**Submission No 56**

# INQUIRY INTO OPPORTUNITIES TO CONSOLIDATE TRIBUNALS IN NSW

**Organisation**: Medical Council of NSW

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Medical Council
OF NEW SOUTH WALES

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The Director
Standing Committee on Law and Justice
Parliament House
Macquarie Street
SYDNEY NSW 2000

By Email: LawandJustice@parliament.nsw.gov.au

Dear Director,

**Submission – Inquiry into opportunities to consolidate tribunals in NSW**

The Medical Council of NSW (the Council) is established pursuant to section 41B of the *Health Practitioner Regulation National Law (NSW)* (the Law). The Council came into existence on 1 July 2010 and assumed the rights and responsibilities of the former NSW Medical Board which was established under the now repealed *Medical Practice Act 1992 (NSW)*.

One of the primary responsibilities of the Council is to assess and respond to complaints that are made against medical practitioners, whose principal place of practice is NSW. Complaints can be made about a medical practitioner's conduct, health or performance or a registered medical student's conduct or health.

The Council's responsibilities are undertaken in conjunction with the Health Care Complaints Commission (HCCC) which exercises its investigative and prosecutorial functions pursuant to the *Health Care Complaints Act 1993 (NSW)*.

The Law, as it applies to medical practitioners in NSW, establishes a Medical Tribunal to consider complaints referred to it by the Medical Council or prosecuted by the HCCC. The Tribunal can suspend or cancel a medical practitioner's registration or impose conditions to the practitioner's registration if it finds the complaint proven. The Medical Tribunal is also responsible for considering appeals and review applications made under the Law. The Council has identified four key issues in relation to the Standing Committee's present Inquiry into the opportunity to consolidate tribunals in NSW.

The Council's submission in response to these issues is as follows:

## 1. Ensuring suitable expertise on tribunals

Presently, section 165A of the Law provides for the composition of the Tribunal to consist of a Chairperson or Deputy Chairperson, two health practitioners registered in the same health profession as the health practitioner or student the subject of the inquiry or appeal, and one lay person. As discussed further below, the Chairperson or Deputy Chairperson are either a Judge of the Supreme or District Court.

Section 165A of the Law further provides that the Council is responsible for appointing the two health practitioners and the lay person to the Tribunal.

The purpose of this provision is to ensure that the composition of the Tribunal includes appropriately qualified and experienced medical practitioners who can assist the Tribunal in its deliberations. The medical practitioners who are appointed to a Medical Tribunal play an important role in ensuring that the Tribunal's decisions, including any findings and subsequent orders, are well-informed and based upon a consideration of accepted professional standards and practice. The medical practitioners appointed to a Tribunal possess the clinical knowledge and experience to provide important advice to the Chairperson or Deputy Chairperson with respect to such issues.

Given the complexities arising from the practice of medicine, it is important that the Council retain the ability to appoint suitably qualified and experienced medical practitioners to sit on Tribunals in order to consider the clinical issues that are often grounded in a complaint.

The practice of medicine has a number of specialties, for example psychiatry, surgery, general practice and obstetrics and within these specialities exist a number of sub-specialities. For example, the College of Surgeons recognises nine distinct surgical divisions which are cardio-thoracic surgery, general surgery, neurosurgery, orthopaedic surgery, otolaryngology, head and neck surgery, paediatric surgery, plastic and reconstructive surgery, urology and vascular surgery.

In the event a Tribunal is considering a complaint relating to a neurosurgeon's surgical competency, then it is highly unlikely that a general or vascular surgeon will be able to provide the same level of clinical insight into the issues in dispute. The College of Physicians recognises a number of sub-specialties, including cardiology, neurology, endocrinology, oncology, nephrology and paediatrics. A cardiologist will not be able to provide the same level of clinical insight into the complex medical issues that arise in nephrology or microbiology. The College of Obstetricians and Gynaecologists also recognises sub-specialties so that a procedural urogynaecologist will not have the same clinical insight into matters that relate to maternal fetal medicine.

Complaints that are prosecuted before a Medical Tribunal are often based on one or more expert or peer reports which may either be critical or supportive of the medical practitioner's performance or conduct. The Tribunal must reconcile opposing expert opinions and form a view as to which opinion it prefers and

provide reasons for its decision. The role of the specialist medical practitioner can therefore be vital in order to ensure that this task is carried out effectively.

There are also difficulties that arise with respect to managing conflicts of interest where medical practitioners may practice within a small subspecialty, for example genetics. On occasions, the Council has been required to appoint medical practitioners from interstate in order to avoid a possible conflict of interest with the respondent medical practitioner.

Additionally, in order to deal with the any conflict of interest or potential conflict of interest between a respondent medical practitioner and a member of the Medical Tribunal, an excluded list is prepared prior to appointing the medical practitioners to a Tribunal. This involves recording the names of medical practitioners who have sat on Council decision-making committees and any previous hearings or inquiries, or may have provided opinion or reports concerning the respondent medical practitioner. If this process is not undertaken, the risk of appointments being made that are subsequently realised to be inappropriate because of a conflict not being recognised is far greater.

Any move to consolidate the NSW Medical Tribunal within a larger tribunal structure must ensure that the tribunal has the ability to appoint medical practitioners from various specialities and subspecialties. Moreover, the tribunal must also be able to appoint experienced and reputable medical practitioners to assist in reconciling the often difficult and complex clinical issues which arise when assessing the knowledge, skill, or judgment possessed, or care exercised by another medical practitioner.

## 2. Expertise of the Chairperson or Deputy Chairperson

Section 165B of the Law provides that a Chairperson or Deputy Chairperson of the NSW Medical Tribunal is to be a judge of the Supreme Court (or a judge or other person having the same status as a judge of the Supreme Court) or a judge of the District Court.

Judges of the Supreme Court and District Court in NSW are more likely to have developed considerable knowledge, experience and skill with respect to medico-legal issues arising from their exposure to common law claims. These judges, possess considerable experience in assessing and making findings in relation to competing medical opinions in complex matters involving questions of liability, causation and quantum.

Any move to consolidate the NSW Medical Tribunal within a larger tribunal structure will result in the loss of this judicial experience which may adversely affect the quality of Medical Tribunal decisions.

## 3. Maintaining high quality decision making

Given the Chairperson or Deputy Chairperson of the NSW Medical Tribunal are a judge of the Supreme Court or District Court, significant expertise has been developed in dealing with matters before the Medical Tribunal. This has, over the years, resulted in consistency with respect to Medical Tribunal decisions, so that a

body of important and influential precedent cases has been developed and are relied on by other courts and tribunals outside of NSW.

The Council maintains that it is imperative that the quality of the Medical Tribunal's decision-making as well as the consistency in its decisions and outcomes, including its protective orders, should not be adversely affected by the transfer of matters to a larger consolidated tribunal.

## 4. Awarding costs

Administrative tribunals have traditionally been established as inquisitorial in nature and are conducted with little formality and technicality and are not bound by the rules of evidence. Moreover, in order to ensure accessibility to tribunals, some tribunals do not provide a right to be legally represented before the tribunal or leave is required before a legal practitioner can appear on behalf of one of the parties. Moreover, some tribunals do not award costs to the successful party unless special circumstances exist.

The Council submits that any consolidation of the NSW Medical Tribunal within a larger tribunal structure must ensure that the parties who appear before the tribunal have the right to legal representation, particularly in light of the consequences which may flow from a finding of professional misconduct. Where a medical practitioner's livelihood and professional reputation can be affected by a tribunal's findings and orders, then that medical practitioner must have the right to be legally represented before that tribunal. Moreover, the Law currently provides a right of representation before a Tribunal or before a Professional Standards Committee. A Professional Standards Committee can only consider complaints of unsatisfactory professional conduct and can not suspend or cancel a practitioner's registration.

Moreover, it is highly questionable whether the public interest is served if the tribunal cannot award costs to a successful party appearing before it or if it can only award costs in special or exceptional circumstances.

Whilst it is recognised that awarding costs in favour of a successful party is not designed to further punish the unsuccessful party, it should be acknowledged that costs may act as a deterrent to matters being prosecuted or defended without reasonable prospects of success. This issue is particularly relevant in circumstances where the HCCC in NSW is funded through consolidated revenue, whereas medical practitioners appearing before Medical Tribunals are often represented (and indemnified as to their own legal costs) by their medical defence organisation.

Moreover, the Council would be significantly concerned if costs could only be awarded in special or exceptional circumstances as this may result in an increase in unmeritorious claims or claims lacking in substance being initiated, on appeal, against the Council's decisions.

Please do not hesitate to contact the Medical Council's Executive Officer, Ameer Tadros, should you require clarification in relation to any of the matters raised in this submission.

Yours faithfully,

Ameer Tadros
Executive Officer