 August 2003. The letter provided the MPBV's reasons for its decision not to put all of Mr A's concerns to an informal hearing.

On 29 August 2003 representatives of the MPBV met with the Acting Ombudsman to discuss the issues he had raised. The MPBV also provided a written response dated 28 August 2003.

In regard to policy/process issues, the MPBV acknowledged it had not kept Mr A informed of the outcome of the preliminary investigation and reasons why certain concerns were not to be pursued further. The MPBV advised it had instituted a process to avoid any repeat of this situation. It now required the Deputy CEO to ensure a complainant be advised of the MPBV's determination of the allegations.

In regard to the findings of the informal hearing panel, in his written response, the MPBV's Executive Officer stated that:

The Board discussed your letter in full and agreed with many of the observations you made about its processes in this particular case and noted your comments on the outcome.

The Executive Officer also disputed the Ombudsman's power to investigate the conduct of Panel or review its findings.

The Executive Officer also advised that even if the Board was of a mind to reconvene the Informal Hearing into Dr B's professional conduct, it did not have the power to do so except in limited circumstances, none of which exist in this case. The MPBV provided a copy of legal advice it had received from Crown Counsel on this point.

3.3 Further enquiries by the Acting Ombudsman

The Acting Ombudsman responded to the MPBV by letter dated 2 October 2003, disagreeing with the MPBV's interpretation of the jurisdiction established by the Ombudsman Act. He said that

It appears to me that the legal opinion is based upon a belief that a panel constituted by the MPBV to conduct a hearing is of a quasi-judicial nature.

The Acting Ombudsman asked the MPBV what rights of appeal a complainant might have from a decision of an informal hearing panel. The Acting Ombudsman believed it advisable for the MPBV to obtain an independent legal opinion to clarify these issues.

On 2 December 2003 the Acting Ombudsman's officer sought an update from the MPBV. The MPBV stated it was still in the process of seeking a legal opinion and was unable to advise when it would be forthcoming.

3.4 Formal investigation

The MPBV provided no further information to the Acting Ombudsman in December 2003 or January 2004. The Acting Ombudsman determined the matter should now be conducted as a formal investigation. The Acting Ombudsman notified the MPBV and the Minister by letters dated 5 February 2004 of his intention to conduct an investigation in accordance with the Ombudsman Act.

3.4.1 Delays

On 6 February 2004 the MPBV advised the legal opinion should be received within the coming week and a copy provided to the Acting Ombudsman soon thereafter. On 16 February 2004 this office contacted the MPBV and was advised the legal opinion had still not arrived, but was scheduled to be delivered the next day and would be passed onto this office within a day or two.

On 26 February 2004 my office again contacted the MPBV and was advised the MPBV had received the legal opinion. The MPBV stated the legal opinion was more complex than expected and wished to further consider the opinion prior to providing it to this office.

By letter dated 11 March 2004 to the MPBV the Acting Ombudsman requested the MPBV provide a copy of the legal opinion. On 23 March 2004 the Acting Ombudsman contacted the MPBV to follow up his earlier request. The MPBV advised the legal opinion was being considered by the legal member of

the MPBV and should be passed on to the Acting Ombudsman within the week.

3.5 Response by MPBV and legal opinion

On 29 March 2004, the Acting Ombudsman received a copy of the legal opinion from the MPBV. The legal opinion was dated 25 March 2004.

In its letter to the Acting Ombudsman the MPBV maintained its position that based on the legal opinion there is no right of review for a complainant in respect of a decision of an Informal Hearing Panel. The letter also stated:

The Board's view is that the characteristics of informal hearings which decide whether a medical practitioner has or has not engaged in unprofessional conduct, as statutorily defined, and then impose determinations, are such as to place them into the quasi-judicial category. However, for the purposes of this discussion, the Board is prepared to assume (although certainly not concede) that the decision of the Informal Hearing Panel is administrative action.

4 DISCUSSION

Mr A's complaint to the Acting Ombudsman raised three issues:

1. Only one of his concerns was referred to an informal hearing, and he had received no explanation why his other concerns were not to be dealt with.
2. He was dissatisfied with the reasons provided in its findings.
3. The MPBV had advised him he had no right of appeal or review.

In its response, the MPBV had questioned the Ombudsman's jurisdiction, and its own capacity to reconsider the decision made by an informal hearing panel.

4.1 Issues referred for an informal hearing

At the time of making his complaint to the Ombudsman, Mr A had not received any reasons for the outcome of the MPBV's preliminary investigation and for deciding which issues were to proceed to an informal hearing.

The Acting Ombudsman drew the MPBV's attention to the fact it had, on a number of occasions, advised Mr A it would provide him with such reasons. The Acting Ombudsman emphasised that the Ombudsman had previously raised the same issue of the MPBV's failure to communicate findings of its preliminary investigation to complainants in May 2002.

The MPBV acknowledged in July 2002 that its communication with complainants was an issue that needed to be addressed and that it had also failed to fully advise Mr A. The Acting Ombudsman was particularly concerned that failure to provide information to Mr A suggested that the MPBV had not rectified its procedures following the Ombudsman's comments in May 2002.

An explanation was finally provided to Mr A in August 2003, as a result of Mr A's complaint to this office. Mr A has raised no

further issues in regard to these aspects of his complaint with this office.

I am now satisfied the MPBV has since amended its procedures and this aspect of Mr A's complaint was resolved.

4.2 Reasons for findings

The MPBV responded to the issues raised by Mr A's dissatisfaction with the reasons and outcome of the informal hearing by challenging the jurisdiction of the Ombudsman to enquire about or investigate such matters. At 26 November 2004 the MPBV has still not provided any information to Mr A in order to clarify or expand upon the reasons for decision of the informal hearing panel.

4.2.1 The question of jurisdiction

Sub-section 13(1) of the Ombudsman Act states:

The principal function of the Ombudsman shall be to enquire into or investigate any administrative action taken in any Government Department or Public Statutory Body to which this Act applies or by any member of staff of a municipal council.

Is the Informal Hearing decision administrative action by a public statutory authority?

In its letter to the Acting Ombudsman dated 26 March the MPBV states its view that the actions of an informal hearing are quasi-judicial in nature. Independent legal opinion obtained by the MPBV states as follows:

2.7 In determining whether the Informal Hearing Panel's decision is administrative action rather than the exercise of judicial power, the High Court authority of *Builders Licensing Board v Sperway Constructions (Sydney) Pty Ltd* (1976) 135 CLR 616 is of assistance.

2.8 In that case the High Court noted that characteristics of a judicial hearing include:

(a) a notice containing particulars of the grounds alleged against the defendant;

- (b) the issues involved are susceptible to further judicial determination;
- (c) there is a hearing, which is to be held in an open court;
- (d) parties may be legally represented;
- (e) the rules of evidence are to be applied; and
- (f) there is the implied obligation to record the evidence that is given.

The legal opinion stated that characteristics (c), (d), (e) and (f) did not apply to informal hearings. It also stated that witnesses are not examined under oath or subject to cross-examination, and the complainant does not have a right to be heard by the Panel. On (b) the opinion indicated the complainant does not have a right of review. On (a) the opinion noted that a panel is bound by the rules of natural justice.

On this issue the opinion concluded:

These considerations indicate support for the view that the Informal Hearing Panel is exercising quasi-judicial power, rather than administrative power. However, in view of the other factors set out above, there is a real risk that a court would find that an Informal Hearing Panel exercises administrative power.

The Deputy Ombudsman met with the Executive Officer and the President of the MPBV on 12 October 2004 to discuss the matter. Subsequently the MPBV provided a QC's legal advice by letter dated 25 October 2004. The advice dated 4 October 2004 supported the Acting Ombudsman's view that the action of the MPBV and in particular, the Panel, was in the jurisdiction of the Ombudsman.

4.2.2 The findings

The MPBV reasons for decision finding of no unprofessional conduct stated:

Dr B acknowledges that her efforts on behalf of Mr A were based on her own view of what would assist him and that she did not sufficiently take into account his concern about the disclosure of information.

The Panel found that Dr B was well intentioned in her efforts to assist Mr A's situation even though she had submitted the TDRs to Centrelink without the patient knowing their content. The Panel accepted that Dr B had made a number of efforts to communicate her diagnosis to Mr A and his daughter prior to this. On the basis of this, the Panel found that, whilst Dr B's management of the disability pension application was in retrospect unwise, under the circumstances that presented her conduct did not reach a level to be categorised as unprofessional conduct.

I acknowledge the MPBV's comments that Dr B's view of the actions as not being in keeping with patient expectations is not determinative of the nature of the conduct. However, following a clear expression by the doctor that the conduct was not of a standard expected by the community, and the panel's reference to the conduct as unwise, in my view it becomes essential for the panel to fully explain the grounds upon which it based its decision of no unprofessional conduct.

It remains unclear from the reasons for decision what are the criteria or components required to maintain a finding of unprofessional conduct under section 3(1)(a) of the Medical Practice Act. Dr B and the patient have both stated Dr B's conduct was of a lesser standard than a member of the public would expect. The panel by reaching the finding it has, must have a different interpretation of what is the standard a member of the public might reasonably expect of a medical practitioner. The reasons provided by the panel do not provide an indication of what a reasonable expectation might be. On the basis of the reasons provided I consider that Mr A would be unable to comprehend how the informal panel arrived at the conclusion it did.

In defining 'unprofessional conduct' in the Act, there is no mention of the intentions of a medical practitioner and it is unclear how the Panel has determined what would be the reasonable expectations of a member of the public in regard to this issue. In consideration of the nature of this complaint, the reasons provided by the Panel are, in my opinion, insufficient to satisfy its findings.

As the MPBV has now agreed to the Panel providing a more detailed finding, I do not propose to take this aspect any further.

4.2.3 Complainant's right of appeal or review

As previously stated, the MPBV's file note of its telephone discussion with Mr A on 21 August 2002 only referred to the Victorian Civil and Administrative Tribunal (VCAT), when Mr A asked if there is a higher body than the Board.

It appears reasonable that from this discussion Mr A would have gained the understanding that he could appeal part or all of the findings of the MPBV to VCAT, or that he could request the MPBV to reconsider his concerns.

This advice provided to Mr A is in contrast to the independent legal opinion of 25 March 2004 provided to the MPBV on this issue. The legal opinion was that in accordance with the Medical Practice Act, the *Administrative Law Act 1978* and the Supreme Court Rules the complainant has no right of review to any tribunal or court. The medical practitioner only has a right of review to a formal hearing.

I am satisfied that the initial advice provided to Mr A was misleading as to his appeal rights in the process.

It seems to me that reconvening the informal hearing panel with the new panel members would provide the most thorough process in assessing the concerns I have raised as a result of Mr A's complaint about the findings of the informal hearing panel. However, as the MPBV has now agreed that the Panel will provide a more detailed finding, I do not propose to take this aspect of his complaint any further.

4.3 General comments

I remain concerned about the response of the MPBV to the actions of my office in investigating Mr A's complaint, particularly the MPBV's delay in addressing this office's concerns.

For example, by letter dated 21 May 2003 the Acting Ombudsman sought clarification on the issues arising from Mr A's complaint with the MPBV. The MPBV responded that a formal response would be provided as a matter of priority, however the investigating officer was on leave until 10 June

2003. The Acting Ombudsman finally received a response on 29 August 2003.

The MPBV sent a letter to Mr A dated 4 August 2003, that set out its explanation in regard to its preliminary investigation that was completed in July 2002. The Acting Ombudsman raised further issues requiring clarification with the MPBV by letter dated 2 October 2003. Despite repeated requests the response accompanied with a legal opinion was only provided on 29 March 2004.

The MPBV had received the legal opinion in mid February 2004. The MPBV did not advise my office during this time of any reasons for delay or provide any update of progress. The MPBV response and legal opinion were provided without explanation for the delay on 29 March 2004.

I consider the poor response and lack of cooperation demonstrated by the MPBV has been unacceptable. In turning its focus onto the jurisdiction of the Acting Ombudsman to comment on particular issues of the complaint, the MPBV has turned its attention away from the central issue of what action it could or could not take to resolve the complaint it had received.

It is disappointing the MPBV failed to follow its advice to Mr A that it would explain to him in writing why certain concerns he had raised would not be referred to a hearing. It is also disappointing that while the Acting Ombudsman drew this failure to the attention of the MPBV in May 2003, it took until August 2003 for the MPBV to supply Mr A with the explanation.

While I do not question the validity of the technical questions of jurisdiction raised by the MPBV in this matter, the situation may have been more easily dealt with by providing Mr A with more substantial reasons for its findings from the outset. I am concerned that this option has not been considered by the MPBV in its response to this complaint.

5 RECOMMENDATIONS

In August 2004 I provided my draft report to the MPBV and the Honourable Bronwyn Pike, Minister for Health. I invited comments to my recommendations. I received a response from the MPBV by letter dated 17 September 2004. The Deputy Ombudsman also met with the President and Executive Officer of the MPBV on 12 October 2004. I received a further written response from the MPBV by letter dated 25 October 2004, which included a copy of a recent legal opinion from a QC, which again supported my predecessor's view that the actions of the MPBV were within the jurisdiction of the Ombudsman.

The MPBV's response to each recommendation is as follows:

5.1 Recommendation One

That the MPBV reconvene a hearing into Mr A's complaint with a differently constituted panel.

Response:

The MPBV accepted that the Ombudsman has jurisdiction in relation to a decision of an Informal Hearing Panel. However, based upon a legal opinion the MPBV remained of the view that the MPBV or a Panel only has power to revoke, re-open or otherwise correct a decision if the original decision was materially affected by jurisdictional error. The MPBV stated that no jurisdictional error is evident in this case.

The MPBV acknowledged the record of the decision provided by the Panel at the end of the hearing does not provide a sufficient basis to enable those reading it to be clear about the Panel's reasons for decision and will ask the Panel to provide fuller reasons.

5.2 Recommendation Two

That the MPBV develop guidelines to assist hearing panels in determining whether or not the conduct complained of constitutes unprofessional conduct under the Act. The guidelines should have explicit reference to each element of the definition of unprofessional conduct in the Medical Practice Act.

Response:

The MPBV states it already has guidelines about the procedures for both informal and formal hearing panels, and it is in the process of reviewing those procedures. The MPBV has advised it will seek to receive input from my office regarding its review of those guidelines.

The MPBV is of the view it is unable to develop guidelines in addition to the language of the Act, and is therefore unable to issue guidelines on the specific question of what constitutes unprofessional conduct. However, the MPBV has accepted my office's advice that the use of examples can be incorporated into its general guidelines to provide guidance to panel members.

5.3 Recommendation Three

That where the MPBV is required to determine whether the conduct complained of constitutes professional conduct of a lesser standard than the public might reasonably expect of a registered medical practitioner, the Informal Hearing Panel should include at least one community member.

Response:

The MPBV states the Act prescribes the membership of the Board as nine registered medical practitioners, one lawyer and two persons who are not medical practitioners. The Act does not prescribe how Informal Panels are to be constituted and it is not possible to ensure that all Informal Hearing Panels contain at least one community member. However, the MPBV states it ensures there is a community member on the Panel whenever that can be arranged.