equality for all

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SUBMISSION ON THE HEALTH PROFESSIONS AMENDMENT BILL [B 10—2006][1]

INTRODUCTION

The AIDS Law Project (ALP) welcomes this opportunity to make written submissions on the Health Professions Amendment Bill [B 10—2006] ("the Bill").[2] As an organisation that has consistently sought to ensure that the Health Professions Council ("the Council") holds health professionals to account, we welcome the Bill and the many positive contributions we believe it will make in advancing and safeguarding the public interest. We do, however, have some concerns about the Bill. As is evident from the recommendations we make below, we submit that numerous provisions do not support the Bill's stated objective – that being progressive transformation of the Council. Instead, they appear to weaken the Council and its independence, to the potential detriment of health care users.

This submission is made against the backdrop of a report issued by the Office of the Public Protector on 19 July 2001 in response to a complaint lodged by the ALP regarding problems many of our clients had experienced with the Council.[3] After investigating the ALP's complaint and meeting with both the ALP and the Council, the Public Protector made various recommendations. Although the specific cases which formed the basis of the complaint have subsequently been resolved, the Public Protector's recommendations – if implemented generally – would still go some way towards ensuring better protection for patients' rights in the future.

The Public Protector's recommendations include the following:

- The Council should be required to educate health professionals regarding the ethical guidelines, and these guidelines should be used as the measure of a health professional's conduct during preliminary inquiries.

- The Council should regulate the time limit given to medical professionals to respond to complaints, particularly where the lifespan of the patient is shortened. If there is no response from a medical professional within the prescribed period, the matter should be referred for a hearing.

- Records should be kept of the preliminary committee proceedings, which can be made available to the complainant if necessary. Detailed reasons for preliminary inquiry decisions should be given.

- The Council should include the involvement of a person who will champion the rights of the patient in the preliminary inquiry stage.

[1] This submission is endorsed by the Treatment Action Campaign.
[2] We will also be making oral submissions before the Portfolio Committee on Health on 1 August 2006.
[3] A copy of the report (reference 7/2 – 0488/01) is attached hereto.

We submit, however, that the Bill fails to deal adequately with many of the Public Protector's recommendations. In our view, this needn't be the case. The Bill provides the ideal opportunity for these recommendations to be codified in an amended Health Professions Act ("the Act") and thereby given the force of law.

This submission focuses primarily on three areas: the composition and powers of – and the appropriate roles to be played by – the Council and professional boards; the conduct of unregistered professionals and inquiries into misconduct (unprofessional conduct); and human resources for health. It first sets out a summary of the key recommendations made in respect of each of the three focus areas. This is then following by detailed submissions in respect of particular sections of the Bill. In conclusion, the submission considers the cumulative effect of many of the provisions that we consider problematic.

SUMMARY OF OUR KEY RECOMMENDATIONS

Composition, powers and appropriate roles of Council and professional boards

- Strengthen section 3 of the Act by –
  - Empowering the Council expressly to enforce professional and ethical standards within the health professions, in addition to upholding and maintaining such standards; and
  - Expressly linking the objects and functions of the Council to those of the Forum of Statutory Health Professional Councils, established in terms of the National Health Act, 2003.

- Retain the composition of the Council as set out in section 5 of the Act, so that it includes up to 25 persons designated by the professional boards on a proportional basis, with at least one representative from each board.

- Abandon the exclusion from membership of the Council of anyone who, at the time of his or her appointment is – or during the preceding 12 months was – "a provincial or national office bearer or employee of any … organization or body of a political nature." Retain the exclusion of provincial and national office bearers and employees of political parties in the new section 5(7) of the Act.

- In section 6 of the Act, expressly set out the procedures to be followed by the Minister in dissolving the Council, including the holding of a fair hearing.

- Retain a central role for the Council in the appointment of its registrar in terms of section 12 of the Act, either by allowing it to continue making the appointment or by empowering the Minister to make the appointment in consultation with – or on the recommendation of – the Council.

- Retain the right of registered professionals to elect their professional boards.

- Strengthen the checks and balances in section 41A(6)(a) of the Act dealing with search and seizure operations.

Conduct of unregistered professionals and inquiries into misconduct

- Retain the requirement in section 10 of the Act that a member of the Council who is not a registered person represent the community in an appeal hearing, and extend this requirement to professional conduct committees. Similarly, extend the requirement of a person with legal knowledge to such committees.

- Retain sections 36 – 39 of the Act, which deal with the prohibition against unregistered professionals performing certain acts, subject to the addition of a provision that permit further detail to be provided in regulations.

- Retain the terminology of "misconduct" and "improper and disgraceful conduct" in section 41 of the Act, instead of replacing them with the vague term "unprofessional conduct".

- Codify the legal developments set out in the full bench decision in *VRM v Health Professions Council of South Africa*,[4] dealing with material disputes of fact between the versions of the complainant and the registered professional in respect of whom a complaint has been lodged.

- Insert a new provision requiring the Council, after consultation with relevant stakeholders, to develop guidelines to assist disciplinary committees in imposing appropriate penalties with greater consistency.

- Retain the role of the Council in the making of regulations, so that the Minister makes regulations in consultation with it.

Human resources for health

- Ensure that the provisions dealing with the suspension of health professionals do not undermine service delivery without good cause by –
  - Requiring the registrar, when inquiring about a registered professional's change of address, expressly to state that a failure to respond within the required time will result in suspension;
  - Making allowance for a registered professional to be put on terms regarding unpaid prescribed annual fees before his or her registration is suspended; and
  - Amending new section 19A(3) of the Act to ensure that the date of suspension is made clear, and making provision for notice periods prior to suspension where necessary.

- Providing guidance regarding the circumstances within which registration categories may be excluded by the Minister from community service, or requiring the Minister to exercise the power in consultation with – or on the recommendation of – the relevant professional board.

[4] Unreported judgment of the High Court (Transvaal Provincial Division) in case no: 1679/2002 (10 October 2003). A copy of the judgment will be made available if required.

DETAILED SUBMISSIONS

Section 3 of the Bill (section 3 of the Act)

Objects, functions and powers of the Council
Section 3 of the Bill proposes a much needed and welcomed broadening of the Council's objects and functions and the strengthening of its powers. Importantly, it proposes greater protection of the public and improved transparency and accountability. We therefore strongly support section 3(g) of the Bill, and in particular, the insertion of new paragraphs (n) and (o) into section 3 of the Act. These new paragraphs mandate the Council to investigate complaints against health professionals, take appropriate disciplinary action (where required) and ensure that the constitutional rights of health care users are protected.

In our view, however, the section could be further strengthened. In *Jansen van Vuuren and Another NNO v Kruger*,[5] the then Appellate Division of the Supreme Court found that patients have a legal right to expect health care workers to obey the ethical guidelines of professional bodies such as the Council. We submit that the language of section 3 of the Act should reflect the role of the Council in enforcing professional and ethical guidelines. In the result, we recommend that the proposed new section 3(m) of the Act be redrafted to read as follows:

> "to uphold, maintain and enforce professional and ethical standards within the health professions"

Forum of Statutory Health Professional Councils
We have one final concern regarding section 3. Surprisingly, it fails to refer to the Forum of Statutory Health Professional Councils (FSHPC) established in terms of section 50 of the National Health Act (NHA). In terms of section 50(2) of that statute, the FSHPC "consists of the chairpersons of the statutory health professional councils and the registrars or chief executive officers, as the case may be, of the statutory health professional councils." In other words, the chairperson and the registrar of the Council are members of the FSHPC.

The FSHPC has a list of obligations set out in section 50(4) of the NHA. These include, for example, ensuring "communication and liaison between the statutory health professional councils upon matters affecting more than one of the registered professions;[6] promoting "interprofessional liaison and communication between registered professions",[7] and promoting "good practice in health services and sharing of information between the statutory health professional councils".[8] As ex officio members of the FSHPC, the chairperson and the registrar of the Council are mandated to discharge their obligations on behalf of the Council. As such, section 3 of the Act should make express reference to section 50 of the NHA.

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[5] 1993 (4) SA 842 (A)
[6] Subsection (4)(c)
[7] Subsection (4)(d)
[8] Subsection (4)(e)

Section 6 of the Bill (section 5 of the Act)

Composition of the Council
Section 5(1) of the Act requires that the council be representative and consist, *inter alia*, of –

> "not more than 25 persons designated by the professional boards, on a basis proportional to the number of persons registered to practice the professions falling under each professional board: Provided that each professional board shall be entitled to designate at least one person registered in terms of this Act".[9]

According to section 6 of the Bill, the upper limit of 25 persons is to be reduced to 16, with the proviso requiring at least one representative from each professional board being removed.

There are currently 12 professional boards, ranging in size from the Professional Board for Dental Therapy and Oral Hygiene (with only 1 344 registered professionals) to the Medical and Dental Professions Board (with 39 020 registered professionals).[10] On the basis of the proposed amendment, the 16 persons designated by the professional boards would be comprised of –

- Six persons designated by the Medical and Dental Professions Board;
- Four persons designated by the Professional Board for Emergency Care Practitioners; and
- One person designated by each of the following six professional boards:
  - Professional Board for Medical Technology;
  - Professional Board for Occupational Therapy and Medical Orthotics/Prosthetics;
  - Professional Board for Optometry and Dispensing Opticians;
  - Professional Board for Physiotherapy, Podiatry, and Biokinetics;
  - Professional Board for Psychology; and
  - Professional Board for Radiography and Clinical Technology.

The following four professional boards would not be represented at all:

- Professional Board for Dental Therapy and Oral Hygiene;
- Professional Board for Dietetics;
- Professional Board for Environmental Health Practitioners; and
- Professional Board for Speech, Language and Hearing Professions.

If the number of professional board designees were to be retained at 25, only one of these four boards would be represented. The only way to ensure that each board is represented at all is to retain the proviso guaranteeing each professional board the right to designate at least one person. And to ensure fairness and meaningful representation, the number of professional board designees should remain at 25.

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[9] Section 5(1)(a) of the Act
[10] Information from "Professional Boards", available online at http://www.hpcsa.co.za/hpcsa/default.aspx?id=81 (last accessed 18 July 2006)

This is important given the large number (22) of executive appointments,[11] as well as the need, as far as is reasonably possible, to ensure that the inclusion of all professional boards does not unfairly limit the numbers of representatives from the two largest professional boards: the Medical and Dental Professions Board and the Professional Board for Emergency Care Practitioners.[12]

Exclusion of persons from membership of Council
Section 6(d) of the Amendment Bill further introduces a new section 5(7) to the Act, which makes provision for the exclusion of certain persons from membership of the Act. Of concern is the exclusion of any person who, at the time of his or her appointment is – or during the preceding 12 months was – "a provincial or national office bearer or employee of any … organization or body of a political nature."

The phrase "political nature" is not defined in the Bill or the Act. Given that members of municipal councils, provincial legislatures and Parliament, as well as provincial or national office bearers or employees of political parties are also excluded, the phrase seems particularly broad. It could extend to civil society organisations whose work is decidedly political but clearly not of a party political nature. Such organisations working in the health care sector include the Rural Doctors Association of South Africa (RuDASA), the South African Medical Association (SAMA), Médecins Sans Frontières (MSF) and the Treatment Action Campaign (TAC).

There is no reasonable basis for excluding otherwise qualified persons from membership of the Council solely on the basis of their affiliation with one or other "organization or body of a political nature". To the contrary, registered professionals who are office bearers of or work for such organisations may bring to the Council much needed passion, experience and expertise. Denying them membership of the Council serves merely to exclude those who may be best placed to bring forward the perspective of those in whose interest the Council is required to act.[13]

Section 7 of the Bill (section 6 of the Act)

Dissolution of council and termination of membership
Section 7(g) of the Bill amends section 6 of the Act to make provision for the dissolution of the Council and the termination of membership of the Council. While there can be no principled opposition to these powers, what does raise concern is the manner in which these powers may be invoked. As they currently read, proposed sections 6(3) – (5) do not appear to provide sufficient clarity regarding the process to be followed by the Minister when dissolving the Council, nor do they appear to grant the Council any right to a fair hearing. Similarly, proposed section 6(6) of the Act does not expressly grant Council members with the right to a fair hearing.

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[11] Of these executive appointments, 11 are made by the Minister of Health, one by each of the nine MECs for health, and one each by the Minister of Education and the Minister of Defence. The remaining members of the Council represent tertiary institutions. (Section 5(1) of the Act)
[12] A further concern relates to the proposed amendments introduced by section 13 of the Amendment Bill to section 15 of the Act. These concerned are addressed below.
[13] Section 7(e) of the Bill, which, *inter alia*, proposes to introduce a new section 6(1)(l) into the Act, makes provision for the vacation from office of members of the Council who become provincial or national office bearers or employees of such organisations. The same concern expressed in relation to section 6(d) of the Bill applies with equal force to this proposed amendment.

This proposed amendment reorganises the proposed text in section 7(g) of the Bill and adds the underlined text.[14] In particular, it seeks to accomplish two interrelated goals. First, it expressly links the procedures set out in section 7(g) of the Bill to the Minister's power to dissolve the Council. Second, it guarantees procedural fairness by granting to the Council an opportunity to make submissions prior to any decision on dissolution being taken.

(3)(a) The Minister may dissolve the Council if –
  (i) the Council fails to comply with any of the provisions of this Act; <u>and</u>
  (ii) <u>the Minister has followed the procedure as set out in subsections (4), (5) and (6)</u>.

(b) All the functions of the Council are vested in the Minister until a new Council is appointed.

(4) If the Minister reasonably believes that the Council is failing to comply with the provisions of the Act, he or she may appoint a person or persons to investigate the affairs of the Council and to prepare a report upon such investigation.

(5)(a) The Minister may in writing request copies of the records, including minutes of meetings and financial statements, of the Council in order to ascertain the extent of the Council's compliance with the provisions of this Act.

(b) The registrar must furnish copies of all such records within 15 days of the date of the Minister's request.

(6) <u>Prior to making any decision regarding its dissolution, the Council must be afforded an opportunity to make written and oral submissions regarding its potential dissolution</u>.[15]

Section 10 of the Bill (section 10 of the Act)

Professional conduct and appeal committees

Section 10 of the Bill proposes numerous technical and two substantive amendments. We support the technical requirements and have no principled objection to the removal in section 10(2) of the Act of the phrase "retired judge or retired senior magistrate, or an attorney or advocate", which is to be replaced by the phrase "person with knowledge of the law". We are concerned, however, that the requirement regarding knowledge of the law only applies in respect of appeal committees and not in respect of professional conduct committees. In addition, we are concerned that the "member of the council appointed to represent the community" may now be a "registered person".

As part of the legal services we provide, the ALP has assisted a number of clients in laying complaints with the Council and has attended (as observer) several hearings into alleged professional misconduct. In our experience, these hearings have

[14] This submission also recommends that proposed section 6(6) of the Act be amended to make provision for Council members to be afforded the opportunity to make written and oral submissions regarding their potential termination of membership.

[15] All references to "the Charter" have been removed, as it is unclear to which charter reference is made. If the relevant charter is to be referenced, the term "Charter" will have to be defined and reference to the duties it imposes on the Council will have to be made.

ordinarily involved matters of law. We have also observed that committees made up of registered professionals are at times more responsive to the medical professional accused of misconduct.[16] This conduct may or may not be indicative of bias on the part of the committee. However, even if it does not affect the outcome in any matter, it certainly undermines the complainant's confidence in the impartiality of the committee, and makes the proceedings more uncomfortable and stressful for complainants and their witnesses.

We submit that if a professional conduct committee is more representative and is able to deal adequately with the legal issues raised, the number of complaints needing to be taken on appeal will be substantially reduced. We are therefore concerned that section 10(b) of the Bill removes the current requirement that a member of the Council appointed to represent the community in an appeal hearing should not be a registered person. In our view, this requirement should be retained with regard to appeal committees and should be extended to professional conduct committees. In addition, we strongly recommend that all professional conduct committees also include a person with a legal background.

Section 11 of the Bill (section 12 of the Act)

Appointment of the registrar
According to section 12(1) of the Act, the Council has the power to appoint a registrar and "such other persons as it may deem necessary for carrying out its functions". Section 11(a) of the Bill, however, proposes that the power to appoint the registrar be removed from the Council and instead given to the Minister, to be exercised "after consultation with the Council". The term "after consultation with" simply requires a consultation process and nothing more – consensus need not be reached.

We do not understand the basis upon which the power to appoint the registrar has been taken away from the Council and given to the Minister, with the Council's role reduced to an advisory one. In the absence of any explanation, we are concerned that this proposed amendment is but one of a long list of proposals that appear designed to erode the powers and/or independence of the Council. We are not averse to the Minister playing a role in the selection of the registrar. In the result, we recommend that the power to appoint the registrar be made by the Minister in consultation with the Council, by the Minister on the recommendation of the Council or simply by the Council itself.

Other appointments
The proposed amendment further states that "the Council may delegate to the registrar the power to appoint such other persons as the registrar may deem necessary for carrying out the functions specified under" the Act. This provision, in section 11(a) of the Bill, assumes that the Council has the power to appoint such persons, even though no such specific power is afforded to it by the Bill (it has such a power under the current Act). This is complicated by the fact that the Bill allocates to the registrar the decision regarding the necessity for making new appointments. This apparent contradiction must be addressed.

[16] For example, some members have been observed to introduce themselves to and shake the hands of the registered professional concerned, whilst at the same time ignoring the complainant.

Section 13 of the Bill (section 15 of the Act)

Establishment and composition of professional boards
Section 13 of the Bill proposes a radical, antidemocratic amendment to section 15 of the Act, which deals with the establishment and composition of professional boards. In terms of section 15(5)(a) of the Act, "the majority of the members of a professional board [are] to be elected by the members of the profession involved". According to section 13(a) of the Bill, elections are no longer required or permitted. Instead, it proposes that members of a professional board are to be appointed by the Minister "on the basis of nominations made by the members of the health profession or professions involved".[17]

In our view, this proposal is unacceptable, particularly given paragraph 2(g) of the memorandum on the objects of the Bill that speaks about "the costly exercise of elections by members of the profession concerned". This does not constitute a reasonable basis upon which such an amendment should be made, particularly given the largely advisory role of professional boards. The only substantive power that professional boards have is in terms of section 15A(c), according to which they are obliged "to control and to exercise authority in respect of all matters affecting the training of persons in, and the manner of the exercise of the practices pursued in connection with, any profession falling within the ambit of the professional board".

Section 14(a) of the Bill proposes that this power be "subject to legislation regulating health care providers and consistency with national policy determined by the Minister." Such legislation includes, but is clearly not limited to, statutes such as the NHA. In our opinion, there are sufficient checks and balances to ensure that professional boards discharge their statutory functions. As such, there can be no basis for suggesting that health professionals should not be entitled to elect their own representatives.

Section 14 of the Bill (section 15A of the Act)

Functions of professional boards
Section 15A(f) of the Act currently makes provision for professional boards "to communicate to the Minister information on matters of public importance acquired by the professional board in the course of the performance of its functions". Section 14(d) of the Bill proposes two changes to this provision. The first is to make reference to both the Minister and the Council. The second is to move away from the communication of "information on matters of public importance" and instead refer to the making of "recommendations … on matters of public importance.

We have no objection to the first change. Indeed, we believe that it is important for the Council to receive input directly from the professional boards and not only through their designated representatives to the Council. In respect of the second amendment, however, we do not understand why the making of recommendations has to be at the expense of the communication of information. We submit that both are important and therefore recommend the following construction instead:

[17] Section 13(f) of the Bill similarly removes the reference (in section 15(5)(g) of the Act) to election and replaces it with nomination, as does section 52(g) of the Bill in respect of the same concern in section 61(1)(g) of the Act.

"To communicate to the Council and the Minister information on matters of public importance acquired by the professional board in the course of the performance of its functions under this Act, and, where appropriate, to make recommendations on such information;"

Section 20 of the Bill (section 19 of the Act)

Registrations of health professionals based outside South Africa
We welcome section 20(b) of the Bill, which proposes deleting section 19(1)(a) from the Act. The amendment will allow a health professional to be out of the country and remain registered in South Africa. This is clearly supportive of current moves to address the human resources crisis in the health sector.

Section 21 of the Bill (new section 19A of the Act)

Suspension of health professionals
While we recognise the need for a provision that deals expressly with the suspension of health professionals and the revocation of such suspension, section 21 of the Bill seeks to insert a number of problematic provisions that, both individually and collectively, have the potential to undermine service delivery without good cause.

- New section 19A(1)(a), while granting a three-month period within which to respond to the registrar in respect of any inquiry regarding a change of address, does not expressly require that the registrar make it plain that should the registered professional not respond within the required time, he or she will be suspended with immediate effect.

- New section 19A(1)(b) does not require any notice period regarding the failure to pay prescribed annual fees. It makes no allowance for putting the person on terms to comply, failing which his or her name will then be removed. In the process, scarce skills may be lost to the health sector.

- New section 19A(3) is vaguely drafted. It is unclear whether the suspension takes place on the date of issue of the notice or the date of receipt of the notice by the person concerned. It appears to cover both dates, which is clearly unworkable.

  More importantly, it provides for immediate suspension, without any notice period being granted. Whilst guilt of unprofessional conduct should indeed result in immediate suspension, mere failure to pay the prescribed annual fee should not result in suspension unless and until the professional concerned has failed to pay upon receipt of a notice calling upon on him or her to do so.

Section 26 of the Bill (section 24A of the Act)

Exclusions from community service
Section 26 of the Bill introduces a new section 24A(2)(c), which allows for the Minister to decide which registration categories should be excluded from community service. While we have no principled opposition to such a provision, we do not

understand the basis upon which such a power would be exercised, given the chronic shortage and maldistribution of all categories of registered professionals in the country.

As it currently reads, the proposed new subsection merely requires consultation with the Council, after which a decision may be taken. In our view, there are two options available for ensuring that the power is exercised with due regard to the human resource needs of the health system: either the legislation could provide guidance regarding the circumstances within which the power should be used, or the power should be exercised in consultation with – or on the recommendation of – the relevant professional board.

Section 28 (amended section 26)

Rule making
We welcome section 28 of the Bill, which proposes that the Council's rule-making powers regarding continuing professional development be exercised in consultation with the relevant professional board. We recognise the importance of drawing the professional boards into decisions regarding ongoing education and training requirements for health professionals, particularly given the existence of sub-specialities within the various health professions that may require of boards to be very involved in these decisions. Given the Council's role – together with other members of the FSHPC – in advising "the Minister on the development of coherent policies relating to the education and training and optimal utilisation and distribution of health care providers",[18] the direct input of professional boards is much needed.

Sections 35 – 38 of the Bill (sections 36 – 39 of the Act)

Unregistered professionals
Sections 35 – 37 of the Bill propose repealing sections 36 – 38 of the Act, with section 38 of the Bill proposing to amend section 39 of the Act. All of these provisions seek to prevent unregistered professionals from performing certain acts that only registered professionals are entitled to perform. The proposed amendments seek to deal with the detail in regulations, keeping the empowering statutory provision particularly broad and vague by simply referring to acts "pertaining to any health profession as may be prescribed under this Act".[19]

In our view, the detail currently provided by the Act should be retained, subject to an empowering provision that permits for further detail – such as, for example, dealing with scope of practice – to be provided in regulations. Our experience in dealing with certain charlatans who seek to undermine health legislation (such as the Medicines and Related Substances Act, 101 of 1965) is that detailed statutory provisions are necessary to ensure proper enforcement. Vagueness in the empowering law simply makes it easier to hide behind conflicting understandings of the legal framework and undermines the authority of law enforcement officers.

[18] Section 50(4)(i) of the NHA
[19] Section 38(b) of the Bill

Section 40 of the Bill (section 41 of the Act)

Unprofessional conduct
We note – with some degree of concern – that the Bill proposes changing all references to "misconduct" and "improper and disgraceful conduct" in the Act to "unprofessional conduct". Our concern is that to members of the public, the words "unprofessional conduct" may not give an adequate reflection of the potential seriousness of the complaint against a health professional. While the term "unprofessional conduct" may be more inclusive, it may also be misleading, including as it does a range of forms of misconduct, from rude behaviour to serious breaches of professional and ethical duties.

In common usage, the words "unprofessional" and "misconduct" have completely different meanings and are not usually equated. Using the former term may simply result in confusion and misunderstanding. For example, when a member of the public is informed that a health professional has previously been found guilty of "unprofessional conduct", it may not give them adequate information to make a decision on whether or not to consult such a professional. In our view, the term "misconduct" has the advantage of being more clearly understood by society in general. In the result, we recommend that the term be retained, as it more adequately reflects the type of conduct against which the professional boards can exercise their disciplinary powers.

Postponement of inquiries
With regard to section 40(b) of the Bill, we support the removal of the proviso in section 41(1) of the Act that allows the professional board to postpone a matter if the complaint involved also forms part of a criminal case. The criminal justice system is frequently subject to lengthy delays, and postponing a matter until the criminal case has been concluded may prejudice the individual complainant and endanger others, particularly where serious issues of negligence and malpractice are involved.

Section 41 of the Bill (section 41A of the Act)

Committees of Preliminary Inquiry
While we welcome the amendments to section 41A(1) of the Act, which we believe have the potential to empower the Council to conduct investigations speedily and more effectively, we are concerned that they do not necessarily address problems that many of our clients have experienced regarding numerous Committees of Preliminary Inquiry and the proper interpretation of their powers in terms of the relevant regulations.

According to the full bench decision of the Transvaal High Court in *VRM v Health Professions Council of South Africa*,[20] a fundamental dispute of fact between the versions of a complainant and the medical professional must result in the Committee of Preliminary Inquiry referring the complaint to a disciplinary hearing for evidence to be lead. Until this decision, many of our clients' versions were simply dismissed out of hand.

[20] See above note 4

Given that Preliminary Committees have in the past overstepped the bounds of their discretion in a number of matters, we submit that it would be appropriate to amend the Act so that it expressly refers to the role of Committees of Preliminary Inquiry and sets out the circumstances in which complaints should be referred to a hearing, in accordance with the guidance provided by the full bench in *VRM*.

Search and seizure operations

Section 41(d) of the Bill also seeks to introduce a much-needed amendment to section 41A(6)(a) of the Act, dealing with search and seizure operations. As it currently reads, only the approval of the chairperson of the professional board is required before premises can be entered and searched without consent. The proposed amendment introduces the general need for a warrant before such premises can be entered and searched.

The proposed amendment, however, is somewhat problematic in the manner in which it deals with searches in the absence of a warrant.[21] While the rationale for allowing search and seizure operations in the absence of a warrant is defensible, what must be considered is that section 41A(2) allows for the appointment of a part-time investigating officer to assist with a particular investigation and invests that officer with "the same powers and duties as the [full-time] investigating officer contemplated in subsection (1)."[22]

In the circumstances, a person who may not necessarily have extensive experience in the field is empowered to enter and search premises – in the absence of a warrant – if "there are reasonable grounds to believe that a warrant would be issued by a magistrate and … the delay in obtaining the warrant would defeat the object of the warrant". Without extensive experience in the field, it is reasonable to expect that many mistakes are liable to be made, with premises being entered and searched in circumstances where a warrant may very well not have been issued.

In addition, the language of the proposed amendment seems particularly overbroad. For example, it speaks about making "such enquiries as he or she may deem necessary", without mentioning the purpose for which such enquiries may be made. In the result, we propose that section 41A(3) of the Act be amended to restrict the powers of persons appointed to assist with particular investigations (in terms of subsection (2)) and proposed the following amended text for a redrafted section 41A(6)(a):

> "for the proper performance of his or her duty, at any reasonable time, with or without a warrant, and without prior notice enter upon and search any premises, and carry out such an investigation and made such enquiries as are reasonable in the circumstances: Provided, where there is no warrant, that a person who is competent to allow the entry and search consents to such an exercise or that there are reasonable grounds to believe that a warrant would be issued by a magistrate and that the delay in obtaining the warrant would unreasonably frustrate the object of the warrant".

[21] The proposed text contains a simple typographical error: referring to "with or with a warrant" instead of "with or without a warrant".
[22] See section 41(3) of the Act

Section 42 of the Bill (section 42 of the Act)

Fines and other penalties
Section 42(a) of the Bill proposes that the reference in section 42(1)(d) of the Act to "a fine not exceeding R10 000" be changed to "a prescribed fine". While we recognise the need for an increase in the maximum allowable fine to allow the Council to impose fines which more adequately reflect the seriousness of certain forms of misconduct,[23] we submit that the phrase "a prescribed fine" be supplemented by the words "that reflects the seriousness of the misconduct in respect of which the person has been found guilty".

In addition, we are concerned about the lack of consistency in the penalties often imposed by committees. In some instances, vastly different penalties have been imposed on medical professionals who were found guilty of largely similar forms of misconduct. We therefore submit that the Council be required, after consultation with relevant stakeholders, to develop guidelines to assist committees in imposing appropriate penalties with greater consistency.

Section 52 of the Bill (section 61 of the Act)

Regulation making
Section 61(1) of the Act empowers the Minister, in consultation with the Council, to make regulations. Regulations are necessary to give full and proper effect to the legislation. The term "in consultation with" requires consensus between the Minister and the Council. Section 61(1) provides, *inter alia*, for the making of regulations on the following issues:

- The "registration by the Council of students in registrable professions", their "standards of general education" and the duration of their curricula;[24]
- "the conditions under which any registered person may practice his or her profession";[25]
- "the election of members of a professional board";[26] and
- "the conduct of an inquiry held in terms of section 42",[27] which deals with professional board inquiries into unprofessional conduct.

In terms of section 61(2) of the Act, the Minister already has the power, "after consultation with the Council, if he or she deems it to be in the public interest, [to] amend or repeal any regulation or rule made in terms of this Act."

What the Act therefore contemplates is a two-stage process with differing levels of participation by the Council. At the first stage, being the initial drafting of new regulations, the Act affords the Council a central role. At the second stage, when existing regulations (which were agreed to by consensus) are to be amended or repealed "in the public interest", the Council's role is limited to an advisory role. A

[23] Higher fines are necessary to act as effective deterrents, taking into account the high salaries/income of many health professionals.
[24] Subsection (1)(a)
[25] Subsection (1)(c)
[26] Subsection (1)(g)
[27] Subsection (1)(h)

balance is therefore struck between full consultation upfront and the need for the executive to move swiftly when the need later arises.

Section 52(a) of the Bill, however, removes the term "in consultation" from section 61(1) of the Act and replaces it with "after consultation", meaning that the Minister will have the power to pass regulations on his or her own, with the role of the Council being reduced to an advisory one. The memorandum on the objects of the Bill provides no explanation for such a radical shift. Instead, it simply asserts that the Bill aims to "empower the Minister to make regulations 'after', and not 'in' consultation with the Council",[28] without any justification. In our view, unless there is a compelling – and constitutionally defensible – reason why the role of the Council should be so diminished, the fine balance struck by the Act should be kept.

CONCLUSION

In many ways, the Bill achieves its stated objective, which is progressive transformation of the Council. It does this in a number of ways, such as by expanding on the objects and functions of the Council and by detailing the financial and administrative obligations of the registrar. But a number of provisions, both individually and collectively, work against this stated aim. Instead of strengthening the Council and ensuring that it is able to play its rightful role, these provisions – whether by design or by accident – have the potential significantly to weaken the Council and compromise its independence.

Consider, for example, the composition of the Council. Executive appointments will in future outnumber the single largest group of existing Council members, being those persons designated by the professional boards. Further, professional boards will no longer be elected by registered professionals, but instead be appointed by the Minister. None of these appointments will be subject to oversight, whether by Parliament or any other appropriate body.

In conclusion, we once again thank the Portfolio Committee on Health for the opportunity to make these submissions, which we trust will be considered seriously. Our intention is to ensure that the Act is amended in a way that strengthens the Council, the professional boards and their committees, empowering them to discharge their statutory and constitutional duties. In many ways the Bill achieves this goal. In certain respects it is indeed deficient. We trust that our recommendations will assist the committee in addressing these shortcomings.

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[28] Paragraph 2(o) of the memorandum