



Australian  
Dental  
Council

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## **SUBMISSION**

**on**

### **NATIONAL REGISTRATION AND ACCREDITATION SCHEME FOR THE HEALTH PROFESSIONS**

**Consultation on Proposed Arrangements for Handling Complaints,  
and Dealing with Performance, Health and Conduct Matters**

17 November 2008

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## 1. Introduction

1.1 The Australian Dental Council appreciates the invitation of the Practitioner Regulation Subcommittee of the AHMAC Health Workforce Principal Committee to comment on policy matters that are set out in the consultation paper (issued 07 October 2008) on proposed arrangements for handling complaints, and dealing with performance, health and conduct matters that are to be incorporated in the second stage of legislation to establish a National Registration and Accreditation Scheme for the Health Professions.

1.2 The Australian Dental Council (ADC) was formed in 1993. Membership of the ADC comprises the following bodies associated with the standards of education and training and regulation of professional practice for dentists, dental specialists, dental therapists and oral health therapists, and dental hygienists in Australia:

- (a) the Dental Boards of the States and Territories of Australia
- (b) the Australasian Council of Dental Schools
- (c) the Australian Dental Association Inc
- (d) the Royal Australasian College of Dental Surgeons
- (e) the Australian Dental and Oral Health Therapists Association
- (f) the Dental Hygienists Association of Australia

In addition, the Dental Council of New Zealand and the Council of Regulatory Authorities for Dental Technicians and Dental Prosthetists Australia and New Zealand Inc (CORA) have Observer status on the ADC Board. The ADC is governed by a Board of Directors comprising nominees of the above member bodies, together with the officebearers and Chairs of standing committees.

1.3 The principal functions of the ADC are:

- (a) to advise and make recommendations to Australian State and Territory Dental Boards in relation to:
  - the accreditation of education courses leading to a registrable dental or oral health qualification, conducted by Australian dental schools and other recognised institutions
  - the assessment of the suitability for practice in Australia of persons with overseas dental qualifications, and
  - uniform criteria for recognition of qualifications for registration and standards of practice
- (b) to provide advice on matters concerning the occupational regulation of dentists, including general and specialist registration, and of professions allied to dentistry
- (c) to undertake certification of other education courses that do not lead to a registrable dental or oral health qualification, conducted by Australian dental schools and other appropriate institutions.

1.4 The ADC has consulted with the following stakeholder groups in the compilation of this submission:

- State/Territory Dental Boards.
- Australasian Council of Dental Schools
- Australian Dental Association Inc
- Australian Dental and Oral Health Therapists' Association Inc
- Australian Dental Prosthetists' Association
- College of Dental Technicians of the Oral Health Professionals Association
- Council of Regulating Authorities for Dental Technicians and Dental Prosthetists Australia and New Zealand Inc
- Dental Hygienists' Association of Australia Inc

Not all groups have been able to respond to the issues canvassed in the consultation paper.

For ease of reference this Submission uses numbering which follows the numbering of the Consultation Paper. Only paragraphs on which comments are made have been reproduced in this Submission (hence the numbering is incomplete). Comments are in ***bold italics*** following the relevant extract from the Consultation Paper.

## 2. Proposed terminology

- 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.
- 2.1.5 Performance management committee** – This term is proposed to be used to describe a committee that may be appointed by a responsible board to oversee the management of practitioners whose performance may be unsatisfactory.
- 2.1.6 Health management committee** – This term is proposed to be used to describe a committee that may be appointed by a responsible board to oversee the management of practitioners whose performance may be unsatisfactory.
- 2.1.11 Conduct management committee** – This term is proposed to be used to describe a committee that may be appointed by a responsible board to oversee the management of investigations and hearings into the conduct of practitioners who may have engaged in unsatisfactory professional conduct.

### Submission of the ADC:

*The consultation paper proposes that the discretion of a national board to appoint members to the various committees be restricted to a list of persons who have been approved by the Ministerial Council. This will lead to a bureaucratic, prescriptive, and inflexible approach which will increase both costs and complexity. The ADC submits that the legislation should empower the national boards to establish committees to assist them to perform their functions in these areas effectively and efficiently, including the power to delegate sufficient functions and decision making to its committees.*

*This is particularly for dentistry where there are multiple professional groups under a single board.*

- 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.

### Submission of the ADC:

*We presume this is meant to be named 'Health assessment panel'.*

- 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'.

### Submission of the ADC:

*The alternative option is preferable. The term 'not a fit and proper person' has wide acceptance, is more relevant to a modern community and is a more generally used term in other legislation. Its use already occurs in the regulation of a number of professions at a State level, and is also utilised in the Commonwealth jurisdiction.*

- 2.1.17 Unsatisfactory professional performance** – This term is proposed to be used to describe departures from an acceptable standard of professional competence or performance that are not so serious as to warrant suspension or cancellation of registration. See Attachment 1 for proposed definition.
- 2.1.18 Unsatisfactory professional conduct** – This term is proposed to be used to describe conduct that is less serious and unlikely to result in suspension or cancellation of a practitioner's registration, and therefore does not require referral to an external tribunal for hearing. See Attachment 1 for proposed definition.

**Alternative Option:** An alternative term for consideration (used in some Acts) is ‘unprofessional conduct’.

**2.1.19 Professional misconduct** – This term is proposed to be used to describe conduct that is so serious that if the allegations are proven, might warrant suspension or cancellation of the practitioner’s registration, and therefore requires the board to refer the matter for hearing by the responsible tribunal. See Attachment 1 for proposed definition.

***Submission of the ADC:***

*The ADC supports the approach of providing for separate definitions for unsatisfactory professional performance, unsatisfactory professional conduct and professional misconduct. However it favours the use of the term ‘unprofessional conduct’, as currently occurs in a number of jurisdictions. There is no suitable definition of ‘unsatisfactory’: a single episode does not constitute unprofessional conduct or ‘unsatisfactory’ performance; complications happen, and there should be able to be clear recognition of the professional obligations of the practitioner in terms of knowledge, conduct and performance, and the ability for another body to deal with recognised complications of treatment.*

## **4. Notifications**

### **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.

***Submission of the ADC:***

*If specific details of what is to be included in a notification form are detailed in the legislation then it should also include ‘the notifier’s contact details’ and ‘consent to exchange information’.*

### **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.

#### **Submission of the ADC:**

***The ADC supports a combination of Options 1b and 2b.***

#### ***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.

#### **Submission of the ADC:**

***The ADC supports the introduction of mandatory reporting obligations on registered practitioners and/or educational institutions in relation to registered students.***

### **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.

#### **Submission of the ADC:**

***The ADC supports the proposal to provide statutory protection to persons making notifications (and any person who provided the notifier with relevant information). However, the protection proposed is too restricted. It is narrower than that currently in place, for example in Queensland (ss. 387, 388, 389 and 390, Health Practitioners (Professional Standards) Act 1999) and Victoria (Conciliation Review Act). The ADC recommends provisions similar to those applicable in these jurisdictions.***

### **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.

**Submission of the ADC:**

***There is general support for the length of time a board may immediately suspend a practitioner pending completion of an investigation and/or disciplinary process being a period of up to at least six months, or even to consideration whether there would be adverse implications if this decision were to be entirely in the Board's discretion, subject to modification of relevant considerations in exercising suspension power in the following way:***

- ***The threshold for taking action under the suspension power should be that the ‘...registrant’s continued practice poses a serious potential risk to public health and safety’ or that immediate action is necessary to protect vulnerable persons***
- ***A better balance between public protection and fairness to registrants should be achieved by a requirement for the board to take the least onerous action to protect the public.***

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

***Proposal 5.1.1:*** It is proposed that the legislation provide for boards to receive a notification and determine whether the notification is within its jurisdiction to deal with and if so, what action should be taken.

***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.

**Submission of the ADC:**

***It is often difficult to determine whether a notification is frivolous, vexatious, misconceived or lacking in substance without investigating the matter. The proposed powers available following receipt of notification do not enable an efficient and cost effective preliminary assessment process. Powers should be provided to enable boards to seek further or better particulars from the notifier and to seek any relevant information from related third parties, such as hospitals, but not including the registrant. In the experience of current boards, this can reduce the number of matters referred for investigation where the principal consideration is to seek information which, if it had been available at initial assessment, would have informed the decision to take no further action or to take a different action from that of investigation.***

***A situation where a notifier is uncooperative in providing additional relevant particulars should be recognised in legislation as a basis for the board to take no further action.***

### **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.

### **Submission of the ADC:**

***Experience suggests that the proposed Notifications assessment committees could be unwieldy and unworkable in the field of dentistry (where there are multiple professions involved). Every notification should have a preliminary investigation. It is therefore proposed that consideration be given to the legislation empowering the responsible board to authorise an investigator to assess a notification (possibly a 'committee' comprising one person, if this arrangement cannot otherwise be readily achieved in the legislation).***

## **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.

### **Submission of the ADC:**

***The proposals in the paper about placing restrictions on registration are potentially confusing, with reference to 'agreements', 'other written agreements', 'undertakings', 'enforceable undertakings', 'undertakings which may include conditions', 'conditions', and 'critical conditions'. It is suggested that a simpler set of set of terms and processes for placing restrictions on registration be considered:***

- ***an 'undertaking' should be considered as a voluntary restriction. For the purposes of the legislation, all undertakings should be enforceable and not published on the register unless it is in the public interest to do so.***
- ***'conditions' should be able to be imposed only at the level of a national board as an imposed restriction on a practitioner's registration and be published on the register (unless it is not in the public interest to do so).***

## **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.

**Submission of the ADC:**

***The ADC suggests that there is an argument for the right of review to be limited to the situation where the national board determines to take no further action following preliminary assessment. There is not a strong argument to support a right of review for a decision to refer a matter to a conduct management committee or a performance management committee since both committees will be constrained to refer a matter to a tribunal if it is a matter of professional misconduct.***

## **6. Performance matters**

### **6.2 Performance management**

**Proposal 6.2.2:** It is proposed that a board or a performance management committee have powers, following receipt of a performance assessment report to:

- request the practitioner to undertake further education and/or supervised practice
- counsel the practitioner
- request the practitioner give an undertaking to the board, which might include, for example, the placement of conditions on registration
- refer the matter for hearing by a performance panel (performance matters)
- refer the matter to be handled as a health management matter (impairment 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, and
- take no further action.

**Submission of the ADC:**

***The ADC submits that only the relevant board/state committee should be empowered to make decisions that impact on a practitioners' registration, not a committee.***

### **6.3 Performance assessments**

**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.

**Submission of the ADC:**

***Assessors are required to report to the board or performance management committee. To require them also to provide a report to the practitioner within 7 days is considered to be an unreasonable and potentially unachievable expectation. It is more appropriate that the board or management committee following receipt of the report, and as the final arbiter, should determine***

- (a) whether it requires the assessor(s) to provide further information or evidence, and***
- (b) how and when to report to the practitioner including, in relation to dealing with the finding, whether the practitioner within a specified period is required:***
  - (i) appear to give an explanation and/or discuss the report, or***
  - (ii) provide a written explanation***

### **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.

**Submission of the ADC:**

***The principle of assessment by peers is desirable to ensure the panel has the necessary capacity to fully understand and appreciate the clinical nature and complexities of a complaint. Membership of a Panel should be balanced to achieve this, and thus the number of ‘non-registered’ panel members should not be greater than number of registrant members.***

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

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

***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.

**Submission of the ADC:**

***Option 2 is supported as it represents a commitment by the registrant to rehabilitation. The legislation should also enable boards to waive these charges, in full or in part, should circumstances warrant such a waiver.***

### **7.3 Health assessments**

***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.

**Submission of the ADC:**

***The requirement for the assessor to give a health assessment report to the practitioner is inappropriate and is also inconsistent with proposal 7.3.3 which enables the Board to withhold the report in certain circumstances and provide it to a health practitioner nominated by the registrant. This is rightfully the responsibility of the relevant board.***

## **8. Conduct matters**

### **8.3 Investigations**

***Proposal 8.3.5:*** It is proposed that the legislation require an investigation to be conducted as quickly as practicable having regard to the nature of the matter, and that at least the following timelines be included in legislation:

- provide notice of a decision on the outcome of an investigation (with reasons if required) to the registrant

and notifier – within 14 days of the decision

- provide progress reports to notifier and registrant – at least three monthly, and
- require the responsible board to keep both the notifier and the registrant informed of progress with the investigation, at a minimum of three monthly intervals.

**Submission of the ADC:**

***The second and third bullet points seem to have the same effect.***

#### **8.4 Powers of investigators – search, entry, seizure**

**Proposal 8.4.1:** It is proposed that the legislation provide for investigators to exercise the following powers:

- by written notice, require a person to:
  - provide information, and
  - attend the investigator to answer questions or produce documents
- enter the premises of a registrant's practice (unless it is also their private residence), during ordinary business hours and, with the consent of the occupier, inspect and search premises generally and request the production of documents or other items and the provision of information, and
- obtain a warrant to enter and search premises and seize evidence (see below).

**Submission of the ADC:**

***There should be reconsideration of the exemption for private residence if the residence is also the registrant's practice, with appropriate protection of the private citizen rights of the registrant.***

#### **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.

**Submission of the ADC:**

***The legislation should be broadly empowering to enable any information relevant to the particulars being considered by the panel to be put before the panel, and not be restricted to considering a report of the conduct management committee, including the results of an investigation. Consideration should be given as well to a provision (a subpoena provision) to require persons of interest to attend panel hearings.***

## 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.

#### **Submission of the ADC:**

***The ADC endorses option 1. This is the only option consistent with the model of professional self-regulation established through the IGA. The ADC is not aware of any evidence that procedural fairness is not delivered under current mechanisms in the various jurisdictions (although it is acknowledged that decision makers, whether boards or separate statutory positions/bodies are not immune from unwarranted criticism by dissatisfied notifiers, registrants and/or the media). There are more than sufficient balances included in the proposed legislation to ensure both procedural fairness and public confidence in the decision making of the national boards, panels and tribunals.***

### 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.

#### **Submission of the ADC:**

***The Boards submit that option 4b will provide the panel with adequate flexibility in undertaking its role since it allows for the right to a legal adviser to accompany the registrant in a hearing, with the decision on whether the legal adviser may speak left to the discretion of the panel.***

## 9.4 Confidentiality of panel hearings

**Proposal 9.4.1:** It is proposed that the legislation make provision for the proceedings of a panel hearing to be closed to the public, and for it to be an offence for any person to publish the name of a notifier, witness or the practitioner concerned. With respect to conduct hearings, it is proposed that the legislation enable a notifier, with the leave of the panel, to make a submission to the panel if the notifier is not called as a witness.

### ***Submission of the ADC:***

***This proposal is endorsed. In addition, the ADC submits that the legislation should incorporate a penalty for breach of confidentiality that acts as a sufficient deterrent, including where publication of the findings could lead to the identification of the notifier, a witness or the practitioner concerned.***

## 9.8 Role of Commonwealth, State and Territory ombudsmen

There are two options for dealing with the scope and application of ombudsman legislation with respect to the national registration scheme:

- Option 1:** Apply the Commonwealth *Ombudsman Act 1976* to the national registration scheme.
- Option 2:** Apply existing State and Territory Ombudsman legislation to administrative decisions made by the boards and National Agency. This would require clarity about which Ombudsman Act would apply in individual circumstances, and if not carefully handled, might provide multiple avenues of review for an individual matter.

### ***Submission of the ADC:***

***Option 1 is supported.***

## 10. Tribunal hearings

### 10.2 Criteria for State and Territory tribunals

**Clause 2.2** of the IGA (Attachment A) requires that all State and Territory tribunal arrangements comply with national criteria agreed by the Australian Health Ministers' Council (AHMC). Note: these criteria are yet to be developed.

### ***Submission of the ADC:***

***Access to, and timeliness of, the tribunal are essential. Given current experience in a number of jurisdictions where matters can take an excessive time to be listed for hearing, consideration should be given to inclusion in the national criteria (to be agreed by AHMC) of adequate resource requirements and other criteria that address issues of access and timeliness.***

### 10.5 Findings and determinations of a tribunal

**Proposal 10.5.1:** With respect to matters referred by the board for tribunal hearing, or where the practitioner has requested the matter be referred, it is proposed that the responsible tribunal would be empowered to make any of the following findings:

- the practitioner is not of good character
- the practitioner's registration was obtained by fraud
- the practitioner has engaged in professional misconduct
- the practitioner's performance has been unsatisfactory, or
- the practitioner's capacity to practise is affected by habitual misuse of alcohol or other drugs or physical or mental impairment.

**Submission of the ADC:**

**Add a further dot point: the practitioner has engaged in unsatisfactory professional conduct (consistent with clause 2.1.18).**

**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

**Submission of the ADC:**

**We presume this is meant to read: 'the responsible tribunal'.**

**Proposal 10.5.4:** With respect to performance, health, or conduct panel decisions referred for review, it is proposed that the responsible tribunal would have the power to either confirm the original decision of the panel, or substitute its own finding and/or determination from the list that were available to the panel. The tribunal would be empowered to find any of the following:

- the practitioner is not of good character
- the practitioner's registration was obtained by fraud
- the practitioner has engaged in professional misconduct
- the practitioner's performance has been unsatisfactory
- the practitioner's capacity to practise is affected by drug or alcohol dependency or physical or mental impairment
- the conditions imposed by the board were unjust, onerous or inadequate, and/or
- the board erred in making its findings

**Submission of the ADC:**

**Add a further dot point: the practitioner has engaged in unsatisfactory professional conduct (consistent with clause 2.1.18).**

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

### **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.

**Submission of the ADC:**

**The ADC sees merit in Option 3 but would not object to the wider discretion for boards under Option 1.**

**ATTACHMENT 1: Draft definitions of ‘unsatisfactory professional conduct’, ‘unsatisfactory professional performance’ and ‘professional misconduct’ proposed for inclusion in the national legislation**

**Submission of the ADC:**

*The ADC proposes that consideration should be given to amendment of the categories and definitions as follows:*

- 1. Unsatisfactory professional performance – professional performance that on more than one occasion demonstrates that the knowledge, skill or judgement possessed, or care exercised by the practitioner is significantly below the standard reasonably expected of a practitioner of an equivalent level of training or experience.*
- 2. Unsatisfactory professional conduct – replace with ‘Unprofessional conduct’ and delete subparagraph (b)*
- 3. Professional misconduct – (as defined in Attachment 1 of the consultation document)*

