

**REVIEW OF
NSW CIVIL AND ADMINISTRATIVE TRIBUNAL
ACT 2013**

**Submission by the
Health Care Complaints Commission**

July 2019

1. Introduction

The Health Care Complaints Commission ('the Commission') welcomes the opportunity to present its submission to the Department of Justice's review of the *Civil and Administrative Tribunal Act 2013*, which established the NSW Civil and Administrative Tribunal (NCAT). The purpose of the review is to find out how well NCAT is working, and to look at reforms that could strengthen access to justice for people in NSW.

It was noted that submissions may be made on any issue relating to the operation of NCAT, however, questions that agencies and individuals may have wished to consider included:

- Is it easy or difficult for people to work out whether NCAT is the right body to resolve their legal issue?
- Is NCAT accessible and responsive to its users' needs?
- Are there things that NCAT could do to make it easier for people appearing in the Tribunal to understand the process and participate?
- Does NCAT resolve legal disputes quickly, cheaply and fairly?
- Should NCAT resolve some matters just by looking at the documents submitted by the parties, without a hearing in person?
- Does NCAT need additional powers to be able to enforce its decisions?

Part 3 of this submission raises the key issues of relevance to these questions from the Commission's perspective. Generally, the issue of greatest concern to the Commission and its core stakeholder groups is the overall timeliness of prosecutions against health practitioners in relation to whom investigations have found significant departures from accepted standards of clinical performance or conduct. Delays in finalising prosecutions has been identified by complainants, providers, medical defence organisations and oversight bodies as a growing concern and one which goes to the question of community confidence in our complaints handling system.

Addressing this issue is ever more imperative in a context where the complaints going to prosecution are becoming increasingly complex and likely to require additional hearing time and senior tribunal member involvement. More often than not, a single prosecution may increasingly bring together a number of different investigations about a practitioner, with large number of patients, issues and treatment scenarios.

2. Background - Commission Relationship to NCAT

NCAT is the primary of the two forums in which the Commission may formally prosecute a complaint against a registered health practitioner, making up 91.5% of the Commission's prosecution matters in 2018-19. The other prosecution forum available is a Professional Standards Committee (but only for registered medical practitioners, nurses and midwives).

Following an investigation, the Director of Proceedings makes determinations under the *Health Care Complaints Act 1993* ('the Act') in relation to whether a complaint against an individual registered health practitioner should be prosecuted and if so, in which forum. Prosecutions are disciplinary proceedings taken against individual practitioners, with the primary purpose of protecting public health and safety.

Complaints referred for consideration of prosecution include allegations of impairment, lack of competence, criminal conviction, and not being a suitable person for registration, as well as unsatisfactory professional conduct and professional misconduct.

In considering whether a complaint should be prosecuted, the Director of Proceedings is independent and is required to have regard to the following criteria:

- the protection of the health and safety of the public
- the seriousness of the alleged conduct the subject of the complaint
- the likelihood of proving the alleged conduct
- any submissions made under section 40 of the Act by the health practitioner concerned.

Most commonly, complaints that have been referred to the Director of Proceedings will involve professional misconduct serious enough to justify suspension or cancellation (or multiple occurrences of unsatisfactory professional conduct which collectively may constitute professional misconduct) and these will be prosecuted before NCAT. Complaints about lower level clinical or conduct matters relating to nurses, midwives or medical practitioners may be more suitable for prosecution before a Professional Standards Committee.

NCAT can cancel or suspend the registration of a practitioner and may also make a prohibition order that bans or limits the practitioner from practising in another area of health service. For example, a psychiatrist whose registration is cancelled can be prohibited from working as a counsellor. Furthermore, conditions may be placed on a practitioner's registration, for example, that they engage in mentoring or complete further education or training. NCAT may determine any such condition to be a "critical compliance" condition, pursuant to section 149A of the Health Practitioner National Law (NSW), with the effect that a contravention of the condition would result in the practitioner's registration being cancelled. NCAT may also fine, formally reprimand or caution the practitioner.

NCAT may also hear appeals from practitioners to its decisions and re-registration applications from practitioners following the end of their non-review disqualification period.

NCAT also hears appeals by unregistered health practitioners against prohibition orders imposed by the Commission, although these are very infrequent.

In 2018-19 there were 52 prosecution matters finalised before NCAT, with a further 13 re-registration applications and eight appeals determined. In total, there were 73 NCAT matters finalised in 2018-19 which is less than previous years.

3. Issues, Challenges and Opportunities

3.1 Electronic lodgement

The Commission strongly advocates that NCAT adopt more online and electronic procedures to improve both access and timeliness. It is noted that the legislation envisages this, so it is assumed that establishment of appropriate administrative systems and protocols are the impediments:

- Section 25(4) of the CAT Act allows the Tribunal to authorise or require the use of an electronic case management (ECM) system.
- Clause 10(1) of the CAT Rules 2014 allows electronic lodgment and issuing of documents where an ECM system is available for use.
- Clause 13(3)(c) of the CAT Rules 2014 allows parties to lodge documents with the Tribunal by such electronic means as the Tribunal has made available for use.

The current **Guideline for Professional Discipline matters** ("the Guideline") requires parties to file material in hard copy and by USB:

- Clause 35 requires the parties to file five (5) hard copies.
- In addition Clause 37 requires the parties to file four (4) USB sticks.
- The directions made at the first directions hearing generally require the parties to file five (5) hard copies plus four (4) USB sticks.
- **Procedural Direction 1 – Serving and Giving Notice** allows for service by electronic means if the Tribunal has made electronic lodgement available for that type of document and in the type of proceedings concerned.

Commission matters in the Health List generally involve voluminous documentary material. A non-complex matter on average consists of at least two (2) lever arch files of documents. A complex matter will consist of between 5-25 lever arch files. The ability to file electronically would substantially reduce the time and resources required to prepare the files and USBs which in turn would reduce the costs of preparation for the Commission and presumably, commensurate cost savings for the Tribunal.

Where a document is able to be lodged electronically, improvements in the Rule to improve the means by which documents can be lodged electronically also require consideration. At present the Guideline requires lodgement of USB sticks, whereas there would be time, resource and security benefits in the ability to file by secure email link. In a recent case, some additional material was allowed by the Registry to be submitted in this way, and this proved to be an efficient way of receiving and distributing the material to the members than reliance on hard copy and/or USBs.

3.2 Online issuing of summonses, producing documents under summons and obtaining directions on return of summons

Clause 29 of 'Procedural Direction 2 Summonses' provides that the person named in the summons can comply by producing a photocopy or copy in electronic form that the party who applied for the summons has indicated would be acceptable.

The Tribunal has not made available an ECM system for summonses to be filed online, for recipients to produce documents online or for parties to seek access orders and uplift documents online.

There are several benefits for the Commission and the Tribunal in seeking to use an online summons portal:

- "NSW Subpoena Response" is already used by other courts and allows subpoena items to be sent electronically;
- Recipients can easily upload files of different formats and sizes and can be reviewed and analysed data in original format (rather than poor quality photocopies);
- The data is encrypted to keep documents secure;
- The uploaded items are received immediately by the Tribunal (rather than waiting 3-5 days for the documents to arrive by post);
- Time and resource savings for parties and the Tribunal in Registry counter staffing (rather than printing and filing 4 hard copies of each summons and attending multiple return of summons at the registry);
- Avoidance of time and cost involved in multiple attendance at the Registry for return of summons if adjourned because the documents have been sent by post, have not yet arrived at the Tribunal or have not yet been processed at the Registry;
- Resource savings for document producers of uploading material for production (rather than printing and sending multiple pages and invoicing the Commission for the photocopying and postage costs which may also be passed on to unsuccessful parties under costs orders).

3.3 Remote appearance and support for witnesses

Matters prosecuted by the Commission often involve vulnerable witnesses with significant support needs and sensitive subject matter, which require privacy and security.

The Commission would recommend greater clarity around the procedures for the taking of evidence from witnesses remotely. At the moment they are ad hoc. Considering the sensitive nature of our matters, this would be beneficial to witnesses.

The Commission would also welcome early consideration of the introduction of facilities on Levels 9 and 10 for confidential discussions. The provision of this type of facility would enhance the wellbeing of these witnesses.

3.4 Improving Hearing Efficiency

“Procedural Direction 3 – Expert Witnesses” should be expanded to include provision of directions and procedures to allow for provision of concurrent evidence and conclaves for expert evidence. Currently, there are limited procedural directions for guidance around the use of conclaves and concurrent evidence. As a consequence they are not utilised as extensively as they could or should. The use of this type of expert evidence is both more timely and cost effective.

The CAT Act (Division 3, Clause 11 of Schedule 5 and Schedule 2 Clause 11) establishes a position of List Manager of the Health Practitioner List. The current experience of the Commission has been that, in many cases, the Directions are not complied with by the parties resulting in frequent multiple appearances at the Tribunal which in turn increases delay and costs. Better utilisation of the powers of the List Manager to reduce non-compliance and to impose constraints subject to procedural fairness (e.g. explanation for non-compliance) would be beneficial.

3.5 Timetabling hearings and finalising matters

In 2018-19 the Commission has finalised only 52 prosecutions in NCAT, which is fewer than both of the two previous years.

Our experience is that particularly in our very complex and highly visible matters, it is increasingly difficult to secure timely hearing dates, often because of the lack of availability of hearing rooms and the unavailability of Tribunal members. This leads to extended time frames between the first directions hearing and the actual hearing itself which in turn allows for requests for extended periods for the provision of evidence and lack of incentive to comply with the timetables. In short, factors compound and this is leading to some very protracted timeframes for our most sensitive and contentious matters. For instance:

- A complaint about [REDACTED] was lodged in 11 January 2017 with hearings not then scheduled until 11-22 December 2017
- A complaint about [REDACTED] was lodged in 21 February 2018 with hearings now scheduled in late July 2019.

As at 1 July 2019, there were 29 matters where a complaint has been lodged with NCAT, but a hearing has not yet held (awaiting a listed hearing date or having a hearing date listed).

Consideration should be given to measures that could prioritise more complex and serious matters or deliver resourcing solutions that will deliver more timely decisions.

On occasions the Commission is experiencing very long delays in the delivery of decisions. For example:

- Again, using the [REDACTED] prosecution, the final submissions were made in April 2018 and the decision and orders were not brought down not until September 2018.
- In the case of [REDACTED] this matter was heard in late 2018, but as at 10 July 2019 the decision remains outstanding.
- In the case of [REDACTED], the matter was heard in June 2018 with the decision still outstanding.

As at 1 July 2019, there were 15 matters awaiting decision (including 4 where we have a Stage 1 decision but awaiting Stage 2 and 1 review matter in which we are the respondent).