

**APS Response to the
Consultation Paper on
Proposed arrangements for handling
complaints and dealing with performance,
health and conduct matters**

**from the Practitioner Regulation Subcommittee,
Health Workforce Principal Committee,
Australian Health Ministers' Advisory Council**

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

Introduction

The Australian Psychological Society (APS) considers this paper one of the most critical with regard to the new National Registration and Accreditation Scheme (National Scheme) because the processes of complaint management and discipline of professionals can impact significantly on the practice and professional experience of health practitioners. More importantly, the access of community members to straightforward complaint processes, efficient and sympathetic investigations and to fair and equitable justice is an essential response to the objectives set for the current revision of registration processes.

The protection of the community from unprofessional and inappropriate practitioner behaviour is as important to health professionals as it is to Government. The capacity of health professionals to work with the community and provide effective interventions is particularly influenced by the *credibility* with which the profession is viewed and the *confidence* in their service which is engendered by that profession. Both of these are undermined by the failure of individual practitioners to meet the highest ethical and professional standards.

It is good to note that the paper ensures the protection of the public in a manner that provides natural justice and due process for the respondent to complaints. It is also important for these principles to be evident in the processes for dealing with practitioners. As a result all members of the community are protected.

Responses to Specific Aspects

The APS strongly endorses most aspects of this Consultation Paper and these will be dealt with in concert with the raising of questions. The APS has some reservations about specific issues and will recommend a few adjustments to emphasis and some specific inclusions that may be helpful in the document and the legislation it pre-empts. Rather than follow the specific outline of the Paper this has been done in the context of identifying major themes and emphases, consistent with the principles behind registration, such as protection of the public, judicial fairness and due process. By assessing the merits of the proposals and their options against these principles, the APS hopes to provide objective feedback on the Consultation Paper.

The APS acknowledges the complexities and challenges of this particular set of issues and see the Paper as effective in integrating the best elements of the current State legislation and evolved practice.

Principle 1: Safety and Quality

The protection of the public and maintaining an acceptable standard of care are the primary purposes of a registration system. The Consultation Paper proposes procedures that will assist this overall, as exemplified by Section 1.1 of the Paper.

The APS endorses the use of the term “notification” over “complaint” (Proposal 2.1.1). APS also supports 4.1.1 (Who may Notify) and 4.2.1 (Form of notification). The APS also endorses Proposals 4.2.2 (assisting members of the public) and 4.5.1 (protection for notifiers). In addition, it endorses 5.6, Option 2, (rights of review). Most definitions (Section 2) are endorsed except for those commented on below.

Mandatory Reporting. Endorsing proposals for the extension of obligations under mandatory reporting (4.4.1b and 4.4.2b) would increase the opportunity to eliminate poor professional functioning but it is acknowledged that it potentially leaves practitioners open to misguided or misinformed notifications from other health professionals. These would need to be carefully managed in terms of guidelines and procedures for national and State officers.

There are clearly points at which misrepresentation of practitioners can occur. Most of the current Psychology Registration Boards could confirm that in recent years (becoming less so in very recent times), many members of the public with disputed cases before the Family Court misused the reporting powers they had to bring complaints (often vexatious) against psychologists performing expert witness roles in the Court. This was often done to cast doubt on their validity as expert witness and not necessarily because of any error of professional practice. Such practitioners need procedures in place to protect them and negate these practices.

For the reasons above and the presumption of innocence arguments expressed later (see Section 3), the APS supports Option 1b and 2b but with qualifications. There are concerns that such requirements could potentially be damaging to constructive relationships and arrangements between practitioners and may rather drive the acknowledgement by impaired practitioners underground. However, the need for openness and the exercise of responsibility by practitioners lends support to the proposals.

It will be critical that practitioners understand the threshold at which they become obliged to notify the responsible Board. "Whom they reasonably believe to be placing the public at risk" is the critical benchmark that delineates legitimate reports from frivolous or superficial reports. Practitioners will need to understand that they will not be liable to report a fellow practitioner engaged in a treating relationship that is effectively managing the situation. They will need to be constantly reassured that they will not be subject to discipline if they fail to report someone who is not placing the public at risk.

Another option would be to qualify the ‘mandatory’ component to 1b and require of each professional body an insertion in their code of ethics (and therefore obligations to the community) to act with regard to other health practitioners who put the public at risk. For instance, the APS has in their Code of Ethics the following:

C.7.2. *Psychologists* who reasonably suspect that another *psychologist* is acting in a manner inconsistent with the ethical principles and standards presented in this *Code*:
(a) where appropriate, draw the attention of the *psychologist* whose *conduct* is in question directly, or indirectly through a senior psychologist, to the actions that are thought to be in breach of the *Code* and cite the section of the *Code* which may have been breached;
(b) encourage people directly affected by such behaviour to report the *conduct* to a relevant regulatory body or the Ethics Committee of the *Society*; or

(c) report the *conduct* to a relevant regulatory body or the Ethics Committee of the *Society*.

Any breach of this principle puts practitioners offside with their Registration Boards and subject to investigation. Strengthening of this to ensure this principle is encoded in legislation may counter the negative impact of 'mandatory' reporting.

Proposals 4.4.1b and 4.4.2b (Mandatory Reporting across disciplines) are endorsed but with request for specific guidelines and practitioner education.

The extension of mandatory reporting to student registrants seems inappropriate. The responsibilities for supervision and supervisors for the professional work of the student is undermined by the presence and use of registration powers to contain and evaluate student behaviour. The responsibility rests with the training institution not Government.

The APS does not endorse the mandatory reporting of student registrants (4.4.2+).

Matters for notification. It is for the reasons identified above that APS questions 4.3.1, which is otherwise endorsed fully but questions the inclusion of 'not of good character' as grounds for notification. As will be argued elsewhere, this is not a sound notion. It is recognised that there may be exceptional circumstances where this has utility despite its questionable validity so should only be used in those exceptional circumstances. Likewise, should proposal 4.3.2 (Notification re previously registered practitioners) be limited in terms of time or should there be no statute of limitations?

APS endorses 4.3.1 (Matters to be the subject of notification) but raises request for qualifications around 'not of good character' and 4.3.2 (Notification re previously registered practitioners) but questions whether a time limit should apply.

In good faith. "In good faith" (4.5.1) will need some careful explanation as to the standard and consistency regarding procedures to be applied. It is acknowledged that section 5.2 begins to grapple with some of these issues and a clearer articulation of the two will be very useful for the new National Scheme.

The APS endorses 4.5.1 (Protection for notifiers) together with 5.1.1 (Powers following receipt of notification) and 5.2.1 (Grounds for a Board to refuse).

Immediate Suspension. Section 4.7 (Immediate suspension powers) is fully supported by the APS and endorsed as being a fair balance consistent with the Safety and Quality principles. The model of 3 months suspension plus another 3 months is deemed best as it pressures the Board to effect efficiency while meeting expectations of natural justice for the practitioner.

Proposal 4.7.1 (Immediate suspension powers) is fully supported by the APS, but the 3-month option. 4.7.2 (right to review) and 4.7.3 (undertakings in place of suspension) are fair balances and are supported.

Assessment Panels. The constitution of Performance Assessment Panels, (Section 6: Performance matters and specifically 6.4.1; impairment matters, 7.4.1; conduct panels, 8.5.1) while supported by the APS, deserves careful consideration. While the introduction of other- or non-professional members increases the openness concepts, a group of professionals is often in a better position to understand what constitutes good practice within their own professional group, as evidenced by the notion of peer-reviews. Therefore, the insistence on no more than 50% of members of the panels being from the profession concerned have the real potential to weaken their preparedness to exact and demand high professional conduct from practitioners. There is a real risk that such provisions can undermine standards of safety and quality of the National Scheme. Nonetheless, the APS endorses the proposed panel membership.

Principle 2: Delineation and separation of powers

The APS generally endorses the extent to which the Consultation Paper goes to considerable length on this principle to ensure delineation and separation of powers within the Board processes and between the various bodies involved. The general approach towards receiving, preliminary assessment and referring on of notifications to the various panels as outlined under Sections 5 and 6 of the Consultation Paper is acknowledged and supported by the APS. While at times these appear to increase inefficiency and potential costs, they are nonetheless necessary to preserve the Separation of Powers principle, as well as upholding the Safety and Quality principle, particularly for the practitioners as outlined above.

With regard to the Boards specifically, separating their various processes to prevent contamination of judgment, and to create the impression and reality of fairness, is a valid concept. Section 5.5 is noteworthy in this context and allows flexibility for Boards to act fairly. However, it should also be noted that it will be extremely hard to institute the panels and associated committees in the smaller jurisdictions (Tasmania, ACT and NT) and for the smaller professions (Podiatry, Osteopaths and Chiropractors), given the relative small size of the workforce concerned and the need to maintain privacy of practitioners and confidentiality of matters under investigation. A “fly-in fly-out” model using assessors and committee members from other jurisdiction may be an option to be considered under this National Scheme. However, this needs to be balanced against its associated operational costs.

It is felt that overall the balance within the processes are fair. The proposals are reasonable and equitable. Under Section 5.6 (the right of review) we would err on the side of allowing a review to be requested (i.e. Option 2).

<p>The APS endorses Proposals 5.3 (Liaison with ‘HCCs’), 5.4.1 (assessment committees), 5.5.1 (powers following assessment), 5.5.2 (referral to tribunal) and 5.5.3 (notification of decisions).</p>
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It would further enhance the appearance, and probably the reality, of ‘separation’ if investigatory responsibilities of the Board were sub-contracted to keep investigation and

judgement processes not embodied in the one organisation. This would bear on the proposal at 5.4 and should be included as an option to that proposal.

Proposal 4.6.1 gives the Board powers to initiate an investigation into a matter of its own motion without a notification. This needs considerable care and specific guidelines to contain the exercise of these powers and avoid denial of natural justice. These powers should only be exercised where concrete evidence exists (eg letters, media reports) or documentable reasons available.

With these provisos, the APS endorses 4.6.1 (Own Motion Powers).
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Principle 3: Natural justice

'Community' involves more than just the clients/patients; practitioners are also part of the community, and therefore deserve equal protection within the system. A balanced approach taking into considerations the need to protect the community whilst minimising the likelihoods of potential prejudices against innocent practitioners must be achieved under the new National Scheme.

It is fully acknowledged that the two groups at risk (complainants and practitioners) are not always equal in terms of resources available to them or in terms of personal vulnerability; so added efforts are made for the former. Nevertheless, the personal, professional and economic consequences of an unjustified complaint by the community about a practitioner are often immense and deserving of fair balance and equal attention.

As a professional membership body, the Society is privy to the emotional, interpersonal as well as the professional and economic cost of a practitioner being reported (justified or not) to the relevant registration body. The very fact of being reported is often a devastating experience in itself. But what follows can also be extremely confronting, despite the best efforts of the registration authority. Then commonly the investigation process can take up to two years of ongoing processes and delays.

There are three matters of principle that need exploring more fully.

1 *Presumption of innocence and mandatory reporting.* It has always been an understanding that extends from the presumption of innocence that there is no justification for extensive investigations by the police until an illegal act has been alleged to be committed. The latitude around this would depend upon the seriousness of the potential crime, but the less significant the risk and the vaguer the evidence the less likely the police would be act. This seemed to be based upon the argument and convention that however keen a community might be to prevent crime and thwart criminals behaving inappropriately, they were not at liberty to violate the presumption of innocence by extensively investigating or confronting members of the community without there having been an alleged crime committed.

It is on this basis that the suggestion above regarding mandatory reporting not being mandatory but part of professional and ethical obligations is enunciated.

2 Presumptions of innocence and the goals of national registration. It is worth recalling that the focus for national registration has changed over the last five years. It began as an opportunity to assist the professional bodies to achieve national registration – thereby avoiding duplication and the need to register in each State – and to develop some nationally consistent standards for each profession in terms of their registration. The emphasis has shifted - no doubt in view of some politically sensitive case examples - to more rigorously containing and monitoring professional behaviour and activity. It has to be said that in the process less attractive aspects have emerged which focus on the risks associated with the very few as if that is the common behaviour of the majority.

It is noteworthy that for the number of registered health practitioners and the number and range of services they deliver, there is relatively small percentage of associated complaints. This needs to be acknowledged, as the vast majority of practitioners are making every attempt to engage in best practice and provide high-quality services. In this context, those practitioners who deliberately breach the set standards should be dealt with swiftly, fairly and with varied degrees of flexibility as found in other judicial settings.

3 Good character. As outlined in previous APS submissions, the ground for notification on the basis of 'not of good character' (Section 4.3.1) does nothing to explain or define what constitutes a *good character*. The whole notion of *character* carries a set of philosophic issues and implications which are not only debatable but impossible to operationalise. Judgment of whether a person is going to be a repeat offender, or fails to comprehend ethical and professional standards, can only be based upon the repeat offences and not on some nebulous ascription to the person that demarcates them from other persons. Unless this concept of character can be defended, it needs to be abandoned and the judgment of Boards and tribunals based on episodes of actual rather than potential behaviour. It also needs to be acknowledged that the proliferation of legislative safeguards and specific penalties for unprofessional behaviour makes the purpose of such a general and vague concept unnecessary.

However, as noted above, there are some very special grounds for the use of this concept and for these purposes – which should be enunciated – it should be retained. (See 2.1.15, 4.3.1, 5.5.2, 10.5.1, 10.5.4.)

The Submission now moves to other aspects that seem to support natural justice.

Performance, Impairment and Conduct Matters. There is a general sense of fairness and genuine concern for practitioners in much of this which the APS welcomes. With some minor adjustments Sections 6, 7 and 8 are endorsed as supportive of natural justice.

With regard to performance, the only issues surround the factor of panel composition which was referred to earlier (Section 1: Performance Panels).

Therefore, the APS endorses Proposals 6.1.1 (General provisions), 6.2.1, 6.2.2 (Performance management), 6.3.1, 6.3.2 and 6.3.3 (Performance assessments), 6.4.1 (Panel hearings), 6.5.1, 6.5.2 (Decisions following). For 6.5.3, the APS would request a change to 14 days for notification. A month is too long for either party to wait.

With regard to impairment matters, the APS generally concurs but would suggest two changes:

- Under health panel hearings, it is not appropriate to bring reports from other performance or conduct assessments from Board processes. The Board panel should only have access to previous health assessments or the clouding of this process by both appearance and in reality may occur. The crucial test is relevance. (Proposal 7.5.2);
- Panel decisions should be reported to the practitioner in 14 not 28 days

Most of the proposals under Section 7: Health or impairment matters were outlined in a logical fashion sympathetic to both the needs of the community as well as those of the practitioners. Specifically, under Proposal 7.1.2, Option 1 is preferred over Option 2 (i.e. Allowing health programs be funded via a component of all registrants' fees, as opposed to a "user-pay" system). The rationale behind this preference is that not all health related matters can be directly or entirely attributed to the registrant and that any "user-pay" system has the potential to punish the victim (e.g. a practitioner started abusing drugs due to an accident not related to work). A strong feature of Section 7 is the flexibility of approaches that the Boards can take to deal with the severity and nature of the presenting issues - an essential characteristic that must be maintained in the new National Scheme.

The APS endorses Proposal 7.1.1, 7.1.2 – Option 1 (General issues), 7.2.1 and 7.2.2 (Health Management), 7.3.1, 7.3.2, 7.3.3 and 7.3.4 (Health assessments), 7.4.1 (Health panels), 7.5.1 and 7.5.3 (Decisions available). The APS does not endorse 7.5.2 (Consideration of other reports).

With regard to conduct matters, the APS has general agreement but some noticeable disagreement. These are mainly around the powers of investigators and the confidentiality of files and documents that may be unrelated to the matter under consideration. Unless these powers are limited, the APS needs to oppose some of these recommendations.

The APS endorses 8.1.1 (Overview issues), 8.2.1 and 8.2.2 (Conduct management), 8.3.1, 8.3.3 and 8.3.5 if 28 is changed to 14 days (Investigations), 8.5.1 and 8.6.1 (panel hearings and decisions).

- 8.3.2 and 8.4.4 To initiate an investigation without notification seems a denial of natural justice;
- 8.4.1 and 8.4.2 is unclear as to the limitations of these powers. Can investigators have unlimited access to a practitioners files? Deny the practice these files for unspecified lengths of time? Unless some limitations around access to specific files and removal of relevant or just notifiers files are made this is far too open to abuse and fishing expeditions;
- 8.6.2, like 7.5.2, supports access to documents, without consent, to reports and assessments not necessarily related to this assessment. Wording should be changed to "any previous conduct investigations";

- 8.6.3 should be changed to 14 days. These are highly charged situations and delay is an injustice.

In their current form the APS opposes 8.3.2 and 8.4.4 (Investigation without notification), 8.4.1 and 8.4.2 (Powers to enter, search and seize), 8.6.2 (Consideration of other reports) and 8.6.3 should be changed to 14 days.

It must be assumed during all the investigation processes that the practitioner has the sense that natural justice is explicitly acknowledged (e.g. presumption of innocence) and clearly articulated. In addition, this should be reflected in processes such as a right to representation (Option 2 under Proposal 9.3), fair management of spent convictions, statute of limitations and observations of Charters of Human Rights that exist in some jurisdictions. The Human Rights and Equal Opportunity Commission (HREOC) provides explicit guidelines to prevent the discrimination of individuals on the basis of their criminal records. It states *“the relevance of a job applicant’s or employee’s criminal record should be assessed on a case-by-case basis against the inherent requirements of the work he or she would be required to do and the circumstances in which it has to be carried out. A criminal record should not generally be an absolute bar to employment of a person”* (HREOC, 2005). Therefore, the ability of the Boards to deal flexibly with practitioners with past criminal records must be clearly stated for the benefit of the public and practitioners alike.

Specifically, more details are sought on whether the following will be assessed as part of a registrant’s assessment:

- Spent convictions
- Convictions unrelated to the registrant’s duties
- Statute of limitation. The issue of statute of limitation also needs to be clarified around Proposal 4.3.2 which deals with reports against practitioners who are no longer registered.
- Related conviction in non-health related activities (e.g. under the Corporations Act).

Separation Issues. This was touched on earlier but deserves further comment. Proposal 91.1, Option 2, seems a sensible and balanced solution and is endorsed. Legal representation was referred to above as part of considerations of natural justice. Balance between confidentiality and openness of panel hearings seems best managed by 9.4, Option 2. 9.4.1 and 9.5.1 seem unnecessarily repetitive but endorsable. Likewise 9.6.1 and 9.7.1 seem sound. On the matter of which ombudsman legislation should apply (9.8), the APS favours Option 1 – the Commonwealth.

APS endorses 9.1.1 (procedural fairness proposal), 9.2.1 (across professions), 9.3 – 4a or 4b (legal representation), 9.4.1 and 9.5.1 (panel hearings procedures), 9.6.1, 9.7.1 (reviews and decisions) and 9.8, Option1, (Ombudsman Acts)

Tribunals.

APS endorses 10.2.1 and 10.2.2 (criteria for a tribunal), 10.3.1 and 10.4.1 – first option (jurisdiction of tribunal), 10.5.1 and 10.5.2 (findings and determinations), 10.5.3, 10.5.4, 10.5.5, 10.6.1, 10.7.1 (constitution and conduct), 10.8.1, 10.9.1 (deregistered practitioners), 10.10.1, 10.11.1 and 10.12.1 (rights, reasons and notices of decisions).

Procedural Matters

APS endorses 11.3.1 (holding out), 11.5.1 (direct or incite), 11.6.1 – Option 1 (advertising) 11.7.1 (enforcement), 11.8.1, 2 and 3 (other offences), 11.9.1 (prosecution) and 11.10.1 (Monitoring). APS also endorses 12.1 regarding transition arrangements.

Principle 4: Communication

This is an area where gaps or failure can in themselves perpetuate or initiate injustice to both community members and practitioners. Frustrations with the system can also be exacerbated by delays in communication and feedback to complainants or notifiers. There is a tension for the Boards to balance the need to inform the community in relation to a notification against the due process of an investigation as outlined under Principle 3 above.

It would be reasonable to expect the Boards to communicate to the community registering complaints of the process involved and an indicative timeframe for their investigations. Any delays to their investigations should also be informed to the notifier. Other factors that are likely to result in frustration and misunderstanding by notifiers also need to be recognised and addressed (e.g. practitioner's rights of appeal). For these reasons the APS has requested a shortening of reporting time lines (e.g. 6.5.3, 8.3.5, 8.6.3).

The National Agency, as opposed to the Boards, would also facilitate consumer access by education and public information dissemination. In that way, the community is aware of their rights and obligations for lodging notifications as well as knowing when, where and how such notifications must be made.

Simultaneously, the National Boards could educate and inform practitioners to bring about improved registrant behaviour and understanding of their rights and obligations under the new National Scheme.

Principle 5: Degree of risk

It is acknowledged that the consequences of events and their severity are dependent on the risks they pose if no actions were taken. It is therefore vital for the Boards to take a flexible approach in both assessing the risks posed by practitioners' behaviours and the

appropriate response to address such risks. It was evident that the Consultation Paper took this approach, as outlined under Sections 6 and 7, on conduct versus health and performance matters. The APS believes that the Consultation struck the right balance between cost of system and responsiveness to complaints on this principle. The issue of flexibility also ensures just management of the variety of practitioners both within and between Boards but also allows for the support of different types of registrants who may vary in their manner of meeting the standards of practice.

Principle 6: Education and training of Boards

One of the critical elements in this new National Scheme is the need for current Boards to grasp the major shift that the new National Boards represent. The use of the word 'Board' is regrettable as it tempts the registration oriented current Boards to transfer their learning and their perceptions to the new Boards. The challenges facing these new Boards include:

- Moving from previous concepts of jurisdictional Boards.
- Familiarisation with roles and processes under the new national scheme, particularly in regard to the limitation of powers and the involvement of other agencies and external bodies (e.g. Referral for tribunal hearings).
- Education and training of Board members in their duties and responsibilities. Mandatory Board training and/or accreditation of Board members, for instance, could be instituted as part of an overall quality assurance program.
- Balancing the need to standardise processes while exercising flexibility of judgement, particularly under Sections 6 and 7 of the Consultation Paper.
- Facilitating information exchange between interested parties whilst maintaining their privacy, confidentiality and rights.
- The Boards' responsibility to other government agencies, especially those that they interact with as outlined under Proposal 2.1.1 to ensure such external agencies are also made aware of their decisions in relation to particular practitioners so as to maintain the primacy of safety and quality of services to the community.

A well functioning Board under the new National Scheme must be transparent in its processes and accountable in its actions. It will exercise judgement without fear or favour, while upholding the interest of the community (including that of the practitioner community) at its heart. This is no small task. Education and training of the Board members will play a vital role in overcoming the challenges outlined above. The APS urges these features or mechanism be featured prominently in the new National Scheme.

Principle 7: Costs of the process

For a system to be accessible to the community, it needs to be affordable. At the same time, as outlined throughout this submission, the system needs to be sensitive to the practitioner population. Costs associated with investigation of notifications, particularly to practitioners from the smaller (population-wise) professions, and the costs associated

with interactions with jurisdictional tribunals and other agencies must not be barriers toward fair and equitable access to the National Scheme.

Therefore, further explanation should be provided, particularly with regard to Sections 3.2 and 5.3 of the Consultation Paper, as to who and how costs for the various committees for the smaller professions and the Boards' interactions with tribunals can be met.

As stated in its previous submission, the APS believes that the primary motivation behind registration, protection of the public, is a function of the government, and therefore any instrumentalities that serve to protect the public should therefore be funded by the government. Just as one should not expect the practitioner to fund his/her health programs for conditions developed outside of his/her professional services, the new Boards cannot be expected to meet all the costs associated with its investigations and operations.

Conclusion

The APS endorses largely the content and approach conveyed by this Consultation Paper. With very few exceptions it endorses most proposals. It also appreciates the opportunity to comment in details about the many elements of the Consultation Paper. Apart from its endorsement of most of the proposals it highlights the following issues for specific consideration:

- Mandatory reporting by health professionals of other practitioners
- 'not of good character' as an operational term
- Assessments panels – constitution of membership and their powers
- Delineation of powers between parties to the processes
- Own-motion powers exercised by Boards
- Communication by Boards to Notifiers and Practitioners
- Education, and education role, of Boards
- Ongoing concerns regarding costs