



This submission is made by the Council of Psychologists Registration Boards of Australasia Inc in relation to the Consultation Paper on Proposed arrangements for handling complaints, and dealing with performance, health and conduct matters under the National Registration and Accreditation Scheme for the Health Professions. It results from consultations amongst the Boards and generally presents their united views. Where an individual Board has a view that is inconsistent with the views expressed in this paper that view is included in a separate submission from that Board.

The Council of Psychologists Registration Boards is the peak body representing all 9 State and Territory Psychology Registration Boards in Australia and New Zealand. If you have any queries on these responses please contact the Executive Officer:
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The Council of Psychologists Registration Boards welcomes the invitation to comment on the consultation paper on handling complaints. CPRB has chosen to comment on key issues in the paper first, and then to present responses to specific points of detail at the end of the submission.

CPRB comments on key issues

CPRB Comment on Separation of Powers

The CPRB supports the principle that "panels appointed to deal with a particular matter may not contain any of the persons on the committee or board which directly referred the matter to the panel" (p.10). It also supports the principle that investigators should be separate from Boards. It is recommended that the investigation function fall under the Agency responsibilities, thus the Agency would fund, employ and manage investigator processes, and that this function should be part of the service agreement with the Board. This will also allow the development and consolidation of specific investigatory expertise which should be transferable across professions. The independence of investigation from Boards will be in the public interest. The alternative, of each Board managing its own investigations, raises the potential for a perceived conflict of interest between the investigators and the decision makers (e.g. that the investigation was manipulated to protect the practitioner, or that a Board is unfairly pursuing a practitioner). Similar concerns are raised with Boards contracting external investigators.

Investigators need powers that are different from Board powers, and should include the power to enter, search and seize. They also need powers to compel witnesses to speak to them. Memoranda between Police and Health need to be in place to allow handing over of documents. CPRB supports the proposed powers and considers that

those given to investigators should be wide to allow them to do their work (section 8.3 - 8.4).

CPRB Comment on Legislative Flexibility

CPRB considers that the Consultation Document is overly prescriptive regarding operational processes but not sufficiently strong on specifying powers. CPRB would prefer a simpler legislative framework which describes the responsibilities of Boards, Investigators and Tribunals, and details the powers that each can exercise and the outcomes that each can achieve in response to notifications. It is of the view that it is unnecessary to describe in detail the names, types and composition of various delegations (such as committees and panels) that the Board may wish to form to help with its work, but rather should just specify that the Board has such a power to delegate. This will leave it free to organize its National and State operations in a way that flexibly and efficiently allow it to discharge its duties. It therefore supports the principle of a 'diversity of forms' and believes that this should be reflected in the legislation. However, experience at a State level indicates the vital importance of specifying powers, to avoid the possibility of a practitioner avoiding accountability due to insufficient precision in the legislation.

CPRB comment on Mandatory Reporting (section 4.4)

CPRB is of the view that the principle of protection of the public is the paramount principle in registration. As such, it would prefer a mandatory reporting system that has a higher 'false alarm rate', i.e. a greater number of reports, some of which will be found to be not substantiated on investigation. Mandatory Reporting significantly increases the likelihood of reports on poorly functioning practitioners being made at an earlier date. This can prevent potentially life-threatening problems arising from the continued, unrestricted practice of such registrants. Without Mandatory Reporting, there are risks that potential problems are not reported because of perceived 'threshold' judgements being made by individuals. Mandatory reporting is a mechanism to discover impaired or unethical practitioners that takes away any subjective 'threshold' judgements made by individuals. Its advantage is therefore that it is a 'no blame' system. Appropriate protection for notifiers ('whistleblowers') is important, to prevent the threat of litigation for those that report. It is known from other contexts that litigation is a significant deterrent to reporting. The requirement to report must be on the basis of a 'reasonable suspicion of unprofessional conduct, or repeated performance issues'. The suggested criteria in the paper 'gross or flagrant' are considered to be unsatisfactory.

CPRB recommends wide Mandatory Reporting obligations therefore should be established for the following groups (a) Registered practitioners covered by the Act, (b) Employees, (c) Students and interns, and (d) Training institutions.

CPRB also recommends that Mandatory Reporting should concern any behaviour by a registered practitioner that meets the definition of unprofessional conduct. The CPRB understands that frivolous and vexatious complaints are occasionally made for competitive, political or other reasons, and believes that these are a problem independent of Mandatory Reporting obligations, and should not be used as a reason to prevent Mandatory Reporting powers proceeding in Bill B. The powers of Boards or their delegates to dismiss complaints at the assessment phase should protect practitioners from such complaints. In addition, the removal of a separate

'performance' stream (recommended below) will remove the onus on Boards to conduct performance assessments on practitioners in the absence of any reasonable grounds related to conduct.

The CPRB understands that much work needs to be done at a National and State level to improve Impaired Practitioner Programs, but this is a priority independent of concerns regarding Mandatory Reporting regulations.

It must be noted that one Board that makes up the membership of CPRB does not support mandatory reporting. This Board has advised that it is not making a separate submission and has asked that its views be presented in this paper. That Board has the view that if some form of mandatory reporting is required it supports limited reporting along the lines of Option 2a.

CPRB comment on Health Complaints Commission (HCC)

CPRB supports the role of the HCC and believes that it is important for the legislation to clarify powers, and where such power is shared (e.g. consultation in decision making), which body has the power to compel the other body needs to be specified. For example, can the HCC compel a Board to act on a matter, or vice versa? It is recommended that such issues be resolved before the legislation to prevent the situation of either two separate investigations by both bodies on the same matter, or alternatively referral of a matter from each Body to the other Body such that the matter 'falls between the cracks'. In general, professional conduct matters are not suitable for conciliation. Thus the HCC and Boards need to agree on the handling of notifications and relevant State legislation needs to reflect the new powers of the National Boards.

CPRB supports a role of conciliation in some matters. It does not support mediation in relation to disciplinary hearings, nor does it support plea bargaining, or acting on only admissions made by a practitioner in relation to a notification.

CPRB comment on Role of a Director of Proceedings

CPRB supports the role of a Director of Proceedings and believes that a Director can ensure an investigation is complete, accurate and proper, and can provide an opinion about proceeding before evidence is formally tested. A Director can be a useful mechanism to help referee the process and should be independent of the Board, Investigators and Tribunal. The Director should be able to (a) request further investigation, (b) advise about likelihood of success of a prosecution, and (c) suggest alternative courses of action, (d) collect national data on the consistency of decisions. There should be clarity on the ability of a Board agree or disagree with a Director, and who has the final decision (highest bidder wins). CPRB supports 9.1.1 Option 2.

CPRB comment of Review Mechanisms

Automatic right of review is an unjustified and costly burden to put on Boards and Tribunals. Therefore parameters governing the right of review are required. It is costly and unwieldy to propose extra layers of management committees to review decisions. A flow chart clearly specifying review procedures and options needs to be agreed. At 5.6, there should be provision for the HCC to be involved in decision review, but CPRB prefers 'invited to be part of decision' rather than 'must'. Provision should be made for a possible internal review by the Board in certain circumstances (option 2). Similarly, a request for a review should substantiate the grounds for the

review (e.g. errors of law), rather than just because the complainant did not like the decision. State based disciplinary hearings should also only be appealed on the basis of questions of law. Other non-tribunal decisions (eg. registration decisions) should be able to be appealed (administrative review) based on errors in process or new information. Whilst a notifier should be provided with a right of review, provisions could be made to allow the option of awarding of costs of review against the notifier, if the complaint is shown to be frivolous or vexatious.

CPRB Comment on Definitions of Misconduct

The CPRB considers the definitions in Attachment 1 for the National Scheme are problematic for a number of reasons. First, the definitions as they read are a list of examples of poor conduct ('unsatisfactory professional conduct' *includes the following* - '). There is an inherent problem in this, as the list will never cover all areas of poor conduct and so the list would have to be unworkably large to cover all possible examples across all registered professions. For example, f) - k) are types of poor conduct very rarely seen in Psychology, yet they comprise over half the list. Because it is a list of examples, it is likely to be open to serious legal challenge, as, unless the conduct is exactly as it appears on the list, it could be argued that it therefore is not misconduct (i.e. that therefore parliament did not intend to cover it). CPRB supports a simple definition that is legally tight. The list is left open ended, but rather should be closed (i.e. must be one of the list). The legislation could incorporate a phrase such as 'without limiting matters that may constitute professional misconduct...' (Tas Medical Practitioners Registration Act 1996).

CPRB supports a qualifier being added that a practitioner should be expected to act in a way "equivalent to their level of training or experience". This will allow consideration of variation in circumstances, such as levels of experience, to be taken into consideration (e.g. mitigating circumstances around very new graduates mistakes compared to very senior experienced practitioners).

Second, CPRB supports that there should be fundamentally one test, with two tiers (unprofessional conduct vs professional misconduct) to measure the degree of seriousness. The CPRB strongly supports definitions based on principles related to peer review but notes that some objective standards are required. For example, a definition of 'professional misconduct' could be made simply as "unsatisfactory professional conduct of a sufficiently serious nature to justify suspension or cancellation of registration". This would allow the difference between misconduct and unprofessional conduct to be defined in terms of the outcome, i.e. the only difference is misconduct is defined as being serious enough for deregistration. It notes, however that additional information on what constitutes such conduct needs to be in place including reference to ethical standards.

The judgement about seriousness needs to be vested with experts and peers, rather than through a comparison with a definition that may not be encompassing. It also supports wording that also gives credence to peer review, such as "any conduct that demonstrates that the knowledge, skill or judgment possessed, or care exercised, is significantly below the standard reasonably expected of a registered practitioner of an equivalent level of training or experience". A danger in defining each of the two tiers separately (rather than as a single test) is that if one fails, then there is a risk the whole case could fall over rather than being determined at a lower level.

Third, the CPRB strongly supports definitions based on reference to ethical codes of practice being explicit in the legislation. There should be reference given to, for example "improper or unethical conduct in the course of practice". This would allow ethical codes and standards to be applied to judgements. CPRB supports a statement such as "All registered practitioners are bound by their Board-approved code of conduct, and a breach of the code of conduct is unprofessional conduct or misconduct." Because this will be omnibus legislation covering all 10 Professions, the statement could be worded to apply to the 'ethical standards recognized by the relevant Board'. Published ethical codes govern professional practice, are wide-ranging and generally explicit, and therefore should be given credence within the legislation. There should be a mechanism to allow them to be used in making judgements of misconduct. The legislation could refer to 'Board approved codes of ethical conduct' for example.

Fourth, fitness to practice must be able to be scrutinized on the basis of:

- convictions (before registration and in registration)
- not of good character
- impairment
- English competency

CPRB Comment regarding 'Performance Stream'

2.1.17 CPRB prefers that 'Performance' is not seen as a 'third' component of the scheme, but rather is a sub-set of conduct. In Appendix 1, there is a tension between 'unsatisfactory professional conduct' and 'performance'. There is an overemphasis in the consultation paper on performance assessment, which is just one tool among many to investigate poor conduct, and does not need to be defined as separate to conduct. Where a notification appears to require a performance assessment, a diversionary provision should exist in the national legislation to allow the registrant to be managed on this basis. CPRB notes that in Appendix 1 problems with performance are nested within the definition of unsatisfactory professional conduct, and agrees that it should be understood as a component of poor conduct. Incompetence or poor performance are examples of poor conduct and should be handled in the same way as other conduct matters within the conduct stream. CPBR supports the use of performance assessment as a tool to investigate problems with conduct. CPRB therefore believes that the conduct arrangements do not need to be duplicated for the matter of a performance assessment (at 6.3-6.5).

Performance assessment must be understood as another option to deal with a notification. Nor does it agree with the enshrining of definitions such as 'unsatisfactory professional performance' in the legislation. The registration system is based on notifications (or complaints) being brought to the Board's attention, and it is at this level that questions of conduct occur. Not maintaining fair and reasonable standards is an example of poor conduct. It therefore supports the principles of a proactive approach but considers that in terms of operation, a notification will have to be shown to be of concern at the assessment stage before a Board will act. Otherwise it will be overloaded with high frequency yet low-level industrial and other work-place performance issues. The onus of responsibility is on the registered practitioner to maintain competence and behave ethically. Registration is a privilege not a right. The legislation should not shift the onus of responsibility and put it onto the Board. This is a danger of a separate performance stream, which could have the unintended consequence of becoming an instrument for the Board to protect itself,

through excessive performance assessments. It also might encourage the shift of responsibility for managing employee problems away from employers within an industrial context or educational institutions, and put these within a registration context. This would be a misuse of the registration system. CPRB believes that the conduct provisions provide effective protection of the public.

CPRB comment on range of powers to discharge a notification

CPRB supports the need for powers to be given to the Board to make a lower level of response to less serious matters. Powers should include:

- the ability to impose conditions on registration
- to require a practitioner to undertake further education or supervised practice
- to counsel a practitioner
- to undertake a performance assessment and respond to the outcome in terms of further education, conditions or other recommendations,
- require a practitioner to undertake a health examination (e.g. get urine analyses, psychometric assessment etc.)
- the power to make recommendations to a practitioner.

These should be defined as ways of discharging a notification, i.e. as an outcome from a notification. CPRB is therefore concerned with Proposal 6.2.2 as it includes referral powers to other committees. It believes that the powers given to a Board should be defined as an outcome, rather than as a process. Referral is not an outcome and it is assumed that determinations with regards referral would already have been made. The CPRB suggests that a comprehensive list of outcomes from any conduct matter be provided in the Act upon which a Board can discharge its obligations in relation to a notification.

CPRB specific comments on parts of the Consultation Paper

Comments on Section 1 (The Intergovernmental Agreement) and 2 (Proposed Terminology)

CPRB prefers the terms:

1.4 Competency (rather than performance).

2.1 Notification (rather than complaint).

2.1.3 Assessment committee (rather than notifications assessment committee or investigations committee). Prefer Assessment, because it is a decision making process as to how to proceed with a notification. Some preliminary investigation may need to have occurred (eg. seeking a response from the practitioner). An outcome from the assessment might be investigation, but other outcomes eg. to dismiss or conciliate, are also possible.

2.1.5 Competence (rather than performance). CPRB's view is that matters of performance and performance assessment can be handled by the Conduct processes.

2.1.8 This is no different than 2.1.5 and should be deleted

2.1.9 Prefer 'Health impairment assessment' as this accurately states what the matter concerns.

2.1.10 Prefer 'Health impairment inquiry'

2.1.13 Prefer 'Conduct inquiry'. Inquiry describes the process (an inquiry into a notification or complaint), whereas the term 'panel' refers to the body conducting the inquiry.

2.1.15 Not of good character (rather than 'not fit and proper')
Appendix 1 CPRB prefers the term 'unprofessional conduct' rather than 'unsatisfactory professional conduct'.

Comments on Section 3: Overview of Proposed System

Preliminary Assessment. CPRB recommends that as well as powers to immediately suspend registration pending investigation, the legislation should have provision for imposing immediate conditions upon registration (e.g. a condition to not provide services to a particular client group such as minors, where there are suspected child protection issues).

Health Impairment Management. CPRB recommends that the powers to be given to the Board be specified (e.g. penalties, conditions, settlement by agreement).

Board Hearings. CPRB recommends that the legislation give the Board powers to require a registered practitioner to undergo a performance or health assessment.

Comment on Section 4 Notifications

4.1.1 Notifications should also be able to be accepted from diverse sources, such as arising from newspaper reports, coronial inquiries and hospital investigations. There should be provision for assistance in putting a complaint into writing.

4.3.1 The place of 'holding out' in legislation. Currently the problem of 'holding out' is discussed in Section 11.3. It should also form a ground for complaint or notification in Proposal 4.3.1

4.3.2 There should be consideration given to the reverse scenario, i.e. the option to pursue investigation of conduct by a registered practitioner either (a) prior to being registered, or (b) when not registered (e.g. when lapsed).

4.5.1 CPRB supports protection for notifiers and registrants. The protection offered under this proposal should not be afforded to those persons making a notification if the notification is deemed to be frivolous, vexatious or malicious.

4.6.1 CPRB supports own motion powers

4.7.1 CPRB prefers there be discretion in determining periods of suspension or conditions. There should be powers to 'roll over' such conditions where there are time limits (e.g. by a tribunal chairperson). Option 1 in the National Proposal Paper which provides for extensions of suspension periods, with review, should be adopted. However, given the protracted nature of some criminal or civil proceedings, and the fact that the determination of these proceedings may be relevant in determining if a practitioner is fit to practice, the Board proposes that there should be no limits imposed on how many times a suspension may be extended, having been reviewed.

4.7.2 CPRB supports the power of imposing conditions. It also supports the use of 'undertakings'.

Comment on Sections 5-8

5.4.1 CPRB recommends there be provision for automatic notification of a complaint to the relevant practitioner

5.5.3 CPRB recommends that the legislation include provision for the publication of decisions, and for these to include public websites, other bodies (e.g. Medicare, Health Insurance Commission, Health Funds) employers, and educational institutions.

7.1.2 support Option 2 that health programs, if provided for by a board, will be funded by the board through charges to the registrant receiving health programs in addition to a component of registrants' fees from the profession.

7.3.2 (and Proposal 6.3.2) The requirement to provide the report within 7 days is not practical, especially if the assessment involves multiple interviews and assessments and review.

Comment on Sections 9-11

CPRB suggests that the investigation function should fall as a responsibility of the Agency, rather than the Board to achieve separation.

9.3 Legal representation. CPRB supports option 4b. CPRB supports the right to legal advice and a legal person to accompany the person and perhaps speak on their behalf with leave of the panel. It is to be made clear to the practitioner that the preference of the Board is to hear from him/her but if this is not possible or requires the augmentation of a person speaking on their behalf, this would assist the panel or Board. (e.g. in sexual assault and impairment matters).

9.4.1 CPRB suggests that protection of the notifier is imperative, and the panels should be closed to the public. The tribunal hearings are normally open unless ruled otherwise.

9.8 Role of Ombudsman. The national paper provides two options for dealing with the scope and application of Commonwealth, State and Territory ombudsman legislation with respect to the national registration scheme. For simplicity, Option 1 is preferred - the "application of the Commonwealth Ombudsman Act 1876 to the National registration scheme".

10.6.1 CPRB supports the Chair of a Tribunal being a legal member who has knowledge of the health system. CPRB notes that this is a protective jurisdiction, not a civil or criminal jurisdiction, therefore needs members with appropriate experience in contrast to only adversarial experience. The best person to chair such a panel would not necessarily be a judge.

11.6.1 CPRB supports Option 3.