

Submission by the Health Practitioner Registration Boards¹

on the exposure draft of the *Health Practitioner Regulation National Law Bill*

Introduction

This submission is made on behalf of all twelve health practitioner registration Boards except where otherwise specified. The Boards are committed to the establishment of the national registration and accreditation scheme and their comments are directed toward ensuring that the national scheme can be implemented and administered efficiently and effectively, and that any administrative law issues are identified and rectified.

The Boards are concerned that, as currently drafted, the legislation has a number of fundamental flaws which must be addressed prior to its introduction to Parliament. In particular, the Boards are concerned that the legislative framework underpinning investigations, management of impaired registrants, management of performance issues and for the prosecution of disciplinary actions has significant shortcomings and without major amendment, will be inadequate for the purposes for which it is intended, and possibly would be unworkable.

In the absence of addressing these matters, public protection would be significantly downgraded, complex linear and cumbersome processes will be required and Board decision making will be open to legal challenge with the associated cost of such challenges.

In submitting on the draft legislation, the Boards will comment on those provisions where they have identified amendments will be necessary, and they will propose amendments to address the identified issues. These comments on specific provisions should not be taken as indicating that the problems with the legislation can be remedied by addressing particular points, without significant revision of the entire legislative framework. In fact, there are risks in taking such an approach, particularly as members of the implementation team have indicated there will be no further round of consultation.

To address these risks, the Boards seek commitment from the implementation team and the Governance Committee to a further process for reviewing a second draft of the legislation. In recognition of the timeframes the Boards are not proposing a further open process of consultation but rather the establishment of a small expert group of current Board CEOs to work closely with the instructing officer and implementation team.

Part 4 Division 4 – Public Interest Assessor

In this section, the Boards raise their general concerns about the role of the public interest assessor, the potential appointment of an independent assessor as an alternative to this role and the ongoing relationship with the local health complaints entity.

Representatives of the implementation project team at the Queensland state fora indicated there would be a public interest assessor appointed under the Act or the Queensland Minister would appoint the local complaints entity (HQCC) as the independent assessor. The Boards

¹ Chiropractors Board of Queensland, Dental Board of Queensland, Dental Technicians and Dental Prosthetists Board of Queensland, Medical Radiation Technologists Board of Queensland, Occupational Therapists Board of Queensland, Optometrists Board of Queensland, Osteopaths Board of Queensland, Pharmacists Board of Queensland, Physiotherapists Board of Queensland, Podiatrists Board of Queensland, Psychologists Board of Queensland, and Speech Pathologists Board of Queensland.

are very concerned that the policy underpinning each alternative is flawed and that the proposal was not aired in the consultation which informed drafting of this legislation; the legislation itself does not clearly articulate the policy intent in establishing a public interest assessor role or the alternative appointment of an independent assessor. In this vacuum the Boards have identified a number of problems with the alternatives available. These are detailed below.

Alternative 1 – Appointment of a public interest assessor

The position assumes the current powers of the HQCC. In this regard, current legislation requires the Boards to: (a) consult with the HQCC about consumer complaints (as differentiated from employer/ peer complaints) and to reach agreement about what action to take in relation to the complaint; and (b) provide the HQCC with a copy of all investigation reports and take into account in finalising the decision about that investigation the views and recommendations of the HQCC.

The position also assumes these powers with regard to all other complaints including the new mandatory reporting category. If the policy intent is to somehow increase confidence of consumers in how Boards deal with complaints it is flawed for a number of reasons, being: (a) the public interest assessor under the legislation is required to make decisions consistent with the objects of the Act, that is, decisions that are in the public interest rather than in the personal interest for each individual consumer who complains; and (b) since the establishment of the HQCC in 2006 the HQCC has made no negative comment or recommendation about any investigation undertaken by a Board serviced by the Office of Health Practitioner Registration Boards.

The establishment of one position to review all complaints (potentially from all jurisdictions with the exception of NSW) will create a bottleneck and result in significant delays to the assessment of complaints and consideration of investigation reports. This cannot be in the public interest and could only be addressed by appointing an increased number of staff to support the role of the public interest assessor either nationally and/or at the state level.

The costs for establishing this role and its support infrastructure will be borne by the professions through increases to registration fees. This will be in addition to increases in costs ensuing from other new requirements in the legislation such as mandatory reporting, student registration, mandatory criminal history screening, etc.

The role may also reduce the effectiveness of the HQCC in its quality charter given National Boards are not required by the legislation to provide the local health complaints entity with copies of all investigation reports. It also reduces the other aspects of the HQCC role in relation to intervening and becoming a party to proceedings before a disciplinary body where necessary. As such intervention has occurred only once since the establishment of a health complaints entity in 1991 this loss may not be a matter of significance. There is also an argument that investigations may be duplicated with the HQCC also investigating a matter being investigated by a National Board.

These matters, however, could be addressed by some minor amendment to the legislation about the provision of investigation reports and through the development of sound communication between the state office and the HQCC about what action is being taken in relation to each complaint at various stages, for example, at preliminary assessment, following investigation, following performance assessment, following health assessment and following any Tribunal action. To put such matters beyond doubt the legislation might provide

that the provision of such information is not in breach of the confidentiality obligations under s.262.

Alternative 2 – Appointment of the HQCC as the independent assessor

The HQCC powers would be extended beyond their resolution and conciliation role in regard to consumer complaints. In this regard the HQCC would also be required to assess peer/ employer complaints about a wide range of conduct and competence issues. This may be inconsistent with the policy for establishment of a health complaints entity in Queensland, particularly with regard to the intent of ss.165 and 241, which provide where agreement is not reached for the more serious action to be initiated.

The extension of these powers is established without any direct governor on the application of the powers. This could result in significant cost imposts being placed on the national agency and Boards in a number of circumstances. For example, the costs of investigation which may not be necessary, the costs of a prosecution before a Tribunal which fails, and a cost order is imposed, etc. It may also lead to some cost shifting between the HQCC, a government funded organisation with the powers to investigate registrants, and a profession funded agency also with the powers to investigate registrants.

Options

There appear to be three options open to address the issues raised above as follows.

Option 1: Amend the draft legislation to incorporate the concept of notifications and limit the role of the public interest assessor to that of consumer complaints.

Option 2: Amend the draft legislation to remove the public interest assessor and to utilise Bill C to maintain the current relationship between the HQCC as the local complaints entity and the National Boards. The Boards note this option is similar to the maintenance of a local Tribunal and was the expected approach articulated in all previous documents issued as the basis of consultation.

Option 3: Progress the legislation as currently drafted.

The Boards support the above options in that order of preference. In regard to Option 1, the Boards note that should this be progressed there will be no significant differentiation between the roles of the public interest assessor or HQCC as the appointed independent assessor and, as such, appointment of either alternative could be progressed with minimal problems.

Part 5 – National Boards

Section 50 – Powers of the National Boards

This provision purports to provide a National Board with the powers necessary to enable it to perform its functions. While generally this is the case, it is questionable at law whether a body which is not established as a legal entity under the legislation can become a party to legal proceedings (for example, legal proceedings for the purposes of ss.128, 129, 131, 171, etc.).

The Boards submit that this issue must be clarified, and rectified if advice is received confirming that the Boards cannot be a party to a legal proceedings.

Part 6 - Accreditation

Section 59 – Definition – accreditation function

The definition as stated limits the functions of an accreditation body recognised through the legislation. There are two issues in relation to the definition. First, under subsection (c) the power of the accreditation body is restricted to assessing authorities in other countries which accredit programs of study. The provision does not provide a power for the accreditation body to also assess the examinations conducted by foreign authorities. In the absence of such a power initiatives such as the competent authority model introduced by medical boards and currently being considered by dental boards will not be enabled.

Second, under subsection (d) the reference to ‘overseeing’ appears to limit the accreditation body’s power to ‘conduct or undertake examinations’. In addition, the power to ‘oversee’ examinations appears to be the equivalent power provided to a National Board under s.49(d).

The Boards submit that both subsections (c) and (d) be amended as discussed above.

Section 63 – Accreditation process to be published

This provision and a number of others appear to legally require each of the National Boards to establish a website. This would be ineffective in both terms of cost and efficiency. As such, references to the website should be amended to reflect each National Board having a web presence through the national agency.

The Boards submit that the provisions referring to a National Board website be amended as discussed above, either expressly or by definition.

Section 66(5) – Accreditation of programs of study

The provision currently provides for a mechanism of internal review but assumes that an accreditation body delegates its decision making for accreditation. In the absence of an amendment, an internal review mechanism may not be possible or, alternatively, it would require accreditation bodies to make significant changes in their current processes. It is more likely, however, that an internal review mechanism would not be possible as there is no power of delegation provided by the draft legislation to an accreditation body which will enable it to delegate decision making about accreditation.

The Boards submit that this matter could be addressed by referring in subsection (5) to ‘the person who conducted the review which recommended accreditation subject to conditions, or refusal of accreditation’.

Section 67 – Approval of accredited programs of study

While an accreditation authority may accredit a program of study, it is the national board under s.67 which gives approval for the purposes of registration. Section 66 provides for an internal review mechanism if an accreditation body refuses to accredit. However, there is no equivalent review process if a National Board determines it will not approve an accredited program of study for the purposes of registration. A Board refusal in these circumstances may be subject to judicial review but this would be a costly imposition on the provider of the program and on the Board.

The Boards submit that a mechanism of review, whether it be internal or on appeal, should be considered in the interests of cost, efficiency and of natural justice.

Section 68(3) – Accreditation authority to monitor approved courses of study

The provision as currently constructed provides that even for minor breaches of accreditation standards the accreditation authority **must** revoke the accreditation of the program of study. In addition, the legislation is silent on whether a National Board must consider such a revocation and determine whether its approval of the program of study should also be revoked. While it could be argued that revocation removes the basis of approval and thus does not require a decision of a National Board, the inclusion of conditional accreditation may require this matter to be revisited.

In the interests of quality processes and cost efficiency, the Boards submit that the legislation should provide an option for an accreditation body to impose conditions on accreditation to enable breaches to be rectified as an alternative to immediate revocation. In such instances a National Board should be notified and empowered to consider continuation of its approval of the program of study for the purpose of registration.

Part 7 – Registration of health practitioners

Section 69 – Eligibility for general registration and Section 70 – Qualifications for general registration

Under s.69(1) to be eligible for registration, among other mandatory requirements, a person must hold an approved qualification or one that the National Board considers to be substantially equivalent to an approved qualification.

The legislation also provides for a Board to require an examination which could assist it in determining equivalence over time for non approved courses. However, in the absence of recognising the examination result as a qualification, it is arguable that overseas qualified applicants who successfully complete an examination or assessment for general registration will still not be able to demonstrate that they have an approved qualification under s.70(a) or that the qualification is substantially equivalent or based on similar competencies under s.70(b).

It also may have the unintended consequences of requiring all overseas applicants to first apply for registration to be assessed by the Board in order that the Board can determine non equivalence and require them to undergo the examination.

The Boards propose that both matters could be resolved by including under s.70 an additional subsection which provides that a person is qualified for general registration if they have successfully completed an examination or assessment conducted by an authority approved by the Board under s.71.

Similar problems arise in ss.75 and 76 for specialist registration and could be resolved in a similar way.

Section 73 – Professional indemnity insurance arrangements

The professional indemnity insurance arrangements as required under this section only relate to general registration. As such a National Board can only determine whether the insurance arrangements are 'appropriate for the purposes of registering the individual in a health

profession'. Professional indemnity insurance arrangements are not required to be considered by a National Board for the purposes of endorsement of registration. As such, insurance arrangements may not be appropriate to the scope of practice being undertaken by registrants. This is particularly the case with nurse and midwife practitioners.

The Boards submit that this matter could be addressed by amending s.73(1)(b) to provide for a National Board to consider whether the type and level of cover are sufficient for any endorsements to that registration. Alternatively, a provision equivalent to subsections 69(1)(d), 75(1)(d), 80(1)(c) and 83(1)(d) could be included in s.117.

Section 80 – Provisional registration

Section 80 as currently constructed is wide enough to cater for the provision of internship programs for professions (currently: medicine, pharmacy and psychology, and from 2012, medical radiation technology), and for those re-entering the profession after a period of non practice. However, the Boards have a number of concerns that the legislation as constructed will provide insufficient power to regulate programs of supervised practice in the public interest. The current construction also creates a number of potential natural justice issues for the applicant.

First, the legislation provides no head of power for the Board to determine whether a supervised practice program is appropriately developed and implemented; conducted in suitable places; and that supervisors are appropriately qualified. While a number of these matters may be addressed through a registration standard, it is questionable whether such a standard can require those other than an applicant or registrant to comply with the requirements of the standard. Additionally, in the absence of a head of power for approval of programs, a National Board will be unable to delegate this activity to an accreditation body (and neither does the accreditation body have the power to develop accreditation standards for this purpose or to assess supervised practice programs against such standards).

Second, while the provision refers to enabling an individual to complete a period of supervised practice, it does not establish 'standard conditions' (that is, those that are not reviewable/ appealable under the legislation) to enable such a supervision requirement or for the receipt of reports about satisfactory completion of the program. In the absence of standard conditions a National Board would be required to impose conditions pursuant to s.80(2) and the imposition of such conditions enliven review/ appeal rights.

Third, the provision is workable for those applicants who have recently completed their qualification. However, it fails to provide a mechanism for circumstances where an applicant has: (a) already commenced a program but not yet completed it; or (b) undertaken a similar but not fully equivalent program in another jurisdiction. In this regard, the provision does not enable an applicant to claim to have relevant experience in the profession which they believe equates to the completion or partial completion, of the required period of supervised practice. In such circumstances, the applicant would apply for general registration and if the National Board did not accept the experience as relevant or equivalent, it would appear that the only option available to the Board would be to refuse general registration and require the individual to make a further application for provisional registration. While this may seem bureaucratic, it protects the individual's right to review/ appeal the decision to refuse general registration.

The Boards submit that:

- a head of power be incorporated for the Boards to approve supervised practice programs, where they may be conducted and who they may be conducted by, including approval of the supervisor;
- the definition of accreditation standard in s.6 and the definition of accreditation function in s.59(b) be amended to enable the Board to delegate accreditation of supervised practice programs to accreditation bodies;
- standard conditions as discussed above be incorporated in the legislation; and
- provision be made under Division 1 (General Registration) to enable the Board, should the Board believe the applicant has not met all requirements of a supervised practice program, to grant registration under the provisional registration category (whether for a full or partial supervised practice program) and for the applicant to be given a right of review/ appeal.

Section 82 – Period of Provisional Registration

Section 82(1) provides that the period of provisional registration is not more than two years but under s.121 is renewable each year. Currently it is our experience that a proportion of interns (particularly those in female dominated professions) do not complete their supervised practice program within the two year period.

The Boards submit that rather than requiring such individuals to make fresh applications it would be more efficient and cost effective to establish a mechanism within this provision to enable the registrant to seek an extension for completion of the program up to a maximum period of five years.

Section 84 – Limited registration for post graduate training or supervised practice

The provision as currently constructed is inconsistent. Subsection (1) limits supervised practice for postgraduate purposes whereas subsection (2) establishes supervised practice as independent of postgraduate purposes.

The Boards submit that subsection (2) should be amended by inserting 'postgraduate' immediately prior to 'supervised practice'.

Section 85(5) – Limited registration for area of need

The guide to the exposure draft states that: 'National Boards will be required to consider applications for registration from practitioners seeking to work in a location *or position* that has been declared'. However, this provision limits declarations to locations and does not include the power to declare an area of need for a position or positions within the jurisdiction or part thereof.

The Boards submit that the provision be reviewed to ensure it is consistent with the policy intent expressed in the guide.

In addition, the Boards are very concerned that there are no standard conditions applied by the legislation requiring supervision, approved supervisors and the provision of supervision reports. In the absence of comprehensive non appealable conditions, the Boards would be placed in a position of having to impose conditions which are reviewable at the Board's expense. In addition, a category of registration enabling unconditional practice in an area of need for those who do not have an approved qualification and have not been assessed for the purposes of general registration would appear to be directly contrary to the public interest.

Section 89 – Limited registration not to be held for more than one purpose

The Boards previously submitted that to attract academics (who were not eligible for general registration and were registered for the purposes of teaching) it had been necessary to also enable them to concurrently hold registration to practise in an area of need. This enabled the universities to increase the remuneration offered as a recruitment and retention strategy. While it is generally accepted that some clinical practice is enabled under the teaching/research category, it is by the nature of the category limited to clinical practice for the purposes of teaching and research.

This matter has not been adequately addressed in the draft legislation. Clinical practice is necessary for two reasons: (a) it enables the registrant to engage in paid clinical practice to supplement their academic income; and (b) it enables the registrant to maintain clinical skills consistent with their obligations to the university.

To address these issues for the medical and dental professions, legislation in Queensland has enabled (medicine) or was being prepared to enable (dentistry) the registrant to practise the profession as long as such practice was in connection with their primary teaching role.

The Boards submit that s.87 be amended to enable a Board to approve that a registrant may practise the profession as long as such clinical practice is in connection with the registrant's primary teaching role.

Section 92 – Eligibility for non practising registration

This provision restricts Boards to only consider applications for non-practising registration from those that hold or have held registration under the new legislation, or have held registration under a participating jurisdiction's prior legislation. It does not enable Boards to consider applications from those who have held equivalent registration in another jurisdiction, and would require such individuals to successfully apply for general or specialist registration under the legislation. Given the small numbers that this would impact on the Boards at this time are not advocating any change, given the complexity such a change would require to determining both eligibility and suitability.

This may nevertheless be problematic as individuals applying for general or specialist registration would have to meet all requirements including the requirement for satisfactory professional indemnity insurance arrangements as well as any requirements stated in a registration standard for the health profession.

Section 93 – Period of non practising registration

This provision establishes a 12 month period of registration while s.121 provides the process for renewal of non practising registration. As currently constructed, s.124 will require non practising registrants to provide an annual statement about their continuing professional development and subject to further submissions to be made by the Boards about the continuing professional indemnity insurance arrangements. This appears to be inappropriate given s.101(1)(a) excludes non practising registrants from the requirement to complete the continuing professional development program required by the National Board and to only practise the profession when satisfactory professional indemnity insurance arrangements are in place.

The Boards submit that amendments should be made to remove this inconsistency. This is particularly the case as s.125: (a) enables a Board to refuse renewal if satisfactory professional indemnity insurance arrangements are not in place; and (b) excludes non practising registrants from the continuing conditions related to continuing professional development and professional indemnity insurance.

Section 94 – Application for registration

Section 94(3)(c) should not be a requirement. Consent is not necessary for the Board to undertake a criminal history screen. It should be noted that if the subsection is retained the lack of consent on the application form would not override the Board's obligations under s.96. Alternatively, a Board may consider the absence of consent as an incomplete application and refuse to process the application on that basis.

Section 96 – Power to check applicant's criminal history

In preparing for the implementation of mandatory criminal history screening in Queensland, the Boards were advised by the Queensland Police Service that it should not be discretionary within the legislation for the Commissioner to provide a criminal history report. If discretionary, other matters may impact on the information provided. As currently constructed, s.96(3) provides a discretion to CrimTrac or a Police Commissioner to give the requisite report.

The Boards submit that the provision should be amended to remove the discretion.

Section 101 – Conditions of registration

As currently constructed, s.101(1)(a) requires a Board to impose conditions about continuing professional development and professional indemnity insurance arrangements and s.101(1)(c) enables the Board to impose any other conditions it considers are necessary or desirable in the circumstances.

However, s.102(1) does not differentiate between the required s.101(1)(a) conditions and the optional s.101(1)(c) conditions. While there may be some differentiation related to an interpretation of the term 'a Board's decision' as it is stated in s.102, it is arguable that the Board will be required to give notice to every applicant about the required conditions and that this enlivens a right of review/ appeal.

The Boards submit that there must be a differentiation between the conditions required under s.101(1)(a) and the conditions imposed under s.101(1)(c). This differentiation will also be necessary should it be determined to incorporate standard conditions as proposed by the Board under the provisional registration category and consequential amendments will also be necessary to s.125.

The Boards also note that it should not be at the Board's discretion whether to decide a review period for a condition. This matter is addressed more fully under s.141 – Removal of condition or revocation of undertaking.

Section 103(1) – Failure to decide application

Section 98(1) provides for a National Board to require an applicant to do one or more things (for example, investigation, examination, health assessment) before it determines the application. Section 103(1) then establishes the timeframe in which a Board must finally

determine the application when the applicant has completed the requirement. If the Board exercises multiple powers under s.98 it is unclear under s.103(1) when the 90 day limit expires.

To remove any doubt the Boards submit that the 90 day period should expire when the later of the s.98 requirements have been met.

In addition, the section as currently drafted assumes that in all instances the matters will be finalised within 90 days of receiving the additional material required, be it an assessment report, health assessment report, examination result or investigation report.

The Boards submit that consideration should be given to including power for the Board to extend the 90 day period by giving notice to the applicant. Such an extension, of course, should not be repeatable and should be time limited to a further 30 days.

Section 106 – Registration of students

This provision does not provide for a National Board to undertake criminal history screening for the purposes of registering students. Therefore, it is possible that a student could have a significant criminal history that remains unknown to the Board until the individual applies for general or provisional registration. This is because the only obligation a student has to supply information about their criminal history is after they have become registered.

In these circumstances, if the previous criminal history is sufficiently serious, members of the public may be put at risk while the student has contact with them during clinical parts of the course. Effectively it could also mean that the student has undertaken a costly and time intensive program of study following which the Board would not register them on the basis that their criminal history demonstrated they were not suitable for registration.

The Boards understand that as it is proposed students will not have to apply for registration and will not be required to pay a registration fee, criminal history screening has been excluded on a cost basis. This does not seem to be an argument consistent with the public interest.

The Boards submit that legislation should require students to notify a Board about any criminal history including when such charges or convictions occurred prior to commencement of the individual as a student. A provision of this nature would enable the Boards to communicate an obligation of this nature to students and enable the Board's decision making under Part 8 as it relates to students.

A Board should also be empowered to undertake a criminal history screen on an audit basis for student registrations to provide for a deterrent against students not declaring as required.

Section 108 – Notice to be given student registration suspended or condition imposed

The Boards note that under Part 8 there is considerable confusion created about the power of a Board to accept complaints and deal with those complaints about students. Additionally, there does not appear to be any power for any disciplinary body to cancel a student's registration. As such, this provision does not require notification to be given to the person or the education provider in such circumstances. The Boards will be submitting that an order for cancellation of student registration should be a matter open to a disciplinary body under the legislation. Should this submission be accepted, further amendments will be required to this provision.

Section 109 – Report to national board of cessation of status as a student

Subsections (2), (3) and (4) are incorrectly included as they refer to a notice given to the education provider whereas s.109(1) requires the education provider to give a notice to the Board. Subsection (5) will require renumbering and the Boards further submit that upon receiving a notice of a student's cessation it should be mandatory for a National Board to cancel the student's registration rather than discretionary.

Section 110 – Endorsement for scheduled medicines

There are a number of issues in relation to this provision. First, the provision enables a National Board to endorse the registration of any registrant including those individuals with provisional, limited and non practising registration. Given these classes of registration are for those who are yet to demonstrate eligibility for general or specialist registration (or in the case of non practising registration where they are required not to practise the profession) the Boards submit that endorsements under this category should be restricted to those with general or specialist registration.

Second, as currently constructed, particularly with the inclusion of the note under subsection (1), it is arguable that a National Board will have to endorse all registrants for scheduled medicines in order to enliven their authority under the relevant participating jurisdictions' drugs and poisons legislation. In Queensland, such legislation recognises registration categories as enlivening authorities for individuals so registered to administer, obtain, possess, prescribe, sell, supply or use scheduled medicines.

If the intention of the draft legislation is for this provision to be used to extend authorities above those already provided in the participating jurisdictions' drugs and poisons legislation, this should be clearly stated.

Sections 111 and 112 – Endorsement for nurse and midwifery practitioners

Consistent with the argument posited for s.110 above, this endorsement should be restricted to those holding general registration.

Section 124 – Annual statement

The annual statement to be provided with an application for renewal does not include information about continuing professional indemnity insurance arrangements. In particular, it does not require the applicant to advise the Board if professional indemnity insurance has been refused or withdrawn by an insurance provider. This is inconsistent with s.125(2)(a) which provides for a Board to refuse to grant the renewal on the basis that there are not satisfactory professional indemnity insurance arrangements in place.

Also the annual statement does not require an applicant detail any change in the applicant's registration status in another jurisdiction as a result of disciplinary, performance or impairment proceedings. This should be included in the public interest.

Section 125 - Decision about renewal

Section 125(3)(c) provides for the Board to impose conditions it considers necessary or desirable in the circumstances upon renewal of registration. The draft legislation does not provide for conditions applying immediately before renewal to continue in force upon renewal.

As such, the Board will be required to issue a new notice under subsection (5) which would enliven a further review/ appeal right.

The Boards submit that this section should be amended to provide that if a Board decides to renew an applicant's registration, the renewed registration is subject to the conditions attaching to the registration immediately before the decision takes effect.

It should also be noted that s.125(5) does not require a Board to give a reason for its decision to refuse to renew or to renew subject to conditions. This is not in the interests of natural justice and the Boards submit that such a requirement should be included in the provision.

Section 128 – Claims by persons as to registration

This section refers to claims by persons to be a registered health practitioner when they are not a registered health practitioner. The section requires the unregistered person to 'intentionally' or 'recklessly' make the claim.

In contrast, the various health practitioner registration Acts either mandate 'must not' or where knowledge is an element use 'knows or ought reasonably to know'. The registration Acts do not require an intent either specifically or by indifference (recklessly) to be established. The result is that a significantly higher threshold has been established for a Board to prove that an offence has been committed.

It is submitted that s.128 be amended to delete 'intentionally or recklessly' in the second line.

Section 129 – Restriction on use of titles

This section relates to the use of restricted titles. The various health practitioner registration Acts simply say that a person who is not a registrant under the relevant Act must not take or use a restricted title (as defined in the Act). Section 129 adds 'that could be reasonably understood to induce a belief that the person could be registered under this Law in the health profession'. The difference is not significant enough to take issue with but might be noted.

However, the subsection in the various registration Acts (eg s.121(4) *Chiropractors Registration Act 1999*) that a person must not use a restricted title in relation to another person who the first person knows, or ought reasonably to know, is not a registrant does not appear to be included in the draft.

It is submitted that s.129 should be amended to include as an offence provision that a person must not use a restricted title in relation to another person who the first person knows, or ought reasonably to know, is not a registrant.

The Medical Radiation Technologists Board further submits that the title 'magnetic resonance imaging practitioner' be included as a protected title. In Australia individuals utilizing this title have been radiographers who operate clinical machines on patients. It should be noted, however, that some universities have commenced courses and enrolled physicists, but those individuals do not use the title and only use the skills gained for research purposes.

The Australian Institute of Radiography has established an accreditation process for magnetic resonance imaging practitioners and requires them to be qualified as a radiographer before they are allowed to sit the required examination.

Section 131 – Claims by persons as to registration in divisions of register

This section refers to registered health practitioners claiming to be registered or qualified to practise in a division of a register that the practitioner is not registered in. The requirement here is that the Board must show that the relevant health practitioner 'knowingly' made the claim. Whilst there is no exactly equivalent section in the various health practitioner registration Acts the test is too high and as a minimum should be lowered to 'knowingly or recklessly' which is still consistent with a breach being considered a disciplinary offence.

It is submitted that s.131 should be amended to include after 'knowingly' where it appears in the clause 'or recklessly' and that the heading of the section be amended by replacing 'person' with 'registered health practitioner'.

Section 132 – Claims by persons as to registration in recognized specialty

This section refers to claims by persons to be a specialist health practitioner when they are not. The section requires the person who is not as specialist to 'intentionally' or 'recklessly' make the claim. In this regard the same comments and submissions apply as in relation to s. 128 above.

Section 133 – Restriction on use of specialist titles

This section refers to taking or using specialist titles. Interestingly this clause is prescriptive 'must not' without any qualification of 'intentionally' or 'recklessly'.

Section 134 – Claims by persons as to registration in recognized specialty

This section refers to registered health practitioners claiming to be registered or qualified to practise in a recognised specialty when they are not registered in the recognised specialty. (The heading to the clause again refers to 'persons'). The same comments apply here as were made in relation to clause 131.

It is submitted that s.134 be amended to include after 'knowingly' where it appears in the section 'or recklessly' and that the heading of the section be amended by replacing 'person' with 'registered health practitioner'.

General comment about title and practice protections

The draft legislation does not include: (a) any provision that a person must not hold out another person as being registered that the first person knows or ought reasonably to know is not registered (eg as in s.123 *Chiropractors Registration Act 1999*); and (b) any provision in relation to a registrant with conditions holding themselves out as being registered without the conditions or without any conditions (eg as in s.125 *Chiropractors Registration Act 1999*).

It is submitted that similar provisions should be included in the draft legislation.

Section 135 – Restricted dental acts

It is the submission of the Dental Board that 'dental technician' as referred to in s.135(1)(c) are not a separate regulated group under the national scheme and for clarity a definition should be included in the legislation. The Board further submits that the definition of restricted dental act should refer to irreversible procedures rather than performance of permanent procedures. The test of irreversibility has more clarity than that of permanence.

It is the submission of the Chiropractors Board and the Osteopaths Board that the definition of a restricted dental act may preclude chiropractors and osteopaths from a current standard practice, being temporomandibular joint adjustments. Such adjustments are aimed at correcting malpositions of the human jaw or associated structures with the aim of permanent realignment. To put this matter beyond doubt, the Boards submit that a relevant exemption for this practice be included under subsection (1).

Section 136 – Restrictions on prescription of optical appliances

The Optometrists Board of Queensland submitted a comprehensive and soundly argued objection to the proposal to extend the practice scope of the unregistered allied health field of practice of orthoptics, which would enable the prescribing of an optical appliance (ie. spectacles) by orthoptists. The Board's concerns centred on public safety based on the current level of orthoptist training and the low level of accountability of such unregulated persons. It is noted that a policy position has been taken in Bill B which would nevertheless provide such an extended role for orthoptists. Orthoptists would be able to prescribe unsupervised after a medical practitioner's referral. Importantly, the provision, as drafted, would not meet the minimum standards of public protection required of any of the regulated health professions.

The Board is firmly of the view that in keeping with the spirit of the legislation and the National Registration Scheme, and in order to refocus on the objective to ensure public safety, the reference to 'orthoptists' in s.136(1)(b) should be removed altogether. There is ample opportunity for orthoptists to be prescribed in the future for the purpose of being authorized to prescribe an optical appliance, by way of a regulation under s.136(1)(d), should the level of their training warrant such recognition. This change would consequently not require the definition of 'orthoptist'.

The provision as presently drafted would, in the Board's view, provide too few safeguards for prescribing of spectacles by orthoptists and their clinical contact with the public. While an orthoptist would be able to engage in such activity under supervision or in certain circumstances under s.136(1)(b)(ii), independent practice within any public hospital and public health, teaching or research facility appears to be envisaged in s.136(1)(b)(i).

Authorization of the engagement in a hitherto regulated field of professional practice by an unregulated group having only voluntary registration or membership of an association is in any case, an extraordinary feature in legislation otherwise concerned with professional regulation and public safety.

With regard to s.136(1)(c) the Board understands that optometry students do not take responsibility for the prescribing of optical appliances under any circumstances. Any clinical contact with a patient undertaken as part of an approved program of study for the optometry profession would be under supervision and the supervisor would take responsibility for any prescription that resulted.

The Board is also very concerned that public protection has not been achieved with regard to restrictions on prescription of optical appliances. Where supply of optical appliances does not rely on a prescription there is in fact no restriction to this high risk practice, particularly in relation to the supply of cosmetic contact lenses.

The Board submits that optical appliances should only be supplied on a basis that the supplier has received a prescription from an optometrist or a medical practitioner.

Use of restricted psychological tests

The following submission is made on behalf of the Psychologists Board of Queensland.

Background

The development and application of tests of intelligence, personality, psychopathology, attitudes, and behaviour is an area of professional practice unique to psychology. Psychological assessment using these tests is applied in the areas of health, education, forensics, the military, and industry. In the past, one of the drivers for the registration of psychologists was the protection of the public from the misuse of these tests recognising that misinterpretation can have life long damaging consequences for individuals. For this reason, publishers of certain psychological tests restrict their sale and use to registered psychologists only.

Most States and Territories except Queensland have tended to prevent the use of certain psychological tests tests by non-psychologists, relying on current legislation (South Australia) or related title or task protection (Tasmania, West Australia) or established practice from repealed legislation (Victoria, New South Wales). Currently this is not the case in Queensland, for instance. The consequences of this in Queensland have been exemplified by complaints received by Psychologists Board of Queensland (PBQ) from registered child psychologists concerning poor and misleading standards of reporting by Guidance Officers and from parents who claim their children have been tested inappropriately, inadequately and unprofessionally within the State Education Department by unregistered Guidance Officers. The Board has had to inform the parents that it may act only if registered psychologists have provided an inadequate service. Since the Guidance Officers are not psychologists and have not called themselves psychologists, PBQ cannot act.

The Australian Psychological Society (representing 17,000 registered psychologists in Australia) has written to PBQ pointing out that the policies of Queensland Education can place the psychologists whom they employ in breach of the Code of Ethics and Ethical Guidelines adopted by the PBQ if they endorse reports based on testing they have not performed. This situation needs resolving.

The absence of specific legislation in the Exposure Draft of Bill B to restrict certain psychological testing has the potential to similarly expose the public to harm and psychological distress.

Purpose of psychological testing

It may assist NRAIP to understand the variety of professional and public purposes which psychological testing serves:

1. Measurement of thinking and reasoning capacity using intelligence and /or specific cognitive tests by all psychologists;
2. Measurement of disturbed personality, behaviour and thinking and diagnosis of mental illness disorders by developmental and clinical psychologists;
3. Diagnosis of neuropathology by clinical neuropsychologists;
4. Identification and classification of intellectual disability and learning disorders using World Health Organisation standards by developmental/educational psychologists;
5. Identification of occupational/vocational potential by occupational psychologists;
6. Assessment of personal qualities and capacities (occupational and other psychologists).

Risks to the public

There are many serious risks to the public from not limiting these tests to trained psychologists both from misuse and freedom of access to these tests:

1. Misdiagnosis of serious and/or co-morbid psychological disorders (e.g. neuropathology, psychopathology, intellectual disability, developmental disorders);
2. Personal distress and life-long personal misperceptions from misinformation;
3. Poorly informed career and life decisions;
4. Threats to life opportunities and self esteem from misclassification;
5. Invalidation of diagnostic tools by public familiarity with the content of the tests. (Because of practice effects, many tests cannot be re-administered until at least one year later.)

Appropriate training needed to use psychological tests

The complexities and depth of psychological test construction and content needs to be fully understood before users can safely and professionally utilise them. The basic knowledge and training must include:

1. Understanding test construction for particular applications;
2. Specific training in the concepts and meaning of specificity, sensitivity, reliability and validity;
3. Understanding of the concepts and theory of intelligence, cognition, personality, behaviour, psychopathology, attitudes;
4. Measurement in psychology and familiarity with descriptive statistics and standardisation;
5. Ability to understand the underlying constructs of a test so as to interpret results accurately and validly;
6. Familiarity with the administration of a comprehensive range of tests;
7. Understanding of the discipline and context in which tests results are generally useful (psychiatry, neurology, education, paediatrics, industry, management, etc).

Request to modify Bill B

The exposure Draft of Bill B has a clause that provides the basis for necessary restrictions on the use of certain psychological tests. Clause 4 (2) (c) states that:

...restrictions on the practice of a health profession are to be imposed under the scheme only if it is necessary to ensure health services are provided safely and are of an appropriate quality

In accordance with these clauses (135-137), Subdivision 2 of Division 11 of Part 7 already contains specific restrictions on dental, optical, and spinal manipulation practices. In the interests of public safety, the Council of Psychologists Registration Boards, the Australian Psychologists Accreditation Council and the Australian Psychological Society request a similar inclusion on the use of certain psychological tests between clauses 137 and 138.

Suggested wording of the Clause:

Restrictions on the use of psychological tests

1. *A person must not perform an assessment of a child or adult using psychological tests restricted to registered psychologists, unless the person*
 - a. *is a registered psychologist*
 - b. *is a student who performs assessments under supervision in the course of activities undertaken as part of an approved program of study in psychology, or*
 - c. *is a person, or a member of a class of persons, prescribed under a regulation as being authorised to perform psychological assessments by the Psychology Board of Australia*
2. *Health practitioners utilising standardised health and clinical questionnaires, inventories, checklists and published tests of psychopathology to screen for health disorders and inform referrals for further assessment are not included in the restrictions under (1)*
3. *Other suitably trained professionals (e.g. specialist teachers) using unrestricted standardised tests of educational achievement, psychosocial attitudes and behaviour, vocational preferences are not included in the restrictions under (1).*

An additional item including a definition either here or in Clause 7 should read:

psychological tests means *published, standardised tests of intelligence, specific cognitive abilities, psychopathology and personality*

Section 138 – Issue of certificate of registration

It is unclear whether the mandatory conditions for continuing professional development and professional indemnity insurance are to be included in the certificate under subsection (3)(d). This matter should be clarified, particularly as the conditions do not apply to non practising registrants.

The Boards further submit that a certificate of registration under subsection (3) should also include an expiry date.

Subdivision 2 – Review of conditions and undertakings

The Boards are very concerned with regard to a number of fundamental issues about the imposition of conditions/ undertakings and their review.

First, there appears to be limited understanding about the difference between a condition (which is imposed by the Board) and an undertaking (which is an agreement entered into voluntarily with the Board by the registrant). Due to this lack of understanding undertakings are treated in exactly the same fashion as conditions in instances where the Board can unilaterally change undertakings or where a Board refuses to change or revoke an

undertaking. This enlivens rights of review/ appeal. Further confusion is created by, for example, s.191(3)(c) (and its equivalents elsewhere in the legislation) which appear to provide a right of review for any decision made under s.189 which includes actions taken under s.190 to enter into an undertaking.

More confusion is then created by s.243 which limits reviewable decisions to those actions taken by Boards under s.190 rather than the decision made under s.189. The confusion created needs to be addressed. Legal recognition of undertakings as a voluntary agreement with the same publication rules as conditions enables Boards to act in the public interest and protects their cost exposure from appeals. It also can demonstrate a registrant's insight and commitment to rehabilitation or improved professional performance. In the absence of agreement for an undertaking, of course, a Board can then rely on its power to impose conditions.

The Boards strongly submit that it is essential that redrafting be undertaken to treat undertakings as voluntary agreements which are not subject to review/ appeal. This will include at a minimum ss.139, 140, 141, 168, 173, 179, 190, 198 and 209.

Second, the right to change conditions under s.139(1) should not extend to 'standard conditions' concerning continuing professional development, professional indemnity insurance and that non practising registrants must not practise the profession. As previously submitted, there needs to be differentiation within the legislation between 'standard conditions' and conditions imposed by a Board.

Third, ss.140(3) and 141(3) preclude a Board from modifying or revoking an undertaking or condition during the review period. This inflexibility, which precludes a Board from dealing with any new information, is clearly not in the public interest and nor is it in the interests of natural justice. The Boards further submit that a Board should have the ability to review a condition or undertaking at any time. The restriction placed on the registrant is supported however.

Fourth, there are numerous provisions which provide a discretion to the Board (for example, ss.101(2), 118(2), etc.) when imposing a condition or agreeing to an undertaking for the Board to set a review period. In the interests of natural justice the Boards submit that this discretion should be removed and that the legislation requires the Board to determine a review period. Amendments of this nature may also require a change to the definition to incorporate a maximum period that the Board may impose, for example, five years.

Fifth, once imposed, conditions and undertakings will require monitoring. Given that there are no inspectorial provisions under the Act, there is no power provided to any individual to undertake such monitoring. While it might be argued an investigator is empowered to undertake such monitoring, the Boards are of the view that this is not the case for the following reasons: (a) a National Board is only empowered under s.211 to investigate a health practitioner about whom the Board has received a complaint (including a Board own motion complaint); and (b) Boards have previously received advice that investigators powers in relation to that matter cease when the investigation report has been provided to the Board. Adequate inspectorial powers are considered to be a necessity in the public interest to appropriately monitor ongoing compliance with conditions imposed and undertakings entered into.

Section 142(3) – Information about offences, clinical privileges and billing privileges

The Boards note that professional indemnity insurance will be a requirement for initial and ongoing registration. However, there is no obligation under s.142 for a registrant to notify a Board when insurance cover is withdrawn by the insurance provider or where their registration has been effected in another jurisdiction as a result of disciplinary, performance or impairment proceedings. The Boards submit that including these requirements in s.142(3) as additional relevant events would enhance a Board's ability to protect the public.

It is further noted that the relevant event under s.142(3)(a) requiring students to notify a Board if they are charged with or convicted of or the subject of the finding of guilt for an offence punishable by 12 months imprisonment or more is inconsistent with the grounds for a complaint under s.155(2)(a). This latter section establishes that a complaint may be made about a student on the basis that the student has been charged with an indictable offence or has been convicted or found guilty of an indictable offence.

The Boards further submit that consistency between the two provisions is required and, given the differing approaches to criminal sanctions in participating jurisdictions, the requirement in s.142(3)(a) should be used within s.155(2)(a).

Section 143 – Changing mailing address

Consideration should be given to extending this requirement to include other changes in particulars, primarily being a change of name. This will enable a Board to maintain an accurate public register. Any change of name should be supported by evidence acceptable to a Board.

Section 146 – Evidence of identity

The Boards note that under s.146(4), the strongest action that can be taken against a person who becomes fraudulently registered is to have disciplinary action taken against them, rather than a prosecution for an offence. While it is acknowledged that a complaint can be made to a participating jurisdiction's police service about criminal fraud, this does not provide any deterrent effect within the legislation against identity fraud.

It appears that the legislation is framed on the assumption that only qualified, registrable individuals engage in identity fraud. This problem is exacerbated as the legislation only provides one mechanism to deal with identity fraud and that is for the matter to be referred to the Tribunal for de-registration proceedings. The Boards note that the Tribunal is not specifically empowered to order a permanent cancellation of registration and a submission on this matter will be made under the relevant section.

The Boards submit that the deterrent effect against identity fraud has not been adequately addressed in the legislation and this matter should be reviewed. Consideration should also be given to empowering a Board to cancel registration where that registration resulted from the provision of false and misleading information. Such a provision would need to be supported by natural justice processes including a right of appeal.

It is also noted that under s.97 the Boards have powers at the time of application to enquire about qualifications, registration status and practice in a health profession. It is submitted that s.146 should be extended to enable the Boards to make such enquiries by notice at any time if it considers there are reasonable grounds for doing so about a registered health practitioner.

Section 147(3) – Criminal History Checking

In preparing for the implementation of mandatory criminal history screening in Queensland, the Boards were advised by the Queensland Police Service that it should not be discretionary within the legislation for the Commissioner to provide a criminal history report. If discretionary, other matters may impact on the information provided. As currently constructed, s.147(3) provides a discretion to CrimTrac or a Police Commissioner to give the requisite report.

The Boards submit that the provision should be amended to remove the discretion.

Part 8 – Complaints, performance, health and conduct

Section 150 - Part also applicable to former registered health practitioners

The Boards note that the provision is intended to make the complaint, performance and discipline sections of the Act applicable to formerly registered health practitioners. Section 150(3) provides that Part 8 other than Divisions 3, 5 and 8 applies to formally registered health practitioners. Unfortunately, Division 3 includes section 158, the provision which enables a Board to take action without having received a formal complaint. Clearly, a National Board should be empowered in relation to formerly registered health practitioners.

The Boards submit that s.150(2) should be amended to include a person who was registered under this law but is no longer registered and s.150(3) should be amended by moving s.150(8) to the end of Division 2.

Section 153 – How a complaint is made

As currently constructed, s.153(1)(a) would require a National Board to accept all complaints that they receive verbally whether such complaints were made in the heat of the moment or for which the details have not been confirmed. This could have significant cost and delay effects for assessment of complaints.

The Boards submit that while verbal complaints should be taken, there should also be a requirement included in the legislation for the complaint and its particulars to be documented by the national agency and confirmed in writing by the complainant. In the absence of such confirmation within a predetermined period of, say, 21 days, the legislation should further require that the complaint is taken to be withdrawn. Amendments of this nature will ensure that only verbal complaints that have been documented and confirmed in writing by the complainant will be assessed.

Section 155 – Grounds for complaint

The grounds for complaint do not mirror the definitions of unprofessional conduct, unsatisfactory professional performance and professional misconduct as documented in s.6 of the draft legislation.

The Boards submit that the grounds for complaint should be consistent with the relevant definitions and amendments should be made to achieve this.

Sections 156 and 157 – Mandatory reporting

The Boards note that there are no obligations placed on education providers or on registered health practitioners for the mandatory reporting of students who may be impaired or who

have been charged with or convicted of an offence as detailed in s.142(3). In the absence of a mandatory reporting obligation: (a) it is expected that education providers will continue to be placed in a legal quandary about whether they can inform the Board of these matters; and (b) registered health practitioners will not be provided with adequate guidance or protections in reporting students in these circumstances.

It is submitted by the Boards that it would be in the public interest for such reporting obligations to be included in the legislation.

Section 160 – National Board to give notice of receipt of complaint

The requirement to give notice to a registrant within 28 days is impractical, particularly given that a determination as to what action is to be taken on the complaint does not have to be made under s.164 for 60 days. This provision appears to provide a bureaucratic and costly approach.

The Boards submit that a better approach would be for a Board to be required to give notice: (a) when it seeks information from the registered health practitioner or student to whom the complaint relates to inform the preliminary assessment under s.163; or (b) otherwise within a reasonable period after a decision on the preliminary assessment has been made under s.164.

Section 165(4) – Agreement with independent assessor about complaint

The Boards note that the action which may be taken in relation to a complaint does not include the ability for a Board to refer the matter to another entity for action. There are matters that come before a Board as complaints which are more properly dealt with by other entities such as the jurisdictional police service or health department, for example. The Boards submit that this matter should be included as subsection (f) in the order of seriousness and subsections (f) and (g) to become (g) and (h).

This provision also sets out the scale of seriousness to be applied in determining an action to be taken for a complaint. This scale is then used to determine which is the more serious when agreement cannot be reached between the Board and the independent assessor as to the action to be taken.

A similar scale of seriousness is included in s.241(3) for the same purpose at the completion of an investigation. The Boards note that the second *most serious* action under s. 241(3) is to refer the complaint to the health complaints entity but referral to a health complaints entity is second *least serious* under s.165. The Boards submit that the order of seriousness that should apply is as detailed in s.165 with the amendments as proposed above.

Section 167(1) – Rejection of a complaint

It is noted that the power of rejection does not include the situation where the Board receives a complaint the subject matter of which has already been appropriately dealt with by the Board or another entity. A Board should not be required to assess a matter it has already dealt with or to take action in a matter where it has determined that appropriate intervention has occurred elsewhere. The latter of these matters will also reduce entity shopping.

Section 168 - Immediate suspension or imposition of condition

The Boards hold serious concerns about a number of matters in this provision. First, the definition in s.168(1)(a) raises the threshold for action as compared to the equivalent provision in current legislation. In this regard the threshold has been raised from 'potential serious risk' to 'serious risk'. The Boards are not satisfied that they will be able to take protective action appropriate to the circumstances if the higher threshold applies. If they take inappropriate action, of course, their decision making is subject to appeal.

It is submitted that s.168(1)(a) be amended to include 'potential' immediately prior to the words 'serious risk'.

Second, a Board is not empowered under s.168(1)(a) to take immediate action against a registrant who may be impaired. This is patently not in the public interest as significantly impaired registered health practitioners can pose serious risks to clients.

It is submitted that s.168(1) be amended to include after 'misconduct' the words 'or has an impairment'.

Third, s.168(1)(a) contemplates that action can be taken against a student if the person has behaved in a way that constitutes professional misconduct, unsatisfactory professional conduct or unsatisfactory professional performance. This is inconsistent with s.142(3) which provides that the grounds for complaints to be made against a student only include relevant offences and impairment.

It is submitted that a provision in addition to s.168(1) be included to specifically provide for immediate action against a student to match the grounds for complaint against the student specified in s.142(3).

Fourth, s.168(4) establishes the notice requirements that a National Board must give to the registered health practitioner and complainant if immediate action is taken by the Board. It does not specify with certainty what actions the Board can take and also refers to the requirement for the Board to give notice about the review process for the decision. However, a s.168 decision to suspend or impose conditions is not a reviewable decision under s.243 but rather is an appealable decision under s.246.

It is submitted that s.168(4) be amended to: (a) change the reference from 'review', to 'appeal'; (b) make it clear what actions are available to a Board following the suspension or imposition of conditions for both registered health practitioners (including investigate, refer directly to Tribunal, refer directly to health panel) and students (see s.108).

Fifth, it is unclear what action would be available to a National Board when it is dealing with a student who has been convicted of a serious indictable offence of a nature which, if the student was a registered health practitioner, the Board would be seeking permanent cancellation of registration. As currently constructed, the only action available to the Board is for the student to be suspended. While the decision to suspend is appealable, if such an appeal is upheld the student could be suspended forever without any further rights. This policy inconsistency is concerning, particularly as the conviction would have to be treated as misconduct of some nature whereas the grounds for complaint are limited to indictable offences and impairment.

Given the above noted matters it should be clarified within the legislation whether a student should be subject to an order of cancellation by the Tribunal.

Sixth, the time limit of three months in paragraphs (c), (d) and (e) are impractical and should be reconsidered. As currently constructed, the subsections allow a period of only three months for the suspension or conditions to be imposed and it would be a very rare case where an investigation or hearing by a disciplinary body is completed in a period less than six months. In addition, subsection (c) assumes that if the matter is dealt with as a professional standards matter under Division 7, it will be referred to a professional standards panel. However, Division 7 does not automatically require a matter to be referred to a panel for it to be dealt with. Also, subsection (a) refers to the decision being set aside on review. This is incorrect as a s.168 decision to suspend or impose conditions is not a reviewable decision under s.243 but is rather an appealable decision under s.246. This is also confused by s.243(f) enabling a review if a National Board imposes a condition while s.246(a) specifies that the decision is appealable if it is made by a National Board under s.168.

Given the abovenoted factors, s.168(6) should incorporate a time limit of at least six months and should clearly specify when the decision continues to have effect. An example of the latter is as follows:

If the decision is to suspend, or impose a condition on, the health practitioner's or student's registration, the decision continues to have effect: (a) until the decision is set aside by the Tribunal on appeal; or (b) if the matter relates to a registered health practitioner and is referable to a responsible Tribunal until the Tribunal decides the matter; or (c) if the matter relates to a registered health practitioner and is dealt with by a professional standards panel under Division 7 or a health panel under Division 8, until the day the panel decides the matter; or (d) if the matter relates to a student and is dealt with as a health matter under Division 8, until the day the panel decides the matter (this may also need to incorporate a Tribunal decision dependent on the response to the Boards' submissions as detailed above); or (e) if the Board makes a decision to end the suspension, modify or remove the conditions, whether, in the case of a health practitioner, before or after the Board has conducted an investigation, the Board makes the decision.

General comment – the form of the amendment must ensure that the power is not lost from s.168 for a Board to lift a suspension or modify or remove a condition at any time and not have to await the outcome of investigation or a Tribunal or panel order.

Section 170(2)(b) – Complaint to be referred to the responsible tribunal

As currently constructed, the provision requires a Board, where the conduct of the practitioner occurred in more than one jurisdiction, to refer the matters to the responsible Tribunal for the participating jurisdiction in which the practitioner's mailing address is located. This may have unintended consequences of significantly increasing the costs of prosecuting the matter in those circumstances where the majority of witnesses are domiciled in another jurisdiction.

A better approach may be for the Board to determine the most cost effective Tribunal in which to prosecute the matter and enable the Tribunal to hear applications to the contrary for transferring a matter to a Tribunal in another jurisdiction. This would not be dissimilar to the processes undertaken in District Court jurisdictions.

Section 171 – Parties to the proceedings

As previously submitted, the Boards are concerned that as the National Boards are not legal entities, it may not be possible for them to be a party to a legal proceeding. This matter requires senior counsel advice to inform any amendments.

Section 172 – Decision

There are a number of matters the Boards wish to raise about this section. First, subsection (1) does not enable the Tribunal to make multiple decisions given the use of ‘or’ at the end of subsections (a), (b), (c) and (d). There are occasions where multiple charges are referred to a Tribunal and different findings can be made about each.

The Boards submit that this matter could be appropriately addressed by including the words ‘one or more of the following’ after the word ‘decide’ in subsection (1).

Second, there is no ability for the Tribunal to make a finding that a registered health practitioner is impaired. While this is generally a matter for a health panel, if a registrant refuses to follow a direction of the health panel as to a health assessment, the panel may refer the matter to the Tribunal. Currently, the only option open to the Tribunal is to review the action of the registrant in refusing.

The Boards submit that if the impairment is to be dealt with in a cost effective and less bureaucratic way the Tribunal should be empowered both to order health assessments and to make findings about impairment in cases where the matter has been referred to them by a panel.

Third, the Boards are of the view that the Tribunal as constituted under legislation will be a competent disciplinary body to determine whether there are any issues arising from a complaint. It is therefore incongruous to suggest that after a Tribunal dismisses a complaint as the outcome of a disciplinary hearing, the complaint can later be considered part of a pattern of conduct. The Boards submit that subsection (2) should be deleted.

Section 173 – Action that may be taken by a Tribunal

Again, the Boards wish to raise a number of matters in regard to this provision. First, subsection (1) does not enable the Tribunal to take multiple actions given the use of ‘or’ at the end of each of the subsections. There are occasions where multiple charges are referred to a Tribunal and different findings could be made on each and it is clear that the Tribunal would on many occasions wish to invoke more than one of the actions to adequately deal with a registered health practitioner. For example, the Tribunal may wish to suspend registration for a period of three months and concurrently establish conditions to be imposed by a National Board on the registration when the period of suspension is complete.

The Boards submit that this matter could be appropriately addressed by including the words ‘one or more of the following’ after the word ‘must’ in subsection (1) and by modifying the stem to also include decisions referred to in s.172(e), (f) and (g).

Second, the provision does not include the power for the Tribunal to approve an undertaking entered into by a registered health practitioner with a Board yet in the draft legislation a professional standards panel is empowered to do so - see s.190(1). This is an important power for a Tribunal to have as it often assists in facilitating a proposed consent order for consideration by the Tribunal as an independent decision maker.

The Boards submit that s.173 should be amended to include that a Tribunal can approve an undertaking entered into by a registered health practitioner with a Board.

Third, there is no power provided under the provision for the Tribunal to award costs whereas this is provided for in the Division about appeals to the Tribunal. The Boards submit that, consistent with normal judicial and quasi judicial practices, costs should follow the event for both disciplinary and appeal matters. As such, s.173 should be amended to include in it a sub clause consistent with s.248 of the draft legislation.

Fourth, the provision enables the Tribunal to cancel registration and to disqualify the practitioner from applying for registration for a specified period. It should not be to the discretion of the Tribunal whether to specify a period or not and for certainty, it should be made clear that the Tribunal can, in relevant cases, order that the practitioner never again be registered by the Board.

The Boards therefore submit that s.173(3) should be amended to make it clear that the Tribunal must decide the period the practitioner cannot be registered by the Board and include words to remove any doubt that the Tribunal can order that a practitioner never again be registered by a Board.

Division 7 – Professional standards matters – general comment

As currently constructed, it appears from reading this Division in conjunction with s.165(4), there is no ability for a Board to find a practitioner has behaved in a way that constitutes unsatisfactory professional performance or unprofessional conduct or to refer a matter directly to a professional standards panel without first going through the performance assessment process referred to in Subdivision 1 of Division 7. Clearly there will be matters which are not performance or competency based where lower level disciplinary action is indicated but a performance assessment is either not appropriate or is unnecessary. A Board's ability to take a matter straight to a professional standards panel may be particularly appropriate in respect of complaints involving health practitioners who are no longer registered. The same problem with regard to referral directly to a panel also arises at the completion of an investigation – see s.241(3).

The Boards submit that an appropriate amendment is necessary to make it clear that a Board has a power to refer a matter to the professional standards panel either after assessment or after investigation without going through a performance assessment.

In addition, the usual process when conducting a performance assessment is to rule out impairment (usually cognitive) first. There is no provision for this in the draft. The only way to deal with all such matters is to use the processes established under Division 8. To enable a non bureaucratic approach, the Boards submit that the power to direct a registrant to undertake a health assessment be provided for under this Division.

The division also lacks a head of power enabling the assessor to source other necessary information to complete an assessment. In this regard, the Boards submit that an assessor should be empowered to undertake such matters as review patient records held and created by the health practitioner being assessed. Not having the current power to undertake such assessments the Boards also recommend that submissions from such bodies as the Medical Board of NSW be considered carefully given that authority's experience in performance assessment.

Section 174(5) – Requirement for performance assessment

Please refer to comments made under s.170(2)(b) above. The Boards submit that this provision requires a consistent amendment with that proposed for s.170(2)(b).

Section 175 – Appointment of assessor to carry out assessment

As currently constructed, the section limits a National Board to the appointment of only one assessor. This appears overly restrictive and does not cater for circumstances where more than one assessor may be necessary. The Boards submit that provision be made for the appointment of one or more assessors.

Section 178(1) – National Boards decision

Subsection (1) refers to a student whereas performance assessments do not apply to students. The Boards submit that reference to student in this section be deleted.

Section 179 – Action that may be taken by National Board at end of proceeding

Again, the Boards wish to raise a number of matters in regard to this provision. First, subsection (1) does not enable the Board to make multiple decisions given the use of 'or' at the end of each of the subsections. There are occasions where multiple decisions may be necessary, for example, counselling and the acceptance of an undertaking or imposition of conditions.

The Boards submit that this matter could be appropriately addressed by including the words 'one or more of the following' after the word 'decide' in subsection (1).

Second, s.179(1)(b) brings with it the same issue as dealt with under s.170(2)(b) above. The Boards submit that this provision requires a consistent amendment with that proposed for s.170(2)(b).

Third, s.179(1)(c) provides that if a Board decides that a practitioner's registration was, or may have been, improperly obtained because the practitioner or someone else gave the Board information or a document that was false or misleading, it may investigate, refer to another body or refer to a professional standards panel. However, s.170(1)(b) provides that if the Board forms a reasonable belief that this scenario has occurred it must refer the matter to the Tribunal.

The Boards submit that s.179(1)(c) be amended to replace 'professional standards panel' with 'Tribunal' if, after consideration of the Boards submission in relation to s.146, it is determined not to give the National Boards a more direct power of cancellation.

Fourth, the draft legislation does not provide a requirement for notice of a Board's decisions under s.178 and s.179 to be given to the registrant and complainant. Where decisions of this nature are made by other bodies under the legislation, such notice is required. For example, see s.191.

Section 184 – Legal representation

The construction of the provision needs further consideration. This is because subsection (1) precludes a legal practitioner from appearing on behalf of the registrant whereas subclause (2) then allows that appearance in a limited way with the leave of the panel. The Boards

submit that s.184(1) be amended to include at its end 'other than to address the panel in accordance with subsection (2)'.

Section 188 – Referral to responsible Tribunal

As currently constructed, this provision enables a registered health practitioner,, at any time before the end of a panel hearing, to require that the matter be referred to the Tribunal. This is clearly not efficient or appropriate and a better alternative would be to require the practitioner to elect within a specified time after the decision to refer the matter to the Panel whether the matter should be heard by the Tribunal. The Boards submit that s.188(1) be amended to provide that a registered health practitioner must elect in writing to the Board within 14 days after receiving notice that the matter is going to a professional standards panel if the practitioner requires the matter to be dealt with by the Tribunal.

Section 188(2) also brings with it the same issue as dealt with under s.170(2)(b) above. The Boards submit that this provision requires a consistent amendment with that proposed for s.170(2)(b).

Section 189 – Decision of professional standards panel

There are a number of matters the Boards wish to raise about this section. First, subsection (1) does not enable the panel to make multiple decisions given the use of 'or' at the end of subsections (a), (b), (c) and (d). There are occasions where multiple charges are referred to a panel and different findings can be made about each.

The Boards submit that this matter could be appropriately addressed by including the words 'one or more of the following' after the word 'decide' in subsection (1).

Second, the Boards are of the view that the panel as constituted under legislation will be a competent disciplinary body to determine whether there are any issues arising from a complaint. It is therefore incongruous to suggest that after a panel dismisses a complaint as the outcome of a disciplinary hearing, the complaint can later be considered part of a pattern of conduct. The Boards submit that subsection (2) should be deleted.

Section 190 – Action by professional standards panel at end of proceeding

Again, the Boards wish to raise a number of matters in regard to this provision. First, subsection (1) does not enable the panel to take multiple actions given the use of 'or' at the end of each of the subsections. There are occasions where multiple charges are referred to a panel and different findings could be made on each and it is clear that the panel would on many occasions wish to invoke more than one of the actions to adequately deal with a registered health practitioner. For example, the panel may wish to counsel the practitioner and concurrently impose a condition on their registration.

The Boards submit that this matter could be appropriately addressed by including the words 'one or more of the following' after the word 'decide' in subsection (1).

Second, as currently constructed, s.190(1)(a)(vi) appears to enable a matter that is the subject of a panel hearing to be referred to the Board for investigation, at the end of that hearing. This is impractical and inappropriate. It may be that the drafter intended for the panel to be empowered to refer conduct issues not the subject of the hearing to a Board for investigation where they were identified in the course of the hearing.

The Boards submit that this subsection be amended by replacing 'the matter' with 'any conduct matters arising during the hearing which are not the subject of the hearing'.

Third, the section provides for the panel to refer the matter to another entity 'for investigation'. How the other entity handles the matter referred to them should be up to that entity. The Boards submit that this subsection be amended to delete 'investigation' and replace with 'action'.

Fourth, s.190(1)(c)(i) and (ii) provides that after the panel finds a practitioner's registration was, or may have been, improperly obtained, the panel can then refer the matter to the Board or another body for investigation. If a finding has been made it is incongruous that any further investigation would be required and s.190(1)(a)(viii) already enables the panel to refer a matter to another entity if the intent was for laying a complaint with a police service in a participating jurisdiction.

Fifth, s.190(1)(c)(iii) brings with it the same issue as dealt with under s.170(2)(b) above. The Boards submit that this provision requires a consistent amendment with that proposed for s.170(2)(b).

Section 191 – Notice to be given to registered health practitioner

This provision refers to the panel giving notice to the Board and the Board giving notice to the relevant registered health practitioner. The notice must include that the practitioner can apply for a review of the panel's decision and how an application for review can be made. However, a s.189 decision of the panel is not a reviewable decision under s.243 but rather is an appealable decision under s.246. The Boards submit that s.191 be amended to change 'review' to 'appeal'.

Division 8 - Health matters – general comments

Construction of this division is very concerning as it establishes an immediate adversarial relationship between the Board and the potentially impaired practitioner/ student. Rather than establishing an adversarial relationship if the matter is not self referred, better practice would be to provide an opportunity for the individual to be dealt with consistent with the procedure for subdivision (1) if it is amended as detailed below. Only where there is a failure to reach agreement about a health assessment and the action ensuing from that health assessment should a Board be empowered to direct a person for a health assessment or refer them to a health panel.

Given these general comments the Boards submit that a significant amount of amendment is necessary. In the absence of agreement to amend the Boards would be very concerned that their ability to deal successfully with impaired registrants would be severely curtailed and it is likely that the new approach as proposed in the legislation would drive impaired practitioners underground.

The Boards have submitted on a number of provisions to inform amendments to achieve better outcomes and can only reinforce that a second round of targeted consultation will be necessary.

The division also lacks a head of power enabling a Board to source other necessary information to complete an assessment. In this regard, the Boards submit that an assessor should not be enabled to make a finding and recommendation based solely on a two hour interview. Information such as inpatient hospital records, treating doctor records and reports,

QComp reports, patient records held by the registrant, employee personnel files, etc. all may be extremely relevant to making an accurate diagnosis and determining an appropriate course of action.

Section 192 – Procedure if registered health practitioner or student informs National Board of impairment

This section covers the situation where an impaired registered health practitioner or student self refers their impairment to the relevant Board. As currently constructed, the provision is deficient in that it does not empower the Board to conduct a health assessment and assumes that agreement will be reached between the Board and the individual on actions to be taken by the Board. It also refers to the Board entering into an agreement with the individual to suspend registration or impose conditions or accept an undertaking. The problems with this approach being addressed in subdivision 2 above about the review of conditions and undertakings.

The Boards submit that the section requires amendment to: (a) include a power for the Board to obtain a health assessment; (b) include a power for the Board to refer the individual to a health panel if the Board and the individual cannot agree on the action to be taken; (c) delete reference to agreement to suspend and replace with acceptance of an undertaking by a practitioner not to practise for a specified period; and (d) include a power for the Board to impose a condition on registration if agreement cannot be reached and make this a reviewable decision or delete the power for the Board to impose conditions on the basis a health panel has this power.

Section 193 – Requirement for health assessment

This section enables a Board if it reasonably believes from a complaint that a registered health practitioner or student has an impairment to require the person to undergo a health assessment. It provides that if the person fails to undergo the health assessment that the Board may refer the matter to a health panel or Tribunal.

It is submitted that s.193 requires amendment to delete reference to a Tribunal as the health panel has wide powers including being able to refer the matter to a Tribunal, and as it is currently constituted the Tribunal does not have power to deal with impairment. If the Boards' submissions in this regard are adopted, no further amendment to s.193 will be required.

In addition, the provision needs to be clearer. It currently refers to the practitioner failing to 'comply' with the requirement to undergo a health assessment. It is arguable that this does not cover the situation when a practitioner fails to 'co-operate' with the requirements of either the Board or the assessor in the assessment process. For example, a practitioner may have attended the health assessment appointment but refused to attend a laboratory to provide a urine sample or a hair sample for drug analysis. In such cases the practitioner could argue that they complied with the requirement of the notice to attend the health assessment appointment.

The Boards submit the section should be amended so that the practitioner can be referred to a panel if the person fails to either comply or co-operate with any requirement of a Board or an assessor during the health assessment process.

Section 194 – Appointment of assessor

It is arguable that, due to the current construction of the provision, the assessor, if a medical practitioner, could not refer the registrant to another practitioner for tests to assist in the assessment, particularly if that other practitioner is a psychologist. In this regard, on many occasions the nature of the impairment requires further specific assessment as a component of the main assessment. The Boards submit that the ability to do so should be put beyond doubt.

Section 196 – Copy of report to be given to health practitioner

This section provides that after obtaining an assessor's report the Board must provide a copy of it to the individual unless this may be prejudicial to their health or wellbeing. In such cases the report must be provided to the individual's doctor or psychologist. A Board nominee must then discuss the report with the individual unless they weren't given a copy of the report. As currently constructed, it appears that if the individual does not initially get the report the discussion must happen after they subsequently receive it. This may mean significant delay in the Board being able to take action in the matter. In addition, there is no provision made for the individual being able to make a written submission to the Board in lieu of having the discussion with the Board nominee. This is particularly pertinent when the individual has also obtained their own independent assessment report.

It is submitted that s.196 should be amended to: (a) give the practitioner or student the opportunity to elect to either discuss the assessment report with a Board nominee or make a written submission to the Board; (b) give the Board power to make a decision on the matter in a timely manner without having to wait in those cases where the report has not been given to the practitioner or student by setting a time limit in subsection (2) or deleting reference to subsection (2) in subsection (3).

A similar amendment to (b) above should be made under s.177 to enable a practitioner subject to a performance assessment to elect to make a written submission to the Board.

Section 197 – Decision of National Board

In order to accommodate the proposed amendment to s.196 above the first line of s.197 should be amended to include after 'report' the words 'any submission from the registered health practitioner or the student and any ...'.

Amending ss.196 and 197 will ensure that the Board has before it both the registrant's position and that of the 'interviewer'. This should reduce risks that the 'interviewer' inadvertently misrepresents the position of the registrant.

Section 198 – Action by the National Board at end of proceeding

Again, the Boards wish to raise a number of matters in regard to this provision. First, subsection (1)(a) does not enable the Board to take multiple actions given the use of 'or' at the end of each of the subsections. There are occasions where multiple actions are necessary and it is noted that the actions listed do not include a power for the Board to require the practitioner or student to undergo further assessments, testing, etc.

The Boards submit that this matter could be appropriately addressed by including the words 'one or more of the following' at the end of subsection (a) prior to the colon.

Second, s.198(1)(c) brings with it the same issue as dealt with under s.170(2)(b) above. The Boards submit that this provision requires a consistent amendment with that proposed for s.170(2)(b).

Section 202 – Notice to be given to registered health practitioner or student

This section deals with a health panel giving notice of a hearing and provides that if the individual fails to undergo a health assessment that the Board may refer the matter to a health panel or Tribunal. Presumably, the reference to failure to undergo a health assessment is meant to be a reference to failure to attend a panel hearing. If the individual fails to attend a hearing this is a serious matter and should be referred to the Tribunal (assuming that the legislation is amended to enable the Tribunal to make a finding of impairment – refer to submissions made under 172(1) above). Alternatively, it may be appropriate to give the panel power to suspend registration in these circumstances.

Given these factors, the Boards submit that section 202 requires amendment to: (a) delete reference in subsection (3) to failure to undergo a health assessment and replace it with failure to attend a hearing of the panel; (b) delete reference in subsection (3) to a professional standards panel; and (c) amendment to subsection (4) in the same way as submitted under s.170(2) above.

Section 207 – Referral to responsible Tribunal

Refer to comments made under s.188(1) above as they apply equally to the election process for referral of a matter from the panel to a Tribunal.

Section 209 – Action by health panel at end of proceeding

This section sets out the actions a panel can take after a hearing. The actions listed on a finding of impairment are set out as alternatives where more than one action may be needed to adequately deal with the matter. There is also listed power to suspend registration but there is no power to cancel registration. The Boards recognise that there is a cogent argument for the power to cancel registration to be reserved to the Tribunal being the highest disciplinary body of original jurisdiction. It is the Board's position therefore that if on finding of impairment a panel reasonably believes registration should be cancelled the matter should be referred to the Tribunal.

It is submitted that s.209 be amended to: (a) insert the words 'one or more of the following' in subsection (1)(a) at the end of the first line; (b) include a further subsection at (vi) a power to the effect that if the panel reasonably believes registration should be cancelled it may be referred to the Tribunal; (c) delete reference to 'investigation' and replace with 'action' consistent with amendments suggested to equivalent sections; and (d) align subsection (1)(c) with the amendment suggested to s.170(2) as detailed above.

Section 210 – Notice to be given to registered health practitioner and complainant

This section refers to a health panel giving notice and includes notice about how the individual can apply for a review of the panel's decision. However, a s.208 decision of the panel is not a reviewable decision under s.243 but rather an appealable decision under s.246.

The Boards submit that s.210 be amended to change 'review of the decision' to 'appeal against the decision' and delete reference 'application'.

Division 9 – Investigations – General comment

As currently constructed, on receipt of a complaint or information the National Board must determine to take one of the actions in s.165(4). The section does not appear to provide for the Board to take multiple actions and this is problematic, particularly in the case of investigations. For example, during the course of the investigation, it may be identified that a health assessment may be necessary. As the draft legislation is currently constructed, this would either require for the investigation to be completed and matter referred for action under the health Part or for the Board to reverse its initial decision and cease the investigation and deal with it under the health Part.

This is costly, complex and bureaucratic as the legislation could simply provide for a health assessment to be undertaken during the course of an investigation if a Board reasonably believes it is necessary. This will enable the matter to be dealt with through one process, that is, decision making at the end of the investigation rather than having to cease an investigation, refer it to the health Part only to find that impairment is not a problem, and then having to reopen the investigation.

Section 212(3) – Registered health practitioner to be given notice of investigation

This section requires a Board to give, at not less than three monthly intervals, progress reports on investigations to the relevant registered health practitioner and complainant. The period set out in the provision is odd – not less than three monthly but no maximum time is set. As such, it could be every two years. In addition, the requirement is that the Board provide the reports whereas it would be more efficient if the investigator were to provide the report without the need for this responsibility to be delegated in writing by the Board.

The Boards submit that the section should be amended by deleting the first two lines and replacing them with 'except where the investigator reasonably believes that their investigation report will be completed within six months, the investigator shall provide written notice of progress in the investigation at six monthly intervals to the following ...'.

Section 214 – Appointment of investigators

This section appears to limit appointment of investigators to members of the national agency staff. The agency is empowered to engage contractors and this provision should not preclude a Board from appointing a contractor specifically engaged for this purpose to undertake investigations. The ability to engage contractors for investigations will be necessary when the investigation workload is greater than internal staff investigators can adequately deal with, particularly during peaks and with the requirement of s.213 that investigations are to be conducted as quickly as possible.

It is submitted that s.214 be amended to include that the Board may appoint as investigator a contractor engaged by the agency for this purpose.

Section 240 – Investigator's report about investigation

This section deals with the provision of a report by the investigator to the Board. While the Board is enabled to receive the report, there is no scope in the provision for the Board to ask

for further information from the investigator or for it to adopt the report as its own report with or without amendments.

It is submitted that s.240 be amended to enable the Board to ask for further information about the report from the investigator and adopt the report as its own with or without amendment.

Section 241(3) – Agreement with independent assessor about action to be taken

Please see comments made under s.165(4) above. In addition, a further concern is that subsection (c) enables a Board to enter into an agreement with a health practitioner to suspend their registration, impose a condition or accept an undertaking. These are unnecessary given the immediate action powers under s.168, and particularly if those powers are extended to include the acceptance of an undertaking.

The Boards submit that subsection (c) be amended to include action taken by a Board under s.168. A similar amendment will be necessary to s.165.

Section 242(2) – Notice to be given to health practitioner and complainant

This section requires notice to be given to the registered health practitioner and the complainant within fourteen days after agreement has been reached between the Board and the independent assessor as to what action is to be taken on completion of the investigation. However, s.241(4) contemplates that agreement may not be reached between the Board and the independent assessor as to the action to be taken.

The Boards submit that s.242(2) should be amended to make it clear that the fourteen days' notice requirement is after agreement is reached, or, if no agreement, a decision is made as to the action to be taken under s.241(4).

Section 243(f) and (g) – Reviewable decisions

Please refer to comments made under subdivision 2 about the review of conditions and undertakings. Should the Boards' submissions in regard to this matter be adopted, further amendments will be required to this section.

Section 244 – Application for review

This section refers to reviewable decisions by a National Board or a professional standards panel or a health panel. However, s.243 lists as reviewable decisions only those decisions made by Boards and s.246 provides for decisions of the panels to be appealable to the responsible Tribunal. In addition, it is unclear which body has the ability to, and is responsible for, the review of conditions imposed by a disciplinary body when the review period has expired or for the consideration of an application for re-registration after a period of cancellation.

On the face of the legislation as drafted, the reference to decisions of a professional standards panel or health panel should be deleted. However, the provisions in the draft need to be carefully checked and appropriate amendments made to ensure it is clear that all reviewable decisions (having regard to natural justice) can be reviewed and that it is clearly established who is the responsible party for the review and what procedure should be established for the review. In this regard at a minimum the legislation should identify the reviewable decision by a reference to the section under which the decision is made consistent with how appealable decisions are dealt with under s. 246.

Section 245 – Review of reviewable decisions

The Boards are also very concerned that the delegation provisions will be overtaken by, in particular, s.245(1). This provision requires the National Board to ensure the review of a decision made by a delegate is not dealt with by the person (including a body politic or a corporate body) who made the original decision or a person who is in a less senior office than the person who made the original decision.

It is expected that the majority of delegations from a National Board will be provided to the state and territory board with some delegations also being provided to staff of the agency. It would be unusual within the Australian context for a Board to delegate certain powers to an individual staff member when a properly constituted state and territory board is available. These powers would include: the refusal to register a person; the refusal to endorse a person's registration; refusal to renew a person's registration or endorsement; refusal to restore a person's registration; the imposition or change of conditions or a change in an undertaking given by the person to the board; the refusal to change or remove a condition or to change or revoke an undertaking; a decision under s.178(1)(a) or (b) or a decision under s.197(1)(a).

If this expectation is realised, the only body which would appear to be empowered under s.245(1) to review such reviewable decisions would be the National Board. This will result in the National Board being inundated with a workload and the associated costs of reviewing decisions made by state and territory boards. Such a workload is expected to be high given there appears to be no costs associated with an application for review and neither can the National Board award an order of costs against an unsuccessful applicant. Given these factors, it is expected that the majority of those who receive a decision adverse to their interests will immediately seek a review of that decision. If the outcome is that the National Board confirms the reviewable decision appeal rights are enlivened with the additional associated workload and costs.

The Boards submit that if a decision is made by a State or Territory Board it should be reviewable only by the responsible Tribunal. Where such reviewable decisions are delegated to an individual staff member of the National Agency s.245 should further provide for the review to be undertaken by the State or Territory Board. Amendments of this nature may also address the following issue.

It is also unclear from the legislation in which responsible Tribunal the appeal would be heard. While s.245(3) provides that the Board in its notice must advise the affected person they may appeal against the decision to a responsible Tribunal stated in the notice, this does not override an argument that the decision is appealable only in the jurisdiction in which the reviewable decision was made. This could have the obverse outcome of a decision being made by the Victorian Board which was reviewed by the National Board sitting in Darwin which would then be appealable in the Northern Territory Tribunal. The legislation should put beyond doubt, that the reviewable decision being appealed must be heard by the Tribunal in the jurisdiction where the original decision was made. The responsible Tribunal should also be empowered to transfer a matter to another jurisdiction's Tribunal if it would be more cost effective for the matter to be heard in that jurisdiction.

Part 8 Division 11

This division deals with appeals. However, there is no head of power in this division or within any other part of the draft legislation to deal with appeals from Tribunal decisions. While it

might be argued that this could be a matter dealt with in Bill C, it would be appropriate to include the head of power without specifying the appeal body. That specification would then be included in Bill C.

Section 251 – Notice from disciplinary body

As currently constructed, a decision of a disciplinary body cannot take effect until a written notice is given to the health practitioner or student. Such a written notice should not be necessary to trigger the date of effect of the decision where the registrant or the registrant's representative is present when the disciplinary body makes its decision.

Section 262 – Duty of confidentiality

As currently constructed, a National Board will be unable to publicly respond to matters which have been provided to the media by parties (complainants and registrants) not subject to the confidentiality restrictions. This places the Board in a difficult position where material is publicly available and the Board is restricted from commenting on that material. The Boards submit that s.262(2) should include a further exemption where a party to a disciplinary proceeding discloses protected information and it becomes publicly available.

Section 266 – National Board to publish certain decisions

As currently constructed, this provision appears inconsistent with the requirement that the proceedings of professional standards and complaints panels are not open to the public. The Boards submit that consistency could be achieved by requiring such decisions to be published in a de-identified form. In addition, there does not appear to be a requirement to publish a decision of a Tribunal, the proceedings of which are open to the public unless otherwise closed by the Tribunal.

Section 271 – Information to be recorded in registers

As currently constructed, subsection (2) has a retrospective effect and will require the National Board to enter data which may not have been captured electronically by a prior existing Board. For example, in Queensland the date on which the practitioner was first registered in the health profession in Australia is not captured electronically. The provision would require a National Board to enter this data by searching over 25,000 hard copy records.

The Boards submit that this unintended consequence should be dealt with by development of an appropriate transitional provision for inclusion in Part 12.

Further, subsection (3) requires a National Board to publish information about the cancellation of a practitioner's registration. As currently constructed, this would require the publication to be unending whether or not the cancellation period is subsequently completed and the person once again registered by the National Board. In these circumstances, the individual would appear on the register both as cancelled and registered. This would appear to be a nonsensical outcome.

The Boards submit that the period of publication under subsection (3) should be limited to the period of cancellation.

Section 335 – Members of local registration authority

The transitional provision for membership on State and Territory Boards does not currently provide for the circumstances where dental prosthetists are registered by separate Boards. This is the case in Queensland and it is submitted that the transitional provision provide for the dental prosthetist members of a stand alone Board to become members of the State dental Board.

Section 340 – Qualifications for general registration in relevant profession

As currently constructed, subsection (1)(c) would provide for an unqualified person to be registered in the relevant profession merely on the basis of five years' practice. It is submitted that the provision should provide for two criteria, being a qualification and practice, not a qualification or practice.

Gap analysis

The Boards have undertaken an analysis of the draft legislation against current legislative provisions to identify those matters which have not been included in the national law. The results of this gap analysis are detailed in Appendix I. The Boards submit that each of the matters included in Appendix I should be incorporated within the national law. Their inclusion will enhance public protection and reduce costs.

Results of Gap Analysis

Part 8 Division 4 Dealing with complaints

There does not appear to be in the draft any equivalent of s.57 of the *Health Practitioners (Professional Standards) Act 1999* (the HPPSA) which provides that the Board can, but does not have to, take action on a complaint which is withdrawn by the complainant.

Part 8 Division 6 Tribunals

It is assumed that the tribunal's procedures for each state will be covered in the legislation for each state.

However in the HPPSA there is power for the tribunal to make and enforce suspended decisions pursuant to ss. 247 to 251 of the HPPSA.

This power has been used regularly by the Health Practitioners Tribunal in Queensland in recent times and should be included in the draft legislation as an additional power of the tribunal giving it more flexibility.

Part 8 Subdivision 2 Professional Standards Panels

Section 182 sets out the things the panel must provide in a notice to the registered health practitioner. The clause does not include any requirement in the notice to set out the ground for disciplinary action or the facts and circumstances forming the basis for the ground (a denial of procedural fairness) – contrast ss.131 and 174 HPPSA.

The draft does not provide for the panel to be able to order substituted service on a practitioner – contrast ss.132 and 175 HPPSA.

Section 183(1) provides that a panel may decide its own procedures. However, for uniformity and to ensure the panel has the power to do certain basic things without legal challenge certain basic things should be included in the legislation. It should be remembered that the professional standards panel is created by the legislation and has no existence independent of the legislation so the more specific its powers the less prospect of any legal challenge to something it does which is not covered by any specific legislative provision. These basic things include:

- issuing of attendance notices to witnesses – see ss.143 and 186 HPPSA
- excluding disruptive persons from hearing – see ss.141 and 184 HPPSA
- being able to be assisted by a lawyer or other person – see ss.142 and 185 HPPSA
- ability to adjourn a hearing – see s.144(2) HPPSA
- ability to inspect things produced at a hearing – see ss.148 and 191 HPPSA
- what happens if a member of the panel is absent from a hearing – see ss.146 and 189 HPPSA
- ability to make decisions by a majority – see ss.145 and 188 HPPSA
- what allowance can be made for payment of witnesses who attend hearings – see ss.150 and 193 HPPSA
- what record of the proceedings the panel is required to keep – see ss.151 and 194 HPPSA

- how can the panel receive evidence eg under oath or affirmation – see ss.158(2) and 195(2) HPPSA
- the incorporation of offence provisions for failing to attend as required by the panel, failing to provide information, providing false or misleading information, being in contempt – see ss.158 to 163 and ss.195 to 199 HPPSA
- ability of the panel to deal with additional disciplinary matters arising during a hearing – see ss.129 and 172 HPPSA

The above noted issues are also relevant to subdivision 3 Health Panels, ss.202 and 203.

Action against formerly registered health practitioners

When referring to powers of the disciplinary bodies to take action after deciding that a practitioner has acted in a way that constitutes professional misconduct, unprofessional conduct or unsatisfactory professional performance the draft does not differentiate between registered health practitioners and health practitioners who are not registered at the time of the decision. Contrast the HPPSA – see sections 166, 203 and 243.

It may be considered that a common sense approach may apply so that a disciplinary body in such circumstances for example cannot impose conditions on the registration of a practitioner not currently registered.

However, clause 173 referring to the tribunal's powers does not include the power for a tribunal to decide that if a practitioner was currently registered it would have cancelled the practitioner's registration and determined a period that the practitioner could not again be registered by the board. This is a significant omission in the tribunal's powers. As the draft stands it is not clear that a tribunal can even impose conditions on any future registration of the practitioner.

Section 243 of the HPPSA cogently sets out powers that the tribunal should have to adequately deal with a formerly registered health practitioner who has acted inappropriately and these powers should be included in the draft.

Part 8 Division 9 Investigations

There are requirements in the draft for the Board to give notice of a complaint received and notice of an investigation to a registered health practitioner. However, it does not appear that there is any requirement that the Board must tell the practitioner that they may make a submission in relation to the matters being investigated – contrast s.66(2) of the HPPSA. There should be such a requirement.

There is no provision in the draft for equivalent action to be taken by a Board to that taken by an overseas regulatory authority without having to go through disciplinary proceedings. Section 311 of the HPPSA provides that a Board can (after a show cause notice process) take identical action to that taken by an overseas regulatory authority - this power is important and needs to be included in the new legislation.

There appear to be no provisions in the draft to enable appropriate inspections/ investigations to be made to enforce compliance with the Act. The HPPSA provides in ss.354 to 367 for appointment of inspectors and specific powers for those inspectors to investigate whether an offence has been committed against the Act.

There is no provision in the draft equivalent to the common sense provisions of ss.377 and 378 HPPSA that investigations and disciplinary proceedings cannot be commenced /continued against registrants or former registrants who are deceased and may not be commenced /continued against registrants who have subsequently ceased to be registrants.

Undertakings are not well dealt with in the draft as covered in the main submission. In addition to the comments in that submission there is no equivalent in the draft to s. 379 of the HPPSA in relation to advising registered health practitioners of the consequences of failure to comply with undertakings and the period for which undertakings are in force.