

**OFFICE OF THE
MINISTER OF HEALTH**

MEMORANDUM TO CABINET SOCIAL POLICY AND HEALTH COMMITTEE

DHB GOVERNANCE AND HEALTH SECTOR CHANGE: THE POWERS OF THE MINISTER OF HEALTH AND DIRECTOR-GENERAL OF HEALTH - FURTHER ISSUES

PROPOSAL

1. This paper builds on previous advice regarding the powers of the Minister of Health and Director-General of Health in the new health and disability sector (refer previous advice on DHB Governance). It is proposed that:
 - i. the ability for the Minister to merge (or divide) Boards is considered in the context of a range of sanctions and rewards and criteria for their application being reported back by the Accountability Workstream [by 30 April 2000]
 - ii. the new health and disability sector legislation include provisions similar to those in s39-42 of the Resource Management Act with regard to investigations and inquiries ordered by the Minister of Health or Director-General of Health.
 - iii. the new health and disability sector legislation include the ability for the Minister of Health to establish committees

EXECUTIVE SUMMARY

2. Three key issues are canvassed in this paper:
 - i. a residual Ministerial power to merge Boards
 - ii. the applicability of the provisions in s39-42 of the Resource Management Act (RMA) to investigations and inquiries ordered by the Minister of Health or Director-General of Health
 - iii. the ability for the Minister to establish committees [with particular focus on a Mortality Review Committee].
3. All the issues relate to the powers of the Minister of Health or the Director-General of Health with regard to the health and disability sector.
4. In response to CAB(00)M11/1A(3)x (the detail of a residual Ministerial power to merge DHBs) - it is proposed that the further work to be undertaken by the Accountability Workstream on a range of sanctions and rewards and criteria for their application consider this issue. Officials consider that the ability for the Minister to merge DHBs should not be considered in isolation, but as part of a range of sanctions.
5. In response to CAB(00)M11/1A(3)xii it is proposed that the provisions in s39-42 of the RMA are adapted for use in health and disability sector

investigations and inquiries. The use of the RMA provisions provides an opportunity to keep investigations and inquiries in the health and disability sector appropriately focused, and of prudent length and cost.

6. It is proposed that the Minister have the ability to establish committees for a particular purpose. In particular, this paper highlights the need for the establishment of a mortality review committee which the Ministry of Health considers is the most appropriate vehicle for considering child mortality, maternal mortality and perinatal deaths. The Ministry prefers this mechanism over a separate Crown Entity relating solely to child mortality as proposed in the Members Bill submitted by Mr Bob Simcock MP. The Mortality Review Committee also needs power to access information and protect the information it needs.

BACKGROUND

7. Cabinet [in CAB(00)M11/1A(3)] agreed that further advice would be provided on the following issues which relate to the powers of the Minister of Health and Director-General of Health:
 - i. a residual Ministerial power to merge DHBs
 - ii. the provisions in s39 of the RMA regarding the questioning of witnesses and whether these are appropriate for inquiries and investigations of DHBs ordered by the Minister of Health or Director-General of Health
8. This paper provides advice on these issues.
9. This paper also provides advice on the ability for the Minister of Health to establish committees as the Minister considers necessary or desirable for any purpose relating to the health and disability sector. While the ability for the Minister to establish committees is a general issue, the discussion in this paper is focused specifically on the establishment of a Mortality Review Committee. This specific focus is in response to the Ministry of Health's submission on Bob Simcock (MP) Member's Bill, *The Child Mortality Review Board Bill*. The Ministry's submission proposes that the new health and disability sector legislation provides a better legislative basis for the appointment of a Committee to review particular categories of death than a Crown Entity solely to review Child Mortality as proposed by Mr Simcock.

MINISTERIAL POWER TO MERGE DHBs

10. It has previously been identified [refer previous advice on DHB Governance] that the Minister of Health may wish to reserve the power to merge (or divide) DHBs where there are good reasons for doing so. This power may be desirable when there is evidence of poor Board

performance, or that there are significant efficiency gains to be made, and Boards are reluctant to undertake a voluntary merger.

11. The Accountability Workstream is reporting back by 30 April 2000 on a range of sanctions and rewards and criteria for their application. The Minister merging (or dividing) DHBs is a serious sanction which needs to be carefully considered in the context of a range of sanctions proposed by the Accountability Workstream.
12. A related issue is the power to merge (or divide) DHBs in order to respond to evidence from overall sector monitoring. For example, instances when there are gains to be made from merging DHBs in response to high level sector performance monitoring, changes in policy settings, or to save administration costs. This would not be a sanction against Boards. For simplicity, this power (while not a sanction) will also be considered in the same context as sanctions and rewards.
13. If the ability to merge (or divide) Boards is desired the legislation will need to give the Minister this power and allow for the transfer of assets.

MINISTERIAL AND DIRECTOR-GENERAL INQUIRIES - ADAPTATION OF PROVISIONS FROM S39 OF THE RESOURCE MANAGEMENT ACT 1991

14. Section 47 of the Health and Disability Services Act 1993 allows the Minister of Health or the Director-General of Health to appoint one or more people to conduct an inquiry or investigation into the purchase or provision of health services or disability services or both. Cabinet has agreed that similar provisions will be included in the new health and disability sector legislation with regard to DHBs [refer CAB(00)M11/1A(3) hhh]. As is currently the case, it is proposed that inquiries/investigations cover the health and disability sector.
15. Recent examples of health inquiries/investigations are:
 - i. the Cervical Screening Inquiry - a Ministerial inquiry where the appointees have the powers of a Commission of Inquiry
 - ii. the inquiry into physiotherapy performed on babies at National Women's Hospital is a Director-General of Health initiated inquiry.
16. Further advice was sought on the applicability of the provisions in s39 of the RMA to such investigations and inquiries. The aim of including the RMA provisions would be to reduce the potential cost, length and antagonism currently associated with health and disability inquiries under the Health and Disability Services Act 1993.
17. Officials consider that the provisions in s39-42 of the RMA are appropriate to health and disability sector inquiries and investigations

(these sections are contained in Appendix 1). These clauses state that where a local authority, a consent authority, or other person given authority holds a hearing the authority shall hold the hearing in public and shall establish a procedure that is appropriate and fair in the circumstances. The sections also cover persons who may be heard at a hearing, provisions relating to hearings, and protection of sensitive information.

18. In conducting investigations and inquiries the key focus must be on ascertaining the truth of the matter or situation being investigated. Officials are concerned however, that this has not always eventuated. Additional cost, length and antagonism associated with investigations/inquiries has resulted from:
 - i. the 'duplication' of the inquiry by lawyers representing affected parties' interests
 - ii. cross-examination of witnesses by lawyers representing affected parties interests
 - iii. focus on issues not central to the determination of the truth of the matter.
19. Officials are not advocating that lawyers should not be involved in investigations and inquiries in the health sector or that cross-examination is an undesirable process in law. Rather the aim is to keep investigations/inquiries focused on the key objective (ascertaining the truth of the matter) as opposed to protecting a person's interests (which is rightly the role of lawyers and the court). It needs to be noted here that investigations and inquiries are not court trials.
20. As the focus of an inquiry is on obtaining the truth of a matter, and the inquiry team is charged with determining the truth, questioning by lawyers should be focused on the inquiry team thus facilitating finding the truth. It is not appropriate that questioning of witnesses by lawyers allow diversion into issues of dubious relevance or result in antagonistic cross-examination of witnesses.
21. The consequence of the current process which allows lawyers to cover all of the same ground as the inquiry team and cross-examine witnesses is additional cost and length of inquiries. There is no evidence that this additional cost and duplication produces a better outcome for investigations and inquiries.
22. Adapting the provisions in the RMA would allow control over the length, cost, and direction of an inquiry by preventing cross-examination of witnesses and requiring any questioning from lawyers to be directed at the inquiry team who in turn will question witnesses.
23. In detail the following processes would be need to be applied to health and disability sector inquiries and investigations:

- i. clear and focused terms of reference for the inquiry team - this is currently the case and terms of reference are set by the Minister of Health or the Director-General of Health
 - ii. the ability for inquiry teams to establish appropriate and fair procedures. The RMA provisions would require the inquiry team to establish a procedure that is:
 - a) appropriate and fair
 - b) avoids unnecessary formality
 - c) does not permit any person other than a member of the inquiry team to question any party or witness
 - d) does not permit cross-examination
 - e) recognises tikanga Māori where appropriate
 - f) receives evidence written or spoken in Māori
 - iii. adequate resourcing to allow the inquiry team to respond to lawyers questioning and obtain the relevant information from witnesses
24. Sections 40-42 of the RMA dealing with persons who may be heard at a hearing, provisions relating to hearings, and protection of sensitive information should also be adapted for use in health inquiries and investigations. These sections naturally facilitate the use of s39 so that the machinery of the inquiry runs smoothly. As a matter of drafting legislation this is likely to mean that the Minister need not direct inquiries to have the powers of a Commission of Inquiry, as sections 40-42 of the RMA (adapted for health purposes) provide the necessary powers from the Commissions of Inquiry Act.
25. On this basis, Officials recommend that the relevant provisions in s39-42 of the RMA are adapted in the health and disability sector legislation in order to allow prudent control over the length, cost and direction of investigations and inquiries in the sector. It is also recommended that the provisions which allow the setting of the terms of reference by the Minister of Health or the Director-General of Health are retained.

THE POWER TO ESTABLISH COMMITTEES: MORTALITY REVIEW FUNCTIONS

26. This section of the paper is cross-referenced to other work being undertaken by the Ministry of Health on the most appropriate mechanism for reviewing categories of deaths. It is appropriate to consider a mechanism for reviewing categories of death in the context of the health sector change process under a broader power for the Minister of Health to establish committees for a particular purpose. This provision will need to be included in the new health and disability sector legislation.

The power to establish committees

27. Section 46 of the Health and Disability Services 1993 provides that the Minister of Health may from time to time appoint committees as considered necessary or desirable for any purpose relating to Act or its administration. It is proposed that a similar mechanism should be reflected in the new health and disability sector legislation.

Reviewing categories of death

28. Mr Bob Simcock, MP, has proposed (in a private members bill) that a separate body corporate be established to review child mortality - *The Child Mortality Review Board Bill*. In its submission on this Bill the Ministry of Health supports a formal mechanism for the review of child mortality recognising the potential for making a significant contribution to reducing the number of deaths of children and young people, and to improving service provision for children, young people and their families. The Ministry proposes that the review of child mortality is more appropriately undertaken in a broader context (covering other categories of death) under provisions in the new health and disability sector legislation.
29. The Hospitals Act 1957 contains provision for the Anaesthetic Mortality Assessment Committee (AMAC) to review assessable anaesthetic deaths. These provisions will be repealed when the Health and Disability Services (Safety) Bill is enacted [this Bill is currently under further consideration by Government and a decision on the content is anticipated this year]. An additional committee, the Maternal Deaths Assessment Committee (MDAC), is established under the Maternal Mortality Research Act 1968.
30. The purpose of mortality reviews is to identify factors contributing to deaths and provide expert recommendations which can be used to improve professional practice, inform education campaigns, inform policy and service development, reduce the incidence of deaths of that kind, and contribute to further research. Both MDAC and AMAC were successful in carrying out their functions to a point and did provide some valuable advice to practitioners. However, since the conviction of a medical practitioner for manslaughter in 1989, medical practitioners have been reluctant to report anaesthetic and maternal deaths unless the legislation was amended to provide for strengthened protection of information. Practitioners are concerned that Police are able to access files as a part of their investigations into a death. There have been no reports of anaesthetic and maternal deaths for some time.
31. However, the Crimes Act was amended to raise the threshold of criminal negligence necessary to constitute offence proceedings under the Crimes Act, and so give better protection. A new section (150A) was

inserted into the Crimes Act in 1997 so that only major departures from the requisite standard of care would involve criminal culpability.

32. It is proposed that the power of the Minister of Health to establish committees be used to establish a committee charged with mortality review. Including mortality review under a general power to establish committees avoids the cost and expense of setting up a new Crown entity specifically for the single category of child mortality, while ensuring that the expertise for mortality reviews will be able to be used in any category of death, not just child mortality.

A Mortality Review Committee

33. The Minister of Health proposes the development of a committee (under the new health and disability sector legislation) with a sufficiently wide scope so that it is capable of dealing with any category of death (with an initial priority focus for children, maternal and perioperative deaths)¹.
34. A Mortality Review Committee could be placed within the Ministry of Health. It would be given specific functions, duties and powers and the Minister could from time to time require it to review particular categories of death. The Minister could also from time to time disband such a Committee as well as adjust the membership, the functions, the procedure of the committee, and the terms of its members (as provided for currently under s46 of the Health and Disability Services Act). Initially however, child mortality should be the primary issue for the Committee to deal with along with maternal mortality and perioperative mortality if deemed necessary.

Access to information and privacy issues

35. Further to the general provision to establish committees, legislation will need to allow the Mortality Review Committee the power to access information. There are considerable problems in accessing information merely by request, which will affect the scope, content, and timeliness of the work of the Mortality Review Committee. Further, legislation is necessary to prevent personal information from being accessible or discoverable.
36. Preventing access to personal information will help ameliorate concerns of health professionals, health providers, families, and other persons involved. Their concerns relate to the use of information provided to assist with mortality review being subject to blame or court proceedings.
37. However, as with the Medical Practitioners' Act, the protection of information should not preclude the ability for the Minister to allow

¹ Perioperative deaths have a wider focus than anaesthetic deaths which occur while under anaesthesia.

release of information where serious offences are concerned (two years or more in prison). While this will not give the full protection health professionals are likely to demand, it is unrealistic to think that where serious offences have occurred, information obtained by a Mortality Review Committee would not be used. The protection mechanism is one which many doctors already are subject to through declared Quality Assurance Activities, a similar mechanism here should achieve desirable balance and consistency.

38. Other exceptions to a prohibition on release of information include where the information does not identify an individual, where everyone directly or indirectly identified by the information agrees, and provision of information to the Minister to decide on release relating to serious offences. Overseas experience has indicated that such systems are likely to be more effective if legislated.
39. The best mechanism for the protection of information would be via a clause in the New Zealand Public Health Services Bill which would enable the Minister of Health, in consultation with other Ministers, to appoint members and set specific functions for a Mortality Review Committee. It would be a Committee established under section 46 of the Health and Disability Services Act (by the Minister of Health). A similar example is the Mental Health Advisory Committee.

Other committees which review death

40. Under the model proposed for Mortality Review there would need to be consequential amendments repealing the Maternal Mortality Research Act 1968, which established the Maternal Deaths Assessment Committee, and sections 13A to 13F of the Hospitals Act 1957, which established the Anaesthetic Mortality Assessment Committee (if the Anaesthetic Mortality Assessment Committee is not repealed by the Health and Disability Services (Safety) Bill, or if that Bill does not progress any further).

Other issues

41. The New Zealand Police, who are usually the first on the scene when there has been an unexpected death, have indicated that they would like to be closely involved with any future policy developments in relation to mortality review functions.

CONSULTATION

42. This report was prepared by an interagency working group led by the Ministry of Health, and including Te Puni Kōkiri, DPMC, The Treasury, the Health Funding Authority, CCMAU, and the State Service Commission.

43. The specific discussion on mortality review has been the subject of consultation with the Ministry of Justice, New Zealand Police and the Privacy Commissioner.

FINANCIAL IMPLICATIONS

44. Full identification of the one-off costs and ongoing fiscal impacts of the proposed structural changes, including those related to the powers of the Minister of Health and Director-General of Health will be reported back in the final paper on fiscal implications in May 2000.
45. The financial implications of the majority of the proposals in this paper have not yet been costed, but relate to:
 - i. the merging of DHBs
 - ii. holding investigations and inquiries (likely to cost less under the proposals in this paper than if these were included in the new legislation)
 - iii. the cost of administering committees formed by the Minister (likely to be cost neutral with regard to the status quo).
46. There are no fiscal implications associated with the inclusion of an enabling clause for a Mortality Review Committee in the New Zealand Public Health Services Bill. It is expected that the costs of the proposed committee, once established, could be met from within baselines. If additional new funding were required, it would be sought in the budget round for 2001/02, to coincide with the likely start up timing of such a committee.

LEGISLATIVE IMPLICATIONS

47. The legislation required forms part of the New Zealand Public Health Services and Health Reforms (transfer and transitions provisions) Bill.

HUMAN RIGHTS ACT 1993

48. The proposal relating to mortality review appears to be consistent with the Human Rights Act 1993. However, the Ministry of Justice has advised that there is a potential inconsistency with section 14 of the New Zealand Bill of Rights Act 1990 (freedom of expression, or in this case non-expression by refusing to provide information) if the proposed legislation compels provision of certain information to the Mortality Review Committee. The Ministry of Justice anticipates that this issue can be addressed at the drafting stage of the proposed legislation. This is when the application of section 5 of the New Zealand Bill of Rights Act can be fully assessed, which provision allows Parliament to legislate reasonable limits on freedoms like that in section 14, as can be justified in a free and democratic society.

REGULATORY IMPACT STATEMENT

49. A Regulatory Impact Statement is attached in accordance with the requirements set out in CO (98) 5 prior to submission to Cabinet.

PUBLICITY

50. Any publicity on matters related to this paper is being managed as part of the Communications Strategy that forms part of the wider work on health sector change.

CABINET

MINISTERIAL POWER TO MERGE BOARDS

- a noted that it is appropriate for the power to merge (or divide) District Health Boards (DHBs) to be considered in the context of the report back on a range of sanctions and rewards and criteria for their application which is being completed by the Accountability Workstream by 8 May 2000, and will then be reported to the Cabinet Social Policy and Health Committee (SPH);

INVESTIGATIONS AND INQUIRIES: USE OF THE RESOURCE MANAGEMENT ACT

noted the recommendations in the submission under SPH (00) 49 regarding health and disability sector investigations and inquiries, and the proposed use of the relevant provisions in the Resource Management Act 1991 as a model for the health and disability sector;

directed the Ministry of Health to consult with the Crown Law Office, and other agencies as appropriate, on the implications of the recommendations referred to in paragraph (b) above;

invited the Minister of Health to report back to SPH as soon as possible on the results of the consultation referred to in paragraph (c) above;

MORTALITY REVIEW FUNCTIONS AND ABILITY TO ESTABLISH COMMITTEES

agreed that the Minister of Health may, from time to time appoint such committees as the Minister considers necessary or desirable for any purpose relating to the health and disability sector (as is currently provided in s46 of the Health and Disability Sector Act 1993);

agreed that a Mortality Review Committee be provided for in the New Zealand Public Health Services Bill, and that it be deemed to be the

equivalent in the new bill of the current Ministerial Committees under s46 of the Health and Disability Sector Act 1993;

agreed that the Minister would consult other interested Ministers on appointments to the Mortality Review Committee before submitting a paper to the Cabinet Appointments and Honours Committee;

agreed that the Mortality Review Committee would have the functions of reviewing categories of deaths, specified from time to time by the Minister, along with any other functions relating to mortality that the Minister would from time to time specify;

agreed that child mortality, along with maternal mortality and perioperative mortality, be the primary focus for a committee if and when established;

agreed that the Mortality Review Committee be given powers to access relevant information relating to mortality reasonably necessary to carry out its functions;

agreed that the Mortality Review Committee must protect personal information it obtains about individuals (including health professionals), and that the provisions of Part VI of the Medical Practitioners' Act would be a good model for this purpose which, inter alia, would allow release of information if all persons involved agree, and release where serious offences were involved (those subject to a maximum penalty of two or more years in prison).

Hon Annette King
Minister of Health

APPENDIX ONE

Sections 39-42 of the Resource Management Act 1991

39 HEARINGS TO BE PUBLIC AND WITHOUT UNNECESSARY FORMALITY—

(1) Where a local authority, a consent authority, or a person given authority to conduct hearings under any of sections 33, 34, 117, 146, [202, or 357], holds a hearing in relation to—

(a) A proposed policy statement, plan, or change [or variation] to a policy statement or plan; or

(b) An application for a resource consent; or

(c) An application for a review of a resource consent; or

(d) An application to change any condition of a resource consent; or

(e) An application that has been called-in; or

(f) A requirement for a designation or heritage order; or

(g) An application for a water conservation order,--

the authority shall hold the hearing in public (unless permitted to do otherwise by section 42 (which relates to the protection of sensitive information) or the Local Government Official Information and Meetings Act 1987), and shall establish a procedure that is appropriate and fair in the circumstances.

(2) In determining an appropriate procedure for the purposes of subsection (1), the authority shall—

(a) Avoid unnecessary formality; and

(b) Recognise tikanga Maori where appropriate, and receive evidence written or spoken in Maori and the Maori Language Act 1987 shall apply accordingly; and

(c) Not permit any person other than the chairperson or other member of the hearing body to question any party or witness; and

(d) Not permit cross-examination.

40 PERSONS WHO MAY BE HEARD AT A HEARING—

(1) At any hearing described in section 39, the applicant, and every person who has made a submission and stated that they wished to be heard at the hearing, may speak (either personally or through a representative) and call evidence.

(2) Notwithstanding subsection (1), the authority may, if it considers that there is likely to be excessive repetition, limit the circumstances in which parties having the same interest in a matter may speak or call evidence in support.

[(3) If—

(a) The applicant; or

(b) Any person who made a submission and stated they wished to be heard at any such hearing-- fails to appear at the hearing, the consent authority may nevertheless proceed with the hearing, if it considers it fair and reasonable to do so.]

41 PROVISIONS RELATING TO HEARINGS—

(1) The following provisions of the Commissions of Inquiry Act 1908 apply to every hearing conducted by a local authority, a consent authority, or a person given authority to conduct hearings under sections 33, 34, 117, 146, or 202:

- (a) Section 4, which gives powers to maintain order:
- (b) Section 4B, which relates to evidence:
- (c) Section 4D, which gives power to summon witnesses:
- (d) Section 5, which relates to the service of a summons:
- (e) Section 6, which relates to the protection of witnesses:
- (f) Section 7, which relates to allowances for witnesses.

(2) Every summons to a witness to appear at a hearing shall be in the prescribed form and be signed by the chairperson of the hearing.

(3) All allowances for a witness shall be paid by the party on whose behalf the witness is called.

[(4) At every hearing conducted in relation to a matter described in section 39(1), the authority may request and receive, from any person who makes a report under section 42A or who is heard by the authority or who is represented at the hearing, any information or advice that is relevant and reasonably necessary to determine the application.]

42 PROTECTION OF SENSITIVE INFORMATION--

(1) A local authority may, on its own motion or on the application of any party to any proceedings or class of proceedings, make an order described in subsection (2) where it is satisfied that the order is necessary--

- (a) To avoid serious offence to tikanga Maori or to avoid the disclosure of the location of waahi tapu; or
- (b) To avoid the disclosure of a trade secret or unreasonable prejudice to the commercial position of the person who supplied, or is the subject of, the information,--

and, in the circumstances of the particular case, the importance of avoiding such offence, disclosure, or prejudice outweighs the public interest in making that information available.

(2) A local authority may make an order for the purpose of subsection (1)--

- (a) That the whole or part of any hearing or class of hearing at which the information is likely to be referred to, shall be held with the public excluded

(which order shall, for the purposes of subsections (3) to (5) of section 48 of the Local Government Official Information and Meetings Act 1987, be deemed to be a resolution passed under that section):

(b) Prohibiting or restricting the publication or communication of any information supplied to it, or obtained by it, in the course of any proceedings, whether or not the information may be material to any proposal, application, or requirement.

(3) An order made under subsection (2) (b) in relation to--

(a) Any matter described in subsection (1) (a) may be expressed to have effect from the commencement of any proceedings to which it relates and for an indefinite period or until such date as the local authority considers appropriate in the circumstances:

(b) Any matter described in subsection (1) (b) may be expressed to have effect from the commencement of any proceedings to which it relates but shall cease to have any effect at the conclusion of those proceedings-- and upon the date that such order ceases to have effect, the provisions of the Local Government Official Information and Meetings Act 1987 shall apply accordingly in respect of any information that was the subject of any such order.

(4) Any party to any proceedings or class of proceedings before a local authority may apply to the [Environment Court] for an order under section 279(3)(a) cancelling or varying any order made by the local authority under this section.

(5) Where, on the application of any party to any proceedings or class of proceedings, a local authority has declined to make an order described in subsection (2), that party may apply to the [Environment Court] for an order under section 279(3)(b).

(6) In this section--

(a) "Information" includes any document or evidence:

(b) "Local authority" includes any community board, board of inquiry, public body, special tribunal, or any person given authority to conduct hearings under section 33 or section 34 or section 117 or section 146 or section 202.