NSW LAW REFORM COMMISSION

REPORT 121

Emergency medical care and the restricted right to practise

April 2009

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Sydney, 2009

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Cataloguing-in-publication

Cataloguing-in-publication data is available from the National Library of Australia.

ISSN 1030-0244 (Report) | ISBN 978-0-7347-2636-0 (pdf)

TABLE OF CONTENTS

TERMS OF REFERENCE

In a letter to the Commission received on 18 November 2008, the Attorney General, the Hon J Hatzistergos MLC, issued the following terms of reference:

> I request that the Commission inquire into and report on whether it is appropriate to amend the *Medical Practice Act 1992*, and in particular the definition of unsatisfactory professional conduct, and any other related like legislation, so as to make plain whether individuals whose legal right to practise medicine is restricted ought to be under any, and if so what, obligation to provide emergency medical care contrary to the restriction on their right to practise.

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LIST OF RECOMMENDATIONS

(1) The *Medical Practice Act 1992* (NSW) s 36(1)(l) should be amended by substituting "in need of emergency medical attention" for "in need of urgent medical attention".

(2) "Emergency medical attention" should be defined as medical attention that is required as a matter of urgency and is necessary to save a person's life or prevent serious damage to his or her health.

The *Medical Practice Act 1992* (NSW) should be amended by adding a section to the effect that a registered medical practitioner is not guilty of unsatisfactory professional conduct described in s 36(1) if the practitioner renders emergency medical attention to a person in need of it unless:

(a) any condition to which his or her registration is subject excludes the rendering of emergency medical attention; or

(b) any condition to which his or her registration is subject excludes the rendering of emergency medical attention of a particular kind or in particular circumstances and the medical attention rendered is of that kind or is rendered in those circumstances.

The *Medical Practice Act 1992* (NSW) s 36(1)(l) should be amended so that it is clear that the practitioner does not have to be "requested" to act, but will be expected to act (subject to the other requirements of the provision) simply when an emergency situation presents itself.

Report

- Medical practice and restrictions on it
- Professional regulation
- Failure to provide urgent attention
- Approaches to reform

1. This Report deals with the question of whether a medical practitioner whose right to practise is restricted by conditions should, contrary to those conditions, provide medical care to a person in need of urgent attention. In particular, it deals with the interaction between two provisions in the *Medical Practice Act 1992* (NSW), namely s 36(1)(c) and s 36(1)(l). These provisions are reproduced in Appendix A to this Report.

2. In a letter to the Commission received on 18 November 2008, the Attorney General, the Hon J Hatzistergos MLC, asked the Commission to:

> inquire into and report on whether it is appropriate to amend the *Medical Practice Act 1992*, and in particular the definition of unsatisfactory professional conduct, and any other related like legislation, so as to make plain whether individuals whose legal right to practise medicine is restricted ought to be under any, and if so what, obligation to provide emergency medical care contrary to the restriction on their right to practise.

3. These terms of reference arose directly from the recommendations in a report of the Special Commission of Inquiry into Acute Care Service in NSW Public Hospitals (the "Garling Report").[1]

4. The terms of reference use the phrase "emergency medical care". The relevant provision in the *Medical Practice Act 1992* (NSW) uses the phrase "urgent attention". The terms "emergency" and "urgent" tend to be used interchangeably despite referring, arguably, to different circumstances.[2]

MEDICAL PRACTICE AND RESTRICTIONS ON IT

5. In NSW, medical practitioners are licensed to practise under the *Medical Practice Act 1992* (NSW). However, their registration may be subject to conditions.[3] These restrictions can be divided into two broad categories: inherent conditions and imposed conditions.[4]

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1. NSW, Special Commission of Inquiry, Acute Care Service in NSW Public Hospitals, *Inquiry into the Circumstances of the Appointment of Graeme Reeves by the Former Southern Area Health Service*, First Report (2008) (the "Garling Report") [7.12].
2. We recommend use of the term "emergency" in preference to "urgent": see para 57 and recommendation 1(1).
3. *Medical Practice Act 1992* (NSW) s 11.
4. See NSW Medical Board, *Submission 1*, 1.

Inherent conditions

6. Inherent conditions are those that arise as a result of the type of the medical practitioner's registration. The Medical Board may grant a variety of types of conditional registration under the Act, including for the purposes of training, teaching, research and satisfying unmet areas of need.[5] Common examples of inherent conditions include restrictions upon:

- Interns,[6] who may be limited to practising in an allocated position in a hospital;
- international medical graduates, who may be limited to working in an "area of need" in a nominated hospital; and
- international medical graduates, whose specialist skills are recognised by the appropriate specialist college but whose "general medical skills" have not been tested.[7]

Imposed conditions

7. Imposed conditions are those that arise as a result of proceedings under the *Medical Practice Act*. The proceedings normally relate to professional conduct, professional performance, and impairment.

8. An example of a condition imposed with respect to professional conduct would be a restriction on a medical practitioner prescribing certain classes of drugs where he or she has been found guilty of unsatisfactory professional conduct as a result of overprescribing barbiturates.[8] An example of a condition imposed in relation to impairment would be one imposed by the Medical Board restricting a practitioner to practice under supervision.[9]

9. Imposed conditions can be either final or temporary. A Tribunal or Professional Standards Committee can impose final conditions. The Medical Board can impose temporary conditions under s 66 of the *Medical Practice Act 1992* (NSW). Temporary conditions may, for example, include a restriction on practising without supervision because of concerns about

5. *Medical Practice Act 1992* (NSW) s 7(1).
6. See *Medical Practice Act 1992* (NSW) s 5.
7. See NSW Medical Board, *Submission 1*, 1.
8. NSW Medical Board, *Submission 1*, 1.
9. *Medical Practice Act 1992* (NSW) s 10.

inappropriate behaviour, such as when there is an allegation of sexual harassment.

PROFESSIONAL REGULATION

10. Complaints against medical practitioners are governed by Part 4 of the *Medical Practice Act 1992* (NSW) and can be in relation to criminal convictions or findings, unsatisfactory professional conduct or professional misconduct, lack of competence, impairment, or character of the practitioner.[10] Complaints can be made to the Health Board or the Health Care Complaints Commission ("HCCC").[11]

11. Depending on the circumstances, the Act provides that one or a combination of the following bodies may deal with a complaint against a medical practitioner: the NSW Medical Board, the Medical Tribunal, a Professional Standards Committee and the HCCC.[12]

12. Breach of conditions or failure to perform other duties (as outlined below) may result in a finding of unsatisfactory professional conduct or misconduct. In dealing with complaints, a Professional Standards Committee or the Medical Tribunal have general powers to caution, reprimand or counsel the medical practitioner, or impose restrictions on the practitioner's registration, or order him or her to undertake training or seek advice.[13]

Unsatisfactory professional conduct

13. A finding of unsatisfactory professional conduct may be made against a medical practitioner as a result of a number of types of conduct.[14]

14. Of particular relevance to this Report is the definition of unsatisfactory professional conduct in s 36(1)(c) of the *Medical Practice Act 1992* (NSW), which states that unsatisfactory professional conduct

10. *Medical Practice Act 1992* (NSW) s 39.
11. *Medical Practice Act 1992* (NSW) s 42.
12. *Medical Practice Act 1992* (NSW) s 50 and s 51.
13. *Medical Practice Act 1992* (NSW) s 61.
14. *Medical Practice Act 1992* (NSW) s 36.

includes "any contravention by the practitioner (whether by act or omission) of a condition to which his or her registration is subject".[15]

Professional misconduct

15. A medical practitioner found guilty of unsatisfactory professional conduct may be liable to a more serious finding of "professional misconduct".

16. A finding of professional misconduct can be made where there are one or more instances of unsatisfactory professional conduct that are "of a sufficiently serious nature to justify suspension of the practitioner from practising medicine or the removal of the practitioner's name from the Register".[16]

17. If a medical practitioner is guilty of "professional misconduct", the penalties are greater than those available for unsatisfactory professional conduct, and include suspension or removal of the practitioner from the Register.[17]

FAILURE TO PROVIDE URGENT ATTENTION

The provision

18. The *Medical Practice Act 1992* (NSW) provides that a medical practitioner may be guilty of "unsatisfactory professional conduct" if he or she fails, "without reasonable cause", to render urgent attention which he or she has reasonable cause to believe is needed "unless the practitioner has taken all reasonable steps to ensure that another registered medical practitioner attends instead within a reasonable time".[18]

19. Justice Kirby has noted of the antecedent provision in the *Medical Practitioners Act 1938* (NSW):

> This is a high standard. It goes beyond what is expected, and imposed by the law, in the case of other professions. It goes far beyond what may be expected and demanded of an ordinary

15. *Medical Practice Act 1992* (NSW) s 36(1)(c).
16. *Medical Practice Act 1992* (NSW) s 37.
17. See *Medical Practice Act 1992* (NSW) s 64.
18. *Medical Practice Act 1992* (NSW) s 36(1)(l).

> citizen. But in the noble profession of medicine, it is the rule which Parliament has expressed; which the organised medical profession has accepted ...[19]

The problem

20. The chief problem arising in relation to the "urgent attention" provision is its interaction with the provision which states that unsatisfactory professional conduct includes "any contravention by the practitioner (whether by act or omission) of a condition to which his or her registration is subject".

21. The two provisions create a conflict for medical practitioners whose practices are subject to conditions and who are confronted with a situation where a person needs urgent medical attention that would breach those conditions. If the practitioners abide by the restrictive conditions, their conduct amounts to "unsatisfactory professional conduct" as they have failed to provide urgent medical attention. On the other hand, if they ignore the restrictions and provide the urgent treatment, they are likewise guilty of "unsatisfactory professional conduct" under the Act for ignoring a condition attached to their registration.

22. The conflict between the two provisions arose in the circumstances described in the Garling Report.[20] The circumstances involved a medical practitioner who provided obstetric services contrary to an order that he cease the clinical practice of obstetrics. One justification for his continued practice in the area was his belief that he was entitled to practise obstetrics in emergency situations or when another practitioner was not available.[21]

23. It is not immediately clear whether a medical practitioner whose practice is subject to conditions is prevented from rendering urgent medical attention that could potentially breach the conditions. Nothing in the Act resolves this difficulty.

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19. *Lowns v Woods* [1996] Aust Torts Reports 81-376, 63,155.
20. NSW, Special Commission of Inquiry, Acute Care Service in NSW Public Hospitals, *Inquiry into the Circumstances of the Appointment of Graeme Reeves by the Former Southern Area Health Service*, First Report (2008) (the "Garling Report").
21. Garling Report, [5.3]-[5.5], [7.5].

24. Justice Badgery-Parker has suggested that there are two broad categories of circumstances that might amount to a "reasonable cause" for failing to provide the necessary urgent treatment: either that there is a health or safety risk to the practitioner; or that a "physical or mental condition" (for example, tiredness, illness or inebriation) prevented the practitioner from treating the patient.[22] This interpretation provides no means of resolving the conflict between the two provisions. While a medical practitioner may be disabled by a condition of registration, it is not a "physical or mental condition" of the type that Justice Badgery-Parker identified. The "reasonable cause" provision arguably does not extend beyond natural causes such as exhaustion and inebriation.

25. The HCCC has suggested that temporary restrictions on practice under s 66 of the *Medical Practice Act 1992* (NSW) may be overridden by the obligation to provide urgent attention when required.[23] However, there is nothing on the face of the Act to suggest that this is necessarily the case.

26. The resolution of this conflict is necessary, as medical practitioners who are subject to restrictions may hesitate to render urgent medical attention or, on the other hand, may attend on a person in contravention of restrictions on their practice. Each action may result in dire consequences – either the person may not receive the urgent medical attention he or she stands in need of, or the medical practitioner may lay him or herself open to a complaint of unsatisfactory professional conduct. In extreme cases, a person may receive inappropriate care at the hands of a practitioner whose practice has been restricted for good reason.

Origins of the provision

27. The provision relating to urgent treatment had its origins in 1963 when it was added to the old *Medical Practitioners Act 1938* (NSW) as conduct that was deemed to be "infamous conduct in any professional respect".[24]

28. The refusal or failure of some doctors to attend on people in need of urgent attention when requested to do so was the subject of some

22. *Woods v Lowns* (1995) 36 NSWLR 344, 360.

23. Health Care Complaints Commission, *Submission 2*.

24. *Medical Practitioners (Amendment) Act 1963* (NSW) s 4(1)(a)(ii), inserting s 27(2)(c) into the *Medical Practitioners Act 1938* (NSW).

concern in 1963, especially in the context of a State-wide shortage of doctors. At that time, the predominant model of medical service delivery was the sole practitioner so that, if a matter required urgent or emergency medical attention, most people would call or visit their local doctor. The refusal of that practitioner to provide services in matters requiring urgent attention often involved serious consequences for the patient.

29. The provision is clearly premised on an old-fashioned method of service delivery, for example, by referring to the practitioner attending "within a reasonable time of being requested to do so" and by allowing that the practitioner can make alternative arrangements by taking "all reasonable steps to ensure that another registered medical practitioner attends instead".

30. The amendments were proposed in the wake of some publicly reported incidents and complaints made to the Department of Health about practitioners who had failed to provide urgent medical attention when asked to do so.[25] The amendment was also said to have arisen as a result of a request of a conference of senior practitioners held in Sydney in 1962 who were concerned about the conduct of some doctors in "emergent" situations.[26]

31. The provision was hotly contested in Parliament. Opponents of the measure postulated many scenarios, for example, suggesting that hypochondriacs could abuse the provision by calling doctors at 2:00 am and demanding their attendance. Questions were raised about the meaning of "urgent attention" and what might amount to "emergency treatment".[27] A question was also raised as to whether the existing provisions would not sufficiently cover the conduct of a doctor in refusing treatment as falling within the reach of "infamous conduct in any professional respect".[28]

32. A particularly relevant question was also raised about doctors who had disposed of their practice and covenanted with the new doctor not to practise within a certain radius of their old surgery. The question was what must a doctor under the contractual restriction do if a person within

25. NSW, *Parliamentary Debates (Hansard)* Legislative Assembly, 27 March 1963, 3807.
26. NSW, *Parliamentary Debates (Hansard)* Legislative Assembly, 3 April 1963, 4060.
27. NSW, *Parliamentary Debates (Hansard)* Legislative Assembly, 2 April 1963, 3995.
28. NSW, *Parliamentary Debates (Hansard)* Legislative Assembly, 3 April 1963, 4057.

that radius were to seek urgent attention?[29] The question was not adequately answered at the time, but a judge of the NSW Supreme Court has since suggested that "such a prohibition might run contrary to the statutory duty of doctors under the *Medical Practitioners Act 1938*".[30]

33. Since 1963, new models of medical service delivery have been developed which have reduced the circumstances in which the duty to attend on a person in need of urgent attention would need to be enforced. In a medical emergency, people are now more likely to call an ambulance using the emergency "000" number, and doctors now commonly practise in medical centres where rosters ensure an adequate level of staffing to cover "urgent" situations. Medicare and bulk-billing are also available, so that non-payment of or inability to pay medical bills is no longer a reason for a doctor to withhold treatment.[31]

Application to a limited range of circumstances

34. The majority of submissions have suggested that they have had no actual experience of the issue and that the circumstances in which the issue would arise are rare.[32] The submissions identified only two instances where the issue arose.[33] There are a number of reasons why this would appear to be the case.

35. The first reason is that the changes to the practice of medicine and the management of medical emergencies noted above have reduced the circumstances in which the provision is likely to be called upon. The duty to attend on a person in need of urgent attention is now more likely to

29. NSW, *Parliamentary Debates (Hansard)* Legislative Assembly, 2 April 1963, 4004-4005.

30. *Lu v Lim* (1993) 30 NSWLR 332, 335 (Young J).

31. A case was raised in parliamentary debate of a doctor who refused to attend a baby because its mother "would not pay cash in advance": NSW, *Parliamentary Debates (Hansard)* Legislative Assembly, 3 April 1963, 4060.

32. NSW Institute of Medical Education and Training, *Submission*, 1; P Crowe, *Submission*; Sydney West Area Health Service, *Submission*; W J Madden, *Submission*; South Eastern Sydney and Illawarra Area Health Service, *Submission*; Health Care Complaints Commission, *Submission 1*; NSW Department of Health, *Submission*, 1; Avant Mutual Group Limited, *Submission*, 1; Royal North Shore Hospital, *Submission*, 1; Ambulance Service of NSW, *Submission*.

33. Health Care Complaints Commission, *Submission*, 2; NSW Department of Health, *Submission*, 1; Avant Mutual Group Limited, *Submission*, 1; NSW Medical Board, *Submission 1*, 1.

arise in "accidental" circumstances away from hospitals or local practice, where a medical practitioner (whether or not subject to restrictions) simply happens to be on hand when the need arises, for example, a car accident, an injury on a sports field or a sudden collapse of a person in a shopping centre. In the circumstances described in the Garling Report, a representative of the Medical Board informed the medical practitioner that the obligation to provide care in an emergency situation was restricted to emergencies where "someone falls down in the street or... something happens in a plane".[34] In practice, these scenarios are likely to require a response that is limited to the provision of first aid until the emergency services arrive.[35] In the majority of cases, the practitioner will also be limited by lack of necessary medical equipment.[36] Further, in most cases the practitioner's restrictions will relate to the "intensity of work" or to "select operative procedures".[37] Restrictions on practice are, therefore, unlikely to be relevant unless there are exceptional circumstances.

36. Arguably, emergency scenarios requiring the assistance of restricted medical practitioners should not arise, at least, in major hospitals. Such institutions will ensure that an appropriate number of qualified practitioners are rostered or on-call in order to ensure that the facility can provide adequate emergency medical care.[38] However, the situation may be different in some country hospitals.

37. Finally, such scenarios are unlikely to become the subject of complaint, investigation and disciplinary proceedings and, even if they are, are unlikely to result in an adverse outcome. This would be especially so if the emergency situation was successfully resolved or if the practitioner clearly did not contribute to an unsuccessful outcome. One submission has pointed out that the appropriate disciplinary body will allow a medical practitioner the opportunity to explain his or her conduct before an adverse finding is made or penalty is imposed.[39] The HCCC has suggested that disciplinary proceedings would be unlikely in such cases,

34. Garling Report, [5.6], [5.7].
35. See P Crowe, *Submission*; M McCaskill, *Submission*.
36. M McCaskill, *Submission*.
37. Sydney West Area Health Service, *Submission*.
38. Sydney West Area Health Service, *Submission*.
39. Ambulance Service of NSW, *Submission*.

provided the actions of the practitioner were reasonable in the circumstances.[40]

Position elsewhere in Australia

38. At the time of enactment in 1963, NSW was the only State in Australia to have such a provision.

39. While some jurisdictions have provisions specifying when acting in an emergency would exempt a medical practitioner from practice restrictions in some circumstances,[41] there is generally no specific statutory provision making it a matter of professional misconduct to refuse or fail to provide urgent medical attention when asked to do so.

Australian Capital Territory

40. The NSW provision was reproduced in the ACT in amendments made to the *Medical Practitioners Registration Act 1930* (ACT) in 1993.[42] The provision was included in a section defining "unsatisfactory professional conduct" for the purposes of the Act. It was part of a raft of measures designed to ensure a uniform approach to the regulation of health professionals across Australia.[43] However, these provisions relating to "unsatisfactory professional conduct" were not re-enacted when the Act was repealed and replaced by the *Health Professionals Act 2004* (ACT).

41. There is now no provision dealing with the failure of a medical practitioner to provide urgent assistance when requested. However, some

40. Health Care Complaints Commission, *Submission 1*.

41. For example, Queensland gives an interstate practitioner who is unregistered in Queensland the status of a (general or specialised) registered medical practitioner for the purpose of "a professional service provided in an emergency": *Medical Practitioners Registration Act 2001* (Qld) s 270(1)(a); Western Australia allows a medical practitioner from another Australian jurisdiction who is not registered in WA a defence that he or she "practised medicine or a specialty... in an emergency": *Medical Practitioners Act 2008* (WA) s 128(2); also, the restrictions on medical practitioners administering anaesthetics do not apply "in an emergency": *Medical Practitioners Act 2008* (WA) s 130.

42. *Medical Practitioners Registration (Amendment) Act 1993* (ACT) s 16.

43. ACT, *Parliamentary Debates (Hansard)* Legislative Assembly, 23 February 1993, 367.

provisions cover closely-related areas. The "Standards Statements"[44] of the Medical Board of the ACT include the Code of Conduct, which states that, in providing care, a medical practitioner should do his or her "best to provide appropriate treatment in an emergency".[45] Other standard statements allow practitioners to treat themselves or family members until another practitioner is available "in emergency situations" and to prescribe drugs of addiction to themselves or family members in an "extreme emergency".[46] Another provision allows people who are not registered to provide a regulated health service where it is "provided in an emergency".[47]

APPROACHES TO REFORM

42. The question, therefore, is whether a medical practitioner should be subject to professional disciplinary action for failing to provide "urgent attention" in circumstances where he or she is subject to relevant restrictions but no other suitably qualified practitioner is readily available.

43. In framing its recommendations, the Commission has given weight to two main considerations. The first relates to the public interest in ensuring that medical practitioners who are subject to restrictions do not continue to practise in contravention of those conditions. The second relates to the expectations of people in need of emergency medical attention that they will receive such treatment as may be available in the circumstances.

Repeal the provision

44. The obligation to provide emergency assistance could be removed from the *Medical Practice Act*, bringing NSW into line with most

44. A breach or failure to adhere to these statements may amount to a breach of the required standard of practice under the Act: *Health Professionals Regulation 2004* (ACT) cl 139.

45. Medical Board of the ACT, "Code of Conduct" (2006) cl 6 «*http://www.medicalboard.act.gov.au/Standards Statements/docs/code of conduct.pdf*» at 8 April 2009.

46. Medical Board of the ACT, "The Treatment of Self and Relatives by Medical Practitioners" (2006) cl 6 b and e «*http://www.medicalboard.act.gov.au/Standards Statements/docs/self treatment.pdf*» at 8 April 2009.

47. *Health Professionals Act 2004* (ACT) s 72(2).

Australian jurisdictions. Notably, the ACT had provisions identical to NSW before the repeal of the *Medical Practice Act 1930* (ACT).

45. The Commission is not in favour of such an approach. The provision appears to have the support of the public and the profession. It may also take on particular importance for communities in regional and remote NSW who may have more limited access to medical services than metropolitan residents.

46. Even if the statutory obligation to provide urgent assistance were repealed, the ethical requirements to provide urgent assistance would still apply. The *Medical Practice Act* currently states that unsatisfactory professional conduct includes "[a]ny other improper or unethical conduct relating to the practice or purported practice of medicine" in assessing whether there has been "unsatisfactory professional conduct".[48]

46. There is a strong possibility that failure or refusal to provide (or make other arrangements for) urgent attention when requested will be seen as improper or unethical conduct relating to the practice of medicine.

48. The current version of the *International Code of Medical Ethics* (first adopted by the third General Assembly of the World Medical Association in October 1949) states that a medical practitioner shall "give emergency care as a humanitarian duty unless he/she is assured that others are willing and able to give such care".[49] This is mirrored in the Australian Medical Association ("AMA") Code of Ethics (2006 revision), which states that medical practitioners "may decline to enter into a therapeutic relationship where an alternative health care provider is available, and the situation is not an emergency one".[50] The Code also provides that "having initiated care in an emergency setting", a medical practitioner

48. *Medical Practice Act 1992* (NSW) s 36(1)(m). Compare the common law test for misconduct in a professional respect: "whether the practitioner was in such breach of the written or unwritten rules of the profession as would reasonably incur the strong reprobation of professional brethren of good repute and competence": *Qidwai v Brown* [1984] 1 NSWLR 100, 105 (Priestley JA). See generally, C J Whitelaw, "Proving Professional Misconduct in the Practice of Medicine or Law: Does the Common Law Test Still Apply?" (1995) 13 *Australian Bar Review* 65.

49. An earlier revision was quoted in NSW, *Parliamentary Debates (Hansard)* Legislative Assembly, 2 April 1963, 3994.

50. Australian Medical Association, *Code of Ethics* (2006), cl 1.1.q.

should "continue to provide that care until [his or her] services are no longer required".[51]

Retain and clarify the existing provisions

49. The Commission considers that the best available course is to retain the existing provisions but also amend them to clarify their operation.

50. The obligation to provide treatment at least in an "emergency" should be retained because people who are in need of treatment in circumstances of an emergency expect to receive the "best" treatment available in the circumstances.

51. At a broader level, other statutes in NSW and other Australian jurisdictions reflect the public interest in people receiving assistance in emergency situations. For example, the "good samaritan" provision in the *Civil Liability Act 2002* (NSW) states that "[a] good samaritan does not incur any personal civil liability in respect of any act or omission done... in an emergency when assisting a person who is apparently injured or at risk of being injured".[52] In the ACT, the provisions preventing people who are not registered from intentionally providing a regulated health service are subject to an exception where the health service is "provided in an emergency".[53] Likewise, in the NT, nothing in the *Health Practitioners Act 2004* (NT) prohibits "a person from rendering assistance in an emergency".[54]

52. There is a general consensus that doctors want to be able to treat people in need of medical attention in an emergency and the public expects them to do so.[55] Submissions generally agreed that, for the public good, people should not be denied urgent or emergency medical attention,[56] especially if the procedures are life saving.

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51. Australian Medical Association, *Code of Ethics* (2006), cl 1.1.o.
52. *Civil Liability Act 2002* (NSW) s 57(1).
53. *Health Professionals Act 2004* (ACT) s 72(2).
54. *Health Practitioners Act 2004* (NT) s 128(a).
55. Avant Mutual Group Ltd, *Submission*; Rural Doctors Association of NSW, *Submission*.
56. NSW Institute of Medical Education and Training, *Submission*, 1; South Eastern Sydney and Illawarra Area Health Service, *Submission*; Avant Mutual Group Limited, *Submission*, 1; R Day, *Submission*; NSW Medical Board, *Submission 1*.

Urgent or emergency medical attention

53. Submissions generally agreed that the meaning of "urgent medical attention" is an issue, especially as some contend that restricted medical practitioners should only attend on a person in need of medical attention in a true emergency.[57]

54. In this context, it should be noted that legislation in other States,[58] as well as the ethical codes and standards,[59] generally use the term "emergency" when dealing with the type of circumstances that might be encompassed in the term "urgent medical attention".

55. Most of the literature about the meaning of urgent or emergency medical care has arisen in the context of medical treatment without consent. However, a consideration of the consent context may be instructive, as the emergency provisions in both contexts are exemptions or excuses, or a means of defence from the usual operation of laws.

56. The *Children and Young Persons (Care and Protection) Act 1998* (NSW) defines "emergency treatment" as treatment that is:

- required as a matter of urgency; and
- is necessary to save the child or young person's life or prevent serious damage to his or her health.[60]

This definition suggests that urgent treatment does not, by itself, sufficiently convey the idea that the treatment must be "necessary" to save a person's life or prevent a person from serious damage to his or her health.

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57. P Crowe, *Submission*, 1; Avant Mutual Group Ltd, *Submission*, 1.

58. *Health Professionals Act 2004* (ACT) s 72(2); *Health Practitioners Act 2004* (NT) s 128(a). See also *Civil Liability Act 2002* (NSW) s 57(1); *Medical Practitioners Registration Act 2001* (Qld) s 270(1)(a); *Medical Practitioners Act 2008* (WA) s 128(2), s 130.

59. Australian Medical Association, *Code of Ethics* (2006) cl 1.1.o and cl 1.1.q; Medical Board of the ACT, "Code of Conduct" (2006) cl 6 «*http://www.medicalboard.act.gov.au/Standards Statements/docs/code of conduct.pdf*» at 8 April 2009 and Medical Board of the ACT, "The Treatment of Self and Relatives by Medical Practitioners" (2006) cl 6 b and e «*http://www.medicalboard.act.gov.au/Standards Statements/docs/self treatment.pdf*» at 8 April 2009.

60. *Children and Young Persons (Care and Protection) Act 1998* (NSW) s 174(1).

57. The Commission recommends that the term "emergency" be used in preference to "urgent" for the sake of consistency with other statutes and ethical codes and standards. In doing so, the Commission considers that it is necessary to distinguish the use of the term "emergency" in the context of "emergency medical attention" from the practice of medicine in, for example, emergency departments of hospitals. To help clarify the situations where such treatment may be permitted, the Commission considers that the definition of "emergency treatment" in the *Children and Young Persons (Care and Protection) Act 1998* (NSW) should be adapted so that "emergency medical attention" means medical attention that is required as a matter of urgency and is necessary to save a person's life or prevent serious damage to his or her health.

58. Whether the treatment of a person is "urgent" or not will depend on the context of each case. For example, the Supreme Court has noted that a treatment that is carried out over a number of weeks may still qualify as "urgent" both with regards to its commencement and its continuation.[61] It should be remembered that a practitioner would only be bound to act in the absence of other suitably qualified practitioners.

RECOMMENDATION 1

(1) The *Medical Practice Act 1992* (NSW) s 36(1)(l) should be amended by substituting "in need of emergency medical attention" for "in need of urgent medical attention".

(2) "Emergency medical attention" should be defined as medical attention that is required as a matter of urgency and is necessary to save a person's life or prevent serious damage to his or her health.

59. A further question is whether it is necessary to provide further guidance to identify situations where the need for emergency medical treatment arises. Options include further defining what is meant by "emergency" or "reasonable cause", or leaving it to the judgment of individual medical practitioners, whether or not subject to an additional express requirement of good faith.

60. One submission raised the issue of expanding the range of circumstances which may require emergency attention. It raised a case where a medical practitioner was restricted from administering morphine without the Drugs of Dependence Unit's approval, except in cases of

61. *Re Elm* (2006) 69 NSWLR 145, [12].

emergency. The medical practitioner administered morphine without approval and sought to justify this by describing the situation as an emergency on the ground that the patient was suffering significant pain.[62] While the case was resolved on another basis, it did not resolve the question of what can constitute an emergency. This submission suggested that an "emergency" should include situations where a person is in need of relief from a "significant level of pain" and no other practitioner is available within a reasonable time.[63]

61. The Commission considers it undesirable to extend the circumstances requiring emergency medical attention to include relief from significant pain. It should be noted that pain relief that is incidental to preserving life or preventing serious harm to a person's health would, conceivably, still be possible.

62. The current provision states that unsatisfactory professional conduct includes a failure to render assistance "where the practitioner has reasonable cause to believe that the person is in need of urgent attention by a registered medical practitioner". One submission suggested that a "further clarification or explanation of what may be considered a 'reasonable cause'" might be desirable.[64]

63. Medical practitioners should be reasonably qualified to assess for themselves whether the situation at hand is one requiring urgent medical attention or not.[65] However, one submission has highlighted the problems associated with relying on medical practitioners' own expertise in determining whether their action in an "emergency" is appropriate. The practitioners' actions will be determined to an extent by "their level of insight into their own skills".[66]

64. One submission has suggested that the practitioner's belief in these circumstances should be qualified by the requirement that it be in "good faith".[67] It also suggested that, if there is a possible breach, the medical practitioner should inform the Medical Board of the circumstances as

62. Avant Mutual Group Ltd, *Submission*, 1.
63. Avant Mutual Group Ltd, *Submission*, 2.
64. NSW Department of Health, *Submission*, 1.
65. See, eg, *Re Elm* (2006) 69 NSWLR 145, [13].
66. NSW Medical Board, *Submission 1*, 2.
67. R Day, *Submission*, 1.

soon as practicable.[68] Such an action in the circumstances could constitute evidence of good faith.

65. The Commission prefers to leave the question of the appropriate response to a situation to the individual practitioner, in the first instance, subject to the possibility of disciplinary review. The Commission is further of the view that the element of "good faith" does not need to be expressly stated in the Act. The good faith of the medical practitioner will be a question to be determined at any subsequent disciplinary hearing.

Providing emergency medical attention

66. The Commission considers it essential that medical practitioners should be able to provide emergency medical attention to people in need of it without fear of complaints being brought against them for unsatisfactory professional conduct simply by reason of their failure to adhere to restrictions on their practice of medicine. There is a need to clarify the position of medical practitioners for the sake of the practitioners themselves and the people in need of emergency attention.[69] This is especially necessary since the majority of temporary restrictions on practice will not have a bearing on the ability of the practitioner to provide assistance in an emergency situation.[70] To this end, the Commission recommends that the *Medical Practice Act 1992* (NSW) be amended to make it clear that it does not prevent a medical practitioner acting in conformity with the emergency attention provision in s 36(1)(l).[71] The model for such an amendment can be found in s 38 of the *Medical Practice Act 1992* (NSW), which provides for an exception to two of the unsatisfactory professional conduct provisions in cases where the conduct involved training, employment of technical support, or research.[72]

67. In retaining the emergency attention provision, we consider it should also be made clear that the appropriate disciplinary body can expressly impose an overriding restriction, where appropriate, to prevent the practitioner from performing emergency or urgent treatment either

68. R Day, *Submission*, 1-2.

69. Avant Medical Group Ltd, *Submission*, 1.

70. M McCaskill, *Submission*; Health Care Complaints Commission, *Submission* 2.

71. This approach was also suggested by W J Madden, *Submission*.

72. A cross-reference to this effect is included at the end of *Medical Practice Act 1992* (NSW) s 36.

generally or in particular circumstances. A practitioner who breaches such a condition should be guilty of unsatisfactory professional conduct.

68. Some submissions supported the idea that the relevant disciplinary body should be able to impose conditions that apply in all circumstances, including situations requiring emergency medical attention.[73]

69. While this approach may prevent some people from receiving urgent medical attention where needed, it ensures that they are not put at risk of the conduct that led to the restrictions being imposed in the first place.

70. In recommending an express exception to s 36(1)(l), the Commission recognises that a specific restriction on practice would provide "reasonable cause" for a practitioner to refuse or fail to provide emergency attention when required.[74]

71. This recommendation should not be read as permitting people who have been disqualified from medical practice from providing emergency medical attention as if they were registered medical practitioners.

RECOMMENDATION 2

The *Medical Practice Act 1992* (NSW) should be amended by adding a section to the effect that a registered medical practitioner is not guilty of unsatisfactory professional conduct described in s 36(1) if the practitioner renders emergency medical attention to a person in need of it unless:

(a) any condition to which his or her registration is subject excludes the rendering of emergency medical attention; or

(b) any condition to which his or her registration is subject excludes the rendering of emergency medical attention of a particular kind or in particular circumstances and the medical attention rendered is of that kind or is rendered in those circumstances.

Requesting attention

72. The drafting of the existing s 36(1)(l) may limit the types of emergency situations where a medical practitioner will be required to act.

73. P Crowe, *Submission*; NSW Institute of Medical Education and Training, *Submission*, 1; Avant Mutual Group Ltd, *Submission*, 2; Ambulance Service of NSW, *Submission*, 1; Health Care Complaints Commission, *Submission 1*; NSW Medical Board, *Submission 1*, 2.

74. See NSW Medical Board, *Submission 1*, 2.

The provision currently only operates when the practitioner refuses or fails to attend "within a reasonable time after being requested to do so". Such a request may not be forthcoming in some emergency situations where, for example, the person in need of attention is unconscious or otherwise unable to communicate a request either him or herself or through an agent. The current drafting would appear to arise from the circumstances envisaged when the provision was enacted in 1963, namely, that of the sole practitioner confronted by an urgent situation in the course of his or her medical practice. To ensure that the provision covers as broad a range of emergency situations as possible, the Commission recommends that it be amended so that the practitioner is expected to act not only upon "request", but whenever an appropriate emergency situation presents itself and no other practitioner is reasonably available.

RECOMMENDATION 3

The *Medical Practice Act 1992* (NSW) s 36(1)(l) should be amended so that it is clear that the practitioner does not have to be "requested" to act, but will be expected to act (subject to the other requirements of the provision) simply when an emergency situation presents itself.

Appendices

- Appendix A: Medical Practice Act 1992 (NSW) section 36
- Appendix B: Submissions received

APPENDIX A: MEDICAL PRACTICE ACT 1992 (NSW) SECTION 36

36 Meaning of "unsatisfactory professional conduct"

(1) For the purposes of this Act, unsatisfactory professional conduct of a registered medical practitioner includes each of the following:

...

(c) **Contravention of conditions of registration**
Any contravention by the practitioner (whether by act or omission) of a condition to which his or her registration is subject....

(l) **Failing to render urgent attention**
Refusing or failing, without reasonable cause, to attend (within a reasonable time after being requested to do so) on a person for the purpose of rendering professional services in the capacity of a registered medical practitioner in any case where the practitioner has reasonable cause to believe that the person is in need of urgent attention by a registered medical practitioner, unless the practitioner has taken all reasonable steps to ensure that another registered medical practitioner attends instead within a reasonable time.

(m) **Other improper or unethical conduct**
Any other improper or unethical conduct relating to the practice or purported practice of medicine.

APPENDIX B: SUBMISSIONS RECEIVED

Dr Robert Day, Director of Emergency Department, Royal North Shore Hospital, 9 December 2008

Avant Mutual Group Limited, 22 December 2008

New South Wales Medical Board, *Submission 1*, 24 December 2008; *Submission 2*, 31 March 2009 (by telephone)

Dr Mary McCaskill, Head of Emergency Department, The Children's Hospital at Westmead, 31 December 2008

NSW Department of Health, 7 January 2009

Sydney West Area Health Service, 12 January 2009

Health Care Complaints Commission, *Submission 1*, 5 January 2009; *Submission 2*, 13 January 2009, *Submission 3*, 27 March 2009

Professor Phillip Crowe, Professor of Surgery, University of NSW, 15 January 2009

South Eastern Sydney and Illawarra Area Health Service, 16 January 2009

W J Madden, Slater and Gordon Lawyers, 20 January 2009

NSW Institute of Medical Education and Training, 31 January 2009

Ambulance Service of NSW, 5 February 2009

NSW Nurses Association, 17 February 2009

Ms Gail Furness, barrister, 19 March 2009 (by telephone)

Mr Peter Garling, barrister, 27 March 2009; *Consultation*, 3 April 2009

Rural Doctors Association of New South Wales, 31 March 2009