Council of Social Service of NSW
66 Albion St, Surry Hills NSW 2010
p: 02 9211 2599 | **f:** 02 9281 1968 | **e:** info@ncoss.org.au | **w:** www.ncoss.org.au

NCOSS Briefing Note – Health Legislation Amendment (Complaints) Bill 2004

Key Amendments Proposed:

1. ***Locating the Health Conciliation Registry, currently reporting to NSW Health, with the HCCC as it is the independent statutory body (Division 8 – Conciliation)***

   The Health Conciliation Registry is currently a statutory body in its own right and moving it to the Health Care Complaints Commission will not change this standing. Under the current HCC Act (Division 8, 57) "*The Health Conciliation Registry has no power to receive or conciliate complaints which may come to it otherwise than on the referral of the Commission. Accordingly, the Registry must refer any such complaints to the Commission*." Therefore moving the Registry into the Health Care Complaints Commission will not change its role and will bring all aspects of the complaints process under one body, rather than having them split across two separate bodies.

   Overall the conciliation process remains the same, as stated under the current Health Care Complaints Act 1997 (HCC Act) it is the location of the Conciliation Registry that is changing.

2. ***Increasing the powers of the Health Care Complaints Commission (HCCC) to require information when assessing or investigating a complaint. (Section 21A, 33 and 34A)***

   The current HCC Act permits an authorised person of the HCCC to enter a property and obtain evidence only if the occupier of the premises has consented or if a search warrant has been obtained. However consumer and community groups are aware of the difficulties faced by the HCCC in gaining access to information, which could substantiate a complaint. Where providers refuse to release information, exercise of these powers to obtain information may be the only option. Concerns were raised about giving a statutory body unrestricted powers of obtaining information and around the privacy of consumer records, though section 33 (f) may provide some protection in this matter depending on who is considered the 'owner' of the records.

   In the proposed amendments a person may comply with the request for information but is not required to comply unless they are the complainant, the person against whom the complaint was made or a health service provider.

In the Parliament of NSW, Committee on the Health Care Complaints Commission – *Report of the Inquiry into Procedures followed during Investigations and Prosecutions undertaken by the HCCC*, Report No. 2 December 2003, it states,

"Commissions which deal with health care complaints in other states possess an array of evidence gathering powers. In Victoria Section 25 of the Health services (Conciliation and Review) Act provides the Commissioner with power to subpoena for documents under the Evidence Act. Search and seize warrants must be issued by a magistrate. Queensland, WA, SA, NT, ACT and Tasmania provide their Commissioners with the power to require a practitioner to produce documentation, give information or attend at a place or time to answer questions." Therefore there is a range of powers already being utilised by other Commissioners and the NSW proposal appears to be in line with the majority of the States and Territories.

Interestingly in the previous review of the Health Care Complaints Act in 1997 the HCC Act Review Committee proposed the following limitations on expanding the powers of the HCCC to obtain information:

The power may only be exercised:
- After the HCCC has given the provider the opportunity to provide information voluntarily within 21 days and the provider has failed to do this
- With the consent of the person about whom the records relate.

However, the Legal Services Commissioner has the power to compel disclosure of information by legal practitioners against whom a complaint has been made and no less a standard should be required for health professionals.

3. Increasing the powers of the HCCC to notify employers of a complaint against one of its health practitioners (Section 28).

In any other industry the employer would be notified of complaint against an employee and it would seem to be appropriate that this is the case within the health professions as well. This is especially so if the complaint is in regards to serious misconduct such as a sexual offence and the Employer needs to take actions in order to protect both the practitioner and other clients. There are some protections available under the proposed changes, for example the HCCC does not have to give notice if it appears, on reasonable grounds, that the giving of notice will *"unreasonably prejudice the employment of the health practitioner in the case of a health practitioner who has provided the health service in the capacity of an employee".* However this is limited by further clauses in regards to the protection of natural justice and the public interest.

4. ***The HCCC will be able to refer matters to a registration board for performance assessment or other action during or after an investigation.***

   This would appear to be a fair process and in line with the Medical Practices Act. However, protection of the consumer is further ensured as the HCCC must still continue with the complaint if, section 26 (2):

   a. *The matter raises a significant issue of public health or safety, or*
   b. *The matter raises a significant question as to the appropriate care or treatment of a client by a health service provider, or*
   c. *The matter, if substantiated, would provide grounds for disciplinary action against a health practitioner.*

5. ***Exempting the HCCC from Freedom of Information Requests (FOI Act Schedule 2)***

   The HCCC is already an exempt body under the Freedom of Information Act – see FOI Act 1989 Schedule 2 – Exempt Bodies and Offices. The proposed amendment within the current review is to change the description of the HCCC as given in the FOI Act and include the Health Conciliation Registry under the HCCC rather than as a separate entry.

   <u>*Currently listed in the FOI Act:*</u>

   The Health Care Complaints Commission—complaint handling, investigative and reporting functions in relation to a complaint that is in the course of being dealt with by the Commission.

   The Health Conciliation Registry—conciliation functions current.

   <u>*Proposed change to the above:*</u>

   The Health Care Complaints Commission—complaint handling, investigative, dispute resolution and reporting functions including any functions exercised by the Health Conciliation Registry).

6. ***Ensuring that the HCCC promptly informs doctors and nurses that they may be the subject of a complaint and what these allegations are (Section 16).***

   The section referred to states that the "*Commission must give written notice of the making of a complaint, the nature of the complaint and the identity of the complainant to the person against whom the complaint is made.*" Therefore it is not just doctors and nurses that are informed but anyone against whom a complaint has been made.

   This is in line with current good practice complaints policies within other organisations. This section does include protection for the complainant where there is the possibility of intimidation or harassment or the complainant may be at risk however notification must be given to the person that is being complained about no later than 60 days after the compliant has been received.

7. ***Removing the requirement for a statutory declaration to be signed by a complainant to trigger an investigation.***

   In the 1997 review of the Health Care Complaints Act consumer groups indicated that the need to provide a statutory declaration can deter people from making a complaint. A written complaint by a consumer should be sufficient basis for commencing an investigation. An investigation will quickly be able to establish any frivolous or vexatious complaints. However consideration may also need to be given to the receiving of verbal or other types of complaints where the person may be unable to write.

   It has also been commented that policy would need to be put in place to provide support to a person who may be the subject of a frivolous or vexatious complaint. NCOSS has been informed of situations where this has happened and the current changes appear to prevent such activity being ever brought into question, except by the Minister, and denies natural justice to, and indeed any possibility of retribution for the accused. This is without regard to the impact this has on the "not-yet-proven-guilty, and maybe-not-guilty-at-all" practitioner. At present there is no forum for the defense of a health worker against a vexatious or serial complainant, or against the HCCC itself. This should be referred to within the legislation.

8. ***Aligning the circumstances in which a complainant's identity is disclosed with that of the Protected Disclosures Act (Section 16).***

   It would make good practice to align this process with the Protected Disclosures Act, which is already in force. The section in the HCC Act is basically a re-write of a similar section within the Protected Disclosures Act (Section 22, Confidentiality Guideline), though the HCC Act leaves out the possibility of a person giving permission for disclosure of the information in writing.

   Under the HCC Act the person against whom the complaint has been made must be notified of the identity of the complainant unless the HCCC is of the opinion that the complainant may be at risk or be intimidated or harassed. However, under 16(5) the Commission must give notice if:

   a. *It is essential, having regard to the principles of natural justice, that the notice be given, or*
   b. *The giving of the notice is necessary to investigate the matter effectively or it is otherwise in the public interest to do so.*

Under Section 22 of the Protected Disclosures Act:

An investigating authority or public authority (or officer of an investigating authority or public authority) or public official to whom a protected disclosure is made or referred is not to disclose information that might identify or tend to identify a person who has made the protected disclosure unless:

a. *The person consents in writing to the disclosure of that information, or*

b. *It is essential, having regard to the principles of natural justice, that the identifying information be disclosed to a person whom the information provided by the disclosure may concern, or*

c. *The investigating authority, public authority, officer or public official is of the opinion that disclosure of the identifying information is necessary to investigate the matter effectively or it is otherwise in the public interest to do so*

9. ***Protecting from liability those whistle blowers who have made complaints in good faith***

There is an ongoing need to protect people who have decided to expose poor work and ethical practices. Experience has shown that these people, while applauded by the community, become the victims of intimidation and/or harassment within their workplace.

10. ***Protecting information provided during the Root Cause Analysis (RCA) process. Amendments will prevent material prepared as part of, or for the purposes of an RCA from being used, and prevent those that participate in an RCA, from being questioned in civil proceedings (Schedule 3, Division 6c).***

To be an effective and fair process and to ensure open communication it would be important that people felt that any information they provided under the Root Cause Analysis is confidential. Protection from civil proceedings would also be a part of this.

It is stated in the legislation that an RCA cannot be undertaken when the "*RCA team is of the opinion that the reportable incident that it is considering raises matters that may involve professional misconduct or unsatisfactory professional conduct by a person who is a visiting practitioner or employee of the organisation or may indicate that such a person is suffering from an impairment*." The definition of reportable incident has been left very vague under this section and this needs greater clarification before being able to determine whether this section is appropriate or not.

However concerns arise in regards to serious offences and evidence about these coming to the RCA Team once they have begun the RCA process, which would be essential for pursuing the complaint through the legal system. For example sexual misconduct and assault where the information disclosed to the RCA team may make the difference between a person having evidence to support their claims in court and their allegation being dismissed. There needs to be a statement included within this section along the lines of any information that is provided, which indicates that a serious criminal offence occurred will result in the RCA process being withdrawn and the information being provided to relevant body.

11. Amending the Nurses and Midwives Act 1991 to provide for performance assessments.

This will bring this Act in line with the Medical Practices Act. Performance Assessments should be available regardless of the medical profession.

However, there does not appear to be any reference to other Health Care professionals such as Physiotherapists, Social Workers, Occupational Therapists, Speech Therapists or Pharmacists. Do the Acts covering them already allow for performance assessments or will those Acts also need to be amended?

12. Mandatory obligations for Area CEOs to report to a registration authority possible causes of unsatisfactory conduct by staff or contractors (Schedule 3.3)

In some instances the CEO may be the only one aware of the matter and this would ensure that they report on these matters .

13. Clarification of the remedial legislation put forward by Walker so that actions taken by the HCCC or other bodies arising out of Walkers recommendations are protected from legal action.

This section already exists in current HCC legislation under Schedule 5 and is a final clause that is being reworded to clarify.

Proposed Change:
Insert, after sections 1 and 2 instead "because a designated person exercises a function in the circumstances or manner authorised by this Schedule or because of any act or omission of the Special Commission".

Current Act – 6 Protection of certain actions relating to Special Commission from challenge:

(1) For the purposes of this clause, a protected action is any action of the HCCC, a disciplinary body, a registration authority, an impairment assessment body or a professional assessment body under this Act or a health registration Act in relation to a health practitioner, being:
   a. Any investigation or other action that is recommended in a report of the Special Commission, or
   b. Any prosecution or other action that is taken following the carrying out of any such recommended investigation or other action.

(2) A protected action may not be:
   a. Challenged, reviewed, quashed or called into question before any court of law, administrative review body or disciplinary body in any proceedings, or
   b. Restrained, removed or otherwise affected by any proceedings,

Because of the exercise by a designated person of any function with respect to a matter to which that protected action relates