

In reply please quote: MB/C96/1418

14 November 2008

Ms Bronwyn Nardi  
Chair  
Practitioner Regulation Subcommittee  
Health Workforce Principal Committee

Dear Ms Nardi,

**National Registration and Accreditation Scheme**

**I refer to the consultation paper Proposed arrangements for handling complaints and dealing with performance, health and conduct matters for the National Registration and Accreditation Scheme.**

The ACT Medical Board's response is attached.

Should you have any questions in relation to this matter, please do not hesitate to contact me by telephone on 02 6205 1600. I can also be reached by email at [bob.bradford@act.gov.au](mailto:bob.bradford@act.gov.au).

Yours sincerely,

A handwritten signature in blue ink, appearing to be 'R E Bradford', written over a light blue horizontal line.

R E Bradford  
Chief Executive Officer

# NATIONAL REGISTRATION AND ACCREDITATION SCHEME FOR THE HEALTH PROFESSIONS

## ACT MEDICAL BOARD

### SUBMISSION ON

### CONSULTATION PAPER

#### **Proposed arrangements for handling complaints, and dealing with performance, health and conduct matters**

#### **1.5 Principles**

**Proposal 1.5.1:** It is proposed that the provisions of the legislation relating to the management of complaints and matters of conduct, health and performance be framed in a way that:

- a. provides for a robust system to protect public safety that deals effectively with complaints, conduct, health and performance matters and focuses on prevention and early intervention
- b. builds on the best aspects of State and Territory schemes, rather than replicating one existing disciplinary scheme
- c. balances the rights and interests of consumers with those of health practitioners
- d. is compatible with nationally and internally accepted standards and consistent with Australia's international obligations, and
- e. reflects the wording and intent of the Intergovernmental Agreement.

#### **Board Submission**

The Board agrees with these principles but does recognise the potential problems associated with balancing the rights of consumers (patients) and practitioners. Further comment in this regard is included in discussion of other also later in the paper.

#### **2. Proposed terminology**

**Proposal 2.1:** It is proposed that the following terminology be adopted with respect to the complaints handling and disciplinary functions of the boards:

**2.1.1 Notification** – This term is proposed to be used in legislation instead of 'complaint' to describe a matter referred to a board about a registered practitioner, because it

encompasses matters referred from a range of sources, not just from clients or patients of the registrant. It also covers self referrals and referrals from colleagues, employers, Medicare, the Professional Services Review scheme, Department of Immigration and Citizenship (DIAC), etc. The terms 'notification' and 'notifier' also reflect the fact that matters may not always come to the board in the form of a complaint from a consumer.

If the term 'notification' is adopted, then a definition will be required in the legislation to make clear that it encompasses consumer complaints. Using the term 'notification' for the purposes of legislation does not preclude the Agency and the boards from using every day language in their dealings with consumers, for example, having information on the website for consumers on 'how to make a complaint'.

**Alternative options:** Alternative legislative terms for consideration are 'complaint' and 'complainant', or 'report' and 'reporter'.

### **Board Submission**

The *Health Professionals Act 2004* (ACT) uses "report" in lieu of complaint. The Board has found that this simple change better reflects the many pathways of how matters (in fact often information on the practise of medicine in the ACT) come to the attention of the board. It also allows the board to consider how best to handle performance and health matters without the necessity of always commencing conduct (disciplinary) activity. It also helps differentiate matters of interest to the board and those systemic issues considered by the Health Services Commission under the *Human Rights Commission Act 2005* (ACT).

The board believes that the use of term 'notification' would achieve similar results.

The Board believes that careful consideration needs to be given to the definition of "notification" including cross reference to the definition of "complaint" in legislation covering the functions of state and territory complaints commissions. The experience in the ACT is unless the definitions are closely linked and explained then there is the potential for a disconnect to occur between the two organisations resulting in a breakdown in communication and the loss of valuable intelligence to the board on the actions of registered practitioners. By way of explanation, the commencement of the *Human Rights Act 2004* (HRA) and resultant consequential amendments in the ACT, disrupted the previously legislated link between the Board and the Health Services Commission. The HRA allows the commission to consider and close a complaint against a registered medical practitioner without discussion of the matter with the board, the effect of which is to sever the board's access to quality information on the practice of medicine in the Territory.

**2.1.3 Notifications assessment committee** – This term is proposed to be used to describe the committee or committees that may be established by a board under the legislation to make the preliminary assessment of a matter and what course of action is required.

**Alternative options:** Alternative terms for consideration are 'complaints assessment committee', 'investigations committee'.

### **Board Submission**

In keeping with the board's earlier comments, the board supports the use of the committee title of "notifications assessment committee".

The board would argue that this committee in keeping with its purpose (preliminary assessment of notifications and establishing a course of action) should not have any other punitive powers, such as the power to suspend. The board believes most strongly that there should always be a separation of the powers of assessment or investigation from powers of discipline including suspension in the public interest. This matter is further discussed below under other proposals.

- 2.1.6 Health assessment** – This term is proposed to be used to describe the assessment that a board or health management committee may request a practitioner undergo, in order to determine whether the practitioner's capacity to practise is affected by a physical or mental impairment or habitual misuse of alcohol or other drugs. It may include, but is not limited to an examination by a medical practitioner. Alternatively, it may be a neuropsychological assessment by a registered psychologist, for example, of a practitioner who has suffered a head injury.

### **Board Submission**

The board supports the terms as described and in particular supports the use of "health assessment" as the appropriate term for the action described.

**Alternative options:** Alternative terms for consideration are 'medical examination' and 'impairment assessment'. The term 'medical examination' is not preferred because it may be perceived as too narrow in scope.

- 2.1.10 Health panel** – This term is proposed to be used to describe a panel appointed by the board (or a health management committee) to conduct a hearing with respect to a practitioner whose capacity to practise may be affected by a physical or mental impairment or habitual misuse of alcohol or other drugs.

**Alternative options:** Alternative terms for consideration (used in some Acts) are 'impaired registrants panel', 'impairment review panel', 'health assessment panel' or 'personal assessment panel'.

### **Board Submission**

The ACT currently titles these panels as "personal assessment panels" but would support the use of health panel as an appropriate title.

- 2.1.15 Not of good character** – This term is proposed to be used to describe a registrant who is not considered suitable to practise because of a defect in their character.

**Alternative option:** Alternative terminology for consideration (used in some Acts) is 'not a fit and proper person'.

### **Board Submission**

The board would argue that the term “not of good character” may be too narrow for the suggested purpose and that “fit and proper person” may also be too narrow.

The board believes that the aspects that it needs to be satisfied of at time of consideration of an application for registration are “suitability to practise requirements” which it suggests would include appropriate professional qualifications, completion of training such as an internship and competence to practise. The board would argue that character would be considered under competence as this could be viewed as including consideration of mental and physical health, communications skills, possible addiction to drugs or alcohol, criminal convictions and recency of practice requirements.

Consideration should be given to widening the definition.

**2.1.16 Impairment** – This term is proposed to be used to describe a physical or mental condition, or habitual misuse of drugs or alcohol which affects the capacity of a practitioner to practise safely and competently.

### **Board Submission**

The board would argue that the term “impairment” has the potential to mislead in relation to the matters as described. Health programs need to be presented to both the profession and the public as positive programs established to assist unwell practitioners while protecting the public. These health programs rely greatly on self referrals as well as referrals by colleagues and the use of harsher descriptive words such as impairment has the potential to dry up such referrals.

The board believes that it would be better to simply define this as “physical and mental health” or simply “health” with the definition including misuse of drugs as an element of it.

## **3. Overview of proposed system**

### **3.1 Background**

#### **Board Submission**

The board disagrees that the causing harm would negate the commencement of performance action. The fact that a practitioner has caused harm should not preclude the undertaking of a performance review otherwise any notification of a consultation that has resulted harm to a patient will be limited to action being taken down the conduct pathway. This would limit the board’s ability to undertake performance action pending completion of a conduct investigation.

The board is concerned that the link to harm as provided demonstrates a fundamental misconception in relation to performance programs and needs to be addressed in the proposal.

To assist in overcoming this potential problem, the Board suggests that the statement regarding harm be removed and the power to split notifications be included in the legislation thus permitting the concurrent taking of action down multiple pathways (such as conduct, health or performance).

The notifications management system also has a number of secondary but important objectives. These include maintenance of public confidence in the health system as a whole, ensuring that competent and ethical practitioners can operate within the health care system and resolving patient grievances in a manner that is satisfactory to those patients. A further objective of the notifications system is to maintain practitioner confidence in the system by ensuring that

practitioners are held to account against fair and reasonable standards that are accepted by their profession.

#### **Board Submission**

One way of maintaining the confidence of those who lodge notifications (especially health professionals) is to incorporate whistleblower type provisions that protect the notifier. S 78 (3) of the *Health Professionals Act 2004* (ACT) helps in this regard as follows:

- (3) If a health professional makes a report under subsection (1)—
  - (a) making the report is not—
    - (i) a breach of confidence; or
    - (ii) a breach of professional etiquette; or
    - (iii) a breach of professional ethics; or
    - (iv) a breach of a rule of professional conduct; and
  - (b) no civil or criminal liability is incurred only because of the making of the report.

### **3.2 Key features of proposed system**

The proposed scheme therefore provides for very distinct functions to be performed but leaves it open to boards whether or not they set up separate committees to deal with these functions. A board could for example, chose to establish a single committee as its delegate in all matters in a particular State or Territory. The exception to this rule, is the requirement that panels appointed to deal with a particular matter may not contain any of the persons on the committee or board which directly referred the matter to the panel.

#### **Board Submission**

The board strongly agrees with the statement that panels should not include members of a committee or board that established the panel. This is a basic requirement of separation of powers and procedural fairness. The board would suggest a further separation of powers which is addressed throughout this submission.

The Board supports the amalgamation of committees especially in the smaller jurisdictions, but suggests that the health management committee is one such committee that should continue to sit separately from other committees. This separation would encourage practitioners to continue to self notify on the basis that such notifications remain in confidence unless elements of the notification suggests action down the conduct pathway. The board has in the past had a deal of success by encouraging self notification based on the in confidence nature of the report from even other members of the board unless public safety demands otherwise.

### ***Consultation with HCC or equivalent State and Territory bodies***

Experience demonstrates that the contribution of health care complaints bodies to the maintenance and improvement of health services is important and valuable. Remedies such as conciliation can play an important role in resolving disputes between practitioners or institutional service providers and their patients. It is proposed that this role continue at the State and Territory level in a way that complements the new national scheme. At the same time, it is important to recognise that the national regulatory scheme is designed to protect the public as distinct from resolution of complaints. To maximise the benefits of the respective roles it is important to ensure there is direct sharing of information between the State and Territory health complaints bodies and the national system. To this end, the legislation will require two-way

sharing of identified information on complaints and consultation between the national boards and the State and Territory health complaints bodies.

With respect to a notification that falls within the ambit of the relevant State or Territory HCC, the legislation would require the responsible board, on receipt of the notification, to notify the responsible commissioner, give a copy of the notification to the commissioner, and, in consultation with the commissioner, determine whether or not the notification is to be dealt with by the board, or by the commissioner as a complaint under the relevant State or Territory health complaints legislation. With respect to a complaint received directly by an HCC that relates to a registered health practitioner, a reciprocal statutory obligation to consult would apply to an HCC under their State and Territory Act.

Following consultation with the responsible HCC, if the board considers the notification or complaint raises questions of possible unsatisfactory professional conduct or professional misconduct by the registered practitioner, or the practitioner may be impaired, then the legislation would require that the matter be dealt with by the responsible board. If, at any time, the board considers the matter suitable for conciliation, then the board may refer the matter, or part of the matter to the responsible complaints commissioner.

### **Board Submission**

The board agrees that consultation with the HCC is an important element of the notification assessment process. The board has concerns, however, how the state based HCC will fit into a national registration and accreditation scheme. The board has some difficulty in accepting that a state based body should have jurisdiction over a person registered under a national scheme. Care will need to be taken in developing the future role of HCC in the scheme.

The board suggests that to assist in this regard, a representative of the HCC could sit on the assessment panel thus negating the need for additional consultation with the HCC following a meeting of a notification assessment committee. Such an arrangement would also provide community representation on the notification assessment committee, an important step in the public gaining confidence in the proposed notification process.

The board further suggest that the role of the HCC be limited to matters where conciliation would assist and to those systemic type issues that in particular extend over the regulatory functions of more than one national board.

### ***Conduct management***

For matters to be dealt with by the board rather than the HCC, the legislation would enable the board to appoint an investigator or investigators, and to immediately suspend the registration of the practitioner if necessary, on the grounds of potential risk to public health and safety. The board or a conduct management committee would oversee the investigation of practitioners who may have engaged in unsatisfactory professional conduct, and, if necessary, appoint a panel to conduct a hearing of the matter.

Boards would have powers to decide not to investigate matters on specified grounds, as well as own motion powers to initiate an investigation (and if necessary a panel or tribunal hearing) in the absence of a notification.

## **Board Submission**

Whilst the board sees the protection of the public element in this proposal it is concerned that under the proposal, should a board or a committee not suspend a practitioner it could be viewed as the board protecting the members of the profession. Such allegations have been made in the past and continue to be made against registration boards.

The board prefers the option used in the ACT where the board is required to lodge an application in the tribunal for a suspension and that the tribunal bring down the order. This ensures natural justice provisions apply and position the boards as standard setters, standard monitors and limits the board's disciplinary activities to the lower end of the disciplinary and performance scale.

Should it be believed that that a board continue to have the power to suspend, the board suggests that the power rest with a panel established by the board rather than rest with the board with any decision of a panel becoming the decision of the board. This separation of powers provides natural justice to the practitioner and a degree of confidence to the public that members of the profession on a board or committee are not protecting other members of the profession.

## ***Board hearings***

If a board or a performance management, health management or conduct management committee determines that a hearing of the matter is required, then it would appoint a panel to conduct the hearing. The legislation would specify the make up of a health panel, performance panel, along with the formal findings and determinations that each may make.

If during any of these proceedings a committee or panel forms the view that the practitioner may have engaged in professional misconduct, then the committee or panel would be obliged to stop the proceedings and refer the matter to the responsible tribunal (see exception for health matters that can continue to be dealt with internally unless cancellation of registration may be warranted). The practitioner could also choose to have the matter dealt with by the tribunal, rather than a committee or panel of the board.

## ***Referral for tribunal hearing***

If the board (or a committee or panel of the board) decides, at any time, that there may be grounds for suspension or cancellation of the practitioner's registration (that is, the practitioner may have engaged in professional misconduct), the legislation would require the board, committee or panel to refer the matter for hearing by the responsible State or Territory tribunal. The exception would be in the case of a registrant who is impaired, where, if suspension is warranted, this could be dealt with by a health management panel of the board.

The relevant State or Territory tribunal would be empowered under the legislation to hear and make findings and determinations with respect to:

- serious misconduct matters referred by the boards, and
- appeals from decisions of performance, health or conduct panels.

Where matters have been referred to a tribunal for hearing, either by the board or on appeal, the board would be responsible for preparing and presenting the case against the practitioner before the tribunal.

## ***Monitoring agreements and conditions***

The board (or the respective committees of the board) would have the power to monitor compliance of registrants with any conditions placed on their registration or undertakings given, and to initiate assessment or hearing processes in cases of breach.

### **Board Submission**

The board notes the absence of any discussion on possible delegations throughout the outline. The board believes that in particular would be appropriate for the power of preliminary assessment of notifications and consultation with the HCC be delegated to individuals. This would particularly apply to individuals on notification assessment committees to review matters out of session thus obviating the need for the committee to meeting possibly weekly in the larger state jurisdictions.

There is also an absence of discussion on the ability of aboard to split a notification into constituent parts that might allow elements of a notification to be addressed simultaneously down a number of pathways including investigation of appropriate matters by the HCC leading to conciliation and performance or health matters that might emerge during the investigation of the notification.

### **3.3 Proposed definitions for what constitutes a departure from professional standards**

**Proposal 3.3.1:** The definitions of unsatisfactory professional conduct, professional misconduct, and unsatisfactory professional performance contained in Attachment 1 are proposed for inclusion in the legislation.

### **Board Submission**

The board prefers the use of the terms “unsatisfactory professional conduct” and “professional misconduct” as defined.

## **4. Notifications**

### **4.1 Who may make a notification**

**Proposal 4.1.1:** It is proposed that the legislation provide for any person (including an organisation) to make a notification to a board, rather than listing in legislation the particular persons or classes of person who may make a notification.

### **Board Submission**

The board agrees with this proposal. The board would suggest, however, that consideration be given to facilitating the lodgement of notifications. It suggests that notifications be accepted where possible in an electronic form and that consideration be given to amalgamating the HCC receipt of complaints into the national scheme. This would assist in addressing consumer concerns regarding the need for a one-stop shop for complaints (notifications) and would also demonstrate to the public the close working relationship of the HCC to the boards.

### **4.2 In what form may a notification be made**

**Proposal 4.2.1:** It is proposed that the legislation provide that a notification must:

- be made in writing
- contain the particulars of the allegations
- identify the practitioner against whom the notification is made, and
- identify the notifier.

### **Board Submission**

The board would argue that in terms of identifying the notifier, the notification should be signed and include the address or similar contact details of the notifier.

The board believes that protections to notifiers should be included in the legislation along the lines that if a health professional makes a notification, making the report is not a breach of confidence, a breach of professional etiquette, a breach of professional ethics, or a breach of a rule of professional conduct, and no civil or criminal liability is incurred only because of the making of the report.

This provision would not apply to a notification that the health professional knows is false or misleading.

## **4.3 What sort of matter may be the subject of a notification**

**Proposal 4.3.1:** It is proposed that the legislation set out the grounds on which a notification may be made about a registered health practitioner, and that these include an allegation that:

- the person's registration was improperly obtained, or
- the registrant's capacity to practise is affected because of:
  - physical or mental impairment, or
  - habitual misuse of alcohol or other drugs, or
- the registrant lacks the competence to practice because of insufficient knowledge and skill, including communication skills (such as competency in the English language), or
- the registrant has engaged in unsatisfactory professional conduct or professional misconduct (however termed), or
- the registrant is not of good character.

### **Board Submission**

The board suggests that consideration might also be given to including the following matters:

Where a health professional has knowingly represent someone employed or engaged by the health professional is a health professional and that the representation was false.

Where a person employing a health professional directs the health professional to engage in conduct that, if engaged in, would contravene a standard of practice.

Where a health professional knowingly provides a health service and in so doing does not comply with a condition on their registration.

**Proposal 4.3.2:** It is proposed that the legislation provide for a notification to be made (and accepted by the board and acted upon) in relation to a practitioner who was registered at the time of the conduct in question but has since ceased to be registered under this Act or a previous enactment.

## Board Submission

Whilst supporting this proposal the board has concerns about what penalty might apply to a health professional found guilty of such conduct once they cease to be registered. In relation to this, the *Health Professionals Act 2004* (ACT) contains the provisions that if the person, was found guilty by the tribunal, the tribunal could declare that, if the person had been registered, the tribunal would have found that the person had contravened the required standard of practice or did not satisfy the suitability to practise requirements.

Whilst an honourable attempt at a censure, the board believes that the censure only protects the public if the person attempts to gain registration in the future. Consideration may need to be given to an alternate outcome.

## 4.4 Mandatory reporting obligations

### ***Options for mandatory reporting***

A number of options with respect to mandatory reporting by registered practitioners are set out below. One or a combination of these could be provided for in the legislation:

#### **Option 1a: All registrants – limited obligations (treating relationships)**

Under this option, the legislation would include provisions that require a registered health practitioner to notify the responsible board where they are in a treating relationship with a registrant from any of the regulated professions whom they reasonably believe to be placing the public at risk in their practice due to a physical or mental impairment, health condition or habitual use of alcohol or other drugs.

#### **Option 1b: All registrants – extended obligations**

Under this option, the legislation would include provisions that require, from any of the regulated health professions, a registered health practitioner to notify the responsible board of a registrant whom they reasonably believe is placing the public at risk in their practice:

- due to a physical or mental impairment or health condition, or
- by practising while intoxicated by drugs or alcohol, or
- by practising in a manner that constitutes a gross or flagrant departure from accepted professional standards, or
- by engaging in sexual misconduct in connection with their practice.

#### **Option 2a: Employers – limited obligations (impairment)**

Under this option, the legislation would include provisions that require a registered health practitioner's employer to notify the responsible board where they reasonably believe that the registrant's practice is placing the public at risk in their practice due to a physical or mental impairment, health condition or habitual use of alcohol or other drugs.

#### **Option 2b: Employers – extended obligations**

Under this option, the legislation would include provisions that require an employer to notify the responsible board of a registrant whose conduct may constitute unsatisfactory professional conduct or professional misconduct.

Registrants would only be expected to report major departures from professional standards where it is within their competence to make such a judgement.

Interested parties are invited to advise of their views with respect to the options for imposing mandatory reporting obligations.

### **Board Submission**

The board would suggest that professional integrity requires that any professional who believes that a member of the profession is placing the public at risk, should report the professional to the appropriate board. This may not be as clear cut between health professional groups where the position or status of the person being reported may raise concerns in the mind of the person reporting.

In this regard the board believes that provisions be included that provide protection to the professional making the report as long as the report is not frivolous or vexatious. This would assist in encouraging notifications to the board.

The board believes that the two extended obligations appear to be the most appropriate.

### ***Student registrants and mandatory reporting***

Interested parties are invited to advise on whether registered practitioners and/or educational institutions should be required to report registered students to their respective boards, and if so, for what types of matters. Advice is also sought on whether any reporting obligations should be placed on student registrants.

### **Board Submission**

The board believes that the focus of such student registration should be the future practise of medicine rather than current student clinical training activity. Student interaction with patients should always be under the supervision of suitably qualified practitioners and would rarely result in a student being subject to a board inquiry - more rightly should anything go wrong then it is the supervisor that would be subject to board action.

The board further believes that student registration should be linked to the need to ensure that only those who are able to practise medicine in time do so. Students are often able to pass examinations and gain a qualification but the qualification itself does not necessarily mean that the person can safely practise medicine. Often the wellness issues of individuals are recognised during their university education, however, they are generally not addressed at that time nor do they necessarily stop the student from obtaining their medical qualification. The board believes that it is better to identify such issues whilst the person is at university and for them to be addressed by the appropriate board rather than registration being possibly refused after graduation. Student registration empowers the board to undertake such remedial action prior to intern registration.

The board believes that in this regard students should be treated no differently to other members of the profession. The board further believes that mandated reporting obligations should be included in the legislation and apply to employers and trainers (universities) alike. As such it would argue that the obligations outlined above under 4.4 should equally apply to universities.

## **4.5 Protection for notifiers and registrants**

**Proposal 4.5.1:** It is proposed that the legislation provide that a person making a notification is not liable for defamation because of the notification, and the making of a notification does not constitute a ground for civil proceedings for malicious prosecution or for conspiracy. It is proposed that this protection extend to any person who, in good faith, provided the notifier with any information on the basis of which the notification was made, or was otherwise concerned with the making of the notification.

### **Board Submission**

See the board's submission on 3.1 (protection of notifiers), 4.2.1 and 4.4 above.

The board believes that this should equally apply to civil proceedings as outlined in this proposal.

## **4.6 Own motion powers**

**Proposal 4.6.1:** It is proposed that a board have the power to initiate an investigation into a matter on its own motion, without a notification.

### **Board Submission**

The board agrees with this proposal providing that applicable natural justice/procedural fairness provisions are applied to any such investigations.

## **4.7 Immediate suspension powers**

**Proposal 4.7.1:** It is proposed that the legislation include provisions that empower a responsible board or a notifications assessment committee to immediately suspend the registration of a practitioner for a period of up to three months, and to impose a second or subsequent period if it considers the registrant's continued practice poses a significant risk to public health and safety and the proceedings have not yet been finalised.

**Alternative options:** Alternative options for the length of time a board may immediately suspend a practitioner pending completion of an investigation and/or disciplinary process are:

- six months
- 12 months, or
- specify no term at all and leave it to the board's discretion.

### **Board Submission**

Whilst the board sees the protection of the public element in this proposal it is concerned that under the proposal, should a board or committee **not** suspend a practitioner it could be viewed by the public (and notifier) as the board protecting the members of the profession. Such allegations have been made in the past and continue to be made against registration boards. The board prefers the option used in the ACT where the board is required to lodge an application in the tribunal for a suspension and that the tribunal bring down the order. This ensures natural justice provisions apply and position the boards as standard setters, standard monitors and limits the board's disciplinary activities to the lower end of the conduct, health and performance scale.

Should it be believed that that a board continue to have the power to suspend, the board suggests that the power rest with a panel established by the board rather than rest with the board or committee with any decision of a panel becoming the decision of the board. This separation of powers provides natural justice to the practitioner and a degree of confidence to the public that members of the profession on a board or committee are not protecting other members of the profession.

There does not appear to be any discussion in the paper on the power to lift a suspension.

**Proposal 4.7.2:** It is proposed that a practitioner whose registration has been suspended pending completion of an investigation and/or disciplinary process have the right to seek a review of this decision by the responsible State or Territory tribunal. However the suspension

would continue to apply while the matter is being heard by the tribunal.

#### **Board Submission**

See board submission under 4.7.1. Notwithstanding that submission, the board agrees that appropriate appeal provisions should be included.

**Proposal 4.7.3:** It is proposed that the legislation include provisions that empower a responsible board (or a notifications assessment committee) to accept an undertaking from a practitioner as an alternative to immediate suspension of the practitioner's registration. Details of any undertaking would be entered on the public register against the practitioner's name.

#### **Board Submission**

Whilst the proposal has some merit, the board has concerns about the legal basis of undertakings particularly in relation to monitoring and advice to other interested parties including employers (including all levels in major hospitals) and patients of the nature of the undertaking. The Board prefers the use of conditions which are enforceable and public.

## **5. Preliminary assessment of notifications**

### **5.2 Grounds for a board to refuse to deal with a notification**

**Proposal 5.2.1:** It is proposed that the legislation provide for boards to decide not to investigate a notification on the following grounds:

- the board determines the notification to be frivolous, vexatious, misconceived or lacking in substance, or
- given the amount of time that has elapsed since the matter arose, it is not practicable for the board to investigate or otherwise deal with the matter, or
- the board determines the notification does not warrant investigation, or
- the health practitioner is not or is no longer registered by the board and it is not in the public interest to pursue the matter.

#### **Board Submission**

Whilst having a deal of credence, decisions taken under the last three dot points of the proposal have the potential for notifiers and others to suggest that the board in refusing to investigate the notifications are doing so to protect members of the profession and not acting in the public interest. It is important to consumers for any decision not to investigate to be published with reasons for the decision. The board believes that this is one of the areas of the scheme that requires careful consideration in order that the public retain confidence in the scheme.

The board suggests that provisions be included that provide a test for these decisions including natural justice/procedural fairness aspects to all parties.

Rights of appeal provisions should also be included.

### **5.3 Liaison with HCCs**

**Proposal 5.3.1:** In light of the IGA, it is proposed that both the national registration and accreditation legislation and the State and Territory health complaints legislation set out the nature of the relationship between the national boards and the respective State and Territory HCCs and the obligations and powers of the respective bodies, along the following lines:

### ***National registration legislation***

The national registration legislation would provide that on receipt by a board of a notification that falls within the ambit of an HCC under a State or Territory health complaints Act (that is, complaints from consumers), the responsible board would be required to notify the responsible HCC and give a copy of the notification, as soon as practicable after the board has received it. The legislation would provide for all information available to the board at this point to be shared with the responsible HCC.

The legislation would then require the board to consult with the responsible HCC, in order to determine whether or not the notification is to be dealt with by the responsible board (as a notification), or by the commissioner (that is, dealt with as a complaint under the relevant health complaints legislation).

The legislation would empower a responsible board to deal with the matter, if, after consultation with the HCC, the board considers the matter raises questions of possible unsatisfactory professional conduct or professional misconduct. However, the board would be empowered to refer a matter, or part of a matter, to the responsible HCC, if the board and the HCC consider the matter suitable for conciliation.

The legislation would also provide for a board, subsequent to this initial consultation with the HCC, to refer a matter, or part of a matter to the HCC at any time, including following a panel hearing, if conciliation is considered appropriate in the circumstances.

### ***State and Territory health complaints legislation***

Under local State and Territory health complaints legislation, complementary provisions would empower an HCC to receive and deal with complaints from consumers that relate to registered health practitioners. The primary role of the HCC in this context would be to assess the complaint, and if appropriate, conduct conciliation or other processes between the complainant and the registered health practitioner, with a view to achieving a conciliated settlement or other resolution of the matter.

An HCC might also continue to carry out any other roles conferred under its legislation, such as to investigate and report to the relevant Health Minister on health system failures.

On receipt by an HCC of a complaint against a registered practitioner (or a person who was a registered health practitioner at the time that the conduct complained of took place), the responsible HCC would be required to notify the responsible board and give it a copy of the complaint as soon as practicable after the HCC has received it. The legislation would provide for all information available to the HCC at this point to be shared with the responsible board.

Following consultation with the responsible board, the HCC would be required to refer the matter to the board if the board considers that the matter raises questions of possible unsatisfactory professional conduct or professional misconduct by the practitioner.

In effect, the legislation would encourage the responsible board and HCC to agree on who is best placed to deal with the matter, but that if there are questions about the professional competence of the practitioner or their capacity or suitability to practise, then the board would keep and deal with the matter, or the HCC would relinquish and refer it. The board would retain powers to refer part of a matter to the HCC for conciliation, while continuing to deal with the professional standards elements.

It is expected that the boards, in consultation with the respective HCCs, would agree a protocol to support these liaison and referral arrangements with the broad parameters set out in the legislation.

In order to give effect to this arrangement, consequential amendments will be required to the respective State and Territory HCC legislation, to complement the provisions in the national legislation.

#### **Board Submission**

Provisions appear to be balanced and well presented and as such are supported by the board. The board would suggest, however, that information gained at any stage of investigation of a notification by a board or consideration of a complaint by a HCC should at appropriate times in the investigation be shared with the other party (board or commission).

### **5.4 Who conducts the preliminary assessment of a notification**

**Proposal 5.4.1:** It is proposed that the legislation contain powers for a responsible board to establish any number of 'notification assessment committees' to oversee the preliminary assessment of notifications and make decisions on what actions to take. It is proposed that, when duly constituted under the legislation, a notifications assessment committee would be empowered to make all the initial decisions that the responsible board would otherwise be empowered to make, as to how a matter should be dealt with.

In order to achieve this, the legislation would require provisions that:

- a. empower a responsible board to:
  - i. appoint one or a number of notifications assessment committees, and
  - ii. appoint persons to sit on a notifications assessment committee, from a list of persons who have been approved by the Ministerial Council
- b. allow a notifications assessment committee to regulate its own proceedings, while requiring it to observe the principles of natural justice and procedural fairness, and
- c. allow members appointed to notifications assessment committees to be paid the sitting fees and allowances approved the Ministerial Council.

#### **Board Submission**

The board would argue that it is imperative that notification assessment committees are established at the local jurisdictional level as it is in the local jurisdiction that the testing of notifications and complaints will occur. The board strongly supports the premise that regulatory activities including such things as health programs and performance programs are best undertaken at the local jurisdictional level. There is a certain amount of comfort to members of the health professions and hopefully members of the public in the knowledge that the issues managed under such programs are being handled by members of the profession with knowledge of the local health and legal environment.

Is it envisaged that where state committees exist, that the notification assessment committee would only be a national committee or is it envisaged that notifications will be referred to state notification assessment committee? If referral is envisaged, will referrals be limited to the committee in the state or territory where the health service took place, or is envisaged that any established notification assessment committee is able to undertake an assessment regardless of the state or territory jurisdiction where the health service occurred? The board raises this issue as it believes that the location of the ACT which is located wholly within the state of NSW is well positioned to provide regional support such as assessment of notifications to a range of areas in NSW should an notification assessment committee be positioned in the ACT. This could potentially assist the potential workload in NSW at periods of peak workloads.

## 5.5 Powers following preliminary assessment of a notification

**Proposal 5.5.1:** It is proposed that, following preliminary assessment of a notification, the board or a notifications assessment committee would be empowered, to take one or a number of the following actions:

- decide that the matter is a performance management matter and, where appropriate, refer the matter to a performance management committee or directly seek a performance assessment (performance matters)
- decide that the matter is a health management matter and, where appropriate, refer the matter to a health management committee or directly seek a health assessment (impairment matters)
- decide that the matter is a conduct management matter and, where appropriate, refer the matter to a conduct management committee or directly authorise investigation (disciplinary matters)
- refer the matter to the responsible State or Territory tribunal for hearing (professional misconduct matters)
- refer the matter for investigation or prosecution by another body (such as for example, the police or Medicare Australia)
- require the practitioner to give an enforceable undertaking to the board, which might include, for example, the placement of conditions on registration
- immediately suspend the practitioner’s registration pending investigation and hearing
- refer the matter, or part of the matter to the responsible HCC for conciliation, and
- take no further action.

### **Board Submission**

The board believes that the powers should include the ability to split a notification so that elements of it may proceed down a number of pathways. This would permit health or performance issues to be addressed pending possible other action down the conduct pathway.

As suggested earlier in this submission, the board strongly believes that the power of suspension should not rest with committees or the board but with the tribunal in each jurisdiction. This is the most appropriate way of separating powers of assessment and/or investigation from the power of adjudication.

The board further believes that an assessment committee should just assess and should not be empowered to remove even temporarily the ability of a person to earn an income. Should it be believed that the power to suspend remain with a board or a committee, the board suggests that the power be transferred to a panel established by the board rather than rest with the board or committee. The panel decision would become the decision of the board. This separation of powers provides natural justice to the practitioner and a degree of confidence to the public that members of the profession on a board or committee are not protecting other members of the profession.

There would need to be well defined powers/natural justice provisions included in this regard especially in relation to the power “to take no further action” on a notification. The board firmly believes that it is the ability to refuse to investigate a matter further without adequate explanation to the notifier (or consumer) that brings the process into question at least in the eyes of consumers. Grounds to refuse to investigate further should be well articulated and defensible.

## 5.6 Notifiers’ rights of review of preliminary assessment decisions

There are two options with respect to review rights for notifiers arising from board or committee decisions at the stage of preliminary assessment:

**Option 1:** No right of review of preliminary assessment decisions for notifiers.

**Option 2:** A right of review of preliminary assessment decisions for notifiers – along the lines of the model outlined above, that is, a review panel established internal to the board, with or without a level of independent input from, for example, a nominee of the responsible HCC. Reviewable decisions would be the decision to take no further action following preliminary assessment, and the decision to refer a matter to a conduct management committee or performance management committee of the board rather than to an external tribunal for hearing. The notifier would have no right of review with respect to matters being dealt with by the board under the health stream.

### **Board Submission**

The Board would prefer option 2 with an independent nominee included in the review panel. Alternatively a delegate of the HCC could sit in review with the power to recommend other actions be taken.

## **6. Performance matters**

### **6.1 Overview of management of performance related matters**

**Proposal 6.1.1:** It is proposed that the legislation make provision for boards to deal with practitioners whose performance is unsatisfactory (though not sufficiently serious to amount to professional misconduct or unsatisfactory professional conduct) through a cooperative and educative process, rather than through a disciplinary process. The legislation would include powers for a board:

- at the time of annual renewal of a practitioner's registration (in response to data generated through application of continuing competence requirements), or through receipt and investigation of a notification, to request a practitioner undergo a performance assessment, and
- to provide guidance and/or direction to the practitioner designed to address any deficits identified in their skills or knowledge, via further education or supervised practice or other matter, which could include conditions on the practitioner's registration.

### **Board Submission**

It is difficult to differentiate performance from conduct especially where performance matters are also part of matters proceeding down a conduct pathway. Lower level conduct matters can also be handled in a performance sense, i.e. admission of performance decline and an agreement to address the issues under a performance review. The process as described has the potential to cloud this process.

In principle, the Board would agree with this proposal but seeks more definitive information on how it might work in practice.

### **6.2 Performance management**

**Proposal 6.3.2:** It is proposed that the legislation would require the performance assessors to provide a report of the assessment to the board or performance management committee, and, within 7 days to the practitioner. The chair or nominee of the board or committee would be required under the legislation to discuss the report with the practitioner, and in the case of an

adverse finding, possible ways of dealing with that finding, including whether the practitioner is prepared to alter the way they practise.

#### **Board Submission**

Within 7 days of what, the performance management committee decision, the assessment of the practitioner or some other point in time?

### **6.4 Performance panel hearings**

**Proposal 6.4.1:** It is proposed that following referral of a matter for consideration as a performance matter, the legislation provide:

- for the committee (or the board) to appoint, if it considers necessary, a performance panel, to hear a matter relating to the professional performance of a registrant with that panel to contain no members of the board or committee referring the matter to the panel
- that a panel must:
  - have at least one registrant member from the same profession as the practitioner
  - have at least one member who is not and has never been a registrant in a regulated health profession, and
  - have no more than half of the members being registrants from the profession concerned
- for notice of the hearing to be issued to the registrant
- for a panel to set its own procedure, be required to observe the principles of natural justice, but not to be bound by the rules of evidence
- for a panel to be empowered to consider, amongst other things the report/s of performance assessment, and
- for a panel to be required to refer the matter to the responsible tribunal for hearing if the practitioner requests, or if, at any time, the panel identifies a pattern of poor performance sufficiently serious to warrant suspension or cancellation of the practitioner's registration.

#### **Board Submission**

The board agrees in principle to the proposal but would seek further clarification of the membership of a performance panel. The proposal is unclear as it appears to indicate that there will always be an even number of members. Will there be a chair appointed? Would a chair have a casting vote? Why equal numbers of professional and non-professional members when professional members would have a better understanding of professional performance?

The board would suggest that a better composition would be two health professions with at least one being from the profession of the person before the panel and a third member who is not a health professional. One of the three to be appointed as chair.

### **6.5 Decisions available to performance panel following a hearing**

**Proposal 6.5.1:** It is proposed that, following a hearing, a performance panel be empowered to take the following actions:

- require the practitioner to undertake further education and/or supervised practice
- counsel the practitioner
- require the practitioner to give an undertaking to the board
- place conditions on the practitioner's registration

- refer the matter to the board or health management committee for health assessment (impairment matters)
- refer the matter to the board or conduct management committee for investigation (disciplinary matters)
- refer the matter, or part of the matter to the responsible HCC for conciliation
- refer the matter an external body (for example, the police, Medicare, State or Territory drugs and poisons units) for investigation, and
- take no further action.

#### **Board Submission**

Board agrees with the proposal but would suggest that any decision of the panel should become the decision of the board. In so doing this confirms the separation of powers required under this process.

## **7. Health or impairment matters**

### **7.1 Overview of management of health related matters**

A registered practitioner may suffer from an illness, injury or disability which affects or may affect their capacity to practise safely. Most commonly, impairment is the result of mental illness, addiction or neurological illness, all of which may affect the practitioner's insight as well as their capacity for safe practice.

Impaired practitioners generally come to the attention of a board through a consumer complaint, notification of a colleague or employer, or self-notification. This may be in response to a single serious or non serious incident, or a pattern of poor performance.

#### **Board Submission**

As suggested earlier in this submission, the board would prefer the use of the word "health" in lieu of "impairment" as it avoids the negative connotations associated with impairment. It would also assist in encouraging self reporting by ill practitioners.

**Proposal 7.1.1:** It is proposed that the legislation make provision for boards to deal flexibly with practitioners who have a health condition, or whose habitual use of alcohol or other drugs, is compromising or may compromise their capacity to practise. Such provisions would enable a board to:

- accept a self-referral from a practitioner who is unwell, and enter into an agreement with the practitioner (or their representative if they have arranged for power of attorney) to:
  - suspend their registration for an agreed period, or
  - limit their practice via the imposition of conditions on their registration, and/or
  - accept an undertaking or enter into some other form of agreement
- refer the practitioner to a range of support programs designed to assist with resolution of their health issues and successful return to unrestricted practice if possible, and
- monitor compliance of the registrant with any agreement reached or conditions placed on registration.

### **Board Submission**

The board agrees with this approach but with some concern in relation to the acceptance by the board of an undertaking. The board's experience has been that undertakings are difficult to manage and are open to interpretation. Should undertakings be considered essential to this process, then the board would recommend that rules be established in legislation to cover their application and monitoring.

**Proposal 7.1.2:** In addition to boards having the powers to conduct health assessments, deal cooperatively and flexibly with impaired registrants (rather than through the disciplinary stream) and monitor their compliance with conditions (if any) on their registration, it is proposed that the legislation provide for boards, at their discretion, to offer health programs for impaired registrants nationally.

There are two options for funding such programs:

**Option 1:** Health programs, if provided for by a board, are funded by the board through a component of all registrants' fees for their respective profession.

**Option 2:** Health programs, if provided for by a board, will be funded by the board through charges to the registrants receiving health programs in addition to a component of all registrant fees from the profession.

### **Board Submission**

The board strongly agrees with this proposal.

In terms of funding, the board strongly supports option 1. The board believes that professions should support colleagues experiencing difficulties without additional duress being applied to them by way of additional fees for participating in health programs. Registrants on the program should, however, meet the costs of some elements of participating, including treatment as well as some monitoring costs.

## **7.2 Health management**

**Proposal 7.2.2:** It is proposed that a board or a health management committee have powers, following receipt of a health assessment report, to:

- request the practitioner to undertake further education and/or supervised practice
- counsel the practitioner
- request the practitioner to give an undertaking to the board, which might include, for example, the placement of conditions on registration
- refer the matter for hearing by a health panel for hearing (health matters)
- refer the matter to be handled as a performance management matter for performance assessment (performance matters)
- refer the matter to be handled as a conduct management matter for investigation (disciplinary matters)
- refer the matter, or part of the matter to the responsible HCC for conciliation
- refer the matter to an external body (for example, the police, Medicare, State or Territory drugs and poisons units) for investigation, or
- take no further action.

### **Board Submission**

The board suggests that the committee should not have all of these powers, in particular the power to request the practitioner to undertake further education and/or supervised practice.

The board suggests that this power should rest with health panels (however titled) appointed by the board or the health management committee. The board believes that it is important that management of a program should not include any power of adjudication. This supports the separation of powers, a recurring theme of this submission.

## **7.3 Health assessments**

**Proposal 7.3.1:** It is proposed that the legislation would empower a board or a health management committee of a board to appoint one or a number of assessors, who are not members of the responsible board or committee and who are agreed upon by the board and the practitioner, to conduct a health assessment. It is proposed that the legislation would require the board to pay for the assessment.

### **Board Submission**

The board agrees with this proposal, which confirms the requirement for separation of powers by not allowing board or committee members to be an assessor.

**Proposal 7.3.2:** It is proposed that the legislation would require the assessor/s to provide a report of the assessment to the health management committee, and, within seven days to the practitioner. The chair or a nominee of the committee would be required under the legislation to discuss the report with the practitioner, and in the case of an adverse finding, possible ways of dealing with that finding, including whether the practitioner is prepared to address the matters identified in the report.

### **Board Submission**

See comments under 6.3.2 as they equally apply.

## **7.4 Health panel hearings**

At times, the matter may be sufficiently serious to warrant a hearing, with appearance by the practitioner before a panel of the board.

**Proposal 7.4.1:** It is proposed that following a decision to handle a matter as a health management matter, the legislation provide:

- for the board or committee to appoint, if it considers necessary, a panel and refer to it for hearing a matter relating to the capacity of the registrant to practise with that panel to contain no members of the board or committee referring the matter to the panel
- that a panel must have:
  - at least one registrant member from the same profession as the practitioner
  - a member who is a registered medical practitioner with relevant expertise
  - at least one member who is not and has never been a registrant in a regulated health profession, and
  - have no more than half of the members being registrants from the profession concerned (excluding the registered medical practitioner with relevant expertise in the case of a medical registrant)

- for notice of the hearing to be issued to the registrant
- for a panel to set its own procedure, be required to observe the principles of natural justice, but not to be bound by the rules of evidence
- for a panel to be empowered to consider a report of the board or health management committee including the results of health assessments, and
- for a panel to be required to refer the matter, at any time, to the responsible tribunal for hearing if the practitioner requests, or if the panel forms the view that the practitioner's capacity to practise is affected to such an extent by physical or mental impairment or habitual use of alcohol or other drugs, that suspension or cancellation of the practitioner's registration may be warranted.

#### **Board Submission**

The board agrees in principle to the proposal but would seek further clarification of the membership of a panel. The proposal is unclear as it appears to indicate that there will always be an even number of members. Is there to be a chair appointed? Would a chair have a casting vote? Why equal numbers of professional and non-professional members when professional members would have a better understanding of professional performance?

The board would suggest that a better composition would be two health professions with at least one being from the profession of the person before the panel and a further member who is not a health professional. One of the three to be appointed chair.

### **7.5 Decisions available to a health panel following a hearing**

**Proposal 7.5.2:** It is proposed that the legislation provide for a panel to consider reports from any previous performance assessments and where the panel considers the evidence demonstrates a pattern of poor performance sufficiently serious to warrant suspension or cancellation of registration, require the panel to refer the matter for hearing by the responsible State or Territory tribunal.

#### **Board Submission**

The proposal appears to focus on performance assessments. The board would argue that any previous health assessments would also be appropriate for consideration of a panel as they would also indicate that health may have previously affected performance.

**Proposal 7.5.3:** It is proposed that the legislation make provision for a panel to be required to give reasons for its decision to the practitioner and the notifier, within 28 days.

#### **Board Submission**

Agreed if this is within 28 days of hearing the matter.

## **8. Conduct matters**

### **8.2 Conduct management**

**Proposal 8.2.2:** It is proposed that a board or a conduct management committee have powers, following receipt of a report of an investigation, to:

- request the practitioner to undertake further education and/or supervised practice or alter the way they practise
- counsel the practitioner

- refer the matter to be handled as a performance management matter (performance matters)
- refer the matter to be handled as a health management matter (impairment matters)
- refer the matter for hearing by a conduct panel (unsatisfactory professional conduct matters)
- refer the matter to the responsible State or Territory tribunal for hearing (professional misconduct matters)
- refer the matter, or part of the matter to the responsible HCC for conciliation
- refer the matter to another external body (for example, the police, Medicare, State or Territory drugs and poisons units) for investigation, or
- take no further action.

#### **Board Submission**

The board suggests that the committee should not have the power to request the practitioner to undertake further education and/or supervised practice.

The board suggests that this power should rest with conduct panels appointed by the board or the conduct management committee. The board believes that it is important that management of investigation should not include any power of adjudication. This supports the separation of powers, a recurring theme of this submission.

### **8.3 Investigations**

**Proposal 8.3.2:** As outlined above, it is proposed that the legislation empower a responsible board to initiate an investigation without a notification, and to proceed to refer a matter to a conduct management committee or tribunal without an investigation.

#### **Board Submission**

The board agrees with this proposal with the caveat that it be widened to include referrals to health or performance committees, as potentially investigations can detect health or performance issues that more rightly should be considered down alternate pathways.

#### ***Notice of an investigation***

Most State and Territory Acts make provision for a practitioner who is subject to an investigation to be given notice of the investigation, including details of the allegations. Some also make provision for the practitioner not to be given notice in certain circumstances.

**Proposal 8.3.3:** It is proposed that the legislation require the board to give notice of an investigation to the registrant, and that the notice must:

- be in writing
- be provided to the practitioner within 28 days of the decision to conduct an investigation, and
- advise the practitioner of the nature of the matter being investigated.

#### **Board Submission**

The board agrees with this proposal with one possible addition.

The board suggests that the professional be given an opportunity to make a written representation to the committee on the matter at hand. A 28 day time period of response could also apply.

## 8.5 Conduct panel hearings

**Proposal 8.5.1:** It is proposed that following referral of a matter to a conduct management committee, the legislation provide:

- for the board or committee to appoint, if it considers necessary, a panel and refer to it for hearing a matter relating to the professional conduct of the registrant with that panel to contain no members of the board or committee referring the matter to the panel
- that a panel must:
  - have at least one registrant member from the same profession as the practitioner
  - have at least one member who is not and has never been a registrant in a regulated health profession, and
  - have no more than half of the members being registrants from the profession concerned
- for notice of the hearing to be issued to the registrant
- for a panel to set its own procedure, be required to observe the principles of natural justice, but not to be bound by the rules of evidence
- for a panel to be empowered to consider the report of the conduct management committee including the results of any investigations, and
- for a panel to be required to refer the matter to the responsible tribunal for hearing if the practitioner requests, or if the panel forms the view that the practitioner's capacity to practise is affected to such an extent by physical or mental impairment or habitual use of alcohol or other drugs, that suspension or cancellation of the practitioner's registration may be warranted.

### Board Submission

See earlier comments under 6.2.2 and 7.4.1 regarding membership of a panel as they are more important in disciplinary matters. The board would argue that the best membership of a conduct panel would be a legal practitioner and two members of the profession of the person before the panel. This not only provides a good balance in relation to understanding of any expert opinion but also allows for the legal practitioner to represent the public interest at the panel.

## 8.6 Decisions available to a conduct panel following a hearing

## 9. Ensuring accountability, transparency and procedural fairness

### 9.1 Achieving separation of functions

**Proposal 9.1.1:** The following options are suggested relating to the procedural fairness and public interest mechanisms in the scheme:

- Option 1:** No additional provisions are required beyond the review, appeal and other mechanisms already described in this paper.
- Option 2:** Provisions that establish a statutory office, possibly within the national agency, to assess prosecution decisions, along the lines of the 'director of proceedings' in the *Health Care Complaints Act 1993 (NSW)* and *Health and Disability Commissioner Act 1984 (NZ)*. The director of proceedings not the boards would make the decisions on referrals to tribunals.
- Option 3:** Provisions that establish a mechanism for automatic review of all board decisions on conduct matters in relation to whether or not they should be brought to a tribunal, with processes for resolution of disagreement between a board and the reviewer.

### **Board Submission**

Option 3 would appear to be most appropriate. Unless this DPP type of power rests at the jurisdiction level where it would appear that most investigations will occur and where tribunal matters will all definitely occur, option 2 appears to be too bureaucratic in approach with the potential to delay the process and further complicate an already layered process by adding another layer to what already appears to be a somewhat bureaucratic investigatory and assessment process.

Is there an opportunity for the director of proceedings as described in option 2 to undertake the review function as outlined in option 3?

**Proposal 9.1.2:** It is proposed that the legislation establish public interest criteria on which any decision to prosecute a matter before a State or Territory tribunal should be based.

Relevant criteria could for example include:

- the protection of the health and safety of the public
- the seriousness of the alleged conduct, and
- the likelihood of proving the alleged conduct.

### **Board Submission**

The board agrees to this proposal although it believes that there may be occasions where the first two criteria might outweigh the third. There are times where the board needs to be seen to be taking action even in cases where the board's case may not be as strong as hoped but where confidence of the public and the profession need to be retained.

## **9.2 Matters involving registrants from different professions**

**Proposal 9.2.1:** It is proposed that the legislation include provisions that allow boards to deal jointly with matters that relate to two or more practitioners who are registered by different boards. This would allow boards to conduct joint investigations of several practitioners arising from a single notification, and any other registrants identified during the investigation as involved in the same events that led to the notification.

### **Board Submission**

The board disagrees with this proposal. The board would argue that such investigations should remain with the HCC currently established to address such systemic type issues. The board suggests that provisions be included in legislation covering the operations of the existing HCC to enable the splitting of complaints (notifications) whereby the board would be able to investigate and address any professional issues (health, performance or standards) that might emerge from such HCC investigations that relate to the profession it regulates.

## **9.3 Legal representation for registrants at panel hearings**

There are a number of options with respect to legal representation:

- Option 1:** The legislation is silent on the matter of a registrant's right to legal representation at a board hearing.
- Option 2:** The legislation specifies that the registrant has the right to be legally represented at a board hearing.
- Option 3a:** The legislation specifies that the registrant has no right to be legally represented at

a board hearing.

**Option 3b:** The legislation specifies that the registrant has no right to legal representation except with the leave of the panel.

**Option 4a:** The legislation specifies that the registrant has no right to legal representation, but can have a person who is not an Australian legal practitioner accompany them and, with the leave of the panel, that person may speak on their behalf.

**Option 4b:** The legislation specifies that the registrant has no right to legal representation, but can have a person accompany them, who may or may not be an Australian legal practitioner, and that person may speak on their behalf with the leave of the panel.

**Option 4b** is preferred.

#### **Board Submission**

Currently in the ACT practitioners are able to be represented before both health and standards panels. This has the advantage of development of agreed facts and can truncate the panel hearing process. Conversely, the involvement of legal representation has the equal potential of lengthening the process, over legalising the issues (given the limited outcomes available to the panel) and can sidetrack the educative low level matter of the matters.

Given the above option 4b is preferred by the board.

### **9.5 Status of notifiers at panel hearings**

While some consumer complainants may perceive that the role of a board is to resolve grievances between the consumer and the registrant, or to punish a practitioner, this is not the case. In all jurisdictions, the role of boards is to protect the public in general, by dealing with practitioners who depart from accepted standards.

In this context, a board's role is limited to determining whether a practitioner has engaged in unsatisfactory professional conduct or unsatisfactory professional performance, or has an impairment that is affecting their capacity to practise, and deciding how this should be addressed in order to maintain acceptable professional standards and protect the public.

**Proposal 9.5.1:** It is proposed that the legislation provide for the notifier to be present at a hearing to give evidence (if required by the board), and to speak with the leave of the panel. It is not proposed that the notifier would have a right under legislation to seek a review of a decision of a hearing panel.

#### **Board Submission**

Given proposal 9.4.1, that is the ability of the notifier to make a submission to the panel, the board would argue that the right of attendance at a hearing is not necessary unless the person is called to give evidence. The presence of the notifier or not will not at a hearing will not reduce the criticism by members of the public as the board believes the fundamentally do not understand the role of the board in this regard.

The board does not agree that the notifier should have the right of appeal.

### **9.6 Review rights for registrants**

**Proposal 9.6.1:** It is proposed that the legislation provide for a practitioner to seek a review of a hearing panel decision, to the responsible State or Territory tribunal, and for this to be a review of the matter on the merits.

### **Board Submission**

The board agrees with this proposal which currently reflects the legislated situation in the ACT.

## **9.7 Notice of decisions of hearing panels**

**Proposal 9.7.1:** It is proposed that the legislation require a responsible board to give notice of its decision in relation to a conduct hearing to the registrant, their employer and the notifier, and provide discretion for the board to provide notice to a range of other persons or organisations including an equivalent registration authority overseas, a government agency or regulatory body.

### **Board Submission**

Unless it is intended that the board be able to overturn a decision of a panel (which the board would disagree with) then the legislation should require that the panel give notice of its decision one with one addressee being the board. This is the current situation in the ACT (see s 123 of the Health Professionals Act 2004 (ACT)). This in turn supports the board's theme of separation of powers in this process.

## **10. Tribunal hearings**

### **10.3 Original jurisdiction of tribunal**

**Proposal 10.3.1:** It is proposed that with respect to the original jurisdiction of a responsible tribunal, the national legislation specify that the responsible board or the practitioner may make application to the responsible tribunal for a hearing under its original jurisdiction.

Such provisions should cover circumstances where the board or panel, at any time during an investigation or panel hearing, is required to, or considers it necessary to refer a matter to the tribunal for hearing – where the board forms the view that the practitioner has engaged or may have engaged in professional misconduct, or where suspension or cancellation of registration may be required. It may also cover fraudulent registration and matters which call into question the practitioner's character.

**Alternative option:** The legislation which confers original jurisdiction on a responsible tribunal provide for certain bodies (in addition to the responsible board and the practitioner) to appear before the tribunal and to make submissions. Such bodies might include government and/or the relevant HCC.

### **Board Submission**

The board disagrees with the alternative option as it believes it not only has the potential to confuse the process but adds further complexity to what already appears to be a complex approach to hearing of conduct matters.

### **10.4 Review jurisdiction of tribunal**

**Proposal 10.4.1:** It is proposed that with respect to the tribunal's review jurisdiction, the national legislation specify that a practitioner who is subject to the decision or the responsible board (or a panel or committee of the board) be empowered to make application for a review of a decision.

**Alternative option:** The legislation which confers review jurisdiction on a responsible tribunal provide for certain bodies (in addition to the responsible board and the practitioner)

to appear before the tribunal and to make submissions. Such bodies might include government and/or the relevant HCC.

#### **Board Submission**

The board disagrees with the alternative option as it believes it not only has the potential to confuse the process but adds further complexity to what already appears to be a complex approach to hearing of conduct matters.

### **10.5 Findings and determinations of a tribunal**

**Proposal 10.5.2:** It is proposed that the responsible board would be empowered to make one or more of the following determinations in such matters:

- require the practitioner undergo counselling
- caution the practitioner
- reprimand the practitioner
- require the practitioner to undertake and complete specified further education or training within a specified period
- impose a fine on the practitioner recoverable by the board (with the maximum fine available to be set by legislation, for example, \$50,000)
- suspend the registration of the practitioner for a specified period
- cancel the registration of the practitioner
- order the practitioner undertake a specified period of supervised practice
- order the practitioner do or refrain from doing something in connection with their practice
- order the practitioner manage their practice in a specified way or subject to specified condition
- order the practitioner to report on their practice to a specified person at specific intervals
- order the practitioner not to employ or engage or recommend a specified person or class of persons
- disqualify the practitioner from applying for registration under the Act for a specified period, if their registration has been cancelled by the tribunal or by an equivalent competent registration authority in another country
- make a prohibition order preventing a practitioner whose registration has been cancelled or suspended from continuing to practise or provide health services, or using specified professional titles or operating a business that provides health services, and/or
- publish the findings of and determinations or orders made with respect to matters heard within the limits of privacy considerations.

### **Board Submission**

The board agrees with the findings as listed but with the reservation previously expressed regarding undertakings. The Board also suggests that consideration be given to adding the following determinations to those already listed:

- a. Require the person to undergo stated medical, psychiatric or psychological assessment, counselling or both.
- b. Impose on the person's registration any condition that the tribunal considers appropriate to protect the public.
- c. Require the person to take part in a review of the person's professional practice.
- d. Require the person to seek and take advice from a stated entity about the management of the person's practice.
- e. Require the supervision, monitoring or reporting about the effect of something the person is required to do by the tribunal.
- f. Require the person to pay the reasonable costs of hearing the application.

## ***Review jurisdiction – performance, health or conduct matters***

### **10.6 Constitution and appointment of tribunal hearing panels**

There is some variability across jurisdictions as to the legislative requirements for membership of the panels that hear serious misconduct matters. Factors to consider in determining the legislative requirements for constitution of the tribunal include:

- ensuring sufficient professional input into decision-making – having at least two members from the profession concerned allows a dialogue on professional standards that may contribute to better decision making than a single practitioner member, and
- there is also a case for a presence on a panel for the consumer or community voice. Given that the tribunal is separate from the boards, and probably chaired by a legal member, community standards are likely to be reflected in the determinations.

**Proposal 10.6.1:** It is proposed that the legislation make provision for a tribunal hearing panel to be constituted with a minimum of three members, at least two must be from same profession as the practitioner who is a party to the proceedings.

### **Board Submission**

The board agrees with this proposal on the basis that presumably the tribunal will be presided over by a legal practitioner who will be well positioned to assume the consumer or public role. This is the current position in the ACT.

## **11. Offences and regulated conduct**

### **11.4 Practice offences**

**Proposal 11.4.1:** It is proposed that the legislation include the following practice offences:

- An offence for practising in a restricted practice area of dentistry, along with related exemptions, for example to ensure the practice of other occupational groups such as dental technicians or dental assistants is not unnecessarily restricted. **Note:** Refer to consultation paper on Registration Arrangements for proposed definition.
- An offence for practising in a restricted practice area of prescribing optical appliances, along with related exemptions, for example to ensure the practice of other occupational groups such as orthoptists or optical dispensers is not unnecessarily restricted. **Note:** Refer to consultation paper on the Registration Arrangements for proposed definition.

It has not yet been decided whether there will also be statutory restrictions on the practice of spinal manipulation to which offences might apply.

#### **Board Submission**

The board agrees with this proposal but suggests that practice offences also include intentionally providing a health service whilst not registered. This could include the provision of an electronic health service into Australia from another country (see s 72 of the *Health Professionals Act 2004 (ACT)*).

### **11.6 Regulation of advertising**

**Proposal 11.6.1:** There are a number of options for dealing with advertising offences under the national legislation:

- Option 1:** Include no advertising offences in the national legislative scheme. If a registrant engages in questionable advertising, they can be dealt with under a board's general disciplinary powers, and by way of guidance, boards can issue guidelines about what might constitute unacceptable advertising. In addition, a State or Territory may legislate, as NSW has done, to provide additional protections, in public health or other legislation to regulate the advertising of health services generally, rather than simply targeting registered practitioners or the bodies corporate that employ them.
- Option 2:** Include narrowly framed advertising offences in the legislation, which just mirror trade practices/fair trading legislation (that is, false and misleading advertising) and a narrow application, only to registrants, and their employing bodies corporate.
- Option 3:** Include broadly framed advertising offences in legislation, that allow boards to deal with both registrants and bodies corporate who, for example, use testimonials, create an unreasonable expectation of beneficial treatment, or encourage the indiscriminate or unnecessary use of regulated health services.

#### **Board Submission**

The Board believes that regulation of advertising is best managed by other agencies such as fair trading. If regulating advertising is to be contemplated, then Option 2 is preferred.

### **11.8 Other offences**

There is a range of other types of offences included in some State and Territory legislation.

**Proposal 11.8.1:** It is proposed that the legislation include offences for registrants who fail to return, within 7 days, to the responsible board their certificate of registration when issued with a notice to do so.

#### **Board Submission**

The board agrees with this proposal but suggests a 14 day period for the professional to comply.

### **11.10 Monitoring of registrants**

**Proposal 11.10.1:** It is proposed that the legislation include powers for a responsible board to monitor compliance of a registrant with:

- determinations or orders made by a responsible tribunal
- decisions made by a performance, health or conduct panel
- conditions placed on registration, at other times, such as at first registration, at renewal, by agreement, and
- other undertakings given or agreements entered into between the registrant and the board.

**Board Submission**

The board strongly agrees with this proposal especially its reservations expressed earlier in this submission in relation to compliance with and monitoring of undertakings.