

## Health Legislation Amendment (Complaints) Bill 2004

New South Wales

### Explanatory note

This explanatory note relates to this Bill as introduced into Parliament.

The following Bills are cognate with this Bill:

*Health Registration Legislation Amendment Bill 2004,*

*Nurses and Midwives Amendment (Performance Assessment) Bill 2004.*

Overview of Bill

The object of this Bill is to amend the *Health Care Complaints Act 1993* (**the Principal Act**):

- (a) to enable the Health Care Complaints Commission (**the Commission**) to focus on dealing with serious complaints concerning health practitioners, health service providers and the provision of health services, and
- (b) to establish the Health Conciliation Registry as a separate unit within the Commission to deal with the conciliation of complaints, and
- (c) to enable the Commission, in appropriate circumstances, to deal with complaints through alternative dispute resolution procedures, and
- (d) to require the Commission to appoint a member of staff as Director of Proceedings to exercise the function of the Commission of determining whether a complaint should be prosecuted before a disciplinary body.

The Bill also amends:

- (a) the *Freedom of Information Act 1989* consequent on the establishment of the Health Conciliation Registry as a unit within the Commission and to protect certain documents provided by the Commission to registration authorities, and
- (b) the *Health Administration Act 1982* to formalise the procedures for appointing root cause analysis teams to look into particular incidents involving the provision of health services by an area health service (and certain other health services organisations) and to give certain protections to those teams, and
- (c) the *Health Services Act 1997* to place certain duties on chief executive officers of public health organisations to report possible professional misconduct or unsatisfactory professional conduct of visiting practitioners and employees.

Outline of provisions

**Clause 1** sets out the name (also called the short title) of the proposed Act.

**Clause 2** provides for the commencement of the proposed Act on a day or days to be appointed by proclamation.

**Clause 3** is a formal provision that gives effect to the amendments to the *Health Care Complaints Act 1993* set out in Schedules 1–3.

**Clause 4** is a formal provision that gives effect to the amendments to other Acts set out in Schedule 4.

### Schedule 1 Amendments to Health Care Complaints

#### Act 1993 relating to complaints

**Schedule 1 [1]** replaces section 3 of the Principal Act so as to make it clear that the primary object of that Act is to establish the Commission as an independent body for the purposes of receiving and assessing complaints relating to health services and health service providers, investigating and prosecuting serious complaints and resolving or overseeing the resolution of complaints. The proposed section also provides that, when exercising functions under the Principal Act, the primary object of the Commission is the protection of the health and safety of the public.

**Schedule 1 [2]** inserts proposed section 3A into the Principal Act which provides an outline of the roles of the Commission, the Director-General of the Department of Health, public health organisations under the *Health Services Act 1997* and health profession registration authorities in connection with the health care system.

**Schedule 1 [3] and [4]** update a reference to mental health services and include a reference to forensic pathology services in the definition of *health service* in the Principal Act.

**Schedule 1 [6]** substitutes section 13 of the Principal Act dealing with the action that can be taken following consultation between the Commission and registration authorities concerning complaints. The new provisions include the options of referring a complaint that neither the Commission nor the appropriate registration authority considers is appropriate to investigate for consideration by the registration authority as to the taking of action under the relevant health registration Act. Such action may include performance assessment or impairment assessment. (However, it is noted that only the *Medical Practice Act 1992* currently contains provisions relating to performance assessment. Similar provisions are also proposed to be inserted into the *Nurses and Midwives Act 1991* by the *Nurses and Midwives Amendment (Performance Assessment) Bill 2004*.) If investigation or referral to the appropriate registration authority is not suitable, the complaint may be referred for conciliation. Under amendments made by Schedule 1 [18], the Commission may, if none of those options are appropriate, deal with the complaint under proposed Division 9 of Part 2 which contains provisions relating to alternative dispute resolution procedures.

**Schedule 1 [7]** substitutes section 16 of the Principal Act to provide that notice of a complaint is to be given to the person against whom the complaint is made not later than 14 days after the complaint is assessed by the Commission for the purpose of determining the action to be taken by the Commission. At present, the initial notice under section 16 is to be given within 14 days after the receipt of the complaint by the Commission.

Existing section 16 enables the Commission to withhold any such notice in certain circumstances where it believes on reasonable grounds that a person would be at risk or the investigation would be prejudiced if the notice were given. However, notice must be given no later than 60 days after the complaint is received. The new provisions remove the requirement to give the notice within that 60-day period but require the Commission to keep under review a decision to withhold giving notice. The Commission will also be placed under an obligation to give the notice regardless of the circumstances if it considers on reasonable grounds that it is essential on the grounds of natural justice or to investigate the complaint effectively or it is otherwise in the public interest (the *Protected Disclosures Act 1994* places a similar obligation on public authorities dealing with protected disclosures to give notice to a person who is the subject of the disclosure).

**Schedule 1 [8], [9], [15], [16] and [35]** make minor law revision amendments.

**Schedule 1 [12]** requires the Commission, as part of its assessment of a complaint and as soon as practicable after commencing the assessment, to identify the specific allegations comprising the complaint and the person or persons whose conduct appears to be the subject of the complaint and to use its best endeavours to confirm those matters with the persons who provided the information.

**Schedule 1 [13]** imposes a duty on the Commission to keep under review its assessment of a complaint while dealing with the complaint. It also enables the Commission to revise its assessment of a complaint at any time (after consulting with the appropriate registration authority) and take appropriate action in relation to the revised assessment. If the Commission revises its assessment of a complaint, it must give certain notices to the persons who are the subject of the complaint. **Schedule 1 [34]** makes a consequential amendment.

**Schedule 1 [14]** extends the power of the Commission under proposed section 34A to obtain documents during the investigation of a complaint to obtaining documents for the purposes of assessing whether a complaint should be investigated (but only in respect of hospital and medical records and documents relating to a health

practitioner's practice).

**Schedule 1 [17]** removes the requirement that a complainant must verify a complaint by statutory declaration. However, **Schedule 1 [5]** includes a note that indicates that the provision of false or misleading information under the Principal Act to the Commission or staff of the Commission is an offence.

**Schedule 1 [18]** substitutes section 24 of the Principal Act (currently dealing with referral of complaints to the Health Conciliation Registry for conciliation) to provide that the Commission must refer a complaint for conciliation if required by section 13 of the Principal Act or if it decides to do so under proposed section 20A and to enable the Commission, in appropriate circumstances, to deal with a complaint under proposed Division 9 of Part 2 of the Principal Act (see Schedule 2 [9]) relating to alternative dispute resolution procedures).

**Schedule 1 [19] and [20]** amend section 25 of the Principal Act which requires the Commission to notify the Director-General of the Department of Health if it appears to the Commission that a complaint involves a possible breach of certain specified Acts so as to include the *Anatomy Act 1977*, the *Health Records and Information Privacy Act 2002* and the *Human Tissue Act 1983*.

**Schedule 1 [21]** enables the Commission to refer a complaint to the Director-General of the Department of Health if the Commission is of the opinion that the complaint relates to a matter that could be the subject of an inquiry by the Director-General under section 71 of the *Public Health Act 1991* or section 123 of the *Health Services Act 1997* (proposed section 25A). A complaint may only be so referred if the Director-General consents. The Commission is not prevented from continuing to deal with a complaint in so far as it concerns the professional conduct of a health practitioner or a health service which affects the clinical management or care of an individual client. **Schedule 1 [10]** makes a consequential amendment.

**Schedule 1 [21]** also inserts proposed section 25B into the Principal Act which enables the Commission (after consultation) to refer a complaint to the appropriate registration authority for the taking of action (such as performance assessment or impairment assessment) under the relevant health registration Act. If the Commission makes such a referral, it is to discontinue dealing with the complaint.

**Schedule 1 [11]** makes a consequential amendment.

**Schedule 1 [22]** substitutes section 26 of the Principal Act to enable the Commission to refer a complaint to a public health organisation for resolution at a local level if the public health organisation consents.

**Schedule 1 [23]** enables the Commission to discontinue dealing with a complaint if it has actually been referred to another person or body for appropriate action. Currently, section 27 (1) (d) of the Principal Act provides that the Commission can discontinue dealing with a complaint if it raises issues that are required to be investigated by another person or body.

**Schedule 1 [24]** substitutes section 28 of the Principal Act and inserts a new section 28A to provide for the following:

- (a) that the Commission's notice to the parties to a complaint of the action it proposes to take after assessment is to be given within 14 days,
- (b) to enable the Commission to give notice of the investigation of a complaint against a health practitioner to a person who currently employs or engages the health practitioner,
- (c) to ensure that the Commission gives notice despite certain exemptions if it is essential on the ground of natural justice and certain other grounds,
- (d) to require reviews of decisions to withhold notice,
- (e) to remove the obligation of the Commission to review its assessment of a complaint if the request from the complainant is not made within 28 days,
- (f) to require the Commission, if possible, to give notification of the outcomes of the assessment of a complaint to a client whose treatment is the subject of the

complaint and who is not otherwise required to receive a notification under the Principal Act,

(g) to require the Commission, if possible, to give notification of the outcomes of the assessment of a complaint, in a case where the client was treated in a hospital or health care facility, to the recorded contact person for the client if the client is deceased or the client is incapable of understanding the notification and the authorised representative of the client (within the meaning of the *Health Records and Information Privacy Act 2002*) consents,

(h) to enable the Commission to give notification of the outcomes of the assessment of a complaint to other persons associated with a client whose treatment is the subject of the complaint if the client is deceased or the client is incapable of understanding the notification and the authorised representative of the client (within the meaning of the *Health Records and Information Privacy Act 2002*) consents.

**Schedule 1 [25]** requires the Commission, when seeking expert advice from a person concerning a complaint, to give the person all the relevant information that it possesses concerning the complaint.

**Schedule 1 [26]** prevents the Commission or the Commissioner from being compelled to produce, or give evidence on, a report of any such expert advice in certain proceedings.

**Schedule 1 [27]** extends the current power contained in section 33 of the Principal Act that enables an authorised person to enter premises used by a person against whom a complaint has been made in connection with the matter with which the complaint is concerned so that the authorised person may enter any premises if it is necessary for the investigation of the complaint. Under section 32, the power cannot be exercised except with the consent of the owner or occupier of the premises or with the authority of a search warrant. **Schedule 1 [28]** makes a consequential amendment.

**Schedule 1 [29]** inserts proposed section 34A into the Principal Act which enables the Commission to require information or documents (including medical records) during the investigation of a complaint from the complainant, the person against whom the complaint was made or a health service provider.

**Schedule 1 [30]** extends the current offence of furnishing false or misleading information to an authorised person to ensure that it covers the situations outlined above in relation to Schedule 1 [29] where information is given to the Commissioner or a member of staff of the Commission.

**Schedule 1 [31]** omits an offence of a person improperly disclosing information obtained during the exercise of investigation functions under the Principal Act.

**Schedule 1 [38]** re-enacts that offence but extends it to information obtained in exercising any function under the Principal Act.

**Schedule 1 [32]** deals with issues of self-incrimination in relation to the giving of information or the production of documents under the amendments made by Schedule 1 [29].

**Schedule 1 [33]** amends section 39 of the Principal Act to include, as one of the options that the Commission has on concluding an investigation into a complaint, referring the complaint to the appropriate registration authority for consideration that the health practitioner be referred for performance assessment or impairment assessment.

**Schedule 1 [36]** omits the function of the Commission of investigating the frequency, type and nature of allegations made in legal proceedings of malpractice by health practitioners.

**Schedule 1 [37]** protects a person making a complaint, or reporting any matter that could give rise to a complaint, to the Commission or a registration authority from personal liability if the person's actions were done in good faith.

**Schedule 1 [39]** notes the provisions of the *Ombudsman Act 1974* dealing with the powers of the Ombudsman to investigate the conduct of certain public authorities including the Commission. The provision ensures that the provisions of the Principal Act or any other Act do not prevent the Commission from providing information to the Ombudsman.

**Schedule 1 [40]** enables regulations to be made of a savings or transitional nature consequent on the enactment of the proposed Act and the proposed *Health Registration Legislation Amendment Act 2004*.

**Schedule 1 [41]** contains specific provisions dealing with certain savings and transitional matters consequent on the enactment of the proposed Act and the proposed *Health Registration Legislation Amendment Act 2004*.

**Schedule 1 [42]** restricts the operation of the privative clause contained in Schedule 5 (Special provisions relating to Walker Special Commission of Inquiry).

## **Schedule 2 Amendments to Health Care Complaints**

### **Act 1993 relating to complaints resolution**

**Schedule 2 [9]** substitutes Division 8 of Part 2 of the Principal Act which deals with the conciliation of complaints and inserts a new Division 9 of Part 2 into the Principal Act relating to other complaints resolution procedures that may be carried out by the Commission.

Proposed Division 8 re-enacts (with certain modifications) the repealed Division and contains the following provisions:

- (a) proposed section 46 which provides for the appointment of a conciliator to conciliate a complaint referred to the Health Conciliation Registry (***the Registry***),
- (b) proposed section 47 which requires the Registrar to give notice of the referral of a complaint for conciliation,
- (c) proposed section 48 which provides that participation in the conciliation process under the proposed Division is voluntary,
- (d) proposed section 49 which sets out the role of conciliators,
- (e) proposed section 50 which provides that the parties to a complaint are not entitled to be legally represented during conciliation of the complaint but may, in certain circumstances, be assisted by another person who is not a legal practitioner,
- (f) proposed section 51 which prevents anything said or documents prepared in connection with the conciliation of a complaint from being used in proceedings without the consent of the persons concerned,
- (g) proposed section 52 which provides that the conciliation process is concluded when either party terminates it, the parties reach agreement or the conciliator terminates it for specified reasons,
- (h) proposed section 53 which requires the conciliator to give a report to the Registrar on the conclusion of the conciliation process and the Registrar to give a copy of the report to the Commission, the parties to the complaint and the appropriate registration authority,
- (i) proposed section 54 which requires conciliators to furnish certain information to the Registrar for the purposes of proposed section 55,
- (j) proposed section 55 which requires the Registrar to make six-monthly reports to the registration authorities providing specified information about the complaints dealt with by way of conciliation,
- (k) proposed section 56 which enables the Commission to investigate a complaint that has been dealt with under the proposed Division, but only in limited circumstances,
- (l) proposed section 57 which states that a member of staff of the Commission employed in the Registry or a conciliator is not subject to the direction and

control of the Commissioner in relation to dealing with any particular complaint,

(m) proposed section 58 which makes it an offence for a conciliator or a member of staff of the Commission employed in the Registry to disclose information obtained during the conciliation of a complaint except in specified circumstances,

(n) proposed section 58A which ensures that a conciliator is not liable to be proceeded against under section 316 of the *Crimes Act 1900* (dealing with offences for concealing information relating to a serious indictable offence) in relation to information obtained in connection with the conciliation process.

Proposed Division 9 contains the following provisions:

(a) proposed section 58B which sets out the objects of the Commission when dealing with complaints under the proposed Division,

(b) proposed section 58C which sets out the function of the Commission under the proposed Division, being to take appropriate measures to assist in the resolution of complaints,

(c) proposed section 58D which provides that participation in the complaints resolution process under the proposed Division is voluntary.

**Schedule 2 [10]** extends the functions of the Parliamentary Joint Committee on the Health Care Complaints Commission to include the function of monitoring and reviewing the exercise of functions by the Health Conciliation Registry.

**Schedule 2 [12]** substitutes Part 6 of the Principal Act to convert the Health Conciliation Registry from a statutory corporation to a unit of the Commission.

**Schedule 2 [1]–[8], [11], [13] and [14]** make consequential amendments.

#### **Schedule 3 Amendments to Health Care Complaints**

##### **Act 1993 relating to Director of Proceedings**

**Schedule 3 [5]** inserts proposed Part 6A into the Principal Act which establishes a position of Director of Proceedings within the Commission. The proposed Part contains the following provisions:

(a) proposed section 90A requires the Commission to appoint a member of its staff as Director of Proceedings,

(b) proposed section 90B provides that the Director is to exercise the functions of the Commission relating to the determination of whether a complaint should be prosecuted before a disciplinary body and requires the Director to consult with the appropriate registration authority (if any) before making any such determination,

(c) proposed section 90C requires the Director to take certain matters into account when making such a determination, including the protection of public health and safety and any submissions received in accordance with the Principal Act from the health practitioner concerned,

(d) proposed section 90D provides that the Director is not subject to the direction and control of the Commissioner when dealing with any particular complaint.

**Schedule 3 [1]–[4]** contain consequential amendments.

##### **Schedule 4 Amendment of other Acts**

**Schedule 4.1** amends the *Freedom of Information Act 1989* as a consequence of the amendments made in relation to the Health Conciliation Registry. The amendments also make documents provided by the Commission to a registration authority in relation to a complaint exempt documents under that Act.

**Schedule 4.2 [1]** amends the *Health Administration Act 1982* as a consequence of the amendments made in relation to the Health Conciliation Registry.

**Schedule 4.2 [2]** inserts proposed Division 6C into Part 2 of that Act which contains provisions for the appointment of a root cause analysis team (**RCA team**) for area health services, and for statutory health corporations and affiliated health

organisations prescribed by the regulations (***relevant health services organisations***). The relevant health services organisation is to appoint members to constitute the RCA team when a reportable incident (to be identified through regulations) occurs that involves the organisation. A RCA team is required to notify the relevant health services organisation of certain matters and report on its findings. Information given to a RCA team and reports made by it are protected and the members of the team are also protected from personal liability for actions done in good faith as a member. Regulations may be made with respect to the functions, procedure, constitution and membership of RCA teams, the furnishing of reports and information by those teams and enabling a RCA team to be appointed by a relevant health services- organisation for a reportable incident at another such organisation.

**Schedule 4.3** amends the *Health Services Act 1997* to require the chief executive officers of public health organisations to report conduct of visiting practitioners and employees that they reasonably suspect may constitute professional misconduct or unsatisfactory professional conduct to the relevant registration authorities.