

**NATIONAL REGISTRATION AND
ACCREDITATION SCHEME FOR
THE HEALTH PROFESSIONS -
PROPOSED ARRANGEMENTS FOR
HANDLING COMPLAINTS AND
DEALING WITH PERFORMANCE,
HEALTH AND CONDUCT**

**SUBMISSION ON NATIONAL REGISTRATION
AND ACCREDITATION SCHEME FOR THE
HEALTH PROFESSIONS BY AUSTRALIAN
DENTAL ASSOCIATION (NSW BRANCH) LTD**

PRESENTED - 17TH NOVEMBER 2008

The information presented in this document is confidential and remains the property of the Australian Dental Association (NSW Branch) Limited. No part of this document may be reproduced without written permission.

AUSTRALIAN DENTAL ASSOCIATION
(NEW SOUTH WALES BRANCH) LIMITED



71-73 Lithgow Street, St Leonards NSW 2065
Tel (02) 8436 9900 • Fax (02) 8436 9999
PO Box 132, St Leonards NSW 1590
Email: adansw@adansw.com.au • www.adansw.com.au

The Australian Dental Association (NSW Branch) Ltd (ADA NSW) welcomes the opportunity to comment on the Proposed Arrangements. ADA NSW is the professional association representing dentists, whether practising in the public or private sector, in New South Wales and the Australian Capital Territory. The Branch has over 3700 members which represent approximately 90% of practising dentists in NSW and the ACT.

ADANSW has a long and significant history in dealing with complaint matters, either in conjunction with an insurer offering a contract of professional indemnity insurance or through an advocacy telephone service available to the public. This service has been recognised and acknowledged by the Health Care Complaints Commission in NSW. The Branch is well positioned to make comments on this consultation and has had an active role in legislative and regulatory reform in NSW and the ACT.

EXECUTIVE SUMMARY

ADA NSW supports the guiding principles underpinning the development of the legislation and the scheme that ensures

- the safety of the public is paramount,
- high quality health care must be protected and advanced
- natural justice processes are maintained
- the costs of regulatory change are minimised and the amount of “red tape” reduced and
- that governments should be accountable and processes transparent

Dentistry in Australia is a well regulated and safely practiced profession; any changes to regulation needs to ensure that this is not affected nor does the cost of administering a scheme lead to an increased cost (either directly or indirectly) to the public. In a previous submission to NSW Health on health care liability, the Branch contended that given a conservative estimate of dental services delivered on any given day in NSW is at least 30,000 people, leading to a conservative estimate of at least 6 million occasions of service each year, the reported error rate is less than 1% and events of any significant public health nature are negligible.

The Branch recognises that consumers of health services have a key role in overseeing standards. However the balance must be struck between the understanding of professional standards and regulation applied by peers versus consumer sentiment and the consequent judgements that maybe applied due to the so-called “power imbalance” due to understanding. It is widely acknowledged that peers in dentistry are often more harsh in their judgements in comparison to that applied by consumers, particularly with regards to clinical standards. Consumers may

in fact be looking for a different satisfaction from the complaints resolution process. The Branch recognises and supports the requirement for natural justice processes to be applied equally through varied authorities, whether that is a registration board, a health care complaints body or consumer fair trading body. Avoiding an overly legalistic, cost effective and administratively simple system would be a good outcome.

ADA NSW will only provide comment on highlighted points; otherwise it can be read that we are in agreement with the consultation.

KEY POINTS

- there is unlikely to be a one size fits all for the professional groups with regards to complaints management to ensure the needs of the public and health workforce are balanced (Proposals 2.1.1, 4.1.1)
- the definitions used and process adopted need to be consistent and unambiguous (Proposals 2.1.15, 3.3.1, Attachment 1)
- the rights of the health professional should not be lessened in the efforts to achieve a patient or consumer centred system (Proposals 4.1.1, 5.6)
- natural justice processes and individual rights need to be maintained and the proposed system not over complicated or more legalistic to achieve desired outcomes (Proposals 4.5.1, 4.6.1, 4.7.1, 5.6, 8.3.2, 8.3.4, 9.1.1, 9.3)
- the system introduced should not become a barrier to health service delivery nor should it increase cost (Proposals 9.1.1, 9.8)
- the powers of the Board and its components and processes need to be clearly defined (Proposal 6.4.1, 7.4.1)
- the relationship to other bodies such as health care complaints and consumer tribunals needs to be well defined to minimise jurisdictional “trawling” and inappropriate review (Proposals 5.3.1, 9.8)
- the approach to mandatory reporting should not lead to unintended negative consequences (Proposal 4.4)
- the interface between health service and commercial markets, in this case advertising, should reflect ACCC guidelines (Proposal 11.6.1)

SPECIFIC COMMENT

Proposal 2.1.1 Notification

Whilst being in general support of the term notification, it is our experience that the dental notification/ resolution process may differ from others, for example, that of the medical notification/ resolution process.

With respect to dental notifications, the notification will be made to the National Dental Board (or a Committee of the National Board located in a State) and a Notifications Assessment (Committee) will determine the most appropriate course of action - whether a notification should be dealt with via a performance management committee, a health management committee or a conduct management committee (e.g. disciplinary). The Board or the Committee can appoint a panel to hear a notification or refer the notification to the Dental Tribunal. It will need to be made clear to the profession and the public what matters will be heard by the Board and/or its agencies to avoid becoming the “dumping ground” for all matters that do not relate to the primary purpose of protection of the public. If this is not achieved then there is scope for confusion and the opportunity for “trawling” through agencies which leads to increased cost and may not respect natural justice processes. Existing legislation provides for an “impairment stream” (e.g. health management stream) and the Branch queries whether the proposed changes in the paper will assist in the administration of health notifications to the benefit of the public.

Proposal 2.1.15 Not of Good Character

The Branch would support “Not of Good Character” but requests clarification of the definition of “defect” and suggests the opportunity here is to align with existing legislation that aims to remove subjectivity from the assessment and clearly define process.

Proposal 3.3.1 and Attachment 1 Draft Definitions of “unsatisfactory professional conduct”, “unsatisfactory professional performance” and “professional misconduct” proposed for inclusion in the national legislation.

Clause a) to the definition of “unsatisfactory professional conduct” provides as follows: *“professional conduct that is of a lesser standard than that which might reasonably be expected of the practitioner by the public or the practitioner’s professional peers”*. The use of “or” rather than “and” takes the standard away from peer review and into the domain of the public. As stated in the Executive Summary, whilst this may be an admirable objective, it may in fact achieve a lowering of the standard expected and therefore expose greater risk (even when that risk is acknowledged as low). The Branch reiterates the need for the Board to hear matters of relevance to its role in ensuring professional standards and competency rather than being drawn further into commercial or consumer affairs issues.

Proposal 3.3 – other matter

Propose ‘sexual misconduct’ be replaced by the term ‘inappropriate behaviour’. This provides a much broader catch all for registrants’ behaviour otherwise ill defined or profession specific. By way of example: A registered health professional must not engage in inappropriate behaviour involving someone who is, or was, a user of a health service provided by the health professional. A Board guideline should set out what kind of behaviour is inappropriate in relation to a health profession

Proposal 4.1.1 Who May Make a Notification

This strikes to the right of review and how a notification may end up being deemed vexatious. The Branch would prefer that the legislation provides for a person (not including and organisation where there may be a commercial conflict of interest) to make the notification. The notifier should not have a right of review (see options 1 and 2 on page 20). The health practitioner should have the right of review set out in 9.6.1 and 10.10.1 of the paper.

Proposal 4.4 Mandatory Reporting Obligations

Mandatory reporting is not a new obligation for medical practitioners but it will be for most other health care providers. The argument for mandatory reporting is that a peer is more likely to be aware of problem and should report that knowledge to the Board as a measure to protect the public. The argument against mandatory reporting is that it may cause the problem practitioners to "go underground". In other words, impaired practitioners will not seek help for fear of being the subject of a notification, so the chance of exposure and rehabilitation (or removal from the health system) is in fact reduced. The paper deals with mandatory reporting to the Board by registered health practitioners and mandatory reporting to the Board by employers. With respect to peer reporting, there are 2 options:

The first option (1a) is limited to notification when the health practitioner is in a treating relationship with the other health practitioner and this option is given guarded support. For example, a dentist consults a psychologist about a family relationship matter. During the consultation the dentist discloses that he is not sleeping properly and drinking more than usual. The psychologist may form the view that the dentist is placing the public at risk and report him to the Board. The problem with peer mandatory reporting is that the standard will vary from one practitioner to another. For example, if the same dentist visited 2 different psychologists one may think he does not pose a risk whereas the other may reach a different view. It is a subjective analysis. However of the 2 options listed, Option 1a is given guarded support whereas Option 1b is problematic as this removes many avenues available to practitioners who may be well supported through impairment processes.

The second area is employer mandatory reporting. The first issue to raise is whether the legislation will define an "employer" given there is existing ambiguity. Option 2a is preferred over Option 2b. In this regard, Option 2b makes it mandatory for an employer to report "conduct that may constitute unsatisfactory professional conduct or professional misconduct." This is extremely problematic and will cause significant strain on the relationship and potentially raise a number of workplace/industrial issues. For example, an employer may use mandatory reporting as a tool to assist in the dismissal of an employee. In short, it is open to abuse. Option 2a is given guarded support.

A concern of the Branch regarding Mandatory Reporting relates to the possibility of vexatious complaints driven by other agendas such as commercial or competitive matters and the ability to hide behind an extended obligation.

The consultation paper invites submission on the mandatory reporting of students. Any such mandatory reporting should be for extreme circumstances only.

Proposal 4.5.1 Protection for Notifiers and Registrants

The Branch provides guarded support if the issue of vexatious notification and right of review is appropriately determined.

Proposal 4.6.1 Own Motion Powers

The Branch provided guarded support again based on the need for appropriate grounds to be stated and that natural justice processes are respected.

Proposal 4.7.1 Immediate Suspension Powers

It is the view of the Branch that proposals 4.7.2 and 4.7.3 should be incorporated into the immediate suspension powers set out in 4.7.1 as it gives the practitioner appropriate options during the process. Only serious breaches with prospects of direct and immediate danger to patients to be included here and legal representation for registrant is permitted in this instance however the view of the Branch on Proposal 9.3 is guarded support for Option 4b.

Proposal 5.3.1 Liaison with HCCs

The Branch supports the appropriate authority dealing with the matter and to ensure that appropriate provisions are in place to ensure non-bias, procedural fairness and professional understanding to enable the basis of complaint to be resolved appropriately and with full understanding of technical (professional) matters.

Proposal 5.6 Notifiers' Rights of review of Preliminary Assessment Decisions

The Branch supports option 1 where the notifier should not have a right of review (see options 1 and 2 on page 20). The health practitioner should have the right of review as set out in 9.6.1 and 10.10.1 of the paper.

Proposal 6.4.1 Performance Panel Hearings, 7.4.1 Health Panel Hearings and 8.5.1 Conduct Panel Hearings

The Branch supports that the majority of members are from the profession concerned.

Proposal 7.1.1 Overview of Management of Health Matters

The Branch supports option 1 as this is an equitable approach.

Proposal 8.3.2 Appointment of Investigators

The Branch provides guarded support as it depends upon the trigger for investigation; and relates to 8.3.4

Proposal 8.3.4 Notice of an Investigation

The Branch objects and believes the practitioner should be given notice to ensure fairness and natural justice. The provision of notice may add to public benefit by the practitioner reviewing his/her practice due to the notice being received.

Proposal 9.1.1 Ensuring Accountability, Transparency and Procedural fairness

Option 1 is supported if the outcomes achieved are as stated and it does not lead to an overly legalistic approach to ensure the interests of the public are achieved.

Proposal 9.3 Legal Representation for Registrants at Panel Hearings

The issue should be procedural fairness and protection of individual rights. The paper quite rightly focuses on protection of the public but we must not lose sight of the rights of the practitioner. The Branch supports 4b and raises the concern that, dependent on the extent and place of legal involvement, this may impact on the cost of representation and professional indemnity insurance.

Proposal 9.8 Role of Commonwealth, State and Territory Ombudsman

The Branch provides guarded support to Option 1 if it achieves a reduction in red tape and removes the multiple avenues for review.

Proposal 11.6.1 Regulation of Advertising

The Branch supports Option 1 where the Board can issue guidelines which interface with trade practices and fair trading legislation, acting in concert with ACCC guidelines.

Summary

The Australian Dental Association (NSW Branch) Ltd is broadly supportive of the proposed arrangements as described in the consultation paper and has provided specific comment above. The Branch reiterates its position that scheme ensures

- the safety of the public is paramount,
- high quality health care must be protected and advanced
- the balance between consumer and provider rights is appropriate
- that governments should be accountable and processes transparent; and
- does not lead to increased costs or administrative burden