

MINISTRY OF HEALTH

20 December 2007

7 12 21 11 09

7



Health and Disability Commissioner
Te Toihau Hauora, Hauātanga

Ryan McLean
Sector Policy Directorate
Ministry of Health
P O Box 5013
WELLINGTON

E-MAILED

Dear Ryan

Review of the Health Practitioners Competence Assurance Act 2003

Thank you for the opportunity to be involved in identifying issues to be considered during the Ministry's review of the Health Practitioners Competence Assurance Act 2003 (the HPCA).

Under section 14(1)(d) of the Health and Disability Commissioner Act 1994 one of the Commissioner's functions is to make public statements in relation to any matter affecting the rights of health and disability consumers. Clearly the HPCA is one of the legislative cornerstones in terms of protecting the safety of health and disability consumers by ensuring that health practitioners are competent and fit to practise. Overall HDC considers that the HPCA has been a welcome development. There are however some key areas in which further improvement could be made.

Key issues

Information sharing

In HDC's view, improvements need to be made to the notification requirements where there is a poorly performing practitioner. At present there is an anomaly in relation to practitioners who are not 'employees'. Furthermore, the threshold for such notifications should be reconsidered along with the provisions relating to information sharing.

Currently sections 34 and 35 of the HPCA only cover employees and not practitioners with admitting rights or access agreements. Accordingly a private hospital has no obligation to notify the registration authority that it has withdrawn visiting privileges of a health practitioner for reasons related to competence. Similar issues could arise in relation to maternity facilities which have access agreements with independent midwives or doctors.

Once a registration authority has reason to believe that a health practitioner may pose a risk of harm to the public, section 35(1) requires that it must notify the practitioner's employer. However this obligation does not clearly extend to notifying other facilities where a health practitioner may practise on the basis of a relationship other than employment. Rather, section 35(2) only provides that notice *may* be given to any person who works in partnership or association with the practitioner. I understand that

some registration authorities do in fact routinely notify facilities such as private hospitals in such situations, however it is clearly preferable to have this as an express requirement rather than a discretion.

These gaps were highlighted in the Commissioner's Tauranga Hospitals Inquiry (a copy of this report is **enclosed**). This inquiry related to a surgeon who worked at three hospitals – one public hospital and two private hospitals. While two of the hospitals had taken steps to address concerns about the surgeon's competence (including restricting his practice) the failure to share information (with other hospitals or the Medical Council) meant that there was no coordinated response and that he continued to practise unrestricted at the third hospital. The inquiry showed that there are strong public safety reasons for reconsidering these aspects of section 34 and 35.

Competence reviews

The review of the HPCA could be enhanced by providing further information regarding the operation of certain provisions. One such area is competence reviews. It is HDC's perception that competence reviews are taking longer than desirable and in many instances getting bogged down in legal challenges. It would be disappointing if this was the case, given the confidential and rehabilitative nature of the reviews and the important part they play in ensuring that practitioners are competent. Also, there are clear public safety issues if the process becomes drawn out and prompt action is not taken on competence concerns. From the information published by registration authorities, it is difficult to get an accurate picture as to how this process is operating.

In HDC's view, consideration should be given to reviewing these provisions in the HPCA to better enable registration authorities to take prompt action on competence concerns in the same way that they are able to when health concerns are raised about a practitioner. Obviously the process needs to be fair and include procedural safeguards for practitioners. However HDC is concerned that at present these factors are outweighing public safety factors. For example, interim suspension can only occur under section 39 if there is a "risk of serious harm to the public" and after the practitioner has been informed and given the opportunity to be heard. In contrast, more immediate action can be taken if there are health concerns – although it would seem that competence issues pose no less of a public safety issue than a practitioner with health problems. HDC also considers that consideration should be given to lowering the threshold in section 39 to a "risk of harm" rather than a "risk of serious harm".

Consideration should also be given to the threshold for notification set out in section 34. Section 36(4)(a) allows registration authorities to review competence if there is reason to believe that a practitioner's competence may be deficient. Given the confidential and rehabilitative nature of competence reviews, HDC considers that this lower threshold should also be adopted in section 34.

Director of Proceedings

There seems to be something of a legislative lacuna in relation to the Director of Proceedings giving notice under section 34(2). Section 34(2) obliges the Director of Proceedings to notify the registration authority if she believes that a practitioner may pose a risk of harm to the public by practising below the required standard of competence. Obviously the Director of Proceedings is only likely to form this view

when a matter is referred to her ie, after the conclusion of an investigation by HDC. However, section 69 limits a registration authority's ability to order interim suspension to instances where an investigation by HDC "is pending." We suggest that the wording of section 69 should be reconsidered because as currently drafted it seems to undermine the efficacy of section 34(2) in relation to notifications by the Director of Proceedings.

Set out below are further comments on other areas in the HPCA which we consider should be revisited.

Enforcement of the Act

You have asked for comments on the Ministry's approach to enforcing the HPCA. In my view the Ministry's approach to enforcement could be further clarified. While the Ministry states that it has the role of investigating alleged breaches of the HPCA, it is HDC's observation that there appears to be some confusion as to whether it is the registration authorities or the Ministry which should enforce sections 7, 8 and 9 of the HPCA.

For example a complaint made to this Office regarding a registered nurse performing a restricted activity (surgical/operative procedure) was brought to the attention of the Ministry. However the Ministry took that view that as the matter involved a nurse, it should be viewed as an issue under section 8 of the HPCA rather than section 9. It was also the Ministry's view that it was the registration authority which should take action in this situation on the basis that it was a disciplinary matter. While I can appreciate the reason for taking this approach to that complaint, it seems that there should be some clarification as to respective responsibilities of the Ministry and registration authorities. I have seen the guidelines produced by the Ministry relating to enforcement, and the respective roles are not canvassed in this document either.

Competence and recertification

It would be our observation that there seems to be a blurring of recertification processes and competence processes. We have also observed instances where practitioners are routinely recertified despite significant health and/or performance concerns. The answer to addressing these concerns may lie more in the implementation and interpretation of the HPCA rather than the drafting itself. Nonetheless they are important issues to consider.

As mentioned above, it is difficult to comment on the efficacy of certain notification provisions (refer to questions 17 and 20 in the consultation document) given the lack of data about how often they are being used. Anecdotally HDC has seen examples of these provisions operating both well and poorly.

Protected quality assurance activities

Under the Code of Health and Disability Services Consumers' Rights, health and disability consumers in New Zealand have a right to open disclosure of any adverse events in their health care. HDC is concerned that wide use of protected quality assurance activities conflicts with this right. This concern is strengthened by reports from patients of being excluded from discussions and investigations as part of a protected quality assurance activity regarding adverse events that happened to them.

This area is another where further information would be useful to enable assessment of the operation of this part of the HPCA. I agree that protected quality assurance activities have a useful place, however anecdotal evidence suggests that they are possibly used too widely and sometimes inappropriately. Indeed we have heard medical defence lawyers advocating the use of protected quality assurance activities wherever possible so as to avoid making internal investigations public. Furthermore there appears to be a lack of data or evidence as to whether such activities are actually leading to improvements in patient safety.

Further information about the approval process would be useful along with the numbers of applications made, those approved and those declined. Before conferring protection, the Minister must be satisfied that doing so is in the public interest. We would be interested in further detail about how the public interest is assessed. From the Ministry publication it appears that this decision is based on information provided by the practitioners/applicants.

Professional conduct committees

The figures set out in appendix 5 of the discussion document indicate that there is a significantly different approach taken to discipline by different registration authorities. On the face of it these figures suggest a lack of consistency between authorities and it would be interesting to explore the reasons for this difference.

Health Practitioners Disciplinary Tribunal (HPDT)

I have sought the views of the Director of Proceedings regarding those parts of the HPCA that relate to disciplinary proceedings and have incorporated her comments in this submission.

HDC considers that having a single tribunal for all regulated professions has been beneficial and led to consistency in decisions and process. However the HPDT needs an adequately resourced secretariat, which it does not have at present.

In terms of the membership of the HPDT, it is HDC's view that, as is currently the case, the chair (and deputy chairs) should have litigation experience and that the lay members should not generally be lawyers.

It would be useful for the HPDT to have the capacity to deal with multi-practitioner/team based matters. We consider that developing this capacity would enable more effective consideration of cases where more than one practitioner is involved in a patient's care. It would also avoid situations where individuals have different hearings where each argues that the responsibility or culpability lies with the other practitioner. In our view this capacity would not be difficult to organise although some legislative amendment would clearly be required. Obviously developing this capacity would not entail members of one profession being involved in decisions relating to a member of another profession.

Appeals

At present a practitioner's rights of appeal (section 106(2)) are different to those of the Director of Proceedings under section 106(3). It is HDC's view that consideration should be given to giving practitioners should have the same rights of appeal as the

Director of Proceedings. Such an amendment would avoid practitioners resorting to judicial review proceedings due to the absence of a right of appeal.

I trust that these comments are of assistance and I look forward to hearing from you regarding the next step in the consultation process.

Yours sincerely

A handwritten signature in black ink, appearing to read 'N. Sladden', with a stylized flourish at the end.

Nicola Sladden
Chief Legal Advisor