NEW ZEALAND
LAW SOCIETY

Health Practitioners Competence Assurance Amendment Bill

05/04/2018

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Introduction

1. The New Zealand Law Society (Law Society) welcomes the opportunity to comment on the Health Practitioners Competence Assurance Amendment Bill (Bill).

2. The Bill amends the Health Practitioners Competence Assurance Act 2003 (Act), to implement recommendations from reviews of the Act. This submission focuses on matters requiring clarification or further consideration.

3. The Law Society does not seek to be heard.

Clauses 6, 7, 8, 9, 11 and 12: Provision of information to 'notifiers'

4. The Bill proposes to amend the Act to require authorities to provide substantive updates to people who have given notification to authorities about practitioner competence or health concerns (see clauses 6, 7, 8, 9 11, 12).

5. Notification will generally have been given by persons within specified categories in the Act,[1] rather than members of the public generally.

6. It is noted that notifiers pursuant to section 34(3) – former employers of the health practitioner concerned – will *not* be advised of the outcome of a notification (clauses 6, 7 and 8 of the Bill refer only to notifications given under section 34(1) or (2)). It is not clear whether this is intended. However, this approach could be justified on the grounds that the notifier no longer has an employment relationship with the subject of the notification and so has no legitimate interest in knowing the outcome of the notification.

7. In relation to the other classes of notifier, it is accepted that they will, generally, have a legitimate interest in knowing the outcome of the authority's process. In the main, notifications (which may be voluntary or compulsory, depending on the circumstances) will not be given lightly. However, the potential impact of the disclosure of such information on the individual practitioners cannot be ignored. The Law Society understands that practitioner competence and health concerns tend to be treated by the Act – and managed by the authorities – as educative and rehabilitative processes. There is a risk that disclosing the outcome of the notification process might have a significant, adverse and possibly unfair impact on individual practitioners and potentially undermine those educative and rehabilitative aims.

8. Notifiers entitled under the Bill to be advised of the outcome of a notification will usually hold positions where they can be expected to treat the information imparted by the authority responsibly.[2] Occasionally, however, notification could be given in circumstances where the

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[1] Particular classes of person who are entitled to give notification are set out in sections 34(1), (2) and (3), and 45(1) and (5) of the Act. In addition, section 45(3) provides for voluntary notification by "any person [who] has reason to believe that a health practitioner is unable to perform the functions required for the practice of his or her profession because of some mental or physical condition".

[2] Namely health practitioners, the Health and Disability Commissioner, the Director of Proceedings under the Health and Disability Commissioner Act 1994, employers of health practitioners, medical officers of health, and persons in charge of an educational programme in New Zealand that includes or consists of

notifier has competing interests. There might be little to prevent such a notifier from putting the information provided by the authority into the public domain or using it for other purposes.

9. In such a case, it is unclear whether the statutory protections in sections 34(4) and 45(6) of the Act would be available. The protections apply "in respect of a notice given under this section".[3] Arguably, the protections are limited to the giving of notice to the authority and do not extend to the publication or other use of information imparted by the authority after a process initiated by the notice. However, if the information given by the authority to the notifier is correct, and is not subject to any obligation of confidence or privacy, a notifier might be prepared to use it even without the benefit of statutory protection.

10. The Law Society suggests that the Committee consider whether safeguards should be put in place restricting the use of information imparted to notifiers generally, or to classes of notifier.

11. It is possible that at least some classes of notifier may wish to use the information received for legitimate purposes. Therefore, a complete ban on the publication or other use of such information may not be appropriate.

Recommendation

12. That the Committee consider whether safeguards (in the form of restrictions) should be put in place in relation to use of information imparted to notifiers generally, or to classes of notifier.

Clause 10: Section 49 amended (Power to order medical examination)

Definition of 'assessor'

13. Currently where there are health concerns about a health practitioner, the authority may order the practitioner to undergo "examination or testing by a medical practitioner" (section 49). Clause 10 replaces "medical practitioner" with "assessor", a term that means "a medical practitioner *or any other health practitioner*" (new section 49(8), emphasis added).

14. The Law Society considers that the expanded definition of "assessor" to include *all* health practitioners is too broad, and could result (in theory at least) in health practitioners being permitted to conduct examinations and assessments outside their area of expertise. The Explanatory Note to the Bill indicates that the intention is that the examination will be conducted by "an *appropriate* health practitioner".[4]

Recommendation

15. The Law Society recommends that the definition of "assessor" in new section 49(8) be reworded as follows: "a medical practitioner or any other appropriately qualified health practitioner".

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a course of study or training that is a prescribed qualification for a scope of practice of a health profession.

[3] Section 34(4) of the Act provides that "No civil or disciplinary proceedings lie against any person in respect of a notice given under this section by that person unless the person has acted in bad faith". Section 45(6) is to similar effect.

[4] Explanatory Note at p2, emphasis added.

Clause 26: Amalgamation powers – consultation

16. Clause 26 proposes giving the Governor-General, by Order in Council on the recommendation of the Minister, the power to amalgamate two or more existing authorities.

17. The consultation requirements prior to any decision to amalgamate are quite limited. The obligation is to consult "the authorities concerned" (proposed new section 116A(2)(a)). The Minister must also be satisfied that the decision is "in the public interest" (proposed section 116A(2)(b)).

18. The amalgamation of health authorities will be a matter of public interest (as recognised by new section 116A(2)(b)), and more extensive consultation than currently provided in the Bill may be warranted. One option may be to provide for wider consultation at the Minister's discretion in particular circumstances.

Recommendation

19. That the Committee consider amending clause 26 to permit the Minister discretionary powers to consult more widely.

Clause 27: Section 118 amended (Functions of authorities)

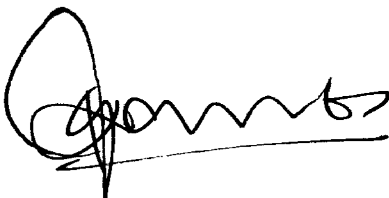
20. Clause 27 would add as a statutory function of the authorities responsible for registration and oversight of health practitioners, the requirement in proposed new section 118(ja):

> to promote and facilitate inter-disciplinary collaboration and co-operation in the delivery of health services

21. The Regulatory Impact Statement indicates that the need for greater team work and communication between multi-disciplinary teams was identified in the 2012 statutory review of the Act. However, the term 'inter-disciplinary' in proposed new section 118(ja) is not defined, and this may cause confusion. The term could be interpreted as a reference to encouraging collaboration and co-operation between different authorities under the Act (although we note that it is already one of the statutory functions of authorities "to liaise with other authorities … about matters of common interest": section 118(j)). Minor rewording of new section 118(ja), or a specific definition of 'inter-disciplinary', may be needed to provide clarity.

Recommendation

22. That the Committee consider whether minor rewording of new section 118(ja), or a specific definition of 'inter-disciplinary', is needed for clarity.



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