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17 November 2008

Ms Bronwyn Nardi
Chair
Practitioner Regulation Subcommittee
of the Health Workforce Principal Committee

Dear Ms Nardi

Re: *Submission to Consultation Paper*
"Proposed Arrangements for Handling Complaints, and dealing with
performance, health and conduct matters"

We refer to your paper of 7 October 2008 inviting comments on the above Discussion Paper. We welcome the opportunity to comment on this important area of the new national registration scheme.

ACM has a number of members from across Australia who have experience of sitting on the nursing and midwifery regulatory board in their jurisdiction, and who have been directly responsible for assisting the relevant Board to respond to complaints and/or issues of misconduct or performance involving midwives. ACM has sought input from these experienced members in preparing comments on this paper.

Arrangements for handling complaints against health professionals is a critically important issue. On the one hand ACM totally supports the need to protect women and their families from the consequences of practice by a midwife that might be incompetent or negligent. Australia's comparatively low mortality rates for mothers and babies suggest this process is working well at present, as midwives are involved in most if not all women's pregnancy care, labours and births. However ACM has also become aware in recent years of examples of a lack of procedural fairness and natural justice towards midwives on the part of regulatory authorities in some states. It has not been uncommon for a midwife to receive a suspension to her license to practice without even being notified that a complaint had been lodged against her. In one case a midwife received notice of the suspension from a taxi driver sent to her house. ACM has a strong interest in seeing that the move to a national system for

handling these important processes both protects the public and treats midwives and other health professionals appropriately.

We therefore offer the following comments in response to the consultation paper.

COMMENTS ON PROPOSALS (BOXES)

- 2.1.1 'Notification' This generic term is adequate to describe a matter referred to a Board that can originate from a range of sources. The legislation should make it clear that 'notification' also encompasses consumer complaints.
- 2.1.3 'Notifications Assessment Committee' adequately describes the Committee or Committees established by a Board to make a preliminary assessment of a matter.
- 2.1.15 'Not of good character' or 'Not a fit and proper person.' Many case law / legal descriptions utilise 'fitness and propriety' tests. As long as the legislation explicates that not of good character includes a lack of fitness and propriety, this is satisfactory.
- 3.3.1 Definitions of unsatisfactory professional conduct, professional misconduct and unsatisfactory professional performance contained in Attachment 1 are satisfactory.
- 4.3.1 Agree with the grounds set out on which a notification can be made about a registered health practitioner in their entirety.
- 4.3.2 Agree with provision for notifications in relation to practitioners who are no longer registered; unsure if there should be some time limit on this or not ...
- 4.4 Mandatory reporting obligations currently differ across jurisdictions (see Attachment 2) Options include 'limited' or 'extended' obligations for both registrants and employers under the new scheme. Whichever option is selected needs to be uniform / consistent for both registrants and employers, ie: both 'limited' or both 'extended.' Whilst a public interest case can be argued to place 'extended' obligations on both for reasons of public safety, consideration also needs to be given to the logistics / potential for increased volume of vexatious claims in particular areas.

Issue of mandatory reporting in relation to students: again, one can make a good argument around public interest and positive professional culture for obligations in relation to students, however, the operational logistics and resources required to manage the potential volume also need to be considered. In relation to serious matters, (eg: previous criminal convictions for serious offences, and issues surrounding character and fitness and propriety), there should be some requirement / guidance for mandatory reporting / monitoring of students.

- 4.5 Legislative protection against defamation claims where a notification is

made in good faith is supported.

- 4.7.1 Discretionary power (with legislated rights of appeal) enabling a responsible board to immediately suspend registration of a practitioner where there is immediate and ongoing risk to public health is supported. Term should be based on boards discretion and supported by evidence in relation to reasons for suspension.
- 4.7.2 Right of appeal to State or Territory Tribunal needs to be accompanied by a requirement for 'timely' review.
- 4.7.3 Voluntary undertakings from a practitioner that are notated on the public register as an alternative to immediate suspension is supported.
- 5.3.1 Legislatively consistent 2 way information sharing provisions between national boards and state and territory HCCs is supported, as is a consistent protocol to support liaison and referral arrangements. Boards will remain responsible for questions of practitioner conduct, competence and capacity to practice, and HCCs manage matters or parts of matters considered suitable for conciliation.
- 5.4 Because of workload associated with performance, health and conduct processes for professions with large volume (ie: nursing and midwifery) it is proposed that legislation will make provision for preliminary assessment to occur at the State and Territory level if the national board so chooses. ACM holds the view that the Nursing and Midwifery Board of Australia should establish a national midwifery committee and delegate to this committee responsibility for undertaking preliminary assessments in relation to midwifery matters
- 5.3.2 Proposals that the legislation contain powers for a responsible board to establish any number of 'notification' assessment committees is supported. (The challenge will be issues around adequate resources!)
- 5.6 Notifier's rights of review: rights for review and appeal is essential for all parties. Option 2 is supported.

PERFORMANCE MATTERS

- 6.1.1 Unsatisfactory professional conduct: cooperative and educative processes is supported along the terms laid out. The proposal for a national midwifery committee is well supported in this area in relation to the processes of continuing professional development and midwifery practice review now established at national level.

HEALTH OR IMPAIRMENT MATTERS

- 7.1.1 Provision for boards to deal flexibly with practitioners who have a health condition, or habitual use of alcohol or other drugs, through conditions,

limitations, undertakings and / or periods of suspension as required is supported, including treatment referral, self referral, and ongoing monitoring of compliance is supported.

7.1.2 In addition to powers to conduct health assessments, the proposal for boards, at their discretion to offer health programs for impaired registrants nationally is a worthy ideal, however ACM does not support either of the funding options proposed.

7.3.1 Health Assessments. It appears that under the legislation, boards will be required to pay for health assessments of registrants.

CONDUCT MATTERS

Unsatisfactory professional conduct can be dealt with by the national board via a conduct management committee. Where the conduct is so serious that it might constitute professional misconduct, the board would be required to refer the matter for tribunal hearing.

8.3.2 Proposal empowering a national board to initiate an investigation without a notification is supported. Referral of a matter to a conduct management committee or tribunal without an investigation is not supported.

8.3.4 We do not support any legislative power for investigators not to give notice to practitioners under investigation. This is a breach of natural justice.

8.3.5 Timeliness provisions re investigations and progress notification to both notifiers and registrants within the timelines identified is supported.

8.4.1 Powers of investigators as identified is supported.

ENSURING ACCOUNTABILITY, TRANSPARENCY and PROCEDURAL FAIRNESS

9.1.1 ACM believes there are questions in relation to whether the proposed scheme sufficiently safeguards procedural fairness and public confidence (both for public and registrants), and support the argument for an additional mechanism as relates to opportunity for 'independent' review of prosecutorial decision making, eg: as in referral to tribunals. Therefore we support Option 2 or Option 3. There are risks and benefits with each Option: ie: 2 is fairly legalistic and direct link to national agency holds some potential risks depending on appointments, but a transparent mechanism through truly independent review via Option 3 may be best.

9.1.2 Public interest criteria on which to prosecute matters as identified is supported.

9.2.1 Joint investigations may be expedient and is supported. Joint hearings are not as this may not uphold the principle of natural justice or procedural fairness for individual registrants. The right to request a matter be heard as an individual should be protected by legislation.

9.3 Legal Representation

We do not support any legislative provision that attempts to waive an individual's right to the representation of their choice, legal or otherwise. Registrants should be able to identify whatever representation or support they require at Panel hearings, therefore Options 3a, 3b, 4a, 4b are not supported.

9.4.1 Proceedings of a Panel to be closed to the public is supported. Offence for any person to publish name of notifier, witness or practitioner is supported. Legislation enabling a notifier to make submissions to the Panel is supported.

9.5.1 Notifier may be present at hearing to give evidence as required is supported. Notifier will not have legislative right to seek review of a decision of a hearing Panel is supported.

9.8 Role of Commonwealth, State and Territory Ombudsmen

A consistent approach is desirable and therefore Option 1 is supported, ie: applying the Commonwealth Ombudsmen Act 1976 to the national registration scheme.

TRIBUNAL HEARINGS

10 The IGA enables each State and Territory to determine the tribunal within its jurisdiction that will be conferred with jurisdiction to hear locally matters arising from decisions of the boards with respect to registration, discipline, performance and health functions. national criteria agreed by AHMAC (and yet to be developed) will require that all State and territory tribunal arrangements comply with national criteria.

Review Jurisdiction – Performance, Health, or Conduct

10.5.4 Tribunals will have the power to either confirm the original decision of the Panel, or substitute its own finding and/or determination from the list available to the Panel. Findings as listed are supported.

10.5.5 Tribunals will have powers to make orders for costs against any party to the proceedings.

10.6.1 Legislation to make provision for a tribunal hearing panel to be constituted with a minimum of 3 members, at least 2 from the same profession as the practitioner who is a party to the proceedings is supported.

9.8.1 Parties to a tribunal hearing will be the responsible board, and the registrant. Notifiers may be called as witness in the board's case before the tribunal.

10.10.1 A party to a proceeding before a tribunal will have the right to appeal a decision of the tribunal on points of law to the responsible State or Territory Supreme Court.

10 OFFENCES and REGULATED CONDUCT

It is significant that 'failure to have professional indemnity insurance' is listed

as an offence when none has been obtainable for midwifery for the past 7 years, and the situation is currently without remedy. This constitutes a serious ongoing public interest issue for birthing women and requires urgent attention.

11.6.1 Advertising Offences. Option 1 (include no advertising offences in the national Legislative scheme) is supported.

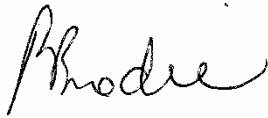
11.10 Legislative powers for a responsible board to monitor registrant compliance with determinations, decisions, conditions, and other undertakings is supported.

12.1 Transition Arrangements

Provision for new national boards to continue to deal with, finalise investigations / disciplinary / performance / impairment matters that were in process prior to 1 July 2010 is practical and supported, as outlined in the proposal.

ACM thanks you for considering our input. We look forward to seeing the legislation in due course.

Yours sincerely,



Professor. Pat Brodie FACM
National President