

MEMORANDUM TO CABINET COMMITTEE ON EDUCATION AND HEALTH

**HEALTH PROFESSIONALS' COMPETENCY ASSURANCE BILL - COMPLAINTS
AND DISCIPLINE PROVISIONS**

PROPOSAL

1. It is proposed that the Health Professionals' Competency Assurance Bill (HPCA) contain provisions relating to the complaints and disciplinary processes for health professionals.

EXECUTIVE SUMMARY

2. On 14 May 2001, Cabinet agreed (CAB Min (01) 15/1) that the proposed HPCA replace the current 11 health occupational regulatory statutes and noted that the paper was the first in a suite of papers on related issues in response to the "Report of the Ministerial Inquiry into the Under-reporting of Cervical Smear Abnormalities in the Gisborne Region" and Helen Cull's "Review of Processes Concerning Adverse Medical Events".
3. This paper is the second in the suite of papers and contains recommendations on the complaints and disciplinary processes for the HPCA. It is complementary to the accompanying paper on proposed amendments to the Health and Disability Commissioner Act 1994.
4. The proposals in this paper are consistent with the requirement that all consumer complaints relating to incidents which occurred after the introduction of the Code of Health and Disability Services Consumers' Rights are referred, in the first instance, to the Health and Disability Commissioner (HDC). In some circumstances it may be appropriate for the HDC to refer the complaint to the appropriate registering authority either for an assessment of competency as part of the HDC investigation or for the registering authority to take the appropriate action.
5. It recommends that registering authorities be empowered to establish Complaints Investigation Committees to investigate complaints referred to it at the discretion of the Health and Disability Commissioner, complaints which occurred prior to the Code of Health and Disability Services Consumers' Rights, notification of convictions from the registrar of a court and other issues which, in the opinion of the registering authority, warrant some action to be taken in respect of the practitioner's practice.
6. It proposes the establishment of one disciplinary tribunal for all the professions registered under the HPCA, chaired by a barrister or solicitor of the High Court, with three practitioners from the same profession as the practitioner under investigation and three persons who are not health professionals.

COMMENT

Competence of health professionals

7. Under the provisions already approved by Cabinet for the HPCA, registering authorities will be empowered to
 - Review the competence of a health professional at any time and be required to review it after receiving a notification that there are reasonable grounds for concern
 - Require health professionals to undertake a competence review if requested to do so by the registering authority
 - Either decline to issue an annual practising certificate or set conditions on a health professional's practice if the authority believes the professional has failed to maintain a reasonable standard of professional competence.
8. It is further proposed that, if a practitioner fails to meet the competency standards of the registering authority after undertaking, or refusing to undertake, a competency programme, after due process, the registering authority may suspend the practitioner until they to undertake a competency programme.
9. All consumer complaints about a health professional's practice must, in the first instance, be referred to the HDC. It is proposed that, when a complaint is received by the HDC, which in his opinion, is best resolved through the competency processes in the HPCA, that the HDC may refer the complaint to the appropriate registering authority for action.

Professional Issues

10. The HDC may also at his discretion, after preliminary assessment of a complaint, refer the complaint to the relevant registering authority if he concludes that the registering authority is the most appropriate organisation to deal with it. This may occur, for example, where the complaint relates to the professional behaviour of the health professional which does not involve patient care nor pose a risk of harm to the public.
11. The registering authority may also be made aware of issues involving professional standards through sources other than a consumer complaint to the HDC.

Complaints and Disciplinary Processes

12. It is proposed that the processes in the HPCA relating to complaints and discipline be based on the provisions in Part VIII of the Medical Practitioners Act 1995 (MPA) with some modifications as follows.

Complaints Investigation Committees

13. It is proposed that registering authorities be empowered to establish a Complaints Investigation Committee (CIC) to consider:
 - complaints referred to it at the discretion of the HDC

- complaints which refer to an incident which occurred prior to the Code of Health and Disability Services Consumers' Rights
- notifications of convictions from the registrar of a Court, and
- other issues which, in the opinion of the registering authority, warrant some action to be taken in respect of the practitioner's practice.

Membership of CICs

14. Under the MPA, the President of the Medical Council appoints a Complaints Assessment Committee (CAC), but it may not include a member of the Council. Some current registering authorities, including the Medical Council, support this approach because they consider that it is important that the complaints investigation be seen to be separate from the registration processes. Some, on the other hand, most notably the Nursing Council, consider that it is valuable for Council members, who have knowledge, experience and expertise, to be involved in the complaints procedures because of the links between the two processes.
15. There will be complete separation from the registering authorities for those major complaints in relation to breaches of the Code of Health and Disability Consumers' Rights that are being investigated in the Office of the HDC (refer to accompanying paper on amendments to the HDC Act). The CIC will, on the other hand, be considering complaints which have been referred to the registering authority by the HDC because he considers that it is the appropriate body to deal with them. The course of action for the registering authority will, in many cases, be of a remedial nature rather than disciplinary.
16. In view of this, I recommend that the HPCA be permissive of both approaches, with a committee of three members, of which at least one is a lay person.

Powers of CICs

17. Under the MPA, CACs are not specifically given investigatory powers. It is proposed that they be empowered to investigate complaints, hence the recommended name change, so they can decide knowledgeably what action is required in response to the complaint. In order to do this a CIC need to be empowered to:
 - appoint a legal assessor who may, at any time, advise the committee of matters of law, procedure and evidence
 - hear evidence from the complainant and the practitioner
 - take advice from clinical or other experts at any time.
18. A CIC should also be required to report to the registering authority, at any time during the investigation, if the committee believes that members of the public may have been put at risk, or will be at risk in the future.

Courses of Action

19. Following investigation, it is proposed that the CIC should be able to determine whether:
 - the registering authority should review the competence of the practitioner

- the registering authority should review the practitioner's fitness to practise (physical or mental health)
 - the registering authority should censure the practitioner
 - the complaint should be the subject of conciliation
 - the matter should be referred back to the HDC
 - a charge should be laid before the Health Practitioners Disciplinary Tribunal
 - the matter should be referred to the Police
 - no further steps should be taken.
20. In the case of an HDC referred complaint, the registering authority shall advise the HDC of its determination in each case for inclusion in the proposed HDC's database of consumer complaints.

Disciplinary Tribunal

21. There was strong support in the submissions received in response to the Discussion Document on the HPCA and Helen Cull's "Review of Processes Concerning Adverse Medical Events" for the disciplinary function to be separate from the registration function of registering authorities. Currently, only the Medical Practitioners Disciplinary Tribunal (MPDT) and three Dental Disciplinary Tribunals are established as separate tribunals.
22. There is also support for the concept of one disciplinary tribunal for all health practitioners registered under the HPCA. The major concern of the current registering authorities is the cost which may be incurred. Currently all the costs of the MPDT are met by the Medical Council from a disciplinary levy. Some of the smaller registering authorities, for example, the occupational therapists, have very few complaints, especially of the seriousness of those likely to be heard by the Tribunal. The Dental and Nursing Councils would prefer to keep separate disciplinary tribunals for efficiency reasons.
23. The arguments in favour of one tribunal are:
- transparency from the public perspective that the hearing is fair for both the complainant and the practitioner
 - minimising the ability of the profession to protect their practitioners
 - consistency of treatment between professions
 - the establishment of expertise and skills in disciplinary processes
 - the costs will not be significantly higher than the combined costs currently incurred by the registering authorities.
24. There are several options for the location of a tribunal:
- stand alone as for the current MPDT
 - in the office of the HDC
 - under the Tribunals Division of the Courts.

25. The HDC considers that his role is to investigate complaints and the office does not have the expertise or resources to conduct the disciplinary function. Nor does he consider it appropriate for it to do so – there would be a conflict of interest if he was both investigator and adjudicator.
26. The Tribunals Division of the courts is a possible option, but would not have any significant advantages over the stand-alone option and there could be pressure for the Crown to meet the costs if it is perceived as a government agency. The registering authorities are more likely to take ownership of it, and consequently meet its funding, if it is a stand-alone organisation.
27. It is proposed that there be one tribunal, the Health Practitioners Disciplinary Tribunal, established under the HPCA, which is fully funded by the registering authorities. To meet the concerns of some of the registering authorities about costs, the costs of the Tribunal will be met by the profession of the practitioner under investigation and may be recovered, in full or in part, from the practitioner if the disciplinary charge is found to be justified.

Membership of the Tribunal

28. The Cull review recommended there be a judge as Chair. However, there will be a wide range of practitioners covered by the tribunal, not just medical practitioners, with a diverse range of complaints. It is commonplace to require that at least one member of a disciplinary tribunal, and perhaps the Chair, be a barrister or solicitor of the High Court, but it would be very unusual to require that the person be a judge. The MPDT has, as chair, a barrister or solicitor of the High Court of not less than seven year's practice, whether or not he or she holds, or has held, judicial office. This has proved satisfactory for the MPDT and is a less costly option.
29. The Cull review also recommended that there be three practitioners and three lay members sitting on the tribunal. The MPDT has four members (other than the Chair) three of whom are practitioners and one not a practitioner. There is support from a consumer perspective for having equal numbers of professional and lay members on the tribunal in the interests of fairness for the complainant. Some professions, on the other hand, while accepting the need for consumer representation, consider that there should be a majority of their professional peers on the Tribunal.
30. It is proposed that:
 - the Minister appoint a chairperson and one or more deputies, each of whom shall be a barrister or solicitor of the High Court who has held a practising certificate for at least seven years
 - six other persons, (of whom three shall be practitioners of the same profession as the practitioner under investigation and three persons who are not health practitioners) be appointed by the chairperson from a panel appointed by the Minister.

The professions are likely to raise the composition of the tribunal at the Select Committee stage of the Bill.

Grounds for Discipline

31. Under the current regulatory statutes, there are a range of charges which a practitioner may be found guilty of, for example, conduct unbecoming and professional misconduct under the Psychologists Act 1981, and professional misconduct, including professional negligence, under the Dental Act 1981. Under the MPA, a medical practitioner can be found guilty of:
- disgraceful conduct in a professional respect
 - professional misconduct
 - conduct unbecoming a medical practitioner, and that conduct reflects adversely on the practitioner's fitness to practise medicine.
32. These categories are subject to different interpretations. It is proposed that these three categories be replaced by two charges, malpractice and professional misconduct, which more appropriately describe the likely causes for discipline. The differing degrees of severity would be recognised by the Tribunal by the penalty imposed.
33. The other grounds under which a medical practitioner may currently be disciplined regarding convictions, practising outside their scope of practice or breaching an order of the Tribunal would be extended to cover other practitioners.

Penalties

34. The MPDT may under the MPA:
- order that the practitioner be removed from the register
 - order that the practitioner be suspended for a period not exceeding 12 months
 - order that the practitioner practise only in accordance with such conditions that may be specified in the order for a period not exceeding 3 years
 - order that the practitioner be censured
 - order the practitioner to pay a fine not exceeding \$20,000
 - order that the practitioner pay all or part of the costs and expenses.

It is proposed that the HPDT be empowered to impose these penalties, except that the limit on the fine of \$20,000 should be raised to \$30,000 to take account of past and future inflation. The means of the professional would need to be taken into account by the HPDT when determining the level of the fine.

Appeals

35. Cabinet agreed at its meeting on 11 May (CAB Min (01)15/1) that appeals against decisions of registering authorities which affect the rights of individuals lie with the District Court. Appeals against decisions of the MPDT under the MPA are also subject to appeal to the District Court.

36. There has been some suggestion that the High Court might be more appropriate for appeals against decisions of the Tribunal. However, the fees for the High Court are higher, waiting times could be considerably longer and the outcome may not be different from that of the District Court. It is proposed, therefore, that appeals under the disciplinary procedures of the HPCA also lie with the District Court.

CONSULTATION

37. Submissions on the appropriate complaints and discipline processes have been received in response to two discussion documents, the first on the proposed HPCA and the second on Helen Cull's review of adverse medical events.
38. The following government agencies have been consulted in the preparation of this paper: Ministry of Economic Development, Treasury, Ministry of Foreign Affairs and Trade, Ministry of Women's Affairs, Ministry of Justice, Ministry of Pacific Island Affairs, Te Puni Kokiri, Ministry of Consumer Affairs, State Services Commission, Department of Prime Minister and Cabinet.
39. The question of whether the registering authorities and the HPDT should be Crown Entities has been discussed with Treasury and the State Services Commission. In the case of the Education Council, the strategic and fiscal risks posed for the Crown by an entry-controlling agency were deemed sufficient to justify the body being a Crown Agent, that is, a Crown Entity required to give effect to government policy.
40. The health registering authorities, on the other hand, and the HPDT, will not be required to implement government policy - their purpose is to protect the public from harm and discipline those who do not meet appropriate standards. However, they do meet one of the criteria set down by the Finance and Expenditure Committee in 1991 for classification as a Crown Entity in that their members will be appointed by the Minister of Health.
41. Eleven registering authorities exist already established under existing legislation and are not classified as Crown Entities. Nor is the MPDT which was established under legislation in 1995 after the 1991 criteria was set. The framework for the HPCA is one of professional self regulation and this concept is highly valued by the health professionals. They will be required to make their processes and procedures public and to report annually to Parliament. I consider that there are sufficient checks and balances in the proposed legislation to minimise any risk to the Crown and that it is not necessary to formally classify them as Crown Entities.
42. Te Puni Kokiri considers that one of the lay members on a CIC and the Tribunal should be Maori.
43. The Ministry of Consumer Affairs considers that every authority which deals with discipline at any level must be accessible, independent, fair (in terms of procedure, basis of decision-making, and criteria for decision-making), accountable, efficient, and effective. They consider that this can be achieved only if there is separation of the complaints and disciplinary functions from the registration function and consumers are adequately represented on CICs and disciplinary tribunals.

44. I proposed in the previous paper approved by Cabinet on 14 May 2001 that there be protocols in place for the appointments process to ensure that there is an appropriate mix of skills, consumer interests, gender and ethnic perspectives on the Boards and Councils. To meet the concerns regarding the processes of CICs and the Tribunal, I propose that the protocols cover the operation of the CICs and the Tribunal.

FINANCIAL IMPLICATIONS

45. The costs of complaints and disciplinary procedures are currently met by the fees and levies paid to their respective registering authorities by practitioners (often met by the government as employer) and may be recovered from the practitioner, in full or in part, if found guilty by a disciplinary tribunal. It is proposed that this continue under the HPCA.
46. The Ministry of Health is not seeking any additional funding for this proposal. However, there may be a need for one-off funding to set up the tribunal which would be recovered subsequently.

LEGISLATIVE IMPLICATIONS

47. There will be consequential amendments to other Acts of Parliament as a consequence of this legislation.

HUMAN RIGHTS ACT 1993

48. The recommendations in this report are consistent with the Human Rights Act 1993.

REGULATORY IMPACT STATEMENT

49. A draft Regulatory Impact and Compliance Cost Statement is attached.

PUBLICITY

50. A press release will be prepared when the legislation is ready for introduction to the House. Meanwhile, it would be helpful for those seeking to comment if the Cabinet paper could be made available on the Minister's web-site.

ON 7 AUGUST 2001, CABINET CONFIRMED THE FOLLOWING DECISIONS ON THE WORK OF THE CABINET HEALTH AND EDUCATION COMMITTEE: [CAB (01) Min 25/2 refers]

EHC Min (01) 9/8

HEALTH PROFESSIONALS' COMPETENCY ASSURANCE BILL: COMPLAINTS AND DISCIPLINE PROVISIONS

Background

1. **noted** that the paper under EHC (01) 45 is the second paper relating to the proposed provisions of the Health Professionals' Competency Assurance Bill, the first of which (on the framework, registration processes and competency provisions for all health practitioners) was approved by Cabinet at its meeting on 14 May 2001 [CAB Min (01) 15/1];
2. **noted** that the decisions below are consistent with those recommended in the paper on amendments to the Health and Disability Commissioner (HDC) Act 1994 under EHC (01) 46 [EHC Min (01) 9/7];

Competency of health professionals

3. **agreed** that a registering authority may suspend a practitioner if the practitioner does not agree to undertake a competency programme;

Complaints Investigation Committee

4. **agreed** that a registering authority shall, where appropriate, appoint a Complaints Investigation Committee (CIC) to deal with:
 - 4.1. complaints referred to it at the discretion of the HDC;
 - 4.2. complaints which refer to an incident that occurred prior to the introduction of the Code of Health and Disability Services Consumers' Rights;
 - 4.3. notifications of convictions from the registrar of a court;
 - 4.4. other issues which, in the opinion of the registering authority, warrant some action to be taken in respect of the practitioner's practice;
5. **agreed** that the President of a registering authority may appoint two practitioners, who may or may not be members of the registering authority, and one layperson to be members of the CIC;
6. **agreed** that the CIC be empowered to:
 - 6.1. investigate complaints;
 - 6.2. appoint a legal assessor who may advise the CIC at any time on matters of law, procedure and evidence;

- 6.3. hear evidence from the complainant and the practitioner to whom the complaint refers;
- 6.4. take advice from clinical experts at any time;
7. **agreed** that the CIC must report to the registering authority if, at any time during the investigation, it believes that the members of the public may have been put at risk, or will be at risk in the future;
8. **agreed** that a CIC may recommend:
 - 8.1. to the registering authority that the competence of the practitioner be reviewed; or that the practitioner's fitness to practise be reviewed; or that the practitioner should be censured;
 - 8.2. that a complaint should be the subject of conciliation;
 - 8.3. that the complaint be referred back to the HDC;
 - 8.4. that the complaint or conviction should be considered by the Health Practitioners Disciplinary Tribunal;
 - 8.5. that the matter should be referred to the Police;
 - 8.6. that no further steps should be taken;
9. **agreed** that, in the case of a complaint referred by the HDC, the registering authority shall advise the HDC of its determination;

Health Practitioners Disciplinary Tribunal

10. **agreed** that a Health Practitioners Disciplinary Tribunal (HPDT) be established under the Health Professionals' Competency Assurance Bill (HPCA);
11. **agreed** that the costs of the HPDT be met by the registering authority of the practitioner under investigation and be recovered, in part or in full, from the practitioner if found guilty;

Membership

12. **agreed** that the Minister of Health appoint to the Tribunal:
 - 12.1. a chairperson and one or more deputies, each of whom shall be a barrister or solicitor of the High Court of not less than 7 years' experience;
 - 12.2. a panel of practitioners who may be called upon by the chairperson to be members of the Tribunal, of whom three persons shall be from the same profession as the practitioner under investigation and three persons shall not be health practitioners;

Grounds

13. **agreed** that the grounds on which a practitioner may be disciplined be where the HPDT is satisfied that the practitioner has:
 - 13.1. committed malpractice;
 - 13.2. been guilty of professional misconduct;
 - 13.3. been convicted of any offence against another health-related Act;
 - 13.4. been convicted by any court in New Zealand or elsewhere of any offence punishable by imprisonment for a term of 3 months or longer, and the circumstances of the offence reflect adversely on the practitioner's fitness to practise;
 - 13.5. practised outside the extent permitted by, or not in accordance with the conditions of his or her registration or any practising certificate held by him or her;
 - 13.6. breached any order of the HPDT;

Penalties

14. **agreed** that the HPDT may impose the following penalties:
 - 14.1. ordering that the name of the practitioner be removed from the register;
 - 14.2. ordering that the registration of the practitioner be suspended for a period not exceeding 12 months;
 - 14.3. ordering that the practitioner may, for a period not exceeding 3 years, practise only in accordance with such conditions as to employment, supervision, or otherwise as are specified in the order;
 - 14.4. ordering that the practitioner be censured;
 - 14.5. imposing a fine of up to \$30,000;
 - 14.6. ordering that the practitioner should meet all or part of the costs;

Appeals

15. **agreed** that appeals against HPDT decisions should be heard by the District Court;

Protocols

16. **noted** that the Minister of Health proposes to establish protocols to ensure that appropriate processes are followed to ensure that consumer, gender and Maori and Pacific perspectives are reflected in the procedures of CICs and the HPDT, and that the rights of both the complainant and the practitioner are adequately provided for;

Drafting instructions

17. **invited** the Minister of Health to issue drafting instructions to Parliamentary Counsel to give effect to the above decisions;

Website publication

18. **noted** that the Minister of Health proposes to make the paper under EHC (01) 45 public through her website following Cabinet approval.

REGULATORY IMPACT AND COMPLIANCE COST STATEMENT: HEALTH PROFESSIONALS COMPETENCY ASSURANCE BILL

STATEMENT OF PUBLIC POLICY OBJECTIVE

1. The public policy objective is to protect the health and safety of the public.

STATEMENT OF THE PROBLEM AND NEED FOR ACTION

2. With the exception of the Medical Practitioners Act 1995, the current eleven regulatory statutes are out-of-date.

STATEMENT OF OPTIONS FOR ACHIEVING THE DESIRED OUTCOME

3. There are no other options for complaints and disciplinary processes.

STATEMENT OF THE NET BENEFIT OF THE PROPOSAL

4. The net benefit of the proposal is a fair and transparent process for handling complaints about health practitioners.

BUSINESS COMPLIANCE COST STATEMENT

Direct costs of the complaints and discipline proposals

- Currently, each registering authority meets the costs of their complaints and disciplinary processes. This will continue under the HPCA.
- The administration costs of the Medical Practitioners Disciplinary Tribunal are met by the Medical Council of New Zealand from a disciplinary levy and amount to \$250,000 - \$275,000 per annum.
- The costs of hearings amount to \$300,000 - \$320,000 per annum. A two-day hearing in Auckland involving a medical practitioner could cost of the order of \$17,000. In addition to the legal fees and the cost of the Chair and the expenses of the lay member, this includes \$650 per day for three medical practitioners on the Tribunal panel.
- A single disciplinary tribunal established under the HPCA for all registered professions would need to meet its own administration costs. It is estimated that it would need additional administrative and financial support and one additional staff member to assist with hearings. Administration costs could be around \$400,000.
- This could be charged as an overhead to the relevant hearing and recovered from the registering authority or the practitioner concerned. In many cases this will be passed on to the Crown as employer.

- However, there could be difficulties in the establishment year in ensuring that there was sufficient funds to meet ongoing costs, such as salaries and rental, until the costs are recovered. An advance may need to be arranged.
- There would be the extra costs per hearing of 2 additional lay members on the HPDT. The cost of a hearing could be around \$20,000, and the total annual cost to the registering authority would depend on the number of cases appearing before the tribunal.