# Dental Council Submission

In the matter of the Health Practitioners Competence Assurance Amendment Bill

## To the Health Select Committee

Dental Council
Te Kaunihera Tiaki Niho

# Submissions on the Health Practitioners Competence Assurance Amendment Bill

## Introduction

The Dental Council ("Council") thanks the Health Select Committee for the opportunity to make this submission in relation to the Health Practitioners Competence Assurance Amendment Bill (the "Bill").

Council wishes to be heard in respect of this submission.

The Council is a multi-profession regulator, responsible for regulating six separate and distinct oral health professions; namely dentistry, oral health therapy, dental hygiene, clinical dental technology, dental technology and dental therapy. As at 5 April 2018 it had 4,842 practitioners on the Register, 4,215 of whom held an annual practising certificate in one or more of 22 scopes of practice.

Like the other 16 authorities regulating health practitioners in New Zealand, the Council operates under the Health Practitioners Competence Assurance Act 2003 (the "Act")

## Executive Summary

Council is generally supportive of the Bill, and welcomes the mandating of the additional disclosure requirements. Balancing the privacy of the individual health practitioner against the right for the public to be informed is a delicate duty, and the additional direction provided by the Bill is of assistance.

The Bill however contains a number of drafting anomalies, particularly in relation to different terminology being adopted, which differs from that in the Act. Unless this addressed and consistency maintained between the two, the differences will inevitably lead to dispute between regulatory authorities and practitioners, and ultimately significantly increased costs where business process reflecting the requirements of the Act is tested by Judicial Review.

Council is most concerned about the cost implications presented by the Bill. Not only that attributable to inconsistent drafting leading to litigation, but those incurred as a consequence of the levying of the administrative Tribunal's administrative costs on regulatory authorities; regulatory authority performance reviews; and, IT costs to enable the collection and management of the additional data sought by the Ministry of Health.

Council is also disappointed that opportunity has not been taken to seek to reduce the operating costs of regulatory authorities where appropriate. The failure to vest a discretion in regulatory authorities to determine whether a notice of conviction warrants investigation by a professional conduct committee is a case on point.

There is disappointment also that the opportunity has not been taken to incorporate many of the recommendations from the 2008/09 functional review of the Act. A majority were matters of operational clarification and efficiency.

Council has developed this submission by undertaking a detailed review and analysis of the Bill on a clause by clause basis. The following is Council's commentary and recommendations

## Clause by clause commentary and recommendations

**Clause 5** (*section 17*) - *Applications for registration of health practitioners and authorisations of scopes of practice*

***Council makes no recommendation in respect of this amendment.***

1. The amendment was proposed by the 2008/09 functional review of the Act, and relates to applications for registration, or for a change in the authorisation of a scope of practice, where the applicant has outstanding fines, costs or expenses imposed under a former registration Act. It permits the authority to decline to take any action until the outstanding fines, costs or expenses are paid.

2. The amendment may have had some relevance when proposed in 2008, four years after the implementation of the Act, however some fourteen years have now elapsed, and it is highly unlikely that applicants registered under prior Acts with outstanding sums will now seek registration. Even if they did then other more current issues such as recency of practice would also be under consideration. In Council's view, the amendment is superfluous.

**Clause 6** (*section 36*) – *When an authority may review a health practitioner's competence*

***Council supports this amendment.***

3. The amendment places a duty on an authority to inform the party who has made a notification whether or not the authority is to review the competence of a practitioner. The obligation only extends to those parties named in sections 34(1) and (2) – that is, a notifying practitioner, the Health and Disability Commissioner (HDC) or the HDC Director of Proceedings.

**Clause 7** (*section 38*) – *Orders concerning competence*

***Council supports this amendment, with a drafting amendment***

4. Section 38(3) of the Act, requires that where an authority has made an order under section 38(1), for example that a competence programme be undertaken by a practitioner, the Registrar must provide certain named parties with a copy of the order within 5 working days after its making.

5. The proposed amendment mandates that in addition to the Registrar providing a copy of the order to the parties named in section 38(3), the authority must within 5 working days inform the person from whom the notice was received under section 34(1) or (2).

6. Whilst section 38(3) mandates the Registrar to take action, the amendment proposed by section 38(3A) mandates that it is the authority who must take action. To avoid confusion it is recommended that the duty imposed by section 38(3) and that contained in the new 38(3A) be imposed on the same person, namely the Registrar.

7. It would also be helpful if the same terminology as is used in section 38(3) could be adopted in the drafting of section 38(3A) – the former requires a copy of an order to be given "*...within 5 working days of after the making of the order...*" The proposed new section 38(3A) simply states, "*...within 5 working days...*" Continuity of language avoids confusion as to exactly what is intended.

**Clause 8** (*section 39*) – *Interim suspension of practising certificate or inclusion of conditions in scope of practice pending review or assessment*

***Council supports this amendment.***

8. It is helpful to have express statutory power to rely on when disclosing otherwise confidential information

**Clause 9** (*section 48*) – *Interim suspension of practising certificate or inclusion of conditions in scope of practice in cases of suspected inability to perform required functions due to mental or physical condition*

***Council supports this amendment, with a drafting amendment.***

9. Section 48 concerns the interim suspension of a practising certificate or the inclusion of conditions on a practitioner's scope of practice because of a suspected inability to perform the functions required of their profession.

10. The proposed amendment requires that a copy of an order suspending a practising certificate or imposing conditions upon a practitioner's scope of practice, be given to the parties named in subsection (6); and the person from whom a notice was received under section 45, informed.

11. Council notes that subsection (7) of the amendment requires that it is the "...*authority*..." that is to inform the person from whom the notice was received. This is at odds with subsection (6) of the amendment and with other notifying or informing provisions of the Act which place such duties on the Registrar.

12. It is recommended that subsection (7) of the proposed provision be amended to place the duty of informing the person from whom the notice was received, on the Registrar.

**Clause 10** (*section 49*) – *Power to order medical examination*

***Council supports this amendment.***

13. Council supports the proposal to remove the obligation for an examination or testing to be undertaken by a medical practitioner, and substituting a requirement that it be undertaken by a health practitioner.

**Clause 11** (*section 50*) – *Restrictions may be imposed in case of inability to perform required functions*

***Council supports this amendment, with a drafting amendment.***

14. The proposed amendment relates to providing a copy of an order made by Council to the parties named in the new section 50(6)9a).

15. Council notes that the proposed wording of subsection 6 is inconsistent with that used in equivalent provisions elsewhere in the Act. It places the duty of informing the person from whom the notice was received on the "...*authority*..." rather than the Registrar. It is recommended that this be changed to ensure a consistent regime for providing copies of orders, and notification that orders have been made.

**Clause 12** (*section 51*) – *revocation of suspension or conditions*

***Council supports the amendment, with drafting amendments.***

16. Council welcomes an express statutory requirement to notify specified parties that an order has been made concerning a practitioner who has been subject to suspension or conditions on their scope of practice because of a health condition; however the proposed amendment contains an apparent drafting error.

17. The proposed new section 51(6)(a) requires the Registrar to ensure that a copy of an order is given within 5 working days after the making on an order to:

> "(iv) any person who, -
>
> (A) …..: or,
>
> (B) under section **48(7) or 50(A)** has received a copy of the order made under section 48 or 50 to which the revocation relates;…"

18. Neither section 48(7) nor section 50A require the Registrar to provide a ***copy of the order*** made. They mandate that the person from whom the notice was received be informed that an order has been made.

19. Accordingly Council ***recommends*** that the proposed section 51(6)(a)(iv)(A) be amended, the drafting be amended to correctly reflect the requirements of sections 48(7) and 50(A) – i.e. that a person has been informed of the making of an order.

**Clause 13** (*section 58*) – *Reporting requirements*

***Council makes no recommendation***

20. The oral health professions regulated by the Dental Council do not participate in Quality Assurance Activities and accordingly **Council expresses no opinion** in relation to the proposed amendment to section 58 of the Act.

**Clause 14** (*section 68*) – *Referral of complaints and notices of conviction to professional conduct committee*

***Council supports the amendment, with amendments***

21. Council supports the amendment, with the **recommendation** that the ambit of the limited discretion proposed for section 67(b) be extended to include notices of convictions provided under section 67(a).

22. Currently, section 68(2) of the Act provides that when a notice of conviction is given under section 67, the authority must refer it to a professional conduct committee for investigation.

23. Section 67 establishes two classes of conviction. The first, under section 67(1) relates to convictions for offences punishable by imprisonment for a term of 3 months or longer. The second, under section 67(2), relates to offences against any one of twelve specified Acts, ranging from the Births, Death and Marriages Act to the Radiation Protection Act and in respect of which the penalty upon conviction is not relevant.

24. The amendment of section 68, proposes that while notices of conviction under section 67(1) must without exception, continue to be referred to a professional conduct committee, the referral of convictions that fall under section 67(2) are to be subject to a limited discretion exercisable by an authority.

25. A new subsection (2A) inserted into section 68 requires the authority to refer a section 67(2) notice of conviction to a professional conduct committee if:

    - it is for an offence punishable by imprisonment or a fine of, or exceeding $1,000.00; or
    - the authority otherwise considers the conviction raises concerns about the appropriateness of the conduct or about the safety of the practice of the practitioner.

26. Council is not aware of any convictions falling under section 67(2) having been referred to a professional conduct committee.

27. Notices of conviction under section 67(1) catch convictions for offences such as reckless use of a motor vehicle, which carries a penalty under section 35 of the Road Transport Act of a term of imprisonment of up to 3 months imprisonment. There is no discretion that permits lower scale cases under such a provision as this to be dealt with other than referral to a professional conduct committee.

28. The majority of notices of convictions received by the Dental Council relate to lower magnitude offences.

29. Council recommends that section 68(2) be amended to provide regulatory authorities with less costly and time consuming alternatives for action. The current provision requires the constitution and convening of a professional conduct committee for minor offences at a cost of approximately $8,000 per time.

30. It would be entirely appropriate to provide regulatory authorities with a discretion that permitted the screening of notices of conviction to assess whether they warranted referral to a professional conduct committee.

**Clause 15** (*section 69*) – *Interim suspension of practising certificate pending prosecution or investigation*

***Council does not support the amendment***

31. There has been ongoing lobbying for amendment to section 69 for a number of years. The concern is centered on the lack of ability of a regulatory authority to act immediately to prevent a health practitioner from continuing to practice in circumstances of clear risk to patients.

32. Currently a regulatory authority does not have the ability to act quickly following an assessment of the information before it, when it has reasonable grounds to suspend or impose conditions on a practitioners practising certificate.

33. Section 48 of the Act addresses that issue in respect of practitioners with a health condition, but it is not the case where conduct is concerned.

34. Not only does the proposed amendment fail to address that concern, but it proposes to introduce a higher threshold test before a regulatory authority can propose to make an order. That is, it is proposed the current test of believing on reasonable grounds *that the conduct of practitioner casts doubt on the appropriateness of the practitioner's conduct*, be replaced with one of believing on reasonable grounds *that the conduct of the practitioner poses a risk of serious harm to the public*.

35. As with the other threshold that appears in the Act - *'risk of harm'* which is specified in section 35 - the term risk of *serious harm* is not defined. Added complexity comes from the fact that the *risk of serious harm* threshold appears in only one other part of the Act, section 39, in which it

describes the potential harm that arises from practice that is below the required standard of competence.

36. Council does not consider there is a credible case to support the proposal to amend the threshold test in section 69.

37. Council **recommends** that a further provision, similar to section 48, be added to the Act to sit alongside section 69, permitting authorities to act without notice to suspend a practitioner's practising certificate or to alter his or her scope of practice, for the purpose of making urgent investigations where the authority considers that the practitioner's conduct may pose a risk of serious harm to the public.

38. The purpose would be to enable Council to promptly make relevant inquiry into the concern for the purpose of assuring itself that there was no possible ongoing risk of harm. To enable that inquiry the Council anticipates that the provisions would include a power to undertake inquiry and seek information (the form of which inquiry would be at the authority's discretion), but that the authority must make reasonable efforts to obtain and consider the practitioner's comments on the process proposed.

39. Similar to section 48, the Council anticipates that an authority could make such an Order for a period of up to 20 working days, with a further extension of 20 working days if necessary to complete any investigation or inquiry.

**Clause 16** (*Section 92A) - Chairperson may prohibit publication of names pending hearing of charge*

***Council supports the amendment, with amendments***

40. Council supports the amendment in principle, but notes that it requires that the parties must *jointly* apply for an order prohibiting the publication of names pending the hearing of a charge before the Tribunal. In most cases it is unlikely that both parties would agree to do so and accordingly one party would be precluded from applying. It would appear more appropriate that where agreement is not forthcoming, a party be able to unilaterally apply to the Chair, submissions from both parties be received, and a determination made by the Chair. It is **recommended** that the proposed section be amended accordingly.

***Council makes no submission*** in respect of:

- **Clause 17** *(section 93) - Interim suspension of registration or imposition of restrictions on practice*
- **Clause 18** *(section 94) – Health practitioner may apply for revocation of order*
- **Clause 19** *(Section 95) - Hearings to be public unless Tribunal orders otherwise*
- **Clause 20** *(section102) – Orders limiting restoration of registration*
- **Clause 21** *(section 103) - Orders of Tribunal*

**Clauses 22 and 23** (Sections 103A and 104A*) - Resourcing Tribunal's administration costs and Recovery of costs, fees, and expenses*

**Council supports the amendments**

41. Although the Council supports the proposed amendments as a matter of equity, it must

emphasis that in doing this, it will result in an inevitable increase in costs to Council which will be borne by practitioners through their annual practising certificate fees, and ultimately result in increased oral health costs to the public.

***Council makes no submission*** in respect of:

- **Clause 24** *(section 104A) – Recovery of costs, fees and expenses*
- **Clause 25** *(section105) – Recovery of fines and costs*

**Clause 26** *(Sections 116A to 116D) - Amalgamation of authorities*

**Council supports the amendments in principle**

42. There are efficiencies to be gained through regulatory authority amalgamation, but the consideration must be whether the cost of doing so warrants the return.

43. Over the 3 year period from 2011 to 2013 the regulatory authorities, at the request of the Minister of Health undertook an amalgamation project based on a Health Workforce New Zealand premise that significant costs and efficiencies would be obtained. Various options were analysed and discarded as not achieving any meaningful financial benefit. In 2013, a working group chaired by Professor Ron Patterson, working with a project team from PriceWaterhouseCoopers undertook a further analysis, and concluded similarly.

44. This resulted in very substantial costs being incurred by the Dental Council and by the other regulatory authorities.

45. A number of regulatory authorities regulate more than one profession – the Dental Council, the Optometrists and Dispensing Opticians Board, and the Medical Sciences Council of New Zealand.

46. The Dental Council is a multi-disciplinary regulator, administering 6 health professions: dentistry, oral health therapy, dental hygiene, dental therapy, dental technology and clinical dental technology. The professions share a number of common practice standards and ethical standards, but have their own sets of competencies and recertification requirements. The peculiarities of each are catered for. Accounting for each is separate and individual and both governance and operational activity is time-costed by profession. Separate fees and levies are set for each.

47. Council understands the desire to seek operational effectiveness and efficiencies and to avoid the unnecessary creation of new authorities as professions are recognised. This is, in part, already provided for in section 115 of the Act, which allows the Minister to recommend that a newly-recognised profession be added to an existing authority. The proposed new sections 116A to 116B go a long way further.

48. While generally supportive of amalgamation based on commonality of modality, shared patients, the range of health services provided, and effectiveness of shared care, Council is concerned that the core test to be applied by the Minister for amalgamation is very subjective.

49. Given the complexity of merging two different systems and organisations and the implications for both the affected authorities and the professions they regulate, the Council is concerned that the only test to be applied is loosely "*that the Minister is satisfied that it is in the public*

*interest*" to do so. Cognizance needs to be taken of the nature of the regulated professions themselves, not simply that the regulators apply the same legislative framework.

50. In reality the ease with which an amalgamation could take place and the capacity to deliver on any desired efficiency or effectiveness gains will inevitably depend on the engagement of the affected professions. Council considers that reciprocal engagement with the profession is vital to the development of, and implementation of, effective regulatory policy and practice. As such the Council not only fully accepts the consultation obligation imposed on it under the Act but extends that practice to all key decisions affecting the profession. This is particularly so where Council's fiduciary obligations are brought into play by significant costs.

51. Council considers that early consultation with affected professions needs to occur for any proposed amalgamation.

52. **Council recommends** that proposed section 116A:

- Require that the Minister formally prepare and consult on a draft proposal (which includes an examination of the costs and benefits of any proposed amalgamation),
- Contain a requirement that the Minister consult with affected professions and organisations,
- Add a requirement that a decision that an amalgamation is the public interest must have to be taken, "having regard to the purpose of the Act and the attainment of that purpose".

**Clause 27** *(section 118) - Functions of authorities*

**Council supports the amendment**

53. Clause 27 adds two new functions to the registration authorities:

- To receive information from any person about the practice, conduct or competence of
health practitioners and if appropriate to do so, act on that in information.
- To promote and facilitate inter-disciplinary collaboration and co-operation in the delivery of health services.

54. Council supports the first proposed amendment concerning the receipt of information; however the logic for the inclusion of the second new function concerning promoting and facilitating inter-disciplinary collaboration and co-operation in delivery of health services is unclear. It is aspirational, and does not sit comfortably with the stated purpose of the Act set out in section 3 – to protect the health and safety of the public.

55. While Council is supportive of promoting and facilitating inter-disciplinary collaboration and co-operation in the delivery of health services it is less comfortable with the suggestion that this is the function of a regulator.

**Clause 28** (section 122A) - *Performance reviews*

**Council supports the amendment**

56. Council agrees that it is appropriate for a regulatory board to be subject to periodic review. This has been the case for some years in the United Kingdom with the Professional Standards Authority maintaining oversight over the British health regulatory authorities.

57. The Dental Council has instigated two full external quality assurance reviews. The first was

carried out in 2015 and the second in 2017, and each has provided valuable insights and resulted in lessons learned. A third review is scheduled for this year.

58. While Council supports the proposed amendment in principle, it is very conscious of the costs that may be incurred, both in terms of direct cost and allocation of staffing and other resources. Prior to initiating the first review, Council was privy to a cost estimate received from the Professional Standards Authority which offered to undertake performance reviews for a number of regulatory authorities for a sum in excess of $90,000 each, provided a sufficient number accepted their offer to make their allocation of time and resources worthwhile.

59. As with any significant financial expenditure, this will need to be budgeted at least a year in advance. Accordingly it is important that regulatory authorities know well advance when the review is going to be undertaken.

60. Such reviews should be also be purposive, undertaken by persons or organisations with established expertise and credibility, and directed to transparent, objective criteria and measureables.

61. While the Council acknowledges the attraction of being able to tailor a review to the circumstances of a particular RA, the optimal benefit from a review framework will come from applying a consistent lens and set of criteria to all registration authorities. Establishing and publishing those criteria in advance, and applying them to each review, will not only allow registration authorities to have those criteria as a focus in their thinking as they explore policy options and approaches but to learn from the outcomes of the progressive body of reports and to apply them to own regulatory approach and activities.

62. Council **recommends** that proposed section 122A be amended to:

- Incorporate a statement of purpose
- Provide for the core terms of reference and assessment criteria to be set by the Minister from time to time, after consultation with regulatory authorities
- Provide for each successive review to be no earlier than 5 years from the date of the completion and/or publication of the previous report
- Provide that the regulatory authorities be given reasonable notice of the initiation of a possible review

### Clause 29 *(section 134A) - Authority to provide to Director-General of Health information about health practitioners*

**Council has concerns about this amendment**

63. The Dental Council understands and supports in principle the need for the Ministry of Health to have access to health practitioner data. However beyond the specific information that practitioners are required by the Act to provide Council to obtain registration and to maintain a practising certificate; Council has no statutory authority to collect anything additional.

64. Contrary to a speech in the House supporting the introduction of the Bill, the proposed amendment does not provide regulatory authorities with a mandate to collect the desired information. It provides a mandate to the Ministry of Health to require regulatory authorities to provide the information, but no legal authority to enable the regulatory authorities to lawfully

comply. Accordingly, Council will only be able to provide such information as may be provided to it voluntarily by practitioners.

65. Council is concerned that the Ministry of Health may not have fully considered the implications of the proposed amendment nor consulted the Privacy Commissioner on the regulatory authorities' ability to lawfully require the provision of the desired information.

66. If the regulatory authorities are empowered to collect the desired data from practitioners, Council must also questions whether its role is to police and enforce compliance with the non-regulatory requirement of a government agency. Council is unsure whether the Ministry has fully analysed the implications of this proposal.

67. It is important that the functions of an RA are clearly stated in law, principle-based and internally coherent. Care should be taken not to take an incremental, reactive approach to the stated functions of registration authorities without retaining a view of the whole. In our view, any extension of the functions listed in s.118, to include a "workforce role" should not occur unless this role has been carefully tested to ensure that it fits with the registration authorities' existing functions.

### Clause 30 *(Sections 157A to 1571) Naming policies*

**Council supports the amendment in principle**

68. Council supports the prosed amendments to section 157 of the Act, but finds the drafting poor and confusing. Section 157 vests in Council a discretionary power to publish notices setting out:
    - the effect of any order or direction made in respect of a health practitioner; and
    - a summary of any finding made under the Act; and
    - the name of the health practitioner.

69. Accordingly the operation of a naming policy must be subject to Council first determining to exercise its discretion under section 157(1) and only applies to orders or directions made.

70. What then is intended to fall within the scope of the naming policy? The intent of the proposed policy becomes more confusing when the reason for including a statutory protection from defamation (the proposed new section 1571) is considered.

71. Paragraph 157B(2)(b) describes the purpose of the naming policy as including "ensuring that health practitioners *whose conduct has not met expected standards* may be named where it is in the public interest to do so." The section is otherwise silent on the categories of Council's directions or orders that might be covered by the naming policy.

72. By contrast, the explanatory note to the Bill describes new section 157B as setting out "when a health practitioner *whose competence, ability or conduct is reviewed or investigated* by the authority may be named".

73. Council **notes** that the intent of the amendments require clarification and **recommends** that the provisions are redrafted to clearly spell out the requirements.

74. Consistency of drafting is also an issue in the proposed section157C which requires an authority to consult, and *to take in account any comments received from,* certain specified persons and agencies. Regulatory authorities consult with stakeholders on a regular basis,

and are indeed instructed to do by section 14 of the Act. It is fundamental to any consultation process that *all* submissions are considered and taken into account. The addendum to section 157C requiring Council to take into account *any comments received from,* certain specified persons and agencies, is both at odds with the requirements of section 14 of the Act, and superfluous.

***Council makes no submission*** in respect of:

- **Clause 31** *(section 170) – Regulations*
- **Clause 32** *(Schedule 1AA) – new schedule 1AA inserted*
- **Clause 33** *(Schedule 1) – Schedule 1 amended*

### Clause 34 *(Clause 17, Schedule 3) - Delegation by authorities*

**Council supports the amendment**

85 The change to allow the delegation to establish a professional conduct committee is welcomed. It will allow an authority to act more quickly and remove an unnecessary administrative burden.

## Conclusion

The Dental Council generally supports the Health Practitioners Competence Assurance Bill, particularly the move towards increased transparency. Council is concerned that in a number of areas further work is required to ensure that drafting of the amendments retain consistency with the current structure and requirements of the Act. If not, then additional costs are likely to be incurred through legal disputes and actions in Judicial Review.

Council is most concerned about the increase in costs that will result from the levying of the Tribunal's administrative costs; regulatory authority performance reviews; and, IT costs to enable the secure collection and management of additional confidential information. These costs will of necessity be reflected in increased annual practising fees payable by practitioners, and will ultimately result in increased costs of oral health care to the public. Council was also disappointed that the opportunity to reduce regulatory authority operating costs has not been taken.

There is also some disappointment that the opportunity has not been taken to include a number of the recommendations that resulted from the 2008/09 functional review of the Act. Most focused on providing additional clarity and efficiencies to the regulatory authorities. Similarly, there appears to have been little forward thinking about issues such as telehealth, nor has there been any recognition of digital communication.

Council thanks the Committee for the opportunity to make this submission.

Dr Robin Whyman
**Chair**