

17 November 2008

Bronwyn Nardi
Chair
Practitioner Regulation Subcommittee
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Dear Ms Nardi

COMPLAINTS ARRANGEMENT SUBMISSION

This submission is directed towards the Consultation Paper issued by the Practitioner Regulation Subcommittee of the Health Workforce Principal Committee on 7 October 2008 in relation to the proposed arrangements for handling complaints under the national registration and accreditation scheme.

I have strong concerns about the proposed arrangements in so far as they deal with liaison between a Health Complaints Commissioner (HCC) and a board in relation to a notification received by a board. On my reading of the paper, the treatment of this subject is based upon an inadequate understanding of the role which HCCs play, and why they have been given that role. One result, contrary to the intent expressed in paragraph 1.5 of the paper, is potential compromise to public safety and the rights and interests of consumers. Another result is impairment of the ability of HCCs to exercise independent oversight over the health system in their jurisdiction, and to achieve improvements in that system.

The role of HCCs is not just to resolve consumer complaints - compare para 2, p 11 of the paper and penultimate para on p 17. In my own case, the function of receiving, assessing and resolving complaints is the fourth-mentioned function in a section which has 11 paragraphs, each of which outlines a different function : *Health Complaints Act 1995 (Tas) (HCA)*c, s 6. Amongst the functions listed before that is the function of identifying and reviewing issues arising out of complaints and suggesting ways of improving health services and preserving and increasing health rights. Another major function is to inquire into and report on any matter relating to health services at my own discretion, or on the direction of the Minister administering the *Health Act 1997*. The Act also expressly empowers me to investigate any issue arising from a complaint if it appears to me to be a significant issue of public safety or public interest, or to be a significant question as to the practice of a health service provider: s 40(1)(c).

Resolving consumer complaints is thus just one aspect of a role which, in broad, is about the protection of the rights of health service users, and about independent scrutiny of public safety and public interest issues arising in connection with the State's health system.

The responsibilities of an HCC dovetail with those of the health profession registration boards in the same jurisdiction. In Tasmania, there are 12 of these. The *HCA* is the principal Tasmanian legislation governing this relationship, not, as Attachment 3 of the consultation paper would suggest, the *Medical Practitioners Registration Act 1996*. The critical provision in respect of a complaint received by a board, and how the board and the HCC deal with this, is s 57 of the *HCA*. First there must be consultation between the two on who should best handle the matter. Then if

there is disagreement, the HCC has the final say. In an appropriate case, the HCC could determine to split the matter, and refer part to the board and retain part for the HCC's own attention.

In contrast, the model presented in the consultation paper appears to give the board the final decision on how the matter is dealt with : last para, p 11; para 7, p 18. The stated criterion for deciding whether the HCC should have the matter (or part of it) is whether the board considers it suitable for conciliation : last para, p 11.

The question must be asked whether it is better for the final say on who deals with a particular complaint to lie with a professional body whose concern is with the maintenance of standards in their own profession, or with an independent and impartial statutory officer whose function is to look at the matter from the point of view of protecting the public interest and improving the health system generally. I submit that it should be the latter, as it currently is in this State. The risk of giving this decision to the board is that public interest or system issues arising from the notification are only dealt with through the lens of, and in light of the interests of, the particular profession, or are not examined at all.

Even if this is not accepted, the criteria for deciding who should handle the matter should be much wider than proposed. I attach in this regard a copy of protocols which I have agreed with registration boards in this State which guide the relationship between the boards and the HCC. In line with the Act, it is agreed (clause 4.1) that a matter will usually be referred to or retained by a board if, were it to be proven (either alone or as part of an apparent pattern of conduct), the matter -

- would represent professional misconduct within the terms of the statute which governs the operation of the board (other than by reason of constituting negligence or incompetence which is not of such seriousness as to warrant the use of the disciplinary powers of the board); or
- involves the maintenance of the standards of professional practice; or
- is best addressed using the disciplinary powers of the board.

It has been agreed on the other hand (clause 4.3) that a matter of complaint will usually be referred to or retained by the HCC if it -

- does not warrant referral to or retention by the board for any of these reasons; or
- may be amenable to early resolution under s 25A of the Act; or
- may be amenable to resolution by conciliation; or
- involves a matter or matters of public interest (*eg* system failure or a significant issue of public safety) best addressed by using the powers of the HCC; or
- is best addressed by using the powers of the HCC.

It is also important to recognise that the issue of whether or not the complaint or any aspect of it is referred to the HCC is one that should not be determined solely at the time of the receipt of the complaint by the board, but should be kept under review whilst the board is handling it. Under the *HCA*, a board which retains a complaint made to it must inform the HCC of its findings, of the reasons for its decision and of any action which it has taken or proposes to take : s 58(2). It must also consult with the HCC with respect to whether the complaint or any part of it, or issue arising

out of it, should be referred back to the HCC for action : s 58(4). The HCC again has the final say on whether such referral should occur : s 58(5).

In this and other ways, the HCC exercises some oversight in relation to the work of the board, again for the purposes of advancing the wider public interest. I note in this connection the power of the HCC to intervene in disciplinary proceedings before a board : s 62.

There is also the potential for a joint investigation by the HCC and a Board : s 58(6).

In the face of such provisions, designed to protect the public interest, the proposals in the paper about how an HCC and a board are to interact, and about how a deadlock between them about referral is to be resolved, are far too limited in conception, and do not represent optimum policy.

As a final matter, since I am both Ombudsman and Health Complaints Commissioner, I believe that only Option 1 under para 9.8 of the Consultation Paper is viable. It would be inappropriate, in my view, for a State Ombudsman to have any role to play in respect of the administrative actions of national bodies.

I hope that these observations are of assistance to the Subcommittee.

Yours sincerely

SIMON ALLSTON
OMBUDSMAN AND HEALTH COMPLAINTS COMMISSIONER

**PROTOCOLS BETWEEN THE HEALTH COMPLAINTS COMMISSIONER
AND REGISTRATION BOARDS**

1. Purpose

- 1.1 The purpose of these Protocols is to set out principles and procedures which are to apply to the dealings under the *Health Complaints Act 1995* (the Act) between the Health Complaints Commissioner (HCC) and the Registration Boards (Boards) listed in Schedule 2 to the Act. The Protocols are intended to supplement the relevant provisions of the Act and of the statutes governing the operations of the Boards, and should be read in conjunction with those provisions.
- 1.2 The Protocols are not binding, and are not intended to in any way limit the exercise of any statutory discretion.
- 1.3 The word "complaint" in the Protocols is intended to cover a grievance within the terms of s 57 of the Act.

2. Meetings

- 2.1 The HCC will meet with each Board at least once a year, to discuss the dealings between the parties under the Act and other matters of mutual interest. The meeting may be with the full Board, or with the Registrar and/or members representing the Board.
- 2.2 Meetings will also take place from time to time between HCC and Board staff for the purpose of consultation required by the Act, to ensure the timely handling of complaints by both parties, and to address other matters of mutual interest. Such meetings may be requested by either party.

3. Consultation

- 3.1 The Act requires consultation between the HCC and a Board –
- where the complaint has been received in the first instance by the HCC, before the HCC determines to refer the complaint to the Board under s 25(1A)(a) – see s 25(3); and
 - where the HCC considers that a matter raised by or during the course of an investigation should be investigated by the Board, before the HCC determines whether or not to refer that matter to the Board – see s 49(2); and
 - where a complaint has been received in the first instance by the Board, before a decision is taken on whether or not the complaint should be referred to the HCC – see s 57(1)(b); and
 - where the Board investigates a complaint pursuant to s 58(1) of the Act, in relation to whether the complaint, or any part of the complaint or any issue arising out of it, should be referred to the HCC – see ss 58(3) and (4).

- 3.2 Consultation will normally be by letter, but may also occur in meetings, by email or by telephone.
- 3.3 Consultation with a Board will take place through the Registrar of the Board unless other arrangement is made.
- 3.4 Each party will provide the other with all information necessary to make sure that the consultation takes place on an informed basis.
- 3.5 Where a party wishes a particular matter to be referred to it, the party will provide reasons for doing so.
- 3.6 Each party will respond as quickly as practicable to any request by way of consultation for its views on whether a particular matter should be referred.

4. Principles applying to referral

- 4.1 A matter of complaint will usually be referred to or retained by a Board if, were it to be proven (either alone or as part of an apparent pattern of conduct), the matter –
- would represent professional misconduct within the terms of the statute which governs the operation of the Board (other than by reason of constituting negligence or incompetence which is not of such seriousness as to warrant the use of the disciplinary powers of the Board); or
 - involves the maintenance of the standards of professional practice; or
 - is best addressed using the disciplinary powers of the Board.
- 4.2 It may also be appropriate to transfer a matter of complaint to a Board on the ground that the HCC is without jurisdiction, or is required to dismiss the complaint under s 25(5) of the Act.
- 4.3 A matter of complaint will usually be referred to or retained by the HCC if it –
- does not warrant referral to or retention by the Board in accordance with para 4.1; or
 - may be amenable to early resolution under s 25A of the Act; or
 - may be amenable to resolution by conciliation; or
 - involves a matter or matters of public interest (*eg* system failure or a significant issue of public safety) best addressed by the HCC; or
 - is best addressed using the powers of the HCC.
- 4.4 In considering whether a complaint should be referred or retained, both the HCC and the Board will consider the desirability of –
- simultaneous referral to the Board and retention by the HCC for conciliation, pursuant to s 25(1B);
 - the splitting of the complaint under s 29;
 - a joint investigation in accordance with s 43(4) or 58(6) of the Act; or
 - a separate investigation by the HCC under s 40(1)(c) or (d) of the Act.

4.5 Where a Board considers that it is urgent that it act upon a complaint without delay, it may ask the HCC for urgent assessment and referral. The HCC will consider and act upon the case with minimal delay under such circumstances.

5. Notification

5.1 Acting in accordance with s 24A of the Act, the HCC will notify the relevant Board as soon as practicable, and in any event within 5 days, of the receipt by the HCC of a complaint within the jurisdiction of the Board, giving the Board details of –

- the file number allocated to the complaint;
- the name of the provider;
- the name of the complainant;
- a brief summary of the complaint, including the date or dates when the matter of complaint arose.

The purpose of so doing is to give the Board early notice of the complaint. Consultation with respect to the complaint will occur later in accordance with the Act and these Protocols.

5.2 A Board will notify the HCC as soon as practicable of any decision to commence disciplinary proceedings, to enable the HCC to determine whether to intervene in the proceedings pursuant to s 62 of the Act.

5.3 Subject to s 35(4) (which limits the information which may be provided to a Board about the outcome of conciliation), the HCC and the relevant Board will each inform the other forthwith of the outcome of the handling of a complaint.

6. Provision of Information

6.1 Subject to clauses 6.4 and 6.5, where the HCC refers a matter to a Board, the HCC will provide the Board with a copy of all medical reports, investigation reports and other materials which are held by the HCC which may reasonably assist the Board in carrying out its functions.

6.2 Subject to clauses 6.4 and 6.5, where a Board refers a matter to the HCC, the Board will provide the HCC with a copy of all medical reports, investigation reports and other materials which are held by the Board which may reasonably assist the HCC in carrying out its functions .

6.3 Subject to clauses 6.4 and 6.5, where the HCC is conciliating a matter of complaint and a Board is exercising or has exercised functions with respect to that matter or a related matter of complaint, the Board will at the request of the HCC provide the HCC with all medical reports, investigation reports and other materials which are held by the Board which may reasonably assist in the conciliation.

6.4 A party may request in writing at the time of providing materials in accordance with this clause that the materials or any specified part of the materials be kept confidential, and any such request will be met.

6.5 Subject to the requirements of the Act, a party may decline to provide materials in accordance with this clause, and in that event will inform the other party of the general nature of the materials being withheld and the reasons why they are being withheld.

7. Joint Investigations

7.1 A joint investigation may be proposed by either the HCC or the relevant Board.

7.2 The investigation will be carried out by an investigative panel appointed by the parties. The panel would usually include the HCC's case officer, a person nominated by the relevant Board, and a person or persons chosen by the parties who will bring necessary professional expertise to the investigation.

7.3 To minimise any potential for confusion or duplication, primary administrative responsibility for the matter of complaint will remain with the party which initially received the complaint. Any correspondence or other materials generated or received by either party with respect to the complaint is to be copied without delay to the other party.

8. Codes

Each Board will at all times ensure that the HCC has an up-to-date copy of all of the codes of conduct which apply to practitioners under the jurisdiction of that Board.

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