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Enhancing the rights-based approach to health care complaints in NSW: submission to the Parliamentary Joint Standing Committee on the Health Care Complaints Commission

12 December 2008

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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 and has, for example, recently provided a submission to the Federal process in respect of national registration of health professionals.¹

PIAC's response to the Terms of Reference

PIAC welcomes the work of the Parliamentary Joint Standing Committee on the Health Care Complaints Commission (the Committee) and notes that the Committee's Terms of Reference are:

¹ 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> at 12 December 2008.

To report on any change that the Committee considers desirable to the functions, structures and procedures of the Commission, the Committee examine the operation of the *Health Care Complaints Act 1993*, with particular reference to:

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

PIAC welcomes the opportunity to respond both to the specific terms of reference and to comment on significant matters affecting the NSW health care complaints system from a consumer perspective.

PIAC submits the most pressing issue regarding the NSW health care complaints system is the proposed changes to that system if a system of national registration of health professionals is introduced.

PIAC submits that there are several areas where the functions, structures and procedures of the Health Care Complaints Commission (HCCC) could be strengthened to the benefit of health consumers.

The first would be to implement the suggestion made by The Hon Deidre O'Connor in her *Review of the Medical Practice Amendment Bill 2008*², that is, to give the HCCC power to initiate its own complaints.

The second would be to strengthen the assessment and investigative powers from a consumer perspective by mandating the provision of written reasons to all parties for all critical decisions made by the HCCC in the complaints process. PIAC also suggests that internal review processes under the HCC Act be codified introducing a more arms-length merits-review process.

Third, PIAC submits that the effectiveness of the NSW health care complaints system could be enhanced by express reference being made to the National Charter of Healthcare Rights in the HCC Act.

The HCCC's role in national registration

PIAC has recently expressed concern regarding some aspects of the proposed national registration scheme for health professionals.³

PIAC supports the concept of national registration of health professionals but is particularly concerned with the contents of the discussion paper, *Proposed arrangements for handling complaints, dealing with performance, health and conduct matters*.

PIAC responded to the discussion paper by way of submission dated 24 November 2008.⁴ In that submission, PIAC stated its support for a national scheme of health registration but submitted that in order to achieve the best outcome for all Australian health consumers, the following principles should apply:

² Deidre O'Connor, *Review of Medical Practice Amendment Bill 2008* (2008).

³ Australian Health Ministers' Advisory Council, *National Registration and Accreditation Scheme for the Health Professionals Consultation Paper: Proposed arrangements for handling complaints, and dealing with performance, health and conduct matters* (2008).

⁴ Dodd, above n1.

- That any organisation or authority that affects the rights of individuals should have clearly defined powers and be accountable.
- That there is a clear separation of the role of regulation of accreditation and standard setting from the role of assessment, investigation and prosecution of disciplinary and performance matters.
- That assessment, investigation and prosecution should be carried out by an independent body that employs dedicated officers to carry out these tasks in a timely manner.
- That there should be no potential for perception by consumers that the system is structured so that the professions can protect their members at the expense of protecting the public interest and patient safety.
- That the processes to determine serious disciplinary and competence matters should comply with the rules of procedural fairness and be conducted in an open and transparent manner. Written reasons should be provided for all decisions. Hearings should be open unless there is a compelling reason for them not to be. All parties including the complainant/ notifier should have a right to request a review of a decision, which is conducted at arms length from the decision-maker.

PIAC calls upon the Committee to take an active stand in defence of existing consumer rights in NSW.

The role of the HCCC would be greatly reduced and its effectiveness undermined if the model canvassed in the Discussion Paper became the regulatory regime dealing with health complaints nationally. PIAC submits that the NSW Government and NSW Parliament should not agree to a national scheme that in any way diminishes the rights of NSW health consumers.

In the model proposed in the Discussion Paper, the HCCC would not have the role of assessing or investigating complaints against health professionals. Significantly, the decision whether to investigate a complaint or refer the to the HCCC for resolution or conciliation would not be a decision made by the HCCC. These decisions would be made by part-time decision makers, the majority of whom would be members of the same profession as the subject of the complaint. Although it may be consulted about these decisions, the HCCC would not be the body making the decision. This would mean that if the HCCC thought a complaint should be investigated and a national registration board disagreed, then the board's decision would prevail.

This can be contrasted with the co-regulatory model that has been developed in NSW that PIAC strongly supports. In the NSW model, an independent body—the HCCC—assesses, investigates and prosecutes complaints about health professionals, but consults with the appropriate registration board at the critical stages of the complaints process. If either the HCCC or a registration board wants to take a matter further in a disciplinary direction, then the view of that body prevails.

In its submission on the Discussion Paper, PIAC advocated that an independent body that assesses, investigates and prosecutes health complaints should be a part of the national system for registration of health professionals. Alternatively, the national system should allow each state and territory to retain its existing mechanisms dealing with the assessment, investigation and prosecution of complaints about health professionals.

Giving the HCCC power to initiate its own complaints

PIAC notes the comments made by former Justice Deirdre O'Connor in her report to the NSW Government on the Medical Practice Amendment Bill 2008 (NSW), that there should be a review of certain aspects of the powers of the HCCC. Specifically, she asked whether the HCCC should be given power to initiate its own complaints.

PIAC submits that the HCCC should have the power to initiate complaints without a written complaint being made under subsection 9(1) of the HCC Act. PIAC submits that the necessity for complaints having to be in writing from an individual complainant is an unnecessary complexity in the NSW health care complaints system.

The need for the HCCC to have power to initiate its own complaints arises in four particular situations:

- **Threats to public health and safety:** Where a particular situation or conduct is brought to the notice of the HCCC and where there is a need for the HCCC to take urgent action or there is a need for the HCCC to immediately commence an assessment leading to an urgent investigation of a serious issue of public health and safety.
- **Adding new respondents or new issues:** Where the HCCC is assessing or investigating a written complaint and it needs to name additional health practitioner(s) as respondents to the complaint or where after assessment or investigation, the HCCC believes it is necessary and appropriate to add grounds to the complaint that were not covered by the original written complaint.
- **Urgent matters for resolution:** Where a verbal complaint or concern is raised with the HCCC that, although not of sufficient seriousness to warrant investigation by the HCCC, nevertheless requires immediate action by the HCCC to resolve the complaint or concerns under Part 2, Division 9 of the HCC Act (complaints resolution).
- **Broader investigations and inquiries:** Where the HCCC can identify, either through its statistical information about complaints, or through information from the public or the media, particular trends or recurrent concerns about particular health providers.

Threats to public health and safety

The NSW public has an expectation of the HCCC that it should act as an effective watchdog over health providers and health professionals. This perception has been reflected in the extensive media coverage of the Reeves complaints and the concerns about emergency departments in public hospitals that led to the Special Commission of inquiry into Acute Care Services in NSW Public Hospitals. However the HCCC's overall watchdog role is limited by the fact that, under the HCC Act, it can only take action if there is a written complaint. The process of assessment set out under the HCC Act can only commence on receipt of a written complaint and nothing can happen, either by investigation or resolution, before a complaint is assessed.

Under the HCC Act, any person or body can initiate complaints. Some of the more serious complaints reflecting a threat to public health and safety have historically been initiated by one of the various registration boards or even Members of Parliament, and often only after there has been some period of extensive media attention. However, if serious matters of public health and safety within the HCCC's jurisdiction are the subject of media attention and there is a public demand for urgent action, these are cumbersome methods of initiating an urgently kick-starting of the HCCC's processes.

PIAC is not advocating that the requirement for complaints in writing under section 9 of the HCC Act be repealed. Rather, PIAC submits that section 8 of the HCC Act be amended to give the HCCC discretion, in certain circumstances, to trigger the complaints process by its own motion. Under this model there would clearly remain an obligation to comply with natural justice principles, including the statutory notice provisions and timelines in the HCC Act in dealing with complaints.

Such a provision would complement section 66 of the *Medical Practice Act 1992* (NSW), which gives the Medical Board powers to suspend or place conditions on the practice of a medical practitioner if urgent action is required in the public interest.

Adding new respondents or new issues

One of the advantages of an independent body such as the HCCC assessing and investigating complaints is that it is a 'one-stop shop' to deal with health complaints. A health consumer can complain about a particular incident at a hospital, and the HCCC can investigate both allegations of unprofessional conduct or lack of competence of individual health practitioners as well as looking at broader systemic issues at the same time. The HCCC also has the power to refer one part of a complaint to conciliation, while investigating and even prosecuting a health practitioner about another aspect of the same complaint.

Authorising the HCCC to initiate complaints on its own motion could enhance this current strength. Currently the HCCC has to go through the cumbersome procedure of finding a formal complainant such as a registration board in order to add a respondent to a complaint or to add additional grounds that have come to light in an assessment or investigation.

If the HCCC could initiate its own complaints it could either add a new health professional as respondent to a complaint or add new issues to an existing complaint.

Urgent matters for resolution

PIAC notes that the HCCC operates an Inquiry Service and encourages health consumers to telephone this service. The HCCC's website's main page says about the Inquiry Service: 'Callers are advised about the options available to resolve their concerns and how to make a complaint to the Commission'.⁵

Yet, if a health consumer calls with an urgent concern about a health service, the HCCC cannot act without a written complaint under section 9 of the HCC Act. Subsection 9(3) states that it is the duty of the HCCC to help a person to make a complaint if the person requests assistance to do so. PIAC notes that HCCC officers do assist health consumers in these situations, often to the extent of providing a draft letter to the HCCC. This means that the requirement that a complaint should be in writing is not necessarily a barrier to the complaints process in non-urgent matters.

However, the HCCC does receive a certain amount of calls about situations where the health consumer or the relative of someone in a hospital, aged care facility, etc, needs urgent assistance to resolve their concerns. These situations are not necessarily matters in which the HCCC would investigate the complaint but they may be situations where the HCCC would normally act under Part 2, Division 9 of the HCC Act.

Section 58C of the HCC Act gives the HCCC power to:

- provide information to the parties of the complaint;
- undertake discussions concerning the complaint with parties to the complaint facilitating the direct resolution of the complaint between parties to the complaint;
- facilitate the direct resolution of the complaint between parties to the complaint.

If the complainant needs urgent action to be taken to resolve their concerns or requires immediate negotiations with a health provider with the HCCC acting as a go-between, then given the timeframes and procedures required under the HCC Act (written complaint, respondent advised in writing with request for written response, etc), the right to complain in reality is rendered ineffective.

⁵ *About the Health Care Complaints Commission* (2007) Health Care Complaints Commission <<http://www.hccc.nsw.gov.au/html/about.htm>> at 12 December 2008.

Before the changes to the HCC Act in 2004, the HCCC's Patient Support Service informally dealt with such matters. With the legislative changes, in 2005 the Patient Support Service became the Resolution Service, which now only deals with complaints that have been through the assessment process.⁶

PIAC submits that it is in the interests of health consumers that there is a mechanism for urgent matters to be resolved as quickly as possible by HCCC officers without the need for a written complaint.

A particular need in this area and one of concern to PIAC is complaints by prison inmates. All NSW prisoners can access the HCCC Inquiry Service by making a free telephone call through the Arunta system. However, prisoners are often frustrated by the need to make complaints in writing and the time taken to assess written complaints. Although there is a practice of HCCC Inquiry Officers passing on prisoners' concerns directly to Justice Health, the HCCC is not made aware of the outcome of such communications and is unable to follow up on matters raised. Prisoners are effectively unable to have complaints about Justice Health dealt with urgently. They also lack the capacity of other health consumers in the community who are able to resolve their complaints through local complaints mechanisms, Members of Parliament, etc.

If the HCCC had power to deal with matters on its own motion, health complaints by prisoners, in urgent situations, could be expeditiously dealt with through the powers in section 58C of the HCC Act. This would only occur in situations where the HCCC assessed that the prisoner had raised a matter that required urgent attention.

Broader investigations and inquiries

Under section 7 of the HCC Act, a complaint can only be made against a 'health practitioner' or a 'health service, which effects the clinical management or care of an individual client'.

Under current practice of the HCCC this has been interpreted as restricting it from dealing with anything but a complaint that is about the way a particular person is treated by a health service or the conduct of an individual health practitioner. A complaint about how a health service or health practitioner deals with a particular class of patient or a particular situation has been deemed to be outside the jurisdiction of the HCCC. For example a complaint by an ex-staff member of an aged care facility that staff at the facility regularly physically abuse elderly residents is unlikely to be investigated unless a particular abused patient is identified and they or their family members are willing to provide information to the HCCC. (Often individual complainants are hard to find because of fears by family members that there will be further retribution if a complaint is made).

The HCCC has, in the past, been involved in broader inquiries but significantly these were not founded on the powers set out in the HCC Act. In 1999 the then Health Care Complaints Commissioner chaired an inquiry into Cosmetic Surgery, which reported to the NSW Minister for Health. The Inquiry was conducted under the *Health Administration Act 1982* (NSW) but the report and its findings were widely seen as a HCCC report.

The HCCC, through both investigation and resolution of complaints, has access to valuable information about patient safety in NSW. The HCCC has the capacity to identify weak spots in the performance of health providers in NSW, in particular public sector providers. If it had powers both to initiate its own inquiries and investigations as well as to assess and investigate health providers and health practitioners beyond the focus on individual complainants, PIAC believes the effectiveness of the HCCC would be greatly enhanced.

⁶ Deloitte, *Health Care Complaints Commission: Internal Review of Resolution Service* (2007) NSW Parliament <[http://www.parliament.nsw.gov.au/prod/parliament/committee.nsf/0/690d5c2fd8b3795bca25744e0018de3b/\\$FILE/Internal%20Audit%20of%20Resolution%20Services.pdf](http://www.parliament.nsw.gov.au/prod/parliament/committee.nsf/0/690d5c2fd8b3795bca25744e0018de3b/$FILE/Internal%20Audit%20of%20Resolution%20Services.pdf)> on 12 December 2008.

PIAC submits that, with appropriate resourcing, if the HCCC were able to initiate its own inquiries, it would be in the public interest for the HCCC to have wider powers in this regard. This would allow the HCCC to investigate, in appropriate circumstances, allegations going beyond individual patient complaints as referred to above and also conduct broader investigations into systemic issues in NSW. PIAC notes the powers of the Clinical Excellence Commission in this regard, but also notes that the Clinical Excellence Commission itself has restricted powers and there are some areas where an inquiry by the HCCC would be in the public interest. The Cosmetic Surgery Inquiry would be an example of the sort of Inquiry the HCCC should be conducting from time to time.

Reasons for decisions and statutory review provisions

PIAC submits that the HCC Act should be amended to include legislative provisions that:

- mandate the provision of written reasons for assessment and post-investigation decisions;
- provide for both internal and external review of assessment and post-investigation decisions.

As noted above, PIAC in its recent submission regarding complaints handling and the proposed national registration scheme for health professionals stated that it was an important principle:

That the processes to determine serious disciplinary and competence matters should comply with the rules of procedural fairness and be conducted in an open and transparent manner. Written reasons should be provided for all decisions. Hearings should be open unless there is a compelling reason for them not to be. All parties including the complainant/ notifier should have a right to request a review of a decision, which is conducted at arms length from the decision-maker.⁷

Reasons for critical decisions in the complaints process

PIAC notes that there is no common law obligation for authorities like the HCCC to give reasons for decisions made that affect the rights of consumers.

PIAC submits that there is a strong argument that if a decision of an authority significantly effects the rights of individuals or makes a significant difference to the lives of individuals in other ways, then reasons for decisions in writing should be provided to affected parties.

The decisions made by the HCCC can have significant outcomes for all parties, health providers, health professionals and health consumers alike. The effects of decisions by the HCCC on health professionals are well documented. Any decision that affects the livelihood of an individual cannot be seen as anything other than serious

All decisions of the HCCC can have profound effect on health consumers. Certainly changes to tort laws in NSW have significantly restricted the opportunity for consumer redress through civil litigation. A complaint to the HCCC may be the only redress that a health consumer or a surviving relative has to resolve concerns and complaints about the treatment by or conduct of health providers and health professionals. Not only is it more and more recognised that health consumers have a right to complain, but it is also recognised that open and accessible complaints procedures form a vital role in the maintenance of patient safety.

⁷ Dodd, above n1, 6.

PIAC submits that the HCC Act should reflect the importance of providing all relevant information to the consumer and, in order to promote effective resolution of complaints, there should be a provision in the HCC Act that requires the HCCC to give written reasons for its decisions about assessment and the outcome of an investigation, to both the complainant and the respondent provider or practitioner.

Reasons should be given for all critical decisions in the complaints process, not just those in the disciplinary stream. Although the HCCC has a primary role of protecting the public, which leads to a primary focus on disciplinary matters, there has been recognition that resolution of complaints is also an important aspect of the HCCC's work. The object's provision—section 3—of the HCC Act recognises a primary object of the HCCC is the 'resolving or overseeing the resolution of complaints'. More recent amendments to the HCC Act in Part 2 Division 9 gave statutory force to the HCCC's powers of complaints resolution.

PIAC submits that it is an important principle that reasons are given after assessment, whatever the assessment decision. Reasons should be given to both respondent and complainant if the a complaint is investigated, referred to the Resolution Service or the Health Conciliation Registry, referred to a registration board or another body, or when the HCCC declines to deal with a complaint.

PIAC recognises that the HCCC has been increasing the practice of giving reasons and explanations for its decisions and this is commendable. There are certainly sections of the HCC Act, such as section 40 that provide that reasons should be given to respondent practitioners. However, PIAC submits that because of past practices and the legislative requirements of only giving reasons in certain circumstances, the HCCC has been seen in the eyes of the public as not sufficiently open and accountable. Had the HCCC been required to give reasons to complainants when dealing with complaints about the (then) Dr Reeves, it may not have received the amount of public criticism it ultimately did receive when this matter received extensive media coverage.

Internal and external reviews of HCCC decisions

The HCC Act currently provides for internal reviews under section 28 (review of assessment decision by complainant) and section 41 (review of decisions made under section 39 – post-investigation decisions by complainant). Neither section provides any guidance as to how a review is to be conducted and who is to conduct the review. Currently section 28 reviews are drafted by Resolution Officers and signed off by the Health Care Complaints Commissioner.⁸

The current review process under the HCC Act cannot accurately be described as an 'arm's-length' process. For the same reasons as stated above in regard to giving reasons for decisions, because of the significance of HCCC decisions both to consumers and respondents to complaints, PIAC submits that it is essential that either through legislation or practice, an 'arm's-length' merits review system be instigated in the HCCC.

At one stage a body was set up called the Independent Complaints Review Committee (ICRC) to review HCCC decisions after the internal review process was completed. The ICRC had consumer and practitioner representatives, but had no statutory basis and only advisory power. Effectively, the Health Care Complaints Commissioner still decided the fate of reviews against his or her decisions at all review stages. The ICRC was disbanded in 2004.

PIAC has a preference for the review process to be set out in the HCC Act. PIAC recommends a statutory internal review process for the HCCC, based on complaint handling best practice, with the following provisions:

⁸ Deloitte, above n6, 2.

- Complainants and respondents having a right to request a merits review after any critical decision in the complaints process.
- Reviews conducted and decided by delegated officers in circumstances where there is clear separation from the Health Care Complaints Commissioner who effectively makes the initial assessment and investigation decisions under the HCC Act.
- Mandatory provision of written review decisions with reasons.
- Procedural fairness principles that apply and both complainant and respondent should have an opportunity to respond and provide additional submissions and evidence if a HCCC decision is subject to review.
- Time limits should be placed on a party's opportunity to respond and the HCCC's response after that.

PIAC also suggests that consideration be given to the establishment of an internal review body, similar to the ICRC referred to above but with more than just advisory powers. The necessity for such a body increases the more the internal review processes are conducted by those who are not seen as at 'arm's length' from those who make the original decisions within the same organisation.

Incorporating the National Charter of Healthcare Rights

On 22 July 2008, the Australian Health Ministers adopted the National Charter for Healthcare Rights (the Charter) developed by the Australian Commission Health on Safety and Quality in Health Care (Safety and Quality Commission).⁹ The Safety and Quality Commission developed the Charter after a lengthy period of consultation with various stakeholders including consumer groups.

PIAC supports the Charter but remains concerned about its lack of enforceability mechanisms.

PIAC has undertaken a considerable amount of work in regard to patient, or health consumer charters of rights over its 26-year history. The most considerable piece of work in this area was the development of an Australian Health Consumers' Charter—prepared for the Australian Consumers' Council by PIAC and Ageing Agendas—in 1996. This work consisted of a draft charter for comment as well as a background paper. More recently, PIAC participated in the consultation process that led to the development of the Charter as adopted by the Health Ministers in July 2008.

PIAC has consistently maintained an effective charter of health rights must have workable enforceability mechanisms. Consistent with this approach, PIAC submits that the HCC Act should be amended to include express references to the Charter.

PIAC submits that the current assessment and investigative powers of the HCCC would be strengthened by references to the Charter in the HCC Act. The Charter could also provide a point of focus for discussions and negotiations that take place in the resolution and conciliation processes.

PIAC would prefer to see the Charter of Healthcare Rights enforced directly by a body such as the HCCC through the HCC Act. Here PIAC points to the New Zealand model. PIAC recognises that this would be a

⁹ *Charter of Healthcare Rights* (2008) Australian Commission on Safety and Quality in Healthcare
<<http://www.safetyandquality.gov.au/internet/safety/publishing.nsf/content/Priorityprogram-01>> at 12 December 2008.

change to how health complaints are dealt with in NSW as it would take the focus beyond simply an assessment of conduct against standards. In this model, an allegation of a breach of a Charter right would be a valid basis for complaint to the HCCC similar to a breach of standards.

Alternatively, a more incremental change would be to:

- To amend the objects clause of the HCC Act—section 3—to include a fifth object ‘to uphold the rights set out in the Australian Charter of Healthcare Rights’.
- To amend the HCC Act to include a provision that the HCCC should consider the Australia Charter of Healthcare Rights when assessing or otherwise dealing with a complaint.
- To include the Charter of Healthcare Rights as a Schedule to the Act.

In this way the Charter would still not be directly enforceable as in the New Zealand model but the HCCC would still be able take the Charter into account in assessment and other decisions.

A further benefit would be that, if the Charter became a Schedule to the HCC Act, this would also lead to greater awareness of the principles set out in the Charter by both consumers and health professionals. The HCCC could also promote the Charter as part of its public education activities.