New Zealand
Dental Assoc.

NZDA House,195 Main Highway
Ellerslie, Auckland 1051
PO Box 28084
Remuera, Auckland 1541
New Zealand
tel. +64 9 579 8001
fax. +64 9 580 0010

Consultations
Dental Council of New Zealand
PO Box 10-448
Wellington 6143

3 December 2019

Dear Council members

Consultation on a Naming Policy under the Health Practitioners Competence Assurance Act 2003

1. This submission is provided on behalf of the New Zealand Dental Association (NZDA). For the information of new members of Council, the NZDA membership comprises of over 98% of New Zealand's dentists and dental specialists, throughout New Zealand and across all private practice and public practice (inclusive of Academia, District Health Boards and Defence).
2. NZDA welcomes the opportunity to make a submission in response to the Draft Policy on naming practitioners who are the subject of an order or direction made by Council (Naming Policy).
3. Aspects that NZDA would like to commend the Council to consider are set out below.

Practitioner well-being

4. The matters that follow demonstrate that the Naming Policy is heavily weighted in favour of the "public's right to know" and not sufficiently on the practitioner's privacy, well-being and rehabilitation. At a time where there is a greater awareness of, and focus on, well-being, it seems unusual for the Council to be advancing a Policy that is largely detrimental to this objective.
5. A recent survey (about to be published in the New Zealand Dental Journal) of NZDA members has considered the psychological health of the profession. In analysing the data, reference is made to the large body of literature that demonstrates the considerable psychological stressors for dentists. These include workload, time pressures, costly and strict regulatory requirements, uncertainties about the future, limited opportunities for growth,[1] and challenging interactions with patients or their families.[2] On top of everyday pressures felt by dentists, it has been noted that dealing with complaints (which are often the precursor to orders/directions) can be a major life-event, leading to depression, anxiety, fear of loss of income, and lost confidence and self-esteem.[3] The importance of emotional support and the need for support from the wider profession is required to counter these concerns.[4] In formulating the Naming Policy, the above stressors should be given more careful attention, the Council's Policy Statement on the Health and Well-being of Oral Health Practitioners should be considered, and practitioner well-being should be prevalent in the Naming Policy's core principles.

[1] Ahmad W, Taggart F, Shafique MS, Muzafar Y, Abidi S, Ghani N et al. (2015). Diet, exercise and mental-wellbeing of healthcare professionals (doctors, dentists and nurses) in Pakistan. PeerJ 3(e12500).
[2] Gorter RC, Albrecht G, Hoogstraten J, Eijkman MA (1999). Measuring work stress among Dutch dentists. Int Dent J 49:144-152.
[3] Stuart T, Cunningham W (2015). The impact of patient's complaints on New Zealand dentists. N Z Dent J 111:25-29.
[4] Stuart T, Cunningham W (2015). The impact of patient's complaints on New Zealand dentists. N Z Dent J 111:25-29.

6. Where there may be risk to the public, the Council should not take a presumptive position (such as described in the consultation document) but should instead consider first whether there are other means of preventing this risk (for example, using conditions or voluntary undertakings requiring chaperones, supervisors, mandatory reporting etc.), before publicly naming a practitioner via a notice. Naming a practitioner will inevitably cause them harm that in most situations will be disproportionate to the extent to which his or her level of practice has come into question.

Discretion / Presumption to name

7. The decision whether to name a dentist against whom an order or direction is made is a discretionary decision. The Naming Policy does not sufficiently emphasise this discretion.
8. The first place in which this issue arises is in the Policy Statement. The Policy Statement sets the tone for the rest of the Naming Policy. That is, as drafted it is skewed in favour of naming a practitioner where in fact it is a much more nuanced decision. A more accurate Policy Statement would read as follows:

> *If the Dental Council (Council) exercises its statutory power to make any order or direction that it has authority to make in respect of a health practitioner, it may publish a notice that sets out the effect of the order or direction, and a summary of any finding, and the name of the health practitioner. ~~will turn its mind to whether to publish a notice naming a practitioner under s 157(1) if the Health Practitioners Competence Assurance Act 2003 (the Act).~~*

9. The Council has also set out in relation to each kind of order/direction made under the HPCAA whether there is a presumption to name. This approach is incorrect.
10. The Council has a discretion to publish a notice – there is no requirement for there to be a presumption either way. The Council's approach at the outset should be neutral and made on a case-by-case basis, following broad principles. The principles from paragraphs 12-20 should therefore be deleted from the Naming Policy.
11. Further, the use of principles from the disciplinary arena (the relationship with discipline is discussed further below) cannot be applied to the Naming Policy. The disciplinary jurisdiction is governed by separate sections of the HPCAA and reserved for the most serious conduct concerns. The principles in the disciplinary jurisdiction have also been established as a result of substantial testing through a vast body of case law. Section 157(1) has not been tested in this way (with only one notice having ever been issued by the Council).

Public interest

12. The Naming Policy assumes that it is always in the public interest to name a practitioner. This is incorrect. While due consideration is to be given as to whether a practitioner should be named, it will not always follow that it is in the public interest to do so.
13. First, as well as naming the practitioner, the Council must also give notice of the effect of any order or direction and a summary of any finding (i.e. the naming of a practitioner is just one element of a notice). This lack of full disclosure can lead to public discussion without full facts. The public is therefore not "fully informed" and harm can be suffered to the practitioner due to the spread of misinformation. It should be the Council, a group of responsible members appointed by the Minister, that has all the facts before them, that determines to what extent a practitioner is required to be restricted in her or his practice. The effect of naming a practitioner can have the consequence of the public determining a practitioner's ability to practice (for example, by no longer attending the practice and/or encouraging others to do the same). In many situations, it would therefore be in the public interest to not name a practitioner and allow the practitioner the chance to comply with the directions/orders made without additional public scrutiny.
14. Secondly, it is important that the public maintains confidence in the profession. Publication of breaches of professional standards can reflect negatively upon the whole profession and a focus on rehabilitation can be much more beneficial. The High Court in Roberts v A Professional Conduct Committee of the Nursing Council of New Zealand,[5] while in the context of discipline, made the following comment:

> *A reason why rehabilitation may be an important consideration is that health professionals and society as a whole make considerable investments in the training and development of health practitioners. Where appropriate, the Tribunal should endeavor to ensure these investments are not permanently lost, provided of course the practitioner is truly capable of being rehabilitated and reintegrated into the profession.*

[5] [2012] NZHC 3354 at [47].

15. Situations where it may be in the public interest to name could include where there is a pattern of high risk, for example, previous non-compliance with orders/directions and/or where harm has been caused to numerous patients.[6]
16. Thirdly, the case law referenced in drafting the Naming Policy that supports the public interest in naming are all disciplinary cases. Again, the issue with referencing the disciplinary framework is discussed further below.
17. As with the discretion aspect, the first place in which it is stated that it is in the public interest to name is in the Policy Statement. The Policy Statement should be amended as follows:

> *In making the decision as to whether to publish such a notice, ~~doing so,~~ the Council will be guided by the principals set out in the policy to ensure that its decision complies with relevant laws, and appropriately considers both ~~balances~~ the public interest ~~in the practitioner being named against~~ and the private interests of the practitioner.*

18. Other references to the "public interest in the practitioner being named" should be amended or removed to recognise the varied public interests.

Relationship with disciplinary process

19. The wording of the legislation is problematic in that it refers to the Council's "disciplinary processes" (s 157B (2)). The Council does not undertake the role of discipline. The use of this language demonstrates a lack of understanding from Parliament that orders/directions are typically rehabilitative. The Council is in a good position to remedy this error in its Naming Policy.
20. Further, while there is a presumption of publication in the disciplinary jurisdiction (s 95 – Hearings to be Public unless the Tribunal orders otherwise), the threshold for obtaining name suppression is nonetheless a relatively low threshold. Section 95 of the HPCAA provides that a Tribunal may make an order prohibiting publication of the name, or any particulars of the affairs, or non-publication orders in respect of any person if it is "satisfied that it is desirable to do so", after having "regard to the interests of any person (including, without limitation, the privacy of any complainant), and to the public interest."
21. When a matter goes to discipline, it means that there have been serious concerns raised about the practitioner's conduct. However, even in this forum the Tribunal has a discretion to grant name suppression, and frequently interim name suppression is granted to allow the practitioner the chance to argue his or her case without any negative ramifications.
22. The way in which the Naming Policy has been drafted sets a high threshold for non-publication of a notice. It is inconsistent for a practitioner to be named when an order/direction has been made (where there are generally less serious concerns to address), but to be able to obtain name suppression (at least on an interim basis) for disciplinary matters.
23. Finally, the fact that the Naming Policy specifically states that a decision to name will not be for punitive reasons demonstrates that the Council has turned its mind to the inevitability of this effect. A practitioner's reputation is one of her or his most important assets and to be named will undoubtedly be perceived as a penalty regardless of the wording of the Naming Policy.

Patient right to be fully informed / Medium of publication

24. Directions and orders are often already on the public register. Where an order is made, there is mandatory reporting to the practitioner's employer (if applicable) and/or the practitioner's partners or associates (if applicable) (s 156A). Where orders regarding competence are made, the informant must also be notified (s 38). Conditions/Voluntary Undertakings requiring limited publication can also be imposed (for example, a sign in a waiting room explaining the need for a chaperone during consultations). The Council should give due consideration as to whether these means of publication are sufficient before determining whether a notice should be published. This should be included as a principle in the Naming Policy.
25. There are serious concerns about the wide-reaching nature proposed for publication. It is unlikely that there will be a need for wide-spread publicity of a practitioner's name and any naming should be as targeted as possible. In particular, the explicit reference to publishing a notice on social media sites (e.g. Twitter, Facebook, Neighbourly) is concerning. Publication on social media is not easily controlled and there is the ability for publication to go beyond the target audience. Further, the use of social media will open practitioners up to unjustified and harmful public comment. This should be avoided at all costs.

Conclusion

[6] For example, the case of *PCC v Zimmerman* HPDT No. 888/Den16/368P.

26. The Naming Policy requires significant amendment. From the outset, the Naming Policy has the wrong focus. This is largely due to the reference to the disciplinary jurisdiction in determining the applicable principles. As a result, the Naming Policy fails to adequately recognise practitioner well-being, privacy and rehabilitation and that there are varied public interest reasons when determining whether to name a practitioner. It underplays the discretion Council has and wrongly presents an imposing 'presumptive' proposition that is simply unfair and wrong.
27. Parliament has directed that the Council have a more transparent process in dealing with practitioners against whom have had orders/directions made against them. This does not necessarily equate to naming more practitioners, but rather allows the public to see that due process is being followed.
28. The NZDA thanks the Council again for the chance to comment and looks forward to its feedback being duly considered.

Yours sincerely

David Crum
Chief Executive
New Zealand Dental Association