



Our Ref: FF10/129 : DD12/01247

Your Ref:

6 February 2012

The Director
Standing Committee on Law and Justice
Parliament House
Macquarie Street
SYDNEY NSW 2000

By Email: LawandJustice@parliament.nsw.gov.au

CONFIDENTIAL

Dear Director,

Further Submission – Inquiry into opportunities to consolidate tribunals in NSW

I refer to the evidence of Dr Greg Kesby, Deputy President of the Medical Council of NSW, who appeared before the Parliamentary Committee on 23 January 2012.

The Council provides the following additional information in response to the questions taken on notice:

Internal Review Division to review the merits of a decision

For the reasons outlined below, the Council would not support any amendment to the Medical Tribunal's processes which would result in a review being available, whether internal or otherwise, on the basis of a review into the merits of the matter.

Currently decisions of the Medical Tribunal can only be appealed to the Court of Appeal on a question of law. Moreover, leave to appeal is required, so that the Court of Appeal can ensure, as far as practicable, that it only considers appeals where there is a reasonable prospect of success.

The Council is of the view that these current arrangements should remain and that any review or appeal in relation to the merits of a decision is undesirable.

The Council's earlier submission identified the fact that serious complaints are referred to the Medical Tribunal of NSW, often relating to a medical practitioner's misconduct. On occasions the complaints may allege a sexual relationship with a patient, an inappropriate examination of a patient or some other conflict between the medical practitioner and the patient arising from the patient's treatment.

In the Council's experience, complainants can find the experience of giving evidence in these circumstances difficult, and on occasions distressing.

The Council would strongly discourage any change which would require complainants to, in effect, give their evidence again and go through the process a second time, because a practitioner has elected to exercise their right of review or appeal against the merits of an adverse decision. It may discourage complainants from giving evidence at first instance, or discourage complainants from giving evidence a second time at the merits review or appeal, given the sensitive and on occasions distressing factual matters that are in issue.

The Council submits that the current arrangements are satisfactory, in that an appeal to the Court of Appeal is limited to a question of law, so that factual witnesses are not required to give their evidence again at any appeal.

The Court of Appeal still has the power to set aside a Medical Tribunal's findings and orders if the Tribunal's findings, including its fact-finding process, was unreasonable, took into account an irrelevant consideration, failed to take into account a relevant consideration or was otherwise erroneous at law. The Council is of the view that the interests of the parties before a Medical Tribunal are sufficiently protected, despite the appeal being limited to a question of law.

Moreover, the Council would be greatly concerned by what invariably will result in an increase in appeals against findings of professional misconduct, if practitioners are able to, in effect, undertake a merits review of the Tribunal's decision. Practitioners are more likely to exercise their right of appeal, particularly against a finding that their registration is suspended or cancelled, in the hope of getting a more favourable outcome on review. This undermines the integrity of the disciplinary system in NSW and has the potential to erode the public's confidence in such a system if different decisions are being made essentially on the same or similar facts.

Quantum of Legal Costs in Tribunal Matters

The Health Care Complaints Commission prosecutes the complaints against medical practitioners before the Medical Tribunal. The Council is not party to these proceedings, so it is unable to precisely quantify the costs arising from the Medical Tribunal complaints, appeals and reviews, conducted in the last financial year.

The Council is however a party to the Medical Tribunal appeals filed against its decisions or applications for review of an order that previously cancelled/deregistered a medical practitioner.

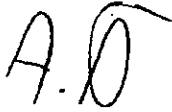
Whilst each matter will vary in terms of its complexity, the legal costs incurred by the Council when appearing as party before the Tribunal in these matters is usually in the vicinity of \$25,000 to \$40,000.

There have been occasions where practitioners are managed through a number of the Council's programs and these practitioners have sought to challenge a number of decisions made by the Council. In matters involving two medical practitioners who initiated a number of appeals and reviews in the Medical Tribunal, the Council incurred legal costs of \$229,166 and \$158,623. In such circumstances, the Council maintains that the award of costs against an unsuccessful party is an effective way of ensuring unmeritorious cases are not frequently commenced. It also ensures that the Council's resources are

maximised in order to advance regulation and public protection and are not diminished by being involved in unmeritorious cases.

Please do not hesitate to contact the Medical Council's Executive Officer, Ameer Tadros, on [redacted] should you require further information concerning the matter.

Yours faithfully,

A handwritten signature in black ink, appearing to be 'A. D.' with a stylized flourish at the end.

Ameer Tadros
Executive Officer