Dental Council
Te Kaunihera Tiaki Niho

Oral Submissions to the Health Select Committee on the Health Practitioners Competence Assurance Amendment Bill

Introduction

We thank you for the opportunity to make this submission on the Health Practitioners Competence Assurance Amendment Bill.

I am Dr Robin Whyman, Chair of the Dental Council, and with me are Marie Warner the Chief Executive and Mark Rodgers, the Registrar.

Council is generally supportive of the Bill and its policy direction, but does have some concerns about balancing transparency and practitioner privacy, the potential for significantly increased costs to practitioners, inconsistent and open ended drafting, and the extension of the legislative purpose of the Act beyond protecting public health and safety of the public. It is also disappointed that the Bill does not permit Council some discretion in the treatment of minor conduct cases.

We have already made a detailed written submission on each of the proposed amendments. In our oral submission, given the time available, we focus on those we consider of greater importance.

As you may be aware from our written submission, the Dental Council is a multi-profession regulator, responsible for regulating six separate and distinct health professions; namely dentistry, oral health therapy, dental hygiene, clinical dental technology, dental technology and dental therapy.

Transparency and Practitioner Privacy

Council is supportive of a policy of transparency and but cautions the need to maintain a balance with the right of the individual practitioner to privacy and natural justice. Council also notes that any perceived threat of disclosure of a practitioner's identity, particularly those with competence or health issues, will see them engage legal representation at the earliest possible moment. This will have a significant impact on the costs incurred by Council, which in turn will be reflected in increased annual practising fees.

We also ask you to be mindful of the remedial nature of Part 3 of the Act which deals with competence and fitness to practice. The objective in both cases is to identify and remediate, and to manage the issues identified in a non-confrontational manner to enable a practitioner's safe practice or return to work. Charges are not laid nor is there an ability for the practitioner to mount a defence To date this regime has worked well, but is reliant to a significant extent on the cooperation of the practitioner. With the prospect of the practitioner being identified, the regime is likely to become significantly more adversarial.

Naming Policy (clause 30 of the Bill - sections 157A to 157I of the Act)

Council notes the reference to conduct cases in the proposed Naming Policy provisions – that is, the naming of practitioners in conduct cases. Whilst it may be Councils prerogative to set its own Naming Policy, It is the function of the Health Practitioners Disciplinary Tribunal to make decisions on practitioner conduct; and those decisions are published. It is therefore unclear in terms of natural justice how a naming policy would cover conduct concerns before a matter has been determined by the Tribunal, or for that matter been investigated by a professional conduct committee. It is assumed that the Naming Policy should in the context of practitioner conduct be restricted to interim orders made by Council.

Notifications (clauses 6-12 of the Bill - sections 36, 38, 39, 48-51 of the Act)

Council does not generally advise those who notify it of practitioner competence or health concerns of the outcome. We advise them of Councils processes and procedures and the possible outcomes in such situations, but that the actual outcome is confidential to the practitioner and to Council.

While Council supports the proposal for greater transparency, it does advise caution, and we have already touched on our concerns, however this particularly in health cases, that is, *a practitioner's suspected inability to perform the functions required for the practice of his or her profession because of some mental or physical condition*.

As with the other Responsible Authorities, Council sees many cases involving the often less visible forms of illness such as addictions, transmissible major viral infections, depression and other forms of mental illness. Such conditions often have unwarranted stigmas and personal shame attached to them. They can, and are frequently successfully managed through programmes and cooperation with the practitioner's medical providers. It would be of real concern that practitioners suffering from such conditions were unnecessarily identified simply on the grounds of transparency. This could present a real barrier to recovery.

It is submitted that if the identity of the practitioner must be disclosed, instead of Council providing a copy of an order it has made to the notifier and the other parties proposed in the Bill, that it would be more appropriate that the obligation be to confirm that an order has been made and provide such additional information as Council considers reasonably necessary in the circumstances.

Requirement to provide workforce data **(clause 29 of the Bill - section 134A of the Act)**

The Dental Council requests all practitioners to complete an annual workforce survey when they complete their application to renew their annual practising certificate. The data is analysed and published annually. The report runs to some 250 pages and includes demographic data.

Practitioners provide their personal information on the assurance from Council that:

- it will only use the information collected to monitor workforce trends, and will not publish information in a form that could identify individuals;
- the data collected may be shared with the Ministry of Health for the purpose of workforce planning; and,
- the Ministry of Health will not publish the information in a form that could identify individuals.

Until 2011 Council collected and provided the workforce data to the Ministry of Health under contract, and the Ministry met the costs of analysis. Council continued to collect the data and meet the costs of

analysis when the Ministry withdrew form this arrangement, and subsequently, at the Ministry's request provided data to assist with workforce modelling.

While Council continues to collect workforce data because it views it as being of value to the professions it regulates, the proposed provision in the Bill *requiring* Council to provide information sits quite uncomfortably with the primary purpose of the Act to *"…protect the health and safety of the public by providing for mechanisms to ensure that health practitioners are competent and fit to practise their professions."* Collecting data for a government agency or department is inconsistent with ensuring practitioners are competent and fit to practise.

Council does note that the proposed obligation on Council is to provide to the Ministry of Health practitioner information *it holds*. It further notes that the proposed new section proposes to override *"…provisions in contracts, deeds, documents, and other enactments that are inconsistent with this section."* This we consider is inappropriate

Council must assume in that case that it is the intention that the proposed new section 137A(5) will override the Privacy Act, in which case the Ministry of Health can require Council to provide practitioner data to it even if practitioners have not consented to it. If that is the case we suspect practitioners may be very wary of providing workforce data to Council in the future.

There is no sound reason why a request to provide workforce data by the Ministry of Health should be permitted to override the protection of personal information by the Privacy Act or by contract.

Council is concerned the proposed new section 134A is silent on who bears the cost of providing information to the Ministry of Health. The default position is obviously that the cost, which given the requirements of the proposal could be substantial, are to be met by Council. This is not appropriate.

Council is funded by the professions it regulates. Workforce planning information is a benefit for the public, not for the individual members of the professions that fund the authorities. It is accordingly both appropriate and reasonable that the Ministry of Health should bear the full costs of collecting and providing this information in a manner similar to that in which it bears the cost of providing statistical information requested under section 123 of the Act. Section 123 provides that if the Minister requests statistical information then the Minister must make a grant to the Authority to enable it to meet the expense of providing that information.

Amalgamation **(clause 26 of the Bill)**

The proposed new section 116A enables the Governor-General by Order in Council on the recommendation of the Minister to amalgamate an existing authority with one or more other existing authorities. The only requirement is that the Minister has consulted the authorities concerned and the Minister is satisfied that it is in the public interest that the order be made.

Whilst Council is generally supportive of the concept of amalgamation of Responsible Authorities, having experienced a proposal to amalgamate in the past, it is concerned that no amalgamation should occur without complete and thorough analysis having first been completed by the authorities concerned or by an appropriate external party. The resultant business case must be able to demonstrate a clear public benefit, such as a significant overall cost benefit or a material improvement to public safety.

Over the 3 year period from 2011 to 2013 the Responsible Authorities, at the request of the Minister of Health undertook an amalgamation project based on a Health Workforce New Zealand premise that significant cost savings and efficiencies would be obtained. Various options were modelled and analysed and discarded as not achieving any meaningful financial benefit. In 2013, a working group chaired by Professor Ron Patterson, working with a project team from PriceWaterhouseCoopers undertook a further analysis, and concluded similarly.

Being a multi-profession regulator, the Dental Council took a lead role in the project and in concert with the other Responsible Authorities incurred, very substantial sunk costs, significant business disruption and staff morale and retention issues.

Performance Reviews **(section 122A)**

Council agrees that it is appropriate for a regulatory authority to be subject to periodic review. This has been the case for some years in the United Kingdom with the Professional Standards Authority maintaining oversight over the British health regulatory authorities.

The Dental Council has instigated two full external performance reviews. The first was carried out in 2015 and the second in 2017 and each has provided valuable insights and resulted in lessons learned.

While Council supports the proposed amendment in principle, it is very conscious of the costs that may be incurred, both in terms of direct cost and allocation of staffing and other resources. Prior to initiating the first review, Council was privy to a cost estimate received from the Professional Standards Authority which offered to undertake performance reviews for a number of regulatory authorities for a sum in excess of $80,000 each, provided a sufficient number accepted their offer to make their allocation of time and resources worthwhile.

Council is concerned at the broad brush approach to the drafting of the amendment. It provides that reviews will be conducted at intervals that are no more than 5 years apart, not at 5 yearly intervals as was stated when the Bill was introduced into the House. This means that reviews could be required annually. The drafting needs to be addressed.

We also note that the costs of a review which will largely be determined by its nature and scope will need to be incorporated in Councils budget planning, and accordingly at least a clear year's notice and agreement to its scope and terms will be necessary.

Referral of complaints and notices of conviction to professional conduct committee (clause 14 of the Bill – section 67 of the Act)

We would also like to bring to your attention what we believe to be an anomaly in relation to the current mandatory requirement to refer certain conduct cases to a professional conduct committee.

The Act requires Council to refer to a professional conduct committee any notice of conviction received under section 67. This section establishes two classes of conviction:

- the first, under section 67(1)(a) relates to convictions for offences punishable by imprisonment for a term of 3 months or longer;
- the second, under section 67(b), relates to offences against any one of twelve specified Acts, ranging from the Births, Death and Marriages Act to the Radiation Protection Act and in respect of which the penalty upon conviction is not relevant.

The Amendment Bill proposes a limited discretion be granted to Council whether or not to refer a notice of conviction to a professional conduct committee for those cases that fall under section 67(b). To the best of Councils knowledge, there have been no cases involving convictions under the twelve named Acts.

By contrast, cases involving convictions punishable by imprisonment for a term of three months or longer are considered by Council not infrequently. This is not surprising considering the punishment

threshold test of section 67(a) catches charges such careless use of a motor vehicle and driving under the influence of alcohol.

The vast majority of cases that come before Council involve low grade convictions which would never be considered as bringing the profession into disrepute. However at a minimum cost of approximately $8,000 per professional conduct committee the cost to the relevant profession of mandatory referral for no good reason can escalate very quickly.

Parliament through the Minister of Health appoints Council members and has clothed them with the responsibility of determining if a practitioner should undergo a competence review, undertake a competence programme, undertake a medical assessment or be suspended on an interim basis. It appears anomalous to Council that it should not be vested with a similar discretion in fitness to practice cases involving convictions which are punishable by imprisonment for a term of three months or longer.

Discretion to permit Council to determine whether or not to refer a conviction to a professional conduct committee would appear to be entirely appropriate.

Additional Amendments

Council was disappointed that the opportunity has not been taken to include a number of the recommendations that resulted from the 2008/09 functional review of the Act. Most focused on providing additional clarity and efficiencies to the regulatory authorities. Similarly, there appears to have been little forward thinking about issues such as telehealth, nor has there been any recognition of digital communication.

Electronic communication: A number of provisions in the Act require communication by post. There is no good reason why such requirements cannot be amended to email. Subsequent to the passing of the Electronic Interactions Reform Act 2017 the notice provisions of a number of statutes have been amended to permit this

Section 15(2) of the Act: To enable overseas practitioners to register in New Zealand this provision permits an authority to treat an overseas qualification as a prescribed qualification if it considers it to be equivalent to or as satisfactory as a prescribed qualification for the purpose of registration

Council has had instances of non-prescribed New Zealand qualifications being submitted for registration, usually in a specialist scope of practice, however because the ambit of section 15(2) is restricted to overseas qualifications, Council has been unable to assess them for equivalence and been forced to decline registration. It would provide a simple 'fix' to delete the word "*overseas*" from section 15(2).

16 May 2018