Submission

No 26

INQUIRY INTO THE OPERATION OF THE HEALTH CARE COMPLAINTS ACT 1993

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NSW HEALTH

The Hon Helen Westwood AM MLC
Chair
Committee on the Health Care Complaints Commission
Parliament of New South Wales
Macquarie Street
SYDNEY NSW 2000

Dear Ms Westwood

Inquiry into the Operation of the *Health Care Complaints Act 1993*

Thank you for your advice as to the Committee's resolution to conduct an inquiry into the above matter.

As you may be aware, a number of the issues encompassed by this review are also likely to arise in the development of the National Registration and Accreditation Scheme.

While the current timetable for the development of the national scheme is quite tight, I would expect any report prepared by the Joint Parliamentary Committee in relation to this current inquiry will be helpful in informing the NSW response to the development of the NRAS proposals.

In this context, the Department has prepared the attached paper, which sets out some relevant issues of background to assist the Committee in this matter.

If you have any further inquiries in regard to this matter please contact Leanne O'Shannessy, Director Legal and Legislation in on (02) 9391 9602.

Yours sincerely

Debora Picone AM
Director-General

17.12.08

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INQUIRY BY THE JOINT PARLIAMENTARY COMMITTEE ON THE HEALTH CARE COMPLAINTS ACT 1993

NSW DEPARTMENT OF HEALTH COMMENTS

I. BACKGROUND

a. Changes to the Legislative Complaints Scheme 1987 to 2008

The current NSW Health professional complaints system has developed in sophistication and coverage over the last twenty years, from the time the Health Complaints Unit was first established as a unit of the Department of Health.

Over these years, the NSW legislation has developed and adapted, beginning with the establishment of the Health Care Complaints Commission in 1994. There has also been an increasing focus on public protection, accountability and transparency and an enhancement of the powers of both the Health Care Complaints Commission and the NSW Medical Board to support these agencies in meeting this objective.

Some of these changes over this period are also broadly relevant to the issues the Committee is currently inquiring into. In particular:

1994 - Health Care Complaints Act 1993, which re-establishes the DOH Complaints Unit as an independent statutory body commences operation in July 1994.

2000 Commencement of Medical Practice Amendment Act, which inserted the Performance Assessment provisions in to the Medical Practice Act.

2005 Amendments to the Health Care Complaints Act and the Medical Practice Act as part of the Implementation of the Review of the Health Care Complaints Act, under taken by the (then) Cabinet Office, and to respond to the Final Report of the Special Commission of Inquiry into Camden and Campbelltown Hospitals

These changes, set out in the Health Legislation (Complaints) Act 2004, including expanded investigative and assessment powers and commenced in March 2005.

In August of that year, additional changes to the Health Services Act, which created a statutory obligation on the Chief Executive of a public health organisation to report suspected misconduct/unsatisfactory professional conduct of an employee or visiting practitioner also commenced.

2008 Amendments made in the Medical Practice (Amendment) Act 2008 to implement the 2007 and 2008 O'Connor reviews, as well as make other changes. The legislation included amendments to:

- Introduce provisions for mandatory reporting by registered medical practitioners of serious misconduct in the practice of medicine;
- Enhance the availability and use of information in the regulatory system by making legislative changes to ensure material relevant to a re-registration

application (including any or all complaints) - is available and considered when a de-registered medical practitioner seeks re-registration

- Enhance the transparency of disciplinary processes by establishing a presumption that Professional Standards Committee proceedings will be held in public and that decisions of the Medical Tribunal or a Committee will be made public;
- Improve the public protection focus of the Medical Practice Act by providing that "protection of the health and safety of the public" is the paramount consideration in respect of all functions and powers exercised under the legislation by any person.
- Improve the information available to regulators by establishing clear powers to obtain information from a practitioner at an "emergency" section 66 hearing
- Ensure the definitions of "unsatisfactory professional conduct" and "professional misconduct" clearly over a pattern or course of conduct arising from one or more complaints against the same practitioner.

II. NATIONAL REGISTRATION AND ACCREDITATION SCHEME

a. The Inter-Governmental Agreement (IGA)

As previously advised by the former Minister for Health in August of this year, in March 2008 the IGA was signed, whereby COAG agreed to introduce a National Registration and Accreditation Scheme (NRAS) for health professional registration to commence operation on 1 July 2010. The new scheme proposed under the IGA will cover issues currently addressed by state registration schemes, including the processes for managing and investigating complaints (with some elements to be retained at the state level). Development of the legislation therefore necessarily involves consideration of state/territory models of legislation such as the Medical Practice and the Health Care Complaints Act.

Issues relating to the complexity of the regulatory system, the appropriateness of assessment and investigative powers and information sharing clearly need to be addressed in the NRAS complaints processes, and the NRAS Implementation Project will look at first instance to provisions at the state and territory level as possible guides for the design of the scheme on these and other issues.

Since August 2008 when the former Minister wrote to the Committee, further work has been undertaken in the implementation project, including the issuing of a series of Consultation Papers, the holding of a number of national, state and territory forums and the development of a more detailed implementation timetable to meet the COAG timeframes for implementation in July.

The Timetable provides for three legislative stages:

Stage One legislation passed by the Queensland Parliament, to establish the basic architecture of the scheme, including the Ministerial Council, the Workforce Advisory Council, Committees and Boards.

Stage One was completed on 13 November 2008, with the passage of the Health Practitioners Regulation (Administrative Arrangements) National Law Act 2008 through the Queensland Parliament.

Stage Two the substance of the national scheme including registration and accreditation processes, titles protections and disciplinary/complaints structures to be settled into a national model law, and passed through Queensland Parliament. It is proposed that the national model will initially be released as an Exposure Draft Bill for public comment and consultation.

Stage Two is due to be completed by June 2009.

Stage Three Each State and Territory to introduce legislation at the state/territory level to adopt the national legislation model and make any necessary local level changes to state/territory laws.

Stage Three is due to be completed by December 2009.

The above time frames were designed to ensure the NRAS commencement occurs in accordance with the 1 July 2010 deadline set by COAG in March 2008.

The timetable is however quite tight. It leaves only a limited period before the structure and content of the scheme is settled at the national level. Within those time constraints however, NSW Health recognises the comments and views, as well as any report prepared by the Joint Parliamentary Committee in relation to this current inquiry will help inform the States response to the development of the NRAS proposals.

In this context, two of the consultation papers released by the NRAIS (one dealing with complaints and performance, the other with information sharing) would be relevant to issues being considered in this inquiry. These papers, the proposals they contain and the submissions made by professional groups, regulators, consumers and other stakeholders will inform the further development of the national scheme to be proposed by the NRAS.

b. NSW Health Perspective on the NRAIS

NSW supports the structures and purposes set out in the IGA, which recognise national legislation as a mechanism to enable health professionals to move around the country more easily, reduce red tape, and promote a more flexible, responsive and sustainable health workforce.

As the Committee may be aware, the IGA does not address some aspects of the scheme in detail, including the complaints and disciplinary process. There is also a substantial degree of variation between jurisdictions in the models adopted to investigate, prosecute and resolve complaints, for example the NSW Health Care Complaints Commission model, whereby a body separate from the Boards is primarily responsible for investigations and prosecutions, does not reflect the structures in a number of other jurisdictions. The NSW regime includes a range of provisions designed to enhance accountability and transparency which go considerably beyond

provisions currently relied on in other jurisdictions – for example the recent proposals for mandatory reporting and increasing transparency of disciplinary processes.

From NSW Health perspective, the development of the laws in NSW over the last twenty years have ensured a high degree of transparency, accountability and emphasis on public protection. This includes not only the quarantining and protection of the investigative and prosecutorial functions from the day-to-day work of professional boards (through establishment of the HCCC) but also through innovative and effective processes for managing complaints and performance issues, such as performance assessment and the Impaired Registrants Panel.

Throughout the NRAS process to date, NSW Health has also run ongoing consultation with key stakeholders at the NSW level – including the Health Care Complaints Commission. Through this process and the public forums organised by the NRAS Implementation Project, NSW Health recognises that many NSW stakeholders hold strong views as to the need to maintain the current levels of accountability and transparency and the public protection focus of the NSW system. These views are shared by NSW Health.

As part of its participation in the implementation of the NRAS NSW Health has (and will continue to) seek to ensure the accountability and transparency inherent in the NSW model of an independent or quarantined investigator of health complaints is maintained. NSW will also seek to ensure that any national system of complaints, however configured, will include mechanisms to ensure at least as high a degree of accountability and transparency as currently enjoyed in NSW.

As the then Minister advised in August 2008, NSW Health will also be raising and pursuing recommendations made by the JPC in the *Report on the Investigation by the Health Care Complaints Commission into the Complaints made against Mr Graeme Reeves ("the Reeves Report")*.

III. MATTERS BEFORE THE JOINT PARLIAMENTARY COMMITTEE

The following sets out a number of preliminary comments from NSW Health on the specific issues identified in the Terms of Reference. Reference is also made to the Reeves Report, which also highlighted a number of these issues. The Department of Health also sought comments from area health services, as to any specific issues they wish the Committee to consider, and these are identified below.

1. The identification and removal of any unnecessary complexities in the New South Wales health care complaints system;

It is recognised that in the Reeves Report, the JPC identified issues of concern as to the complexity of the system as follows:

> *"... the health care complaints system remains a complicated series of processes with a multiplicity of interested parties .... The picture is further complicated by the existence of another ten registration authorities, and by the fact that since 2006 the Commission has also had responsibility for complaints made against unregistered practitioners.*

In recent evidence to the Committee, the Commission's Director of Proceedings highlighted the difficulties in determining how to respond to a complaint, due to inconsistencies between the various registration Acts. Specifically, she noted that not all registration bodies have a Professional Standards Committee, but may only have a Tribunal or Boards of Inquiry, so that all matters are dealt with by the one body, regardless of the seriousness of the complaint.

The Committee agrees that legislative complexity and inconsistencies may inhibit proper and timely investigation of health care complaints. Accordingly, the Committee is currently preparing a Discussion Paper on the oversight of Registration Authorities in NSW generally, which it intends to use a basis for recommending constructive change to the existing system". (pp 11-12)

NSW Health notes these issues, and anticipates the NRAS will provide a further opportunity to look at developing more standard practices across the whole range of health professional registration legislation.

At the same time, it is worth noting that the two different approaches adopted for managing lower level complaints (ie via a separately established professional standards committee or an external assessment committee reporting to the Board), were adopted in consultation with the various professions and boards and are designed to recognise the different needs of the differing groups, and the need to design systems with sufficient flexibility to operate effectively.

For example, most of the professions registered in NSW rely on an Assessment Committee/Board structure for dealing with lower level complaints. This enables an external committee to investigate these matters, with recommendations provided to the Board. The Board will then deal with these matters sitting as a formal inquiry, normally at the times allocated for the monthly Board meetings. This system works with great efficiency in the smaller professional groups, as the numbers of registrants and the number of complaints are relatively low, enabling direct Board involvement at the Board's regular meetings without adversely impacting on its day-to-day business.

Such an approach is not however so practical in the larges groups of registrants in the medical, nursing and midwifery area. For this reason those professions rely on a dedicated Professional Standards Committee structure operating externally to the Board.

As noted in the then Ministers advice to the Committee in August 2008, NSW Health is relying on the Medical Practice Act model in relation to negotiations and discussion on the NRAS. At the same time however, the above types of factors will continue to remain relevant and require consideration, as even at a national level, some professional groups will continue to operate from a very low registrant base – for example the NRAS Implementation Team have advised the national osteopaths registration scheme will only cover 1,200 registrants.

South Eastern Sydney Illawarra Area Health Service (SESIAHS) raised an issue with the timeframes established by the Act for a health service provider to respond to serious complaints. The AHS concern was that these timeframes are limited

especially when the issues may involve multiple stakeholders within the Health Service.

SESIAHS advised that complaints vary in their complexity and many have very serious concerns raised. These complaints quite often involve multiple services and providers. Section 22 of the HCCC Act requires the Commission to carry out an assessment of a complaint within 60 days. In order to assist the Commission in this assessment, the Health Service is required to respond to the complaint within 28 days of the request.

Allowing for internal processes, the short time frame can be difficult, particularly in complex cases, meaning that in some cases inadequate information may be provided. SESIAHS suggests that the Committee consider a provision whereby in exceptional circumstances the Commission may review the progress of the assessment at 60 days and defer the decision if it is considered more expedient to do so.

2. The appropriateness of the current assessment and investigative powers of the Heath Care Complaints Commission

As noted in the then Minister's response to the Reeves Report in August 2008, there have been ongoing discussions between the Department of Health and the HCCC in relation to a range of amendments proposed by the Commission to improve the assessment and investigation process.

NSW Health broadly supports the changes proposed by the Commission.

3. The effectiveness of information-sharing between the Health Care Complaints Commission and Area Health Services and Registration Authorities in New South Wales

As the Committee will be aware, and as set out at page 1 of these comments, recent legislative changes in NSW have moved to enhance the capacity of the public health system and the complaints systems to share relevant information. The changes made over the 2005-2008 period re-enforce and support information sharing. In particular:

- The introduction in 2005 of a statutory obligation on Chief Executive of a public health organisation to report suspected misconduct/unsatisfactory professional conduct of an employee or visiting practitioner also commenced;
- The provision of additional powers to the NSW Medical Board to require provision of information from a registrant when exercising its emergency suspension powers under section 66 of the Act;
- The enhancement of the powers and obligations of the NSW Medical Board to notify an employer of a medical practitioner, or the body at which a medical practitioner is a visiting medical officer or otherwise accredited, of any order or condition imposed on the medical practitioner under the Act. This would include any condition or order resulting from a finding of professional misconduct or unsatisfactory professional conduct on the part of the practitioner. The Medical Board also has the power to notify any subsequent employer or body at which a medical practitioner is accredited that the Board considers appropriate;
- The enhancement of the powers of the HCCC to obtain information at both the preliminary investigation and full investigation stage of their activities;

- Introduction of provisions for mandatory reporting by registered medical practitioners of serious misconduct in the practice of medicine;
- Establishing a presumption that decisions of the Medical Tribunal or a Professional Standards Committee will be made public;

From NSW Health perspective, policy directives are in place to require a public health organization to obtain and consider relevant complaints and disciplinary information at recruitment, for example, before employment or appointment of a registered health practitioner, a public health organisation must check the relevant health professional register to independently verify the persons current registration status, as well as contact the HCCC for any relevant complaints information. NSW Health is also in the process of finalizing a Service Check register, which, from early 2009 will allow all full-time, part-time, temporary and casual staff employed or appointed across NSW Health to be checked against a state wide NSW Health Service Check Register.

The Service Check Register is an electronic database that will contain records of critical actions taken in response to a risk assessment or an investigation involving a serious disciplinary matter. The register will also allow automatic interrogation of the NSW Register of Medical Practitioners. Area health services will be required to check the Service Check Register prior to recruiting or appointing new personnel or before finalising actions in relation to serious disciplinary matters under investigation.

South Eastern Sydney Illawarra Area Health Service (SESIAHS) raised an issue which also related to employment issues, noting the provisions for the Commission to notify an employing or contracting body of a health professional who is the subject of a complaint.

From time to time the Health Care Complaints Commission receives complaints regarding individual clinicians who are either employed or contracted to work at an AHS. These complaints may or may not involve the Health Service as part of the issues raised.

As the Act currently applies, the requirements to notify the employing/contracting body do not apply until after the Commission has completed their assessment of the complaint. An AHS may therefore be unaware that a clinician working at an AHS facility is the subject of a complaint. While this may occur only for a limited period of time, it may still pose a risk to the Health Service or patients being treated there. In addition, the AHS may also hold relevant information and or be investigating a concurrent complaint against the clinician which may be relevant when taken together with the HCCC complaint.

SESIAHS has therefore requested the Committee consider a provision that ensures employer Health Services be notified when a clinician is named as an individual respondent to a complaint. The provision would enable the Health Service to assess any risk that may be associated with the practices of the clinician and identify any trends of the issues.

IV. CONCLUDING COMMENTS

As previously advised by the former Minister for Health in August 2008, NSW Health remains of the view that given COAG has agreed to move to national legislation for

health professional registration, the best and most effective way to further develop and reform registration schemes, and establish improvements to the complaints and disciplinary processes, is through the new national model. This is particularly the case given the fast progress made on the national scheme to date, including the passage of the initial legislation to support the scheme through the Queensland Parliament.

It is recognised however that the Joint Parliamentary Committee is in a somewhat unique position to make comment on many issues of key importance to the NRAS, given its history overseeing the NSW Health Care Complaints Act since its commencement in 1994. As such, NSW Health would welcome any comments or advice or recommendations the Committee may wish to make on the issues currently under investigation, and looks forward to those comments and the assistance they will provide NSW Health in developing its response to the NRAS as it develops further.

NSW HEALTH
December 2008