



The peak body representing chiropractors

Consultation Paper on Proposed Arrangements for handling complaints and dealing with performance, health and conduct matters under the National Registration and Accreditation Scheme

Submission to the Australian Health Ministers' Advisory Council
Practitioner Regulation Subcommittee of the
Health Workforce Principal Committee

from the

Chiropractors' Association of Australia (National) Limited

The peak body representing Chiropractors

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The Chiropractors' Association of Australia (National) Limited's (CAA) submission has provided comments on the proposals of the Australian Health Ministers' Advisory Council Practitioner Regulation Subcommittee of the Health Workforce Principal performance, health and conduct matters.

The CAA has confined comment to specific proposals within the proposed Arrangements for handling complaints and dealing with performance, health and conduct matters consultation paper.

GENERAL COMMENTS

Commenting in general to the consultation paper, the CAA supports the following:

- A national scheme that provides for performance (competence), health (impairment), and conduct (discipline) streams allowing matters to be addressed as separate processes, while recognising there may be some overlap and cross-referral between them.
- A national scheme that provides equity and consistency within individual professions, and across professions throughout Australia. Currently there is an inconsistent national approach across 8 jurisdictions to conduct matters and the new scheme should ensure that every practitioner receives the same approach in regard to disciplinary matters as well as remediation, support and counseling about performance and health issues.
- Consumer protection is recognised, however it is also important that health professionals receive natural justice and procedural fairness.
- A scheme which has consistent rulings under national law.
- A scheme which ensures that notifications (complaints) are dealt with in a timely manner for the health professional and the consumer, regardless of whether they relate to performance, health or conduct matters. There is a need to deal with the significant number of lower level complaints in an efficient and timely manner.
- That any delay in action be minimized and monitored if notifications cross over into one or other of the three pathways/streams proposed.
- A "one-stop-shop" for consumers to lodge their complaints and the provision of easy to understand material outlining the different pathways for handling complaints or notifications.
- Greater clarity being provided for consumers on the role of the Health Complaints Commission and the National Boards

MANDATORY REPORTING

The CAA supports a scheme wherein a culture of public safety is paramount and a system that is able to identify health professionals that pose a risk to the public and to then take appropriate action.

However, the CAA is of the view that mandatory reporting could have a negative effect on the objective of protecting the public, in a situation where practitioners know they are at risk of being reported to the National Board. The impact of this would see health professionals becoming fearful of seeking advice or support from their peers and/or professional associations and as a result problems would then go “underground” with the potential of practitioners then working unsatisfactorily and undetected in the community.

There could be a potential problem associated with breaching confidentiality.

There needs to be protection in place for the “whistleblower”.

Mandatory reporting is open to abuse. Practitioners need to be protected from vexatious, self-motivated practitioners who may report on other practitioners out of vested interest. There needs to be clear guidelines as to what is acceptable evidence for mandatory reporting.

The CAA understands the stance of consumers in that it cannot condone non-reporting of “harmful”, “criminally incompetent” acts or of practices that show “strong neglect” of a person’s health and wellbeing.

The CAA suggests that there should be a clear definition and guidelines as to when registered health practitioners are required to report another registered health practitioner. The CAA would support mandatory reporting if there is a clear and ongoing risk to the public.

It also supports a scheme which promotes early advice of problems and, if not a conduct matter, remediation of practitioners through assisting with their performance and providing health practitioner programs for all registrants.

There needs to be more clarity around the underlying philosophy of the process – is it a restorative or punitive model? Is conciliation and mediation freely available? CAA understands it to be a regulatory model responsible for managing risk and the protection of the public as distinct from the resolution of complaints. As a regulatory body it would not be involved in satisfying the public via mediation, which is more of the role of the Health Complaints Commissioners. Through early reporting the scheme would take preventive action involving the practitioner by helping them to improve their performance and their health.

CAA refers the reader to the submission provided by Guild Insurance Limited which deals specifically with mandatory reporting. For reasons given, Guild Insurance Limited provides the following, which I quote from their submission (refer Attachment 1 to this submission):

- “7. *GIL supports limited mandatory reporting obligations. GIL would provide support for Option 1a (under point 4.4 Mandatory reporting obligations in consultation paper) if there were clear guidelines as to when registered health practitioners should report another registered health practitioner in a treatment relationship.*
8. *GIL opposes Option 1b. Need to say why?*

9. *GIL provides conditional support to Option 2a. GIL believes that the AHMAC needs to obtain specialist advice on workplace relations/industrial law issues relevant to mandatory reporting by employers.*
10. *GIL opposes Option 2b.”*

CAA supports the proposals suggested by Guild.

TRIBUNALS

As tribunals deal with people's livelihoods there needs to be assurance that boards are trained in procedural fairness and natural justice applies.

There needs to be information for consumers on the role of tribunals.

IMPAIRMENT PROCESS

Programs needs to protect the public.

Health pathway must be distinct from conduct and performance pathways. However any decision taken to refer practitioner on a health pathway to the conduct stream must be related to public risk.

In addition, the CAA's I comments on the numbered proposals in the consultation paper are as follows:

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.

CAA agrees with this Proposal and recommends that information sharing between the boards and the relevant professional bodies is considered within point b. above.

CAA suggests the addition of point f. to provide for a nationally consistent and streamlined system that ensures transparency, timeliness and cost efficiency.

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’.

CAA supports the terms “notification” and “notifier”.

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’.

CAA supports the use of the term “preliminary 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’.

CAA agrees with the term “notifications assessment committee”.

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.

CAA agrees with the term “responsible HCC”.

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.

CAA agrees with the term “performance management committee”.

CAA strongly recommends that membership of such committees includes professionals with the relevant expertise in the situation/s being managed (e.g. alcohol dependence, mental health etc).

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.

CAA agrees with the term “performance assessment”.

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.

CAA agrees with the term “performance panel” however strongly recommends that the “performance panel” includes members from the relevant profession.

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.

CAA prefers the term “Health Capacity Committee”.

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.

CAA agrees with the term “health assessment”.

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’.

CAA agrees with the term “health panel” and strongly recommends that the “health panel” includes members from the relevant profession.

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.

CAA agrees with the term “conduct management committee”.

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.

CAA agrees with the term “conduct investigation”.

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.

CAA agrees with the term “conduct panel” and strongly recommends that the “conduct panel” includes members from the relevant profession.

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.

CAA agrees with the term “responsible tribunal”.

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’.

CAA’s preference is for “not a fit and proper person” as this is a broader category than character only.

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.

CAA agrees with the term “impairment” however suggests that “incapacity” may be a better term.

2.1.17 Unsatisfactory professional performance – This term is proposed to be used to describe departures from an acceptable standard of professional competence or performance that are not so serious as to warrant suspension or cancellation of registration.

CAA agrees with the definition of “unsatisfactory professional performance” as outlined in Attachment 1 of the Consultation Document.

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.

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

CAA would prefer “unprofessional conduct” as outlined in Attachment 1 of the Consultation Document.

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.

CAA agrees with the definition of “professional misconduct” as outlined in Attachment 1 of the Consultation Document.

3.2 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.

CAA would suggest the inclusion of:

Whether a person who is not registered to perform a restricted practice may have performed a restricted practice

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.

CAA agrees with the definitions of “professional conduct”, “professional misconduct” and “unsatisfactory professional performance” as outlined in Attachment 1 of the Consultation Document however suggests that “unprofessional conduct” should also include any deviation from the prepared Standards or Codes. Unsatisfactory performance should include “or expected competence”. Misconduct should include “misleading or deceptive advertising”

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.

CAA supports this proposal.

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.

CAA strongly recommends that notification must be made in writing and signed. Notifications could be received electronically but must be followed up by sending an original signed notification.

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).

CAA agrees with this proposal.

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.

CAA agrees with this proposal. However suggests in the last bullet point it be that a registrant is "not a fit and proper person"

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.

CAA agrees with this proposal.

4.4 Mandatory reporting obligations

Options for mandatory reporting

A number of options with respect to mandatory reporting by registered practitioners are set out below. One or a combination of these could be provided for in the legislation:

Option 1a: All registrants – limited obligations (treating relationships)

Under this option, the legislation would include provisions that require a registered health practitioner to notify the responsible board where they are in a treating relationship with a registrant from any of the regulated professions whom they reasonably believe to be placing the public at risk in their practice due to a physical or mental impairment, health condition or habitual use of alcohol or other drugs.

Option 1b: All registrants – extended obligations

Under this option, the legislation would include provisions that require, from any of the regulated health professions, a registered health practitioner to notify the responsible board of a registrant whom they reasonably believe is placing the public at risk in their practice:

- due to a physical or mental impairment or health condition, or
- by practising while intoxicated by drugs or alcohol, or
- by practising in a manner that constitutes a gross or flagrant departure from accepted professional standards, or
- by engaging in sexual misconduct in connection with their practice.

Option 2a: Employers – limited obligations (impairment)

Under this option, the legislation would include provisions that require a registered health practitioner's employer to notify the responsible board where they reasonably believe that the registrant's practice is placing the public at risk in their practice due to a physical or mental impairment, health condition or habitual use of alcohol or other drugs.

Option 2b: Employers – extended obligations

Under this option, the legislation would include provisions that require an employer to notify the responsible board of a registrant whose conduct may constitute unsatisfactory professional conduct or professional misconduct.

Registrants would only be expected to report major departures from professional standards where it is within their competence to make such a judgement.

Interested parties are invited to advise of their views with respect to the options for imposing mandatory reporting obligations.

CAA would support Option 1a if there were clear guidelines as to when registered health practitioners should report another health practitioner.

CAA would provide conditional support to Option 2a and strongly recommends that AHMAC obtain specialist advice on workplace relations/industrial law issues relevant to mandatory reporting by employers. In Option 2a and 1a perhaps "misuse" would be better than "habitual "use" or alcohol or other drugs"

CAA refers the reader to our general comments on mandatory reporting on pages 3

and 4 of this submission, and to the submission from Guild Insurance Limited which deals specifically with mandatory reporting requirements (see attachment no. 1 to this submission).

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.

CAA is of the opinion, if student registration is to apply under the regulatory scheme, that the same reporting responsibilities as listed above for practitioners should apply. CAA believes that educational institutions should be required to report on impairment and conduct matters.

CAA knows of situations where students have had criminal convictions recorded and have been refused registration after completion of their training program. These situations should be handled at the time of student registration or occurrence, not at the conclusion of five (5) years training.

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.

CAA is of the view that there is a need for various safeguards e.g. whistleblower provisions, and appropriate registrant protection against vexatious or vested interest related complaints.

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.

CAA agrees with this proposal.

4.7 Immediate suspension powers

Proposal 4.7.1: It is proposed that the legislation include provisions that empower a responsible board or a notifications assessment committee to immediately suspend the registration of a practitioner for a period of up to three months, and to impose a second or subsequent period if it considers the registrant's continued practice poses a significant risk to public health and safety and the proceedings have not yet been finalised.

CAA agrees with this proposal. It suggests that no more than two (2) periods of up to three (3) months should be implemented by a responsible board.

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.

If an investigation and/or disciplinary process has not been finalised within the above suggested six (6) allowable months, then the responsible board should approach the relevant tribunal with respect to further suspension.

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.

CAA agrees with this proposal.

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.

CAA agrees with this proposal.

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.

CAA agrees with this proposal.

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.

CAA agrees with this proposal.

The CAA recommends that a decision a board makes to not investigate a notification should be advised to the notifier and the respective practitioner.

5.3 Liaison with HCCs

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.

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.

CAA agrees with this proposal.

5.4 Who conducts the preliminary assessment of a notification

Proposal 5.4.1: It is proposed that the legislation contain powers for a responsible board to establish any number of 'notification assessment committees' to oversee the preliminary assessment of notifications and make decisions on what actions to take. It is proposed that, when duly constituted under the legislation, a notifications assessment committee would be empowered to make all the initial decisions that the responsible board would otherwise be empowered to make, as to how a matter should be dealt with.

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.

CAA supports the above proposal. There is, however a need for adequate pathways to keep National and States informed of outcomes.

There needs to be mutual recognition of decisions upheld between jurisdictions.

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.

CAA agrees with this proposal.

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).

CAA agrees with this proposal.

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.

CAA agrees with this proposal.

5.6 Notifiers' rights of review of preliminary assessment decisions

There are two options with respect to review rights for notifiers arising from board or

committee decisions at the stage of preliminary assessment:

Option 1: No right of review of preliminary assessment decisions for notifiers.

Option 2: A right of review of preliminary assessment decisions for notifiers – along the lines of the model outlined above, that is, a review panel established internal to the board, with or without a level of independent input from, for example, a nominee of the responsible HCC. Reviewable decisions would be the decision to take no further action following preliminary assessment, and the decision to refer a matter to a conduct management committee or performance management committee of the board rather than to an external tribunal for hearing. The notifier would have no right of review with respect to matters being dealt with by the board under the health stream.

CAA's preferred option is Option 2.

6. Performance matters

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.

CAA agrees with this proposal however strongly suggests that issues of "hands on" competency and performance assessment should be determined by a member or members of the same profession and with relevant training and experience.

6.2 Performance management

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).

CAA agrees with this proposal with the inclusion of a member or members of the same profession if a performance management committee is in place.

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.

CAA supports this proposal.

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.

CAA agrees with this proposal again with the inclusion of an assessor or assessors from the same profession.

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.

CAA agrees with this proposal.

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.

CAA agrees with this proposal.

6.4 Performance panel hearings

Proposal 6.4.1: It is proposed that following referral of a matter for consideration as a performance matter, the legislation provide:

- for the committee (or the board) to appoint, if it considers necessary, a performance panel, to hear a matter relating to the professional performance of a registrant with that panel to contain no members of the board or committee referring the matter to the panel
- that a panel must:
 - have at least one registrant member from the same profession as the practitioner
 - have at least one member who is not and has never been a registrant in a regulated health profession, and
 - have no more than half of the members being registrants from the profession concerned
- 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.

CAA supports this proposal but its preference is for at least 2 registrant members from the same profession. CAA considers that the panel should report its findings and recommendations to the performance management committee or respective board.

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.

CAA supports this proposal but believes it is the role of the panel to report its findings and recommendations to the performance management committee or respective board.

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.

CAA agrees with this proposal.

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.

CAA agrees with this proposal however 28 days may not always be attainable particularly if committees don't meet regularly. Again the CAA believes the panel should advise the Performance Management (PM) committee or board of their recommendations and that the PM committee would do the reporting to the practitioner. It is inconsistent that a panel does the investigating and then hands out the judgement.

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.

CAA agrees with this proposal.

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.

CAA's preferred option is Option 2.

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).

CAA agrees with this proposal.

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.

CAA agrees with this proposal.

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.

CAA agrees with this proposal again with the inclusion of a practitioner assessor from the same profession.

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.

CAA agrees with this proposal.

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.

CAA agrees with this proposal.

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.

CAA agrees with this proposal.

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.

CAA endorses this proposal however strongly recommends that a panel must have at least 2 registrant members from the same profession.

CAA also recommends that the wording should read "a member who is a registered medical or other health practitioner with relevant expertise". This for example would cover a psychological problem. It may be better to have a psychologist rather than a medical practitioner in this case.

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.

The CAA supports this proposal but suggests that the panel report back to the health management committee or board with their advice for implementation or otherwise.

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.

CAA agrees with this proposal.

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.

CAA agrees with this proposal.

However, it is of the view that the role of the panel is to advise the health management committee or board of their recommendations and that the health manage committee would do the reporting to the practitioner. It is inconsistent that a panel does the investigating and then hands out the judgement.

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 a hearing into the matter.

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.

CAA agrees with this proposal.

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.

CAA agrees with this proposal.

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.

CAA agrees with this proposal.

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.

CAA agrees with this proposal.

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.

CAA agrees with this proposal.

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.

CAA agrees with this proposal.

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.

CAA agrees with this proposal.

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.

CAA endorses the proposal however has some concerns in regard to the 14 days being insufficient if the provision of details is to be given

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).

CAA agrees with this proposal.

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.

CAA agrees with this proposal.

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.

CAA agrees with this proposal.

However strongly recommends that a panel must have at least 2 registrant members from the same profession.

CAA also believes that a panel should consider and assess matters and then report its findings and recommendations to the appropriate national board.

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.

CAA agrees with this proposal but suggests that the role of the panel is to give this advice to the conduct management committee or board for implementation or otherwise. CAA also recommends that a conduct panel should be able to recommend that a matter be referred to a tribunal.

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.

CAA agrees with this proposal.

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.

CAA supports this proposal.

However the CAA believes that the role of the panel is to appropriately advise the health management committee or board of their recommendations and that the conduct management committee would do the reporting to the practitioner. CAA believes it is not appropriate that a panel does the investigating and then hands down the judgement.

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.

CAA's preferred option is Option 1. as the standards required to progress through the proposed system are fair and review systems are also being proposed.

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.

CAA agrees with this proposal.

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.

CAA agrees with this proposal.

9.3 Legal representation for registrants at panel hearings

There are a number of options with respect to legal representation:

- Option 1:** The legislation is silent on the matter of a registrant's right to legal representation at a board hearing.
- Option 2:** The legislation specifies that the registrant has the right to be legally represented at a board hearing.
- Option 3a:** The legislation specifies that the registrant has no right to be legally represented at a board hearing.
- Option 3b:** The legislation specifies that the registrant has no right to legal representation except with the leave of the panel.
- Option 4a:** The legislation specifies that the registrant has no right to legal representation, but can have a person who is not an Australian legal practitioner accompany them and, with the leave of the panel, that person may speak on their behalf.
- Option 4b:** The legislation specifies that the registrant has no right to legal representation, but can have a person accompany them, who may or may not be an Australian legal practitioner, and that person may speak on their behalf with the leave of the panel.

CAA's preferred option is Option 4b.

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.

CAA agrees with this proposal.

9.5 Status of notifiers at panel hearings

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.

CAA agrees with this proposal.

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.

CAA agrees with this proposal.

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.

CAA agrees with this proposal.

9.8 Role of Commonwealth, State and Territory ombudsmen

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

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

CAA's preferred option is Option 1.

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.

CAA agrees with this proposal.

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.

CAA agrees with this proposal. We assume in the first bullet point that the word panel should read 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.

CAA agrees with this proposal.

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.

CAA supports the alternative option.

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).

CAA agrees with this proposal.

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.

CAA agrees with this proposal.

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.

CAA agrees with this proposal.

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).

CAA agrees with this proposal.

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.

CAA agrees with this proposal.

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.

CAA agrees with this proposal.

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.

CAA agrees with this proposal however such a panel should also include additional member/s as a consumer and/or person with legal expertise.

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.

CAA agrees with this proposal.

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.

CAA agrees with this proposal.

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.

CAA agrees with this proposal.

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).

CAA agrees with this proposal.

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

CAA agrees with this proposal.

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).*

CAA agrees with this proposal.

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.

CAA agrees with this proposal.

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.

CAA supports 11.4.1 and supports that offences would apply to the restricted practice of spinal (and extremity) manipulation in two parts

- a. those registered practitioners who do not have the qualifications to allow them to use a restricted practice, or
- b. those persons who are not a registered practitioner under the act who have allegedly performed a restricted practice.

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.

CAA agrees with this proposal.

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.

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.

CAA's preferred option is Option 3.

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).

CAA agrees with this proposal.

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.

CAA agrees with this proposal.

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.

CAA agrees with this proposal.

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.

CAA agrees with this proposal.

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.

CAA agrees with this proposal.

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.

CAA agrees with this proposal.

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.

CAA agrees with this proposal.

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.

CAA supports the above provision in the IGA.

ATTACHMENT NO. 1

Submission to the Practitioner Regulation Subcommittee on the consultation paper titled:

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

Guild Insurance Limited

1. Guild Insurance Limited (“GIL”), an APRA regulated entity operating since 1963, is a specialist professional indemnity insurer of Australian health practitioners. GIL provides professional indemnity protection nationally to the members of many professional associations representing health practitioners.

Specifically in relation to the proposed new registration arrangements, GIL provides this protection nationally to the majority of pharmacists (members of the Pharmacy Guild of Australia and Pharmaceutical Defence Limited), physiotherapists (Australian Physiotherapy Association), chiropractors (Chiropractors Association of Australia), osteopaths (Australian Osteopathic Association), podiatrists (Australasian Podiatry Council).

GIL insures the majority of dentists in New South Wales, Victoria, South Australia and Tasmania, through referral arrangements with the respective Australian Dental Association Branches in those states. Among others, GIL also insures the members of the Australian Institute of Radiography, and members of the Australian College of Nursing.

GIL supports the general thrust of the legislation, and believes there are others within the relevant professions well placed to comment on many the aspects of the proposals. As such, GIL will confine its commentary to one particular area of concern.

Mandatory Reporting

2. GIL supports and indeed embraces a system that is able to identify and take appropriate action against those registered health practitioners that pose a risk to the public. The overriding question is whether the mandatory reporting proposals contained in the consultation paper achieve that objective. GIL holds grave concerns that the proposed obligations will not reach the desired objective and indeed, be counter productive. GIL also holds concerns about the impact of the proposed obligations on existing arrangements for the management of claims against registered health practitioners.

The risk that the proposed obligations will be counter productive

- 2.1 GIL, and its agents, works closely with professional bodies in order to ensure that proactive steps are taken in the area of risk management. In this regard GIL acknowledges that it has an important role to play in connection with promoting high standards within the allied health professions and in doing so, reducing the risk of harm to the public.
- 2.2 GIL is aware that registered health practitioners often contact their professional associations in order to seek counselling about a performance, health or conduct issue. The contact is essentially a cry for help. GIL supports this contact. GIL has witnessed the “rehabilitation” of registered health practitioners where peer support is obtained in circumstances where the practitioner understands the discussions and actions to be confidential. It is with this confidential support and guidance that the practitioner has the greatest hope of rehabilitation.
- 2.3 GIL’s concern regarding the proposed obligation is that this supportive environment is lost to an environment of uncertainty and fear. There is, in our view, a real and substantial risk that practitioners will simply not seek assistance (whether via treatment or counselling by a peer) in circumstances where they are at risk of being reported to the National Board. We then have a situation where

the problem “goes underground”. This is not good for the public or society at large. It is certainly not good for the individual practitioner.

Option 1a: All registrants – limited obligations (treating relationships)

2.4 Option 1a provides as follows:

“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”.

2.5 GIL believes there are a number of issues to be considered with respect to option 1a. Firstly, there is a risk that registered health practitioners requiring assistance will avoid “regulated professions” and seek assistance from unregulated individuals. We also repeat the issues raised above in paragraphs 2.2 to 2.3 by way of general observation. Another difficulty with option 1a is the subjective nature of the “reasonable belief” test. The reasonable belief of one regulated professional will vary to that of another regulated professional.

2.6 GIL submits that if option 1a is to be adopted (and it is certainly to be preferred over option 1b) then it recommends that guidelines be made available to assist in gaining an understanding of what is meant by “placing the public at risk”. It is also essential that a well resourced and specialised support system is available for the reported health care practitioner.

2.7 So in summary, GIL holds grave concerns about mandatory reporting obligations. If a mandatory reporting obligation is to be included in the legislation then the preference is for option 1a as opposed to option 1b. However, guidelines should be provided to health care practitioners to assist in

determining whether the public is at risk. A well resourced support system needs to be available for the health practitioner.

Option 1b: All registrants – extended obligations

2.8 GIL strenuously opposes the inclusion of option 1b in legislation.

2.9 A registered health practitioner has many roles in the community. Those roles include:

2.9.1 a treatment provider;

2.9.2 a peer providing support to his / her colleagues;

2.9.3 a member of a professional association;

2.9.4 a peer advisor employed and / or contracted by a professional association to provide confidential support and advice to members;

2.9.5 an expert witness retained by a solicitor for the purpose of proceedings before a court;

2.9.6 an expert witness retained by a solicitor for the purpose of anticipated proceedings before a court;

2.9.7 providing opinion to regulatory bodies under statutory compensation schemes;

2.9.8 a member of a professional board;

2.9.9 a member of a professional tribunal.

2.10 This is not meant to be an exhaustive list but does support our general observation that the role of a registered health practitioner is not limited to the provision of health care services to the public and it would be dangerous to take a simplistic approach when considering the issue of mandatory reporting.

- 2.11 If option 1b is adopted into legislation then existing systems and protocols will fall into disarray to the detriment of the public. We are also concerned that the option 1b mandatory reporting obligation will give rise to abuse to the detriment of the public.
- 2.12 We query whether the AHMAC has considered the impact of option 1b on the many roles set out in paragraphs 2.9 above.
- 2.13 Let us provide you with a simple example. A registered health practitioner has a policy of insurance with GIL. The policy provides cover for civil claims and the legal fees associated with complaints to professional bodies. A patient commences a civil claim alleging breach of duty of care. A number of allegations are made which include allegations that would fall under the reportable matters set out in option 1b. They are allegations, not fact. The solicitor acting on the behalf of the patient retains a peer expert to comment on the standard of care of the registered health practitioner. That peer expert is asked to assume that the patient's version of events is correct (even though they have not been tested). The peer expert, having read the material, forms the view that he / she needs to report the registered health practitioner to the Board. In this regard the peer expert fears that he / she will be at risk of penalty if the report is not made. It is arguable that his /her belief is reasonable in all the circumstances. Is the expert breaching his / her duty of confidentiality to the solicitor and the patient? Has the peer expert waived, without the consent of the solicitor or the patient, any claim for legal professional privilege that would attach to his / her opinion?
- 2.14 So you can see from the above example there is tension and we suspect conflict, between the mandatory reporting option set out in 1b and the existing common law and statutory principles of confidentiality and legal professional privilege.

2.15 GIL also objects to the subjective test of whether there has been “a gross or flagrant departure from accepted professional standards”.

2.16 In summary, GIL strongly opposes the adoption of option 1b into legislation.

Option 2a: Employers – limited obligations (impairment)

2.17 The first observation GIL would like to make is the uncertainty that surrounds the term “employer”. Whilst there is no doubt that some registered health practitioners are in a traditional employment relationship, there are a number of registered health practitioners who are in other contractual relationships and sometimes are uncertain as to their employment status. The AHMAC is no doubt aware of the case law which lists the criteria to be considered in ascertaining whether an individual is an employee or independent contractor. The distinction is often not clear. For example, many practitioners consider themselves employees of a corporation whereas the corporation considers the health practitioner a contractor.

2.18 If option 2a is to be adopted into legislation (and it is certainly to be preferred to option 2b) then GIL submits that consideration should be given to publishing guidelines as to what constitutes an employer for the purpose of the legislation.

2.19 GIL also submits that the AHMAC should seek guidance from workplace relations / industrial law specialists in order to gain an understanding of the procedural fairness obligations that an employer would need to follow when complying with mandatory reporting obligations. For example, would an employer be in breach of its duty of care to the employee in reporting conduct to the Board without first providing the employee with an opportunity to respond to the complaint?

2.20 We would submit that the AHMAC would want to be satisfied that any mandatory reporting obligation does not create a mine field in the employment relations area and in doing so create uncertainty, public concern and increased costs to all the parties concerned.

Option 2b: Employers – extended obligations

2.21 GIL strenuously opposes the adoption of 2b into legislation. To make it mandatory for an employer to report an employed health practitioner “whose conduct may constitute unsatisfactory professional conduct or professional misconduct” is asking the employer to become a “peer”. We repeat the submissions made in paragraphs 2.19 to 2.20 above concerning the workplace relations issues.

Insurance Contract Issues

3. When applying for insurance a health practitioner must disclose to an insurer every matter that is known to the insured, being a matter that the insured knows to be a matter relevant to the decision of the insurer whether to accept the risk and, if so, on what terms. (see section 21 of the Insurance Contracts Act 1984).
4. In addition to this legislative duty, the GIL insurance policy excludes cover for civil liability claims arising from circumstances which the insured health practitioner was aware of, prior to the commencement of the policy, that may give rise to a claim under the policy or which a reasonable person should have been aware might give rise to a claim under the policy.
5. So, existing legislation and the GIL contract encourages disclosure and notification. Indeed, many practitioners disclose circumstances (not a claim) in order to ensure protection. This ensures that adequate reserving is maintained for the purpose of our

own internal protocols and the requirements of APRA, and also aids in developing risk management initiatives aimed at reducing errors.

6. Our concern is that the proposed mandatory reporting requirements will result in under reporting or no reporting. As stated in paragraph 2.3 above, we are concerned that problems will “go underground” with disastrous consequences for the public. The last thing the public wants is a health practitioner who is not entitled to insurance cover due to non-disclosure.

Summary

7. GIL supports limited mandatory reporting obligations. GIL would provide support for Option 1a if there were clear guidelines as to when registered health practitioners should report another registered health practitioner in a treatment relationship.
8. GIL opposes Option 1b.
9. GIL provides conditional support to Option 2a. GIL believes that the AHMAC needs to obtain specialist advice on workplace relations / industrial law issues relevant to mandatory reporting by employers.
10. GIL opposes Option 2b.