DISCIPLINE OR BONDAGE:
Aspects of the Disciplinary Jurisdiction Governing Medical Practitioners

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I. INTRODUCTION

Increased accountability of those who exercise power has been a feature of policy making in New South Wales for the past decade. Lawyers, judges, police and administrative decision-makers have their professional conduct scrutinised by a range of external agencies with varying powers to ensure appropriate standards are maintained.

The medical profession has been accountable for its conduct for many decades. In New South Wales the level and intensity of the regulation increased in 1993 with the passing of the *Health Care Complaints Act* (the "Act"). The Act established the Health Care Complaints Commission (hereafter the "Commission"), a body independent of the profession, and the NSW Department of Health, to investigate and prosecute complaints against doctors and other health practitioners. This article will address its jurisdiction in relation to medical practitioners only.

The Commission, in consultation with the Medical Board of New South Wales (hereafter the "Medical Board"), receives complaints against medical practitioners and investigates concerns about their clinical competence, ethics and general professional conduct. Unique in Australia, the Commission is then empowered to prosecute complaints before the Medical Tribunal and Professional Standards Committees alleging, among other matters, a lack of adequate skill, care, judgement or knowledge or other improper or unethical conduct in the practice of medicine.

One of the aims of the Commission is to maintain standards of health services in New South Wales. It initiates disciplinary action against those who transgress such standards. The framework of the Commission is based on protection of the

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public - its paramount consideration - and on fairness to those who are subject to its scrutiny.

This article will consider, first, the nature of the Commission's disciplinary jurisdiction, and secondly, the form in which procedural fairness is accorded to practitioners under investigation.

II. LEGISLATIVE FRAMEWORK FOR DISCIPLINARY ACTION

The Commission investigates in order to obtain information and determine what action should be taken. It can obtain reports from experts and, with consent of the occupier of premises or with a search warrant, the Commission can enter premises used by the practitioner, as well as search and seize relevant material.[1] It has no other powers to compel assistance or to hold a hearing in pursuit of an investigation. Following the completion of an investigation, the Commission gives a practitioner the opportunity to make submissions concerning any adverse outcome and consults with the Medical Board. In appropriate cases, it then prosecutes a complaint before a disciplinary body.[2]

Disciplinary proceedings are commenced by the Commission lodging a complaint, which particularises the conduct alleged, with the Medical Board. The complaint is then heard before a Professional Standards Committee or the Medical Tribunal. More serious complaints are heard by the Medical Tribunal which consists of a Judge of the District Court, two medical practitioners and one lay person.[3] Professional Standards Committees (hereafter "PSCs") consist of two medical practitioners and a lay person.[4]

Complaints can allege a criminal conviction, unsatisfactory professional conduct or professional misconduct, a lack of competence, impairment, or lack of good character.[5] Unsatisfactory professional conduct includes a range of conduct. The most common complaint is a lack of adequate knowledge, skill, judgement or care by the practitioner in the practice of medicine, contravention of registration conditions, or other improper or unethical conduct relating to the practice of medicine. Professional misconduct is unsatisfactory professional conduct of a sufficiently serious nature to justify suspension or removal from the Register.[6]

The Tribunal or PSC holds an inquiry and in so doing, is not bound by the rules of law governing the admission of evidence and may inform itself of any matter in such manner as it thinks fit.[7] If the Tribunal or a PSC finds the subject

1 *Health Care Complaints Act* 1993 (NSW), ss 32-4.
2 *Ibid*, ss 39,40.
3 *Medical Practice Act* 1992 (NSW), ss 52, 147
4 *Ibid*, s 169.
5 *Ibid*, s 39.
6 *Ibid*, s 37.
7 *Ibid*, Sch 2 clause 1.

matter of a complaint proven, or the practitioner admits to it in writing, then the PSC or Tribunal may:

- caution or reprimand the practitioner;
- order appropriate medical or psychiatric treatment or counselling;
- impose conditions on registration;
- order completion of educational courses;
- order reporting on the practitioner's medical practice; or
- order the practitioner to obtain advice in relation to practice management. [8]

Fines up to $5,000 and $25,000 may be imposed by a PSC and the Tribunal respectively provided that a fine in another jurisdiction has not been imposed for the same conduct.[9]

Only the Medical Tribunal can suspend or deregister a practitioner if it is satisfied that the person is not competent to practise medicine or is guilty of professional misconduct.[10]

III. PROTECTIVE NATURE OF DISCIPLINARY PROCEEDINGS

The function of the Medical Tribunal and PSCs is not to punish practitioners but to uphold the standards of the profession and to protect the community. The existence and maintenance of high standards are essential to protect the community which must have absolute trust in the members of the profession. The jurisdiction does not "take hostages to punish a practitioner".[11]

The courts have emphasised the protective nature of the jurisdiction on many occasions. In *Walton v Gill, Herron and Gardiner*,[12] the High Court considered an appeal against a decision of the NSW Court of Appeal staying disciplinary proceedings against three medical practitioners in the Medical Tribunal. The complaints before the Medical Tribunal arose out of occurrences at the Chelmsford Private Hospital concerning the administration of deep sleep therapy. In dismissing the appeal, Mason CJ, Deane and Dawson JJ stated:

> The jurisdiction of the Tribunal, which is not a court in the strict sense, is essentially protective ie. protective of the public - in character... In particular, in deciding whether a permanent stay of disciplinary proceedings in the Tribunal should be ordered, consideration will necessarily be given to the protective character of such proceedings and to the importance of protecting the public from incompetence and professional misconduct on the part of medical practitioners.[13]

Brennan J, with whom Toohey J agreed, stated:

> The jurisdiction of the Tribunal exists in order that patients be protected and that the public know that patients are protected against, inter alia, professional misconduct.

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8 *Ibid*, ss 60-1

9 *Ibid*, s 62.

10 *Ibid*, s 64

11 *McBride v Walton* (unreported, Court of Appeal, Kirby P, 15 July 1994) at 47

12 [1993] 177 CLR 378.

13 *Ibid* at 395-6

> The protection is afforded by the statutory powers of the Tribunal which enable the Tribunal publicly to declare that professional misconduct has been proved and to impose on a medical practitioner an appropriate disciplinary penalty. Those powers are designed not only to do a measure of justice as between medical practitioner and his or her patient or to impose an appropriate penalty for professional misconduct but also to declare and enforce proper professional standards.[14]

In addition, in relation to the issue on which he dissented, Brennan stated:

> In the Court of Appeal ... their Honours focused their attention on the effect of delay on the position of the medical practitioners against whom the complaints had been made. Their Honours gave less weight to the interests of the public and of the Chelmsford patients ... in having the professional conduct of the respondents investigated by the competent disciplinary Tribunal and, if the conduct were proved to have amounted to professional misconduct, in having that conduct publicly stigmatised as such. When the very purpose of conferring jurisdiction on the Tribunal is to protect the public and particular patients against professional misconduct, it is a curious power which allows the pursuit of that purpose to be aborted in order to protect the interests of medical practitioners who are alleged to have grievously mistreated their patients.[15]

The case of Dr Richter illustrates that protecting the interests of practitioners can still feature in some judicial considerations. Dr Richter sexually assaulted a female patient. He admitted the conduct and was de-registered by the Medical Tribunal which stated the following principles:

- the purpose of a de-registration order is to protect the public and not to punish the practitioner;
- the protection of the public includes maintaining the standards of the medical profession and maintaining public confidence in that profession; and
- the protection of the public involves consideration of the risk of the respondent re-offending, his contrition and the nature and extent of the harm occasioned to the patient. [16]

Dr Richter appealed to the Court of Appeal against the de-registration order.[17]

In their majority decision, Kirby P and O'Keefe A-JA upheld the appeal and ordered that his name be restored to the Register. Dr Richter was reprimanded and conditions imposed that he see female patients in the presence of a chaperone and undergo psychiatric treatment. The Court stated that the purpose of an order was to protect the public and not to punish the practitioner and gave weight to the following considerations:

- that the unacceptable behaviour of the appellant was uncharacteristic;
- that such behaviour was engaged in on the spur of the moment;
- that the likelihood of any recurrence was exceptionally remote;
- the response of the appellant to his wrongdoing, ie. freely confessing, exhibiting genuine remorse and amendment for his wrong doing and recognising its seriousness; and

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14 *Ibid* at 411-2

15 *Ibid* at 416

16 *Walton v Richter* (unreported, Medical Tribunal, 5 May 1993) at 18.

17 *Richter v Walton* (unreported, Court of Appeal, Kirby P, O'Keefe AJA, 15 July 1993)

- the previously untarnished professional and personal record of the appellant over almost ten years in practice.[18]

It is instructive to note that on a number of occasions throughout the majority judgment, the language used minimised the incident giving rise to the complaint. For example, the incident was described by Kirby P and O'Keefe A-JA as follows:

> [i]n the course of examining a female patient the appellant interfered with her by inserting one of his fingers into her vagina, caressing her on and otherwise interfering with her breasts and engaging in associated improper actions... there was no suggestion of force, violence or any rough handling of or language to the patient.[19]

In addition, they said:

> Should the services of such a highly qualified and caring medical practitioner be lost to the public ... because of this event of a few moments? In the circumstances of the present case we think not.[20]

The same incident was described by Priestley JA in his dissenting judgment as follows:

> [w]ithout her consent [he] handled and kissed her right breast and nipple, began playing (the patient's words) with her clitoris, inserted one finger in her vagina, then a second finger. Again using the patient's words, he continued playing with her clitoris, began to move his fingers in and out of her vagina and pulsated his fingers there.[21]

He did note that the patient had been terrified;[22] the majority noted her distress.[23]

Kirby P and O'Keefe A-JA accepted psychiatric evidence for Dr Richter that the likelihood of his reoffending was virtually nil and noted that Dr Richter had lightened his workload and changed the circumstances in which he examined female patients.

Priestley JA noted in dissent that the focus of the appeal proceedings switched from the facts of the misconduct and the effect on the patient to why the appellant had misconducted himself and the consequences of the misconduct for himself. In expressing his view that the appeal should be dismissed his Honour stated:

> The degree of trust which patients necessarily give to their doctors may vary according to the condition which takes the patient to the doctor. Even in regard to the most commonplace medical matters the trust a patient places in a doctor is considerable. In some cases, of which the present seems to be an example, the patient's trust cannot help but be almost absolute. The doctor's power in regard to the patient in such cases is also very great... the doctor ... is in a position to do whatever the doctor wants with the body of the patient. This is one of the reasons why doctors are subject to correspondingly great obligations and are expected to maintain very high standards; all this being very much in the public interest. When

18 *Ibid* at 8.
19 *Ibid* at 1.
20 *Ibid* at 8-9
21 *Ibid* at 2.
22 *Ibid* at 3.
23 *Ibid* at 2

> the maintenance of those standards and the protection of the public interest are considered in relation to what happened in the present case, I do not think that it can be said that the orders made by the Tribunal were inappropriate.[24]

It is submitted that the majority in the Court of Appeal in this case took a narrow view of the protective nature of the jurisdiction and placed undue emphasis on the likelihood of recurrence and associated factors relevant only to the particular practitioner.

Kirby P sought to further limit the application of the public interest requirement in his dissenting judgment in an appeal by William McBride against the Medical Tribunal decision removing his name from the register:

> It is not the function of professional disciplinary bodies to assume wider obligations or the duties of punishing a practitioner. Their sole function is to protect the public in the context where they have legitimacy and expertise, namely professional practice.[25]

Kirby P took the view that an evaluation of the public interest in such cases incorporates the availability of a highly skilled practitioner to serve the community:

> Where the court concludes that the conduct is isolated, unlikely to recur and not such as to affect the professional functions of the practitioner, it will not be in the public interest to deny the practitioner the opportunity of practising the profession ... the purpose of the jurisdiction [is not to] visit on a senior practitioner additional burdens because a practitioner's fall from grace has attracted much public attention.[26]

In the same case, in the majority judgment, Powell JA defined the public more broadly and did not limit it to members of the lay public who deal with medical practitioners. He included fellow practitioners and others in the community whose interests may be detrimentally affected by the conduct of the practitioner.[27]

It is submitted that the dissenting judgment in *McBride* and the majority judgment in *Richter* are unduly narrow in the application of the public interest to disciplinary proceedings. The tenor of most judicial comments on this issue firmly places protection of the public above personal considerations of the practitioner. Acknowledgment of the seriousness of the conduct, in particular sexual misconduct, is an important tool in maintaining standards.[28]

IV. GENERAL PRINCIPLES OF PROCEDURAL FAIRNESS

The rules of procedural fairness were developed in recognition of the need for fair and flexible procedures in administrative decision making. Procedural

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24 *Ibid* at 25.

25 *McBride v Walton* (unreported, Court of Appeal, Kirby P, Powell and Handley JJ, 5 July 1994) at 25

26 *Ibid* at 47.

27 *Ibid* at 84.

28 The Court of Appeal overturned the *Richter* decision in the recent case *Health Care Complaints Commission v Litchfield* (unreported, Court of Appeal, 8 August 1997), approving Justice Priestley's dissenting judgment.

fairness simply imposes a duty to act fairly in making administrative decisions which affect individual rights, interests and legitimate expectations.

> It is a fundamental rule of the common law doctrine of natural justice expressed in traditional terms, that generally speaking, when an order is to be made which will deprive a person of some right or interest or the legitimate expectation of a benefit, he is entitled to know the case sought to be made against him and to be given an opportunity of replying to it... The reference to "right or interest" in this formulation must be understood as relating to personal liberty, status, preservation of livelihood and reputation, as well as to proprietary rights and interests.[29]

The principle is not limited to decisions which can affect legal rights but extends to the conduct of investigations and inquiries which only result in recommendations to other bodies.[30] Decision makers exercising a statutory power or function in the conduct of investigations must accord procedural fairness.

Whether or not the rules of procedural fairness apply depends upon the statute which governs the decision maker.[31] They will not if the legislation clearly and expressly states that procedural fairness does not apply. Some Acts do so state,[32] however many Acts are either silent or expressly indicate that the rules apply. Where an Act does not expressly state that fairness is to be accorded, but contains provisions commensurate with rules of procedural fairness, the common law rules which extend beyond the provisions may still apply.[33] Thus while an Act may have many provisions which dictate procedures, this does not prevent further requirements being implied by the common law and therefore the statutory provisions being supplemented by common law principles.

The Courts are reluctant to find manifest intent by the legislature to exclude the common law principles when constructing legislation. Kirby P has stated there is a presumption that a legislative strategy and its manner of exercise will be fair and just.[34] Thus the common law will usually imply a condition that a power be exercised with procedural fairness to parties whose interests might be adversely affected by the exercise of power.[35] Accordingly, in most cases the issue will not be whether or not procedural fairness needs to be accorded but what the duty to act fairly requires in the circumstances of the particular case.

Generally, the procedures followed must be fair to the individual concerned. That involves a fair hearing (or reading) and lack of bias on the part of the decision maker. Precisely what that will require depends upon the circumstances of the case, the terms of the statute and the nature of the function being exercised.[36] As Justice Deane has stated: "The common law rules of natural justice or procedural fair play ... reflect minimum standards of basic fairness

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29 *Kioa v West* (1985) 159 CLR 550 at 582, per Mason J

30 *Annetts v McCann* (1990) 170 CLR 596 at 599.

31 *Ibid* at 604.

32 For example, the *Corrections Act* 1986 (Vic).

33 *Annetts v McCann*, note 30 *supra* at 604.

34 *Ackroyd v Whitehouse* (1985) 2 NSWLR 239 at 247

35 *Annetts v McCann*, note 30 *supra* at 604.

36 *News Corporation Limited v National Companies and Securities Commission* (1984) 156 CLR 296 at 326, per Brennan J

which the common law requires to be observed in the exercise of government authority or power".[37]

V. PROCEDURAL FAIRNESS AND THE HEALTH CARE COMPLAINTS COMMISSION

That investigative bodies and disciplinary bodies have an obligation to accord procedural fairness is without doubt. Over the last three decades, judicial activism has resulted in greater transparency and openness in public decision making with the rights of individuals being safeguarded against intrusion by bodies with strong investigative powers. The High Court has affirmed that procedural fairness is to be accorded by professional tribunals in their disciplinary jurisdiction and by registration boards.[38]

As Brennan J stated in the High Court:

> It is especially appropriate that judicial review should be available when the function conferred by statute is to inquire into and report on a matter involving reputation, even though the report can have no effect on legal rights and liabilities.[39]

In determining the extent of the duty owed by the Commission one needs to examine the Act. The Act which governs the Commission is an unusual piece of legislation in that it is highly prescriptive of the procedures to be followed in the investigation of a complaint. It dictates various processes designed to accord fairness to practitioners against whom complaints are made.

A. Notification of Complaint

The Commission is required to notify a practitioner of the nature of a complaint and the identity of a complainant within 14 days of receipt of the complaint. In some limited cases, it can delay notification up to 60 days.[40] In addition, notice of the assessment of the complaint by the Commission, that is, what, if anything it proposes to do with it, must be given. Such provisions are rarely found in statutes governing investigative bodies.[41]

B. Comment on Adverse Report

In the event that the Commission proposes to prosecute, intervene in disciplinary proceedings, recommend disciplinary action or make comments to a practitioner following the completion of its investigation, it must provide him or her with the substance of the grounds for its proposed action and invite written submissions within 28 days.[42] Similar provisions apply with respect to health

37 *South Australian v O'Shea* (1987) 163 CLR 378 at 416, per Deane J.

38 *Hoile v Medical Board (SA)* (1960) 104 CLR 157, *Tate v Public Accountants Registration Board* (1987) 14 ALD 168

39 *Ainsworth v Criminal Justice Commission* (1992) 175 CLR 564 at 585

40 *Health Care Complaints Act* 1993 (NSW), s 16

41 For example, the *Ombudsman Act* 1974 (NSW) and the *Independent Commission Against Corruption Act* 1988 (NSW).

42 *Health Care Complaints Act* 1993 (NSW), s 40.

organisations.[43] In effect, in combination with the general practice of providing a copy of the complaint and any peer criticism, this mirrors the common law requirement that if adverse findings are to be included in a report of an investigative body, procedural fairness is to be accorded and the person is to be given an opportunity to comment.[44] The decision maker must:

> listen fairly to any relevant evidence conflicting with the finding and any rational argument against the finding that a person represented at the inquiry, whose interests (including in that term, career or reputation) may be adversely affected by it, may wish to place before [the decision maker] or would have so wished if [the person] had been aware of the risk of the finding being made.[45]

The Act specifically states that the opportunity to make submissions does not apply when the Commission proposes to refer the matter to the Director of Public Prosecutions.[46] It could be argued that this indicates clear legislative intent that procedural fairness in this respect is not to be accorded on the basis that any subsequent criminal proceedings would permit the practitioner an opportunity to respond to the matter. It would be a surprising decision of the court to imply a right to be heard in these circumstances, however, given the broadening application of these rules, a challenge on this basis might be successful in the future.

In addition, the Commission is not required to offer this opportunity to practitioners who are thought to be impaired[47], if they have been informed of the proposed disciplinary action by the registration board.[48]

The common law requirement that parties be given an opportunity to be heard has a number of different aspects.

(i) The Stage at Which the Opportunity is to be Given

The Act sets out that the opportunity to comment is to occur at the completion of an investigation. This is consistent with the common law duty which only arises when the decision maker has "reached the stage of contemplating the making of an unfavourable finding".[49] As was stated by the High Court:

> It is of the very nature of an investigation that the investigator proceeds to gather relevant information from as wide a range of sources as possible without the suspect looking over his [or her] shoulder all the time to see how the inquiry is going.[50]

In *Ainsworth v Criminal Justice Commission*,[51] the High Court considered a report prepared by the Criminal Justice Commission (hereafter "CJC") about the introduction of poker machines into Queensland. The report was required to be furnished to the Parliamentary Committee overseeing the CJC. The report

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43 *Ibid*, s 43

44 *Mahon v Air New Zealand* [1984] AC 808 at 820.

45 *Ibid*

46 *Health Care Complaints Act* 1993 (NSW) ss 39(1)(f), 40.

47 "Impaired" in this context refers to a 'health impaired' practitioner, ie one who suffers from a drug addiction or psychiatric condition, for example.

48 Note 46 *supra*, s 40(3)

49 *Annetts v McCann*, note 30 *supra* at 610.

50 *News Corporation Limited v National Companies and Securities Commission*, note 36 *supra* at 323

51 *Ainsworth v Criminal Justice Commission*, note 39 *supra*

recommended that the appellants not be permitted to participate in the gaming machine industry in Queensland. The Parliamentary Committee conducted hearings after it received the report. The appellants were not informed of the CJC investigation nor of the recommendation to be made. The CJC was found to have failed to accord the appellants procedural fairness.

A matter touched upon in the case was whether the obligation to provide a hearing could be satisfied by the Parliamentary Committee holding hearings rather than the Commission itself affording the opportunity. The Court said:

> It is not in doubt that, where a decision-making process involves different steps or stages before a final decision is made, the requirements of natural justice are satisfied if the decision-making process, viewed in its entirety, entails procedural fairness. The difficulty in the present case is in viewing the Commission and the Parliamentary Committee as engaged in the one decision-making process. That is because the report was the final step in the discharge by the Commission of the functions and responsibilities which were brought into play by its decision to investigate and report with respect to the introduction of poker machines. Moreover, the functions and responsibilities of the Commission and of the Parliamentary Committee are separate and serve quite different purposes.[52]

It was irrelevant that the Parliamentary Committee might redress the unfairness, because it had no function or obligation to do so :

> A failure by the Commission to accord natural justice to a person whose reputation is damaged by a Commission report is not "cured" by subsequently giving the bearer of the damaged reputation an opportunity to attack the finding and to defend the reputation in proceedings before the Parliamentary Committee.[53]

Similarly in the High Court in *Johns v Australian Securities Commission*[54] it was decided that the failure of the Australian Securities Commission to comply with the rules of natural justice was not cured by the possibility that the appellant might have obtained a hearing before the Royal Commission on the same subject matter. The bodies were seen as separate and not part of the same power structure and therefore not involved in the same decision making process.

The Health Care Complaints Commission, however, has an obligation to give a person the right to be heard: a right which is clearly imposed by the statute.

(ii) The Extent to Which the Opportunity Must be Given

The right to comment is limited to those matters relevant to the individual and does not extend to the investigation at large. In *Annetts v McCann*[55] it was held that parents whose sons' deaths were the subject of a coronial inquiry, were only entitled to make submissions concerning matters that could give rise to findings adversely affecting their interests, not on the general subject matter of the inquiry.

The Act would be most likely to be construed consistent with this principle and only those matters touching upon the conduct of the practitioner need to be

52 *Ibid* at 578-9.

53 *Ibid* at 594, per Brennan J.

54 *Johns v Australian Securities Commission* (1993) 116 ALR 567.

55 *Annetts v McCann*, note 30 *supra*.

disclosed, not any associated systemic failure or the conduct of other health practitioners.

(iii) Nature of the Information Given to the Practitioner

The clear legislative intent is for the Commission to conduct open investigations in which the practitioner is informed of the nature of the complaint, the identity of the complainant and be given an opportunity to comment on any adverse outcomes proposed by the Commission.[56]

In *Chairperson, Aboriginal and Torres Strait Islander Commission v Commonwealth Ombudsman*[57] (hereafter "the ATSIC case") the Federal Court considered a draft report prepared by the Ombudsman which was critical of the activities of the Aboriginal and Torres Strait Islander Commission (hereafter "ATSIC"). A copy of the report was provided to ATSIC by the Ombudsman to provide it with an opportunity to comment prior to publication. However, the Ombudsman omitted from the draft report a significant allegation that appeared in the final report.

It was held by the Federal Court that she had denied ATSIC procedural fairness in not providing an opportunity to comment on that particular allegation. Of interest is that it was held that the form of words to be used by the Ombudsman need only convey to the individual concerned the substance of the proposed criticism. Nothing in the *Ombudsman Act* demanded that the exact form of words contemplated or intended in the report be used.

The *Health Care Complaints Act* 1993 (NSW)contains no reference to the exact words to be used, however, the Commission is required to put the substance of the proposed action, the same concept as referred to in the ATSIC case.

VI. DAMAGE TO REPUTATION

While reputation is clearly a right which attracts the application of procedural fairness, it is not a right which is determinative of the exercise of power by the decision maker. The NSW Court of Appeal considered this issue in light of the discretion reposed in the Independent Commission Against Corruption (hereafter "ICAC") as to whether to conduct public or private hearings. The ICAC exercised its discretion to hold hearings in public after properly considering the factors set out in its legislation. A number of serving and former police officers called to give evidence argued that they had been denied fairness by the ICAC proceeding to hold a hearing in public.

Chief Justice Gleeson said:

56 *Health Care Complaints Act* 1993 (NSW), s 40

57 (1995) 134 ALR 238.

> There is a fallacy in passing from the premise that the danger of harm to reputation requires the observance of procedural fairness to the conclusion that fairness requires that proceedings be conducted in all respects in such a way as to minimise damage to reputation.[58]

While the Health Care Complaints Commission does not have powers to enable it to conduct hearings, professional standards committees have a discretion whether to hold inquiries in public or in private.[59] The Commission then has a role in making submissions as to the exercise of that discretion. The principle enunciated by Gleeson CJ is a useful one in relegating reputation to a factor rather than the overriding consideration.

VII. SUSPENDING A PRACTITIONER

Procedural fairness also applies to the exercise of power by registration authorities. The power of a registration authority to suspend a practitioner is a significant one which should be attended by fairness and exercised so as to protect the public.

In NSW, the *Medical Practice Act* 1992 (hereafter the "Medical Practice Act") does not prescribe whether, and if so, how, the practitioner is to be informed of the intention to suspend or the right to make representations.

In *X v Medical Board (NSW)*,[60] Dr X was charged by the police with sexual assault offences in relation to a patient. Two weeks later, a complaint was made to the Complaints Unit of the Department of Health (now the Health Care Complaints Commission). The doctor was then advised in writing by the Medical Board of NSW that he was suspended from practising medicine for a period of 30 days effective from that date.

The suspension was pursuant to s 66(1) of the Medical Practice Act under which the Board may suspend a practitioner at any time for up to 30 days, if it is satisfied that such action is necessary for the purpose of protecting the life or the physical or mental health of any person. At the same time it is required to refer a complaint to the Tribunal and to the Commission for investigation. Dr X was not given an opportunity to be heard before the suspension was invoked.

In the Supreme Court, the argument was put that the doctor had been denied procedural fairness as he had not been given an opportunity to be heard. The Medical Board argued that the Medical Practice Act constituted an exceptional legislative circumstance which precluded the operation of the rules of procedural fairness.

Justice Levine described the powers in the Medical Protection Act as draconian and extraordinary[61] and noted that the statute imposed no obligation on the board to give reasons for the suspension.[62] His Honour recognised that

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58 *ICAC v Chaffey* (1993) 30 NSWLR 21 at 28.
59 *Medical Practice Act* 1992 (NSW), ss 161, 176
60 (1993) 32 ALD 330.
61 *Ibid* at 331.
62 *Ibid* at 337

the Act was concerned with a fundamental matter of public interest, and that there may arise circumstances of the utmost urgency for which no right to be heard would be found. In this case he found that there was no urgency. In particular he relied on the fact that two weeks had elapsed between the incident complained of and the complaint to the Complaints Unit.

He found that the rules of procedural fairness applied, and that while the opportunity to be heard need not be given in every case, there was no sound reason not to give the doctor an opportunity to put his position in this matter.

Given the Board's role of protecting the public, and the statutory provisions that endorse this principle, the two-week interval between the incident and the making of the complaint should not determine the issue of urgency. In addition, the well documented reluctance of victims of sexual assault to subject themselves to bureaucratic and judicial processes and the distress occasioned by a sexual assault, suggests that two weeks is remarkably rapid, particularly noting that the complainant had already complained to the police.

It has been noted that this decision implies a judicial reluctance to see "public interest" values outweighing the right to a hearing.[63] It is submitted that the urgency should be directed at the protection of the public once a matter is brought to the attention of the board, not to the complainant's robustness and speed in complaining.

VIII. BIAS

A component of procedural fairness is that a decision maker, and in particular a person exercising a judicial or quasi-judicial function, should not only be impartial but should appear to be impartial to members of the public. The person will be disqualified if a party to the proceedings or a fair minded and informed lay observer might in the circumstances reasonably apprehend a lack of impartiality on the part of that person.[64]

While it is clear that this principle applies to the Commission, its application to the professional disciplinary bodies is of particular note given their composition of members of the same profession as the person the subject of complaint. *Bannister v Walton*[65] concerned a claim of apprehension of bias by a Medical Tribunal following an order by the Tribunal directing that the practitioner's name be removed from the Register. The issue arose in a re-registration application by the surgeon. One of the original Tribunal members was a member of the Australian Orthopaedic Association and the practitioner before the Tribunal had been an associate member of the same association. The issue was that the member of the Tribunal had known at the time of the initial hearing that the Association had been "trying to get rid of the practitioner for a very long time".[66]

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63 S Smith, "Suspension of Doctors and Natural Justice" (1996) 3 *Journal of Law and Medicine* 262 at 268.

64 *Webb v The Queen* (1994) 181 CLR 41.

65 *Bannister v Walton* [1996] ACL Rep 10 NSW 10

66 *Ibid*

The member of the Tribunal gave evidence before the Court of Appeal that his knowledge of the attitude of the Association was, in part, at least the result of a story that 'went the rounds'. He had had no involvement in any meetings or deliberations of the Association with regard to the membership of the practitioner.

It was held by the Court of Appeal that a fair minded observer would not have equated the views of the Association with those of one of its members in the absence of any actual connection. In addition, it held that there was no basis for the view that the member would bring an unfair or prejudiced mind to the inquiry.[67]

The judgment of Deane J in *Laws v Australian Broadcasting Tribunal*[68] was referred to where he stated:

> [a]cquaintanceship with or preconceived views about a party of a kind which would create the appearance of disqualifying bias in a judge exercising the judicial power of a court of law may be permissible and unobjectionable in a statutory body which, while required to accord procedural fairness in the discharge of a particular function, is entrusted with other functions which necessitate a continuing relationship with those engaged in a particular industry.

Medical and other professional disciplinary bodies have been established to provide a form of peer review. That very foundation would be called into question if bias was perceived on the basis of a professional relationship relating to membership of the same professional body. It is clear from this decision that that is not the case.

IX. CONCLUSION

The concept of bondage as the state of being subjected to external control, implies a lack of consent or input by those who are bound. It is clear from the foregoing that medical practitioners are, like other professionals and those in positions of trust and power, subject to a measure of external scrutiny. The composition of the Committees and Tribunals which exercise disciplinary power is such that the profession itself participates in the disciplinary process. Furthermore, the nature of the jurisdiction is protective rather than punitive. In conclusion, the processes followed by the disciplinarians are manifestly fair and offer the practitioner the opportunity to be heard, in a substantive sense, before judgment occurs. Disciplined they may be; held in bondage, they are not.

67 *Ibid* at 14

68 (1990) 170 CLR 70 at 90.