NSW Legislative Assembly Hansard

HEALTH LEGISLATION AMENDMENT (COMPLAINTS) BILL
HEALTH REGISTRATION LEGISLATION AMENDMENT BILL
NURSES AND MIDWIVES AMENDMENT (PERFORMANCE ASSESSMENT) BILL

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Bills introduced and read a first time.

Second Reading

Mr MORRIS IEMMA (Lakemba—Minister for Health) [8.00 p.m.]: I move:

That these bills be now read a second time.

On 14 September the Health Legislation Amendment (Complaints) Bill and two cognate bills were released as exposure draft bills for public comment. The bills implement the recommendations of the Special Commission of Inquiry into Campbelltown and Camden Hospitals and the review of the Health Care Complaints Act 1993 undertaken by the Cabinet Office. The bills have been the subject of an extensive public consultation process during which 20 submissions were received. The Cabinet Office also met with a number of key stakeholders, and their views have been carefully considered. In many instances changes have been made to the bills that I am introducing today. Details of the issues raised through the consultation period and the Government's response to those matters are set out in a consultation report, which I seek leave to table.

Leave granted.

Report tabled.

I take this opportunity to thank all stakeholders who made submissions on the draft bills.

Mr Thomas George: And the Opposition Whip.

Mr MORRIS IEMMA: And I thank the Opposition Whip. The first main purpose of the bills is to refocus the Health Care Complaints Commission [HCCC] on investigating serious complaints about health service providers. To achieve this, Commissioner Walker recommended that unsatisfactory professional conduct be redefined so that only significant instances involving a lack of skill, judgment, or care will result in an investigation or disciplinary action. Unsatisfactory professional conduct will be defined as "any conduct that demonstrates that the knowledge, skill or judgment possessed, or care exercised, by the practitioner is significantly below the standard reasonably expected of a practitioner of an equivalent level of training or experience". The reference to "significantly" in that context may refer to a single act or omission that demonstrates a practitioner's lack of skill, judgment or care, or it may refer to a pattern of conduct. In any individual case, that will depend on the seriousness of the circumstances of the case.

The Pharmacy Board of New South Wales and the Australian Psychological Society raised a concern about assessing unsatisfactory professional conduct by reference to other practitioners of an equivalent level of training or experience. Those organisations considered that all practitioners should be judged by the entry level standard for practitioners and should not be judged by the differing levels of training and experience, which practitioners acquire over time. They suggested that practitioners should be able to treat all conditions, regardless of their level of experience. The Government does not support that view. A practitioner who has only recently commenced practice should not be held to the same standard as a more experienced practitioner and be expected to treat all conditions. It would be unfair to expect a registrar to be able to treat a condition that should be treated only by a specialist.

I note that all practitioners will still need to meet the entry level standards reflected in the requirements for registration. A number of recommendations of Commissioner Walker sought to give the HCCC greater flexibility in dealing with complaints. This is consistent with the goal of refocusing the HCCC on investigating serious complaints. These changes will ensure that the HCCC and the registration boards have a broad range of options available to them for dealing with complaints where a complaint is assessed but does not meet the threshold for investigation. One of those options, which will be provided for in proposed section 25B of the Act, will allow the HCCC to refer a matter to a registration board for consideration of performance assessment. Under proposed sections 20A and 39, the HCCC will be able to use that option at any time while dealing with a complaint or at completion of its investigation.

Proposed section 25B of the Health Care Complaints Act is specifically designed to recognise the co-regulatory regime and will clarify that the HCCC does not have a supervisory role over the registration boards in relation to performance assessment. The proposed section will make it clear that investigation by the HCCC and performance assessment by the registration boards are alternative streams. The registration boards' current obligation to refer back to the HCCC serious matters which emerge when dealing with complaints, either by performance assessment or by other means, will be

retained. This is recognised in a drafting note. The purpose of that clarification is to reinforce the co-regulatory nature of the complaints regime involving the health professional registration boards. It should be noted that Commissioner Walker particularly praised one of the registration boards—the Medical Board—for its handling of complaints falling within the board's area of responsibility. Commissioner Walker recommended also that performance assessment be introduced for the nursing profession.

Performance assessment has proven to be an effective means of reviewing a medical practitioner's performance. That is because performance assessment occurs in an environment focused on rehabilitation rather than punishment. Accordingly, the Nurses and Midwives Amendment (Performance Assessment) Bill introduces similar performance assessment provisions to those that have operated successfully for medical practitioners. The Government recognises that the implementation of those provisions will require considerable consultation by the Nurses and Midwives Board with the profession, including the Nurses Association. It is therefore proposed that the commencement of those provisions will be delayed until the necessary consultation and preparation is complete. Proposed section 3 of the Health Care Complaints Act seeks to redefine the objects of the HCCC. Proposed section 3A clearly sets out in the legislation which agencies and organisations in the health system have responsibility for improving standards.

The new objects for the HCCC emphasise that its primary role is the investigation of serious complaints, and the resolution of complaints through alternative dispute resolution. A number of stakeholders expressed strong support for the new objects of the HCCC. The bills also include a requirement for the HCCC to have regard to the protection of the public when exercising its complaints handling and other functions, bringing it into line with the health professional registration Acts which have an explicit public protection focus. The second main purpose of the bills is to improve the operation of the complaints handling process to make the process faster and more effective. That is to be achieved by proposed sections 21A and 34A of the Health Care Complaints Act, which will empower the HCCC to require the production of hospital, medical and practice records during assessment of a complaint and investigation.

In addition, when the HCCC investigates a complaint, it will be empowered to require relevant people to provide documents and information. Commissioner Walker recommended the introduction of those new powers on the grounds that early characterisation and assessment of complaints involving Campbelltown and Camden hospitals could well have been assisted by giving the HCCC greater access to records. Commissioner Walker also noted in that regard that such powers would involve questions of privilege and immunity in relation to evidence obtained in that way. For that reason, proposed new section 37A of the Act will provide that, while a person can be compelled to provide self-incriminatory information, that information cannot be used against them in criminal or civil proceedings if the person objects. The material will still be able to be used in disciplinary proceedings.

The HCCC is also excused from responding to a subpoena if the document to be provided would be inadmissible in proceedings; for example, when the subpoenaed information contains self-incriminating answers. Several stakeholders wanted those provisions to go further so that any information provided to the HCCC cannot be subpoenaed. However, it is not the intention of the bills to make it more difficult to conduct litigation and I believe that the provisions introduced today strike the right balance. A further way in which the complaints handling process is to be streamlined is through the removal of the requirement for a statutory declaration to be provided by a complainant before a complaint is investigated. The Special Commission of Inquiry identified the practical problems with requiring a statutory declaration and the fact that it contributes to delay.

A request by the HCCC for a statutory declaration may discourage those with poor literacy skills, or persons from particular cultural backgrounds who are reluctant to approach government agencies, from pursuing complaints. Furthermore, other watchdogs such as the Independent Commission Against Corruption and the Ombudsman do not have a statutory declaration requirement. It remains important to ensure that complainants do not provide false or misleading information when making a complaint. I have therefore written to the HCCC requesting that it review its administrative procedures so that it appropriately notifies complainants that it is an offence knowingly to provide false or misleading information to the HCCC. As suggested by the New South Wales Medical Services Committee, a drafting note specifically referring to this offence has also been included in the Health Care Complaints Act below section 9. That provision sets out the requirements for making a complaint.

The third main purpose of the bills is to make the complaints system fairer for all parties by giving proper protection to practitioners, to complainants and to the general public within this framework. Proposed section 20 (2) of the Act implements the recommendation of the Special Commission of Inquiry that the HCCC must promptly identify doctors and nurses who are the subject of complaints and the allegations against them. In addition, an ongoing obligation has been imposed on the HCCC to keep under review its assessment of a complaint. The purpose of these provisions is to respond to a key finding of Commissioner Walker, namely that the HCCC failed in many cases properly to identify and notify those against whom a complaint had been made.

Another important protection for practitioners is the creation of a new office of the Director of Proceedings within the HCCC. The director will make independent decisions on whether complaints should be prosecuted. This proposal addresses perceptions of bias within the HCCC. This proposal was suggested by the HCCC during consultation and was circulated for comment to stakeholders, who have given it wide support. To ensure that the co-regulatory nature of the system is preserved, the Director of Proceedings will be required to consult with the relevant registration board about its views before deciding whether or not to institute disciplinary proceedings.

Section 96 of the Health Care Complaints Act will be amended to provide that complainants will be protected from liability if they make a complaint in good faith. This amendment ensures that protections which are available to persons who make protected disclosures are available to those who make a complaint to the HCCC. Proposed sections 99A and 117A of the Health Services Act will improve public protection by introducing a mandatory obligation on chief executive officers

of public health organisations to report suspected unsatisfactory professional conduct to registration authorities.

Proposed section 28A of the Health Care Complaints Act will require the HCCC to use its best endeavours to notify a person identified in a hospital record as the next of kin of the outcome of an assessment decision in relation to a complaint by the HCCC in cases where a patient has died or lacks capacity. The hospital must assist the HCCC by providing the name of the person identified in the hospital record. The purpose of this provision is to address concerns that arose during the HCCC's investigation into Camden and Campbelltown hospitals because some patients and families were not notified directly of any problems identified with the health care they received.

The bills also provide for the integration of the Health Conciliation Registry with the HCCC so that all dispute resolution functions can be performed by the same body. Stakeholders have generally supported the inclusion of the proposed safeguards in the bill, which will ensure that the conciliation functions are kept independent of the HCCC's investigative function. These safeguards include the statutory recognition of the separate role of the registry, providing that the registry and conciliators are independent of the HCCC when conducting conciliations, offence provisions to prevent the unauthorised disclosure by registry staff or conciliators of information obtained as part of their duties, and giving the parliamentary joint committee a role in overseeing the operation of the registry.

I acknowledge in particular the contribution of the parliamentary Joint Committee on the Health Care Complaints Commission in its "Report into Alternative Dispute Resolution of Health Care Complaints in New South Wales" and its submission on the bills. A number of the committee's recommendations are not appropriate to implement through legislative change. Consultation will occur with the HCCC to determine whether they can be implemented administratively. Root cause analysis provisions will be introduced based on the quality assurance committee provisions of the Health Administration Act 1982 in order to protect information provided to root cause analysis teams. This will encourage practitioners to participate in root cause analysis, which is an important tool for ensuring that the causes of adverse events are properly identified.

In addition, to reduce the possibility that serious individual conduct matters are buried in the privileged process, the amendments also explicitly provide for matters that raise possible unsatisfactory professional conduct or individual performance issues to be referred to hospital management for action. Finally, amendments to schedule 5 to the Health Care Complaints Act address concerns raised by the doctors' representatives about the remedial legislation that was introduced following the first report of the Special Commission of Inquiry. As recommended by the inquiry, these changes will ensure that challenges based on oppressiveness or delay are not prevented. I note that the relevant provisions are supported by the main doctors' representatives. I commend the bills to the House.

Debate adjourned on motion by Mr Thomas George.

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  Iemma Mr Morris
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