



Friday 21st November 2008

Chair, Health Workforce Principal Committee
Megan Cahill
HWPC Secretariat
Level 12/120 Spencer St
MELBOURNE, Vic 3000

Attention: Practitioner Regulation Subcommittee

Dear Ms Cahill,

PROPOSED COMPLAINTS HANDLING ARRANGEMENTS

The Chinese Medicine Registration Board (the Board/CMRB) thanks you for the opportunity to comment on this very important document. We are in general in agreement with much of it based on our experience to date with the new Victorian legislation (the Health Professions Registration Act 2005 or HPRAct).

We have not commented on every aspect but have selected some key issues to focus upon.

Our more detailed comments are included as an attachment to this letter.

Yours sincerely,



Vivian Lin
President

Proposed Terminology

Complaint/Notification

The term "notification" is favoured for the reasons outlined in the discussion paper.

The CMRB experience supports the usefulness of defining complaints broadly to enable the Board to properly deal with matters of legitimate concern. The CMRB has experienced legal defences denying the Board's jurisdiction, with obstructive arguments that a matter brought to the Board's attention does not fit the definition of a complaint and therefore ought not be considered or dealt with. Such arguments are resource intensive to deal with and contrary to the purpose of the legislation.

Assessment/Investigation

The term investigation is preferred to "assessment". This more clearly conveys a right/responsibility on the part of the relevant Board to obtain the necessary information to properly assess and progress the matter. In the context of titles for various optional committees¹, the context and role is made clearer with the term investigation.

Similarly, the term health panel is preferred to "health management committee" for simplicity and clarity.

Not of Good Character versus Fit and Proper Person

Definitions from sections 4.4.2, 4.4.3, 4.4.4, 4.4.5 and 4.4.6 of the Legal Profession Act 2004 (Vic) may be a useful reference.

Proposed System

Monitoring Agreement and Conditions

This is strongly supported. It is essential to be able to take swift action in response to evidence of non-compliance with conditions and depending on the circumstances, referral to an external tribunal may be an unwarranted first step and ought not be the only option.

Notifications

The requirement that a notification be in writing is inappropriate. Whereas the Board may have "own motion" powers, it is preferable for the true source of the information to be the official "notifier" but non-negotiable requirements such as this, although strongly preferred, can be a significant disincentive to some members of the public. Boards can offer assistance (for example to persons of non-English speaking background)² but it is a significant step for some notifiers to initially engage with the Board. This needs to be made as easy as possible. Such matters can, regardless, be dealt with as a matter of policy and need not be crafted into legislation.

The requirement "that a notification identify the practitioner" is potentially problematic. The notifier may not know that name of the practitioner/s where practitioners work in groups or teams or where unprofessional conduct has been observed in a particular setting (e.g. shopping centre or expo). The notifier may also get the practitioner's name wrong.

The requirement "that a notification identify the notifier" is potentially problematic. The Board needs to act in response to anonymous complaints, especially if the allegations are serious. Whilst there may be consequent

¹ Which could be more effectively dealt with in legislation via Board delegations

² And surely this 'good practice' role does not need to be enshrined in legislation

evidence problems, an investigation may be warranted and may uncover independent evidence. In addition, persons who feel threatened or unsafe may be unwilling to *commence* the process due to such a requirement. Boards need flexibility to manage these potential situations individually.

Matters which may be the subject of a notification

The CMRB was unable to deal with pre 1-01-02 (initial date of registration under the CMR Act) conduct issues about registered practitioners unless such issues went to character. This problem may apply to regulation of Chinese medicine in other states if Chinese medicine is brought under the proposed arrangements, and may also apply to future regulation of any of the currently unregulated professions.

Additionally, even with all currently regulated professions, there is the issue of Boards grappling with conduct matters predating registration. This grey area needs clarification.

Referral to Tribunals

The requirement that matters which may be professional misconduct be automatically referred to an external tribunal is inappropriate as:

1. It is inconsistent with other parts of the proposed arrangements (especially powers of panels)
2. It would be very burdensome as it does not allow for Boards to consider the strengths/weaknesses of the evidence as a criterion for proceeding.

Mandatory Reporting

This is potentially very problematic and needs to be carefully considered. The public protection principle is important but misguided reporting would be personally and professionally devastating for a practitioner, and financially burdensome for Boards. Issue of concern include:

- Sanctions for non-reporting
 - Sanctions for reports not made in good faith?
 - Desirable goal of providing early assistance to practitioners who are troubled
- Overall, this option is too complex. As an alternative the legislation could provide immunity to practitioners who make such reports in good faith without making it mandatory. The national board could provide education and guidance to practitioners about when it is appropriate to notify a Board of such concerns.

With regard to students, CMRB submits that registration of students in the first instance should be optional for Boards, and if not, mandatory reporting must not create the opportunity for schools to devolve their student management responsibilities to Boards.

Immediate Suspension

The reference to limited periods is inappropriate as it lends itself to contrived delays which force the Board "back to the drawing Board" for exactly the same issue. Whilst suspensions cannot reasonably be open-ended suspension should be possible until any investigation is completed and the responsible board is of the opinion that there is no serious risk that the health and safety of the public will be endangered as a result of the health practitioner practising as a health practitioner (or the student undertaking clinical training) or the suspension is otherwise revoked for example after a hearing. The Board must ensure that the matter is investigated or heard as soon as possible after the suspension. A practitioner can appeal against a suspension.

Preliminary Assessment of Notifications

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:*

- *require the practitioner to give an enforceable undertaking to the board, which might include, for example, the placement of conditions on registration*

It is suggested that Boards be given power to enter into a voluntary agreement with a written undertaking at this point in dealing with notifications.

It is also suggested that boards be given the power to enter into agreements of the type enabled by section 59(2)(b),(c) and (d) of the Victorian Health Professions Registration Act 2005.

Referral to Tribunal for Possible Professional Misconduct

As above under referral to tribunals.

Notifiers' rights of review of preliminary assessment decisions

Notifiers should have a right to request a review of a decision to arrange to have a matter settled (an investigation outcome which is currently possible in 59(2)(b), 59(2)(c) and 59(2)(d) of the Victorian Health Professions Registration Act 2005.

Performance Matters

CMRB supports a flexible system where issues (or parts thereof) can be moved from one pathway to another as becomes appropriate.

CMRB supports the proposed power to require a performance assessment on application for renewal.

Proposal 6.5.2

Details from previous conduct proceedings may be equally relevant to a performance panel especially since performance assessments may not have been available to some boards prior to the proposed arrangements coming into effect.

Notice of Decisions of Hearing Panels

The requirement for a responsible board to give notice of its decision in relation to a conduct hearing to the registrant, their employer and the notifier can create problems regarding privacy if additional matters have been heard, beyond the issues initially raised by the notifier (as a result of the investigation).

Health or Impairment Matters

Proposal 7.1.2 – Funding of Health Programs

A combination of the two proposed options is possible.

Health Panel Hearings

The requirement to have on a panel a person who has never been a practitioner in a regulated health profession is too limiting. This eliminates many people who have made a career change. Is there any evidence to support this proposal? Perhaps, the legislation could eliminate persons who were ever registered in the specific area of health relevant to the practitioner in question.

Conduct Matters

Conduct Panel Hearings

The requirement to have on a panel a person who has never been a practitioner in a regulated health profession is too limiting. This eliminates many people who have made a career change. Is there any evidence to support this proposal? Perhaps, the legislation could eliminate persons who were ever registered in the specific area of health relevant to the practitioner in question.

Powers of Investigators

CMRB disagrees with the restriction on entry to practices because they may be located at private residences. A practitioner decision to conduct a regulated health practice at their place of residence is their choice and must be subject to all the same processes and standards which apply to non-residentially-based practices.

Composition of Panels

The prohibition on appointment of Board members ignores the possibility of quarantining individual members from certain complaints. The use of Board members on panels dealing with the less serious matters is desirable from the perspective of:

- Utilising Board member expertise in these important processes
- Developing and maintaining Board members' understanding and appreciation of these processes and the consequential outcomes
- Providing opportunities to Board members for stimulating involvement in Board work

Panel Hearings

Proposals 8.5.1 and 8.6.1

Absent is power for a panel to refer a matter to a Tribunal where it considers the conduct involved such as may justify suspension or cancellation of registration (other than in the circumstances set out in proposal 8.6.2 which require a pattern of poor performance).

Accountability, Transparency and Procedural Effectiveness

Proposal 9.1.1

CMRB is concerned about costs and complexity of legislatively imposing specified mechanism on boards. The legitimate concerns about accountability, fairness and consistency are somewhat addressed via the national scheme in its entirety, and improvements are expected. An effective national body will attend to these issues as a matter of good governance.

Proposal 9.1.2

Criteria are always useful but can be set as matters of (public) policy. All offence provisions should only be offences because they are serious matters, which go to public protection. In contrast to "likelihood of proving the alleged conduct" a Board may decide to prosecute because the matter is regarded as an appropriate test case of an issue. The Health Professions Registration Act 2005 (and its predecessors) make it an offence to fail to notify the Board of a change of address. It is doubtful that such an offence has ever been prosecuted. The CMRB believes this type of behaviour would be better dealt with as an unprofessional conduct issue.

Legal representation for registrants at panel hearings

The CMRB supports BOTH option 3b that the legislation specifies that the registrant has no right to legal representation except with the leave of the panel and option 4a 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.

Tribunal Hearings

Proposal 10.5.1

Tribunals should be able to make a finding of unprofessional conduct.