

Submission

No 7

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

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26 November 2008

The Hon Helen Westwood MLC  
Chairperson  
Committee on the Health Care Complaints Commission  
Parliament House  
Macquarie Street  
SYDNEY NSW 2000

Dear the Hon. Helen Westwood MLC

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

The Health Services Association of New South Wales welcomes the opportunity to contribute to the Committee on the Health Care Complaints Commission's inquiry into the operation of the *Health Care Complaints Act 1993*. This submission raises issues regarding the operation of the *Act* and public health organisations.

The submission is structured as follows. It will commence with an overview of the Health Services Association of NSW. This will explain the Association's role in the NSW public health system. The submission will then turn to briefly outline and explain the nature of public health organisations constituting the NSW public health system. This is important to understanding of the issues the operation of the *Act* raises in relation to public health organisations. The submission will conclude by identifying the issues regarding the operation of the *Act*. In identifying the issues, the submission will identify recommended changes to the *Act* designed to alleviate the issues.

**About the Health Services Association of NSW**

The Health Services Association is the peak body representing publicly funded health service providers delivering public health services in NSW.

Established in 1921 and originally called the Hospitals' Association of NSW, it was established to specifically assist small community and district rural and metropolitan public hospitals in dealing with government, legal and industrial relations issues. In 1933 it became the registered employer organisation for public hospitals in NSW, ceasing this role in 1991. On 21 June 1991 the organisation changed its name to the *Health Services Association of NSW*.

The Health Services Association was also instrumental in founding the Hospitals Contribution Fund (now HCF Australia) in 1932. This was so that patients could attend public hospitals. The Health Services Association is still a member of HCF Australia.

### **Public Health Organisations**

Section 7 of the *Health Services Act 1997* (NSW) defines three types of public health organisations. They are:

- Area Health Services
  - Are constituted under section 17 and listed in Schedule 1 of the Act. Section 8(2) defines this type of public health organisation as facilitating “public hospitals and health institutions and the provision of health services for residents of the areas of the State in respect of which the services are constituted”. An Area Health Service is a corporate entity managed and controlled a Chief Executive (s24)
- Statutory Health Corporations
  - Are constituted under section 41 and listed in Schedule 2 of the Act. Section 11(2) defines this type of public health organisation as facilitating “certain health services and health support services to be provided within the State other than on an area basis”. That is, Statutory Health Corporation provides state-wide services. A Statutory Corporation is a corporate entity managed and controlled by a Board or a Chief Executive (ss46, 52A)
- Affiliated Health Organisations
  - Are constituted under constituted under section 62 and listed in Schedule 3 of the Act. Section 13(3) defines this type of public health organisation as facilitating “certain non-profit, religious, charitable or other non-government organisations and institutions to be treated as part of the public health system where they control hospitals, health institutions, health services or health support services that significantly contribute to the operation of that system”. Affiliated Health Organisation facilities are “recognised” by the State. Generically public health organisations are referred to as Schedule 1, 2 or 3 public hospitals. Affiliated Health Organisations are legal entities. The majority are corporate entities and the remaining are trusts. An Affiliated Health Organisation is managed and controlled by boards independent of the Government.

The following three important points need to be made about public health organisations:

- All public health organisations are legally equal
  - The *Health Services Act* does not create a hierarchy between public health organisations. They report directly to the Minister.
- The Health Minister and public health organisations
  - The *Health Administration Act 1982* (NSW) (and reflected in the *Health Services Act 1997*), defines the Health Minister’s functions as to formulating general policies for “the purpose of promoting, protecting, developing, maintaining and improving the health and well-being of the people of New

South Wales to the maximum extent possible having regard to the needs of and financial and other resources available to the State” (s5(1)). From this function the Minister is able to direct public health organisations in the overall management of the public health system. However, both *Acts* are clear not to extend the Minister’s function to include the managing and controlling the public health organisation as an entity.

- Section 21 of the *Health Administration Act 1982* permits the delegation of the Minister’s functions to another person (natural or a corporation). In keeping with the Minister’s functions the Minister’s delegate is not authorised to manage or control a public health organisation.
- The Director General of NSW Health and public health organisations
  - The *Health Administration Act 1982* defines the functions of the Director General (section 8). Following the functions of the Minister, the *Act* does not attribute to the Director General legal authority to manage and control a public health organisation as an entity.
  - Section 21 of the *Act* permits the Director General to delegate his or her functions to another person (natural or a corporation). As the Director General does not have the legal authority to manage and control a public health organisation, then the Director General is unable to delegate this function.
  - Section 123(1) of the *Health Services Act 1997* authorises the Director General to “inquire into the administration, management and services of any organisation or institution providing health services (other than a public health organisation) if those services are wholly or partly funded with money paid from the Consolidated Fund”. However, this is a power to inquire, it does not authorise the Director General to manage or control the administration, management or services of a public health organisation. If the Director-General were to do so, the Director General would be acting *ultra vires*.

### **Issues associated with the operation of the *Health Care Complaints Act 1993***

#### *1. Public health organisations are directly responsible for the clinical governance of their organisations*

Common Law and Statutory corporations law makes public health organisations directly responsible for the clinical governance of the organisation (along with other aspects of the organisation’s governance). This position is recognised in the *Health Administration Act 1982* and the *Health Services Act 1997* by not granted either the Health Minister nor the Director General (and their delegates) authority to manage and control the governance of public health organisation. These *Acts* grant the Minister and Director General authority to manage the public health system. This differentiation between micro and macro governance is important.

However, the *Health Care Complaints Act 1993* overlooks this differentiation. It does so by deeming the Director General as the person with primarily responsibility for clinical governance issues relating to public health organisations. This occurs in sections 25 and 25A typify the *Act’s* conceptualisation of the function of the Director-General.

Section 25(1) requires the Commission to notify the Director General of the details of a complaint made about a public health organisation. The *Act* does not require the Commission to notify the public health organisation of a complaint being made. The *Act* assumes the Director General would notify the public health organisation but there is no requirement under the *Act* for the Director General to do so. Under section 43 provides the first formal time when the Commission is to directly notify a public health organisation – this is when the Commission invites the public health organisation to make submissions upon the findings of the Commission following the Commission’s investigation into the complaint.

Similarly, section 25A authorises the Commission to refer a complaint to the Director General if the complaint or part thereof “relates to a matter that could be the subject of an inquiry” under section 123 of the *Health Services Act 1997*.

The Health Services Association has been advised by public health organisations that they are not directly informed about a complaint and therefore not in a position to directly manage it. Furthermore, public health organisations advise that their submissions in response to section 43 requests are required to be submitted through the Director General who then forwards them onto the Commission. Evidence suggests submissions are changed without consultation with the public health organisation. The *Act* permits this practice by not preventing it.

#### Recommendations

In relation to this issue the Health Services Association makes the following recommendations:

- 1.1 That section 3A(4) of the *Health Care Complaints Act 1993* be amended giving full recognition to public health organisations as the primary legal entities responsible for their own management and control of clinical issues.
- 1.2 That section 25 and 25A of the *Health Care Complaints Act 1993* be amended requiring the Commission to directly inform a public health organisation of a complaint made against it before commencement the Commission decides it dismiss or investigate it, and that this be done at the same time as the Director General is informed of the complaint.
- 1.3 That section 43 of the *Health Care Complaints Act 1993* be amended requiring the public health organisation to directly submit its submission to the Commission.

## 2. *Public health organisations and the Assessment and Investigation of complaints*

Division 4 and Division 5 of the *Health Care Complaints Act 1993* respectively set out the complaint assessment and investigations processes to be undertaken by the Commission. The Divisions do not explicitly refer to the involvement of the public health organisations. The *Act* implicitly implies the Commission would involve the public health organisation about whom a complaint has been made. Coupled with sections 25 and 25A it is legally conceivable that the assessment and investigation of a complaint could be undertaken without involvement of the public health organisation. The only time a public health organisation could become aware of a complaint is a section 43 invitation to make a submission on draft findings of the Commission.

Public health organisations have indicated to the Health Service Association that conflict has occasionally arisen between the Commission's investigation team and the public health organisation.

### Recommendation

In relation to this issue the Health Services Association believes the public health organisations should be actively involved in the assessment and investigation of complaints by the Commission. This is because public health organisations are legally responsible for the management and control of their clinical services. Accordingly, the Health Service Association recommends:

- 2.1 That sections 19 and 29A be amendment making it a requirement that the public health organisations be directly and actively involved in the assessment and investigation of a complaint made to the Commission about the public health organisation.

## 3. *Review of investigations*

At present the *Health Care Complaints Act 1993* does not require the Commission to review the investigation process following the conclusion of an investigation. This prevents public health organisations from formally feeding back comments on the investigation. A continuing review process is required to ensure issues regarding the investigation process are identified and addressed.

### Recommendation

In relation to this issue the Health Services Association recommends:

- 3.1 That a new section 29AB be inserted into the *Health Care Complaints Act 1993* requiring the Commission to undertake at the conclusion of an investigation a review of the investigation process involving the public health organisation (the subject of the complaint) to identify and address any issues arising from the process.

**Conclusion**

The Health Services Association believes adoption of the recommendations proposed in this submission would enhance the efficacy and effectiveness of the operation of the *Health Care Complaints Act 1993*.

Yours sincerely

A handwritten signature in black ink, appearing to read 'J McGillicuddy', with a large, sweeping flourish at the end.

**James McGillicuddy**  
**Executive Director**