Response from AVANT to the NSW Joint Parliamentary Committee on the Health Care Complaints Commission
Inquiry into the Operation of the *Health Care Complaints Act 1993* - Report Paper No. 5/54
and to Specific Questions from the Parliamentary Committee

INTRODUCTION

Avant is Australia's largest medical defence organisation supporting almost 50,000 members with broad medical indemnity cover with the majority in New South Wales. In addition, Avant supports dentists, optometrists and other allied health professionals.

Avant has had a long and close involvement with the Health Care Complaints Commission and the operation of the *Health Care Complaints Act,* as it advises and represents medical practitioners throughout the complaint process.

Avant endorses the principles of accountability, transparency, fairness and effectiveness in the processes of both the Commission and the Registration Boards, while seeking to balance the individual rights of health care consumers, the individual rights of medical practitioners and other health care professionals with the "whole of community values" necessary to the proper provision of health services and consumer satisfaction.[1]

OVERVIEW

It is unfortunate that the imposition of a new scheme of health registration in new legislation has not provided an opportunity to repeal and redraft the *Health Care Complaints Act*. Historically, amendments to the Act have been made 'piece-meal' and usually in direct response to an inquiry into a failure within the health system. The Act that is currently being administered by the Commission is internally inconsistent, and also inconsistent with other statutes regulating the provision of health services in NSW.

Avant is concerned that incremental amendments have led to a failure to adequately address the competing interests of private rights with the public good, and that many of the amendments now proposed by the Commission would further erode rights of individual practitioners.

[1]Australian Government Productivity Commission Research Report *Australia's Work Health Force* December 2005

Before turning to the specific questions put by the Committee, Avant would like to address the investigative and prosecutorial procedures of the Commission as it is these provisions and practices that cause greatest concern, particularly in the context of the Commission's proposal to broaden and further enhance its powers.

Investigative Powers

The Commission was set up to receive, assess, investigate and prosecute complaints. It has extensive powers of entry, search and seizure, may seek to obtain search warrants, and power to compel the production of documents on pain of criminal penalty. It enjoys exemptions from safeguarding legislation such as privacy legislation, and from the rules against self incrimination. In our view, these extraordinary powers of the State should be enforced against individuals only when justified on the basis that there is a reasonable belief it is necessary to implement them because the circumstances are sufficiently serious, and other, less coercive measures are not available or have failed.

It is of concern to us that these measures are sometimes utilised by the Commission in its day to day activities, for routine matters. The Commission can and does exercise its extensive powers without regard to the level of severity, or the subject matter of the complaint or the ability of the Commission to obtain records, documents or other information by other means.

- It is our submission that the Commission should not issue notices under s21A or 34A of the Act, or demand the production of medical records using the exemption contained in Schedule 1 Clause 11 (1)(k) of the *Health Records and Information Privacy Act* 2002 without first making some attempt to obtain consent or authority from the patient whose notes it seeks to access. It is our submission that the Commission should only dispense with the need to obtain the patient's authority to access his or her medical record in exceptional circumstances and that use of coercive powers should be a last, not first, resort.

Avant is familiar with several cases in which the patient is not the complainant and has therefore not given the Commission authority to access and use the patient's medical record for the purpose of the assessment or investigation. It may be that the patient has no complaint to make against the medical practitioner and is unaware that a complaint has been made by someone else. The Commission has served a notice on the practitioner to produce the record of the patient, without first ascertaining the views of the patient. This causes the practitioner great disquiet as it compromises patient confidentiality and may have a negative impact on the doctor-patient relationship when the patient discovers his or her record has been provided without their consent to a third party (regardless of who the third party is).

Director of Proceedings and Disciplinary Proceedings

The role of the Director of Proceedings is independent of the control of the Commission. It is our submission that in exercising the powers vested in her to refer matters to disciplinary proceedings, close attention should be paid to the manner and form of that referral, and the evidence available to the Commission in support of it.

- We agree that the Director should have power to re-determine a matter at any stage and discontinue any proceedings. The Commission is always at liberty to withdraw the Complaint and one that is without prospects of success should fall foul of s90(1)(c) well before it reaches a disciplinary hearing.

- Power to amend a Complaint at any time is a matter governed by the common law, and in our submission that should remain the case. It is unnecessary to legislate to permit this. In our view, amendment of a Complaint is a matter for legal argument before, and decision by, the appropriate Chairperson. In our view, proper preparation of a matter prior to hearing should alleviate the necessity for applications, which in practice are common, to amend a Complaint.

- If the Commission withdraws a Complaint at a late stage, the question of costs should be a matter for argument before the relevant tribunal and depend on the circumstances of each case. Again, the proper application of s 90(1)(c) is relevant.

- In our view, the Director of Proceedings should indicate in writing the reasons for taking the decision she has taken, when referring matters under s39, with reference to those matters under s90 that she is required to take into consideration.

It is unnecessary, at this time of change generally to the *Medical Practice Act* and in particular the provisions in relation to the definition of unsatisfactory professional conduct to address in detail matters that should be considered by the Commission to be unsatisfactory professional conduct. However we would like the Committee to note that we strongly oppose the submission that a breach of s28 of the *Poisons and Therapeutic Goods Act* or that "any breach of the Health Care or other health registration Act" should amount to unsatisfactory professional conduct on the basis of the convenience to the Commission, and in order merely to streamline its prosecutorial processes. The Commission puts forward no analysis, case law, interpretation of statutory principles, philosophical, theoretical or legal argument in support of these propositions.

Simplifying procedure is no substitute for applying appropriate prosecutorial responsibility to the preparation of matters and in the exercise of discretion to proceed.

SPECIFIC QUESTIONS

1. Could you please advise the Committee as to the input, if any, which Avant had in the development of the national scheme of registration and accreditation? What is your view of the effectiveness of the consultation process and the proposed model?

The Medical Indemnity Industry Association of Australia (MIIAA) is an industry association and its members include Australian based medical indemnity insurers and medical defence organisations. Members of the MIIAA represent approximately 75% of insured medical practitioners in Australia. Avant represented the MIIAA throughout the consultation process with the introduction of a new National Registration and Accreditation Scheme for health professionals. Avant was fortunate to be in a position to attend both national and state forums throughout Australia. Avant was privileged, through the NSW National Registration Scheme Working Party, to review draft legislation as it was released. Avant has been in a position to lobby successfully for exemptions to the mandatory notification provisions in the National Law for Professional Indemnity Insurance bodies.

The National Registration and Accreditation Scheme is necessarily a broad based model. It is the product of the development by COAG, and other bodies, of the work of the Australian Productivity Commission into the Health Workforce which focussed on economic and labour force considerations, particularly the cost to government of health care delivery. The effectiveness of the consultation process will be measured by the workability of the scheme it has produced, which can only be determined by future review. The MIIAA supports the establishment of a national scheme, and whilst Avant sees advantages in a uniform registration model it does have some concerns, shared with others and also expressed by the NSW Medical Board, that it tries to be all things to all people which may not be beneficial in every sense

> "*One-size fits all pieces of legislation lead to simplification or a winding back of provisions which have been included for the public protection and a jurisdiction which deals with a large number of registrants in the complex and often combative environment.*[2]

The proposed model which is being adopted by all states (with the exception of NSW) and which is contained in Bill C, is disappointing as it has rejected the co-regulatory model. And yet those factors deemed by the Ministers as key to the future development and success of this scheme are features of a co-regulatory system, which must:

[2] NSW Medical Board submission, on consultation paper on registration arrangements 3112008

- ensure that public protection is paramount;
- maintain a high degree of transparency; and
- be appropriately accountable.[3]

Co-regulation affords appropriate limits of the tendency of self-regulating professions towards protectionism and at the same time provides a fetter on the power of government authority by means of scrutiny and consultation. The NSW model has a multi level approach to dealing with complaints against practitioners including sophisticated pathways in health and performance which are internationally recognised. This dual system permits the medical profession to support its membership whilst government acknowledges and reacts to notification of a medical consumer's level of dissatisfaction.

2. What do you consider to be the key elements of the national scheme in terms of its impact on your work as a medical defence organisation, and your continued professional interaction with the HCCC?

The key impact of the national scheme, in terms of our interaction with the Commission, will be determining how best to assist our members who are respondents to a complaint or otherwise involved in an investigation. Particularly important will be the interpretation of new statutory professional standards, the operation of mandatory reporting provisions, and the administrative and procedural aspects of complaint handling and disciplinary proceedings.

At the time of this submission, the draft Bill C2 has not been introduced to the NSW Parliament, however, throughout the wide national registration scheme consultation process, we have been supportive of an independent investigatory body such as the Commission, on the basis that the interests of both the public and the professions are best served by a system which shares power and governance.

The Commission is a unique complaints handling body in that it was set up with a prosecutory, not conciliatory, approach to complaint investigation. It has developed its Conciliation and Resolution streams along the way. It provides a comprehensive complaints process for the medical consumer not provided by the exclusive control of the registration board. We see the continuation of the function of the Commission as a valuable part of delivering high standards of health care, however the role of the Commission is administrative and it does not provide the machinery for the maintenance of standards which is left to the Registration Boards. Avant works closely with both arms of the co-regulatory system and envisages our professional interaction with both will continue under the new system.

[3] PRS HWPC Consultation Paper - Proposed arrangements for handling complaints and dealing with performance, health and conduct matters. 711/08

We accept the Committee's conclusion that a health care complaints system for the 21st century should be based on principles of:

- accountability;
- clarity and transparency;
- fairness; and
- effectiveness.[4]

3. The focus of the Committee's Inquiry was very much on communication, transparency of decision-making, etc. In your experience, how fair is current HCCC and registration body practice on medical practitioners who have had complaints against them? Are practitioners fully informed of their rights and options, and do they have decision-making processes properly explained? If not, what suggestions could you make to improve the current system?

The majority of complaints are dealt with through the process of assessment and referral to the Medical Board for counselling or interview, or to the independent Conciliation or Resolution process. Whilst the outcomes do not always meet with universal approval, the processes largely meet community and professional expectations. The co-regulation of complaints offers an important means of consultation and review, providing checks and balances so the power to investigate, prosecute and adjudicate complaints is not vested in one body.

Nevertheless, in our view, the process of complaint assessment and investigation by the HCCC is not balanced and respondents to complaints are disadvantaged. For example, a respondent has no redress where a complainant makes false allegations or slanderous comments. Practitioners are powerless to prevent defamatory statements made against their professional competence.

Case Study

A surgeon received numerous complaints lodged by patients of another practitioner in the same area. The surgeon had little option but to address each one as it arrived, undergo investigation and wait for the Commission to decide the matter did not require further action. It has been an extraordinarily damaging process for the surgeon, and has impacted very severely on the workplace attitude towards this practitioner, resulting in professional isolation, and has also impacted upon the practitioner's personal life.

Avant submits that the confidential aspect of complaint handling is crucial for the continued integrity of the system. The respondent's rights of confidentiality, privacy and due process should be paramount considerations to be balanced

[4] Committee on the Health Care Complaints Commission operation of the *Health Care Complaints Act 1993* Discussion Paper Report No. 5/54 September 2009 p.2

fairly against the right of the complainant to have his or her complaint investigated.

There is no process of review set out in the HCC Act – the only right of review for respondents against decisions made by the Commission is to seek judicial review. In contrast, there are statutory rights of appeal and review throughout the *Medical Practice Act* from decisions of the Board or actions of disciplinary committees or tribunals.

Avant submits that the lack of any review mechanism for a practitioner against a decision which may have a significant impact upon his professional practice and reputation is illustrative of the fundamental unfairness of the process for respondents.

The Commission's prosecutorial and adversarial approach towards the management of complaints is a function of its founding legislation and its objects still reflect this, as well as the paramountcy of the protection of the health and safety of the public. The Medical Board also has a mandate to protect the public and the good name of the profession in its role in the co-regulatory system. However, if the process of complaint handling is seen as unfair by the profession, then the process is undermined and public confidence in the system is also undermined. It is too easily overlooked that members of the health professions are also members of the public. The concept of acting to protect the good name of the profession should not preclude input from the profession in considering how its own good name is to be protected.

Are practitioners fully informed of their rights and options, and do they have decision-making processes properly explained?

Yes, however not fully, and it is an important part of the process that they be informed by the inclusion of brochures, and letters informing them that they should obtain advice from their indemnity insurer, MDO or a lawyer.

As pointed out by the Commission, the inconsistencies in the Act prevent a consistent approach to information provision across each part of the process.

Do they have decision-making processes properly explained?

The process itself is explained but on many occasions the practitioner is not made aware of the reasoning behind the process. In general, the lower the level of complaint, the more likely the practitioner is to be given sufficient information. As the complaint progresses through the system that information becomes less informative, and the process less transparent. Certain decisions are never explained, even when the Commission is asked to provide reasons. For example the Commission might notify a practitioner that a matter has been determined, and not subsequently notify him that the complainant has sought a review. This causes confusion and distress, as the practitioner has assumed the matter is finalised, but then finds himself under investigation.

Certain practices are not explained, such as why the Commission requires the production of all records of a patient when the practitioner in question is not himself the subject of the complaint or investigation, rather another practitioner is. If the Commission will not divulge the subject matter of an investigation, it is not possible to discern whether a demand for "all the records…all correspondence…" is warranted or reasonable, and the practitioner has no choice but to comply, without reasonable excuse, or else face penalty. In many cases, providing all the records for a patient is a significant administrative burden for a practitioner.

Case Study

Dr A, whose patient, Dr B, was under investigation by the Commission. Dr A was required under a s. 34A notice to provide all the medical records of his patient, Dr B. Dr A was concerned as the record contained sensitive personal health information which was highly unlikely to be relevant to any investigation. The Commission would not divulge the subject matter of the investigation and insisted on the production of Dr B's medical file. Submissions as to the reasonableness of Dr A's refusal to provide the records were unsuccessful. Without knowing of the investigation, it was very difficult to make "reasonable excuse" submissions. The medical record was reluctantly provided on the basis that it be examined and returned immediately. It was returned many months later. This attitude towards Dr B's right to the privacy of his personal health information caused considerable distress to both doctor and patient.

It is often the case that the practitioner does not hear from the Commission again so has no sense of closure or completion, or even whether it was a worthwhile exercise to respond. This lack of communication has been commented upon by others, and the Commission has set out in its submission some of the inconsistencies in the Act that prevent it from notifying relevant persons of outcomes.

- Avant agrees that in most cases, the outcome of an investigation and the reasons for whatever decision flows from it, should be made known to both complainant and respondent. If a review of the decision is sought, that information and the outcome of the review should be made known as well.

What suggestions could you make to improve the current system?

- Policies and guidelines should ensure openness and transparency in the processes, whilst ensuring adequate protection of privacy and confidentiality to all concerned.

- Policies should be developed to ensure coercive measures are not used as a first resort.

- Policies and guidelines should emphasise the weight to be given to the rights of the respondent to a complaint, as well as the complainant, and the need to ensure fair practices are followed.

- Decisions relating to key steps in the process should be provided, with reasons.
- The Act should be amended to provide equally for internal review of decisions for both complainant and respondent.
- The process of review should be contained in the guidelines, if not in the Act.

4. Do you consider that there is consistency of decision-making *within* the HCCC and *across* NSW Area Health Services, so that similar complaints are dealt with in a similar manner?

There is both consistent and inconsistent decision making within the HCCC and across AHS. In large part, complaints are dealt with in a similar manner within the HCCC and within the AHS, however there are significant discrepancies both within the organisations and between them. This is referable to the different tasks and *foci* of the kinds of investigations undertaken, and the individuality of each complaint. As a result it makes it difficult to advise a practitioner of the likely outcome in many investigations. This leads to great uncertainty and worry for the practitioner. It is accepted that the exercise of discretion is bound to result in a broad range of decisions, and the use of subjective criticism inherent in peer review will similarly impose case-by-case development on complaint handling, however it is considered that a more consistent approach could be achieved through appropriate training and education of decision makers and through the implementation of more transparent processes.

5. As Avant operates nationally, are you aware of any empirical or anecdotal evidence that medical practitioners have different experiences of the health care complaints system by jurisdiction? For example, is there anything to suggest that the co-regulatory system in NSW achieves a better balance between protecting the rights and interests of patients and those of the practitioners whom you represent?

Previously, each State Act contained its own statutory standards, and different boards and bodies charged with dealing with health care complaints means that each jurisdiction dealt with a matter in a different way. The difference between legal standards, local attitudes and procedure lead to differences in assessment and outcomes, even where one body was the provider of all decisions. It is not possible to say that this resulted in a marked difference between outcomes, but only that there is variation between jurisdictions.

NSW has a unique system where the investigative lay body and the professional registration body confer prior to a decision as to the most appropriate method of dealing with the complaint. There are a number of available outcomes of this consultation process including the impairment and performance assessment

programs which permit a practitioner to continue practising whilst supported by a system of continuing Board review. In this way the public good is served by keeping highly trained and valued professionals in the workforce (whereas in other jurisdictions typically that practitioner might be suspended) and the expectations of the complainant are met by having the matter properly addressed and the practitioner brought to account.

6. Are there are any other comments that you would like to make with respect to the Inquiry's Terms of Reference?

Issues 1, 2 and 3 - The Australian Charter of Healthcare Rights

Avant does not support the proposal that the *Health Care Complaints Act* be amended to include or refer to the Australian Charter of Healthcare Rights.

The intention of Parliament was to create an independent body in the Health Care Complaints Commission to carry out its functions independently of political interference and in accordance with the precepts of natural justice, bringing to bear informed and balanced decision making. Although it is part of co-regulation with the *Medical Practice Act*, the *Health Care Complaints Act* 1993 stands alone.

There is no necessity for the incorporation of the *Australian Charter of Healthcare Rights* into the Act, as patient welfare is already implicitly addressed, and it would tend to emphasise the rights of the individual over the protection of the public in general. Inclusion of the Charter could lead healthcare professionals to consider that the Commission is a partisan advocate of patients' rights, but more importantly, the Charter was not devised as an enforceable statement of legal principle, but as a 'platform for discussion' between patients and healthcare providers about patients' rights.[5]

It is unclear to us what would be the proposed purpose of incorporating the Charter into the *Health Care Complaints Act*, or the intended effect of incorporation upon the decision making processes of the Commission and the Medical Board. We concur with the Commission's view that to incorporate the Charter as part of the legislative framework within which the complaints body operates would be to alter the whole object and intent of the Act as it now stands.

[5] Australian Commission on Safety and Quality in Healthcare, 'Using Australian Charter of Healthcare Rights in your health service' (2008).

Issue 5 – Advice to Practitioners

Avant supports any review by the Commission of its procedures for, and the content of, information provided by it to both healthcare professionals, patients and complainants in a clear and easily understood manner.

Issue 6 – "Best endeavours" to be measured

Avant supports any endeavours undertaken by the Commission to ensure its processes are measured and understood by everyone.

Issue 11 – Investigations of its own motion

Avant does not support this proposal.

The New South Wales Medical Board has power to act on its own motion to suspend a practitioner in the public interest. If the Commission has immediate concerns about a practitioner's conduct, it can refer the matter to the Board and the matter can be dealt with pursuant to s66 of the *Medical Practice Act 1992* (NSW). If the Board takes any action it is then required to refer the matter to the Commission for investigation.[6] This process ensures that the practitioner is afforded a hearing in keeping with the rules of natural justice, and that the Commission remains at arms length unless and until the matter becomes a complaint and thus suitable for investigation.

Avant sees no necessity for the Commission to have the power to instigate investigations, or conduct enquiries of its own motion, and no basis for the proposed categories of action put forward by PIAC. The Act provides that 'any person' may make a complaint and it is this complaint that founds the jurisdiction of the Commission and provides its power to investigate. The lack of checks and balances available to ensure that adequate protection is afforded to those who may be the subject of an investigation is already a matter of concern, and Avant can see nothing that warrants a further accretion of power and the potential transition of the Commission from a complaints body to a general, free-ranging, permanent commission of inquiry.

Similarly, Avant can see nothing to warrant the granting of an indeterminate power of investigation into clinical management of patients "in general" as this would be against principles of certainty.

[6] *Medical Practice Act 1992* (NSW) s66B.

The need for achieving a balance between an individual's right to due process, to privacy, to the confidentiality of medical information, and the necessity for the Commission to carry out its investigative functions and to remain publicly accountable for its actions and processes requires a cautious approach to extending a grant of power. Commission officers are obligated to act within express powers conferred by statute and, in many cases, it is only the limitation of this power that imposes controls upon the infringement of individual rights. To expand and broaden powers in this way in our view is not justified.

Issue 13 – Determination of Complaint malicious or vexatious

Avant supports this proposal.

We consider that it would be appropriate for the Commission to determine, at any stage, that complaints are malicious, vexatious, frivolous or lacking in substance, and that this decision should be notified in writing.

Issue 14 – Plain English

Avant supports this proposal.

We support any review by the Commission of its procedures and the content of information provided by it to both healthcare professionals and patients particularly in relation to possible use of any written report, and the rights of the author of the report.

Issue 15 – Note to Division 5

Avant supports this proposal.

Issue 16 – s 22 – exceptional cases

Avant supports this proposal.

We support the proposal to amend the time limits and provide an exception to the 60 day limit. Whilst Avant is mindful of the need to determine matters expeditiously there are circumstances in which it is not always possible to comply with arbitrary limits.

Issue 17 – Investigation quickly as practicable

The Act already provides that 'the investigation of a complaint is to be conducted as expeditiously as the proper investigation of the complaint permits.'[7] If the Act is to also provide that investigations must be conducted as quickly as practicable, then it should also make clear that investigations should not be expedited at the expense of procedural fairness and a thorough understanding of the issues. On the other hand, the length of time taken to investigate a complaint is of concern and is often a source of great distress for both the complainant and the practitioner. Lengthy, investigations which sometimes lack transparency are against the interests of the profession, creating distrust and confusion, and do nothing to uphold the integrity of the system and the perception of fairness.

Issue 18 and 19 – written reasons and internal review

Section 28(8) provides the Commission must provide, *to the complainant,* reasons for its decision following an assessment. Under section 41 it must provide reasons for action taken pursuant to s39, subsequent to an investigation, and in this instance the respondent is provided with reasons. In neither of these instances is there a right of review afforded to the respondent against these decisions, although in both cases there is a right of review for the complainant (but no process of review explained). In general there is no obligation to provide reasons as a matter of course to the respondent, or a right of review afforded to the respondent to the complaint. This is a fundamentally unbalanced approach and in breach of universally accepted rules of due process.

The process of decision making in the Commission is not, in our experience, consistent, transparent or easily understood. As a matter progresses through assessment to investigation and ultimately, perhaps to the Director of Proceedings, the reasoning behind the decision making is not readily ascertainable. Despite the provision of a section 45 investigation report (which is *not* always provided, in

[7] *Health Care Complaints Act 1993* (NSW) s29A.

practice) the reasoning behind a decision to proceed with a prosecution is not clear. Avant supports the provision of written reasons for post assessment (but not mandatory provision of same) and post investigation decisions (mandatory), and in particular, the provision of reasons regarding the referral of matters to disciplinary hearings. The reasons should address those matters that the Director of Proceedings is to take into account pursuant to s90C of the Act.

It is Avant's submission that key decisions should be explained by the provision of adequate written reasons. Importantly in our view, there should also be a mechanism for decisions made following conferrals between the Medical Board (or other registration body) and the Commission to be reduced to writing which can be provided as a matter of course.

Without reasons, it is not possible to advise a practitioner as to whether or not any review - internal or judicial review of administrative action - should be sought. Review of administrative decision making is a fundamental right and as a matter of policy should be available to both Complainants and Respondents.

The Commission cannot put forward the argument that the ability of the respondent to provide a response is a substitute for a right of review (In any event a response can be, and is, in practice, demanded by the Commission pursuant to section 21A which changes that nature of that "ability" to respond from a right to a legal duty to comply). An opportunity to respond or make submissions in relation to an allegation contained in a complaint forms part of the core content of the *audi alteram partem* rule. The provision of adequate, explanatory reasons by a decision maker is an entirely different matter.

Issue 20 – Peer Review

Avant supports this proposal.

The peer reviewer is an integral part of the process of self regulation and expert assessment. There are many concerns in regard to the capacity, quality and suitability of peers. Avant supports the gathering of further information and expert review in the event of a disagreement between the Board and the Commission.

Avant notes the Commission's comments that where there are conflicting reports there would be difficulty in arguing that there is a generally acceptable standard of conduct. In our view, where there are conflicting reports, and the conflict is unable to be resolved, proceedings against the practitioner should be terminated as it would be very unlikely that any decision maker could be comfortably satisfied, on that basis, that the requisite standard had been breached.

Issues 21 and 22 - Peer Review and Experts

Avant supports these proposals however in our view, the seeking of an expert review should not necessarily be limited to occurring at the end of the investigation. We agree with the comments from the Nurses Association that peers are required to assume a set of facts and proceed to base their expert opinion on these facts. Those facts may not be correct which has the potential to undermine the opinion in its entirety. The better course is for a process of continued review to take place, and for changes and modifications to be reassessed, as necessary, and in particular that the peer reviewer is given ***all*** the material upon which the Commission intends to rely to the extent that it relates to the questions asked of the reviewer. That same material must also be provided to the respondent. At the present time, the Commission does not routinely provide all the material under consideration to the respondent. What is only provided is what the particular officer considers to be "relevant".

Issue 23 – Notice to Respondent

Avant supports this proposal.

Issue 24 – Serious Course of Action

Avant does not support this proposal.

If the Board and the Commission cannot agree on a proposed course of conduct put forward by one or the other there would no doubt be good reasons for such an impasse. It is crucial, in our view, that a fair process demands that in the event of such an impasse, the matter is reviewed by a differently constituted committee, or if necessary a review panel. The rarity of this would not impose an unacceptable burden on resources. It is manifestly unfair to a respondent to proceed upon the most serious avenue available merely because consensus cannot be reached. The proposed approach is unreasonable and has the potential to waste public resources and bring the process into disrepute by proceeding from a false position. Prosecuting a respondent before a disciplinary hearing, for example, with all the attendant resource investment, distress to the parties and often irreparable damage to the practitioner's reputation, should only be a course embarked upon for good, cogent and articulated reasons, not because of a failure to find those reasons.

Issue 25 – Internal Review

There is currently no process for results of reviews or audits carried out to be made available to the public. As it is an important means of achieving transparency and public accountability, Avant supports this proposal in principle whilst remaining mindful of the administrative burden it would impose upon the Commission.

Issue 26 – Open Disclosure

Avant does not support the proposal.

We do not support the proposal that the Commission adopts the Open Disclosure Policy of NSW Health. We do support any measures that open the Commission processes to scrutiny and accountability, and compel a "process of providing an open, consistent approach to communicating with relevant parties" however we do not see the adoption of PD2007_040 as being appropriate. Nor do we endorse the adoption of the severity rating (SAC) used by NSW Health. The perspective of the Commission in dealing with and investigating complaints is often quite different from that of the public bureaucracies to which the NSW Health policies and directives apply.

Issue 28 – Reporting obligations of employers and health services

Avant does not support this proposal.

There are already provisions in the *Health Services Act* and the *Medical Practice Act* that enable the reporting of findings, and serious concerns or grounds for complaints to Area Health Services, Registration Boards and employers in various circumstances. Routine notification by the Commission to an employer is uncalled for and a breach of a healthcare professional's right to privacy, and rights to a fair hearing by an unbiased decision maker. Notification of a complaint to a healthcare professional's employer should only be made where there is some identifiable reason for doing so such as where the practitioner presents a danger to the health and safety of the public (in which case it is more than likely that the Medical Board will exercise its powers under s66 and subsequently notify the employer).

This is particularly important because of the potential to unfairly prejudice an employer's view of a healthcare professional, if an unfounded (or even substantiated) complaint is made against a person and a lengthy investigation ensues. It may be years before the investigation is complete and in the interim there is the potential for the person's workplace to become rife with speculation, innuendo and damage that is impossible to control. Even in circumstances where a complaint that has real basis is being investigated, the potential for disproportionate damage to the career of the person is very real and hard to calculate. It is impossible, in our view, to overestimate the detrimental effect that a complaint to the Commission has on a health professional. It is a matter of frequent grievances to us from our membership that a respondent feels he has been pronounced guilty before he or she has been tried. It does nothing for this perception of unfair treatment to find that one's employment is under extreme and unwarranted scrutiny because a complaint has been made, and there are many sad cases of practitioners being forced out of their place of employment not because of any finding against them but because of a poisoned work environment.

Issue 29 – When HCCC asks for response from AHS, should AHS provide information concerning other complaints within its knowledge to the HCCC?

Avant does not support this proposal.

We oppose this proposal. It is fundamental to fair process that a respondent to a complaint (or indeed any allegation) should know the case that he or she is required to answer. Basic tenets of procedure limit the seeking of information to that which is relevant to the issues, in this case the investigation which is curtailed by the scope of the inquiry into the complaint - and should become not an unlimited, uncontrolled fishing expedition. The extensive powers of coercion, investigation and determination already held by the Commission should only be used, in our view, with circumspection and never without reasonable belief as to the necessity of applying of such powers. It is inappropriate to consider that such an intrusive and excessive power should be used against an individual, when there are no countervailing provisions requiring accuracy, protection or justification.

If an Area Health Service is in possession of information about a healthcare professional whom the AHS reasonably believes poses a risk of harm to the public then it should notify the Commission of its concerns, or refer the matter to the Board under existing legislative provisions.

7. Is there anything you would like to suggest which would assist the Committee in the exercise of its oversight role?

In all, despite the shortcomings identified in the submissions before the Committee, Avant considers the system of co-regulation works to the ultimate advantage of the people of NSW by providing an appropriate mechanism for the public purposes for which it has been designed. Public expectation is also served by maintaining confidence in the conduct of these institutions and the integrity of their processes and values. Avant considers that public scrutiny of the functions and operation of the co-regulatory system, through open hearings of the Parliamentary Committee, is an important aspect of open, responsible and accountable government, and provides an appropriate mechanism for change.

Questions Taken On Notice

1 There has been a lot of publicity about the high premiums that doctors are required to pay for insurance in certain specialities or areas of practice, which in turn deters doctors from wanting to practise in those areas. Does Avant have any view on what can be done to make the system work more efficiently?

Avant works closely with a variety of Governmental bodies with the intention of protecting its members from increasing premium rates.

Avant supports a national long term care and support scheme for people with profound or severe disabilities subject to such a scheme not resulting in any material increase to the already significant cost of medical indemnity cover for Australian Doctors.