THE CABINET OFFICE

NEW SOUTH WALES

REVIEW OF THE HEALTH CARE COMPLAINTS ACT 1993

CONSULTATION REPORT

October 2004

HEALTH CARE COMPLAINTS ACT 1993
REPORT BACK ON THE CONSULTATION PROCESS

1. BACKGROUND

1.1 Draft exposure Bills

On 14 September 2004, the Minister for Health tabled in Parliament an Introductory Paper and the following draft exposure Bills:

- the Health Legislation Amendment (Complaints) Bill 2004;
- the Health Registration Legislation Amendment Bill 2004; and
- the Nurses and Midwives Amendment (Performance Assessment) Bill 2004 (**Nurses and Midwives Bill**).

The purpose of the Bills is to implement the recommendations of the *Final Report of the Special Commission of Inquiry into Campbelltown and Camden Hospitals* dated 30 July 2004 (the **Final Report**) and The Cabinet Office review of the *Health Care Complaints Act 1993* (*Health Care Complaints Act*).

The Special Commission of Inquiry concluded that the statutory complaints system in New South Wales is well designed and does not require any major changes (page 2, Final Report). Many of the shortcomings of the Health Care Complaints Commission (HCCC) in its investigation into Campbelltown and Camden Hospitals were related not to the statutory framework itself but to the failure of the HCCC to comply with its statutory obligations (page 33, Final Report). Nevertheless, the Commissioner recommended that some changes to the statutory framework should be considered because they 'offer real prospect of improvement' (page 32, Final Report).

In general terms, the Bills refocus the HCCC on investigating serious complaints about health service providers, improve the operation of the complaints handling process, and give proper protection to complainants, practitioners and the general public within this framework.

1.2 Consultation process

The Bills were posted on The Cabinet Office website and approximately 50 stakeholders were notified by letter of the consultation process (see Appendix 1).

During the four week consultation process, The Cabinet Office met with a number of stakeholders and received 20 submissions (Appendix 2). The focus of the review has been on responding to the recommendations in the Final Report and improving the operation of the HCCC. Where other matters raised have not been adopted in this review, they may be considered for future reform.

2. MAJOR ISSUES RAISED BY STAKEHOLDERS

2.1 Summary

The purpose of this Report is to summarise the submissions of stakeholders on the main issues raised by the exposure draft Bills, and to explain the further amendments made to those Bills in light of those submissions. The issues have been grouped into similar categories to those used in the initial Introductory Paper dated September 2004. For the sake of completeness, a summary of other amendments made to the Bills is attached at Appendix 3.

2.2 Improving the complaints handling process

The measures designed to improve the complaints handling process were largely welcomed by stakeholders. The main issues raised in this context are set out below.

2.2.1 *Powers of the HCCC to obtain information*

Commissioner Walker found that 'early characterization and assessment' of complaints 'could well have been assisted by greater access' for the HCCC to records at Campbelltown and Camden Hospitals (page 71, Final Report). As such he recommended that the HCCC be given new powers. The Commissioner notes that compelling witnesses for the purposes of an investigation will involve questions of privilege and immunity in relation to the evidence obtained in this way (page 83, Final Report).

The draft exposure Bills contain new provisions permitting the HCCC to issue notices to compel the production of documents, and to require a person to attend at a specified place and time for the purpose of providing information and answering questions. The Bills provide that a person can be compelled to answer questions or provide information, even though the answer or information might incriminate them. Where an answer or information incriminates a person, however, the draft Bill provides that the answer or information cannot be used against them in criminal or civil proceedings. The HCCC is also excused from responding to a subpoena if the document to be provided would be inadmissible in proceedings.

Three amendments have been made to these provisions in response to comments of stakeholders.

- In response to a submission of the Parliamentary Joint Committee, the power of the HCCC to issue a notice specifying the time period and place for compliance with a notice has been amended to provide that the specified time period and place must be reasonable. [Health Legislation Amendment (Complaints) Bill 2004, Schedule 1 [29]].

- The Parliamentary Joint Committee also suggested that a failure by a practitioner to comply with a notice to provide information should be capable

of constituting unsatisfactory professional conduct. This is consistent with similar provisions under the *Medical Practice Act 1992* and amendments have been incorporated in the Health Registration Legislation Amendment Bill. [Schedule 1.3 [2] amends the *Medical Practice Act* and Schedule 1.4 [3] amends the *Nurses and Midwives Act 1991*. Schedule 1 also amends the other health registration Acts].

- In response to AMA/ASMOF/UMP, the reference to 'documents' in section 37A(5) (which restricts the subpoenaing of documents which would otherwise be inadmissible) has been clarified so that it covers information provided to the HCCC under the new provisions which would be inadmissible in court proceedings on the grounds of self incrimination. [[Health Legislation Amendment (Complaints) Bill 2004, Schedule 1 [32]].

The HCCC, the Medical Services Committee, and AMA/ASMOF/UMP submitted that there should be a more general exemption for the HCCC from responding to subpoenas issued in court proceedings for documents it obtains during its investigations. These groups argued that it is not appropriate for the HCCC to become the target for legal process requiring production in private litigation when the health provider is capable of producing the relevant information and contesting its production. In addition, these stakeholders were concerned that organisations may produce documents under compulsion that may not be self-incriminatory, but may incriminate employees or other individuals. It was suggested such material should not be available in private litigation.

Whilst these concerns are noted, it is considered that, as a general principle, litigation should not be made more difficult by procedural requirements and the HCCC should therefore be able to be subpoenaed if it holds relevant documents. Furthermore, the protection against self incrimination is rightly limited to the individual providing potentially incriminating evidence against themselves, and should not be used to prevent a party from obtaining evidence from others.

In a related request, UMP has noted that the *Medical Practice Act* does not give a practitioner protection from self incrimination when giving evidence in the Medical Tribunal, and has submitted that the Act should be amended to do so. It is considered that this proposal falls outside the scope of this review, and has broader application in relation to similar tribunals both within and outside the health sector.

2.2.2 Proposal to create independent office of Director of Proceedings

In the course of the consultation process, the HCCC proposed the creation of a statutory office of an independent Director of Prosecutions within the HCCC. The Director would be responsible for decisions with respect to proceedings before a disciplinary body. A copy of the HCCC's proposal is attached at Appendix 4.

This proposal was circulated to stakeholders for comment. The purpose of the proposal is to seek to address concerns by health professionals that there is a lack of

clear separation between the investigation and prosecution of disciplinary proceedings within the HCCC, which in turn can contribute to a perception of bias by the HCCC when dealing with complaints.

This proposal was well received in the submissions (notably by the Medical Services Committee, AMA/ASMOF/UMP, the Optometrists Association Australia (NSW Division), the Australian Physiotherapy Association (NSW Branch), the Psychologists Registration Board and the Australian Dental Association). PIAC advised informally that it supported the proposal in principle although noted that there was limited detail available. NCOSS would have preferred public release of the fully drafted proposal.

The Government has decided to adopt this proposal. There was a strong preference of the Medical Services Committee to refer to the new position as 'Director of Proceedings' to avoid the association between 'prosecutions' and criminal conduct and this has been adopted. [Health Legislation Amendment (Complaints) Bill 2004, Schedule 3 [5]].

Some concerns were raised by stakeholders as to how the proposal would fit in with the co-regulatory model for the regulation of health professionals in NSW. Under the co-regulatory model, the various registration boards and the HCCC consult regularly as to the action to be taken in relation to complaints. While the HCCC proposed that the Director be given a discretion to consult with registration boards, at the request of the Medical Board, the Nurses and Midwives Board, the Psychologists Registration Board and the Parliamentary Joint Committee, a provision has been inserted requiring the Director of Proceedings to consult with the relevant registration authority about its views before deciding whether or not to institute disciplinary proceedings. [Health Legislation Amendment (Complaints) Bill 2004, Schedule 3 [5]].

Although AMA/ASMOF/UMP submitted any such consultation should be left to the discretion of the Director, this amendment is considered necessary to ensure the involvement of the registration authorities as co-regulators and is consistent with the current position in section 39 of the *Health Care Complaints Act* under which the HCCC is required to consult with the relevant registration authority before prosecuting a complaint before a disciplinary body.

AMA/ASMOF/UMP requested that the Director of Proceedings be appointed by the Governor or the Minister in order to emphasise the independence of the position. It is considered that this measure would add a level of administrative complexity to the operation of the HCCC and is unnecessary given the explicit provision (in section 90C) that the Director of Proceedings is not subject to the direction and control of the Commissioner of the HCCC in relation to particular complaints. [Health Legislation Amendment (Complaints) Bill 2004, Schedule 3 [5]].

2.2.3 *Removal of requirement for statutory declaration*

The proposal to remove the requirement for a statutory declaration to be provided for a complaint was opposed by AMA/ASMOF/UMP, the Medical Services Committee, the Australian Dental Association (NSW Branch), the Australian Psychological Society and Dr Robert Wines. Given the detailed comments made in the Final Report concerning the practical problems with requiring a statutory declaration, and the fact that it contributes to delay, the Government remains of the view that the requirement for a statutory declaration should be removed. In addition to the reasons put forward in the Final Report, it is noted that neither ICAC nor the Ombudsman have a mandatory requirement to obtain a statutory declaration before investigating a matter. Further, a request by the HCCC for a statutory declaration (pursuant to the Act) may discourage those with poor literacy skills or persons from particular cultural backgrounds who are sensitive to government agencies from pursuing complaints.

The Medical Services Committee has proposed inserting drafting notes below the relevant provisions noting that it is an offence to provide false or misleading information in relation to a complaint. A drafting note has accordingly been inserted below section 9 of the *Health Care Complaints Act* referring to the main offence provision in section 99 of the *Health Care Complaints Act*. [Health Legislation Amendment (Complaints) Bill 2004, Schedule 1 [5]].

AMA/ASMOF/UMP have submitted that if the statutory declaration requirement is not retained, legislative provisions should be inserted requiring both the HCCC and the Medical Board to advise complainants that it is an offence to provide false or misleading information. The Psychologists Registration Board also expressed a preference for inserting a legislative provision. As noted in the Introductory Paper, informing complainants of the offence provisions is better done at an administrative level to avoid a technical breach of the Act and the Minister for Health has written to the HCCC requesting administrative implementation of the proposal.

2.3 Refocusing the HCCC on investigating serious complaints.

A number of amendments were included in the draft exposure Bills to refocus the HCCC on ensuring individual accountability of practitioners in relation to serious complaints. These included tightening the definition of unsatisfactory professional conduct, clarifying the objects of the Act to ensure the HCCC focuses on dealing with serious complaints and explaining the role of other bodies in the health system in maintaining high standards of patient care.

2.3.1 *Amendments to objects of Health Care Complaints Act*

Stakeholders supported the proposed new objects of the *Health Care Complaints Act*. AMA/ASMOF/UMP, in particular, expressed strong approval of the new objects as placing appropriate emphasis upon the HCCC's role of receiving, assessing and

investigating complaints against practitioners, prosecuting serious complaints, and overseeing the resolution of complaints.

The Medical Board proposed insertion of an additional object to reflect the HCCC's role in protecting the public. Clearly, it is imperative that the HCCC ensures that it exercises its functions with protection of the public in mind. A provision has therefore been inserted requiring the HCCC to exercise its functions in a manner that protects the public (modelled on s.2A of the *Medical Practice Act*). [Health Legislation Amendment (Complaints) Bill 2004, Schedule 1 [1]].

2.3.2 *Definition of unsatisfactory professional conduct*

The draft exposure Bills implemented the Special Commission of Inquiry's recommendation to tighten the definition of 'unsatisfactory professional conduct' so that only significant instances of a lack of skill, judgment or care will result in disciplinary action. 'Unsatisfactory professional conduct' is to be defined as any conduct that demonstrates that the knowledge, skill, judgment or care possessed by the practitioner in the practice of the profession is significantly below the standard reasonably expected of a practitioner of an equivalent level of training or experience.

The Australian Psychological Society queried whether a practitioner may 'possess' care, as provided by the draft definition. The advice of Parliamentary Counsel has been taken to amend the definition to refer to the 'judgment possessed or care exercised' by a practitioner. [Health Registration Legislation Amendment Bill 2004, Schedule 1.3[1] amends the Medical Practice Act and Schedule 1.4[2] amends the Nurses and Midwives Act. Schedule 1 also amends the other health registration Acts].

The Medical Board suggested that 'unsatisfactory professional conduct' should be limited to matters which involve the wilful, criminal, reckless or unethical conduct by a practitioner. Other matters would still be dealt with by referral to the Board for performance assessment. The proposed definition has not, however, been amended as such an amendment could mean that negligent conduct, which was nonetheless serious, may not be required to be investigated.

Both the Pharmacy Board of NSW and the Australian Psychological Society expressed concern about the requirement to assess 'unsatisfactory professional conduct' by reference to other practitioners 'of an equivalent level of training or experience'. These organisations considered that practitioners should be judged by the entry level standard and should not be judged by the differing levels of training and experience. The Government does not support this view. The intent of the provision as drafted is to ensure that a practitioner is judged by the standards of his or her peers. A practitioner who has only recently commenced practising should not be held to a higher standard in circumstances where he or she is presented with a more complex problem for which he or she may not have been trained. In such cases, the practitioner should, in accordance with entry level standards, know to refer

the patient to a more experienced practitioner. Conversely, a practitioner who holds themselves out as a specialist should not be able to avoid a finding of unsatisfactory professional conduct simply because an entry level practitioner would not have known how to deal with a particular problem. All practitioners will still need to meet the entry level standards reflected in the qualification and other requirements for registration.

The Pharmacy Board noted that it was not appropriate to amend the definition of 'professional misconduct' in the Pharmacy Act, as that profession does not currently have the two-tiered definition of unsatisfactory professional conduct and professional misconduct. That Act is currently the subject of a separate review, and the definition will be updated in accordance with the recommendations of the Final Report at that time.

2.3.3 Removal of HCCC function which is not exercised

Section 80(1)(j) of the Act has been deleted so as to remove the requirement that the HCCC investigate the frequency, type and nature of allegations made in legal proceedings of malpractice by health practitioners. The HCCC submitted that in view of the importance of re-focusing the HCCC on the investigation of serious complaints, it is inappropriate to retain this redundant function. It is also noted that the new incident monitoring system being implemented across the health system will produce data which will provide a more useful basis for analysing trends in relation to adverse events and medical error. This information will be available to the Clinical Excellence Commission for analysis. [Health Legislation Amendment (Complaints) Bill 2004, Schedule 1 [36]].

2.4 Expanding the range of actions available to the HCCC

The draft exposure Bills sought to give the HCCC increased flexibility to deal with complaints which require attention but do not require investigation. These options include referring a matter to a registration board for consideration of performance assessment or other action, and referring appropriate matters to the relevant area health service and the Director-General of the Department of Health. Subject to the issues raised below, stakeholders did not object to these revisions.

2.4.1 *Separation of the investigation process from processes adopted by the registration authorities*

The Medical Board submitted that the Bills should be amended to better reflect the co-regulatory nature of the complaints regime when a matter is referred for performance assessment by the Board. The Medical Board suggested that the Bills should make it clear that investigation by the HCCC and performance assessment by registration authorities (such as the Medical Board) are alternative streams. Following consultation with the HCCC, the Bills have been amended to remove the current uncertainty in the exposure drafts so it is clear that the HCCC does not have a supervisory role over the Board in relation to performance assessment. A new

section 25B has been inserted in the *Health Care Complaints Act* to this effect. The registration authorities' current obligation to refer serious matters back to the HCCC will be retained and this is recognised in the drafting note below this new section. [Health Legislation Amendment (Complaints) Bill 2004, Schedule 1 [21]].

2.4.2 *Introduction of Performance Assessment provisions for nurses and midwives*

The Nurses and Midwives Board and the Nurses' Association expressed general satisfaction with the new performance assessment provisions to be inserted in the *Nurses and Midwives Act*. The Nurses' Association noted that the Nurses and Midwives Board NSW has yet to determine the procedures and processes to be adopted. It should be noted that it is not proposed to commence this Bill until the procedures for performance assessment have been finalised by the relevant stakeholders and this will be done in consultation with the Nurses' Association.

Provisions have been inserted confirming that decisions of the Panel may be appealed in certain circumstances. This change has been made in response to issues raised by Nurses' Association and the Nurses and Midwives Board. This is in line with the performance review provisions in the Medical Practice Act [Nurses and Midwives Amendment (Performance Assessment) Bill 2004, Schedule 1[2]].

2.5 Integration of Health Conciliation Registry functions with the HCCC

The draft exposure Bills provide for the integration of the Health Conciliation Registry (HCR) with the HCCC so that the existing conciliation service is better utilised and all alternative dispute resolution functions are performed efficiently under the auspices of the HCCC.

The Parliamentary Joint Committee on the HCCC, AMA/ASMOF/UMP and the Medical Board each expressed a preference for the Registry to be a separate statutory entity to the HCCC whilst recognising the reasons for the proposed transfer. There was broad support for the measures contained in the Bill to ensure the conciliation function remains independent (these include statutory recognition of the separate role of the HCR, providing that the HCR and conciliators are independent of the HCCC when conducting conciliations or participating in the assessment process, offence provisions to prevent HCR staff or conciliators disclosing information obtained in the course of their duties, and giving the Parliamentary Joint Committee a role in overseeing the operation of the HCR).

The Parliamentary Joint Committee also submitted that the provisions relating to the position of Registrar should be amended to provide for appointment as a result of an external competitive recruiting process, or that at least the more senior staff of the HCR should be appointed following such a process. This amendment has not been adopted as it is considered that recruitment procedures are best dealt with internally by the HCCC and not specified in the legislation.

The Health Legislation Amendment (Complaints) Bill required the HCCC to consult with the Registrar before dealing with a complaint. The HCCC, the Medical Services Committee and AMA/ASMOF/UMP expressed concern that this would give the Registrar access to information about a practitioner which could affect the manner in which conciliation is handled, and is inconsistent with the general proposition that the role of the HCR should be separate from the HCCC's other functions. There is, however, some merit in consultation with the HCR to ensure only complaints which are suitable for conciliation are referred. Accordingly, the Health Legislation Amendment (Complaints) Bill has been amended to limit the requirement to consult with the Registrar so that it only applies where it is proposed to refer a complaint for conciliation to determine if it is suitable for conciliation. [Health Legislation Amendment (Complaints) Bill 2004, Schedule 2 [4]].

The Parliamentary Joint Committee has a particular interest in proposals relating to the HCR both because of its general responsibility for overseeing the HCCC and because of its proposed new function to monitor and review the exercise of functions by the HCR. It has prepared a separate report into alternative dispute resolution of health care complaints in NSW and has made a number of recommendations which are set out in Appendix 5.

The Parliamentary Joint Committee noted that a number of provisions already in the Bill protect the independence of the Registrar and the conciliators, but recommended that additional safeguards be adopted. A number of those recommendations (recommendations 5, 8, 9, 10, 11, 12, 13, 14, and 15) are best implemented by financial or administrative arrangements and not by legislative change, and therefore they will be considered separately.

In relation to the Parliamentary Joint Committee's legislative recommendations, proposed section 46(2) of the Bill has been amended to permit the appointment of more than one conciliator.

Recommendation 6 of the Parliamentary Joint Committee proposes that the Registrar, as well as not being subject to the direction of the Commissioner of the HCCC in performing his or her functions (as proposed in the Bill), should be legislatively responsible to the Commissioner for the efficient, effective and economical management in the carrying out of the HCR's functions. While clearly the Registrar should be responsible to the Commissioner for performance issues, it is not considered necessary to amend the provision as it is implicit that the Registrar would be responsible for performance issues.

The Committee has also proposed in recommendation 7 that all forms of complaint resolution by the HCCC, other than investigations, should come under the functions of the Registrar. This proposal has been carefully considered in the course of The Cabinet Office review. The model proposed in the Bill, whereby the other alternative dispute resolution functions of the HCCC are recognised in the Bill but are separate from conciliation, will enable these new functions to be used early in the

assessment of a complaint without the need for the matter to be separately referred to the HCR. This may allow some complaints to be resolved more quickly.

AMA/ASMOF/UMP requested that the Registrar be appointed by the Governor or the Minister in order to emphasise the independence of the HCR. For similar reasons to those given in relation to the Director of Proceedings, this proposal has not been adopted. It is considered that this measure would add a level of administrative complexity to the operation of the HCCC and is unnecessary given the safeguards that have been inserted to ensure a separation of the HCR functions and the HCCC's investigative role.

2.6 Further protection of the public, complainants and practitioners.

The draft exposure Bills contained a number of amendments to improve protections for practitioners, whistleblowers, complainants and the public. The issues raised by stakeholders are summarised below.

2.6.1 *Introduction of protections for root cause analysis teams*

Support for the new provisions relating to the establishment of root cause analysis (RCA) teams was expressed by a number of stakeholders including AMA/ASMOF/UMP, the Medical Services Committee and the Northern Rivers Area Health Service. AMA/ASMOF/UMP note that the Bill provides extensive protections in relation to those involved in an RCA and that these protections are essential if the RCA process is to work as it is designed to do. The Medical Services Committee noted a number of practical and administrative issues that need to be addressed in order to ensure proper and satisfactory functioning of the RCA teams. These will be considered by the Department of Health when it further develops policies to support the RCA process.

2.6.2 *Remedial legislation*

The proposed amendments to the remedial legislation introduced following the Special Commission of Inquiry's Interim Report are supported by AMA/ASMOF/UMP.

2.6.3 *Legal representation*

The Health Registration Legislation Amendment Bill provides that health practitioners will be allowed to be represented by an adviser (other than a lawyer) when appearing before a Professional Standards Committee (PSC). This reform has been welcomed by AMA/ASMOF/UMP and the Nurses' Association. The Medical Board, however, expressed concerns that permitting representation will lead to increased legalism and fundamentally change the successful 'inquisitorial' nature of a PSC.

The proposed amendments permitting non-legal representation are to be retained because they ensure that practitioners are not disadvantaged before PSCs in circumstances where an experienced representative of the HCCC argues the case against the practitioner.

AMA/ASMOF/UMP have submitted that the provision should go further and permit a PSC to give leave to allow representation by a lawyer if the issues become complicated. It is considered, however, that representation in a PSC should be limited to non-legal representation at this stage so that it does not become too legalistic.

AMA/ASMOF/UMP also requested clarification be provided as to whether the new right of non-legal representation is not limited to merely 'addressing' the PSC. Accordingly, the reference to 'address' has been replaced with 'represent'. In order to retain the inquisitorial nature of a PSC and address concerns of the Medical Board, a new provision has been inserted providing that the right to representation does not prevent a PSC from asking a practitioner questions directly. [Health Registration Legislation Amendment Bill 2004, Schedule 1.3 [15]].

AMA/ASMOF/UMP also requested the right to legal representation (or, at a minimum, non-legal representation) for practitioners in inquiries under section 66 of the *Medical Practice Act*. Such inquiries provide for the emergency suspension of a practitioner or the imposition of conditions to protect the public. In view of the fact that the Medical Board already has the discretion to allow legal representation in a section 66 inquiry, that any suspension only applies for eight weeks at a time, and that appeal rights are available, the proposal has not been adopted.

2.6.4 *Right of review by a practitioner*

AMA/ASMOF/UMP have requested an amendment to section 28(9) of the *Health Care Complaints Act* to include a right for the practitioner the subject of the complaint to request the HCCC to review its assessment decision. This section currently provides that the HCCC may review a decision made after assessing a complaint if requested by the complainant only. It is considered that it is unnecessary to give the practitioner a right of review at the assessment stage since the practitioner has a clear right to put his or her case when and if he or she is subject to an investigation. By contrast, if the HCCC decides not to proceed any further with a complaint following assessment, without the right of review in proposed section 29(5), there is no further scope for the complainant to request a reconsideration of this decision.

2.6.5 *Protection of confidentiality of information provided to the HCCC*

Currently, the offence of improper disclosure of information in s.37 of the *Health Care Complaints Act* applies only to information obtained by the HCCC under Division 5 of Part 2 for the purposes of investigations. The HCCC recommended that this offence be extended to apply to the improper disclosure of information obtained under any part of the *Health Care Complaints Act* in order to impose appropriate

confidentiality obligations on its staff and to protect complainants. This proposal has been adopted. [Health Legislation Amendment (Complaints) Bill 2004, Schedule 1 [38]]

2.6.6 *Protecting complainants*

Currently, the identity of whistleblowers and other complainants may be kept secret if there is a risk of intimidation or harassment for up to 60 days only. After this time, their identity must be disclosed to the respondent practitioner. The draft Bill proposed to remove this time limit and to require the HCCC to review its decision to keep the identity of complainants confidential every 60 days, subject to certain limitations.

The Nurses' Association was concerned, however, that the HCCC had an unfettered discretion to withhold information about the complaint from the practitioner. To address this concern, the Bill now provides that in deciding not to provide information, the Commission's decision must be reasonable [Health Legislation Amendment (Complaints) Bill, Schedule 1[7]].

A new provision has been inserted in the Health Legislation Amendment (Complaints) Bill requiring the HCCC to use its best endeavours to notify the outcome of an assessment decision to a patient whose treatment is subject to the complaint or the person identified in a hospital record as the 'next of kin' in cases where a patient has died or lacks capacity. The hospital must assist the HCCC by providing the name of the person identified in the hospital record. In addition, the HCCC will be permitted to notify relatives, carers and other 'significant others' about the outcomes of the assessment of the complaint in certain circumstances. [Health Legislation Amendment (Complaints) Bill 2004, Schedule 1 [24]].

2.7 Review of amendments

The Medical Board has requested a review of the proposed amendments in three years time. Although a formal review provision has not been included in the legislation, the Government will continue to monitor the legislation to ensure that it is effective and if necessary amend the legislation. In addition, the ongoing role of the Parliamentary Joint Committee in scrutinising the legislation will allow any issues to be identified as soon as they arise.

3. CONCLUSION

The Cabinet Office appreciates the input of the stakeholders that provided submissions on the issues raised in the exposure draft Bills. The amended Bills will be available on the website of the NSW Parliament upon introduction into Parliament.

APPENDIX 1

LIST OF STAKEHOLDERS NOTIFIED IN WRITING OF THE PUBLIC CONSULTATION PROCESS

Professor Kim Oates	Administrator	Children's Hospital at Westmead
Professor Stuart Schneider	Administrator	Southern/Greater Murray Area Health Service
Dr Claire Blizard	Administrator	Far West/Macquarie/Mid Western Area Health Service
Mr Terry Clout	Administrator	Hunter/New England Area Health Service
Mr Chris Crawford	Administrator	Northern Rivers/Mid North Coast Area Health Service
Dr Stephen Christley	Administrator	Northern Sydney/Central Coast Area Health Service
Dr Denise Robinson	Administrator	South Eastern Sydney/Illawarra Area Health Service
Dr Diana Horvath	Administrator	South Western Sydney Area Health Service
Associate Professor Steven Boyages	Administrator	Western Sydney/Wentworth Area Health Service
Dr Geoff Duggin	Chair	Medical Services Committee
Judge Kenneth Taylor	Commissioner	Health Care Complaints Commission
Mr David Brown	General Manager Legal Services	United Medical Protection
Dr Geoff Duggin	President	Australian Salaried Medical Officers Federation
Dr John Gullota	President	AMA (NSW Branch)
Mr Laurie Pincott	Executive Director	Australian Medical Association (NSW Branch)
Mr Si Banks	NSW President	Pharmacy Guild of Australia (NSW)
Dr Matthew Fisher	Chief Executive Officer	Australian Dental Association (NSW)
Mr E G Butler	Secretary	Guild of Dispensing Opticians

Ms Eve Sainsbury	Executive Director	Australian Podiatry Association
Mr Brett Holmes	General Secretary	New South Wales Nurses Association
Mr Brian Davey	National Chairman	Australian Society of Practising Physiotherapists
Mr Andrew McKinnon	Executive Director	Optometrists Association Australia (NSW)
Ms Kerri Martin	President	Orthoptic Association of Australia Inc
Ms Jan Axe	General Manager	Australian Physiotherapy Association (NSW Branch)
Mr Stephen Robbins	Executive Director	Australian Osteopathic Association
Mr R Scott	President	Dental Technician Association of NSW
Ms Mary Papatheocharous	President	Chiropractors Association of Australia (NSW Branch)
Professor Paul Martin	President	Australian Psychological Society
Mr Peter Werth	President	Chiropractic and Osteopathic College of Australasia
	The Registrar	NSW Medical Board
	The Registrar	Dental Board of NSW
	The Registrar	Pharmacy Board of NSW
	The Registrar	Chiropractors Registration Board
	The Registrar	Dental Technicians Registration Board
	The Registrar	Nurses and Midwives Board
	The Registrar	Optical Dispensers Licensing Board
	The Registrar	Osteopaths Registration Board
	The Registrar	Optometrists Registration Board
	The Registrar	Physiotherapists Registration Board
	The Registrar	Podiatrists Registration Board
	The Registrar	Psychologists Registration Board
Mr Douglas Holmes	Executive Officer	NSW Consumer Advisory Group

Mr Gary Moore	Director	The Council of Social Service of NSW (NCOSS)
Dr Robert D Wines		
Mr Scott Chapman		
Dr Diana Horvath	Administrator	South Western Sydney Area Health Service
Ms Annie Pettitt	Policy Officer	Public Interest Advocacy Centre
Mr Peter Kell	Chief Executive Officer	Australian Consumers' Association
Ms Catherine Watson	Committee Manager	Joint Parliamentary Committee on Health Care Complaints Commission
Mr Bruce Barbour	NSW Ombudsman	
Helen Hopkins	Executive Director	Consumers' Health Forum of Australia
Wendy McCarthy AO	Chair	Health Participation Council

APPENDIX 2

LIST OF SUBMISSIONS RECEIVED BY THE CABINET OFFICE

AMA, ASMOF and United Medical Protection (UMP) (joint submission)
Australian Dental Association (NSW Branch)
Australian Psychological Society
Australian Physiotherapy Association (NSW Branch)
Dr Robert Wines
Health Care Complaints Commission
Medical Board
Medical Services Committee
NSW Ombudsman
NSW Physiotherapists Registration Board
Nurses' Association
Nurses and Midwives Board
Northern Rivers Area Health Service
Optometrists Association Australia (NSW Division)
Pharmacy Board of NSW
Parliamentary Joint Committee on the Health Care Complaints Commission
Psychologists Registration Board
Tim Smyth, Phillips Fox lawyers
Council of Social Service of NSW (NCOSS)

MEETINGS WITH STAKEHOLDERS

Australian Psychological Society
Australian Medical Association
Australian Salaried Medical Officers Federation
Health Care Complaints Commission
NSW Medical Board
Nurses Association
Parliamentary Joint Committee
United Medical Protection

DISCUSSIONS BY PHONE

Public Interest Advocacy Centre

APPENDIX 3

MINOR AMENDMENTS TO DRAFT EXPOSURE BILLS

Section 14 of the Health Care Complaints Act currently provides that a registration authority must not take any action under a health registration Act concerning a complaint while it is subject to conciliation. This provision has been amended to make it clear that, similarly, a registration authority must not take action where a complaint is subject to complaints resolution under Division 9 (response to issue raised by HCCC).). **[Health Legislation Amendment (Complaints) Bill 2004, Schedule 2 [5]]**

The provision contained in exposure draft Health Legislation Amendment (Complaints) Bill Schedule 1[11] enabled the HCCC to revise its assessment of a complaint at any time and to take certain actions following that assessment (for example refer it for conciliation or for alternative dispute resolution). It is proposed to amend this provision to insert an additional action, namely investigation, which may be taken by the HCCC after it revises its assessment of a complaint (response to issue raised by the HCCC). **[Health Legislation Amendment (Complaints) Bill 2004, Schedule 1 [13]]**

The provision contained in exposure draft Health Legislation Amendment (Complaints) Bill Schedule 1[17] inserted a reference to the *Health Records and Information Privacy Act 2002* in the list of Acts contained in section 25 of the *Health Care Complaints Act*. Section 25 requires the HCCC to notify the Director-General of the Department of Health if it appears that a complaint involves a possible breach of any of those Acts. It is proposed to refer specifically to the relevant sections of the *Health Records and Information Privacy Act 2002*, being sections 68, 69, and 70 in order to distinguish these sections from other breaches of the Act for which the Director-General is not responsible for enforcing (response to issue raised by the NSW Ombudsman). **[Health Legislation Amendment (Complaints) Bill 2004, Schedule 1 [20]]**

The provision contained in exposure draft Health Legislation Amendment (Complaints) Bill Schedule 1[33] (s.103A(2) *Health Care Complaints Act*) has been amended to extend s.103A(2) (which makes it clear that nothing in the Act prevents information from being provided to the Ombudsman in an investigation by the Ombudsman) to refer also to preliminary inquiries under s.13AA of the Ombudsman Act. This is because the majority of the Ombudsman's general work is done pursuant to this power, not his formal investigation powers (response to issue raised by the NSW Ombudsman). **[Health Legislation Amendment (Complaints) Bill 2004, Schedule 1 [39]]**

The savings provisions set out in exposure draft Health Legislation Amendment (Complaints) Bill Schedule 1 [35] which provided that the new amendments do not apply to complaints already referred to a Committee or Tribunal have been extended

to apply to complaints referred to a registration board for inquiry (response to issue raised by HCCC). **[Health Legislation Amendment (Complaints) Bill 2004, Schedule 1 [41]]**

The provision contained in exposure draft Health Registration Legislation Amendment Bill Schedule 1.3[8] relating to section 66B(3) of the *Medical Practice Act* has been amended to clarify that the HCCC is required to investigate a complaint referred to it under this section if it considers it appropriate to do so (response to issue raised by HCCC and Medical Board). **[Health Registration Legislation Amendment Bill, Schedule 1.3 [9]]**

The provision contained in exposure draft Health Legislation Amendment (Complaints) Bill Schedule 4.1[1] has been amended to extend the FOI exemption which applies to documents held by the HCCC to deal with a possible gap in coverage so that it applies to documents provided by the HCCC to registration boards (response to issue raised by the Medical Board).). **[Health Legislation Amendment (Complaints) Bill 2004, Schedule 4.1 [1]]**

APPENDIX 4

Extract from response by the Health Care Complaints Commission ('the Commission') to the exposure draft of the Health Legislation Amendment (Complaints) Bill 2004 ('the draft bill') and related draft legislation.

Director of Prosecutions

There exists among health service providers a strong perception of bias in the manner in which the Commission has performed its functions. It has become clear in consultations with the representative groups of health professionals that this perception is deeply held. The concentration of powers in the Commissioner fuels this perception.

The suspicion that information volunteered in conciliation, for example, might be used in an investigation against a respondent to a complaint led to the creation of a Health Conciliation Registry administered separately.

Another area of the Commission's practice in which this perception of bias is manifest, is the lack of clear separation between the investigation and prosecution of complaints. The Joint Parliamentary Committee on the Health Care Complaints Commission, in its report of December 2003[1] noted at page 16:

> *Most submissions argued that a greater separation, if not a complete separation, between investigations and prosecutions was necessary to ensure objectivity and due process. Some suggested that the current proximity of the two functions serves to ensure that the Commission remains more adversarial than it is investigative.*

The Commission proposes a more effective method of separating investigations from prosecutions than that recommended by the Parliamentary Committee – the creation of a statutory office of an independent Director of Prosecutions within the Commission.

The model currently operating in the New Zealand *Health and Disability Commissioner Act 1984* is broadly applicable. The NZ Act creates a Director of Proceedings that acts independently in respect of decisions regarding the prosecution of complaints before the relevant disciplinary body. The position is, however, responsible to the Commissioner for the "efficient, effective and economical management of the activities of the Director of Proceedings" – section 15 of the NZ Act.

At the end of an investigation, the NZ Commissioner may refer a matter to the Director of Proceedings for the purpose of deciding whether disciplinary proceedings should be taken (section 45(f) of the NZ Act). It is then entirely a matter for the Director, independently of the Commissioner, to determine whether such

[1] Report of the Inquiry into Procedures followed during investigations and prosecutions undertaken by the Health Care Complaints Commission, Report No 2, December 2003

proceedings should be instituted. The Director is obliged to give any proposed subject of disciplinary proceedings the right to be heard before taking any proceedings (section 49(2) of the NZ Act) and, in reaching a decision, must take into account the wishes of the complainant and public health and safety (section 48(3)).

In order to separate the Commission function of prosecution and to ensure that it is not disproportionately affected by views formed during the conduct of the Commission's investigation, the Commission proposes the creation of a position of Director of Prosecutions within the Commission.

The independence of the Director of Proceedings would mirror the relationship between the Commission and the Minister and that between the proposed Registrar of Conciliation and the Commission. The Director of Prosecutions would be independently responsible for decisions made with respect to individual prosecutions but responsible to the Commission for the efficient and effective management of prosecutions. A provision similar to the proposed section 57 of the exposure draft of the Health Legislation Amendment (Complaints) Bill 2004 with respect to the independence of conciliation would be applicable.

At the end of an investigation, instead of the current option in section 39(1)(a) of the *Health Care Complaints Act 1993* ("the Act") that the Commissioner, after consultation, prosecute the complaint as a complaint before a disciplinary body, the Commissioner would be given the option of referring the complaint to the Director of Prosecutions for consideration of whether or not the complaint should be prosecuted before a disciplinary body.

A new Division of the Act, perhaps Division 6A, would need to be inserted setting out the role and responsibilities of the Director of Prosecutions. The Commission considers that providing the person the subject of complaint with the right to make representations to the Director of Prosecutions before any decision is made and the public interest criteria on which any decision to prosecute should be based, should also be included in the Act. Relevant criteria to be taken into account in determining whether or not prosecution is warranted should include:

- the protection of the health and safety of the public;
- the seriousness of the alleged conduct; and
- the likelihood of proving the alleged conduct.

The draft bill should also contain a provision to the effect that the Director of Prosecutions may consult with the various Registration Boards at any time. This provision will provide for appropriate consultation with respect to any orders that it may be appropriate to request from the relevant Tribunal or other disciplinary body. In some cases, relevant orders may include the imposition of conditions that are to be supervised by the relevant Registration Board.

APPENDIX 5

List of Recommendations of the Parliamentary Joint Committee on the Health Care Complaints Commission relating to the draft amendments to the Health Care Complaints Act 1993 and related legislation

1. The Committee recommends that the proposed section 34A(1)(a) and (c) be amended to specify that the time period for compliance must be reasonable. Similarly, so should the place of attendance be reasonable.

2. The Committee recommends that consideration be given to also providing for a disciplinary sanction under the relevant health professional registration acts for non compliance with section 34A. Alternatively a note could be included to refer the reader back to the related sanctions in the relevant acts.

3. The Committee recommends that proposed sections 37A(2) and (3) be amended to more clearly define and differentiate between "information" and "document" for the purposes of these sections.

4. The Committee recommends that proposed section 46(2) should be amended to read that *The Registrar may appoint more than one conciliator to conciliate the complaint if the Registrar considers that is desirable to do so.*

5. The Committee recommends that proposed section 87 should be amended to provide that the position of Registrar should be appointed as a result of an external competitive recruiting process.

6. The Committee recommends that proposed section 88 be amended to provide that at least the more senior staff of the Registry should be appointed following an external competitive recruiting process.

7. If a Director of Prosecutions is to be created, consultation between the Director of Prosecutions and the relevant health professional registration board concerning each case received by the Director should be mandatory.

Recommendations relating to Report into Alternative Dispute Resolution of Health Care Complaints in NSW

If the Registry remains a separate body

1 The Health Conciliation Registry should be given the legislative power to obtain the consent of the parties to participate in conciliation.

2 All Area Health Services should be allowed direct access to the Health Conciliation Registry for resolution of any complaints they receive which they would not normally refer to the Health Care Complaints Commission under the existing guidelines and legislation.

3 The Health Conciliation Registry should be required to produce its own annual report in accordance with the annual reporting legislation and Treasury Guidelines

4 The *Health Care Complaints Act 1993* should be amended to allow for the splitting of complaints, where possible, between investigation and conciliation.

If the Registry is amalgamated with the Commission

5 The Health Conciliation Registrar position should be given equivalency to the proposed Director of Prosecutions position in terms of its importance within the organisation and its fiscal remuneration.

6 The Health Conciliation Registrar should not be subject to the direction of the Health Care Complaints Commissioner in performing his or her functions but should be responsible to the Commissioner for the efficient, effective and economical management in the carrying out of the Registry's functions.

7 All forms of complaint resolution within the Commission other than investigations should come under the functions of the Health Conciliation Registrar.

8 The Commission should adequately resource the Registry to enable it to effectively carry out all its functions.

9 The Health Conciliation Registrar should be given a separate budget which will be allocated by the Commissioner each year and separately accounted for in each annual report of the Health Care Complaints Commission.

10 The activities of the Health Conciliation Registrar and the proposed Director of Prosecutions should be reported in their own separate sections of each annual report of the Health Care Complaints Commission.

11 The Health Conciliation Registrar should be responsible for the appointment of his or her staff, including conciliators.

12 The Health Conciliation Registrar should meet on an annual basis with the Joint Parliamentary Committee independently of the Health Care Complaints Commissioner to discuss issues arising from each Health Care Complaints Commission annual report which relate to his or her functions.

13 The Minister for Health should fund an external performance review of the Registry's operations within the first three years of its amalgamation with the Commission. The Review should be overseen by the Joint Parliamentary Committee.

14 The Health Conciliation Registry should be required to conduct regular external performance reviews.

15 The Registry's premises should be separate from those of the Commission, if feasible.