HEALTH PRACTITIONER REGULATION NATIONAL LAW

RESPONSE TO EXPOSURE DRAFT BILL B

The Medical Board of Western Australia acknowledges the complexity and volume of work required to draft Bill B, however seeks to raise significant issues of concern in respect of several areas.

Issues of Concern

MINISTERIAL COUNCIL

Accreditation Standards

Contrary to the Ministerial Communiqué of 8 May 2009, s.10 (3)(d) and (4) of the Bill provides that the Ministerial Council may give a direction to a National Board about a particular accreditation standard for a health profession if (in the opinion of the Ministerial Council) the accreditation standard will have a substantive and negative impact on the recruitment of the supply of health practitioners to the workforce.

The wording of s.10 enables the direction by the Ministerial Council as to accreditation standards; and further this is qualified to be only if the accreditation standard will have a substantive and negative impact on workforce. It is submitted by the Board that directions as to accreditation standards should not be based on workforce issues. Changing accreditation standards to counteract a negative impact on workforce is in conflict with the basis upon which standards are introduced.

PART 8 "Complaints, Performance, Health and Conduct"

There are fundamental flaws in Part 8 of Bill B which may lead to ineffective, inappropriate and delayed handling of complaints and notifications. As drafted, it fails to take into account the currently developed regulatory system and is driven by a punitive disciplinary approach to all complaints management. Whilst it is recognised that stringent disciplinary processes are absolutely necessary where practitioners have engaged in deliberate or reckless misconduct, the Bill treats impaired and under performing practitioners as potential misconduct matters. This is a retrograde step and not in keeping with the stated objective of protection of the public. Managing impaired and under performing practitioners back into the community is vital to the public interest and bears directly on workforce issues.

This problem is borne out in the characterisation of "unsatisfactory performance" as a subset of "unsatisfactory conduct" at section 6. Whilst there will be matters where this is appropriate (recklessly or wilfully undertaking procedures for which a practitioner is not trained) for the great majority, it is not. The punitive disciplinary processes must be reserved for professional misconduct.

In essence, the Board supports:

1. non-disciplinary management of impairment and performance matters; and disciplinary management of matters where conduct considered unprofessional;
2. terminology changes such that "complaint" not refer to impairment and performance reporting, instead these should be termed "notifications". This will encourage notification of these situations;
3. complaints/notifications assessed initially as to the appropriate pathway, however the ability to transfer between pathways without having to proceed through one specific pathway fully as currently drafted in Bill B. The ability to refer practitioners between pathways is essential; and the possibility of running parallel pathways is also a requirement that needs to be allowed for.

From a practical sense Part 8 is largely unworkable and procedural fairness is lacking to a great extent. The very prescriptive nature of the drafting mandates that the processes are correct in the management of this part of the Bill. It is vital that this legislation works effectively and appropriately.

"Making a Complaint"

The Process of Making a Complaint

The legislation requires a complaint be made directly to the National Agency and it will then be referred onto the National Board and then to state offices. Whilst it's acknowledged that the idea behind enabling the complainant to go directly to the National Agency as a "one stop shop", the potential complexity of having to engage National Agency staff in the national office to identify matters requiring urgent attention; and the potential for delays in progressing complaints to the relevant jurisdictions must be taken into account in this process. It is understood from discussions that complaints may be made directly to State Boards or the National Agency, however this simply adds to the potential for confusion, a reduction in the expediency with which matters will be dealt and the increased possibility of missing matters of an urgent nature. There needs to be absolute clarity of the process.

Section 153(1) enables the National Agency to accept a verbal complaint including by telephone. It is suggested that it be mandatory to then reduce the complaint to writing (assistance as necessary). Managing verbal complaints without written follow up has the potential to create unnecessary investigations being undertaken and an inability to trace witnesses to substantiate allegations.

"Mandatory Reporting by Health Practitioners"

The Board supports mandatory reporting by health practitioners and by employers, however is of the view that implementation may result in problems, as the wording is currently drafted. Under section 156, the first health practitioner must as soon as practicable, after forming the belief, report reportable conduct back to the National Agency. It is the view of the Board that this belief must be reasonable and/or bona fide to avoid vexatious reporting. More clarity is required in the Bill in respect of

what leads to "belief" mandating reporting. It is noted at section 156(3) failing to report a colleague after forming the belief of reportable conduct may result in disciplinary action being taken against the first health practitioner. At the very least the word "reasonable" should be inserted before "belief". Further, the exemptions listed under subsections 156(4) should be expanded to, for example spouses.

As to the definition of "reportable conduct", it is suggested that paragraph (d) should be amended to read *"place the public at risk of harm because the health practitioner has practiced the profession in a way that constitutes a substandard departure from accepted professional standard"*. The Board supports the change of wording to qualify the departure from standards and thereby reduce the likelihood of over reporting of minor matters.

"Dealing with Complainants: Section 160"

Whilst the National Board must within 28 days after receiving a complaint about a practitioner give written notice of the complaint to the practitioner, there is no provision to allow the practitioner to respond and then have that response and the complaint taken into account. It is noted that under section 160(3)(a) the National Agency is not required to give the practitioner a copy of the complaint if doing so would prejudice the investigation of a complaint. This is worded too broadly and may be open to abuse. It denies natural justice. Such a section should only be invoked where the activity in question appears to be of a criminal nature. A practitioner must be provided with an opportunity to respond to a complaint, unless there is a risk to a person or such disclosure would interfere with a criminal investigation.

Section 160(3)(c) is unnecessary and should be deleted. It would be inflammatory and unnecessary for the National Agency to require further information from other patients who had used the health service provided by the practitioner. If this were required then obtaining information by way Investigator's Certificate would be more prudent than fishing for information from other patients to shore up a case against a practitioner.

There is a significant lack of procedural fairness for the health practitioners under Part 8 generally.

Rejection of Complaints

It is noted that there is no provision for the health practitioner's response to be taken into account. This needs to be spelt out in the legislation somewhere and mandated such that natural justice is not denied. Further in Section 167(3), where the National Agency rejects a complaint it must also give written notice of the rejection to the practitioner against whom the complaint has been made.

"Immediate Action"

The drafting of this section is problematic. It is an important provision and is currently available in most jurisdictions. These processes are used only occasionally, however when used need to be invoked specifically for immediate protection of the

public. The drafting of section 168 requires amendment and the Board suggests that the wording is firstly too broad. Making an assessment of whether a practitioner may have behaved in a away that is unprofessional, unsatisfactory or actual misconduct is unnecessary. Identifying a serious risk to persons requiring immediate action is sufficient to invoke such an order. Under section 168(6), the term of the imposition of the suspension or imposed conditions on the health practitioner's registration is too long in the Board's view and may amount to procedural unfairness. The nature of the action taken under this section is that it is urgent and that it is done to protect the public. As such it is reasonable to assume that a maximum period of 60 days suspension would be appropriate and then urgent action taken to expedite such a matter through to the tribunal.

The Board suggests the wording of this section include that the Board is of the opinion that the activity of the medical practitioner does or will involve the risk of injury or harm to the physical or mental health of any person; and that the Board may, without further inquiry, give to the medical practitioner who is carrying on that activity an order prohibiting the carrying on the activity for a period of not more than 60 days. There should be a requirement that the order be revoked within a period (of say 30 days) or alternatively progressed to the Tribunal within 60 days.

Suspension or conditions recorded on the register is covered under section 169. This is a problematic section in respect of health conditions being imposed in respect of health matters.

"Investigations"

Investigation of complaints mandates that where the National Board decides to investigate a practitioner, it must direct an appropriate investigator to conduct the investigation. To appoint an investigator for every matter investigated will be administratively onerous and is unnecessary in many cases that are investigated by Boards. Currently the complainant or the patient about whom the complaint is made provides formal written consent to the Board to enable retrieval of all medical records and to enable the practitioner to respond to the Board in a written or verbal form releasing the confidential health information of the complainant to the Board. Investigators are appointed in circumstances where information needs to be obtained and is not forthcoming or where consent is not available or where urgent seizure of documents is required. The administrative burden of having an investigator appointed for every matter that is investigated will be expensive and time consuming and may lead to delays in investigation.

A further issue of concern in respect of investigators is covered under Sub Division 2. Whilst it is assumed that section 214 anticipates that the National Board will appoint a member of one of the State Offices as an investigator (as a member of the National Agency staff), the requirement for an identity card is unnecessary. Investigator certificates have been used by Boards in the past and are sufficient authorisation if executed appropriately, to enable the investigator to obtain information. The legislation surrounding the identity card is bureaucratic and unnecessary and once again has the potential to delay matters.

Under Sub Division 3, the power to obtain information is prosecutorial and begs the question as to procedural fairness in respect of section 218(2)(b) & (c). These powers are similar to police powers and it appears the only basis upon which the practitioner can refuse to answer a question is on the grounds that it may incriminate the individual. Arbitrary application of these powers has the potential to escalate the investigation of a complaint into a police investigation. Given the mandatory nature of appointing an investigator on each complaint to be investigated and the lack in the legislation to enable general investigation without use investigators powers, these sections pertaining to the investigators have the propensity to entirely change the nature of investigation by the regulatory authority.

"Procedures of Professional Standards Panel"

Section 183 allows the Professional Standards Panel to make its own procedures. Panellists will be appointed by Ministers and there should be a uniform procedure in place to ensure a standardised, fair approach to all Professional Standards Hearings held throughout Australia.

"Legal Representation"

Section 184 enables a practitioner appearing before the Professional Standards Panel to be accompanied by a legal practitioner (or other person) however a legal practitioner is not entitled to appear on behalf of the practitioner. There is a discretion for the panel to allow the legal practitioner to address the panel on behalf the practitioner however it is submitted that whilst representation of each party at a Professional Standards Hearing is not necessary, where there is no legal member sitting as a panellist, it would be prudent to engage "counsel assisting" to assist both parties to present their cases fairly to the panel. Some of the matters proceeding to Professional Standards Hearings are complex, involve expert opinion and many documents. The opportunity to have counsel assisting in matters of a more complex nature, may assist the Professional Standards panel to ensure that the appropriate management of the matter is undertaken during a hearing.

"Public Interest Assessor"

There are three significant aspects of concern in respect of the proposed role of the PIA:

a) Firstly is the issue as to whether there is in fact a necessity to create such a position, given the likely cost, the considerations as to who should bear those costs and the clear possibility of utilising the current framework (without a PIA) to satisfy the need for transparency and an unbiased decision making base for complaints.
b) The second concern pertains to the practical and professional implementation of such a role. There is a strong likelihood for potential delays in progressing complaints given the double assessment requirement by the PIA; and the potential for an arbitrary approach to complaints assessment if each State appoints its own PIA (and approach is not standardised). Further, the "most serious action proposed" call (section 165) ignores the professional nature of the bases upon which the National Board will proceed to investigation –

unsatisfactory professional performance, unprofessional conduct or professional misconduct (sections 172, 178, 189, 208). This decision making process (the "most serious action" call) creates the possibility arbitrary decision making and the generation of a substantial amount of unnecessary work, if the PIA has unrealistic views on which matters warrant further action.

c) Thirdly, as the Bill is currently drafted, there is a distinct imbalance of power between the National Board and the PIA in the decision making process (section 165); and the functions of the PIA have the potential to expand from currently unfettered powers (section 37) to "any other function" (section 36(c)). Of concern is the mandatory requirement at section 165 for the National Board to attempt to reach agreement with the PIA but no reciprocal requirement for the PIA.

It is acknowledged that the need to address community/consumer concerns as to a transparent and unbiased approach to complaints management is paramount. This is entirely achievable without the creation of a PIA role, by using the currently proposed framework of community Board (and Committee/State "Board") members in combination with the ongoing and enhanced interaction with current health complaints bodies.

There are currently 3 community members on each Board and it is understood that this will also occur with the National Board (and is likely at State level). With such a balance of membership it is possible for there to be a directive that all complaints assessment committees (as delegated from the National Board) have an equal number of community members as there are medical members to assess complaints. In addition to this, enhanced communication with the health complaints bodies particularly as to matters which may fall to either jurisdiction can be formally set up (if they are not already).

The cost of setting up a national PIA is unknown but assumed to be extensive given the requirement for all complaints to be considered by this person or body (section 165) and an "Office of the PIA" seems more likely. Alternatively, the cost of implementing standardised jurisdictional independent assessors (to fill the role of PIA) is unknown but likely to be extensive given the need for all complaints to be considered twice and the need for an understanding of what constitutes unprofessional conduct.

A proposal to use the existing health complaints bodies as a jurisdictional PIA raises the possibility of conflict. These bodies are generally independent (of the health professional and the public) and proceed to investigate complaints with a view to conciliation. The Boards are of a prosecutorial nature in respect of disciplinary matters. One body being involved in both roles would be untenable.

In summary, the necessity for creating such a role as an independent person/body is not supported and the potential cost is a clear deterrent.

If the role does become part of the scheme amendments to the current drafting will be necessary. To avoid delays in progressing matters, elimination of consultation with PIA at section 165 (leaving consultation at section 241 only) would assist.

Alternatively only those complaints determined by the Board not to warrant investigation be provided to PIA for assessment.

The Bill is silent on the skill set required to fulfil the PIA role and it is entirely unclear whether the PIA will have an understanding of what constitutes unprofessional and unsatisfactory conduct. The "most serious action proposed" call should be amended to: "Where the PIA and Board cannot agree on the management of a complaint, independent legal advice be sought as to the likelihood of a breach of the Act". These situations are unlikely to occur often; and if only assessed after the investigator's report is received (section 241), then the call to be made will be of a legal nature.

The imbalance of power in the decision making process between the National Board and the PIA needs to be rectified in the drafting. On the current drafting, the PIA has no accountability to any person or body in the scheme. This would appear to be contrary to administrative law principles.

Referring Complaints to Tribunals

Section 170(1)(a) is potentially problematic as it mandates the National Board to refer a complaint to a Tribunal if after "preliminary assessment..." the Board reasonably believes the behaviour constitutes professional misconduct. It is suggested that the words "preliminary assessment be deleted to avoid unnecessary expense where matters are referred prematurely and without sufficient investigation to enable an educated assessment of the likelihood of the existence of misconduct.

Section 170(2)(c) has been raised in discussion and it is strongly recommended that where possible matters be investigated in the jurisdiction in which the incident occurred.

Rejection of a Complaint and Decision (pattern of conduct matters)

Sections 167(2) and 172(2) raise two different scenarios. Whilst rejection of a complaint does not preclude the complaint being taken into account when considering a pattern of conduct argument at a later date, proceeding under the same premise, following the decision of a Tribunal is unlikely. Whether dismissed Tribunal matters can be considered in this matter needs clarification.

Jurisdictional Representation

The Board fully supports equal jurisdictional representation from each state and territory. The regulatory nature of each state and territory differs considerably, particularly in respect of the Northern Territory and Tasmania. Each state and territory has its own unique problems in respect of registration and regulation and each requires representation at national board level. The Board supports increasing the number of members on the National Boards by 3 and maintaining the community/professional membership balance.