CLIENT NOTE

Recommendations by the Workgroup to Review the Taking of Informed Consent and the SMC Disciplinary Process

9 January 2020

Introduction

1. In March 2019, the Workgroup to Review the Taking of Informed Consent and the Singapore Medical Council's ("**SMC**") Disciplinary Process (the "**Workgroup**") was constituted, amidst public outcry over disciplinary proceedings against Dr Lim Lian Arn and Dr Soo Shuenn Chiang.

2. On 3 December 2019, the Workgroup made public its comprehensive report, *inter alia*, recommending a proposed new test for the taking of informed consent, and measures to fine-tune the SMC disciplinary process.

3. This article summarises the salient recommendations by the Workgroup, and the rationales behind and intended effects of these recommendations.

Overview of the Workgroup

4. The Workgroup was appointed by the Ministry of Health ("**MOH**") on 13 March 2019, consisting of 12 members ranging from medical and legal practitioners to laypersons.

5. The Workgroup was tasked, *inter alia*, to undertake a comprehensive review of and to make comprehensive recommendations on: -

    a. the taking of informed consent by a medical practitioner from a patient; and

    b. the SMC disciplinary process as set out in the Medical Registration Act (Cap 174) – this includes the SMC's consideration of complaints and institution of the Disciplinary Tribunal ("**DT**").

6. The mode of review by the Workgroup involved canvassing the views of medical practitioners from different practices across the private and public healthcare settings.

7. The recommendations have since been accepted by the MOH. While some recommendations may be immediately incorporated into existing processes, others require legislative changes. It is expected that the proposals will fully be in place by the first half of this year.

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A new test for the standard of care expected of doctors in providing medical advice and the taking of informed consent

8. The Singapore Court's landmark decision of *Hii Chii Kok v Ooi Peng Jin London Lucien* [2017] 2 SLR 492 laid down the modified-Montgomery test as a guide on what was expected of medical professionals in providing information and medical advice to their patients.

9. Following the decision in *Hii Chii Kok*, many doctors faced difficulties in applying the more customised, patient-centric approach espoused in the case. More alarmingly, at the Workgroup's townhalls and engagement sessions, doctors highlighted that they started adopting defensive practices, providing patients with voluminous information on risks and alternatives, or even declining to offer certain treatments altogether, for fear of legal repercussions.

10. In light of this, the Workgroup's first main proposal, is the re-formulation of the modified-Montgomery test. It combines aspects of the *Bolam* test and *Bolitho* addendum (which was the position pre-*Hii Chii Kok*), and the patient-centric nature of the modified-Montgomery test: -

    a. A medical professional would have discharged his duty of care in the provision of medical advice to his patient, if the said advice is supported by a respectable body of medical opinion.

    b. The respectable body of medical opinion must also consider whether the medical professional gave / arranged to give to the patient relevant and material information that the patient would reasonably require to make informed decisions on his treatment. Additionally, the said information would have to be information the medical professional knows / ought to have known would be relevant and material to the patient.

    c. However, such peer professional opinion cannot be relied on if the Court determines that such opinion is illogical.

    d. The fact that there are differing opinions by a significant number of respected practitioners in the relevant field does not in itself mean that the peer professional opinion sought to be relied on should be disregarded as evidence of support of a respectable body of medical opinion.

11. The aforementioned formulation brings peer professional opinion back as a gatekeeper in determining the relevant legal standard for the provision of medical advice by doctors. This was in part due to the Workgroup's observation that in Singapore's Asian context, patients still look to doctors for advice, and many prefer to be passive recipients of information. However, in not disregarding the intention behind the modified-Montgomery test, such peer professional opinion has to informed by the specific patient's need for information.

12. Accordingly, the implications of the Workgroup's recommended re-formulation of the test, are that: -

    a. doctors have to give due consideration and weight to patient autonomy, to meet the requisite standard of care. This would involve giving patients an opportunity to ask questions and have their concerns addressed;

b. where a patient has shared a specific concern / query, it would ordinarily be unreasonable for the doctor to withhold information (although possibly immaterial), and the doctor would have to advise on the corresponding risks; and

c. there remain reasonable justifications for non-disclosure of material information to the patients, including situations of emergency or therapeutic privilege, where withholding information would be necessary to prevent harm to the patient. Even so, such situations remain to be assessed by reference to the respectable body of medical opinion.

Improvements to the SMC disciplinary process

13. The second area in which the Workgroup made notable recommendations, pertains to the SMC disciplinary process. The recommendations by the Workgroup draw inspiration from the disciplinary process of the Law Society of Singapore, and best practices of medical disciplinary bodies in other Commonwealth jurisdictions.

14. The above was prompted by the Workgroup's findings that the current SMC disciplinary process was plagued by unmeritorious complaints, inefficiency and inaptitude, and concerns surrounding independence of the various SMC constituents.

Establishment of an Inquiry Committee

15. Currently, the SMC disciplinary process starts with a written complaint lodged with the SMC. A Complaints Committee ("**CC**") is then appointed to conduct an inquiry into the complaint. The CC decides if the complaint is to be dismissed, referred for mediation, or investigated. If the complaint is investigated, the CC will then decide whether to refer the complaint for a formal inquiry before a DT.

16. The Workgroup recommends establishing a new mechanism known as the Inquiry Committee ("**IC**"), having the focused role of sieving out unmeritorious complaints at the initial stages of the complaint. The IC may require a doctor to submit a response to the complaint and set a deadline for this (recommended to be 3 weeks). Additionally, it is envisaged that the IC be given the power to request for information.

17. The IC will then decide whether the complaint is to be dismissed with reasons, or direct the issuance of a letter of advice, for the case to go to mediation, or that it be referred to a CC and for investigations to commence.

More stringent timelines

18. With respect to the time taken for the SMC disciplinary process, the Workgroup identified that an ideal situation would be for the overall timeline from the receipt of a complaint to the decision of the DT to not extend beyond 18 months.

19. In line with this, the Workgroup made the following recommendations: -

    a. The creation of a Disciplinary Committee ("**DC**") to oversee the conduct of DT hearings;

    b. The Chairman of the Complaints Panel has the power to grant, for the completion of CC investigations, a single extension of time, not beyond 6 months from the date of appointment of the CC;

    c. At the DT stage, the President of the DC can grant a first extension of a maximum of 3 months;

    d. Further extensions of time at the CC and DT stages can be made through *ex parte* applications by the CC or DT to the High Court, for a maximum of 3 months at a time – suggested factors for consideration include the complexity of the matter, the reasonableness of the time period sought, and the reasons justifying the extension of time.

Introduction of a time bar for complaints

20. The Workgroup further recommended that complaints touching on doctors' conduct from more than 6 years since the complainant had knowledge about the circumstances giving rise to the complaint, should not be referred to the Chairman of the Complaints Panel, unless it is considered to be in the public interest to do so. This militates against the situation in which the doctor cannot properly defend himself against the complaint, for reasons such as loss of evidence.

Costs

21. Further, the Workgroup proposed that the IC and CC be empowered to make costs orders against complainants who lodge frivolous or vexatious complaints. In the Workgroup's view, this would not unnecessarily create barriers to the ease of lodgement of complaints, given that such orders would be reserved for the most frivolous or vexatious cases.

22. The Workgroup also recommended that it be expressly provided in legislation, that costs can be awarded against the SMC, where this is "just and reasonable" in the circumstances, particularly where there has been injustice or prejudice to the medical practitioner in question.

Conclusion

23. The aforementioned recommendations by the Workgroup are part of an array of measures developed drawing from past instances of "miscarriages of justice", and the extensive views of the medical and legal professions.

24. The recommendations, once implemented, will pave the way for a clearer standard for doctors in their provision of medical advice and taking of informed consent, and serve to refine the SMC disciplinary process to make it fairer, more consistent, and transparent. It is hoped that the recommendations will help restore trust and confidence in the medical profession's self-regulated system, with patients' safety, interests, and welfare at the heart of it all.

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