



nraip@dhs.vic.gov.au

Dear Sir/Madam

Exposure draft of the *Health Practitioner Regulation National Law 2009*

Thank you for the opportunity to comment on the proposed law.

The Human Rights Commission of the Australian Capital Territory promotes the human rights and welfare of people living in the ACT and provides an independent, fair and accessible one-stop shop for complaints of unlawful discrimination, and complaints about health services, services for older people, disability services and services for children and young people.

Prior to the establishment of independent health complaints commissioners, registration boards regulated their own professions and the shortcomings of that model have been well-documented. The model for dealing with health complaints under Health Practitioner Regulation National Law 2009 (Bill B) released on 12 June 2009, does not effectively protect the independent role of health complaints commissioners and provides a lesser model of protection for consumers than currently exists. It is quite likely that there will be consumer criticism, and a decrease in public confidence, if the Bill B model of complaints is kept.

Against that background, I make the following particular comments about Bill B.

1. Hierarchy of PIA/Board actions

Bill B's hierarchy of responses as laid out in cl. 165 relegates the Commission to the lowest-significance role, given that the strongest view prevails.

Bill B's hierarchy, in order of seriousness, is

- Tribunal
- Board investigation
- Standards Panel
- Health Panel
- Commission investigation (or conciliation)
- No further action

The current ACT hierarchy, in order of seriousness, is

- Tribunal
- Commission investigation (or conciliation)
- Standards Panel
- Health Panel
- No further action.

With a premise that the strongest view prevails, the ACT Commission's current role of independently investigating health complaints, *including complaints about breaches of standards by registered professionals*, will be effectively removed. This is not an enhancement to the current scheme, nor is it in the public interest.

Bill B further compromises the independent oversight role of the Health Services Commissioner in relation to registration board processes. The checks and balances currently provided in the ACT by the Commissioner's involvement, for example, by being a party to professional standards panels, are not carried forward in Bill B.

The Commission believes that the following hierarchy, applied both at allocation and again if a breach of standards or suitability to practice were to be identified, would preserve the important independent role of the Commission, and preserve the marked benefits of the ACT system in this regard:

- Tribunal
- Commission investigation (or conciliation)
- Board investigation
- Standards Panel
- Health Panel
- No further action.

The Commission acknowledges that giving effect to such a model may have differing effects on the National Agency and the Boards, depending on whether the relevant Board has a local presence or not.

2. Impairment

The Commission notes the definition of impairment in cl. 6:

impairment, in relation to a registered health practitioner or student, means the practitioner or student has a physical or mental impairment, disability, condition or disorder (including substance abuse or dependence) that detrimentally affects or may detrimentally affect:

- (a) the practitioner's capacity to practise the practitioner's profession, or
- (b) the student's capacity to undertake clinical training in the profession.

While the Commission supports the definition of impairment, the use of the plain word 'impairment' in the text of the legislation could lead the casual reader to assume that any impairment that a health practitioner suffers from can found a complaint or lead to conditions on the practitioner's registration and contribute to a perception that impairment of itself is always a debilitating factor. It is suggested that a term that is more self-evident be used so that it is clear on the face of the provisions that presence of a disability alone is

not sufficient cause for complaint or the imposition of conditions. Examples of possible terms might be 'relevant impairment', 'affecting impairment' or 'defined impairment'.

3. Fit and proper person test (cl. 72 and cl. 155)

The use of a 'fit and proper' test delegates the job of deciding criteria for determining fitness and propriety to the courts and tribunals. It allows decision-makers to make arbitrary decisions in cases where legal action is not taken. The Commission is concerned that a broad test without clear specification of relevant factors may in practice limit rights protected under the *Human Rights Act 2004 (ACT)* ('the HRA') - in particular, the right to a fair trial (s 21) and the right to equality before the law (s. 8). Courts in the United Kingdom and Europe have found that the right to a fair trial will be unreasonably limited where those subject to a 'fit and proper person test' in disciplinary action are not provided procedural safeguards and natural justice.¹ Absent any specification of relevant factors in determining a person's status as a 'fit and proper person',² it is possible that factors that would unreasonably limit the right to recognition and equality before the law (s. 8 of the HRA) will be considered in applying this test. In particular, I have concerns that potentially irrelevant matters (such as charges against a person which have been dismissed) disclosed in a search of the health practitioner's criminal history may be relied upon in making these assessments. This issue is discussed further below.

Rather than relying on such a general test, which leaves room for differing opinions and the consideration of potentially discriminatory matters, it would be preferable to specify a list of criteria (even if these criteria are not exhaustive) that indicate whether a person is a fit and proper person.

4. Criminal history (cl. 6, def *criminal history* and *criminal history law*, cl. 96 (4), cl.124 and cl. 147)

Under Bill B, before deciding an application for registration, a National Board must check the applicant's criminal history (cl. 96(4)). Registered health practitioners are required to report annually on any changes to their criminal history (cl. 124) and a National Board may seek a report about a registered health practitioner's criminal history at any time (cl. 147). Bill B specifically excludes the operation of local criminal history laws (in the ACT, the *Spent Convictions Act 2000*) in relation to these provisions, so that all spent convictions are required to be disclosed by Crim Trac or a Police Commissioner as part of an applicant or registered practitioner's criminal history. The definition of criminal history covers not only convictions, but findings of guilt and criminal charges, regardless of the outcome of those charges (ie even if charges have been dismissed or proceedings discontinued). Criminal history also extends to matters occurring when the applicant was a child under 18 years old.

While the definition of 'unprofessional conduct' includes 'the conviction of the practitioner for an offence under another Act, the nature of which may affect the practitioner's

¹ See eg, *Kingsley v United Kingdom* (2002) 25 EHRR 10 and *X v United Kingdom* (1998) 25 EHRR CD88.

² We note that Bill B allows, but does not require, a National Board to develop registration standards, codes or guidelines which may be used in disciplinary proceedings and assessing suitability for registration (cl 56, 58 and 72), however, these appear to be distinct considerations rather than criteria elucidating the 'fit and proper' test.

suitability to continue to practise the profession', criminal history extends to information other than convictions. Bill B does not provide clear guidance as to how other matters required to be disclosed as part of a health practitioner's criminal history are to be taken into account in decisions regarding registration or disciplinary matters. There is no requirement that a National Board have regard only to offences objectively and reasonably connected to the person's fitness or suitability to practise as a health practitioner. Without such guidance, Bill B might be construed as indicating that any charges or offences disclosed in a check of a practitioner's criminal history render that practitioner unfit to practise as a registered health practitioner.

These very broad provisions are potentially inconsistent with the right to equality before the law (s. 8), the right to privacy (s. 12), the rights of children to special protection (s.11) and, possibly, the right to the presumption of innocence (s. 22) , which are protected in the ACT under the HRA.

The right to equality in the HRA is derived from Article 26 of the International Covenant on Civil and Political rights, which has been interpreted to include non discrimination on the basis of criminal record.³ This right does not prohibit consideration of criminal records in relation to professional registration, but does require that any distinctions made on this basis be 'reasonable and objective' with the aim of achieving a legitimate purpose.⁴ The International Labour Organisation Convention 111 provides further guidance that permissible distinctions must be based on the 'inherent requirements' of an occupation. The right to privacy also requires that any interference with a person's privacy and reputation not be arbitrary, so that there must be a clear connection between the required disclosure and the fitness or suitability of a person to be registered as a health practitioner.

The mandatory disclosure of a person's juvenile criminal record and the exclusion of spent conviction legislation, which would otherwise tightly restrict the use of children's criminal records, may amount to an unreasonable limit on the right of a child to special protection under the HRA. In my view, the protection of children's criminal records under the ACT's *Spent Convictions Act 2000* reflects an appropriate balance between community interests and the particular importance of rehabilitation for juvenile offenders which should be preserved in Bill B.

It is also arguable that a decision to refuse an application for registration, or to take disciplinary action against a practitioner, based upon a charge which has been dismissed or discontinued may breach the right to be presumed innocent until proven guilty in criminal proceedings, if the decision implies that the practitioner was in fact guilty of that criminal offence.⁵

³ *Thlimmenos v Greece*, 6 April 2000, Application No 34369/97.

⁴ General Comment 18

⁵ In *Allenet de Ribemont v France* [1995] ECHR 5, the European Court of Human Rights found that the presumption of innocence continues to apply where a charge has been discontinued, and that it may be breached by a public authority, as well as a court. However, there is some debate as to whether this presumption applies in the context of civil proceedings: see *Sabet v Medical Practitioners Board of Victoria* [2008] VSC 346 (12 September 2008)

To ensure that the criminal record provisions are consistent with human rights, at a minimum, Bill B should be amended to provide specific guidance as to the purpose of criminal record checks, and the assessment of relevance of matters disclosed in a person's criminal history. Clear parameters should be set out in the Bill rather than left to the National Boards to determine in registration standards. The Bill should specify that matters disclosed in a practitioner's criminal history must only be taken into account in decision making to the extent that they are relevant to the practitioner's fitness and ability to practise in their occupation, and should emphasise the need for particular caution in relation to reliance on information about juvenile offences or charges which have not been proven.

5. Sharing complaints (cl. 166)

Under cl. 166, if a National Board receives a complaint the subject matter of which would also provide a ground for a complaint to a health complaints entity (HCE), the Board must notify the entity about the complaint and provide a copy of the complaint and other material.

If a HCE receives a complaint about a health practitioner, the entity must notify the National Board and provide a copy of the complaint and other material, there is no prerequisite of the complaint having to be related to standards.

Rather than requiring the National Board to have an understanding of whether the subject matter of a complaint would also provide a ground for complaint to a HCE, it would be more consistent with the approach taken in relation to complaints received by the HCE if the National Board simply provided the HCE with a copy of all complaints received. This would allow the HCE to take action if the public interest required it. This is consistent with current practice in the ACT and works well.

6. Relationship with health complaints entity (cl. 166)

It is suggested, from experience, that if the relationship between the health complaints entity and the National Board is not set out, there will be problems with the relationship. Clause 166 does not set out the relationship between National Boards and HCE, it only provides for information sharing.

7. Splitting complaints (cl. 165)

It should be clear on the face of cl. 165 that complaints can be split and that the most serious action from each part of the split complaint must be taken.

8. Power of health panel to suspend registration (cl. 209)

It is not clear why, in a case that is not an emergency, a health panel should have the power to suspend a health practitioner's registration. If there is sufficient reason to suspend, it would be more appropriate for a tribunal to make that determination on a recommendation from the health panel.

9. No power to prevent re-registration

The powers of the tribunal do not include the power to prevent a person from being re-registered. It is not unknown for a health practitioner who has been the subject of a complaint to close their practice, go overseas for a year or 2, then return, reapply for registration and re-open their practice. If the real possibility exists of preventing re-registration, the practitioner is more likely to stay and deal with the problem or, at the very least, can be more easily stopped from re-registering.

I commend ACT *Civil and Administrative Tribunal Act 2008*, s. 66 (2) (f) as a model:

- (f) disqualify the person from applying for ...registration...for a stated period or until a stated thing happens;

10. Inconsistency with ACT HRA

If any aspect of Bill B is found to be inconsistent with the ACT *Human Rights Act*, the ACT Attorney General would be required to issue a statement to the effect that the ACT counterpart bill adopting Bill B (Bill C) is not compatible with human rights, under s. 37 of the *Human Rights Act*. This, in turn, could prevent passage of Bill C through the Legislative Assembly and the adoption of the national registration scheme in the ACT.

Yours sincerely

Julie Field
Acting Health Services Commissioner
Disability and Community Services Commissioner

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