

Out of the shadows: Professional Standards Committee hearings

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TO THE EDITOR: I read with interest the accounts of de Costa, Walton, and Flynn and Atkinson dealing with the Professional Standards Committee (PSC) of the NSW Medical Board and the behaviour of the Health Care Complaints Commission (HCCC).¹⁻³ I would like to add a few comments arising from my personal experience of appearing before the PSC.

The PSC is supposed to be non-adversarial. The *Medical Practice Act 1992* (NSW) states that the doctor under investigation and the HCCC are not to be represented by a solicitor or barrister, but could be assisted by one. In my case, I soon realised that the HCCC Hearings Officer opposing me was dauntingly competent in court craft. She was, in fact, a very experienced solicitor who had for a long time been in practice outside Australia but was not registered as a solicitor in New South Wales. As a result of my application to the Supreme Court, this malpractice was stopped by Justices Dunford and O'Keefe.^{4,5} Note that Justice O'Keefe ruled that a person qualified in law could represent the HCCC in PSC hearings, provided the person had never been registered as a legal practitioner.

I would like to pose three questions. Firstly, why was it left to me, someone inexperienced in legal processes, to call a halt to this inequity? Secondly, why did the Medical Board countenance this malpractice, when it was manifestly in breach of the Medical Practice Act and most unfair to the medical practitioners whose welfare is its responsibility? And thirdly, why did legal representatives of the medical defence organisations continue to permit this obvious imposition on the doctors whom they had been paid to defend?

In my case, evidence obtained in confidence from peer reviewers has been published in the journal of the Health Care Complaints Commission, even though the action against me has not yet come to hearing. The HCCC's practice of publishing such information prior to hearings has been sanctioned by the Medical Tribunal.⁶

It is my belief that the HCCC has brought the NSW medical regulatory bodies into disrepute by its malpractices, its disrespect for the wishes of Parliament and its lack of a long-term perspective.

1. de Costa CM. Out of the shadows. *Med J Aust* 2001; 175: 331-332.
2. Walton MM. Out of the shadows commentary. *Med J Aust* 2001; 175: 332-334.
3. Flynn JM, Atkinson J. Out of the shadows commentary. *Med J Aust* 2001; 175: 334-335.
4. Dunford JH. Judgment 30005/98. *Richard Gorman v Health Care Complaints Commission and ors*. September 2, 1998.
5. *Gorman v Health Care Complaints Commission* (2000) NSWSC 1228.
6. *Gorman v Health Care Complaints Commission*. Medical Tribunal 40026/2002. □

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TO THE EDITOR: I am a general practitioner who has specialised solely in the field of cosmetic medicine since 1988. I have been the subject of an investigation by the Health Care Complaints Commission (HCCC) and a resultant Professional Standards Committee (PSC) hearing, in which peer reviewers with significant conflicts of interest were used.

The process was triggered by a complaint from a patient who had developed blisters and superficial crusting after facial laser hair removal treatment. This is a recognised complication that the patient was aware of when giving consent for the procedure. The HCCC briefed a dermatologist, Dr "X", to comment on the treatment of which the

patient had complained. The HCCC further instructed Dr X: "Your report need not be confined to the above questions [relating to such treatment] but should include any other matters you consider relevant and significant."

I was referred to the PSC primarily on matters unrelated to the treatment that had led to the patient's complaint. Before the PSC hearing I submitted various documents to the HCCC: (a) a copy of a newspaper advertisement for laser hair removal in which Dr X had stated "Trust only a dermatologist to recommend a safe and reliable method of managing unwanted hair" and "Prospective clients should closely check the qualifications of their laser practitioner and look for the letters FACD"; (b) a report from another dermatologist stating that Dr X "does have a history of a negative attitude to general practitioners who specialise in lasers. He has been seen on television on several occasions espousing this view."; (c) expert reports from two dermatologists expressing views contrary to the opinions of Dr X that had triggered my PSC referral; and (d) statutory evidence from a patient treated in his practice that Dr X's own clinical practice was contrary to that which he had advised the HCCC I should have followed.

The NSW Medical Board appointed as a PSC representative at my hearing a dermatologist who was a co-advertiser for laser hair removal with Dr X. The dermatologist in question was later removed (with difficulty) on objection. The PSC systematically disregarded expert evidence I had presented in favour of evidence presented by the HCCC. I have been told that this is a common occurrence.

I sincerely hope that the NSW Government Inquiry into the HCCC, to be released in 2002, will address the abuse of this system by biased reviewers. However, justice cannot be guaranteed when the HCCC and NSW Medical Board both effectively collude to prosecute these cases. PSC hearings should be administered by an independent body.

Correspondents

Letters must be no longer than 400 words and must include a word count. All letters are subject to editing. Proofs will not normally be supplied. There should be no more than 4 authors per letter. Each author should provide current qualifications and position. Contact telephone and facsimile numbers should be supplied. Letters from a single author may be submitted by email (editorial@ampco.com.au), but must include full details of postal address and telephone number. There should be no more than 5 references. The reference list should not include anything that has not been published or accepted for publication. Reference details must be complete, including: names and initials for up to 4 authors, or 3 authors, et al. if there are more than 4; places and dates for conferences and publishers, places and year of publication for their proceedings; publishers, places, year of publication and page numbers for monographs; volume numbers and page numbers for journal articles.

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TO THE EDITOR: The Acts constituting the NSW Medical Board and Health Care Complaints Commission (HCCC) unfortunately permit inequitable joint functioning of these agencies. The provision that the complainant may appeal an unsatisfactory decision of a Medical Board's Professional Standards Committee (PSC) to the Medi-

cal Tribunal is misleading.¹ The HCCC chooses its peer reviewer in any matter, investigates, recommends that the Board take action (or not), prosecutes matters at a hearing (or not) and is the only complainant allowed to appeal.² Clearly, the skills, methods, and decisions of the HCCC and the Board must be beyond reproach.

The HCCC selects peer reviewers to consult during the investigation of a complaint.³ They are paid to report on documents and to appear as witnesses before any committee or tribunal of inquiry — either before an in camera PSC of the Board or at a Medical Tribunal, chaired by a judge in open court. Peer review reports, which are legally privileged and generally inscrutable, may be selectively biased. My own involvement (as a complainant disallowed appellant standing from the PSC, and as an occasional consultant to a complainant and to the defence in other, separate psychiatric complaint matters) has led me to conclude that some peer review reports are inconsistent with minimal professional requirements or even duplicitous. Blind faith in a system comprising these two statutory bodies and an anonymous peer reviewer is inappropriate.

The NSW Administrative Decisions Tribunal (ADT) has judged disclosure of the membership lists of HCCC peer review panels to be in the public interest. In 1999, the ADT inquired into the selection of the list of psychiatrist peer reviewers when dealing with an application for disclosure based on the *Freedom of Information Act 1989* (NSW).⁴ The list proved to have evolved over an unknown period, through unknown differing methods (such as recommendations from unidentifiable practitioners or staff), for unknown precipitating reasons, and at unknown times. There was no general awareness within Medical Colleges or other medical associations of the selection process or of the members who may be thus empowered. This, when we know that, as a profession, we cannot be uniformly sensible, ethical or emotionally stable. The HCCC and the NSW Medical Board are thus vulnerable to corrupt influence.

The NSW Parliamentary Committee on the HCCC has sought submissions from the public and has been conducting an inquiry since November 2001 to determine necessary improvements to the functioning of the HCCC. I believe professional bodies need to take a resolute lead, declare their intentions, identify their roles, consult with their members and heed their responses. Ideally, each will clarify its policies and procedures for regulation and will demand

proper functioning from the agencies with statutory responsibilities.

1. *Medical Practice Act 1992* (NSW), No. 94, Section 87.
2. Hidden J, Supreme Court of NSW, 15 December 1995. *Shoulder v NSW Medical Board & anor*.
3. Adrian A, Commissioner, Health Care Complaints Commission. Guidelines for peer reviewers. An available commission document. Surry Hills, NSW: HCCC, July 2001.
4. *Dawson v Commissioner, Health Care Complaints Commission* [1999] NSWADT 57. Available at: <http://www.lawlink.nsw.gov.au/adtt> (follow links to ADT decisions, 1999 [General Division], Page 2, No. 57). □

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IN REPLY: A Medical Board's role is to protect the public by ensuring that appropriate standards of conduct and practice are maintained by registered medical practitioners. In New South Wales, the NSW Medical Board administers the disciplinary provisions under the *Medical Practice Act 1992* (NSW). Included in this legislation is the Medical Tribunal/Professional Standards Committee (PSC) model that has been the subject of comment in recent correspondence. It is important to note that the Medical Board, the Health Care Complaints Commission (HCCC), the Medical Tribunal and PSCs are all independent bodies in their own right.

The Medical Board welcomes constructive comment on the system and its administration. It meets regularly with the major parties (HCCC, United Medical Protection, and the Australian Medical Association [AMA] as the doctors' professional body) to discuss the workings of the disciplinary system, to identify problems and shortcomings, and to develop solutions.

Inevitably, there will be aspects of the process that participants do not like — who enjoys being taken to court, in any circumstances? As in all legal and quasi-legal processes, the parties are unlikely to uniformly praise the impartiality or quality of witnesses, experts, and the judiciary. Processes are in place to minimise the possibility of conflict of interest, or the perception of bias. On the rare occasion when a panellist is challenged, a conservative approach is generally taken, and a replacement found.

Heber raises concerns about an inquiry extending beyond the parameters of the original patient complaint. In a protective jurisdiction, it would be quite wrong to limit a case to what the complainant had been able to articulate. Not infrequently, a patient's unhappiness is focused on what, from a medical perspective, is relatively minor, while seriously poor conduct or

practice is not recognised as such. The legislation specifically envisages an "inquiry", which, subject to natural justice requirements, may go beyond the original complaint. To deny this would be inconsistent with the protective nature of the jurisdiction.

The issues raised by Dawson and Gorman concentrate on procedures adopted by the HCCC regarding peer review and representation before hearings. The Board understands that the HCCC has a detailed policy document, prepared in consultation with stakeholders including the AMA and United Medical Protection, regarding the selection and utilisation of peer reviewers and expert witnesses. The Board is also aware of wider concerns in the legal system regarding the use of "hired guns" as distinct from impartial peers or experts, and when concerns have been brought to its attention suggesting even a perception of bias it has taken steps to address them.

The Board and members appointed to sit on PSCs and Medical Tribunals take their roles very seriously, and do so with a sense of professional responsibility, while acknowledging the difficulty of sitting in judgement on their peers. Criticisms are carefully considered and practices changed where appropriate. At all times, the Board must ensure that it acts fairly and in accordance with its charter of public protection. □

Childhood obesity: of growing urgency

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TO THE EDITOR: A number of recently published articles indicate that the prevalence of overweight and obesity in children is increasing at an alarming rate on a national¹ and international² level.

Overweight children are more likely to become overweight adults and to experience chronic health problems associated with adult obesity. We report results obtained from a survey of primary schoolchildren on the New South Wales Central Coast which extends the time series from that in the article by Magarey and colleagues (1985 and 1995 data)¹ to the year 2000.

We undertook a cross-sectional study of children at a Central Coast primary school