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To whom it may concern:

SUBMISSIONS ON THE PROPOSED REFORM TO THE HEALTH OMBUDSMAN ACT

We take this opportunity to make this submission as publicly invited in respect of the above subject matter.

We refer to the *Public Health (Childcare Vaccination) and Other Legislation Amendment Bill 2015* which proposes to amend the investigative powers given to the Health Ombudsman at section 228 of the *Health Ombudsman Act 2013* (**the Act**). This submission relates to that proposal only.

The power to compel an individual to appear and answer questions under the current provisions of the Act was held to be invalid in *Ali Al Moosawai v Luke Massey* [2015] QSC 169 (**Moosawai**).

The Explanatory Notes indicate the primary purpose of the Bill is to provide an authorised person with the power to require a person to attend and answer questions and produce documents in relation to investigations into serious healthcare complaints and offences under the Act.

We consider that the proposed amendments would not be in the best public interest, since it will not fully cure the apparent defect in the legislation as encountered by the Office of the Health Ombudsman (**OHO**) in Moosawai.

1. SUBMISSIONS

1.1. The Act

Any redrafted empowering section should clearly allow the OHO or delegated investigator the power to require attendance for the provision of oral information and any other specified information. The draft provision as currently cast in our submission would be open to uncertainty in respect of occasions where its operation could be avoided conceivably on all occasions where it might be argued that compliance would expose any respondent to liability for misconduct or a "penalty" in respect of such conduct under investigation.

While the inclusion of section 228(3)(b) in the Act will enable the OHO to require a person

to attend and answer questions, the effect of 229A(2) would allow such person to refuse to attend or answer questions if they may be exposed to a penalty in respect of the very disciplinary conduct under investigation.

We submit that this draft provision will provide a basis of excusal for individuals required to give or produce information pursuant to a s228(3) request on the grounds of "self-incrimination." To this end, the proposed amendments fall short of the apparent main objective; to require health care professionals to respond to allegations of serious misconduct and offences under the Act.

1.2. Comparative New South Wales Legislation

It is noted that any such shortfall is apparently addressed in New South Wales, without erosion of usual rights to silence or protection from liability for matters other than the conduct under investigation and liability for disciplinary action.

The powers of the Health Care complaints Commission there are governed under the *Health Care Complaints Act* 1993 (HCCA).

Section 34 of the HCCA relevantly provides:

> *(1) If the Commission is investigating a complaint and is of the opinion that a person is capable of giving information, producing documents (including medical records) or giving evidence that would assist in the investigation, the Commission may, by notice in writing given to the person, require the person to do any one or more of the following:*
>
> > *(a) to give the Commission, by writing signed by the person (or, in the case of a corporation, by a competent officer of the corporation) and within such time as is reasonable, and in the manner, specified in the notice, any such information of which the person has knowledge,*
> >
> > *(b) to produce to the Commission, in accordance with the notice, any such documents,*
> >
> > *(c) to appear before the Commissioner or a member of staff of the Commission authorised by the Commissioner at a time and place specified in the notice that is reasonable and give any such evidence, either orally or in writing, and produce any such documents.*
>
> .....
>
> *(4) A person who is subject to a requirement under subsection (1) must not, without reasonable excuse, fail to comply with the requirement.*

In a footnote to that provision it is stated that a failure by a health practitioner to provide such information may constitute unsatisfactory professional conduct. Additionally and most importantly under section 37A, a person required to produce the information pursuant to section 34A is not excused on the grounds of self-incrimination.

This provision goes on to render any such information as inadmissible in civil or criminal proceedings, except disciplinary proceedings or for a breach of the Act eg for failure to produce the information under the request.

Accordingly, a practitioner in New South Wales would be lawfully obligated to answer questions about alleged misconduct to the Health Care Complaints Commissioner, while a Queensland practitioner, who may be subject to the same level of misconduct, may refuse to do same on the grounds of self-incrimination.

It is submitted that this anomaly may be properly addressed in the public interest by provisions similar to the HCCA in New South Wales. The New South Wales provisions are long standing and time honoured.

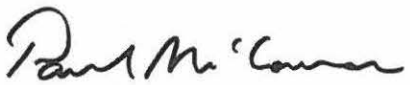
Importantly safeguards are built into the NSW legislation to prevent the use of any information obtained under the compulsive powers other than for use in any disciplinary proceedings under the HCCA. Thus the information cannot be used in civil or criminal proceedings, except in the case where the requested information is not provided.

2. CONCLUSION

We submit that provisions similar to that of New South Wales ought to be considered to be enacted in Queensland to ensure that the OHO's investigative powers are provided with clarity and operate in the public interest.

We trust you will give careful consideration to the above and take this opportunity to thank you for the opportunity to address this important legislative reform.

Yours faithfully
McInnes Wilson Lawyers



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