

NSW Health Care Complaints Commission
submission to the exposure draft of the

Health Practitioner Regulation National Law 2009

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Ministerial Council for public consultation

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Thank you for the opportunity to comment on the exposure draft bill.

The NSW Health Care Complaints Commission (the Commission) is a statutory body charged with the function to receive, assess, resolve, investigate and prosecute complaints about health service providers, including health practitioners, in NSW.

The position in NSW is that the state will not adopt the system for complaints handling in the exposure draft of bill B, but will implement its own system, which will continue the present process in NSW where the investigation and prosecution of complaints is carried out by the Commission in consultation with the health registration boards.

The general scheme proposed in bill B lacks transparency and an appropriate balance between the interests of practitioners and the public interest. The addition of a Public Interest Assessor does not sufficiently address the concerns of consumers of health services. In so far as the exposure draft of the legislation sets out a scheme where the assessment, investigation and prosecution of complaints is handled by health registration boards, this submission will not comment other than these opening remarks.

This submission is made with the intent of improving the proposed system within the limits of its general structure, which is not accepted as the best model by the Commission. It also makes suggestions to broaden certain draft clauses in anticipation that the national boards will be required to work with the Health Care Complaints Commission under a different model in NSW.

The Commission's contact officer for any questions in relation to this submission is Mr Kim Swan, Executive Officer of the NSW Health Care Complaints Commission. Mr Swan can be contacted on (02) 9219 7483 or by email to kswan@hccc.nsw.gov.au.

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Specific comments on the draft exposure bill

Clause 6 – Definitions

The proposed definitions of **unprofessional conduct** and **professional misconduct** are unnecessarily broad and lack precision. The definition of unprofessional conduct is any “professional conduct that is of a lesser standard than that which might be reasonably expected”. This sets the bar too low as any departure from standards, no matter how insignificant or trivial, will amount to unprofessional conduct. It sets a higher statutory standard than is enforced in practice and will lead to lack of confidence. The definition in NSW of unsatisfactory professional conduct which requires conduct “significantly below” acceptable standards is preferable.

Similarly, the definition of professional misconduct requires conduct to be “substantially” below the standard reasonably expected. The definition in NSW, which requires that professional misconduct is conduct that “would warrant suspension or de-registration”, is clearer and preferable.

Clause 6 – Definitions

The proposed definition of **registration status** should include any investigations against practitioners commenced by a health complaints body. As the function to investigate complaints about the conduct of registered health practitioners will lie with the NSW Health Care Complaints Commission, for consistency, this information should also be included in the registration status.

Revised proposal

registration status, in relation to an applicant for registration, includes:

- (a) any undertakings given by the applicant to a registration authority, whether before or after the commencement of this Law, and
- (b) any conditions previously imposed on the applicant’s registration by a registration authority, whether before or after the commencement of this Law, and
- (c) any findings made by a registration authority, a tribunal, a court or another entity having functions relating to the regulation of health practitioners about the applicant’s practice of the profession, whether before or after the commencement of this Law, and
- (d) any investigation commenced by a registration authority or **statutory complaint handling body** into the applicant’s conduct, performance or possible impairment but not finalised at the time of the application.

Clause 23 – Functions of National Agency

The function of the National Agency in relation to establishing complaint handling procedures should be exercised in conjunction with the relevant state body, such as the Health Care Complaints Commission in NSW, where applicable. It is also clear that there will not be consistent processes nationally.

Revised proposal

[...]

- (i) to establish **efficient procedures** for receiving and dealing with complaints against persons who are or were registered health practitioners and person who are students, including **processes** for receiving complaints about registered health practitioners in all professions **in consultation with relevant State complaints bodies**.

[...]

Clause 38 – Vacancy in office

Although clause 37 ensures the formal independence of the Public Interest Assessor, clause 38 (2) undermines it by giving the Ministerial Council the right to terminate the appointment, at any time and **for any reason**. To fully ensure the independence of the Public Interest Assessor, safeguards should be in place to prevent a termination of the appointment for reasons other than unsatisfactory performance of the defined functions.

Clause 42 – Annual Report

To enhance transparency and public accountability, the annual reporting requirements of the National Agency should explicitly include reporting on its performance in relation to its defined functions under clause 23, part 4.

Revised proposal

- (2) The annual report must include a financial statement for **and a report on the National Agency's performance of its functions under this Law**, and each National Board, for the period to which the report relates.

Clause 49 – Functions of National Boards

In NSW, the Health Care Complaints Commission will operate in consultation with the national boards under a different arrangement. The functions of the national boards should recognise this. Hence it is suggested to amend paragraph (g) accordingly.

Revised proposal

- (g) **in conjunction with relevant State complaint bodies**, to oversee the receipt, assessment and investigation of complaints about persons who:
 - (i) are or were registered as health practitioners in the health profession under this Law or a corresponding prior Act, or
 - (ii) are students in the health profession,

Clause 98 – Boards' other powers before deciding application for registration

A provision should be added allowing the boards to undertake employment checks before deciding an application for registration. The same applies to clause 144, see below.

Revised proposal

- (1) Before deciding an application for registration, a National Board may:
 - (a) **obtain information about the applicant from the current or former employers of the applicant**, and investigate the applicant, and
 - (b) by written notice given to the applicant, require the applicant to give the Board, within a reasonable time of at least 30 days stated in the notice, further information or a document the Board reasonably requires to decide the application, and
- [...]

Clause 124 – Annual statement

For the boards to be able to protect the safety of the public, it should be mandatory for practitioners to immediately advise the board of certain information, which currently is only required as part of the annual statement.

Section 127B of the *Medical Practice Act 1992 (NSW)* requires practitioners to advise the board within seven days of any convictions, criminal findings and certain charges.

Revised proposal

Clause 124 (b), (c) and (d), should require the practitioner to advise such change in circumstances to the Board immediately, instead of only in the annual statement.

Clause 138 – Certificates of registration

The certificate of registration does not include any undertakings entered into by the practitioner. This is inconsistent with clause 271 (j) (Information to be recorded in registers) that states that any undertakings the registrant has entered into are to be included in the register.

Revised proposal

- (3) A certificate of registration must include the following:
- (a) the name of the registered health practitioner,
 - (b) the type of registration granted and, if the registration is endorsed, the type of endorsement granted,
 - (c) the date the registration or endorsement was granted,
 - (d) the division of the register, if any, in which the practitioner is registered,
 - (e) any condition to which the registration or endorsement is subject, **or any undertakings the practitioner has entered into.**
 - (f) any other information the Board considers appropriate.

Clause 144 – National Board may ask registered health practitioner for employer's details

The clause provides for the board to request the contact details of the practitioner's employer. However, it should be amended to provide the board with the power to undertake employment checks, including requiring relevant information from employers, if it considers this being necessary to review the application for registration of a particular practitioner.

Revised proposal

- (1) A National Board may, at any time by written notice given to a health practitioner registered by the Board, ask the practitioner to give the Board the following information,
- (a) information about whether the practitioner is employed by another entity,
 - (b) if the practitioner is employed by another entity:
 - (i) the name of the practitioner's employer, and
 - (ii) the address and other contact details of the practitioner's employer.

[...]

Additional clause

The Board may obtain information about the performance and conduct of the practitioner, including complaint history, from the practitioner's current and former employers.

Clause 148 – Directing or inciting unprofessional conduct or professional misconduct

The exception in Clause 148 (2) for certain health facilities is unexplained and there appears to be no good reason for it.

Clause 151 – Responsible Minister may nominate independent assessor

In earlier consultation, it had been suggested that the State health complaint bodies may be nominated as Independent Assessors. Although the use of ‘person’ implies the option of nominating an organisation, this option should be expressly included in the relevant clauses. See also clauses 165 and 166.

Revised proposal

- (1) The responsible Minister for a participating jurisdiction may nominate a person **or health complaints entity** as being the independent assessor for the jurisdiction.
- (2) A nomination under subsection (1) must be made by written notice given to the National Agency.

Clause 153 – How complaint is made

The current drafting allows a complaint to the national agency to be made verbally or in writing. The inclusion of verbal complaints is likely to lead to confusion, unrealistic expectations and dispute – it is not clear what would be the obligations on the National Agency to transcribe and verify verbal complaints. It is inadequate to accept verbal statements without proper written transcription. If verbal complaints are to be accepted, a provision as to the rules of transcribing such evidence and having it adopted by the complainant should be included in the bill as well.

Experience from NSW shows that a far higher number of people inquire about making a complaint, but after discussing the options they have, decide to pursue their complaint in another way than lodging formal complaint. It would be preferable that complaints be made in writing.

Revised proposal

- (1) **A complaint may be made to the National Agency in writing, including by email or other electronic means.**
- (2) A complaint must include particulars of the ground on which it is founded.

Clause 154 – National Agency to provide reasonable assistance to complainant

The definition of an “entity” includes a person and unincorporated body. It is not clear that an entity includes an individual person, although ordinary statutory interpretation suggests that it would. If an entity includes an individual, paragraph (2) of the clause is irrelevant, as already covered by paragraph (1). If an entity does not include an individual, there appears to be no good reason why a discretion is allowed to the Agency not to provide reasonable assistance to individuals where there is an obligation to assist entities. The Agency should be required to assist all complainants, particularly individuals, who are more likely to need assistance.

Clause 155 – Grounds for complaint

The grounds on which a complaint may be made are limited and somewhat technical. There is no good reason to limit the grounds for complaint. Any person should be allowed to complain about any health service provider and express their complaint as they see fit.

Limitation of the grounds for complaint gives the Agency the capacity to manipulate complaints data by characterising what complainants believe to be complaints as something else on the basis that they do not fit within the definitions in the clause.

Giving the Agency the power to screen incoming complaints as to their suitability based on limited grounds may lead to some complaints not being referred to boards for their consideration, as the Agency may not characterise them as “complaints” under clause 155.

Clause 164 – Preliminary assessment

As raised in the comments provided in relation to clause 155 above, clause 164 (1)(b) should be deleted, as it would limit the grounds on which complaints could be made and referred to the relevant board. It appears be contrary to the public interest to limit the grounds for a complaint prior to a proper assessment of the issues raised in the complaint being undertaken. As currently drafted, the board could determine that complaints do not constitute “complaints” within the terms of the legislation and determine not to refer them to the Independent Assessor.

The intent of clause 164(1)(c) is also unclear. It could be interpreted as meaning that complaints which are also within the jurisdiction of a health complaints entity are not “complaints” within the meaning of the draft legislation. The relationship with the health complaints entities is generally unclear (see further comments below in relation to clause 166).

Clause 165 – Agreement with independent assessor

As noted above, it is not clear what will be referred to the Independent Assessor.

The actions provided as to how the complaint will be dealt with are unnecessarily limited. There is no provision to refer a complaint to another appropriate body, such as the Police or other law enforcement agencies for further action. This is often necessary where there are allegations of Medicare fraud or criminal conduct. At this point it is relevant to note the **limitations on disclosure of information by boards** in clause 265 – there is no provision to provide information to law enforcement agencies where criminal conduct is concerned. The boards should have such an option. Recent amendments to the NSW legislation provide a model.

Clause 165(4)(f) allows part of a complaint to be referred by the board to a health complaints entity. There are no provisions for managing or co-ordinating actions on a complaint between the board and health complaints entity when parts of it are dealt with separately. This point also goes to clause 166.

Clauses 166 – Relationship with health complaints entity

Clause 166(1) requires the board to notify the relevant complaints entity only of certain complaints, whilst clause 166(2) requires the health complaints entity in return to notify the Board of any complaint it receives.

For consistency, and because the board may err in its characterisation of complaints, the legislation should require both the board and the relevant complaints entity to notify each other of any and all complaints they receive. This would also allow both bodies to be aware of complaint histories when managing complaints.

Revised proposal

- (1) **If the National Board receives a complaint about a health practitioner, the Board must, as soon as practicable after its receipt:**
 - (a) notify the relevant health complaints entity that the Board has received the complaint, and
 - (b) give to the health complaints entity:
 - (i) a copy of the complaint or, if the complaint was not made in writing, a copy of the Board's record of the details of the complaint, and
 - (ii) any other information the Board has that is relevant to the complaint.
- (2) If a health complaints entity receives a complaint about a health practitioner, the health complaints entity must, as soon as practicable after its receipt:
 - (a) notify the National Board established for the practitioner's health profession that the health complaints entity has received the complaint, and
 - (b) give to the National Board:
 - (i) a copy of the complaint or, if the complaint was not made in writing, a copy of the health complaints entity's record of the details of the complaint, and
 - (ii) any other information the health complaints entity has that is relevant to the complaint.

Where a complaint, or part of a complaint, is referred by a board to a health complaints entity, there are no provisions for further communication about how the complaint is being managed. This is likely to lead to confusion for both complainants and practitioners who will be subject to action by two bodies over the one complaint.

Clause 167 – Rejection of complaint

The clause in its current form does not include a right to review the decision of the board to reject the complaint. It would appear appropriate for the Independent Assessor to exercise the review function. An appropriate provision should be added accordingly.

Revised proposal

- (1) A National Board may decide to reject a complaint it receives if:
 - (a) the Board reasonably believes the complaint is frivolous, vexatious, misconceived or lacking in substance, or
 - (b) given the amount of time that has elapsed since the matter complained of happened, it is not practicable for the Board to investigate or otherwise deal with the complaint, or
 - (c) the person to whom the complaint relates has not been, or is no longer, registered by the Board and it is not in the public interest for the Board to investigate or otherwise deal with the complaint.
- (2) A decision by a National Board to reject a complaint does not prevent a National Board or disciplinary body taking the complaint into consideration at a later time as part of a pattern of conduct or practice by the health practitioner.
- (3) If a National Board rejects a complaint it must give written notice of the rejection to the entity that made the complaint.
- (4) A notice under subsection (3) must state:
 - (a) that the National Board has decided to reject the complaint, and
 - (b) the reason the Board has decided to reject the complaint.

Additional clause:

The entity that made the complaint can request a review of the Board's decision to reject the complaint, which should be dealt with by the independent assessor.

Division 6 – Tribunals

The legislation should specify that tribunal hearings are held in public unless the tribunal determines otherwise in the public interest.

Clause 171 – Parties to the proceedings

The practice in NSW is that complaints about registered health practitioners are prosecuted by the Director of Proceedings of the NSW Health Care Complaints Commission before a tribunal. Clause 171 should be amended to reflect this practice.

Revised proposal

The parties to proceedings relating to a complaint being heard by a responsible tribunal are:

- (a) the health practitioner who is the subject of the complaint, and
- (b) the National Board **or the relevant health complaints entity** that referred the complaint to the tribunal.

Clause 173 – Action that may be taken by tribunal

Where a tribunal imposes conditions on practice, it should also be the review body that decides variations to those conditions unless it specifically refers this power back to the relevant board. See the *NSW Medical Practice Act*, sections 92 and 93.

Clauses 174, 178 – Requirement for performance assessment

It appears from the phrasing of clause 174 (1) that all complaints that are not referred to tribunals, to health assessment, for immediate investigation or to a health complaints entity are to be dealt with by way of performance assessment. There appears to be confusion between performance assessment and dealing with a matter as a disciplinary issue. There is confusion about how matters of unprofessional conduct would be dealt with. The fact that the legislative intent is confused becomes clear in clause 178 (1) (d) which specifically contemplates that a complaint that a practitioner has obtained their registration by fraud can be dealt with through performance assessment. Clearly, such a complaint is a disciplinary matter.

It may provide some clarification, if the threshold of possible matters being referred for performance assessment is changed to exclude complaints where the subject matter does amount to unprofessional conduct, unless it is unsatisfactory professional performance.

Revised proposal

- (1) If a National Board reasonably believes a registered health practitioner about whom a complaint has been made practises the health profession in a way that is or may be unsatisfactory but it does not amount to **unprofessional conduct**, the Board may require the practitioner to

Clause 174 (4) should also be amended, on simple procedural fairness grounds, as follows:

Revised proposal

- (4) If the practitioner fails to comply with the requirement to undergo a performance assessment **without reasonable excuse**, the Board may refer the practitioner to a professional standards panel or the responsible tribunal.

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

The reference to ‘matter’ in clause 174(1)(a)(vii) is open to interpretation. It is unclear whether matter is intended to be the original complaint or the performance assessment report. The clause should be clarified.

Clause 180 – Establishment of professional standards panel

To facilitate procedural fairness and in the public interest, the chairperson of a professional standards panel should be required to be legally trained. This will ensure appropriate consideration of evidence presented to the panel.

Revised proposal

- (3) At least half, but no more than two-thirds, of the members of a professional standards panel must be persons who are registered health practitioners in the health profession for which the Board is established, and chosen from a list approved under section 181, **with the chairperson to be legally trained.**

Clause 184 – Legal Representation

This clause is inconsistent with the legal representation allowed at health panels (Clause 204). Legal representation should be allowed at professional standards panels.

Clause 187 – Hearing not open to the public

In the public interest, hearings before professional standards panels should be public, unless the panel decides that it would not be in the public interest to have the hearing in public. In NSW, hearings of Medical Professional Standards Committees are being held in public, a provision that should apply to all professional standards panels in future. The protection of the privacy of a practitioner that would require the hearing not to be public is outweighed by the public interest and demand for transparency and accountability in such matters.

Clause 190 – Actions by professional standards panels at the end of proceedings

A possible outcome under clause 190(1)(a)(vi) is that the panel may refer the complaint to the National Board for investigation. This outcome highlights the issue referred to above with regard to Clauses 174 and 178.

Revised proposal

- (c) for a decision referred to in section 189(1)(d):
(i) to refer the matter to the National Board for investigation, **if it had not been investigated by the board or a health complaints entity previously,** or
(ii) to refer the matter to another entity for investigation, **if it had not been investigated by the board or a health complaints entity previously,** or

Clause 204 – Legal representation

See the submissions made above with respect to Clause 184.

Clauses 236 and 237 – false information/documents to investigators

These clauses create offences with respect to providing false and misleading information and documents to board investigators. There should be similar offences for providing false and misleading information to the board generally, with respect to all its functions.

Clause 241 – Agreement with independent assessor about action to be taken

Before a decision is made that affects the rights of a practitioner, procedural fairness demands that the practitioner under investigation is provided with the proposed findings of the investigation, the proposed action by the board and the opportunity to make a submission to be considered before deciding the final outcome. This should form part of the legislation.

In addition, the possible action to be taken in order of seriousness should list the referral to the health complaints entities as second last, because after an investigation, the least likely, and less serious, action by the Board would be to consider resolution or conciliation options in regard to the complaint.

Revised proposal

- (3) The action that may be taken in relation to the matter, from most serious to least serious, is as follows:
- (a) refer the matter to a responsible tribunal under Division 6,
 - (b) enter into an agreement with the health practitioner to:
 - (i) suspend the practitioner's registration for a specified period, or
 - (ii) impose a condition on the practitioner's registration, or
 - (iii) accept an undertaking from the practitioner, or
 - (c) deal with the matter as a professional standards matter under Division 7,
 - (d) deal with the matter as a health matter under Division 8,
 - (e) refer the matter to another entity for investigation or other action,
 - (f) refer the health practitioner to the health complaints entity,**
 - (g) take no further action.

Clause 244 – Application for review

Under this clause, the practitioner has the right to request a review of certain decisions. It is noted that there are no rights of review for complainants or other public interest body.

Clause 266 – National Board to publish certain decisions

It is unclear what is intended to be meant by the phrase 'information about decisions' in this clause. The Commission submits that professional standards panels should be held in public and it follows that their decisions should also be public. The lack of clarity about this point exemplifies the lack of transparency in the proposed legislation. The bill should specify whether the boards are required to publish the actual decision by the tribunal, or only a summary of the findings and outcomes or otherwise.

The clause is silent on whether the boards should be required to publish tribunal decisions. It is submitted that they should be, since they are the most likely point of inquiry by members of the public.

Clause 266(1)(c) appears to contain a typographical error.

Clause 272 – Board may decide not to include certain information in register

Clause 272(1) suggests that the practitioner's privacy is paramount unless it is displaced by public interest considerations.

Clause 272 (2)(a) in its current form appears to be too broad and further illustrates the lack of transparency in the proposed legislation. The legislation should specify that only details of health conditions not to be included on the public register where they would impose a danger to the health and safety of the practitioner. The register should unequivocally include the conditions imposed on the practitioner for other than health reasons.