Submission

No 16

INQUIRY INTO THE OPERATION OF THE HEALTH CARE COMPLAINTS ACT 1993

Organisation: Health Care Complaints Commission

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HEALTH CARE
COMPLAINTS
COMMISSION

Our ref: Executive/JPC
Your ref: HCC95

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Dear Ms Westwood

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

Thank you for your letter of 6 November 2008 inviting the Commission's submission to this inquiry.

The Commission notes the terms of reference of the inquiry include that the Committee examine the operation of the *Health Care Complaints Act 1993*, with particular reference to:

- the identification and removal of any unnecessary complexities in the New South Wales health care complaints system;
- the appropriateness of the current assessment and investigative powers of the Health Care Complaints Commission; and
- the effectiveness of information-sharing between the Health Care Complaints Commission and Area Health Services and Registration Authorities in New South Wales,

The Commission's submission is attached. I trust that this information is of assistance to the Committee's inquiry.

Yours sincerely

Kieran Pehm
Commissioner

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Health Care Complaints Commission submission to Parliamentary Joint Standing Committee on the Health Care Complaints Commission inquiry into the operation of the *Health Care Complaints Act 1993*

The Commission notes that the Committee's inquiry comes 19 months before the planned implementation of a national registration and accreditation scheme for health professionals. As the Committee is aware the Commission recently responded to a consultation paper detailing proposed national arrangements for handling complaints, and dealing with performance, health and conduct matters.

The model proposed essentially vests the management of complaints against practitioners with the registration boards and Commission argued that this is a fundamental problem with the scheme. In short, the Commission believes that health consumers and complainants cannot be assured that their complaints will be dealt with impartially and effectively and that appropriate action will be taken under the proposed scheme.

The Commission prepared a submission arguing that the co-regulatory model currently in place in NSW is a more transparent, accountable and impartial system and better serves the public's best interest. The Commission believes that the current NSW complaint handling processes generally achieve the right balance between practitioner and consumer. The Commission recognises that this view may not be shared by all parties to a complaint, and that any option of the appropriateness of the Commission's process will clearly depend on the perspective of the party involved.

Despite the pending national scheme, this submission concerns the current NSW legislation that the Commission feels could be improved by amendments. These are detailed below. The Commission is happy to provide further detail to support these suggested improvements.

General

1. The Commission should be given the power to conduct inquiries and investigations of its own motion without the need for a complaint under section 7 of the *Health Care Complaints Act 1993* ("the HCC Act").

2. Section 7(1)(b) of the HCC Act should be amended to allow the Commission to inquire into complaints about a health service provider which affect the clinical management or care of patients in general, rather than "of an individual client" as the section currently requires. Amendments would also be need to be made to sections 25(4)(b) and 25A(3)(b).

Appropriateness of current assessment powers

The Commission considers that the current assessment powers of the Commission should be enhanced with the following amendments to the HCC Act.

3. As you are aware, the Hon Ms Deirdre O'Connor, in her first report of 28 March 2008 concerning the case of Dr Graeme Reeves, recommended the following amendments to the *Health Care Complaints Act*:

   - An amendment to section 34A – to enable the Commission to require the production of information and documents from any person. (The section as it currently stands only permits the Commission to require the production of information and documents from complainants and health service providers.)

   - An amendment to section 21A – to allow the Commission to exercise all of the powers available under the broadened version of section 34A during the assessment of complaints.

   The Commission notes that Ms O'Connor's recommendations were endorsed by the Committee in its report of June 2008 regarding the Commission's investigations into complaints about Dr Reeves. The Commission agrees with the Committee's statement that the absence of these powers

   > … remains a gap, given that documents held by other persons or bodies may contain important evidence as to matters being considered … especially as part of the process of piecing together a pattern of behaviour of a practitioner.

   Section 21A of the HCC Act should be amended to allow the Commission to exercise all of the powers under section 34A as part of its assessment of a complaint. At present the Commission is limited to requiring the production of documents during the assessment phase.

4. The amendments to the HCC Act in March 2005 inserted section 28A which requires the Commission to notify patients, or their next of kin, of an assessment decision where the complaint relates to their care even though they are not a complainant. This includes notice of an assessment decision that a complaint be investigated. There is no provision to withhold notice on the basis that it would prejudice investigation or harm health or safety, such as is provided in relation to notice to respondents in sub-sections 28(4)-(7).

   The notice provisions in sections 28 and 28A of the HCC Act should be consistent and allow notice under section 28A to be withheld in the same way as notice under section 28.

Appropriateness of current investigative powers

The Commission considers that the current investigative powers of the Commission should be enhanced, with the following amendments to the HCC Act.

5. Section 34 should be broadened to allow the Commission to apply for a search warrant in order to obtain evidence that would assist in the execution of the Commission's functions, rather than being limited to the circumstances set out in section 34(1).

6. As noted above, both the Committee and Ms O'Connor have recommended amendments to section 34A of the HCC Act to broaden the Commission's powers in relation to compelling any person to provide documents and information.

   Section 34A should be broadened to give the Commission the power to compel documents and information from any person, rather than being limited to complainants and health service providers.

7. A broader issue in relation to section 34A relates to evidence obtained under compulsion being admissible in disciplinary proceedings. This is sensible where the evidence is obtained from the respondent practitioner. Where other individual health service providers may have been aware of the conduct but not reported it earlier, or may have participated in misconduct but to a lesser degree, any evidence gained from them under compulsion can also be used against them in disciplinary proceedings. There should be provision for some sort of immunity or indemnity to be given to witness practitioners in these situations. This is particularly pertinent to the perceived culture of complicity amongst health practitioners and the failure to report misconduct, and also relates to the proposed mandatory reporting of misconduct. One solution may be to empower the Chairs of Tribunals to issue certificates that indemnify a practitioner from disciplinary proceedings in return for evidence against a health service organisation or individual practitioner.

   The recent amendments protecting practitioners who make mandatory reports of misconduct recognise this general problem, but are too limited.

8. The insertion of section 28A into the HCC Act also creates difficulties when it comes to notifying the outcomes of investigations. Although the Commission is required to notify patients or their next of kin at the time of the assessment decision, it is unable to notify the same persons of the outcome of any subsequent investigations. Divisions 6 and 7 of the HCC Act make it clear that the Commission can only notify the "parties to a complaint" of the outcome of investigations. The "parties" are defined in section 4 as the complainant and the person against whom the complaint is made.

   Sections 41 and 45 of the HCC Act should be amended to give the Commission the discretion to notify any person the Commission notified under section 28A or any other relevant person such as an expert reviewer, of the outcome of an investigation.

9. In addition section 45 of the HCC Act does not allow the Commission to provide a report under section 42(2) on the outcome of an investigation into a health service organisation to a complainant. This issue has been the subject of discussion with the Director-General who has agreed that the Commission can provide a copy of the report on her behalf.

   Section 45 of the HCC Act should be amended to allow the Commission to provide the outcome of an investigation to a complainant including the full reasons for that outcome.

10. The amendments introduced under the *Health Legislation Amendment (Unregistered Health Practitioners) Act 2006* make provision for the Commission or a tribunal to make prohibition orders in relation to a person (see for example, section 41A of the HCC Act and section 64(2A) of the Medical Practice Act) where it is satisfied that the person poses a “substantial risk to the health of members of the public”.

    The amendments were in part introduced due to concerns that deregistered practitioners could set up practice in a related but unregistered field and potentially continue their misconduct without any consequences. For example a psychiatrist or psychologist who was deregistered by a tribunal as a result of boundary issues, ie a sexual relationship with a client, could set up practice as a counsellor or therapist. The purpose of the prohibition order is to prevent such practitioners from practicing in these fields.

    In such cases, especially where the relationship with the client has been a consensual one and there has been no damage to the health of the patient, it may be difficult for the Commission to establish that the person poses a substantial risk to the “health” of members of the public. It would better reflect the purpose of the amendments if the reference to the health of members of the public could be extended to include the “health **or safety**” of members of the public. This would also reflect the objects of the HCC Act and related health registration Acts.

    The various references to prohibition orders in the HCC Act and other Acts affected by the Health Legislation Amendment (Unregistered Health Practitioners) Act 2006 should be amended so that a prohibition order can be made if the Commission or tribunal is satisfied that the person poses a “substantial risk to the health **or safety** of members of the public”.

Appropriateness of current provisions relating to the Director of Proceedings

11. The amendments to the HCC Act in March 2005 inserted the position of the Director of Proceedings, to determine whether or not to prosecute a complaint before a disciplinary body, following referral after investigation by the Commissioner. If the Director of Proceedings decides not to prosecute, the HCC Act is silent on whether or not any further action can be taken. In practice the Commission has agreed with the registration boards when such a situation has arisen, that the Director of Proceedings can refer a matter back to the Commissioner for a further determination under section 39, such as counselling or comments.

    Part 6A of the HCC Act should be amended to formally provide that, in the event that the Director of Proceedings determines not to prosecute a complaint, she may refer it back to the Commissioner for another determination under section 39.

12. Prior to the amendments to the HCC Act in March 2005, the decision to prosecute was made by the Commissioner pursuant to section 39(1)(a) and notification of the decision was then made pursuant to section 41. Following the amendments, the determination to prosecute was removed from section 39 and devolved to the Director of Proceedings in section 90B(1)(a). There are currently no provisions to allow the Director of Proceedings to notify any party of the outcome of a determination.

A new section 90E should be added to the HCC Act to allow the Director of Proceedings to notify the parties to the complaint and the appropriate registration authority, in writing, of the results of the determination under section 90B(1)(a). The section should also give the Director of Proceedings a discretion to advise of the outcome of a determination to any person the Commission notified under section 41.

13. Section 90A of the HCC Act provides that the Commission may appoint a person to act in the office of Director of Proceedings "during the illness or absence of the Director". Although under section 84 the Commission can delegate its functions, section 90B makes it clear that the prosecution functions can only be exercised by the Director of Proceedings. There would appear to be no provision for the delegation of the Director's functions in situations such as a perceived conflict of interest in relation to an individual matter.

    Section 84 of the HCC Act should be amended to make it clear that the Commission can also delegate the functions of the Director of Proceedings to any officer. Alternatively, an additional subsection should be added to section 90A to allow the Director of Proceedings a discretion to delegate her functions in relation to an individual matter whilst still carrying out the duties of the Director in relation to the remaining matters.

14. Section 90B of the HCC Act provides (emphasis added):

    (1) The following functions of the Commission are to be exercised only by the Director of Proceedings in relation to any complaint referred to the Director by the Commission:
    (a) to determine whether the complaint should be prosecuted before a disciplinary body and, if so, whether it should be prosecuted by the Commission or referred to another person or body for prosecution,
    (a1) if the Director determines that the complaint should be prosecuted before a disciplinary body by the Commission, to prosecute the complaint before the disciplinary body,
    (b) to intervene in any proceedings that may be taken before a disciplinary body in relation to the complaint.

    (2) In addition, the Director of Proceedings has any other functions conferred or imposed <u>on the Director</u> by or under this or any other Act.

    …

    (5) <u>While holding the office of the Director of Proceedings, a person is not to exercise any function of the Commission other than a function referred to in subsection (1).</u>

    The combined effect of these provisions appears to be that the Director of Proceedings is unable to exercise any function <u>of the Commission</u> conferred or imposed on the Commission by legislation other than the HCC Act.

    This situation recently posed a difficulty in relation to conducting a review of a complaint about the Commissioners conduct under the Privacy legislation. The Commissioner requested the Director of Proceedings to conduct the review. However, following an examination of the provisions of section 90B of the HCC Act, it appeared that the Director of Proceedings had no power to conduct the review for the reasons discussed above.

The provisions of section 90B should be amended to allow the Director of Proceedings to conduct functions of the Commission conferred or imposed on the Commission under legislation such as the privacy and freedom of information legislation.

Appropriateness of current provisions relating to the prosecution of practitioners

The following discussion concerns proposed amendments to both the *Health Care Complaints Act* and the health registration legislation.

Professional Standards Committees ("PSCs")

15. Legal representation – parties are currently able to have a non-legal advocate to speak on their behalf. The doctor can also have a legal representative, but the representative cannot appear for them, except in impairment matters. Increasingly, legal issues are being raised in PSCs. All parties should be able to be legally represented.

Disciplinary proceedings generally

16. Procedural rules for PSC and Tribunals – the Commission has been requesting that practice directions/procedural rules for PSC and Tribunals be published by the Medical Board, so that all parties are aware of the way in which PSC and Tribunals work. Currently, the procedure of each PSC or Tribunal varies depends on the Chair. Depending on the implementation of the above recommendations, basic procedural rules for PSC and Tribunals should be legislated.

17. Current protections that apply under the criminal law to the giving of evidence by children and the victims of sexual assault should be extended to disciplinary proceedings under the various health registration legislation.

    Disciplinary matters involving children and victims complaining of sexual misconduct are currently not covered by the rules of evidence that apply in the criminal jurisdiction. It is up to individual Tribunals to limit the ways in which evidence may be given in disciplinary proceedings, ie in person, by videolink, by telephone, etc and it is not clear at the outset of the proceedings what will be allowed. While Tribunals can step in to limit the cross-examination of such witnesses, there are no rules regarding when this should occur, or what should happen when the respondent practitioner is unrepresented.

18. A number of disciplinary matters involve allegations of sexual or physical assault. In some matters, the complainant/witness may suffer from a psychiatric or psychological condition which may be either pre-existing or the result of the alleged misconduct. While the Director of Proceedings considers the complainant's/witness's veracity, and their willingness and ability to give evidence, at the time that the determination to prosecute the matter is made,

circumstances can change, and the complainant may later decide not to give evidence or receive medical advice that it is not advisable for them to do so.

Section 90B of the *Health Care Complaints Act* should be amended to make it clear that the Director of Proceedings has the ability to redetermine the matter at any stage of the proceedings in accordance with the criteria set out in section 90C and, if appropriate, discontinue any disciplinary proceedings or amend the complaint.

19. In some cases, the Director of Proceedings may determine that, even without the evidence of the complainant/witness, there may be other evidence sufficient to justify the continuation of the prosecution. The Commission might then seek to withdraw/not to rely on the evidence of the witness or ask that very limited weight be given to any statement/written material of that witness in the proceedings.

    Currently, a disciplinary body has the ability to compel the attendance of any witness that may be of assistance, including those witnesses that the Commission has determined not to call for a variety of reasons. This has the potential to put the witness at great risk of psychological and even physical harm. This is especially so when the conduct being examined relates to either sexual or physical misconduct. Examples where this issue has arisen can be provided if required.

    While disciplinary matters generally proceed as a free-ranging inquiry, directed by the relevant disciplinary body, it is submitted that the delicate balancing of the protection of the public and the protection of an individual, and the ultimate decision to seek to compel a complainant/witness who is also the 'victim' of the sexual or physical misconduct to give evidence, should reside with the prosecution. This is consistent with the criminal law.

    It is recommended that amendments be made to ensure that a disciplinary body is unable to compel the attendance of a victim of sexual assault or violence without an application having first been made by the Commission.

    In appropriate circumstances, the Director of Proceedings may make a determination that the public interest outweighs the individual interests of a complainant/witness and seek that the complainant/witness be compelled to give evidence. It is expected that such instances would be rare.

20. While the *Medical Practice Act* and the *Nurses and Midwives Act* specifically allow for an inquiry to be discontinued if the complaint is withdrawn, the other health registration acts do not do so. Currently, it appears that some Tribunals are required to continue with the inquiry even if the Commission seeks to withdraw the complaint. The other health registration legislation should be amended to ensure consistency with the *Medical Practice Act* and the *Nurses and Midwives Act*.

21. In the event that the Director of Proceedings makes a determination not to proceed with a prosecution and the complaint is withdrawn due to the complainant no longer wishing to give evidence, the Commission should not be liable to pay any legal costs incurred by the respondent to that point.

22. The Commission rather than the Medical Board should appear in all applications for restoration (re-registration applications) before the Medical Tribunal. The Commission currently appears in relation to all other re-registration applications relating to other types of health practitioners and has traditionally done so in relation to medical practitioners. The Commission is best placed to appear, having had the carriage of all disciplinary matters against the applicant, including the prosecution that led to the de-registration, and any subsequent appeals and re-registration applications.

23. Currently, the only restriction on an applicant bringing a re-registration application is where a Tribunal prescribes a period of time that must elapse before an initial application can be made or a fresh re-registration application made. Even in circumstances where the application clearly has no merit or where the applicant has been found to be a vexatious litigant in other jurisdictions, a Tribunal must be appointed and the matter heard. While the Commission can seek costs if successful, it is very difficult to recover the costs as the applicant is rarely in a position to pay, often having been unemployed for a lengthy period of time.

    It is proposed that the Chairperson or the Deputy Chairperson of the relevant Tribunal be given the power to conduct a preliminary hearing in the matter to ensure that the application has some merit and to dismiss the application if it does not.

24. The *Poisons and Therapeutic Goods Administration Act* has provisions relating to the prescribing of drugs of addiction that are often breached by doctors and prosecuted by the Commission. The main provision is section 28, relating to the obtaining of authorities. While the HCC Act includes a number of criminal offences, they are rarely prosecuted and it would assist in streamlining the investigation and prosecution of such matters by the Commission if contraventions of the *Poisons and Therapeutic Goods Administration Act*, in particular section 28, amounted to unsatisfactory professional conduct pursuant to section 36(1) of the *Medical Practice Act*.

    Any breach of the HCC Act and/or a health registration act should also amount to unsatisfactory professional conduct.

25. The definition of what constitutes a complaint of conviction varies between the various health registration legislation. It would be of assistance if the definition used in the *Medical Practice Act* were replicated in the other health registration Acts. This would mean that the reference to fitness to practice would be considered in relation to protective orders rather than being a pre-requisite to proving the complaint.

26. In addition the definitions of competence and impairment in the various health registration legislation are internally inconsistent and should be reviewed across the health registration Acts.

27. The Commission has had some difficulty in prosecuting matters involving child pornography where the conduct has not occurred in the course of professional practice. It is currently unclear as to whether or not this conduct can amount to unsatisfactory professional conduct. Prosecuting alternative heads of complaint such as character or conviction in relation to these offences has also been problematic. The change to the conviction complaint referred to above would assist in this regard.

    It would also be of assistance if the health registration Acts were amended to so that certain types of criminal conduct were defined to amount to unsatisfactory professional conduct whether or not they occurred in the course of practice. Rather than trying to pick out certain offence types, it seems preferable to include all offences under the *Child Protection (Offence Registration) Act* 2000 (which results in offenders being placed on the child sex offenders register and which provides the relevant offences for the *Child Protection (Offenders Prohibition Orders) Act* 2004).

28. In the recent case of *Health Care Complaints Commission* v *Wingate* [2007] NSWCA 326, the issue arose as to whether medical practitioners have a duty of full and frank disclosure in proceedings instituted by the Medical Board. Basten JA delivered the judgment, with Harrison J agreeing. McColl JA expressed no view on this aspect of the judgment.

    Basten JA considered the duty of full and frank disclosure and whether or not the duty of candour overrides the general law privilege against self-incrimination. Basten JA noted that

    > Absent an express statutory provision, or a necessary implication arising from statute, to that effect, the privilege will generally be available. On the other hand, the privilege does not entitle a practitioner to make untruthful or misleading statements nor, if the practitioner declines to answer particular questions, will it prevent the Board or a tribunal taking steps in order to protect a public interest.

    Basten J then undertook a review of relevant cases. He referred to *Bowen-James v Walton* (NSWCA, 5 August 1991, unreported) in which the Court stated "In our opinion there is no right to silence or any privilege against self-incrimination upon which a medical practitioner, answering a complaint before the Tribunal is entitled to rely…" Basten J expressed doubt as to whether this view, namely that there was no applicable privilege against self-incrimination, would be adopted today following the recent decision in *MacDonald* v *Australian Securities and Investments Commission* [2007) NSWCA 304. He went on to state that "it must at least be doubted whether a professional obligation of full and frank disclosure extended to the process instituted by the Board".

    While the Court was not required to make a finding in relation to the duty of candour by medical practitioners or whether such duty overrides the general law privilege against self-incrimination, it has certainly raised significant questions in relation to both. The decision also casts significant doubt over the finding in *Bowen-James* that, because of the protective nature of the jurisdiction, medical practitioners have no right to silence or any privilege against self-incrimination. It is recommended that the HCC Act be amended

to make it clear that the views expressed in *Bowen-James* are correct. This would also be consistent with the principles behind mandatory reporting.

29. The health registration Acts do not currently contain protections for witnesses, including respondent practitioners, who make admissions of a criminal nature in the course of proceedings. There are certificates available under section 128 of the Evidence Act 1995 but currently, the definition of a "New South Wales court" excludes Professional Standards Committees and tribunals as such bodies are not required to apply the laws of evidence.

    The NSW Law Reform Commission has made recommendations in its Discussion Paper (No 47) on this issue and recommended the following:

    > "The definition of a "New South Wales court" in the Dictionary of the Evidence Act 1995 (NSW)"should be amended to include "any person or body authorised by a New South Wales law, or by consent of the parties, to hear, receive and examine evidence".

    It is unclear as to whether or not this proposed amendment is to be enacted. Such an amendment would be of great assistance to the Commission as the lack of such certificates in tribunal matters has caused problems in a number of recent prosecutions.

    In one matter before the Medical Tribunal, a complaint was prosecuted by the Commission that a medical practitioner had inappropriately touched a patient. The patient had been a heavy user of marijuana and her level of usage at the time of the alleged incident and her subsequent mental state became highly relevant. The patient was willing to make admissions in relation to her drug use at that time but was understandably concerned that she might be charged by the police, especially as she lived in a small country town and the matter received a high level of publicity. In the absence of any certificates or other protections, the deputy chairperson of the Medical Tribunal requested that the Commission's counsel provide a written advice to the a witness as to the potential consequences of making an admission. Whilst the witness did give the required evidence, it caused much distress to her and resulted in the matter being adjourned for a time to resolve the issue, leading to additional cost for the Tribunal and the parties.

    In another Commission matter involving an alleged sexual assault by a practitioner on a patient during the course of treatment, the patient had earlier taken a recreational drug. The practitioner foreshadowed in other proceedings that this will be a relevant issue and may be used to attack the patient's credit in any Commission proceedings. The patient declined to assist the Commission in the prosecution although she did not provide any reasons for this. In attempting to persuade the patient to assist the Commission, the Commission was unable to offer her any prospect of protection against prosecution. Similarly, if the patient had been compelled to attend the tribunal proceedings, the tribunal is would have been unable to give an evidentiary certificate and if she had made admissions in relation to her drug use, she would have opened up the prospect of criminal action being taken against her.

    The proposed amendments should be made to the definition of New South Wales court in the Evidence Act should be amended or alternatively, the

health registration Acts should be amended to allow for tribunals or Professional Standards Committees hearing complaints under the various Acts to issue certificates in relation to self-incriminatory statements made by witnesses or respondents in the course of proceedings.

30. If a nurse fails to pay their fee for an annual practising certificate, the Nurses and Midwives Board administratively cancels their registration and removes their name from the Register pursuant to section 33(3) of the Nurses and Midwives Act ("NM Act"). This has caused the Commission some difficulty in disciplinary matters before the Nurses and Midwives Tribunal where the Commission would ordinarily be seeking deregistration pursuant to section 64(1)(g)(ii) of the NM Act. Section 64(2) states that a number of powers, including deregistration under section 64(1)(g)(ii), cannot be exercised unless the person is registered or enrolled. Where a Complaint is proved against a person who has already ceased to be registered the Tribunal can only make an order that the person be registered or enrolled subject to compliance with certain orders or conditions and an order under section 64(5) fixing a time before which a person may apply for registration.

    The import of this is that nurses who are deregistered under section 64(1)(g)(ii) must make application to the Tribunal pursuant to section 68 of the NM Act and are subject to a hearing before the Tribunal prior to being restored to the Register. In contrast, nurses who have had their registration cancelled can apply directly to the Nurses Board to be reregistered pursuant to section 33(4) of the NM Act. This is in contrast to other health registration Acts where practitioners are in effect deemed to have been deregistered even if they have already ceased to be on the register.

    Historically, the Nurses and Midwives Tribunal has taken a purposive approach to this issue and found that section 64(2) of the NM Act does not apply where the nurse has been removed from the Register pursuant to section 33(3). Whilst the Commission is of the view that this interpretation leads to the better result for the protection of the public, namely that the nurse cannot be reregistered without a review by the Tribunal, it would seem that the Tribunal's reasoning is flawed. The Commission obtained advice from the Crown Solicitor's Office to the effect that if a nurse's name has been administratively removed from the Register, then the Nurses and Midwives Tribunal does **not** have the power to make an order in complaint proceedings under the NM Act to remove the name of the nurse from the Register pursuant to section 64(1)(g)(ii) of the NM Act.

    Following submissions to this effect being put by the Commission, differently constituted Tribunals have given differing judgments on this point, some following the purposive approach and others accepting the Crown Solicitor's view.

    This issue was highlighted by the amendments to the NM Act allowing for the issue of prohibition orders. Section 68(1)(c) of the NM Act makes it clear that a nurse must apply to the Tribunal for the review of a prohibition order. In a recent case where a nurse had been administratively cancelled prior to the hearing, the Commission sought that the person not practise as a nurse for a period of time and also sought a prohibition order that the person not practice as a massage therapist. If the Tribunal was to follow the Crown Solicitor's advice, the Tribunal would be unable to deregister the person and would have

to proceed pursuant to section 64(2) of the NM Act. The person would be free to apply to the Nurses and Midwives Board to be reregistered as a nurse. The Board, however, does not possess the same powers and rigorous processes as the Tribunal. In contrast, should the person want to seek a review of the prohibition order that they not practice as a massage therapist; they would have to seek a review of that order by the Tribunal. It is clearly an anomalous and unsatisfactory situation.

Rather than testing this matter on appeal, and especially where the Commission agrees with the outcome achieved by the purposive approach, the NM Act should be amended to provide that where the Tribunal finds proved a Complaint against a person who has ceased to be registered that they be deemed to be deregistered for the purpose of section 68 of the NM Act. Alternatively, the Act could provide that they can only become reregistered after a section 68 review by the Tribunal. This approach would bring the NM Act into line with the approach taken in other health registration Acts (for example, section 53(3) of the *Psychologists Act 2001* and section 64(2) of the *Medical Practice Act 1992*)

Registration Authorities

General

31. A number of the recommendations made above highlight that there are numerous substantive and procedural differences between the health registration Acts. The Commission submits that all the health registration Acts should be reviewed and amended so that they are consistent.

    Recent amendments to the *Medical Practice Act* regarding public hearings and other changes for PSCs, and procedures for suspension of practitioners should be extended to all health registration Acts.

32. The boards should be required to advise the complainant of the board's consideration of their complaint and give reasons for any decision.

33. Where the boards' handling of a complaint against a practitioner becomes protracted, such as through action by its impairment or performance programs, the boards should be required to give reasonable progress reports to the complainant.

Information sharing between the Registration Authorities and the Commission

The Commission also has some recommendations that go to the transparency of the registration authorities ("boards") preliminary complaint-handling procedures, where a complaint is referred to a board by the Commission. The following should apply to all boards:

34. A recent appeal from a Professional Standards Committee to the Medical Tribunal seeking an order to set aside summonses served by the Commission for the production of documents has highlighted a number of problems with

the various health registrations Acts with respect to the "power to obtain documents".

Clause 3 of Schedule 2 of the Medical Practice Act ("the MPA") currently requires a person served with a Notice to Produce Documents to appear at a specified time and place before a member of the Professional Standards Committee or the Medical Tribunal or a person authorised by the Committee or Tribunal on a specified date and time and produce the documents specified in the notice. Clause 3 does not allow for documents to be produced other than in person and does not allow for things other than documents to be produced.

To date summonses to produce documents, which have been drafted by the parties to an Inquiry, have been modelled on Form C in the Medical Tribunal Rules. However, in the appeal, the Deputy Chairperson of the Tribunal stated that both Rule 10 and Form C appear to require immediate redrafting. This is because they do not comply with the statutory requirements of clause 3 of Schedule 2 of the MPA. The Commission is currently liaising with the Medical Board in order to make some minor amendments to the relevant Notices to Produce documents and to seek amendment to the Rules. Contact will also need to be made with the other registration Boards as the provision is currently the same in the other health registration Acts.

Whilst the Tribunal was not required to make a decision in relation to the production of documents prior to the appointed day, the decision stated that in the "absence of a legislative or regulatory basis" permitting documents to be produced to the Registrar of the Board in advance of the nominated day, "it is simply not permissible for the notices to produce to provide for such alternate production". The consequence is that any Notice to Produce which makes provision for documents to be produced in advance of the nominated return date is likely to be held to be invalid.

The health registration Acts should be amended to ensure that a Notice for Production:

- encompasses both "documents and other things"
- be described as a "Notice to Produce Documents and other things" to allow for other things such as x-rays, scans, medication or containers to be summonsed and produced
- permits a person served with a "Notice to Produce documents and other things" to deliver or send the Notice or copy of it and the document(s) or thing(s) to the Clerk of the Medical Tribunal or the Officer assigned to the Professional Standards Committee at the address specified in the Notice, so that they are received no later than 1 clear day before the date specified in the Notice for attendance and production

Other amendments

35. Section 99A of the *Health Care Complaints Act* makes it an offence for any person – including any officer of the Commission – to disclose information obtained in exercising a function under the HCC Act, unless the disclosure is made on one or more of the following grounds:

(a) with the consent of the person to whom the information relates
(b) in connection with the execution and administration of the Act
(c) for the purposes of any legal proceedings arising out of the Act or of any report of any such proceedings
(d) with other lawful excuse.

There are a number of practical difficulties arise from the application of this provision, these are addressed below.

35.2 Information sharing with other law enforcement agencies

The Commission recognises that certain of the material obtained by it in the course of its investigations may be of assistance to law enforcement bodies such as the DPP, both State and Commonwealth, the police and the Coroner. At present section 99A of the HCC Act makes it difficult for the Commission to provide such information, other than by way of subpoena or other lawful notice, even where it is willing to do so.

As the Committee is aware many Commission complaints can run concurrently with police investigations, particularly those complaints involving sexual assault and/or drug misuse. It would assist both if information could be more readily exchanged in appropriate circumstances.

In one matter, the DPP sought details of a Commission prosecution being run before a Professional Standards Committee in order that it could satisfy its disclosure requirements in an upcoming trial. The Commission indicated that it required a subpoena but when it was received, the subpoena sought a much broader amount of material. Following further negotiation with the DPP, agreement was reached to allow the Commission to produce limited material. The matter would have been quickly and easily resolved at the outset if the Commission had the discretion to provide material for law enforcement purposes.

35.2 Subpoenas

Section 99A of the HCC Act currently allows for information to be disclosed for a number of purposes including with “other lawful excuse”. This section is relied upon by the Commission when releasing material in response to subpoenas and notices to produce. The Commission expends a large amount of time and resources in complying with subpoenas, the bulk of which relate to private litigation including civil claims against practitioners and area health services. The material sought in relation to civil proceedings is often material that can be obtained from other sources, i.e. medical records, statements etc.

The Commission has a number of difficulties in relation to subpoenas, including the following:

i. All lawfully requested material is generally produced upon subpoena by the Commission with the exception of expert reports that are not compellable pursuant to section 30(5) of the HCC Act. Section 30 does not extend to material that includes the name of the expert or to letters sent to the expert and accordingly, such material must generally be produced. This opens up the possibility of a party contacting the expert

directly and seeking to obtain a fresh report to avoid the section 30 restrictions.

ii. Subpoenas can be received by the Commission at any stage of the complaint handling process, including during the investigation process. These subpoenas are generally drafted very broadly and unless agreement can be reached with the issuing party, the Commission is obliged to produce all of its files and documents, much of which is at a draft or preliminary stage. This has the potential to prejudice the investigation. The parties may also get access to preliminary recommendations and other material which may change quite significantly once all of the evidence is obtained and analysed. This may lead the parties to anticipate a particular outcome which does not eventuate.

iii. Whilst the majority of matters that proceed to Legal are privileged, it is unlikely that matters that go to PSCs attract such privilege. They are however quasi-legal proceedings and prepared in very much the same manner as legal proceedings and often include reports directed at the strengths and weaknesses of the case, including the prospects of success. Such documents must be produced on subpoena, often to the respondent prior to the hearing.

iv. In one matter the Commission had been engaged in very long negotiations over a subpoena issued by the legal representatives of a patient who has lodged a civil claim against a practitioner in relation to an alleged boundary violation. The patient had not at any time herself made a complaint to the Commission in relation to the practitioner. The subpoena required the production of “all” complaints against the practitioner, even those that were terminated at the assessment or investigation stage and even if they did not involve a boundary issue. There are numerous complaints in relation to the practitioner, most of which did not proceed and many boxes of files. The Commissioner instructed the Crown Solicitors Officer to appear in the matter and to resist the subpoena on a number of grounds. Whilst the Crown Solicitor’s office attempted to negotiate with the issuing party, the process took up a substantial amount of time and the costs incurred were significant.

v. The Commission had a further subpoena served on it by a respondent who has been prosecuted by the Commission for impairment issues and where those findings were at the time under appeal. The subpoena related to a separate matter, namely an anti discrimination claim made by the respondent against an area health service and sought production of a response to the Commission from a practitioner against whom the respondent had previously lodged a complaint and which was terminated by the Commission.

   The response from the practitioner was a very thorough and considered response. The practitioner however requested that that it not be released to the respondent as the practitioner had a genuine concern for his safety. The Commission again instructed the Crown Solicitors Office to appear in the matter and to resist the subpoena on a number of grounds. The validity of the subpoena took some time to be resolved. The Crown Solicitors Office briefed Counsel and the costs were quite significant.

To address the two issues raised in section 99A the Commission suggests that a scheme of the following nature should be applicable to the Commission:

- Officers of the Commission should not be compellable in any legal proceedings to give evidence or produce documents in respect of any matter in which they have been involved in the course of the administration of the *Health Care Complaints Act*. The only exceptions to this position should be for proceedings before a Royal Commission, a Special Commission of Inquiry or the ICAC, or for an inquiry by the Ombudsman.

- The Commission should have a discretionary power to disclose information obtained in the course of exercising its functions to other persons and bodies, including courts, tribunals, and other persons acting judicially, and law enforcement, investigative, and prosecuting agencies.

- The Commission should have a power to consult and co-operate with such other persons and bodies, including law enforcement, investigative, and prosecuting authorities, as the Commission thinks appropriate, and to disclose such information to those agencies as the Commission thinks appropriate.

Comparable provisions can be found in the legislation governing the other main complaint-handling and investigative agencies in New South Wales – the Legal Services Commission, the Ombudsman, the Police Integrity Commission and the Independent Commission against Corruption.