

Submission

No 38

## INQUIRY INTO THE OPERATION OF THE HEALTH CARE COMPLAINTS ACT 1993

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**public interest**  
ADVOCACY CENTRE LTD

**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)*

27 October 2009

**Peter Dodd, Solicitor – Health Policy and Advocacy**



# Introduction

## The Public Interest Advocacy Centre

The Public Interest Advocacy Centre (PIAC) is an independent, non-profit law and policy organisation that works for a fair, just and democratic society, empowering citizens, consumers and communities by taking strategic action on public interest issues.

PIAC identifies public interest issues and, where possible and appropriate, works co-operatively with other organisations to advocate for individuals and groups affected. PIAC seeks to:

- expose and redress unjust or unsafe practices, deficient laws or policies;
- promote accountable, transparent and responsive government;
- encourage, influence and inform public debate on issues affecting legal and democratic rights;
- promote the development of law that reflects the public interest;
- develop and assist community organisations with a public interest focus to pursue the interests of the communities they represent;
- develop models to respond to unmet legal need; and
- maintain an effective and sustainable organisation.

Established in July 1982 as an initiative of the Law Foundation of New South Wales, with support from the NSW Legal Aid Commission, PIAC was the first, and remains the only broadly based public interest legal centre in Australia. Financial support for PIAC comes primarily from the NSW Public Purpose Fund and the Commonwealth and State Community Legal Services Program. PIAC also receives funding from the NSW Government Department of Water and Energy for its work on utilities, and from Allens Arthur Robinson for its Indigenous Justice Program. PIAC also generates income from project and case grants, seminars, consultancy fees, donations and recovery of costs in legal actions.

## PIAC's work on health complaints issues

PIAC was central to the consultation process leading to the enactment of the *Health Care Complaints Act 1993* (NSW) (the HCC Act). PIAC also provided legal representation in the New South Wales Royal Commission into Deep Sleep Therapy (the Chelmsford Royal Commission) and was involved in related processes dealing with the specific issues at the Chelmsford Hospital, but also more broadly, about the handling of serious complaints about medical practice in NSW.

PIAC continues to maintain a focus on ensuring effective complaints processes in respect of health care. In the past six months, PIAC has made several submissions in relation to healthcare complaints and the national registration of health professionals, including a response to the *Consultation Paper on Proposed arrangements for handling complaints and dealing with performance, health and conduct matters*<sup>1</sup>, a submission to the Senate Community Affairs Committee Inquiry into the National Registration Scheme for health practitioners<sup>2</sup>, and comment on the exposure draft of the Health Practitioner Regulation National Law.<sup>3</sup>

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<sup>1</sup> 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.html](http://www.piac.asn.au/publications/pubs/sub2008112_20081124.html)> at 26 October 2009.

<sup>2</sup> 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/sub2009050\\_20090504.html](http://www.piac.asn.au/publications/pubs/sub2009050_20090504.html)> at 26 October 2009.

# Inquiry into the operation of the *Health Care Complaints Act 1993* (NSW)

PIAC welcomes the opportunity to discuss the contents of the Discussion Paper entitled *Operation of the Health Care Complaints Act 1993* (the Discussion Paper) released by the NSW Parliamentary Joint Standing Committee on the Health Care Complaints Commission (the Committee).

## Response to previous PIAC submission items

PIAC notes that several recommendations in PIAC's earlier submission to the Committee<sup>4</sup> (PIAC's 2008 Submission) are set out as issues for further consideration in the Discussion Paper. In relation to all of these issues PIAC submits that the proposals in PIAC's 2008 Submission should be taken up by the Committee as law reform proposals to the NSW Government. In addition, in relation to **Issue 11**, PIAC now makes a supplementary submission that the *Health Care Complaints Act 1993* (NSW) should be amended to allow the Health Care Complaints Commission (HCCC) to accept complaints other than in those in writing.

In relation to **Issues 1, 2 and 3**, PIAC is still strongly of the view that the HCC Act should recognise the Australian Charter of Healthcare Rights (the Charter).

PIAC proposes that the objects of the HCCC should include recognition of the Charter as a statement of consumer rights that underpins the health system in NSW and Australia. PIAC also submits that the Charter should be taken into account when assessing and investigating complaints. The HCCC currently takes into account a variety of standards when assessing a complaint: the HCCC might seek an initial peer assessment; it might refer to existing standards or codes of conduct drafted by a registration board or a college of specialist practitioners; it might also refer to NSW Health policies and protocols. What PIAC is recommending is that the HCC Act also state that the Charter is a source of standards to be considered when assessing and investigating a complaint, and the Charter be included as a schedule to the HCC Act, to clearly identify the principles set out in the Charter for those participating in the assessment and investigation processes and for the information all NSW health care consumers.

In relation to **Issue 11**, PIAC maintains that the HCCC should have power to investigate complaints of its own motion. PIAC notes that this general proposition is also supported by the HCCC in earlier submissions. Supplementary to these proposed changes, PIAC now submits that the HCCC should also be able to accept verbal complaints.

PIAC notes that the inability of the HCCC to accept verbal complaints under the HCC Act adds to the difficulties the HCCC has in dealing with urgent complaints from consumers that could possibly be resolved by timely resolution assisted by HCCC officers. PIAC, in its earlier submission, referred to the particular difficulties that the HCCC encounters when it is dealing with urgent requests for assistance from prisoners because of the lack of power the HCCC has in initiating its own complaint without something in writing from the complainant.<sup>5</sup> The

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<sup>3</sup> Peter Dodd, *Putting health care 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.html](http://www.piac.asn.au/publications/pubs/sub2009071_20090717.html)> at 26 October 2009.

<sup>4</sup> Peter Dodd, *Enhancing the rights-based approach to health care complaints in NSW: submission to the Parliamentary Joint Standing Committee on the Health Care Complaints Commission* (2008) Public Interest Advocacy Centre <[http://www.piac.asn.au/publications/pubs/sub2008121\\_20081212.html](http://www.piac.asn.au/publications/pubs/sub2008121_20081212.html)> at 26 October 2009.

<sup>5</sup> Peter Dodd, *Enhancing the rights-based approach to health care complaints in NSW* (2008) Public Interest Advocacy Centre [6] <[http://www.piac.asn.au/publications/pubs/sub2008121\\_20081212.html](http://www.piac.asn.au/publications/pubs/sub2008121_20081212.html)> at 26 October 2009.

requirement of written complaints also creates an unnecessary barrier for people with limited written English skills or with disabilities that result in difficulties in putting a complaint to writing.

PIAC notes that section 12 of the *Ombudsman Act 2004* (NSW) states that the Ombudsman may accept a complaint that is not in writing if the Ombudsman considers it appropriate to do so, and in that event, the complainant must reduce the complaint to writing as soon as practicable.

PIAC also notes that in the Health Practitioner Regulation Law Bill 2009 (Qld) (Bill B), currently before the Queensland Parliament, there is a provision that allows complaints to be initiated other than in writing. (clause 146 allows for complaints to be made 'verbally, including by telephone'). PIAC has made submissions to the Commonwealth Government and the Senate Community Affairs Committee in support of this provision.<sup>6</sup> PIAC believes that there is a strong argument that people with a non-English speaking background, people from disadvantaged groups with limited language and literacy skills, some people with disability, and those who are traumatised or simply suffering from intense grief, are disadvantaged by provisions that insist that complaints must be in writing.

If Bill B, referred to above, becomes the uniform legislative model for a national complaints system regarding health practitioners, the continuance of the insistence on written complaints will put NSW out of step with the requirements in all other states and territories. As PIAC interprets Bill B, the National Health Practitioners Regulation Agency (the Agency) will be able to accept verbal complaints, and have the power to refer these complaints to the HCCC as the body that assesses and investigates completes in NSW. Is it proposed that the HCCC would have to reject such a complaint because it was not originally in writing? Or will the HCCC go through the artifice that it sometimes applies with complaints that come through the registration boards, deeming the Agency and not the consumer as the complainant, thereby depriving the consumer of appropriate feedback and response to their complaint?

Therefore, PIAC submits that, as well as allowing the HCCC to initiate its own complaints, the HCC Act should be amended to allow complaints other than those in writing. The HCC Act could be amended to allow the HCCC to accept verbal complaints, as in Bill B, and to simply encourage written complaints as a preference, or the HCC Act could be amended to include a provision similar to section 12 of the *Ombudsman Act 2004*(NSW).

PIAC also continues to support the proposition contained in **Issue 18** to mandate written reasons for HCCC decisions to be provided to both the complainant and the respondent to a complaint after assessment decisions are made and after investigations are concluded.

PIAC also continues to support the proposition that the internal review process should be fully codified in the *HCC Act*, based on complaint handling best practice, as set out in **Issue 19**.

## Response to other issues raised in the Discussion Paper

PIAC does not support the following proposals in the Issues Paper for the following reasons:

**Issue 21:** PIAC does not see any reason for an additional report at this stage of the investigation process. Health practitioners, under the principles of procedural fairness, always have the opportunity to provide their own alternative expert/peer reports that should be taken into account during the investigation and disciplinary processes.

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<sup>6</sup> Peter Dodd, *Putting Health Care Rights to Work: The Health Practitioner Regulation National Law, a step close to best practice in health care complaints* (2009) Public Interest Advocacy Centre [2-3] <[http://www.piac.asn.au/publications/pubs/sub2009071\\_20090717.html](http://www.piac.asn.au/publications/pubs/sub2009071_20090717.html)> at 26 October 2009.

**Issue 23:** PIAC does not support any change to section 16 or section 28 of the HCCAct. PIAC submits that there are exceptional cases where revealing any information at all to the respondent to a complaint might prejudice the investigation of the complaint and/or might lead to intimidation of a vulnerable complainant, in extreme cases putting them at risk of harm. In complaints about practitioners or providers in small communities, or when dealing with health providers with limited staff and a small client population, any information at all might make the identity of a particular complainant easy to identify. Discretion must be left for the HCCC to be able to decide not to notify a respondent to a complaint in exceptional cases.

**Issue 25:** PIAC is not aware of any reasons that an additional report is necessary at this stage of the investigation process and relies on the comments made in relation to Issue 21 above. It is clearly a principle of good administration and best practice complaints management that the progress of a complaint is always kept under regular review.

In addition to the PIAC proposals in the paper, PIAC supports the following proposals contained in the Issues Paper: **Issues 6, 7, 12, 14 and 17.**

With regard to **Issue 7**, PIAC has previously taken the view, following the recommendations of the Productivity Commission 2005 Report on *Australia's Health Workforce*, that there should be one national Health Practitioner Board, covering all health professionals and allied workers.<sup>7</sup> Consistent with this position, PIAC believes a similar regulatory arrangement should apply in NSW.

PIAC's reasons for this position are that one unified board and unified legislation regulating all health professionals and allied workers would:

- provide consistent regulation of currently non-registered health professionals and allied health workers with the existing regulated health professions;
- help diminish the notion of 'high status' and 'low status' occupations in healthcare;
- encourage uniform basic standards across all health professions;
- better regulate the use and allocation of labels such as 'specialist' in health professions;
- encourage the transferability of skills across professional boundaries;
- better act as co-regulators with health complaints bodies when complaints concern more than one category of health professional and/ or systemic problems are identified.

With regard to **Issue 12**, PIAC believes that the HCCC should issue guidelines, in plain English, for consumers and health practitioners and health providers, setting out its assessment process, in particular its process of assessing complaints against established standards and setting out the sources of those standards.

In relation to **Issue 9**, PIAC submits that one Standing Committee of the NSW Parliament should be part of the accountability mechanisms for both the HCCC and the Registration Boards. The very issues raised in the Discussion Paper illustrate how the issues facing both the HCCC and the Registration Boards are intertwined, particularly as they are all co-regulators in the healthcare complaints system. PIAC therefore supports the

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<sup>7</sup> Robin Banks, *Submission to Senate Community Affairs Committee into the national registration for doctors and other health workers* (2009) Public Interest Advocacy Centre [3]  
<[http://www.piac.asn.au/publications/pubs/sub2009050\\_20090504.html](http://www.piac.asn.au/publications/pubs/sub2009050_20090504.html)> at 26 October 2009.

existing Joint Standing Committee having an expanded area of coverage rather than the establishment of a new Committee.

In relation to the remaining issues and proposals, PIAC makes no comment.