Submissions

Mr David KERSLAKE

17 October 2005

Mr D Kerslake
Health Rights Commissioner
Health Rights Commission
Level 19 288 Edward Street
BRISBANE QLD 4000

Dear Mr Kerslake

This morning I reminded counsel appearing before the Commission that, arising out of concerns about complaints which had been made against certain medical practitioners and the way in which those complaints have been handled or the failure to deal with them in a timely fashion, I might be obliged to consider the system or systems providing for the investigation of complaints against medical practitioners and this, in turn, might impinge upon the way in which complaints against other health professionals and nurses should be handled. I indicated that that consideration might result in my making recommendations with respect to amendment or repeal of provisions in legislation relating to the handling of complaints against such persons as well as with respect to appropriate administrative structures for that purpose.

Consequently I invited the parties to make submissions on any of those matters. I mentioned specifically that they might be of interest to QHealth, the Medical Board and the Nurses Union, and I also indicated that I did not intend to restrict submissions on those questions to those parties only.

As any such consideration may affect your Commission and its legislative and administrative structure, I invite you also to make such submissions as you consider appropriate upon those issues.

The submissions of the parties, other than you, are, as you may know, required to be made to the Commission by close of business on 21 October 2005. However, as your representative has not been present during most of the hearing of this Inquiry, I am prepared to extend that time to you until the close of business on 28 October 2005. As in the case of the other parties, those submissions must be in writing.

Yours sincerely

Hon Geoffrey Davies AO
Commissioner

Commissioner
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28 October 2005

The Hon Geoffrey Davies AO
Commissioner
Queensland Public Hospitals Commission of Inquiry
Level 9
363 George Street
BRISBANE QLD 4000

Our reference: 12352/80026643

Dear Mr Davies

Submission - Health Rights Commission

We refer to your letter of 17 October 2005 to the Health Rights Commissioner, Mr David Kerslake.

We and our client thank you for the opportunity to comment upon the matters you have raised from the perspective of the Health Rights Commission, and respectfully enclose the following submissions on behalf of our client for your consideration.

Yours faithfully

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Enclosure

Submission by the Health Rights Commission

Queensland Public Hospitals Commission of Inquiry

28 October 2005

Table of contents

1. Introduction

This submission is provided in response to the Commissioner's letter of 17 October 2005 to the Health Rights Commissioner whereby the Commissioner observed:

- that he might be obliged to consider the system or systems providing for the investigation of complaints against medical practitioners;
- that such consideration might impinge upon the way in which complaints against other professionals and nurses should be handled and might result in recommendations with respect to provisions in legislation relating to the handling of complaints against such persons, as well as with respect to appropriate administrative structures for that purpose; and
- that the Health Rights Commissioner be invited to make such submissions as he considers appropriate upon those issues.

The evidence which underpins the following submissions is the statement of Mr Kerslake dated 19 September 2005 (exhibit 354) and the original submission by the Health Rights Commission to the Bundaberg Base Hospital Commission of Inquiry dated 19 May 2005 (attachment "DK1" to exhibit 354).

2. Own motion powers

Consideration should be given to strengthening the Health Rights Commission's ("HRC") independent role by empowering the Health Rights Commissioner to investigate public interest issues of his "own motion".

A significant limitation on the existing powers of the Health Rights Commissioner is that he can only respond to complaints actually received. Even if he becomes aware of apparently serious health issues by means such as media reports, the Commissioner has no power to intervene in the absence of a complaint, notwithstanding the matter reported may raise important issues of public interest, significant systemic issues or serious concerns about a practitioner's competence.

A related concern is that there have been occasions where the HRC has received a complaint against a health service provider and, in the course of its enquiries, became concerned about the care provided by a different provider. The HRC has been limited in its ability to deal with the additional matters in the absence of a complaint made under the HRC Act.

This places a significant limitation upon the Commissioner's ability to act unilaterally in the public interest.

It is respectfully submitted that the HRC's robustness as an independent body would be reinforced and the protection of the public interest greatly strengthened by affording the Commissioner his or her "*own motion*" powers in circumstances where there appears to be an immediate risk to the health or safety of a user of a health service, or where the Commissioner is satisfied that the public interest otherwise so requires.

The requirement for such a power appears to have been recognised, to some extent, in the final report of the Queensland Health Systems Review (hereinafter referred to as the "Forster Report") which provides for a Commission (described in that report as the "Health Commission") whose functions include a power to "*investigate on its own initiative and where necessary report on systemic failures within the State's public and private health facilities*". However it is respectfully submitted that this power should be extended beyond "*systemic failures*", and should encompass the broader circumstances described in this submission.

3. Power to conduct investigations against individual registrants

Under it's existing legislation, the HRC is only empowered to conduct formal investigations of complaints against *non-registered providers*, that is, organisations such as hospitals, hostels or nursing homes, and a small number of alternate therapists who are not required to be registered.

By virtue of amendments introduced by the *Health Practitioners (Professional Standards) Act* 1999, the HRC is prevented from investigating complaints against individual registrants (such as medical practitioners and nurses). In the case of individual registrants, the HRC retains the power to *assess or conciliate* complaints, but following the legislative amendments referred to above, only registration boards have the power to formally *investigate* complaints against individual registered providers. This restriction, which is unique to Queensland, is one example whereby the existing Queensland legislation provides less flexibility than is the case in other States. All other States and Territories Health Commissions may, if they deem it appropriate, conduct formal investigations into *any of the complaints received.*

Another example of such inflexibility is Section 83 of the HRC Act which provides that a HRC officer who is a conciliator must not be involved at all in the investigation of health service complaints. The Australian Capital Territory and Northern Territory Acts place no restrictions upon conciliators also being involved in investigations. Under the New South Wales legislation an officer may not investigate and conciliate the same complaint if to do so

might interfere with the conciliation process. In Western Australia, the legislation permits officers to both conciliate and investigate cases provided that they do not do so for the same complaint.

It is respectfully submitted that it would be in the public interest for the HRC's power of investigation to be reinstated. There are two primary reasons for this submission.

Firstly, such a change would facilitate the comprehensive review of complaints that raise multiple issues, that is, matters pertaining to an individual registrant's actions as well as the effectiveness of broader health systems or procedures. Such cases are by no means unusual. Take the example of a complaint concerning shortcomings in respect of hospital procedures, a treating doctor and an attending nurse. Under the current legislation, three separate investigations would be required. The HRC has no power to investigate the actions of the individual registrants - that power is vested solely in the relevant registration bodies. The registration bodies have no power to review the conduct of the hospital and possible systemic deficiencies - that power resides in the HRC. The inefficiencies, delays and potential for distress and frustration on behalf of complainants inherent in such a process are self-evident.

Secondly, whilst the HRC currently has the power to conduct an initial assessment of all complaints (whether against individuals or organisations), it is limited in its ability to do so by the absence of any power to compel individual registrants to participate in its processes. The HRC Act provides that, having commenced assessment of a complaint, the HRC must *invite* the health provider to respond. Although most providers choose to cooperate, some simply refuse. In the event that a non-registered provider declines to participate, the HRC is able to use its formal investigative powers to ensure that it can obtain relevant information. However, where an individual registrant declines to participate, the HRC is powerless to take the matter further and the only available avenue is to refer the matter to the relevant registration body, which does have such power. If, however, that registration body deems that the complaint is not sufficiently serious to warrant its attention, the complainant would effectively be denied the capacity to have their concerns independently reviewed. Even if the registration body accepts the referral, its role is limited to reviewing the outcome of the investigation in the context of considering possible disciplinary action against the registrant. It has no power to recommend a remedy for the complainant even if it considered such an outcome was warranted.

The HRC respectfully submits that Queensland should be brought into line with all other Australian States and Territories and that it be vested with the power to investigate *any* health complaint where it deems such action appropriate, subject perhaps to a requirement that before commencing an investigation of an individual registrant, the HRC should first consult with the

relevant registration body. Further, it is respectfully submitted that the HRC should have power to refer a matter to a registration body following investigation with a recommendation for disciplinary action. Whilst disciplinary bodies may retain the capacity to conduct their own investigations, there should be no requirement for them to do so if they consider that the outcome of the HRC's investigation provides a sufficient basis for disciplinary action.

4. Compulsory provision of information at the assessment stage

Under the existing legislation, health service providers (registered or otherwise) have no obligation to provide information to the HRC at the assessment stage. As noted in submission no. 3 above, a power to compel the production of information exists in respect of non-registered providers where a complaint is investigated.

However, speedy and satisfactory resolution of health service complaints is to be encouraged in the public interest, and for that reason, the HRC endeavours to address and finalise a large proportion of complaints received in assessment or conciliation, leaving formal powers of investigation to be exercised in the more serious cases, or in circumstances of a particularly recalcitrant provider. However, the capacity to speedily and satisfactorily address complaints would be enhanced if the HRC was empowered at the assessment stage to compel a health provider to furnish information relevant to the complaint.

In practice, the circumstances in which such a power would need to be exercised are likely to be limited. Experience of other regulatory bodies would suggest that the existence of such a power will be sufficient to secure the cooperation of most providers in supplying information in response to a complaint. It is nevertheless respectfully submitted that the existence of such a power would enhance the HRC's ability to deal with complaints in a comprehensive and timely manner.

5. Obligation to advise complainants of their right of independent review/development of a statewide complaints database

Best practice in complaints management requires recognition by consumers of their health rights, including their right to access an independent complaints review body. It is respectfully submitted that the public awareness of this right would be enhanced through health service providers generally, or at least Queensland Health having an obligation, when responding to complaints at the local health service level, to advise complainants of their right if dissatisfied to seek further review from the HRC.

Best practice also requires that where serious action is warranted, the need for such action is identified promptly, and that information gathered through past experience is used to inform improvements to the quality of health services and to reduce adverse incidents. An important initiative to address these objectives is the development of a statewide complaints database which would record details of all complaints, adverse events and incident reports in relation to the provision of healthcare by Queensland Health. Queensland Health should be charged with collating, analysing and disseminating such data in order to identify systemic issues and facilitate systems improvement. The Health Rights Commission should be responsible for cross referencing Queensland Health's data with complaints made directly to the HRC and other independent complaints bodies and for monitoring health outcomes and trends. The database should include data relating to those complaints which are resolved at the local level. This would ensure that the successful local resolution of individual complaints does not obscure more disturbing patterns of conduct.

The Forster Report recommends the development of such a complaints database. The HRC endorses that recommendation subject to the observations noted above.

6. Concentration of patient complaints management and resolution at the local health service level

Health consumers are entitled to expect that their complaints will be addressed at a local level by people who are committed to understanding their concerns and to resolving them in a fair and effective way. The HRC respectfully submits that you cannot have a quality health system in the absence of a culture that welcomes complaints and values feedback, and it is a matter of concern that at the time when such a large number of complaints began to materialise, there was no patient liaison officer in place at Bundaberg Base Hospital. Patients are more likely to complain if they feel that their concerns will be taken seriously and that the effort of making a complaint has some realistic chance of making a difference, and staff members are likewise unlikely to come forward if they feel their concerns will be trivialised.

The Forster Report recommends a complaints model that provides first for local resolution, with escalation to an independent complaints body if the complaint is not resolved in 30 days. The HRC agrees that the timely resolution of complaints will be facilitated by improving the quality of complaints management and resolution within Queensland Health at the local health service level with the support of appropriately trained and experienced patient complaints officers. However, the HRC respectfully submits that attempted resolution of the complaint at the local health service level should not be mandatory. Circumstances can be readily envisaged where it is self-evident that attempted resolution at the local level will be futile (eg a

sexual misconduct complaint), and under this model, the HRC should retain a discretion, in the public interest, to receive complaints directly, or to take over the management of a complaint at any time. Providing the HRC with access to the proposed complaints database would further facilitate this capacity.

The HRC strongly endorses the recommendation of the Forster Report that local resolution be facilitated by the principles of *open disclosure* and that the consistent application of such principles will make a major contribution to the fair and timely resolution of complaints.

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1 November 2005

The Secretary
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Our reference: 12352/80026643

Dear Sir

Health Rights Commission

We refer to the letter dated 31 October 2005 by Messrs Gilshenan & Luton, solicitors for the Medical Board of Queensland ("MBQ") to the Commission of Inquiry in reply to the submission of the Health Rights Commissioner dated 28 October 2005. On behalf of our client, we wish to make reference to one matter.

The MBQ submission in reply suggests that there is an inconsistency between the HRC's submission no. 2 (power to conduct investigations against individual registrants) and the evidence of the Health Rights Commissioner (Mr Kerslake). This suggestion is, with due respect, contrary to the evidence.

In its original submission of 19 May 2005 (attachment "DK1" to exhibit 354) the HRC referred to the removal in 2000 of its power to investigate complaints against individual registrants, the impact of this legislative amendment upon the HRC's ability to deal with complaints, and the possibility of the need for legislative review in the area of investigations (attachment "DK1", pages 10-11 and 18).

This issue is also specifically addressed in the HRC's Annual Report to the Minister for Health for 2003/04 (attachment "DK5" to exhibit 354, pages 8-9) in which problems associated with the inability of the HRC to investigate individual registrants are highlighted, and the return to the HRC of its former power to investigate individual registrants identified as a possible solution to these problems.

The reservation as to the New South Wales Health Care Complaints Commission model referred to by Mr Kerslake in the passage of evidence cited by the MBQ in its submission of 31 October 2005 is clearly a reservation as to the incompatibility between the undertaking by the HRC of its existing role, and the exercise by it of a prosecutorial role through the undertaking of disciplinary action, and is not, as suggested by the MBQ in its reply, evidence as to a dichotomy between the HRC's existing role and that of an investigator.

That Mr Kerslake's reservation related to the exercise by the HRC of a prosecutorial (and not to an investigative) function is clear from the passage of evidence immediately following that cited by the MBQ in its reply (transcript page 5645 lines 38-45). Mr Kerslake there refers to perceptions as to the level of cooperation from health providers in New South Wales being lower than the level of cooperation enjoyed in Queensland or in other States. New South Wales is the only Australian State in which health commissions undertake a prosecutorial function, whereas all Australian States, other than Queensland, exercise an investigative power in respect of registered providers.

There is no dichotomy between the HRC's role as an investigator and its role as a conciliator in that, pursuant to its existing powers, the HRC undertakes both such roles (investigation and conciliation) in respect of non-registered providers without there being any suggestion (or evidence) of incompatibility in the exercise of those functions.

Yours faithfully

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