HEALTH CARE COMPLAINTS COMMISSION

PROSECUTION AND GUIDELINES POLICY

1 July, 2001

PROSECUTION POLICY AND GUIDELINES

CONTENTS

1. INTRODUCTION

This document describes in broad terms the prosecution policy and guidelines of the Health Care Complaints Commission. It deals generally with the foundation for prosecution and the basic approach of the Commission in prosecuting complaints against health practitioners before disciplinary bodies and appeal Courts.

The Commission's prosecution policy and guidelines are reviewed regularly and are revised and re-published as required. They are freely and publicly available and should be read in conjunction with the many other instruments that affect the Commission's functions and duties such as: the Health Care Complaints Act 1993 (the Act); the health registration Acts and other legislation; the Commission's values, Code of Practice, Code of Conduct and Ethics; and the Practice Manual.

This policy outlines the legislative framework in which the Commission operates and the prosecutory powers that the Commission has under the Act. This will provide information and an understanding of the role of the Commission as a prosecutor in taking disciplinary action against individual health practitioners.

There is clearly a public interest in the proper discharge by health practitioners of the privileges which the community accords to them, and in the due accounting for the exercise of the considerable influence which the nature of their occupation permits them, and indeed requires them, to exert over health consumers. These privileges cover the whole ambit of practice both clinical and ethical. The manner in which health practitioners exercise these privileges directly impacts upon the quality of health care provided to health consumers and public health and safety.

In recent years there has been an increasing emphasis in New South Wales that the focus of health services should be the health consumer (patient) and that quality treatment should be made available to them. In the Second Reading speech for the Act on 28 October, 1993 (Hansard p.4810) the then Minister for Health stated:

> *"I believe .. balances … the interests of both consumers and providers in the delivery of healthcare in New South Wales. As I have previously stated the Health Care Complaints Bill heralds a new era in the resolution of health complaints in this State focussing on quality and standards of care and the patient as a consumer of health services."*

This focus is the guiding principle for the Act and Commission.

The passage of the Act saw the establishment within New South Wales of an independent statutory Commission to deal with complaints against health providers, both individual health practitioners and health services such as hospitals in both the public and private sector. It was the intention of Parliament to create a statutory body with among other matters, the power to investigate and prosecute complaints against individual health practitioners. The Commission is a statutory body representing the Crown (s.75(2)) and acts independently of Government.

The objects of the Act are stated in Section 3 as follows:

- to facilitate the maintenance of standards of health services in New South Wales;
- to promote the rights of clients in the New South Wales health system by providing clear and easily accessible mechanisms for the resolution of complaints;
- to facilitate the dissemination of information concerning clients' rights throughout the health system;
- to provide an independent mechanism for assessing whether the prosecution of disciplinary action should be taken against health practitioners who are registered under health registration Acts.

The functions of the Commission are outlined in Section 80 of the Act and include:

- to receive and deal with complaints relating to the professional conduct of health practitioners, concerning the clinical management or care of individual clients by health service providers or referred to the

Commission by a health registration authority under a health registration Act;

- to assess complaints received and refer them for conciliation or investigation in appropriate cases;
- to make complaints concerning the professional conduct of health practitioners and to prosecute those complaints before appropriate bodies such as Tribunals and Professional Standards Committees;
- to report on any action the Commission considers ought to be taken following the investigation of a complaint if the complaint is found proved in whole or in part;
- to monitor, identify and advise the Minister on trends in complaints;
- to publish and distribute information concerning the making of complaints;
- to provide information to health service providers, professional and educational bodies concerning the trends in complaints;
- to consult with groups which have an interest in the provision of health services about the complaints process and the dissemination of information concerning the complaints process;
- to develop, after such consultation with clients, health service providers and persons who, in the Commission's opinion, have an appropriate interest, a code of practice to provide guidance on the way in which the Commission intends to carry out some or all of its functions;
- to investigate the frequency, type and nature of allegations made in legal proceedings of malpractice by health practitioners.

Section 39 of the Act provides:

(1) At the end of the investigation of a complaint against a health practitioner, the Commission must do one or more of the following:

(a) prosecute the complaint as a complainant before a disciplinary body;
(b) intervene in any proceedings that may be taken before a disciplinary body;
(c) refer the complaint to the appropriate registration authority (if any) with a recommendation as to any disciplinary action the Commission considers appropriate in respect of the complaint;
(d) make comments to the health practitioner on the matter the subject of the complaint;
(e) terminate the matter;

(f) refer the matter the subject of the complaint to the Director of Public Prosecutions.

(2) The Commission must consult with the appropriate registration authority before deciding what action to take.

(3) In this section, "disciplinary body" means a person or body (including a Professional Standards Committee) established under a health registration Act that has the power to discipline a health practitioner or suspend or cancel (by whatever means) the registration of a health practitioner.

In the case of **Wortley -v- Health Care Complaints Commission** (Supreme Court unreported 13 March 2001) Sully J held that a fair reading of the entirety of the statutory scheme for which the Act makes provision indicates that the Act falls precisely within that category of *"regulatory or welfare legislation affecting a particular area of activity"* of which Lord Brown-Wilkinson concluded in **X (Minors) -v- Bedfordshire County Council** (1995) 2 AC 633 that *"the legislation is not to be treated as being passed for the benefit of those individuals (affected in particular by the relevant activity) but for the benefit of society in general."*

In relation to health practitioners and in recognition of the need for better accountability and scrutiny of the professions the Act established a co-operative approach between the Commission, health registration Boards and the health professions to properly deal with complaints with a view to ensuring: the maintenance of professional standards; protection of the public from incompetent and unethical practitioners; and maintenance of public confidence in the health professions. This co-operative, collaborative and public interest approach espoused in the Act is fundamental to the way complaints are handled by the Commission including the prosecution of complaints.

Bearing in mind the legislative framework and particularly the objects of the Act the Commission has made the following statement:

> "*The Health Care Complaints Commission acts in the public interest by investigating, monitoring, reviewing and resolving complaints about*

health care with a view to maintaining and improving the quality of health care services in New South Wales."

The exercise by the Commission of its prosecutory power derived from s.39(1) and s.80(1)(c) of the Act needs to be viewed in the context of the objects and beneficial/welfare nature of the Act. The power is exercised in the public interest for the benefit of society in general.

2. PURPOSE OF POLICY AND GUIDELINES

Government policy requires fairness, openness and efficiency in public administration. These standards apply to the Commission in its role and function of prosecuting complaints.

This document contributes to a fair and open process by providing both a functional policy and guidelines for use by officers of the Commission and an information source available to the community, registration Boards, health professions and health services. It outlines the process whereby the Commission exercises its discretion to commit public resources to taking disciplinary action against individual health practitioners and the principles and practices which govern its decisions to prosecute and the way it conducts disciplinary inquiries and appeal cases.

The purpose of this policy and guidelines is to ensure consistency and fairness in decision making and to identify for the benefit of the community, the registration Boards, health professions and health services:

- the general principles the Commission follows in the prosecution of complaints;
- the basis upon which the Commission makes a decision to prosecute;
- the matters to be taken into account in deciding to prosecute;
- the matters to be considered in determining the appropriate mode for a disciplinary inquiry;
- the requirements for consultation with registration Boards;
- the nature of disciplinary proceedings;

- the basis upon which the Commission will make a decision to appeal the decision of a disciplinary body or Court;
- the basis upon which the Commission will make a decision to seek costs in disciplinary and appeal proceedings;
- how the Commission reviews decisions of disciplinary bodies and Courts to facilitate improvement of its practices and procedures.

3. THE NATURE OF DISCIPLINARY PROCEEDINGS - PROTECTION AND STANDARDS

The nature and purpose of disciplinary proceedings can be misunderstood. Proceedings are designed to be protective in nature and not punitive. Proceedings are not about awarding compensation for harm or damage suffered as a result of a practitioner's conduct.

Whilst there can be adverse consequences flowing from disciplinary proceedings in relation to a practitioner's registration, reputation and livelihood the primary purpose of proceedings is to protect the community and to maintain the ethical and clinical standards of the relevant profession. The standards exist to ensure that health consumers receive quality health care from competent and ethical practitioners.

In NSW the eleven health registration Acts provide the legislative scheme for the registration of health practitioners and the prosecution of disciplinary complaints. Protection of the public and the maintenance of standards is the focus of all the registration Acts.

An example is the registration requirements for medical practitioners. Under the Medical Practice Act 1992 a person can be registered as a medical practitioner if they possess the prescribed qualifications, have the prescribed experience, and satisfy the Medical Board that they are of good character. These provisions recognise that the nature of medical practice demands from its practitioners appropriate ethical and clinical standards. One of the functions of the Medical Board is to promote and maintain standards of medical practice.

The registration Acts in NSW are:

1. Chiropractors and Osteopaths Act, 1991;
2. Dentists Act, 1989;
3. Dental Technicians Registration Act, 1975;
4. Medical Practice Act, 1992;
5. Nurses Act, 1991;
6. Optical Dispensers Act, 1963;
7. Optometrists Act, 1930;
8. Pharmacy Act, 1964;
9. Podiatrists Act, 1989;
10. Physiotherapists Registration Act, 1945;
11. Psychologists Act, 1989;

There are some health practitioners who are not governed by registration Acts such as social workers, dietitians, occupational therapists, acupuncturists, psychotherapists, counsellors, naturopaths, hypnotherapists, homeopaths and practitioners of traditional Chinese medicine. In such cases, disciplinary proceedings cannot be instituted for misconduct under a registration Act, however, the relevant professional association may be able to take appropriate action if the practitioner is a member. An employer could also take industrial action and if criminal conduct is involved the misconduct can be referred to the Director of Public Prosecutions. It should also be noted that health practitioners registered in another area of practice can provide complementary therapies as part of their services.

Disciplinary action under a relevant health registration Act is commenced by the Commission making a formal complaint alleging, if available under the Act, that the practitioner:

a) has been guilty of unsatisfactory professional conduct;
b) has been guilty of professional misconduct;
c) has been convicted of an offence;
d) is not competent to practise i.e. the practitioner does not have sufficient physical capacity, mental capacity or skill to practise or does not have sufficient communication skills for practice;
e) suffers from an impairment;
f) is not of good character.

The Commission is the complainant for the purpose of the disciplinary proceedings **Shoulder -v- Registrar NSW Medical Board & Ors** (Supreme Court unreported 1 March 1996).

The onus is on the Commission to prove the complaint. The standard of proof is the civil standard expressed as comfortably satisfied on the balance of probabilities **Bannister -v- Walton** (1993) 30 NSWLR 699**; Briginshaw -v- Briginshaw** (1938) 60 CLR 336; **Rejfek -v- McElroy** (1965) 112 CLR 517.

The disciplinary body must have regard to the gravity and importance of the matters which it is deciding in accordance with what was stated by Sir Owen Dixon in **Briginshaw -v- Briginshaw** at p.361:

> *"Except upon criminal issues to be proved by the Prosecution it is enough that the affirmative of an allegation is made out to the reasonable satisfaction of the Tribunal. But reasonable satisfaction is not a sate of mind that is obtained or established independently of the nature or consequence of the fact or facts to be proved. The seriousness of an allegation made, the inherent unlikelihood of an occurrence of a given description, or the gravity of the consequences flowing from a particular finding are considerations which must affect the answer to the question, whether the issue has been proved to the reasonable satisfaction of the Tribunal. In such matters, "reasonable satisfaction" should not be proved by inexact proofs, indefinite testimony, or indirect inferences."*

In **Rejfek -v- McElroy** the Court said at p.521:

> *"But the standard of proof to be applied in a case and the relationship between degree of persuasion of the mind according to the balance of probabilities and the gravity or otherwise of the fact of those whose existence the mind is to be persuaded are not to be confused. The difference between the criminal standard of proof and the civil standard of proof is no mere matter of words: it is a matter of critical substance. No matter how grave the fact which is to be found in a civil case, the mind has only to be reasonably satisfied and has not with respect to any matter in issue in such a proceeding to attain that degree of certainty which is indispensable to the support of a conviction upon a criminal charge."*

Unsatisfactory professional conduct and professional misconduct are defined in some of the registration Acts. Under the Nurses Act, 1991 and Medical Practice Act, 1992 unsatisfactory professional conduct includes demonstration of a lack of adequate knowledge, skill, judgment or care and any other improper or unethical conduct. Professional misconduct under these two Acts means unsatisfactory professional conduct of a sufficiently serious nature to justify suspension of the practitioner from practising or the removal of the practitioner's name from the Register.

Once a complaint is made it is either referred to a Board, Professional Standards Committee or Tribunal for inquiry depending upon the disciplinary forums available under the registration Act and the legislative requirements of the Acts. Following referral, an inquiry is held into the complaint. A disciplinary body may conduct the proceedings as it thinks fit and is not bound by the strict rules of evidence.

A number of cases confirm the protective nature of disciplinary proceedings and give useful instruction on matters to be considered by a disciplinary body in holding an inquiry and in protecting the community.

In **Mr D.** (Pharmacy Board, unreported 14 August, 1991) the Board stated at p.7:

> *"This Board takes the view that the protection of the public is paramount when considering allegations of professional misconduct. Pharmacists have been entrusted with the dispensing and supply to the public of such drugs and that responsibility includes ensuring that the relevant legislative provisions are complied with and that the pharmacist does not abuse the privileges which accompany registration as a pharmacist."*

In **Dr H.** (Medical Tribunal unreported 14 December, 1990) the Tribunal stated at p.6 and 7:

> *"The function of this Tribunal is not to punish but to uphold the standards of the profession and to protect the community. The protection of the community is best met by the existence of high standards and the adherence by the profession to those standards. It is essential that the community can repose absolute trust in the members of the profession"*

In **Walton -v- Gill, Herron and Gardiner** (1993) 177 CLR 378 (High Court 29 April, 1993) Mason C.J., Deane J. and Dawson J. stated at p.395 and 396 concerning the Medical Tribunal:

> *"The jurisdiction of the Tribunal, which is not a court in the strict sense, is essentially protective - i.e. protective of the public - in character… In particular, in deciding whether a permanent stay of disciplinary proceedings in the Tribunal should be ordered, consideration will necessarily be given to the protective character of such proceedings and in the importance of protecting the public from incompetence and professional misconduct on the part of medical practitioners. "*

Brennan J. stated at p.411:

> *"The jurisdiction of the Tribunal exists in order that patients be protected and that the public know that patients are protected against, inter alia, professional misconduct. The protection is afforded by the statutory powers of the Tribunal which enable the Tribunal publicly to decide that professional misconduct has been proved and to impose on a medical practitioner an appropriate disciplinary penalty. Those powers are designed not only to do a measure of justice as between a medical practitioner and his or her patient or to impose an appropriate penalty for professional misconduct but also to declare and enforce proper professional standards".*

In **Health Care Complaints Commission -v- Litchfield** (1997) 41 NSWLR 630 (Court of Appeal 8 August 1997) the Court stated at p.637:

> *"Disciplinary proceedings against members of a profession are intended to maintain proper ethical and professional standards, primarily for the protection of the public, but also for the protection of the profession."*

The Court also stated at p.638:

> *"Female patients entrust themselves to doctors, male and female, for medical examinations and treatment which may require intimate physical contact which they would not otherwise accept from the doctor. The standards of the profession oblige doctors to use the opportunities afforded them for such contact for proper therapeutic purposes and not otherwise. This is the standard that the public in general and female patients in particular expect from their doctors, and which right thinking members of the profession, observe, and expect their colleagues to observe."*

These cases confirm that disciplinary proceedings are not concerned with assigning blame or punishment even though practitioners can have protective orders made against them. Proceedings are concerned with the proper and fair prosecution of complaints in the public interest bearing in mind the protective purposes of the jurisdiction. Proceedings are focussed on protecting people from unethical and incompetent practitioners, maintaining professional standards and maintaining public confidence and trust in health professions and practitioners.

4. ROLE OF THE COMMISSION AS PROSECUTOR

The role of the Commission is to:

- initiate disciplinary action by prosecuting the complaint as a complainant before a disciplinary body. This involves lodging a complaint with the relevant registration Board which, after consultation, is referred to the disciplinary body;
- appear at disciplinary inquiries and any appeals to prosecute the complaint;
- intervene in any proceedings that may be taken before a disciplinary body;
- initiate or defend appeals from disciplinary bodies and Courts;
- intervene in review and re-registration applications.

The Commission is to assist disciplinary bodies and Courts in their task of determining facts and the complaint or appeal according to law and the requirements of fairness.

The Commission is not entitled to act as if representing private interests in litigation. The Commission represents the community and not any individual or sectional interest. It does not represent the person or body who made the complaint to the Commission. The Commission does not have a "client" in the conventional sense. It acts independently and in the public interest. The Commission is the complainant because it acts in the public interest and the person who made the complaint to it should not have to bear the costs of conducting disciplinary proceedings.

Legal practitioners, whether in-house lawyers or external Counsel, act on the instructions of the Commissioner. In representing the Commission they are subject to the obligations imposed upon them by the NSW Barristers Rules and the Law Society of NSW Solicitor Rules particularly concerning prosecutions and advocacy.

There are similarities between the role of the Commission in its prosecution function and the Director of Public Prosecutions, Crown Prosecutors and other government departments with a prosecution function. The responsibilities and duties applicable to them in representing the Crown as espoused by Courts and others are equally applicable to the Commission.

It behoves the prosecutor *"neither to indict, nor on trial to speak for conviction except upon credible evidence of guilt, nor to do even a little wrong for the sake of expediency, nor to pique any person or please any power; not to be either gullible or suspicious, intolerant or over-pliant: in the firm and abiding mind to do right to all manner of people, to seek justice with care, understanding and good countenance."* (R.R. Kidston QC, former Senior Crown Prosecutor of New South Wales "The Office of the Crown Prosecutor (More particularly in New South Wales)" (1958) 32 ALJ 148.

Kirby P. said in **Price -v- Ferris** (1994) 34 NSWLR 704 at p.707:

The object of having a Director of Public Prosecutions is:

> "*to ensure a high degree of independence in the vital task of making prosecution decisions and exercising prosecution discretion*"

It ensures that there is:

> "*manifest independence in the conduct of the prosecution. It is to avoid the suspicion that important prosecutorial discretions will be exercised other than on neutral ground. It is to avoid the suspicion, and to answer the occasional allegation that the prosecution may not be conducted with appropriate vigour."*

C.S. Kenny in Outlines of Criminal Law (19th Edition) 1966 described the proper role of prosecuting Counsel as follows:

> *"A prosecuting Counsel stands in a position quite different from that of an advocate who represents the person accused or represents a plaintiff or defendant in civil litigation. For this latter advocate has a private duty – that of doing everything that he honourably can to protect the interests of his client. He is entitled to fight for a verdict. But the Crown Counsel is a representative of the State, 'a minister of justice,' his function is to assist the jury in arriving at the truth. He must not urge any argument that does not carry weight in his own mind, or try to shut out any illegal evidence that would be important to*

the interests of the person accused. It is not his duty to obtain a conviction by all means; but to lay before the jury the whole of the facts which compose his case, and to make these perfectly intelligible, and to see that the jury are instructed with regard to the law, and are able to apply the law to facts. It cannot be too often made plain that the business of Counsel for the Crown is fairly and impartially to exhibit all the facts to the jury. The Crown has no interest in procuring a conviction. Its only interest is that the right person should be convicted, that truth should be known and that justice should be done."

Deane J. stated in **Whitehorn -v- R** (1983) 152 CLR 657 at p.663:

"Prosecuting Counsel in a criminal trial represents the State. The accused, the Court and the community are entitled to expect that, in performing his function of presenting the case against an accused, he will act with fairness and detachment and always with the objective to establish the whole truth in accordance with the procedures and standards which the law requires to be observed in helping to ensure that the accused's trial is a fair one."

In the disciplinary jurisdiction these duties and responsibilities are discharged by the Commission in the environment of an inquisitorial system and where the rules of evidence do not strictly apply. Advocacy must be conducted temperately and with restraint bearing constantly in mind the protective nature of the jurisdiction.

There will be occasions, however, when prosecuting Counsel will be entitled to firmly and vigorously argue the prosecution's view about a particular issue and to test and if necessary to challenge the credit of a practitioner or witness. An example is where there is strong evidence of sexual misconduct or medicare fraud and the misconduct is denied.

Judgment, sensitivity and commonsense needs to be exercised in individual cases to ensure that action taken is consistent with this policy and guidelines.

5. CONDUCT OF CASES AND GENERAL PRINCIPLES

Inquiries and appeals are conducted in accordance with the principles and practices outlined in Part 4 and this Part.

The disciplinary inquiry is a two step process. The first task of the disciplinary body is to determine if the complaint is proved or not. This requires an examination of and findings on the oral and documentary evidence presented at the inquiry. If the complaint is proved, the second task is to determine what protective orders are necessary to protect the public from the practitioner and the conduct involved and to meet the other protective purposes of the jurisdiction.

The Commission employs hearing officers to conduct the inquiries before Professional Standards Committees under the Medical Practice Act, 1992 and Nurses Act, 1991. It employs in-house lawyers and external Counsel for inquiries before Boards, Tribunals and Professional Standards Committees where legal representation is permitted by the health registration Act. Hearing officers are not legal practitioners, they are not admitted as a Solicitor or Barrister and do not have current practising certificates.

There must be regular case review of the Commission's and practitioner's evidence when preparing the case for inquiry. If it is necessary to amend a complaint it must be filed and served as soon as possible after the evidence upon which the amended complaint is based becomes known to the Commission as a matter of fairness to the practitioner and to enable the practitioner adequate time to meet the case to be presented against them.

Circumstances may arise where the Commission may seek to join a further complaint to existing complaints which are the subject of the disciplinary inquiry. In these circumstances it is preferable to have one inquiry into all complaints to enable the disciplinary body to examine all relevant matters when considering the question of a practitioner's fitness to practice and in the interests of expediency and costs. This will always be subject of course

to the requirements of procedural fairness and natural justice including the possible prejudice that may be caused to the practitioner.
There are a number of general principles and practices underpinning Commission prosecutions some of which have been outlined earlier. A number of these are common to the principles underpinning investigations conducted by the Commission. The principles include:

Fairness

The Commission is under a continuing obligation in assisting disciplinary bodies and Courts to act impartially and fairly towards the health practitioner. There must be no bias.

As stated in **The King -v- War Pensions Entitlement Appeal Tribunal**: **Ex Parte Bott** (1933) 50 CLR 228 at p.248 per Starke J; and **Gorman –v- Health Care Complaints Commission** (Supreme Court unreported 20 December 2000.) disciplinary bodies must accord fairness which ordinarily involves a duty to:

- act judicially;
- deal with the matter for decision without bias;
- give each party the opportunity of adequately presenting its case;
- observe the procedural and other rules provided for in the relevant statute;
- come to its decision with that sense of responsibility that is the necessary accompaniment of the duty to do justice.

Disclosure

The Commission is under a continuing obligation to make full and timely disclosure to the practitioner of all facts and circumstances and the identity of all witnesses reasonably to be regarded necessary to prove the complaint. It involves disclosure of all oral and documentary evidence to be relied upon by the Commission in the disciplinary inquiry to prove the complaint. Tactical considerations are not to be taken into account when making that assessment.

The duty of disclosure extends to any statement by a witness that may be inconsistent with their intended evidence including any statement made in conference.

Occasions may arise where the overriding interests of justice (for example a need to protect the integrity of the administration of justice, the identity of an informer or to prevent danger to personal safety) may require the withholding of information. Such a course is only to be taken with the approval of the Commissioner.

Legal professional privilege will be claimed by the Commission against the production of documents in the nature of in-house legal advisings or Counsel advisings, subject to the considerations of legitimate forensic purpose and any legal advice obtained concerning the production.

Expedition

It is a fundamental obligation of the Commission to assist in the timely and efficient administration of justice. Accordingly:

- cases should be prepared for hearing as quickly as possible;
- complaints and amended complaints should be prepared, filed and served as early as possible;
- response to requests for further and better particulars of the complaint should be forwarded to the practitioner as soon possible after request;
- any amendment to a complaint should be indicated to the practitioner as soon as possible;
- applications and consents for adjournments should only be made in exceptional circumstances and can only be approved by the Commissioner;
- timetables set by disciplinary bodies and Courts are to be met.

Unrepresented practitioner

Particular care must be exercised by the Commission in dealing with an unrepresented health practitioner. The basic requirement, while complying in all other respects with the policy and guidelines, is to ensure that the practitioner is properly informed of the prosecution case so as to be equipped to respond, while maintaining an appropriate detachment from his or her interests.

All oral communications with an unrepresented practitioner should be promptly recorded in all cases. A record should be maintained of all material provided to an unrepresented practitioner.

While the Commission has a duty of fairness to an unrepresented practitioner, it is not its function to advise a practitioner about legal issues, evidence, inquiries and investigations that might be made, possible defences or the conduct of the defence.

Witnesses

The Commission should file and serve statements of and be prepared to call all witnesses whose evidence is essential to proving the Commission's case. It may not be necessary though to call every possible witness to give evidence for instance, where there is agreement on the facts, the evidence is not necessary to prove the complaint, the practitioner does not require the witness to give evidence, there is other documentary evidence to prove the complaint, or the evidence would be of no assistance to the disciplinary body in making a decision about the complaint.

If a decision is made not to call a witness where there are identifiable circumstances establishing that his or her evidence is clearly unreliable, the Commission should where appropriate assist the practitioner to call such a witness. Mere inconsistency of the testimony of a witness with the prosecution case is not grounds for refusing to call the witness.

Unchallenged evidence that is merely repetitious should not be called.

A decision not to call a witness otherwise reasonably to be expected to be called should be notified to the practitioner a reasonable time before the commencement of the inquiry with an indication of the reasons for the decision.

Previous convictions or disciplinary action against a witness, if known, should be disclosed to the practitioner in advance of the inquiry. There must be due consideration of any confidentiality requirements with respect to disclosure of previous disciplinary action. It should also be disclosed if any information in the possession of the Commission reflects materially on the credibility of a witness and where cross-examination based upon it might reasonably be expected to materially affect that credibility. The mere unwillingness of a witness to testify is not ordinarily required to be disclosed unless the matter proceeds to a contested inquiry.

Consideration needs to be given to those witnesses such as complainants in sexual misconduct complaints who have suffered harm as a direct result of the conduct of the practitioner. Harm includes physical or psychological harm, the loss of a family member or damage to property.

Such persons and relatives, whether witnesses or not, should appropriately and at an early stage of proceedings have explained to them the prosecution process and their role in it. The Commission should generally initiate the giving of such information and should do so directly rather than through intermediaries.

The Commission employs Patient Support Officers who are available to support and assist persons and relatives through the investigation and disciplinary process and to meet any special needs.

Child witnesses are to be treated as far as is practicable consistently with the provisions of the UN Convention on the Rights of Children. The Commission is to ensure that the child is appropriately prepared for and supported in his or her appearance in the inquiry. The Commission should

comply with the Interagency Child Guidelines for Child Protection Intervention in cases of the physical or sexual assault of children.

Careful consideration should be given to any request by a person who has suffered harm or the complainant who made the complaint that the proceedings be discontinued. In sexual offences particularly such requests, properly considered and freely made, should be accorded significant weight. It must be borne in mind, however, that the expressed wishes of these persons may not coincide with the public interest and in such cases, particularly where there is other evidence implicating the practitioner or where the gravity of the alleged misconduct requires it, the public interest must prevail.

The views of complainants and those who have been harmed will be considered and taken into account but those views alone will not be determinative in deciding what action to take or the matter in which cases are conducted. It is the public, not any private individual or sectional, interest that must be served.

Evidence

Where the practitioner advises that the admission of evidence is to be challenged, care should be taken in opening the case to a disciplinary body to ensure that nothing is said that may lead to a subsequent miscarriage of the inquiry.

Where evidence intended to be led appears on reasonable grounds to have been illegally or improperly obtained, the Commission should inform the practitioner within a reasonable time.

Cross-examination

Cross-examination of a practitioner as to credit or motive must be fairly conducted. Material put to a practitioner must be considered on reasonable grounds to be accurate and its use justified in the circumstances of the inquiry (see also Barristers and Solicitors Rule 63 and 64)

Addresses

In making addresses the Commission is guided by Barristers and Solicitors Rules 63 to 65 where it states a prosecutor :

- must not press the prosecution's case for a conviction beyond full and firm presentation of that case;
- must not, by language or other conduct, seek to inflame or bias the Court against the practitioner;
- must not argue any proposition of fact or law which the prosecutor does not believe on reasonable grounds to be capable of contributing to a finding of guilt and also to carry weight.

Case Review

All disciplinary cases must continuously be reviewed. The evidence available must be continually assessed with a view to ensuring the complaint remains appropriate, obtaining further evidence and the proper course to be taken in the prosecution. Conferences with witnesses are an essential part of the review process.

Early conferences between witnesses and hearing officers, in-house lawyers and Counsel should occur. Conferences serve the dual purpose of obtaining information from and about witnesses and providing relevant information about the proceedings to witnesses.

In evaluating evidence there should be regard to the following matters:

- whether there are grounds for believing the evidence would be excluded bearing in mind the principles of admissibility and procedural fairness. The likelihood that any evidence might be excluded should be taken into account when the sufficiency of evidence to justify the proceedings is reviewed and, if the evidence is crucial to the case, that assessment may substantially affect the decision whether or not to proceed;

- if the case depends in part upon admissions by the practitioner are there any grounds for believing that they are of doubtful reliability;
- whether it appears that a witness is exaggerating or is faulty in memory or is either hostile or threatening to the practitioner or may be otherwise unreliable;
- whether a witness has a motive for not telling the whole truth;
- whether there are matters which might be properly put to a witness by the practitioner that would undermine his or her credibility;
- whether the witness suffers from any physical or mental disorder which is likely to affect his or her reliability;
- if there is conflict between witnesses whether it goes beyond what reasonably might be expected hence materially weakening the case;
- if there is consistency between witnesses accounts whether there is anything which suggests that a false story may have been concocted;
- whether all the necessary witnesses are available and competent to give evidence;
- where child witnesses are involved whether they are likely to be able to give sworn evidence;
- if identity is likely to be an issue whether the evidence of those who purport to identify the practitioner is cogent and reliable.

This list is not exhaustive and the matters to be considered will depend upon the circumstances of each individual case. A practical approach is to be taken to consideration of the prospect of the complaint being proved on the basis of the available evidence.

6. THE DECISION TO PROSECUTE

The decision to prosecute is made under s.39 of the Health Care Complaints Act. The Commission makes a complaint under the provisions of the relevant health registration Act and the disciplinary inquiry is conducted under that Act. The decision to prosecute is made by the Commissioner.

The decision whether or not to prosecute is the most important in the prosecution process. In every case great care must be taken to ensure that the right decision is made. A wrong decision to prosecute, or conversely the

wrong decision not to prosecute, can undermine the confidence of the community in the health care complaints system. The resources available for prosecution are finite and should not be wasted pursuing inappropriate cases. It is important that available limited resources are employed to pursue those complaints which require prosecution in the public interest. It is only after considering all relevant matters that a decision to take prosecution action is made.

Prosecution is one of the outcomes of an investigation conducted by the Commission. Not every complaint, however, will result in a prosecution. The guiding principle is that stated by Sir Harley Shawcross QC, UK Attorney General, speaking in the House of Commons on 29 January, 1951:

> *"….prosecute wherever it appears the offence or the circumstances of its commission is or are of such a nature that a prosecution in respect thereof is required in the public interest. This is still the dominant consideration."*

This statement applies equally to the prosecution of health care complaints in this State. The public interest is the paramount concern. The primary question is whether or not the public interest requires that a complaint be prosecuted.

The decision to prosecute is an administrative one and the general principles of procedural fairness apply to that decision. The rules of procedural fairness were developed in recognition of the need for fair and flexible procedures in administrative decision making.

Procedural fairness simply imposes a duty to act fairly in making administrative decisions that affect individual rights, interests and legitimate expectations. As stated by Mason J in **Kioa-v-West** (1985) 159 CLR 550 at p.582:

> *"It is a fundamental rule of the common law doctrine of natural justice expressed in traditional terms, that generally speaking, when an order is to be made which will deprive a person of some right or interest or*

> *legitimate expectation of a benefit, he is entitled to know the case to be made against him and to be given an opportunity of replying to it.… The reference to right or interest in this formulation must be understood as relating to personal liberty, status, preservation of livelihood and reputation, as well as to proprietary rights and interests."*

The principle is not limited to decisions which can affect legal rights, but extends to the conduct of the investigations and inquiries which only result in recommendations to other bodies **Annetts -v- McCann** (1990) 170 CLR 596.

The Courts are reluctant to find manifest intent by the legislature to exclude the common law principles when construing legislation. Kirby P. has stated that there is a presumption that a legislative strategy and its manner of exercise will be fair and just **Ackroyd -v- Whitehouse** (1985) 2 NSWLR 239 at p.247.

Generally, the procedures followed must be fair to the individual concerned. That involves a fair hearing, and a lack of bias on the part of the decision maker. Precisely what that will be required depends upon the circumstances of the case, in terms of the statute and the nature of the function being exercised **News Corporations Limited -v- National Companies and Securities Commission** (1984) 156 CLR 296.

As Deane J. stated in **South Australia -v- O'Shea** (1987) 163 CLR 378 at p.416:

> *"The common law rules of natural justice or procedural fairplay reflect minimum standards of basic fairness which the common law requires to be observed in the exercise of government authority or power."*

There is no doubt that investigating and disciplinary bodies have an obligation to accord procedural fairness. Over the last three decades, judicial activism has resulted in greater transparency and openness in public decision making with the rights of individuals being safeguarded against intrusion by bodies with strong investigative power.

As Brennan J. stated in **Ainsworth -v- Criminal Justice Commission** (1992) 175 CLR 564 at p.585:

> *"It is especially appropriate that judicial review should be available when the function conferred by statute is to inquire into a report on a matter involving reputation, even though the report can have no effect on legal rights and liabilities."*

The Health Care Complaints Act, 1993 sets out various processes designed to accord fairness to practitioners against whom complaints are made. Examples are s.16 and s.40.

Under s.40(1) of the Act if, at the end of an investigation, the Commission proposes to initiate disciplinary action it must first inform the health practitioner of the substance of the grounds for the proposed action and give the health practitioner an opportunity to make submissions in writing within 28 days unless the substance of the grounds for its proposed action relate to the sufficiency of the physical and mental capacity of the practitioner and the practitioner has been notified by the appropriate registration authority of action to be taken.

Any submissions made by the practitioner pursuant to s.40 must be considered by the Commission before making the final decision on what action should be taken. The Commission then consults with the relevant registration authority under s.38 and s.39(2) of the Act.

It is important to note that the Commission does not have an unfettered discretion in deciding whether to prosecute a complaint in certain circumstances. Reference must always be made to the relevant health registration Act. An example is s.66 of the Medical Practice Act, 1992 which requires that where the Medical Board suspends a medical practitioner or imposes conditions on that practitioner's registration the Board must make a complaint and refer it to the Commission for investigation. Under s.66(4) the complaint must be referred to the Medical Tribunal or Professional Standards Committee. Another example is s.52 of the Medical Practice Act,

1992 which imposes a duty on the Board and the Commission to refer a complaint to the Tribunal if of the opinion that it may, if substantiated, provide grounds for the suspension or de-registration of a practitioner. The complaint can be referred to a Professional Standards Committee if it relates solely or principally to the physical or mental capacity of the practitioner to practise medicine. A complaint does not have to be referred if it is frivolous or vexatious.

A frivolous complaint is one which is inconsequential. The Oxford Companion to Law (1980) defines vexatious actions as those brought, not bona fide, but to annoy or embarrass the other party, or not likely to lead to any practical result. After citing that definition and reviewing the authorities, Roden J. in **Attorney General -v- Wentworth** (1988) 14 NSWLR 481 concluded that the test for a vexatious complaint may be expressed in these three propositions:

- proceedings are vexatious if they are instituted with the intention of annoying or embarrassing the person against whom they are brought.
- they are vexatious if they are brought for collateral purposes, and not for the purpose of having the Court adjudicate on the issues of which they give rise.
- they are also properly regarded as vexatious if irrespective of the motive of the litigant, they are so obviously untenable or manifestly groundless as to be utterly hopeless.

Bias

A component of procedural fairness is that a decision maker should not only be impartial but should appear to be impartial to members of the public. The person will be disqualified if a party to the proceedings or a fair-minded and informed lay observer might in the circumstances, reasonably apprehend a lack of impartiality on the part of that person **Webb -v- The Queen** (1994) 181 CLR 41; **Bannister -v- Walton** (1996) ACL Rep 10 NSW 10.

Each decision must therefore be fair, objective and impartial. A decision must not be influenced by:

- the race, religion, sex , origin, national or political association or beliefs of the health practitioner;
- the race, religion, sex, origin, national or political association or beliefs of any person involved;
- personal feelings of officers concerning the practitioner, the conduct involved, or the breach of professional standards involved;
- possible political advantage or disadvantage to the Government or any political group or party;
- financial advantage or disadvantage to the practitioner or any other person or business or corporation;
- the possible effect of a decision on the personal or professional circumstances of the officers responsible for the prosecution.

Matters to be considered

The Commission considers the following matters when making a final decision to prosecute:

- whether the public interest requires prosecution;
- the risk to the health and safety of individuals and the community in the present and future;
- the protective nature and purpose of disciplinary proceedings;
- whether the admissible evidence available can prove the complaint to the required standard of proof **Bannister-v-Walton** (1993) 30 NSWLR 699; **Briginshaw -v- Briginshaw** (1938) 60 CLR 336; **Rejfek-v-McElroy** (1965) 112 CLR 517. This involves a careful and thorough examination of all the evidence, both the written and oral evidence to be given;
- whether there is no reasonable prospect of a tribunal of fact properly instructed as to law finding the complaint proved;
- the legislative requirements of the relevant health registration Act;
- the relative seriousness of the unsatisfactory professional conduct or professional misconduct;

- special circumstances that would prevent a fair inquiry from being conducted;
- the nature of the conduct whether clinical or ethical;
- the degree of departure from acceptable professional standards applicable at the time of the conduct;
- the degree of criticism of peer reviewers;
- the time elapsed since the conduct the subject matter of the complaint occurred;
- other complaints or disciplinary action taken against the practitioner;
- the legal principles and conduct standards established or espoused by precedent cases and policies;
- the protective orders required to protect the community;
- the degree of culpability of the practitioner;
- mitigating or aggravating circumstances e.g. prior warnings, insight, remedial action, systemic issues;
- registration status of the practitioner;
- the youth, age, maturity, intelligence, physical health and mental health or special disability or infirmity of the practitioner, a witness or the complainant;
- the co-operativeness of the complainant;
- whether the complaint is frivolous or vexatious;
- any s.40 submission from the practitioner.

This list is not exhaustive and the matters to be considered will depend upon the circumstances of each individual complaint.

The applicability of and weight to be given to these and other matters will vary widely and will also depend on the particular circumstances of each complaint.

The views of complainants will be considered and taken into account but those views will not alone be determinative. It is the public, not any private individual or sectional, interest that must be served.

An example of a standard of conduct is that encapsulated by Priestley JA. in a minority judgment in **Richter-v-Walton** (NSW Court of Appeal unreported 15 July 1993) where it was stated:

> *"The degree of trust which patients necessarily give to their doctors may vary according to the condition which takes the patient to the doctor. Even in regard to the most commonplace medical matters, the trust a patient places in a doctor is considerable. In some cases, of which the present seems to be an example, the patient's trust cannot help but be almost absolute. The doctor's power in regard to the patient in such cases is also very great. I do not mean power in the abstract way as a matter of fact; the extent of the power will vary according to the temperament of the patient, but the doctor with some patients and for limited periods, because of the relationship in which they are temporarily placed, is in a position to do whatever the doctor wants with the body of the patient. This is one of the reasons why doctors are subject to correspondingly great obligations and are expected to maintain high standards; all this being very much in the public interest."*

The majority decision in **Richter-v-Walton** was over-ruled in **Health Care Complaints Commission-v-Litchfield** (1997) 41 NSWLR 630 where it was stated that the dissenting judgment of Priestly JA. was entirely correct.

7. MODE OF INQUIRY

In making a decision to prosecute a complaint the Commission must also decide whether the complaint should be referred to a Board, Professional Standards Committee or a Tribunal for inquiry. This will depend upon the modes of inquiry available under the relevant health registration Act and consideration of the matters referred to in Part 6, in particular the requirements of the relevant health registration Act concerning referral of the complaint.

Generally, complaints that do not provide grounds for suspension or de-registration and do not involve very serious breaches of professional

standards are referred to Professional Standards Committees. Those that do are referred to a Tribunal or Board of Inquiry.

The Commission consults with the relevant registration Board not only about the complaint but also about the disciplinary body to which the complaint should be referred for inquiry. If the Board is of the view that the complaint should be referred to a higher body for instance a Tribunal then the complaint will be referred to the Tribunal. If on the other hand, the Commission is of the view that the complaint should be referred to a Tribunal but the Board believes it should be referred to a Professional Standards Committee, the complaint will be referred to the Tribunal (Second Reading Speech Hansard p.4808).

Tribunals and Boards of Inquiry are usually open to the public, Professional Standards Committees are usually held in the absence of the public.

The modes of inquiry differ depending upon the provisions of the relevant registration Act. The table below sets out the provisions:

Health Profession	**Disciplinary Body**	**Members**	**Public Inquiry**
Chiropractors and Osteopaths	Chiropractors and Osteopaths Tribunal s.44	Judge or Legal Practitioner as Chairperson/Deputy Chairperson 2 registered chiropractors/osteopaths 1 lay person s.44	Yes s.46
	Professional Standards Committee s.35	2 registered chiropractors/osteopaths 1 lay person s.35	No s.36
Dental Technicians	Board of Inquiry or delegate s.20	Members of Board or delegate s.20	Yes s.20

Health Profession	Disciplinary Body	Members	Public Inquiry
Dentists	Board of Inquiry s.46	Members of Board s.46	Yes s.46
Medical Practitioners	Medical Tribunal s.146	District Court Judge as Chairperson/ Deputy Chairperson 2 registered medical practitioners 1 lay person s.147	Yes s.161
	Professional Standards Committee s.167	2 registered medical practitioners 1 lay person s.169	No s.176
Nurses	Nurses Tribunal s.59	Legal practitioner as Chairperson/ Deputy Chairperson 2 accredited nurses 1 lay person s.59	Yes s.61
	Professional Standards Committee s.50	2 accredited nurses 1 lay person s.51	No s.52
Optical Dispensers	Board of Inquiry s.25 Reg 17	Members of Board s.25	Yes s.25
Optometrists	Board of Inquiry s.15	Members of Board s.15	Yes s.15

Health Profession	Disciplinary Body	Members	Public Inquiry
Pharmacists	Board of Inquiry s.19H	Members of Board s.19H	Yes s.19H
	Professional Standards Committee	2 registered pharmacists 1 lay person who is a legal practitioner s.19C	Yes s.19H
Physiotherapists	Board of Inquiry s.24	Members of Board s.24	Yes s.24
	Professional Standards Committee s.24A	2 registered physiotherapists 1 lay person s.24A	No Reg 37
Podiatrists	Board of Inquiry s.15	Members of Board s.15	Yes Reg14
	Professional Standards Committee s.21	2 registered podiatrists 1 lay person s.21	No Reg14
Psychologists	Board of Inquiry s.15	Members of Board s.15	Yes Reg16
	Professional Standards Committee s.21	2 registered psychologists 1 lay person s.21	No Reg16

8. DOUBLE JEOPARDY

The taking of disciplinary action against a health practitioner is often misunderstood where there are or have been other proceedings concerning the subject matter of the complaint such as criminal proceedings. No double

jeopardy arises when disciplinary proceedings are instituted against a health practitioner in these circumstances.

Section 97 of the Health Care Complaints Act provides that the Commission, the Commissioner, the Health Conciliation Registry, the Registrar and a conciliator are not prevented from exercising any function concerning a matter merely because legal proceedings relating to the matter have been commenced.

Some of the health registration Acts, for example s.56 of the Medical Practice Act 1992, provide that a complaint can be referred to a Committee or a Tribunal and can be dealt with even though the practitioner concerned is the subject of proposed current criminal or civil proceedings relating to the subject matter of the complaint. The Court of Appeal decision in **Health Care Complaints Commission -v- Litchfield** (1997) 41 NSWLR 630 makes it clear that disciplinary proceedings can be brought against a practitioner irrespective of any other proceedings and the outcome of the proceedings as no double jeopardy arises.

In **Litchfield** the medical practitioner had been acquitted on criminal charges arising from the same facts as the third complaint. In a cross appeal, the practitioner claimed that the Medical Tribunal had no jurisdiction to hear this complaint, that if it did, it should have excluded any evidence that challenged the correctness of the acquittal, and that the verdict of the jury prevented the Tribunal from finding this complaint had been proved. The Court noted the principle in **R -v- Storey** (1978) 140 CLR 364 stated by Barwick CJ at p.372:

> "*the citizen must not be twice put in jeopardy, that is to say, as relevant to the present discussion, must not be placed at the risk of being thought guilty of an offence of which he has been acquitted, or of in any sense being treated as guilty. It is the use of the evidence given on the prior occasion to canvas the acquittal which, if allowed, would offend the rule against double jeopardy, giving that rule a generous application. The principle that the accused in the subsequent trial must be given the full benefit of the acquittal thus might be regarded as akin to but not a mere*

extrapolation of the principle of autretois acquit, both being grounded upon the protection of the law against double jeopardy."

The Court also noted the principle stated by Mason J at p.396:

"The principle of res judicata as applied in criminal proceedings will preclude the Crown from challenging the effect of the previous acquittal, not merely in proceedings for the same or a substantially similar offence, but also for proceedings for a different offence when evidence of the transaction the subject of the acquittal is sought to be relied upon. In its application in this fashion the res judicata gives expression to the notion that once a person is acquitted of an offence, the acquittal must be recognised fully and without qualification for the purposes in criminal proceedings."

The Court stated at p.634 to 636:

"It is clear that the principles established in ***R -v- Storey*** *only apply in criminal proceedings between the Crown and an accused, and have no direct application where double jeopardy relied on arises from disciplinary proceedings heard after an acquittal... It is strongly arguable that there is no identity of parties in this case…Even if, in this case, the parties in both proceedings are the same there is still no res judicata estoppel. These are civil proceedings in which the civil onus applies…. Even if the factual questions were identical, the difference in the onus of proof prevents the issues being the same. Whether particular conduct has been established beyond reasonable doubt is not the same question as whether that conduct has been established on the balance of probabilities. Thus an acquittal does not bar civil proceedings against the accused arising out of the same facts....In any event, the factual questions before the jury were not necessarily the same as those before the Tribunal… Disciplinary proceedings consequent upon a conviction on criminal proceedings are not barred by autrefois convict or any wider principle of double jeopardy…. The converse is also true and adverse disciplinary action does not bar later criminal proceedings arising out of the same facts…. The proposition*

> *that an acquittal does not inhibit disciplinary proceedings arising of the same facts is well established in other common law jurisdictions…is also sound in principle because both the onus of proof and the purpose and focus of the proceedings are different… Section 56 does not deal directly with the effect of an acquittal but it authorises the Tribunal to hear and determine disciplinary proceedings although criminal proceedings are pending. This demonstrates that disciplinary proceedings are not to be governed by the result in criminal proceedings… The Tribunal has a duty, and not a discretion, to conduct the inquiry."*

However, double jeopardy does arise if a health practitioner is subjected to further disciplinary proceedings arising from the same set of facts. This is recognised in **Litchfield** where it was stated at p.636:

> *"A medical practitioner is entitled to be protected from double jeopardy arising from earlier proceedings in the Tribunal* (**Walton -v- Gill, Herron and Gardiner** (1993) 177 CLR 378) *and there is power to stay proceedings in the Tribunal for abuse of process."*

9. PROTECTIVE ORDERS

In disciplinary cases the opinion and assistance of the Commission is often sought by disciplinary bodies when deciding upon the appropriate protective orders to be made in the public interest once a complaint is proved. Instructions concerning appropriate protective orders are obtained from the Commissioner.

The Commission is guided by the principles enunciated in Rule 71 of the Barristers Rules and Solicitors Rules which provide:

- a prosecutor must not advocate for a vindictive sentence;
- a prosecutor must not advocate for a sentence of a particular magnitude, but may inform the Court of an appropriate type and range of penalty by reference to authority;

- the prosecutor must attempt to correct any error made by his or her opponent;
- the prosecutor must inform the Court of any relevant authority or legislation bearing upon the appropriate sentence;
- a prosecutor must assist the Court to avoid an appellable error on the issue of sentence.

Reference must be made to the relevant health registration Act concerning the protective orders that are available to the disciplinary body once a complaint is proved. Protective orders can include:

- a caution or reprimand;
- medical or psychiatric treatment or counselling;
- conditions on practice;
- educational courses;
- report on practice;
- to seek and take advice in relation to management of practice;
- fine;
- recommend suspension or de-registration on grounds of lack of physical or mental capacity;
- suspension;
- removal of name from register.

In determining what are appropriate protective orders, the Commission will consider the findings of fact, the public interest, the proven misconduct, the likelihood of repetition of the misconduct, the risk to the community, precedent cases and any other relevant matters that may arise during the course of the inquiry.

10. SUPPRESSION ORDERS/NON PUBLICATION ORDERS

The Commission is conscious of the need to maintain and protect the confidentiality and privacy of information it obtains as part of an investigation in accordance with the statutory requirements of s.37 of the Health Care Complaints Act, 1993 and the Privacy and Personal Information

Protection Act, 1998. It is appreciated that to disclose such information can cause harm to the parties to complaints and affect their information privacy. The Commission has therefore developed policies and guidelines to deal with the confidentiality of information it receives or obtains as part of dealing with a complaint. These policies and guidelines are contained in the Commission's Code of Practice, Code of Conduct and Ethics and Procedures Manual.

Complaints to the Commission and the former Complaints Unit often relate to very personal and confidential matters containing detailed information about the medical treatment, condition and history of persons who have complained about the provision of health services and/or the mental and physical health of individual health practitioners.

It is very important when it comes to prosecutions particularly in public inquiries that privacy and confidentiality are preserved subject to the requirements of the public interest and the exceptions provided in s.37. It is for this reason the Commission always seeks a suppression or non publication order under the relevant health registration Act prohibiting publication of patient and complainant details including information that may identify them. In virtually all cases such applications are not opposed and the disciplinary body will make an order.

An example of a suppression/non publication order is Clause 6 of Schedule 2 of the Medical Practice Act, 1992 where a Committee or Tribunal may if the person presiding thinks it is appropriate in the particular circumstances of the case:

- direct that the name of any witnesses not to be disclosed in the proceedings;
- direct that all or any of the following matters are not to be published:
    - the name and address of any witness;
    - the name and address of a complainant;
    - the name and address of a registered medical practitioner;
    - any specified evidence;
    - the subject matter of a complaint.

A health practitioner can also make an application for a non publication order. In deciding whether to consent or oppose an application the Commission must consider the public interest and the grounds for the application.

Professional Standards Committee inquiries are usually held in the absence of the public unless the Committee otherwise directs. Accordingly, decisions are not made public except at the direction of the Committee or relevant registration Board as provided for in the relevant registration Act.

11. COUNSEL

The Commission briefs external Counsel to provide advice and to conduct disciplinary inquiries and appeals on behalf of the Commission. Counsel are only briefed in appropriate cases. Decisions to brief are made on a case by case basis and depend upon the requirements of the individual case. An example of when Counsel is briefed is where the case involves complex evidence and legal issues.

The Commission briefs junior, senior junior and senior Counsel depending upon the requirements of the case.

Instructions to brief Counsel are obtained from the Commissioner.

12. DISCONTINUATION OF PROCEEDINGS

In the course of preparing a case or inquiries information may come to light which raises the question of whether or not the Commission should continue with the disciplinary action.

It should be recognised that unanticipated events may occur and circumstances can change after the making and referral of a complaint which require the Commission to re-evaluate its position in fairness to the

parties including the health practitioner. Examples include where a complainant in sexual misconduct proceedings decides not to give oral evidence; where a peer reviewer retracts previous disapproval; where new information is received from the practitioner or other sources; where a witness changes evidence; where a witness becomes unavailable or where the personal circumstances of the practitioner change.

If this occurs the Commission must act expeditiously and advise the health practitioner and the disciplinary body or Court of its intended action.

There is no specific power in the Health Care Complaints Act, 1993 to withdraw or discontinue a complaint once it has been referred to a disciplinary body for inquiry. However, it is open to the Commission not to offer any evidence or request the disciplinary body not to conduct an inquiry or if an inquiry has commenced to terminate the inquiry **Health Care Complaints Commission and Dr W** (Medical Tribunal unreported 22 March 2000.)

Reference must also be made to the relevant health registration Act and to the powers of the disciplinary body concerning the conduct of inquiries. For instance, Clause 12(1)(c) of Schedule 2 of the Medical Practice Act, 1992 provides that a Committee or Tribunal may decide not to conduct an inquiry or at any time to terminate an inquiry or appeal if the complaint is withdrawn. The Commission therefore can withdraw complaints under this Act.

In making a decision about whether or not to proceed the Commission will consider all relevant matters including the new information, whether the complaint can still be proved, the public interest and the views of the person who made the complaint.

13. APPEALS

Appeals by Commission

In determining whether or not the Commission should appeal against the decision of a disciplinary body or Court the Commission will have regard to following matters:

- the appeal provisions of the relevant health registration Act. This includes the right to appeal and the appeal body or Court;
- the findings of the disciplinary body or Court;
- whether the disciplinary body or Court made an error of law;
- the adequacy of the protective orders;
- the public interest;
- precedent cases;
- whether there is a reasonable likelihood the appeal will succeed.

An appeal in relation to a protective order is an appeal against the exercise of a judicial discretion or its equivalent and attracts the principles in **House -v- King** (see **Health Care Complaints Commission -v- Litchfield** (1997) 41 NSWLR 630).

In **House -v- King** (1936) 55 CLR 499 it was stated by Dixon J., Evatt J. and McTiernan J. at p.504 that:

> *"The manner in which an appeal against an exercise of discretion should be determined is governed by established principles. It is not enough that the judges composing the appellant court consider that, if they had been in the position of the primary judge, they would have taken a different course. It must appear that some error has been made in exercising the discretion. If the judge acts upon a wrong principle, if he allows extraneous or irrelevant matters to guide or effect him, if he mistakes the facts, if he does not take into account some material consideration, then his determination should be reviewed and the appellant court may exercise its own discretion in substitution for his if it has the materials for doing so."*

Appeals by Practitioner

In determining the Commission's position in relation to appeals by practitioners against the decision of a disciplinary body or Court the Commission has regard to the same matters as when it appeals.

14. COSTS

Costs arise in two situations:

- an award of costs in favour of the Commission following successful disciplinary or appellant cases.
- an award of costs ordered against the Commission following unsuccessful disciplinary or appellant cases.

Costs can only be awarded by the following Tribunals:

- Chiropractors and Osteopaths Tribunal (Chiropractors and Osteopaths Act 1991 s.49(6))
- Medical Tribunal (Medical Practice Act 1992 Clause 13 Schedule 2)
- Nurses Tribunal (Nurses Act 1991 s.64(6))

Costs cannot be awarded for disciplinary inquiries under any of the other health registration Acts and cannot be awarded in Professional Standards Committee inquiries. Costs can be awarded in Court cases involving appeals.

The relevant cases in this area are **Latoudis -v- Casey** (1991) 170 CLR 542 and **Ohn -v- Walton** (1995) 36 NSWLR 77. These decisions make it clear that:

- a successful practitioner can be awarded costs unless there is conduct disentitling such an award.
- costs are compensatory in the sense that they are awarded to indemnify or reimburse the successful party against reasonable expenses incurred.
- the test of whether an order for costs should be made against an unsuccessful party is not whether he or she has done anything to

warrant punishment, it is whether, in the circumstances, the complainant Commission or practitioner should be compensated.

The Commission normally seeks to recover its costs for successful disciplinary and appellant cases. The Commission will consider not seeking costs in the following circumstances:

- where the public interest does not require it;
- where an inquiry has not been held or was terminated;
- the practitioner suffers from an impairment or physical or mental incapacity and a costs order will impose significant financial hardship on the practitioner.

15. REVIEW AND RE-REGISTRATION APPLICATIONS

The Commission often appears in applications by a practitioner for a review of the decision made by the original disciplinary body which includes applications for re-registration. The Commission appears as the complainant in the original disciplinary inquiry and intervenes as provided by the relevant registration Act or by leave.

It is important to understand the nature of such applications and the need for a practitioner to adduce relevant and cogent evidence at the inquiry that would lead a Tribunal or other relevant body to order re-registration or change the protective orders made. Some practitioners inappropriately seek to challenge the original decision of the disciplinary body and fail to accept the original findings of fact and orders. This is particularly so where practitioners have been acquitted of criminal charges relating to the misconduct which caused their de-registration.

The issue in a re-registration application is whether the practitioner is now a fit and proper person to be re-registered. The onus is on the practitioner to establish this. The standard of proof to be applied is that referred to in **Rejfek -v- McElroy**(1965) 122 CLR 517; **Bannister -v- Walton** (1993) 30 NSWLR 699; **Briginshaw -v - Briginshaw** (1938) 60 CLR 336. As stated in **Prakash** (Medical Tribunal unreported 31 July 1992):

> *"The onus is on the applicant to satisfy the Tribunal on a balance of probabilities that he is now a fit and proper person to be registered. This onus requires him to prove that he is of good character and that he has overcome the defect in his character, as shown by his previous dishonest and fraudulent conduct. It is a heavy onus as it is not easy of proof and one cannot easily rely merely upon the effluxion of time."*

The Commission decides whether or not to oppose the application and if the application is successful what conditions should be imposed on the practitioner's registration. In making these decisions the public interest is the paramount concern.

The Commission considers the following when making its decision:

- the nature of the original complaint;
- the findings of the original disciplinary body or Court;
- the reasons for the protective orders including de-registration;
- previous review and re-registration applications;
- the grounds put forward by the practitioner for re-registration;
- whether the practitioner has overcome the defects in practice and character that lead to de-registration;
- the practitioner's fitness to practice;
- clinical and ethical knowledge;
- conditions to be placed on practice;
- whether the practitioner has insight into the prior misconduct and whether the findings and orders of the disciplinary body or Court are accepted;
- the onus and standard of proof;
- precedent cases such as **Ex Parte Tzinolis: re Medical Practitioners Act** (1966) 84 WN Part 2 275;
- the public interest.

Instructions concerning any review or re-registration application are obtained from the Commissioner. The Commission consults with the

relevant registration Board concerning the application and possible conditions that are required in the public interest to be placed on a practitioner's registration if the application is successful.

16. STAY APPLICATIONS

Stay applications arise in two situations:

- a stay application on appeal. An example is s.90 of the Medical Practice Act, 1992 where the Supreme Court can stay an order made by the Medical Tribunal, on such terms as the Court sees fit, until such time as the Court determines the appeal;
- a permanent stay of disciplinary proceedings usually for abuse of process **Walton -v- Gill, Herron and Gardiner** (1993) 177 CLR 378.

A disciplinary body can also delay the effect of disciplinary orders. Reference must be made to the relevant registration Act. An example is s.155 of the Medical Practice Act, 1992 where a protective order of the Medical Tribunal takes effect on the day when the order is made or such later day as specified in the order.

The usual grounds for making an application to a disciplinary body to delay the effect of an order is to enable an appeal to be lodged and/or to make appropriate arrangements to transfer the care of patients to other practitioners and to provide an appropriate period to cease practice. The Commission's position in relation to such applications depends upon:

- the nature of the complaint;
- the findings of the disciplinary body and the protective orders made;
- the individual circumstances of the case;
- the public interest.

It is appropriate in some cases to consent to a delay to enable the appropriate transfer of care of patients to other practitioners.

In relation to stays on appeal reference must be made to the relevant registration Act. Some registration Acts provide for an automatic stay once an appeal is lodged see s.21(2) of the Pharmacy Act 1964. Where this is not the case stays are generally only granted in certain limited circumstances. **Bannister -v- Walton** (Supreme Court unreported 30 April 1992); **Macarthur -v- Walton** (Supreme Court unreported 25 January 1995); **Leicester -v- Walton** (Supreme Court unreported 13 June 1995); **Huang -v- Walton** (Supreme Court unreported 10 August 1992); **Sinha** (Supreme Court unreported 5 March 2001). It should be noted that if the practitioner's name has been removed from the register prior to the application being made then the order cannot be stayed see **McBride -v- Walton** (Supreme Court unreported 27 August 1993)

The Commission's position in relation to such stays depends upon consideration of the same matters outlined above and the following:

- the likelihood of success on appeal;
- the onus on the applicant to demonstrate a public basis for staying the orders in fairness to all parties;
- whether the appeal would be aborted because it would be heard after the expiration of a suspension period.

A stay application for abuse of process involves a weighing process between the public and private interests involved. The matters to be considered are those outlined in **Herron -v- McGregor** (1986) 6 NSWLR 246 and **Walton -v- Gill, Herron and Gardiner** (1993) 177 CLR 378. In the latter case Mason CJ., Deane J. and Dawson J. stated:

> *"the question whether disciplinary proceedings in the Tribunal should be stayed* by *the Supreme Court on abuse of process grounds should be determined by reference to a weighing process similar to the kind appropriate in the case of criminal proceedings but adapted to take account of the difference between the two kinds of proceeding. In particular, in deciding whether a permanent stay of disciplinary proceedings in the Tribunal should be ordered, consideration will necessarily be given to the protective character of such proceedings and*

to the importance of protecting the public from incompetence and professional misconduct on the part of the medical practitioners. As we read their Honours judgments, the members of the Court of Appeal all utilised such an adapted weighing process in the present case."

17. PUBLICATION OF REASONS FOR DECISION

Reasons for decisions to prosecute and decisions made in the course of proceedings including the giving of advice may be disclosed to relevant parties orally or in writing. Generally, disclosure is consistent with the open and accountable operations of the Commission, however, the terms of any advice given may be subject to legal professional privilege. Reasons for not proceeding with a prosecution may also be given. An example of providing reasons is s.41 of the Health Care Complaints Act where the parties to a complaint are advised in writing of the decision to prosecute and the reasons for it.

Information will only be given to an inquirer with a legitimate interest in the matter where it is otherwise appropriate to do so and subject to privacy and confidentiality considerations. A legitimate interest includes the interest of the media in disciplinary proceedings conducted in public.

Reasons will not be given where to do so would cause serious undue harm to a complainant, witness, victim, or practitioner or significantly prejudice the administration of justice, subject to statutory provisions.

No public comment is to be made to the media about any case except with the express approval of the Commissioner.

18. REVIEW OF JUDGMENTS

Once decisions or judgments are received from disciplinary bodies and Courts the Commission reviews them for the following reasons:

- to ensure that the Commission's decisions in relation to initiating and conducting the disciplinary action were appropriate and fair;

- for the education and training of staff;
- to pass on relevant information to the community, registration Boards and health professions as required by the objects of the Health Care Complaints Act and s.80 of the Act;
- to improve the efficiency, effectiveness and performance of the Commission.

A review covers such issues as:

- the adequacy and appropriateness of the investigation;
- the decision to prosecute;
- the conduct of the proceedings including the adequacy of evidence;
- the appropriateness of the protective orders;
- the principles of conduct and law enunciated;
- lessons to be learned.