

ADVOCACY CENTRE
PUBLIC INTEREST

31 March 2010

The Committee Manager
Committee on the Health Care Complaints Commission
Parliament House
Macquarie Street
SYDNEY NSW 2000

Our ref: PRO08-6159

Dear Mr Keenan

Inquiry into the operation of the Health Care Complaints Act 1993.

I refer to your letter of 17 March 2010, and provide the following responses to the questions asked by the Committee on the Health Care Complaints Commission:

1. Input in relation to the proposed national health care complaints handling scheme

The Public Interest Advocacy Centre (PIAC) had the following input to the national health care complaints handling scheme:

- PIAC made a submission in response to the consultation paper, *Proposed arrangements for handling complaints, and dealing with performance, health and conduct matters* (the National Consultation Paper).¹ PIAC's submission, *Maintaining consumer focus in health complaints: the key to national best practice?*, was made on 24 November 2008.
- PIAC participated in a meeting in Sydney on 21 October 2008 held to elicit public comment on the National Consultation Paper.
- PIAC made a submission in response to the Senate Community Affairs Committee Inquiry into the National Registration Scheme for Doctors and Other Health Workers on 4 May 2009², and gave oral evidence to that Inquiry on 14 July 2009.
- PIAC made a submission, *Putting healthcare rights to work*⁴, to both the Federal Government and the Senate Community Affairs Committee on the exposure draft of the Health Practitioner Regulation National Law 2009 (Cth) in July 2009.
- PIAC also participated in several forum discussions convened by the Consumers Health Forum on the proposed national registration scheme.

While it has taken the opportunity to make the above contributions, PIAC remains concerned that other organisations and individuals might not have the capacity or time to contribute to the consultation process. The meeting held in Sydney on 21 October

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2008 was the only consultation meeting held for the whole of Australia on the National Consultation Paper. Only a few consumer representative organisations were invited. The invitees were largely national organisations despite the fact that the model in the discussion paper had potential to remove existing rights of health consumers in the state jurisdictions.

The deadlines for response to several of the public discussion papers and drafts have been very short indeed. This makes it very difficult for organisations with limited resources and busy schedules to respond.

PIAC's attitude to the current legislative arrangements in relation to the national registration scheme is set out below.

2. Key elements of the scheme

PIAC, in its submission, *Maintaining consumer focus in health complaints: the key to national best practice*³, set out the principles that should be reflected in a health complaints system. PIAC also identified in that submission the elements of the scheme as set out in the National Consultation Paper that failed to comply with these principles.

PIAC notes that the NSW Minister for Health is now proposing that legislation will be introduced into the NSW Parliament in the near future that will preserve the Health Care Complaints Commission (HCCC) as the independent body that assesses, investigates and prosecutes health care complaints in NSW.

PIAC's preferred position is that a properly resourced and independent national healthcare complaints body should deal with all healthcare complaints, Australia wide. However, PIAC recognises that this option has not been proposed or adopted as part of the current reform process, and that the compromise solution, negotiated by the NSW Government, whereby the HCCC keeps its existing role in NSW, protects the existing rights of NSW consumers.

PIAC submits that NSW should not rest on its laurels in this area, and should strive to make the healthcare complaints process in NSW even more accountable, accessible and transparent.

3. Mandatory provision of written reasons

PIAC notes sections 28(8) and 41(1) of the *Health Care Complaints Act 1993* (NSW) (the HCC Act).

Section 41(1) mandates the provision of reasons for post investigation decisions to all parties. Section 28(8) mandates the provision of reasons for assessment decisions to complainants only.

However, there is no obligation to provide reasons for assessment decisions to parties other than complainants, and it should be noted that, although in practice reasons are given in response to section 28 reviews, nothing in the HCC Act mandates this.

PIAC also notes that there is a vast difference between the mere provision of information about under what section of the legislation a complaint was not proceeded with, and an response giving a party details of how and why the HCCC made a particular decision. As noted in PIAC's submission, the HCCC's practice was previously to do the former, but now it is attempting to do the latter in most cases. This new approach is welcomed.

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PIAC submits that a general provision in the legislation that requires the HCCC to provide detailed reasons for decisions to all parties in a timely manner would enhance and reinforce the current policy of the HCCC. PIAC notes that, for example, section 28(8) of the Act has not changed since 1993, yet it is only relatively recently that the HCCC has provided detailed reasons for assessment decisions to complainant.

4. Internal reviews

PIAC is disappointed that the HCCC appears to consider a more transparent review system to be 'overly bureaucratic and unduly cumbersome'. The HCCC's own response confirms a process where the Commissioner effectively reviews his own decisions on assessment and on action after investigations. This process could not be seen by complainants as either a transparent process or an independent process.

Ironically, the current practice of reviews drafted by Resolution Officers and 'signed off' by the Commissioner often provides the complainant with a more comprehensive explanation of the HCCC's original decision-making process, but does not provide an independent review of that process.

Bodies such as Centrelink operate both efficiently and effectively with a detailed internal and external system of review and appeal of decisions.

The fact that the HCCC makes all of its significant decisions about health practitioners in consultation with the relevant registration board may add to the complexity in overturning HCCC decisions, but this is no reason to deny consumers the right to an independent review of decisions made by the HCCC.

PIAC is perplexed by the comment of the HCCC that there is also the opportunity for judicial review of decisions by the Commission (page 21 of the HCCC submission).

Whilst this is accurate in the sense that all decisions of government authorities are subject to challenge in very limited circumstances, on procedural grounds only, there is no statutory review of HCCC decisions to the Administrative Decisions Tribunal (ADT), unlike some other NSW authorities and commissions (except for a very narrow right of appeal for unregistered health practitioners under section 41(c) of the Act).

The alternative to an ADT review is judicial review of administrative decisions to the Supreme Court. This is an expensive option, outside the financial reach of most health consumers, and in an area where a consumer is unlikely to be granted legal aid. Supreme Court litigants also face a significant risk of adverse costs orders if they lose, which in itself deters most potential litigants with even minimum assets or savings.

PIAC is disappointed that the HCCC would suggest this option as a serious alternative to a statutory independent internal review process.

PIAC would, however, welcome the introduction of a statutory right of appeal to the ADT from the HCCC, after the conclusion of an independent internal merits review process.

5. Principles for a health care complaints system

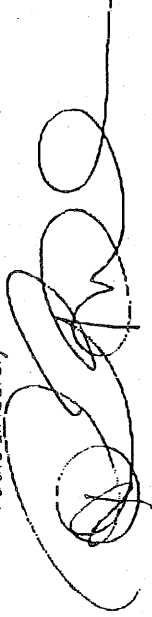
PIAC does not have any disagreement with the principles set out in the Committee's discussion paper. These are similar to principles set out by PIAC in previous submissions. In the submissions to the Committee, *Enhancing the rights-based approach to health complaints in NSW*⁶, and *Still supporting a rights-based approach*⁷, PIAC sets out its suggestions how the NSW healthcare complaints system can better meet these principles.

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PIAC thanks the Committee for the opportunity to provide these further comments and looks forward to continuing to have opportunities to contribute to the Committee's work in overseeing the operations of the Health Care Complaints Commission.

Should the Committee have questions about any aspect of this response, please don't hesitate to contact PIAC's Solicitor – Health Policy and Advocacy, Peter Dodd, on 02 8898 6523 or by e-mail to pdodd@piac.asn.au.

Yours sincerely



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- 1 Australian Health Ministers' Advisory Council, Practitioner Regulation Subcommittee, Health Workforce Principal committee. *Proposed arrangements for handling complaints, and dealing with performance, health and conduct matters* (2008).
 - 2 Peter Dodd, *Maintaining consumer focus in health complaints: the key to national best practice* (2008) Public Interest Advocacy Centre <http://www.piac.asn.au/publications/pubs/sub2008112_20081124.htm> at 31 March 2010.
 - 3 Robin Banks, *Submission to Senate Community Affairs Committee inquiry into the National Registration Scheme for Doctors and Other Health Workers* (2009) Public Interest Advocacy Centre <http://www.piac.asn.au/publications/pubs/sub2009030_20090504.htm> at 31 March 2010.
 - 4 Peter Dodd, *Putting healthcare rights to work: The Health Practitioner Regulation National Law, a step closer to best practice in healthcare complaints* (2009) Public Interest Advocacy Centre <http://www.piac.asn.au/publications/pubs/sub2009071_20090717.htm> at 31 March 2010.
 - 5 Dodd, above n 2.
 - 6 Peter Dodd, *Enhancing the rights-based approach to health care complaints in NSW: submission to the Parliamentary Joint Standing Committee into the Health Care Complaints Commission* (2008) Public Interest Advocacy Centre <http://www.piac.asn.au/publications/pubs/sub2008121_20081212.htm> at 31 March 2010.
 - 7 Peter Dodd, *Still supporting a rights-based approach: submission to the inquiry of the NSW Parliamentary Joint Standing Committee on the Health Care Complaints Commission into the operation of the Health Care Complaints Act 1993 (NSW)* (2009) Public Interest Advocacy Centre.