



## **Submission**

### **National Registration and Accreditation Scheme for the Health Professions**

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

**November 2008**

CHOICE is a not-for-profit, non-government, non-party-political organisation established in 1959. CHOICE works to improve the lives of consumers by taking on the issues that matter to them. We arm consumers with the information to make confident choices and campaign for change when markets or regulation fails consumers.



CHOICE supports the establishment of a new national health complaints system. However, we believe there must be changes to the model proposed in the Consultation Paper. The transition to a national registration system provides an opportunity to develop a better complaints system which is effective and meets the needs of all stakeholders. As noted in the Consultation Paper, an effective complaints system will “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 practice.” To achieve this aim, the interests of consumers must be central in the design of the system. It must be open and accessible with appropriate accountabilities for decisions.

This submission focuses on the structure and operation of the proposed national health complaints system. We believe the new system must have features to ensure consistency, impartiality and accessibility. Ideally the complaints handling arrangements should apply nationally or at least apply a framework which will operate identically in each state. We also believe that the opportunity to create a new system should not be based on the lowest common denominator. It must bring all States up to a standard which provides an adequate level of protection to consumers.

Unfortunately, CHOICE does not believe that the arrangements as proposed in the Practitioner Regulation Subcommittee’s Consultation Paper would achieve these objectives. In particular, CHOICE is concerned about the prominent role given to professional boards in the investigation and determination of complaints. We do not believe this achieves a balance between the interests of health practitioners and consumers.

CHOICE deals with complaints handling schemes across a wide range of industries. In recommending improvement to the proposed system we are not questioning the professionalism or intentions of the boards or Australia’s health professionals. Rather we believe that, when it comes to consumer complaints mechanisms, there should be the greatest possible amount of transparency and independence. In our experience, this increases public trust in the system. It will also protect the boards and professionals involved from any perception that they are protecting their colleagues.

Independence does not suggest there is no role for the professional boards. We recognise the important role of professional boards in setting standards and evaluating professional behaviour. This can continue within a scheme that also delivers transparency and independence.

We recommend the following changes to the proposed national health complaints system:

1. A single point for consumer complaints
2. An independent agency to initially assess and prosecute complaints
3. Clear separation of powers between investigation, prosecution and determination of complaints
4. Open and transparent decision-making
5. A right for complainants to have decisions reviewed independently
6. Adequate consumer representation on decision-making bodies
7. Effective regulation of advertising for health services

Without these changes we believe the system will fall well short of good practice in complaints handling. Furthermore, it may reduce the protections for consumers in some States. We would not support the complaints handling arrangements proposed in the Consultation Paper without these changes.



If you would like any further information please contact CHOICE's Senior Policy Officer – Health, Michael Johnston, on (02) 9577 3374 or email [mjohnston@choice.com.au](mailto:mjohnston@choice.com.au).

## **1. A single point for consumer complaints**

A complaints mechanism is effective only if it is easy for consumers and others to make a complaint. Complaining about a health service can be a stressful and intimidating process for a consumer. The system must seek to minimise this and ensure consumers are confident that complaints will be dealt with seriously and compassionately. Consumers must also be certain that any inquiries will be dealt with discreetly. There must be a single point (a 'one-stop shop') where consumers can go for advice and assistance on health complaints processes. This must be a body which is independent from the professional boards. It must continue to have a presence in each State to ensure it is accessible for consumers.

Under the proposed arrangements, notification must be made in writing. In general this makes it more difficult for consumers to complain. However, in some cases it may be necessary. In this instance, we are not opposed to a requirement that complaints be put in writing. However, it is important that there are simple and accessible arrangements to enable consumers to do that. It should be easy for consumers to make an initial inquiry to one point including by email or a toll-free phone number. The one-stop shop must provide trained staff who can then provide advice to consumers and assist them put their complaints in writing. This should not be the role of the responsible professional board.

## **2. An independent agency to assess complaints**

### *Initial assessment of complaints*

The initial decision about whether or not to proceed with an investigation is important for all parties involved. This stage must be transparent and fair.

The Consultation Paper proposes that the power to make the initial decision will reside with the relevant national board. However, where a consumer makes the complaint, the board will need to consult with the relevant State health complaints commission (HCC). From the Consultation Paper, it is not clear what influence the HCC has over the final decision of the board.

In NSW, the initial assessment for all complaints relating to registered health practitioners is undertaken by the Health Care Complaints Commission (HCCC), in consultation with the relevant board. If there is a disagreement between a board and the HCCC as to how a complaint is to be managed, then the investigation/disciplinary path is chosen. This is an effective model for initial assessments because no single body has total responsibility. Furthermore, there is significant involvement from a body which is independent to the professional group. This helps ensure all participants are held accountable for their decisions.

Consumers may be concerned that if their complaint is handled by a professional board, it will not be taken seriously or that the profession will protect itself. It is irrelevant whether this is the case in practice. It is an impression that has developed from the health professions' handling of cases in the past. If this concern is not addressed it may reduce the likelihood that a consumer will make a complaint.



A national complaints agency with primary responsibility for the initial assessment would overcome this concern. The national complaints agency would need to make decisions in consultation with the relevant boards. This arrangement would apply to all complaints regardless of which stream they belong to. This does not undermine the role of the boards rather it ensures there is a check on their decision-making and protects them from unnecessary criticism. Experience in other professions (eg legal services, auditing) has shown that there is a need to ensure complaints are not handled entirely by the profession.

#### *Complaints about registrants from different professions*

Complaints which relate to registrants from different professions will require the input from a number of professional boards. The Consultation Paper proposes that boards could work together when necessary to investigate matters. CHOICE is concerned that this process will increase the complexity for complainants who will need to deal with a number of boards in the process of their complaint. It is not clear what would occur if different boards come to different conclusions about the way the case should proceed. A national complaints agency would coordinate complaints about registrants from different professions and ensure consistency in complaint handling.

### **3. Clear separation of powers and accountability**

The proposed arrangements only provide for structural separation of the assessment, investigation, prosecution and determination of disciplinary matters in relation to serious matters. 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. It is suggested that the legislation will address issues of due process such as avoidance of bias in decision-making and prejudgement.

Ensuring there is no overlap between the membership of panels and the commissioning boards is proposed as one measure to address issues of separation of powers. We note the discussion paper also suggests provisions for review and appeal and options seeking review for complainants will increase separation of powers. The proposals in relation to both these matters are extremely limited. In particular, it is proposed there will be no right of review for complainants.

CHOICE does not believe these measures will adequately address issues of separation of powers. In particular, we foresee the following problems:

- The Consultation Paper proposes that the panel could not include any member of the board or committee referring the matter to the panel. Nevertheless, the board or committee is responsible for appointing the panel. It will be difficult for the board/committee to avoid accusations that they ultimately have influence over the panel or that they have selected a panel to achieve the outcome they want.
- Within health professions there is often significant contact between members of the profession. It would be difficult for the board members to investigate and prosecute a complaint against one of their peers with no potential conflict of interest. This is particularly true in small professions or small jurisdictions.



A national complaints agency to investigate and prosecute complaints would overcome these problems.

The discussion paper notes that:

*some jurisdictions have addressed this [issues of separation of powers] by separating the investigation and prosecution function from the registration board and establishing internal checks in the assessment and decision-making processes to ensure due process*

CHOICE believes this is the ideal arrangement to deliver separation of powers and accountability for all decision-makers. This provides further support for the establishment of an agency which would be responsible for the initial assessment, investigation and prosecution of complaints against health professionals.

#### **4. Open and transparent decision making**

##### *Confidentiality of panel hearings*

It is proposed that panel hearings will be closed and hearings will be conducted in private. This may be appropriate where the panel is dealing with health matters or minor matters of competence. However, the panel may also deal with serious conduct matters. In these cases, we believe the panel hearings should be open unless there is a good reason to have the proceedings closed. For example, it may be appropriate to hold closed hearing or partly closed hearing where the complainant's privacy may be breached.

In addition to open hearings, a panel should be required to publish reasons for its decision and a transcript of the proceedings. For closed hearings, panels should be required to publish de-identified reasons for decisions. This will increase public confidence in the system. It will also ensure health practitioners are aware of the professional and ethical standards imposed by the panels.

#### **5. A right for complainants to have decisions reviewed independently**

The Consultation Paper proposes that a registrant will have the right to seek review of a decision against them. We believe the complainant must also have a right to request a review of the decision if they are not satisfied with the outcome. Two options for the complainant's right of review are mentioned in the Discussion Paper (although ultimately Option 1 is proposed):

1. no right to complain; or
2. a right of review by 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. This would be limited to particular 'reviewable decisions'.

Option 1 is unacceptable. If this option was chosen as part of the proposed arrangements, the board can decide to deal with the complaint, investigate the complaint, and appoint a panel to hear its prosecution of the complaint. If the complainant is not happy with the outcome they have no right to seek a review. Under these arrangements we believe the board is not accountable for its decision. There is therefore a substantial risk that complainants will be dissatisfied with the outcome. In addition, it may encourage the view that the professions are protecting their own.



For the complainant to be satisfied with the outcome of decision, they must have the right to have those decisions reviewed. Option 2 provides for a review but it would be by a panel established internally to the board. This further complicates issues of separation of powers. Under this option, the board would appoint the panel to review the decision of a panel which it also appointed. This does not provide for independent review of decisions.

Complainants must be able to seek review of decisions made at each stage of the process eg following initial assessment, after panel decision, etc. That review should be conducted by a review panel which is established independently to the decision-maker (for example by the relevant HCC). The review panel should have representation from professionals and consumers as for all decision-making bodies (see below).

#### *Role of ombudsman*

The discussion paper also envisages an ability to seek review by the State or Commonwealth Ombudsman. This should be permitted in the legislation. However, it should not be considered an adequate substitute for the type of review discussed above. The Ombudsman cannot overturn a decision; they can only review the process and make recommendations. The Ombudsman's decision is not binding on the board and it cannot compel the board to do anything.

The Consultation Paper seeks comments on applying either the State and Territory Ombudsman Acts or the Commonwealth Ombudsman Act. Applying State and Territory Ombudsman legislation may make it difficult to determine which Ombudsman Act would apply in different circumstances. This is a national scheme and it would be appropriate for a single national Ombudsman to oversee complaints about administrative actions. The Commonwealth Ombudsman Act should apply to the national registration scheme.

## **6. Adequate consumer representation on decision-making bodies**

In complaints about health professionals' conduct it is important that their behaviour is assessed against community values as well as professional standards. To ensure this occurs consumers must be represented on all representative decision-making bodies. This includes professional boards, panels and tribunals.

Representation on these decision-making bodies must be balanced. There must be an equal number of health professionals and consumer representatives. For each decision-making body, a suitable number of consumer representatives should be appointed by the Ministerial Council from nominations from key consumer bodies (for example, Choice, the Consumers' Health Forum, state health consumer councils – where they exist). The consumer panels could be appointed at a national or state level. They would be professional tribunal members who would be paid sitting fees for their work.

#### *Consumer representation on boards*

Standard setting and accreditation are professional decisions. It is appropriate for those functions to be performed by a board of largely health professionals. However, when it comes to making decisions about complaints a board should also have consumer representatives. We



believe these two functions are mutually exclusive and should be performed separately. For the complaints function, it is appropriate that half the board be consumer representatives.

#### *Consumer representation on panels*

It is proposed that a panel must have:

- at least one registrant from the same profession as the practitioner;
- at least one member who is not and has never been a registrant in a regulated health profession;
- no more than half the members being registrants from the profession concerned.

From the discussion paper, it would appear that anyone who is not a registrant in a regulated health profession would be able to be a member on the panel. The requirements for non-registrant members need to be clearer to ensure they are someone who is suitably independent and qualified to represent the community.

Based on the proposal above, it appears that a two-person panel could be appointed with a representative of the registrant's profession and another person. We believe that panels should consist of at least three members and be chaired by a lawyer (to ensure natural justice and due process). The panel should also include one representative from the registrant's profession and one consumer representative. This ensures community standards are incorporated into decisions.

#### *Consumer representation on tribunals*

In the discussion paper, it is proposed that a tribunal hearing panel would consist of at least three members. This would include at least two from the same profession as the practitioner who is party to the proceedings. It is also suggested that the Chair would be a legal member and that that member would ensure determinations reflect community standards. CHOICE believes that to reflect community standards, it is important there are consumer representatives appointed specifically for that purpose. Tribunals should consist of five members. This would include a chair (legal member), two professional representatives and two consumer representatives.

It would also be beneficial for the tribunals to develop similar standards of professional conduct across the professions and encourage consistency in decision-making. Consideration should be given to the two professional representatives including one representative from the practitioner's own profession and one from another profession.

## **7. Effective regulation of advertising for health services**

There is a strong case to impose a high standard in advertising for health services. At worst, unnecessary health services can be harmful to your health. However, advertising can also give consumers unrealistic expectations of beneficial treatment and generate unnecessary concern about one's health. The standard should go beyond a prohibition on false and misleading advertising. Health professionals have a duty to only engage in advertising which is ethical and in the interests of health consumers.

# choice

The boards should have the scope to develop standards to deal with emerging matters. However, there are particular practices which should be explicitly prohibited in legislation and not left to self-regulation. For example, legislation should explicitly prohibit advertising which:

- creates an unreasonable expectation of beneficial treatment;
- offers gifts, discounts or other inducements without setting out the conditions;
- encourages the indiscriminate or unnecessary use of health services, medicines or other therapeutic goods; and
- advertises a service likely to cause harm.

Practices such as these should be included in the national legislation so that consumers in all States have the same level of protection.

To ensure the effectiveness of the regulation of advertising there also needs to be effective monitoring and sanctions. This should not be left to the professional boards. It requires a proactive regulator with responsibility for monitoring advertising. There also needs to be sanctions which will deter inappropriate advertising. This must include fines set at a level which will discourage breaches. We suggest the Practitioner Regulation Subcommittee work closely with the Australian Competition and Consumer Commission to develop appropriate arrangements in this area.