

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

**Submission on behalf of the Australian Osteopaths
Registration Boards**

**Contact person: Brad Skidmore
Acting Registrar, NSW Osteopaths Registration Board
02 9219 0246
bskidmore@hprb.health.nsw.gov.au**

CONSULTATION PAPER

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

Issued by the Practitioner Regulation Subcommittee
Health Workforce Principal Committee
Australian Health Ministers' Advisory Council
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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.

Position	Comment
Supported	

2. Proposed terminology

There is variability across State and Territory legislation as to the terms used to describe certain functions or processes of the boards. It will be necessary for the legislation to adopt agreed terminology to describe these functions.

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’.

Position	Comment
No consensus	Refer to comments below for the various views expressed:

The Act where ever possible should use plain language that is easily understood by the public. The term notifications is not readily understood by the public and it is the Boards preference that it should be replaced with the every day language of Complaints and complainant. The Act could then define complaints to include other forms of notifications.

Notification needs better clarification that it is a complaint.

Notification is preferred as it covers matters that are not specifically complaints. The Board is concerned that members of the public and other practitioners may be reluctant to lodge a complaint against a practitioner who suffers from a health-related impairment

Notification is a good generic term which encompasses complaints but includes other matters which may come before the Board.

2.1.2 Preliminary assessment - This term is proposed to be used to describe the action taken by a board (or a committee of the board) when a matter comes to its attention, in order to determine how it can be best dealt with, whether via a performance, health or disciplinary process. Note: It is proposed there be flexibility to move between the performance, health and disciplinary streams as the circumstances dictate.

Alternative options: Alternative terms for consideration (used in some Acts) are 'investigation' or 'preliminary investigation'.

Position	Comment
No consensus	Refer to comments below for the various views expressed:
	The term preliminary assessment does not adequately describe the process. It is more than just an assessment it is an investigation into the facts of the matter. The term assessment should be replaced with investigation.
	Use of the term preliminary assessment is preferred as the primary purpose of this stage is to determine if an investigation is warranted.
	The first step in the process should be an assessment. Investigation should follow assessment.

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'.

Position	Comment
No consensus	Refer to comments below for the various views expressed:
	The term assessment does not adequately describe the process. It is more than just an assessment it is an investigation into the facts of the matter. The term assessment should be replaced with investigations committee.
	Use of the term notification assessment is preferred as the primary purpose of this stage is to determine if an investigation is warranted.
	The first step in the process should be an assessment. Investigation should follow assessment. Notification Assessment Committee is appropriate.

2.1.4 Responsible HCC – This term is proposed to be used to describe a health complaints or health services commissioner or other similar body, established under relevant State or Territory legislation and responsible for, amongst other things, conciliating consumer complaints against health service providers.

Position	Comment

Supported	

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.

Position	Comment
Supported	

2.1.6 Performance assessment – This term is proposed to be used to describe the assessment that a board or a performance management committee may, under legislation, request a practitioner undergo, in order to determine whether the practitioner has sufficient knowledge, skill and judgement to practise in the regulated health profession.

Position	Comment
Supported	

2.1.7 Performance panel – This term is proposed to be used to describe a panel or panels appointed by a responsible board, to hear and determine a performance (competence) matter.

Position	Comment
Supported	

2.1.8 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.

Position	Comment
Supported	

2.1.9 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.

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.

Position	Comment
Consensus decision supports original	

proposal	
The ACT Board prefers the Alternative option “Examination by a relevant Health Practitioner”	

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’.

Position	Comment
Supported	

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.

Position	Comment
Supported	

2.1.12 Conduct investigation – This term is proposed to be used to describe the investigation that is undertaken by the board or a conduct management committee, in order to determine whether disciplinary action should be taken against the practitioner.

Position	Comment
Supported	

2.1.13 Conduct panel – This term is proposed to be used to describe the panel appointed by a board following investigation, to hear allegations that a practitioner has engaged in unsatisfactory professional conduct.

Position	Comment
Supported	

2.1.14 Responsible tribunal – This term is proposed to be used to describe the relevant State or Territory tribunal responsible for hearing and determining matters of serious professional misconduct by registered practitioners, and appeals from certain board decisions.

Position	Comment
Supported	

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’.

Position	Comment
Supported	

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.

Position	Comment
Supported	

2.1.17

2.1.18 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.

Position	Comment
Supported	

2.1.19

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’.

Position	Comment
Consensus decision supports original proposal	
The ACT Board prefers the Alternative option “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.

Position	Comment
Supported	

3. Overview of proposed system

3.1 Background

The purpose of the registration system is to register and regulate health practitioners in the public interest. A notifications management system, comprising separate streams for addressing concerns about practitioners' performance, their health or conduct is a crucial element of such a system.

In serving the public interest, the notifications management system must operate above all else to protect the public from practitioners who are incompetent (to a greater or lesser degree), unethical, or impaired in their capacity to practise.

Where matters that raise questions about the professional performance, health or conduct of a practitioner, are brought to the attention of a board, whether through a report from a third party, complaint or self referral, it is intended that boards have the option of pursuing the matter through one or more of three streams: performance management (competence), health management (impairment) or conduct (discipline).

Matters which suggest possible professional misconduct or unsatisfactory professional conduct would be addressed, in the first instance through the investigation and disciplinary stream. Matters that primarily involve professional performance or impairment would be managed through separate processes that none the less, can feed into the disciplinary stream if necessary.

The three streams of the notifications management system are designed to achieve the public protection objective from different directions. The performance management stream and the health management stream aim to protect the public by identifying registrants whose practice or approach to practice causes concern but who have not caused harm to any person or potentially caused harm to a person, to address and overcome those matters of concern before harm or the potential for harm eventuates. These streams are proactive. The disciplinary stream approaches public protection from the other direction - where a complaint has been made that a practitioner has engaged in misconduct and harm has been caused, or may potentially have been caused, to a patient.

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.

3.2 Key features of proposed system

A diversity of forms

In developing the requirements for the new arrangements it is important to distinguish between functions and powers that must be provided for and forms of arrangements which may be used on an optional basis to give effect to these functions and powers. The mandatory features of the scheme must suit the circumstances of all professions and the distribution of registrants in those professions across Australia. For example, the ten professions vary in size from around 350,000 nurses and midwives currently registered across Australia (including double registrations) and less than 5000 registrants in each of the chiropractic, optometric, osteopathic and podiatric professions. The number of committees which boards choose to use to carry out the range of functions assigned to them will be very different across professions. Were it otherwise, the weight of committee structures would be beyond the smaller professions to find people to serve on them or the funds to cover their activities.

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.

Key features of the proposed scheme are as follows:

Receipt of notification (includes a complaint)

Each national board (or one or more notifications assessment committees of the board) would be responsible for receiving notifications about registered practitioners (or practitioners who were registered at the time that the conduct complained of occurred).

Preliminary assessment of notification

The national board (or a committee of the board including one located in a State or Territory) would be responsible for making a preliminary assessment of the matter, to determine the most appropriate course of action. At this point, the board or committee would determine:

- whether the notification has arisen from a consumer complaint and requires consultation with the responsible State or Territory HCC (all consumer complaints would require consultation)
- which other external bodies have an interest or involvement in the matter, such as other complaints bodies, Commonwealth State or Territory agencies
- whether the matter raises questions of the performance or competence of the practitioner
- whether the matter raises questions that the practitioner may have an impairment that is affecting his/her capacity to practise
- whether the matter raises questions of possible unsatisfactory professional conduct or professional misconduct
- whether continued practice by the registrant presents such a serious risk to public health and safety that their registration be immediately suspended pending investigation and hearing (see section 4.7)
- whether the matter should be referred to an external body for investigation or other action, and
- whether the notification warrants no further action because it is considered by the board to be frivolous, vexatious, lacking in substance or otherwise does not warrant investigation or other action.

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.

Performance management

If the board's preliminary assessment has found evidence that the practitioner's performance may be unsatisfactory, then the board may refer the matter to a performance management committee.

The role of the board or the performance management committee in such cases would be to oversee the assessment and management of poor performance. The board or the committee would have the power to appoint an assessor or assessors to undertake a performance assessment.

Following completion of the performance assessment and receipt and consideration of the report of the assessor, the board or committee would decide whether a formal performance panel hearing is required, or what other action is necessary to address any identified deficits in the practitioner's performance.

Health management

If the board's preliminary assessment has found evidence that the practitioner may have a physical or mental impairment, or may be habitually using alcohol or other drugs and that this is affecting or may affect their capacity to practise, then the board may refer the matter to a health management committee.

The role of the board or the health management committee in such cases would be to oversee the assessment and management of impaired registrants. A board or a health management committee would have the power to appoint a health assessor or assessors to undertake an assessment of the health of the practitioner. Following completion of the health assessment and receipt and consideration of the report of the assessor, the board or committee would decide whether a formal health panel hearing is required, or what other action is necessary to address any capacity to practise issues identified.

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 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.

3.3 Proposed definitions for what constitutes a departure from professional standards

Attachment 4 sets out the various definitions and standards in State and Territory registration Acts, against which judgements are made as to whether a registrant’s performance, capacity or conduct is deficient and whether they have a case to answer. Jurisdictions deal differently with these matters.

Some jurisdictions have a two tiered standard, for example, ‘unsatisfactory professional conduct’ and ‘professional misconduct’, others do not distinguish between serious and less serious matters. Also, one jurisdiction imposes a positive obligation on registrants to meet ‘the required standard of practice’, while most others focus on defining, more specifically, what constitutes sub-standard practice. There is, however, a level of consistency across jurisdictions in many of the elements that are considered sub-standard.

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.

Position	Comment
Consensus decision supports proposal	
The ACT Board prefers the Alternative option “Unprofessional Conduct” instead of “unsatisfactory professional conduct”	

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.

Position	Comment
Supported	

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.

Position	Comment
Supported	

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Proposal 4.2.2: It is proposed that the legislation provide a role for the responsible board to ensure that a person who wishes to make a notification is given reasonable assistance to do so.

This would allow assistance to be provided to a person who is not able, on their own, to put their complaint in writing, or who needs assistance to clarify the nature of their complaint (for example, persons with a disability or from a non-English speaking background).

Position	Comment
Supported	

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.

Position	Comment
Supported with amendment	To ensure the above list is not restrictive, first line of proposal should be: "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, but are not

	<p>limited to, an allegation that:”</p> <p>The term “habitual misuse” should be replaced with “substance abuse”</p> <p>Add to list: “The Registrant has breached professional practice standards issued or approved by the Board.”</p>
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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.

Position	Comment
Supported	
If not provided for elsewhere, the legislation should also provide a mechanism for the imposition of the outcomes of a notification to be imposed on the practitioner if they seek re-registration at a later date.	

4.4 Mandatory reporting obligations

There is considerable variation across jurisdictions as to the mandatory reporting obligations that are contained in registration legislation, to whom they apply, and for what types of matters. For example, some jurisdictions have no mandatory reporting obligations for any practitioners, and others have extensive provisions applying to medical practitioners and their employers. Some mandatory reporting obligations apply only to medical practitioners who are in a treating relationship with a practitioner who is impaired (in order to overcome the treating practitioner’s confidentiality obligations). Others extend beyond impairment, to professional conduct matters such as sexual misconduct, practising while intoxicated, or other serious breaches of professional standards. [Attachment 2](#) sets out the existing arrangements for mandatory reporting across jurisdictions.

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.

Position	Comment
Support options 1B and 2A	Consensus view.
<p>A diversity of opinions exist between jurisdictions with regard to this issue which include:</p> <ul style="list-style-type: none"> * The addition of mandatory requirement of employers to notify the Board if employment has been suspended or terminated as a result of health issues, misconduct, issues of competence. * To protect the public it is necessary to include sexual misconduct and employers have a role in ensuring those in their employ are behaving appropriately. * The Qld Board supports option 2B based on its experience with the Patel case – The extended obligations enable hospitals to report professional indiscretions. 	

Student registrants and mandatory reporting

If student registration is to apply under the regulatory scheme, then decisions will also be required on whether mandatory reporting obligations should extend to requiring registered practitioners and/or educational institutions to notify the responsible board with respect to a registered student and under what circumstances (impairment, or impairment and conduct matters, such as criminal charges or convictions laid for example, for drug trafficking). The obligations on students would also need to be considered.

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.

Position	Comment
Consensus position;	<p>This is a delicate area and it raises issues of the transfer of education responsibility to Boards. Learning and registration are distinctly separate areas with the learning being dealt with by Educational Institutions and the registration being dealt with by Boards. It is the Boards view that the appropriate time for the Board to intervene is at the time of registration. Prior to this it is a matter for the educational institution. There should not be mandatory reporting of health matters. Competence matters should be dealt with by the University. There should not be any reporting obligations placed on students.</p> <p>If students are registered under the scheme they should be subject to the same mandatory reporting requirements as other registrants, although some concerns exist where students may be subject to reporting on competence – ie they are students and by definition “not yet competent”</p>
<p>An alternative view expressed was that mandatory reporting of students should take effect once students are treating members of the public.</p>	

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.

Position	Comment
Supported	

4.6 Own motion powers

Most State and Territory Acts provide for boards to deal with matters where there is no external notifier or complainant. However the mechanism through which this is achieved varies as does what the boards are empowered to do in the event of an anonymous complaint. Some Acts provide for the board to make a complaint to itself and in that way initiate proceedings if necessary, others provide ‘own motion’ powers to initiate investigations or proceedings in the absence of a formal notification. While anonymous complaints are not to be encouraged, own motion powers allow a board to look into potentially serious matters that may come to its attention from a range of sources, including from data generated through the board’s own monitoring of registrants’ continuing competence.

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.

Position	Comment
Supported	

4.7 Immediate suspension powers

Most State and Territory legislation gives powers to registration boards to suspend, in advance of a disciplinary or other process, those registrants whose continued practice is considered to present a serious risk to the community. However, the level of flexibility provided varies, as does the mechanism through which the suspension is achieved. Some jurisdictions empower their boards directly to suspend, others require the board to seek an emergency order from the responsible tribunal. Also, some jurisdictions place a time limit on the suspension (eight weeks, six months, 12 months), in others, no time limit is specified and the board may apply a suspension until the proceedings are completed. Some jurisdictions with time limits allow a second and subsequent period of suspension to be imposed.

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.

Position	Comment
Support alternative option	Specify no term at all and leave it to the board’s discretion, providing there is an appeal process.

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.

Position	Comment
Supported	

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.

Position	Comment
Supported	

5. Preliminary assessment of notifications

5.1 Powers following receipt of a notification

The legislation will need to make provision for a board (or a committee of the board) to make a preliminary assessment of a notification, with a view to determining:

- whether it is within the jurisdiction of the board to deal with the notification
- if so, whether the notification is also within the jurisdiction of an HCC, and if so, whether it should be retained and dealt with by the board, or referred to the responsible HCC for conciliation, and
- whether the notification should be dealt with, in the first instance, as a performance matter, a health matter or a conduct matter.

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.

The details of how these decisions are proposed to be made under the legislation are set out below.

Position	Comment
Supported	

It was noted that as this is a legal concept it may be outside of the expertise of the Board.

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

Most State and Territory Acts make provision for boards to ‘reject’, ‘refuse’ or ‘dismiss’ a notification (or complaint) and set out the grounds for this. Most allow a board to decide not to proceed with a complaint that it considers to be frivolous or vexatious.

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.

Position	Comment
Supported	

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5.3 Liaison with HCCs

State and Territory registration Acts contain various statutory arrangements for registration boards and the responsible HCC (in whatever form this occurs) to work together with respect to a complaint against a registered practitioner. [Attachment 3](#) sets out the respective arrangements in each jurisdiction.

While most jurisdictions’ Acts specify a requirement for liaison between the respective bodies, these arrangements vary as to:

- which body has first option in dealing with a complaint received in the first instance by either party
- what role the HCC takes in the ongoing management of a complaint that is dealt with by a registration board
- whether the HCC takes on the role of prosecuting serious misconduct matters before a disciplinary tribunal in addition to the conciliation function, and
- the obligations on the respective parties to keep the other informed.

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.

Position	Comment
Supported	

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.

Position	Comment
Supported	

5.4 Who conducts the preliminary assessment of a notification

The statutory power to determine how notifications are to be dealt with will reside with the respective national boards and in the case of notifications from consumers, following

consultation with the responsible HCC. Because of the workload associated with the performance, health and conduct processes for some professions, and the need for local input, it is likely that the legislation will need to make provision to allow for preliminary assessment to occur at the State and Territory level if the board so chooses.

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.

Position	Comment
Supported	

d.

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.

Position	Comment
Supported	

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Proposal 5.5.2: It is proposed that the legislation require a board (or committee of the board) to refer a matter to the responsible tribunal for hearing if the board or committee forms the view that:

- the practitioner is not of good character, or
- the practitioner may have engaged in professional misconduct, or
- the practitioner’s capacity to practise is affected to such an extent that cancellation of registration may be warranted (health matters).

Position	Comment
Supported	

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Proposal 5.5.3: It is proposed that the legislation require the responsible board to:

- give to the notifier notice of the decision, the reasons for the decision and rights of review (if any), and
- give to the practitioner notice of the decision and, in the case of referral to a tribunal or committee of the board, the reasons for the decision.

Position	Comment
Supported with qualification	In relation to matters being referred to a Tribunal there should be no need for the Board to provide reasons as the matter has not concluded and the Tribunal will make the final reasons for the decision. All appropriate available information should be made available to both the notifier and the practitioner.

5.6 Notifiers’ rights of review of preliminary assessment decisions

The right of a practitioner to seek a review of a board’s decision with respect to a notification generally arises at the end of a performance, health or conduct process, when the board or tribunal has made its findings and determinations. Rights of review for practitioners are dealt with in [section 9.6](#) below.

With respect to notifiers, for some, their complaint may be finalised early, if a board decides to close the matter with no further action. With respect to notifiers’ rights at this point, there is variability across jurisdictions. Some Acts are silent on the question of notifier rights concerning a decision made by a board in these early stages. In others, the legislation is explicit about the rights of notifiers at this point.

For example, in one jurisdiction, notifiers have a right to seek a review of the following decisions:

- a decision not to investigate a notification
- a decision to close a matter with no further investigation, and
- a decision to hear a conduct or performance matter by a panel of the board, rather than referring it externally, for tribunal hearing - such a decision involves a judgement by the board about the seriousness of the matter and a complainant may not agree with the board.

In this jurisdiction, review of these early decisions is conducted internally, by a board appointed review panel, but the legislation provides that a nominee of the responsible HCC must sit as a member of each panel, a move designed to bring a level of independence to bear in scrutiny of the board’s assessment or investigation process and decisions. The review is conducted, initially, ‘on the papers’. However, if a review panel finds a problem with the initial assessment,

investigation or the resulting decision, it has the power to investigate further, or substitute its own decision. In practice, complaints from consumers represent only a proportion of all notifications to a board, and of those, only a small proportion of consumers choose to exercise their right of review.

It is considered important that the legislation be transparent about these matters, that those affected know where they stand, and that the legislation balance the rights of registrants and those of consumers. It is also important to attempt to address, at least in part, the perception that registration boards may at times act to protect the interests of registrants rather than those of notifiers, particularly when the board decides no further action is required, and the notifier disagrees.

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.

Position	Comment
Consensus position to support option 1 or stated alternative	Option 2 simply extends the complaints process without providing any notable benefits. In fact it undermines the complaints process by questioning decision made by the umpire. At some point in the process a decision has to be made and the Board should be making that decision. The alternative to this approach is to remove the entire complaints process from the Boards and place it in an independent complaints body similar to the present NSW system.
<p>The Tasmanian Board supports option 2 with the following comments:</p> <ul style="list-style-type: none"> * The right to seek a review should be restricted to a decision to take no further action. To allow review of other decisions is to invite the notifier to become involved in the work of the board. * Option 1 is unlikely to be accepted by legislators as it potentially denies natural justice. <p>The Queensland Board does not support either option. Refer to the Joint Boards submission from Queensland.</p>	

6. Performance matters

6.1 Overview of management of performance related matters

From time to time, a board may identify a practitioner whose knowledge, skill, judgement or care is or may be below the standard that their peers would expect, and which raises questions as to their continuing competence to practise.

A number of registration Acts across State and Territories, particularly those dealing with larger professions such as medicine and nursing include specific provisions to address poor or substandard performance. There are a variety of models – some provide for boards to deal cooperatively and flexibly with such practitioners to make arrangements to assess the performance of a registrant and, where deficits in their skills and knowledge are identified, reach agreement with the registrant, on a course of action to address these. This may or may not involve the placement of conditions on the practitioner’s registration.

In other jurisdictions, the process operates more formally, separate from the disciplinary process, and deals with performance issues which very clearly *do not* fall into a disciplinary category, in a framework of early intervention and remediation, the primary aim being to improve overall professional performance. While they rely on the practitioner’s co-operation and willingness to learn and improve, they can also be more directive.

All systems have in common however, the need for clear and flexible processes to address as disciplinary matters any concerns that the practitioner may be placing the public at risk. Thus, where a board’s assessment or monitoring processes identify a risk and/or the practitioner is resistant to addressing this, the board should have the option of dealing with this as a disciplinary matter rather than a performance matter. Equally, all schemes recognise that performance assessment processes can also provide a useful adjunct to a matter which is primarily disciplinary.

Some jurisdictions have also identified practitioners who may be reluctant to participate and co-operate in the process that lacks a clear distinction between performance assessment and disciplinary matters, raising concerns the assessment is no more than a preliminary exercise to trawl for evidence to support the prosecution of a disciplinary matter.

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.

Position	Comment
Supported	

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6.2 Performance management

If the board’s preliminary assessment has found evidence that the practitioner’s performance may be unsatisfactory, then the board may refer the matter to a performance management committee.

Proposal 6.2.1: It is proposed that the role of the board or a performance management committee be to oversee the assessment and management of registrants whose performance may be unsatisfactory. A board or a performance management committee would have the power to appoint an assessor or assessors to undertake a performance assessment of the practitioner. Following completion of the performance assessment and receipt and consideration of the report of the assessor, the board or the committee would decide whether a formal performance panel hearing is required, or what other action is necessary to address the performance issues identified (if any).

Position	Comment
Supported	

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.

Position	Comment
Supported	

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6.3 Performance assessments

Proposal 6.3.1: It is proposed that the legislation would empower a board (or performance management committee of a board) to appoint one or a number of assessors, who are not members of the responsible board (or committee of the board), to conduct a performance assessment of the practitioner, and that the board would pay for the assessment.

Position	Comment
Supported	

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.

Position	Comment
Supported	
	Some jurisdictions noted that 7 days may be unrealistic in the context of complex performance assessments.

Proposal 6.3.3: It is proposed that the legislation would provide a process for dealing with circumstances where a practitioner:

- does not agree to a performance assessment, or
- does not abide by an agreement to undergo a performance assessment.

In such circumstances, the board would be empowered to refer the matter to a conduct management committee for investigation, or to a tribunal for hearing.

Position	Comment
Supported	

6.4 Performance panel hearings

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

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.

Position	Comment
Proposal requires amendment	The above does not provide for a lawyer to be a member of the panel. Without a lawyer being present on the panel who would have the expertise to be able to protect the principles of natural justice and the complainants and practitioners rights. This is even more relevant in a system where the practitioner does not have legal representation. Also need to specify that a majority of panel should be registered peers.
Attention is also drawn to Section 3.5.3 of the consultation paper “Other matters for inclusion in Bill B” regarding the composition of panels.	

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.

Position	Comment
Supported	

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Proposal 6.5.2: 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.

Position	Comment
Supported	

Proposal 6.5.3: 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.

Position	Comment
Supported	

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.

Where a registrant is suffering from a physical or mental condition that affects their capacity to practise, most State and Territory Acts make provision for boards to deal flexibly with such practitioners (rather than via a formal disciplinary process).

The legislation usually allows the boards the flexibility to make arrangements by agreement with the registrant, to suspend or limit the registrant’s practise if necessary, and to work cooperatively with them to assist their return to unrestricted practice, without the need for a formal hearing or tribunal process. Conditions may or may not be placed on their registration.

These arrangements are entered into and monitored locally, and are designed to protect the public while enabling impaired practitioners to return to or remain in the workforce if it can be made safe for them to do so.

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.

Position	Comment
Supported	
The Western Australian Board queried whether it is the role of the Board to refer the practitioner to the support programs or if it was more appropriate that the Board refer the practitioner to a health care professional who can assist in sourcing these support programs more effectively?	

In some jurisdictions there are various types of health programs that provide assistance and referral services, and in some cases, treatment and monitoring of registrants. Some are conducted externally to the board while others are run directly by the board as part of its impairment pathway.

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.

Position	Comment
Support option 1 with amendment	The Board should have the ability to charge the registrant if deemed necessary. (in cases of non cooperation, continual relapse etc.)
The ACT Board supports option 2. The NT Board suggested the possibility of shared costs.	

7.2 Health management

If the board's preliminary assessment has found evidence that the practitioner may have a physical or mental impairment, or may be habitually using alcohol or other drugs, and that any of these is affecting or may affect their capacity to practise, then the board may refer the matter to a health management committee.

Proposal 7.2.1: It is proposed that the role of a board or a health management committee in relation to a health matter be to oversee the assessment and management of registrants whose capacity to practise may be affected by physical or mental impairment, or habitual use of alcohol or other drugs. A board or a health management committee would have the power to appoint an assessor or assessors to undertake a health assessment of the practitioner. Following completion of the health assessment and receipt and consideration of the report of the assessor, the board or the committee would decide whether a formal health panel hearing is required, or what other action is necessary to address the health issues identified (if any).

Position	Comment
Supported	

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.

Position	Comment
Supported	

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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.

Position	Comment
Supported	
A comment was also made that the legislation should have flexibility to accommodate situations where the practitioner does not attend an appointment for a health assessment and the Board still has liability for the cost, which would be inappropriate.	

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.

Position	Comment
Supported	

Proposal 7.3.3: It is proposed that the legislation would provide for circumstances where a report of a health assessment contains information of a medical or psychiatric nature which the committee considers, if disclosed to the practitioner, might be prejudicial to their physical or mental health or wellbeing. In such cases, the board or committee would be empowered to decide not to give the report directly to the practitioner, but rather, to give it to a registered practitioner nominated by the health practitioner.

Position	Comment
Supported	

Proposal 7.3.4: It is proposed that the legislation would provide a process for dealing with circumstances where a practitioner:

- does not agree to a health assessment, or
- does not abide by an agreement to undergo a health assessment.

In such circumstances, the board or committee would be empowered to refer the matter for hearing by a health panel, or to a tribunal.

Position	Comment
Supported	

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.

Position	Comment
Supported	

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7.5 Decisions available to a health panel following a hearing

Proposal 7.5.1: It is proposed that, following a hearing, a health panel have the power, to take the following actions:

- require the practitioner to undertake treatment 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 be handled as a performance management matter (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 for investigation by an external body, or
- take no further action.

Position	Comment
Supported	

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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.

Position	Comment
Supported	

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.

Position	Comment
Supported	

8. Conduct matters

8.1 Overview of management of conduct related matters

From time to time, a board may identify a practitioner whose professional conduct falls below the standard that their peers or the public would expect, and which raises questions as to their suitability to practise.

While the proposals outlined in sections 6 and 7 above provide powers for boards to deal cooperatively and flexibly with practitioners to address health matters that affect their capacity to practise, or deficits in their skills and knowledge that compromise their performance, there are times when the practitioner may be competent and well, but has behaved in an unethical or unprofessional matter, or has failed to cooperate with the board in addressing identified performance or health issues.

Proposal 8.1.1: It is proposed that the legislation make provision for boards to accept a notification that a practitioner has engaged in unsatisfactory professional conduct, to refer the matter to a conduct management committee for investigation, and if necessary, conduct hearing into the matter.

Position	Comment
Supported	

Where the conduct is so serious that it might constitute professional misconduct, the board would be required to refer the matter for a tribunal hearing.

8.2 Conduct management

If the board's preliminary assessment has found evidence that the practitioner may have engaged in unsatisfactory professional conduct, then the board may refer the matter to a conduct management committee.

Proposal 8.2.1: It is proposed that the role of the board or a conduct management committee in relation to a conduct matter be to oversee the investigation of a registrant who may have engaged in unsatisfactory professional conduct. A board or a conduct management committee would have the power to appoint an investigator to undertake an investigation. Following completion of the investigation and receipt and consideration of the report of the investigator, the board or the committee would decide whether a panel hearing is required, or what other action is necessary to address the conduct issues identified.

Position	Comment
Supported	

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.

Position	Comment
Supported	

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8.3 Investigations

Appointment of investigators

Proposal 8.3.1: It is proposed that the legislation empower a board or notifications committee to appoint, in writing, a person or persons to investigate a notification.

Position	Comment
Supported	

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.

Position	Comment
Supported	

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.

Position	Comment
Supported	

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Proposal 8.3.4: It is proposed that the legislation empower the board or an investigator to decide not to give notice to the practitioner of the investigation if such notice might prejudice an investigation or place at risk a person's health and safety, or place a person at risk of intimidation or harassment.

Position	Comment
Supported	

Timelines for the conduct of investigations

There is a need to ensure the timeliness of board investigations, disciplinary and other processes under the national scheme. However, it is problematic to specify legislative timeframes for completion of an investigation or disciplinary or other process, since at times the delays will be beyond the control of the board.

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.

Position	Comment
Supported	

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8.4 Powers of investigators – search, entry, seizure

All jurisdictions provide powers for inspectors/investigators to enter and search premises and seize documents and other ‘things’, however the extent of these powers varies as does the detail. For example, some jurisdictions provide powers for non-residential premises to be entered during business hours without a warrant. Others go further and provide powers for an inspector to use reasonable force to break into non-residential premises if immediate action is required, and without a warrant, or without a warrant but with five days notice in writing.

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).

Position	Comment
Supported	Investigators must be adequately trained and qualified.

Proposal 8.4.2: It is proposed that the legislation empower investigators or other persons authorised by a board to obtain and execute a warrant to enter and search premises and seize documents or other items. The legislation would provide for, amongst other things:

- in general terms, where a warrant may be obtained (via local State or Territory Magistrates Court or similar authority)
- what a warrant may authorise (subject to the applicable State/Territory law), that is, powers to:
 - enter premises
 - require information including name and address
 - require production of documents and other items, and
 - seize evidence
- how seized evidence is to be handled, for example, receipts, storage, damage, compensation, etc
- safeguards on the exercise of enforcement powers
- evidentiary requirements, and
- various offences for failure to comply, obstruction of an authorised inspector, etc.

Position	Comment
Supported	

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8.5 Conduct panel hearings

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

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.

Position	Comment
Supported with amendments	The above does not provide for a lawyer to be a member of the panel. Without a lawyer being present on the panel who would have the expertise to be able to protect the principles of natural justice and the complainants and practitioners rights. This is even more relevant in a system where the practitioner does not have legal representation.
It was further suggested that the legislation specify the requirement for a community representative.	

8.6 Decisions available to a conduct panel following a hearing

Proposal 8.6.1: It is proposed that, following a hearing, a panel have the power to take the following actions:

- require the practitioner to undertake further education, supervised practice or alter the way they practise
- caution the practitioner
- reprimand the practitioner
- counsel the practitioner
- require the practitioner to give an undertaking to the board
- place conditions on the practitioner’s registration
- refer the matter to be handled as a performance management matter (performance matters)
- refer the matter to be handled as a health management matter (health matters)
- refer the matter, or part of the matter to the responsible HCC for conciliation
- refer the matter for investigation by an external body (for example, the police, Medicare, or a State or Territory drugs and poisons unit), or
- take no further action.

Position	Comment
Supported	

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Proposal 8.6.2: It is proposed that the legislation provide for a panel to consider, amongst other things, 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.

Position	Comment
Supported	

Proposal 8.6.3: 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.

Position	Comment
Supported with qualifications	Without a lawyer on the panel there may be no one with the required expertise to write the decision. If there is insufficient legal expertise on the panel, it may be necessary to seek legal advice regarding the decision and therefore further time may be necessary.

9. Ensuring accountability, transparency and procedural fairness

9.1 Achieving separation of functions

The terms of the IGA provide for a structural separation of the assessment, investigation, prosecution and determination of disciplinary matters at only one point, that is, serious misconduct matters are to be dealt with by a State or Territory tribunal that is independent of the agency. As a result, the functions of assessment, investigation, prosecution (of both serious and less serious issues) and determination of less serious issues, will all fall to the relevant national board.

This requires the legislation to address issues of due process (for example avoidance of bias in decision making and pre-judgement), given the IGA structure provides that one body will have the capacity, not only to investigate but also prosecute and make determinations on less serious matters. By way of example, criminal matters are generally pursued by separate offices for each stage of the process, that is, the police investigate allegations, decisions as to prosecution are referred to a separate body (generally a Director of Public Prosecutions) and all decisions as to findings of guilt and penalties are made by the courts. This separation of process not only addresses possible issues of prejudgment, but also ensures a level of oversight of the investigative process, which all provides for a more robust and accountable system. Such processes can add to public confidence in systems of regulation.

It is recognised that the analogy of the criminal law is not directly appropriate, given the criminal law is a punitive model while professional regulation is focussed on public protection. The issues however, particularly in relation to due process, have some relevance given the potentially serious impact of the outcome of a disciplinary process on a practitioner.

To this end, some jurisdictions have addressed this by separating the investigation and prosecution function from the registration board and establishing internal checks in the assessments and decision making processes to ensure due process. The separate investigative body is also seen as having the advantage of being able to develop a body of expertise in investigations in a single organisation, enhancing consistency of approach to investigations across all professional groups.

Given the terms of the IGA, this paper is not proposing to pursue such a tightly constructed model. It is considered however, that public and professional confidence in the new national system can be achieved through other processes. Some of these have already been outlined in this paper: provisions for review and appeal as anticipated in the IGA; provisions that there be no overlap between the membership of panels and the commissioning board or committee, options for seeking review for notifiers (see section 5.6) etc.

There remains a question as to whether these arrangements sufficiently safeguard procedural fairness and public confidence in the scheme or whether additional mechanisms are required.

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.

Position	Comment
Consensus position supports option 2.	Option 2 provides the boards with advice that proposed proceedings are legally sound and assessment of any further evidence requirements. The placement of the director of proceedings in the national agency should also allow for consistency across professions as the nature of matters considered sufficiently serious to warrant prosecution in a tribunal.
The Queensland Board strongly supports option 1 (refer to the Qld Joint Boards submission). The ACT Board supports option 1.	

Option 2 (above) is designed to ensure that important decisions are publicly accountable, and are made following an assessment against specific legal criteria. This should reduce the capacity for criticism that irrelevant matters have been considered in the decision to prosecute before a tribunal, and ensure that any prosecution taken is legally sound. In NSW and New Zealand, matters are referred to the director of proceedings at the end of an investigation, for the purposes of deciding whether disciplinary proceedings should be taken. The director, independently of the board then makes a decision having regard to legal principles, any submissions made by the practitioner, the wishes of the notifier (if any), and public health and safety, and other criteria (see 9.1.2 below).

It may be seen that this process in some way removes the national boards from an oversighting role in the investigative process. This is not intended to be the case however. It is better to view the process as similar to the criminal law, where most jurisdictions have a director of public prosecutions who assesses the findings of an investigation at law, and determines whether based on the evidence available, a prosecution can reasonably be made out. It effectively provides the boards with a protection that proceedings commenced are legally sound, and an opportunity to assess what additional evidence may be required before a formal tribunal process is commenced.

Option 3 (above) is designed to increase the level of independent input into the management of serious matters without taking away from the boards their role in decision-making in relation to tribunals. The review would have regard to legal principles and other criteria but would not involve separate submissions from the parties. The boards would need to be able to have a right of appeal against the decision of such a review.

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.

Position	Comment
Supported	
The tribunal must understand that they are taking over responsibility for hearing a disciplinary matter which would otherwise have been heard before a Board. The situation is analogous to the Board being the informant before the Magistrates or County Court. Board's do not make application to the tribunal as a party seeking an agreement or conciliation. The Boards are there because there is a statutory obligation that they proceed with a disciplinary hearing before the tribunal when the matter is considered by the Board to be so serious that it may warrant suspension or cancellation of registration. Otherwise the Board would have conducted a Panel hearing.	

9.2 Matters involving registrants from different professions

It is not unusual for a complaint – particularly those involving care in a hospital or other health care facility – to involve a number of different professional groups, such as nurses, medical practitioners and allied health professionals, as well as questions of systemic or institutional deficiencies. Ensuring systemic issues are properly addressed will largely be dealt with by ensuring State based bodies with a role in reviewing these type of matters are notified when these cases arise. It is important that there be a co-ordinated and consistent approach to the assessment, management and investigation of these types of cases.

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.

Position	Comment
Supported	

9.3 Legal representation for registrants at panel hearings

With respect to the rights of a registrant in a board panel hearing, different arrangements are in place across jurisdictions. It is intended that panel hearings be low key and informal, at least as far as is possible given the need for proper consideration of the matter. Allowing a registrant to have legal representation at a panel hearing is likely to increase considerably the level of formality and technicality of such proceedings. Arguably if a registrant wishes to be legally represented, then they can choose to have the matter dealt with before the responsible tribunal.

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.

Position	Comment
Support option 4B	

9.4 Confidentiality of panel hearings

Whether board panel hearings are open to the public or closed varies across jurisdictions. This depends in part on whether the board deals with both serious misconduct matters as well as less serious matters.

There are a number of options for dealing with the confidentiality of panel hearings:

Option 1: All panel hearings are closed to the public.

Option 2: All performance and health panel hearings are closed to the public but conduct hearings are open to the public but the panel has powers to close the proceedings or part of the proceedings.

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.

Position	Comment
Supported	

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.

Position	Comment
Supported	

9.6 Review rights for registrants

While most State and Territory Acts make provision for a right of review for a practitioner from a performance, health or conduct proceeding, the body to which the matter is referred varies.

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.

Position	Comment
Supported	

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.

Position	Comment
Supported	

9.8 Role of Commonwealth, State and Territory ombudsmen

In addition to the role of State and Territory HCCs or their equivalent who are empowered to deal with consumer complaints against health service providers, most jurisdictions have ombudsman legislation which provides for a statutory appointee (an ombudsman) to receive complaints, and investigate or inquire into any administrative action taken by a government department or public statutory body, including a registration board. The jurisdiction of an ombudsman will not extend to the disciplinary decisions of a tribunal (which are subject to formal appeal processes). Ombudsman legislation generally allows recommendations to be made to the decision maker on matters of process but does not allow an ombudsman to overturn a decision. [Attachment 5](#) sets out the relevant arrangements in each jurisdiction.

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.

Position	Comment
Support option 1	It is a national system therefore to ensure a consistent approach it should be the Commonwealth Ombudsman.

10. Tribunal hearings

10.1 Establishment or continuation of State and Territory tribunals

In accordance with the IGA (as outlined in [section 1.4](#)), each State and Territory is 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 the registration, discipline, performance and health functions.

[Attachment 6](#) sets out current arrangements by jurisdiction with respect to the hearing of unsatisfactory professional conduct/misconduct matters (however described) and appeals from board decisions.

In order to give effect to the provisions of the IGA, the task will be different in each jurisdiction. Some jurisdictions may wish to continue current arrangements, while others may establish new arrangements.

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.

Proposal 10.2.1: It is proposed that the national legislation (as opposed to legislation in each State and Territory) make provision for the following:

- the definition of a ‘responsible tribunal’
- the grounds on which a responsible board may refer a matter to the responsible tribunal
- the grounds on which a responsible board must refer a matter to the responsible tribunal (for example professional misconduct matters)
- what matters a tribunal may hear in its review jurisdiction
- what matters a tribunal may hear in its original jurisdiction
- who may make an application with respect to the tribunal’s original and review jurisdictions, and
- which bodies must be notified of a decision of the tribunal, for example, the registrant, the notifier, the responsible HCC (where relevant), any employer, Medicare, the Professional Services Review Scheme, etc.

Position	Comment
Supported	

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Proposal 10.2.2: It is proposed that with respect to other matters, the respective State and Territory legislation specify the detailed procedure of the tribunal, such as application processes, powers to close hearings and suppression of the identity of persons appearing, etc. It is proposed that State and Territory legislation make provision for at least the following:

- hearings to be open to the public but with power for the panel to close the hearing under certain circumstances
- powers for a hearing panel to suppress the identity of any party or witness to the proceedings, and
- decisions and reasons to be published.

Position	Comment
Supported	

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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.

Position	Comment
Support Alternative option	

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.

Position	Comment
Consensus decision supports Alternative option	
The Queensland Board supports the original proposal.	

Proposal 10.4.2: It is proposed that with respect to the exercise by the responsible tribunal of its review jurisdiction, the national legislation specify the following as reviewable decisions:

- refusal to register (including failure to make a registration decision within the specified period, for example three months)
- refusal to endorse registration
- refusal to renew registration
- refusal to renew an endorsement on registration
- imposition of conditions on a practitioner’s registration or endorsement of registration
- refusal to lift or vary conditions on a registration or endorsement of registration
- cancellation of registration because the practitioner is no longer eligible for registration
- a finding or determination by a performance panel, health panel or conduct panel (see [sections 6.5, 7.5, and 8.6](#) of this paper)
- a decision to suspend the practitioner’s registration if the responsible board has not instituted an investigation in relation to the practitioner within a reasonable period, and
- a decision to continue a suspension beyond the period specified under the Act (see [section 4.7](#) of this paper on immediate suspension powers).

Position	Comment
Supported	

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10.5 Findings and determinations of a tribunal

The IGA requires that the national legislation set out the findings, and determinations or orders that a responsible tribunal may make with respect to each type of matter heard under its original and review jurisdictions.

Original jurisdiction

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.

Position	Comment
Supported	

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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.

Position	Comment
Supported	

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Review jurisdiction – registration matters

Proposal 10.5.3: With respect to registration decisions, it is proposed that the responsible tribunal would have the power to uphold or confirm the board’s original decision, or to substitute its own decision from the range of decisions that were available to the board (see Registration consultation paper).

Position	Comment
Supported	

Review jurisdiction – performance, health or conduct matters

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

and on this basis make an order to suspend or cancel the practitioner’s registration or vary or place conditions on a practitioner’s registration, in addition to any of the determinations listed above under its original jurisdiction.

Position	Comment
Supported	

Proposal 10.5.5: It is proposed that the tribunal would have powers to make an order for costs against any party to the proceedings.

Position	Comment
Supported	

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.

Position	Comment
Supported	

10.7 Procedure for conduct of tribunal hearings

Proposal 10.7.1: It is proposed that State and Territory legislation concerning the responsible tribunal would also make provision for the procedure of the tribunal, in accordance with national criteria agreed by AHMC (Clause 2.2 Attachment A of the IGA), and taking into account existing tribunal arrangements (if any). Matters to be addressed include:

- appointment of members, presiding members, acting members
- application processes for appointment, remuneration, disclosure of interests, etc
- application fees and processes for hearing of matters, including notification of hearings, withdrawal of matters
- administration of the tribunal and its health professions list
- compulsory conferences, mediations and settlement
- service of documents
- use of experts
- conduct of hearings
- taking of evidence and witness summons
- reasons for decisions
- powers to award costs
- orders, injunctions, declarations, enforcement of orders
- offences, such as non-compliance with order, failure to comply with summons, failure to give evidence, false or misleading information, contempt, etc
- immunities, and
- appeals from tribunal decisions.

Position	Comment
Supported	

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10.8 Status of notifiers

There are differences across State and Territory legislation as to the status of notifiers or complainants in disciplinary and other proceedings of a board.

Proposal 10.8.1: It is proposed that the parties to a tribunal hearing would be the responsible board, and the registrant. It is not intended that a notifier have a right to make application for a hearing with respect to a registration or disciplinary decision of a board, or with respect to allegations of professional misconduct against a practitioner. The notifier may be called as a witness in the board's case before the tribunal.

Position	Comment
Supported	

10.9 Powers in relation to deregistered practitioners

Proposal 10.9.1: In accordance with the proposed determinations of a responsible tribunal listed in section 10.5 above, it is proposed that a responsible tribunal would have the power to issue a prohibition order at the time that it cancels the registration of a practitioner. A prohibition order might prevent the practitioner from providing health services or owning or operating a business that provides health services, or might attach conditions to their practice. Breach of a prohibition order would be an offence under the legislation, with breaches prosecuted through the courts in the relevant State or Territory.

Position	Comment
Supported	

10.10 Review rights from tribunal decisions

Proposal 10.10.1: It is proposed that a party to a proceeding before a responsible tribunal would have the right to appeal a decision of the tribunal on points of law only. It is proposed that the appeal would be to the responsible State or Territory Supreme Court (or other body as determined by each jurisdiction).

Position	Comment
Supported	

10.11 Reasons for decisions

Proposal 10.11.1: It is proposed that the State and Territory legislation require the responsible tribunal to publish reasons for its decisions.

Position	Comment
Supported with qualification	Care needs to be taken in relation to hearings that are closed to the public and protecting the identity of the complainant or practitioner in cases where there is no case to answer.

10.12 Notice of decisions

Proposal 10.12.1: It is proposed that the legislation require the responsible board to notify a range of persons and organisations of the outcome of a tribunal hearing, publish details of decisions on its website, and enter on the register (or a separate part of the register) details of any current conditions, suspension or cancellation of registration (except for details of health-related conditions).

Position	Comment
Supported with qualification	Care needs to be taken in relation to hearings that are closed to the public.

11. Offences and regulated conduct

11.1 Current arrangements

There is significant overlap across jurisdictions in the types of offences that apply in State and Territory registration Acts. Such offences can be grouped along the following lines:

- unauthorised use of restricted professional titles
- unauthorised holding out as having registration, a type of registration, endorsement, division of registration, specialist/specialty endorsement, unconditional registration, etc
- holding out another person as having registration, a type of registration, endorsement, division of registration, specialist/specialty endorsement, unconditional registration, etc
- breach of conditions on registration
- unauthorised practice, for example, of a regulated health profession generally, a restricted core practice, or 'restricted practice area'
- treatment of certain conditions/diseases/pregnancy by persons who are not registered
- prohibit breaches of confidentiality in relation to keeping and disposing of patient records, or in relation to information that a person obtains in the course of carrying out their functions under the Act
- signing of medical certificates when not registered
- failure to have professional indemnity insurance
- failure to return registration certificates when required
- failure to notify of change of specified registration details/circumstances
- false and misleading advertising
- directing or inciting a registrant to engage in unsatisfactory professional conduct or professional misconduct
- supplying health services when prohibited
- actions relating to the exercise of coercive powers (search, entry, seizure powers), for example, obstructing/impersonating an investigator, failing to return identity card, failing to answer questions or provide documents, and/or
- illegal election practices.

11.2 The IGA

The IGA specifies the following with respect to offences under the national scheme:

1.28 The substantive legislation to establish the national registration and accreditation scheme will have the following features to ensure the appropriate protection of the public:

- (b) the primary basis for regulation will be 'protection of professional title', with statutory offences to prevent unregistered or unauthorised persons using professional titles, which in the first instance will be those listed in [Table 2](#), with further titles to be determined by the Ministerial Council (or in the event that the Ministerial Council has not been established, by AHMC)*
- (c) practice restrictions will be applied where they are currently adopted across all jurisdictions as follows:*
 - i) two professions, dentistry and optometry, will be subject to legislative definitions of core practices and offences to prevent practice by unregistered or unauthorised persons*
 - ii) elements of the practice of spinal manipulation may also require legislative protection, and further work will be undertaken to define these for this purpose*
- (d) general exemptions from title and practice offence will apply to regulated professionals undertaking their usual activities, students, assistants working under supervision, businesses employing registered practitioners and persons assisting in emergencies*

1.29 The Ministerial Council, in consultation with stakeholders, may determine further modifications to registration categories and practice restrictions within the parameters of clause 1.28.

1.30 Jurisdictions will continue to have discretion to regulate additional core practices through local public health, drugs and poisons.

11.3 Holding out offences

Proposal 11.3.1: It is proposed that the following types of holding out offences be included in the legislation:

- offences that prohibit persons who are not duly registered to use the titles listed in Table 2 of Attachment A of the IGA
- offences that prohibit persons from using any other title, name, symbol, description, whether in English or other language, which given the circumstances could be reasonably understood to indicate the person is a registered practitioner in a regulated profession
- offences that prohibit a person from holding out that they have a type of registration, for example in a profession, in a division, with an endorsement, free of conditions, etc, when they do not
- offences that prohibit a person from using the title ‘specialist’ in a context that could reasonably be understood to indicate the person is endorsed as a specialist in a recognised specialty of a regulated health profession, and
- offences that prohibit a person from holding out another person as registered, registered in a division, endorsed, a ‘specialist’, free of conditions, etc.

Exemptions would apply, as set out in Clause 1.28(d) of Attachment A of the IGA.

Position	Comment
Supported	

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.

Position	Comment
Supported	Offences should apply to restricted practice of spinal manipulation.
	It was also noted there was a need to ensure that provision in the legislation is made to deal with unregistered practitioners.

11.5 Direct or incite offences

Proposal 11.5.1: It is proposed that the legislation include a series of offences for any person who directs a registered practitioner to act in a manner that might constitute unsatisfactory professional conduct or professional misconduct (however termed). This would include:

- powers for a court or tribunal to issue a ‘prohibition order’ on a person found to have directed or incited a registered practitioner in this matter. Such an order might prevent, for example, the person from providing health services or carrying on a business that provides health services
- an offence for breach of a prohibition order
- differential sanctions for bodies corporate and individuals

- provisions that extend liability for an offence to each officer of the body corporate, and
- provisions that require the maintenance of a register of prohibitions.

Alternative option: This offence could be framed more narrowly, to apply only to persons who employ a registered practitioner.

Position	Comment
Supported	

11.6 Regulation of advertising

Under some State and Territory legislation, boards are empowered to develop guidelines about what constitutes acceptable advertising of regulated health services, in the context of increasingly aggressive advertising of such services as cosmetic surgery, impotence treatment, heart checks, hair loss treatment services, etc. Some guidelines:

- prohibit spruiking practices such as free on the spot health checks in shopping centres, designed to sign prospective patients up to contracts of care, or
- place obligations on practitioners to use warning labels when advertising directly to the public services such as cosmetic surgery.

Under the national legislation, boards will have powers to develop (in consultation with stakeholders) codes of practice with respect to a variety of professional standards matters.

Most Acts contain offences with respect to registrants (or persons generally) who advertise in a manner that is false or misleading. Some Acts provide further detail with respect to what constitutes unacceptable advertising, such as advertising that:

- creates an unreasonable expectation of beneficial treatment
- offers gifts, discounts or other inducements without setting out the conditions
- uses testimonials
- directly or indirectly encourages the indiscriminate or unnecessary use of regulated health services, medicines or other therapeutic goods
- disparages other health services or registrants, and
- advertises a service likely to harm another person.

Often higher penalties apply to bodies corporate who are found to commit a breach than those that apply to individuals.

In the context of National Competition Policy, most jurisdictions reviewed their legislative restrictions on advertising during the 1990s. Most made the case for retaining provisions that, in effect, apply a higher standard to registrants than that which applies under general trade practices and fair trading legislation to the rest of the community. Given the risks associated with some forms of health service, this position was accepted by competition bodies and government.

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.

Position	Comment
Consensus decision supports option 2.	Medical goods and services are not “general” goods and services, therefore should be subject to higher standards with regard to advertising and not a “lowest common denominator”.

It was also noted that option 2 could include an option for referral to an external body. The Western Australian Board indicated support for Option 1, stating that it offered the best solution to a complex issue.

Factors to consider in the policy debate include the effectiveness of current discipline specific advertising regulation, the cost of enforcement – to government and/or the professions, the proper scope of regulatory activity for the national scheme, and the need to protect the public.

11.7 Offences related to enforcement activities

Proposal 11.7.1: It is proposed that the legislation include a series of offences related to the role of authorised officers who investigate matters on behalf of a responsible board and may enter and search premises and seize documents or other things. These might include, for example, offences for:

- obstructing an authorised officer/inspector
- impersonating an authorised officer
- providing false Statements or misleading an authorised officer
- failing to comply with a lawful request, or
- failing to return identity card (after ceasing employment as an inspector/authorised officer).

Position	Comment
Supported	It was noted that the final point possibly should read “failing to return identity card after being requested by the Board”.

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.

Position	Comment
Supported with qualification	Although the concept is supported the time frame should be made more reasonable to allow for delays in delivery etc. suggest 28 days.

Proposal 11.8.2: It is proposed that the legislation include offences for breaches of prohibition orders issued by the responsible State or Territory tribunal when a practitioner is deregistered, as referred to in section 10.9 above.

Position	Comment
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Supported	

Proposal 11.8.3: It is not proposed to include the following types of offences in the national legislation:

- offences for breach of conditions on registration – instead, it is proposed that the legislation provide for a panel or tribunal to identify ‘critical compliance conditions’ which, if breached, will allow the responsible board to suspend the practitioner’s registration. This is likely to be a much more immediate and effective sanction than prosecuting a registered practitioner through a magistrate’s court, or
- offences for unregistered persons to issue medical certificates or treat patients with certain types of conditions such as HIV or cancer – instead, these matters can be dealt with in State and Territory public health legislation if a jurisdiction considers it necessary.

Position	Comment
Supported	

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11.9 Prosecution of offences

Proposal 11.9.1: It is proposed that the legislation make provision for a responsible board to initiate a prosecution in the relevant State or Territory court for offences under the Act.

In some cases, the responsible police service will investigate and charge a person under the Act and bring the case to court. In others, it may be appropriate for the responsible board to initiate the action.

Position	Comment
Supported	

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.

Position	Comment
Supported	

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It is expected that the boards would develop and implement a risk based compliance program that would determine a risk profile of registrants, assess how regularly individual registrants need to be monitored and a compliance strategy to ensure this monitoring occurs. There is scope within such a scheme to build in closer linkages between the boards and bodies such as Medicare, with potential, for example, for Medicare data to be used to assist the boards in monitoring compliance with conditions on registration in some professions.

12. Transition arrangements

In order to ensure a smooth transition from State and Territory schemes to the new national arrangements, it will be necessary for the legislative scheme to make provision for the new national boards (delegated as they see fit) to continue to deal with, and finalise any investigations and disciplinary/performance/impairment matters that were in process prior to 1 July 2010, including any matters outstanding from previously repealed legislation within a jurisdiction. The alternative, that current boards continue to handle existing cases, is not considered practical because of the long timeframes associated with some cases.

Proposal 12.1: It is proposed that the legislation include transitional provisions that allow the relevant board to complete all matters that originate under the repealed legislation. This will include powers to:

- receive and deal with notifications that relate to conduct that occurred prior to 1 July 2010, and to initiate and complete an investigation, and a hearing if necessary, and make findings and determinations (however termed). With respect to such matters, it is likely that the investigator or hearing panel's powers will be limited to those they might have exercised under the repealed legislation
- complete all investigations that were in train prior to 1 July 2010, with decisions as to course of action constrained by what was available under the repealed legislation
- complete all disciplinary, impairment and performance processes that were in train prior to 1 July 2010, in accord with the processes, findings and determinations available under the repealed legislation, and
- complete all tribunal hearings (where applicable) and deal with any appeals as if the relevant State and Territory legislation had not been repealed.

Position	Comment
Supported with qualification	The legislation should be drafted in a way that allows constituted panels to continue until the matter is finalised.

Clause 6.10 of the IGA provides for all existing members of jurisdictional boards and supporting hearing panels for the regulated professions to be appointed (if they agree), to a list of persons from which national boards may form committees for a period of two years from commencement of operation of the scheme. It is expected that such persons will be an essential resource for boards to draw on in completing investigations and hearings under the repealed legislation as outlined above. In addition the provisions yet to be determined that ensure continuity of staffing for the boards will be important in managing the caseload in the transition to the new scheme. It may take a number of years for all matters that arose under the previous enactments to be finalised, including appeals.