

**REVIEW OF THE 2008-09 ANNUAL REPORT
OF THE HEALTH CARE COMPLAINTS COMMISSION**

ANSWERS TO QUESTIONS ON NOTICE

Question 1

In relation to the College of Nursing, are there any professional development courses available where the Commission makes a regular contribution?

[Transcript of evidence, page 6]

The Commission has offered and makes presentations to the College of Nursing on request. Staff from the Commission's Investigations Division gave presentations to the College of Nursing in March 2008 and November 2009.

The Commission also made ten other presentations in 2008-09 that were specifically directed to nurses and midwives – including four presentations at universities.

In addition, the Commission has provided an article to “LAMP” – the magazine of the NSW Nurses Association – on how the Commission handles complaints about nurses and midwives.

Question 2

Do you make any assessment of people who are of non-English-speaking background or who do not have appropriate literacy levels as to whether they are making it into the complaints process?

[Transcript of evidence, page 6]

The Commission regularly makes presentations on the Commission's role and work to health consumer groups from culturally and linguistically diverse (CALD) backgrounds.

In 2008-09, this included presentations to:

- Migrant Services Inc.
- African community leaders
- Indian-Pakistani community members
- Filipino New Settlers
- Filipino Senior Citizens Group.

The Commission arranged for its translated information resources to be included on the Multicultural Health website of the Department of Health.

The Commission also used the email link service of the Community Relations Commission to provide its translated information resources to community groups representing ten community language groups in NSW. These community groups were encouraged to contact the Commission to arrange presentations to their communities.

As a result of the Commission's liaison with the Department of Immigration and Citizenship, the Department has agreed to include information about the Commission, and the Commission's counterparts in other Australian jurisdictions, in the 2010 edition of the Department's information resource "*Beginning a life in Australia*". This resource is translated into 37 languages, and is available through the Department's website at <http://www.immi.gov.au/living-in-australia/settle-in-australia/beginning-life/booklets/english.htm>. The information about the Commission and its counterparts is currently being translated and will be available shortly.

The Commission recently made a presentation to the Refugee Settlement Service Providers Forum, which was attended by 94 service provider representatives from across NSW. The forum was hosted by the Refugee Settlement Programme of the Department of Immigration and Citizenship.

On 29 July 2009, the Commission was awarded a certificate of commendation for its publications "*Concerned about your health care?*" and "*Resolve concerns about your health care*", which are available in 20 community languages on the Commission's website. As a result, bilingual Commission staff were interviewed by SBS Radio for the Spanish and Filipino communities.

The Commission employs a number of staff who can speak in a language other than English – Italian, German, Spanish, Croatian, Macedonian, Serbian, Hindi, Punjabi, and Tagalog (Filipino) – and who are available to assist complainants speaking these languages. Where appropriately qualified, these staff are paid under the Community Language Allowance Scheme.

Question 3

At last year's hearing, you expressed the view that it might be suitable for the Commission and the Area Health Services to have input into practitioner area education conducted by the New South Wales Medical Board, and you undertook to follow this up with the chief executives of the Area Health Services. Has there been any progress?

[Transcript of evidence, pages 6-7]

The comments about possible input by the Commission into the education of medical practitioners were in the specific context of an earlier question and answer regarding the introduction of a legislative requirement for mandatory reporting by medical practitioners of

other practitioners suspected of engaging in sexual abuse, drug or alcohol abuse, or conduct involving a gross departure from accepted standards – see page 18 of the transcript of evidence at the Committee’s hearing on 29 April 2009.

Against that background, the Commission provides the following information:

The NSW Medical Board published guidelines for medical practitioners on the issue of mandatory reporting. These guidelines are available on the Medical Board’s website.

On 25 November 2009, the Commissioner gave a presentation to an “*Obstetric Malpractice*” conference in Sydney about the development of the mandatory reporting requirements for medical practitioners.

In November 2009, the Commission also provided a background briefing on mandatory reporting to the following health professional colleges, with an offer to make presentations on the subject:

- Royal Australian College of General Practitioners
- Royal Australasian College of Surgeons
- Royal Australasian College of Physicians
- Royal Australian and New Zealand College of Obstetricians and Gynaecologists
- Royal Australasian College of Radiologists
- Royal Australian and New Zealand College of Psychiatrists
- Australasian College for Emergency Medicine
- Australasian College of Dermatologists.

The Commissioner’s column in the 22 January 2010 edition of “*Australian Doctor*” – the leading publication for general practitioners in Australia – discussed the mandatory reporting obligations of medical practitioners.

The Commission’s Communications Officer made a presentation on mandatory reporting to a “*Medico-Legal*” conference in Sydney on 23 March 2010.

Finally, the Commission notes that the national registered health profession boards have developed detailed guidelines on mandatory reporting that will be available to registered health practitioners through the boards’ websites.

Question 4

When answering a question relating to complaints around medical centres at correctional and detention facilities, you responded that:

There is a proportion of complaints around the methadone, buprenorphine distribution in jails, and that is a significant number. That is a difficult matter of administration for Justice Health, because there is a problem of diverting and trafficking internally, and we get complaints from people that say they have

been unjustly thrown off that program, and the explanation from Justice Health will be that they have been suspected of diversion ... It might be in the description on the issues with the computer search. We could get that.

How many would there have been out of that category?

[Transcript of evidence, page 8]

In 2008-09, the Commission received 138 complaints about correctional and detention facilities, raising 238 issues. 41 of these issues (17.2%) related to “medication”. However, this figure includes a range of medication issues that did not necessarily involve methadone or buprenorphine.

Question 5

Do you have the same proportion of complaints about the system in medical centres at correctional and detention facilities as opposed to practitioners, as you would in the health system outside the justice system?

[Transcript of evidence, page 9]

As noted above, the Commission received 138 complaints about correction and detention facilities in 2008-09. Linked to these cases were four additional complaints about health service providers outside Justice Health – one about a medical practitioner, two about public hospitals, and one about a psychiatric hospital.

Accordingly, in 2008-09, the Commission received a total of 142 complaints about correction and detention facilities and associated providers. Only five of these concerned private health service providers.

In 2008-09, the Commission received a total of 3,360 complaints. As noted above, 142 of these concerned correction and detention facilities and associated providers. Of the remaining 3,218 complaints, 1,311 concerned public health service providers, with 789 relating to public health organisations and 522 relating to individual health practitioners in the public health system.

In general, where the complaint concerns issues of a systemic nature, the Commission records the complaint as being about the relevant health organisation. Complaints containing allegations of improper or unreasonable conduct by individual practitioners are recorded as complaints about those particular practitioners.

Question 6

Are private providers of medical services in the jails over-represented or under-represented in complaints?

[Transcript of evidence, page 9]

In 2008-09, the Commission received 138 complaints about correction and detention facilities. Only five of these (3.6%) were about the Junee private correction facility.

The Commission does not have ready access to data that would allow it to relate these figures to either the general number of services delivered by private health facilities, or the proportions of prisoners held in public and private correctional facilities in NSW.

Question 7

Of the 138 complaints from persons in correctional and detention facilities, can you identify which facilities the complaints came from?

[Transcript of evidence, page 9]

The Commission has set out below an analysis of the complaints that it received in 2008-09 about correction and detention facilities, by reference to the particular facility where the health service was provided. (For 27 complaints, the location of the Justice Health facility was not specified in the Commission's recording of the complaint.)

Health service provider	
Justice Health (Matraville)	59
Justice Health (facility not specified)	27
Justice Health (Goulburn)	9
Justice Health (Silverwater)	8
Justice Health (Wellington)	6
Justice Health (Long Bay)	5
Junee Correctional Centre	5
Justice Health (Kempsey)	3
Justice Health (South Windsor)	2
Justice Health (Berrima)	1
Silverwater Correctional Centre	1
Mid North Coast Correctional Centre	1
Cessnock Correctional Centre	1
Wellington Correctional Centre	1
Emu Plains Correctional Centre	1
Justice Health (Emu Plains)	1
Frank Baxter Juvenile Justice Centre	1
NSW State Coroner's Court (Glebe)	1
Justice Health (Parramatta CC)	1
Villawood Immigration Detention Centre	1
Justice Health (Bathurst)	1
Justice Health (Grafton)	1
Goulburn Correctional Centre	1
Total	138

Question 8

With regard to Dr Gorman's appeal, the Commission was recently subject to some serious criticism from the Court of Appeal with respect to its use of the power under section 66 of the Health Care Complaints Act to extend the suspension of medical practitioners. Do you consider that the extensions complained about are indicative of the manner in which the Commission uses section 66, and what are you doing to address the Court's criticism?

[Transcript of evidence, page 10]

The Commission has now had the opportunity of considering the Court of Appeal's judgment of 3 March 2010 in the case of *Gorman v NSW Medical Board*.

The case involved an appeal by Dr Gorman against a decision by the Medical Tribunal on 2 July 2009 to confirm a decision by the NSW Medical Board to suspend Dr Gorman from practising medicine, and subsequent decisions by the Board to extend the period of suspension. The Court of Appeal dismissed the appeal.

The power to suspend a medical practitioner

At the outset, it should be emphasised that it is the Medical Board – not the Health Care Complaints Commission – that has the power to suspend a medical practitioner. Section 66 of the *Medical Practice Act* provides that the Medical Board must suspend a medical practitioner where the Board is satisfied that it is “*appropriate to do so for the protection of the health or safety of any person or persons*” or that suspension is “*otherwise in the public interest*”.

It is also the Medical Board – not the Commission – that has the power to extend the period of suspension. This power is conferred by section 67 of the *Medical Practice Act*.

Investigation by the Commission

Where the Medical Board suspends a medical practitioner, section 66B(1) of the *Medical Practice Act* requires the Board to promptly refer the matter to the Commission for investigation. (The Board's referral must be made “as soon as practicable” and, in any event, within seven days after the suspension.)

Sections 66B(2) and (3) stipulate how the Commission must deal with such a referral. Section 66B(2) provides that that the Commission must deal with the matter as a “complaint” about the practitioner. Section 66B(3) requires the Commission to investigate the complaint, and also – if the Commission “*considers it appropriate to do so*” – to refer the complaint to the Medical Tribunal or to a Professional Standards Committee “*as soon as practicable after the completion of the investigation*”.

Section 29A of the *Health Care Complaints Act* provides that the Commission's investigation of any complaint must be conducted "*as expeditiously as the proper investigation of the complaint permits*".

The Court of Appeal's comments

The Court of Appeal questioned the time taken by the Commission between July and November 2009 to investigate the issues giving rise to Dr Gorman's suspension, and also the time taken by the Commission's Director of Proceedings to determine whether disciplinary proceedings should be instituted. The Court pointed out that Dr Gorman was suspended from practice pending the outcome of the Commission's complaint-handling processes.

Specifically, the Court of Appeal observed that it "*may be a matter of debate*" as to whether the Commission's investigation between July and November 2009 had been expeditious, and that "*prima facie*" that did not appear to have been the case. However, it is important to note that the Court also said: "*I accept and acknowledge that the Commission has not been heard on the subject*".

The chronology of the matter

The overall chronology of the matter is as follows.

Background

29 August 2008 – A performance assessment was conducted of Dr Gorman's treatment of a number of patients.

28 October 2008 – Following its consideration of the report on the outcome of the performance assessment, the Medical Board's Performance Committee resolved that a complaint should be made to the Commission about Dr Gorman. The Performance Committee also suggested that the Board should hold an inquiry under section 66 of the *Medical Practice Act* to determine whether Dr Gorman should be suspended or conditions placed on his practice.

28 November 2008 – The Medical Board notified the Commission of the complaint about Dr Gorman, and also advised the Commission that the Board would be holding a section 66 inquiry on 4 December 2008.

2 December 2008 – The Commission assessed the complaint as being suitable for investigation, subject to consultation with the Medical Board.

5 December 2008 – The Medical Board decided to suspend Dr Gorman.

9 December 2008 - The Medical Board advised the Commission that it had suspended Dr Gorman.

11 December 2008 – The Commission consulted with the Medical Board, and decided to investigate the matter, as required by section 66B of the *Medical Practice Act*.

16 December 2008 – The Commission notified Dr Gorman of the investigation.

The Commission's investigation up to July 2009

9 January 2009 – The Medical Board provided the Commission with its written decision on the outcome of its section 66 inquiry. The Commission's Director of Investigations then arranged for the allocation of the file to an investigation officer and suggested certain lines of inquiry for the investigation.

11 January 2009 – The Commission required Dr Gorman to provide copies of relevant medical records and invited his response to the complaint.

12 January 2009 – The Commission wrote to the Medical Board to arrange for statements to be obtained from the medical practitioners who had conducted the performance assessment of Dr Gorman.

17 February 2009 – Dr Gorman advised the Commission of arrangements for accessing his medical records and provided his response to the complaint.

19 February 2009 – The Commission asked the practice manager of the clinic at which Dr Gorman had been practising to provide the medical records. The medical records were received on 2 March 2009.

3 and 9 April 2009 – The Crown Solicitor's office provided the Commission with statements by the medical practitioners who had conducted the performance assessment of Dr Gorman.

11 May 2009 – The Medical Board advised the Commission that Dr Gorman had appealed to the Medical Tribunal against his suspension by the Board, and that the hearing of the appeal was listed for eight days. The Board said that the evidence to be considered by the Tribunal and the outcome of the appeal might be relevant to the Commission's investigation.

14 May 2009 – The Commission asked the practice manager of the clinic at which Dr Gorman had been practising to provide further medical records.

25 May 2009 – The Commission asked the Medical Board to provide the medical records for the patients reviewed during a performance assessment of Dr Gorman in October 2007.

10 June 2009 – The Commission investigator attended the Medical Board, inspected 12 volumes of documents concerning Dr Gorman, and obtained copies of documents relevant to the investigation. The investigator also asked the Medical Board to supply a transcript of the Board's section 66 inquiry and of Dr Gorman's appeal against his suspension.

2 July 2009 – The Medical Tribunal decided to dismiss Dr Gorman's appeal against his suspension.

8 July 2009 – The Commission received a copy of the Medical Tribunal’s decision.

The Commission’s investigation from July to November 2009

16 July 2009 – The Commission sought an expert opinion on the matter.

9 September 2009 – The expert provided his opinion, which was that Dr Gorman’s treatment of five patients during the performance assessment on 29 August 2008 fell “significantly below” the standard expected of a medical practitioner of an equivalent level of training and experience.

21 September 2009 – The Commission provided Dr Gorman with a copy of the expert’s report, advised him that it proposed to refer the matter to the Director of Proceedings for the consideration of disciplinary proceedings, and invited his submissions within 28 days, as required by section 40 of the *Health Care Complaints Act*.

25 September 2009 – Dr Gorman asked the Commission to provide him with a copy of the Commission’s brief to the expert, which the Commission did on 7 October 2009.

21 October 2009 – The Commission received Dr Gorman’s submissions on the matter.

23 October 2009 – The Commission finalised its investigation report, and provided a copy of this report to the Medical Board for the purposes of consultation with the Board about the matter, as required by section 39(2) the *Health Care Complaints Act*.

29 October 2009 – The Commission received further material in relation to the matter from Dr Gorman.

17 November 2009 – The Medical Board advised the Commission that it agreed with the Commission’s proposal to refer to the matter to the Director of Proceedings.

20 November 2009 – The Commission advised Dr Gorman that it had decided, following consultation with the Medical Board, to refer the matter to the Director of Proceedings.

Consideration of the matter by the Director of Proceedings

4 December 2009 – The Commission finalised its preparation of the brief of evidence and provided this brief to the Director of Proceedings.

31 March 2010 – Following her consideration of the brief, the Director of Proceedings decided that, subject to consultation with the Medical Board, the Commission should institute disciplinary proceedings against Dr Gorman before the Medical Tribunal.

1 April 2010 – The Director of Proceedings advised the Medical Board of her proposal to institute disciplinary proceedings against Dr Gorman before the Medical Tribunal, and requested the Board’s consultation advice on the matter, as required by section 90B(3) of the *Health Care Complaints Act*.

15 April 2010 – The Medical Board advised the Director of Proceedings that the Board agreed with her proposal.

30 April 2010 – The Director of Proceedings advised Dr Gorman of the decision to institute disciplinary proceedings against him before the Medical Tribunal. The Commission's Legal Division is currently drafting a formal complaint against Dr Gorman for lodgement with the Medical Board, so that the Board may refer the complaint to the Medical Tribunal.

Discussion

The Court of Appeal's concerns about an apparent lack of expedition in the Commission's investigation between July and November 2009 can be adequately answered as follows:

- The Commission needed to obtain an expert opinion on Dr Gorman's conduct. The expert opinion was requested promptly and obtained in September 2009.
- The *Health Care Complaints Act* required the Commission to seek Dr Gorman's submissions on the matter, and on the proposal to refer the matter to the Director of Proceedings, as a matter of procedural fairness. The Act also required the Commission to allow Dr Gorman a period of 28 days to make any submissions. The Commission received Dr Gorman's submissions on 21 October 2009.
- The Act also required the Commission to consult with the Medical Board about its proposal to refer the matter to the Director of Proceedings. The Medical Board advised the Commission that it agreed with the Commission's proposal on 17 November 2009.

The Court's apparent concerns about the time taken for the Director of Proceedings to decide whether to institute disciplinary proceedings can also be answered as follows:

- The Commission generally allows a period of up to three months for a consideration of the brief of evidence and the making of a determination by the Director of Proceedings on the question of whether to institute disciplinary proceedings. In this case, and taking into account the Christmas break, the determination of 31 March 2010 fell only slightly outside that timeframe.
- The Act also requires the Director of Proceedings to consult with the Medical Board about the matter. The Director of Proceedings promptly arranged for such a consultation, and the Medical Board advised the Director of Proceedings of its agreement with her proposal on 15 April 2010.

Question 9

Some junior doctors have made complaints in the media that they have been working very long hours and this could lead to errors in dealing with patients if they are fatigued. Could that be a factor, the pressure within the public hospital system?

[Transcript of evidence, page 12]

Junior doctors working long hours could be a factor – one of many factors – affecting the treatment of patients in the public health system.

The Commission's mechanisms for capturing and analysing complaint data have not been able to provide ready access to any meaningful information on this issue. However, at an anecdotal level, the Commission's experience is that it has rarely, if ever, received a complaint specifically alleging that the poor medical treatment in question was the result of the treating practitioner being fatigued as the result of working long hours. Furthermore, the Commission can only recall one matter in which a practitioner the subject of complaint raised the issue of their working long hours as a factor affecting their treatment of the patient.

RCA processes, with their emphasis on identifying any "systemic" factors that have led to adverse health events, may provide an avenue through which the issue of long working hours, and other "pressures" on health practitioners within the public health system, can be examined and addressed.