

NATIONAL REGISTRATION AND ACCREDITATION SCHEME FOR THE
HEALTH PROFESSIONS

CONSULTATION PAPER

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

SUBMISSION FROM THE DENTAL BOARD OF NEW SOUTH WALES
November, 2008

The Dental Board of New South Wales has considered the Consultation Paper on Proposed arrangements for handling complaints, and dealing with performance, health and conduct matters and would make the following submissions. Where no comment has been made with respect to proposals contained in the Consultation document it can be assumed that the Board is in broad agreement with the proposal.

The Board in New South Wales, in addition to fulfilling its obligations to the community in accordance with the requirements of the Dental Practice Act, is actively involved in the assessing, hearing and resolving of dental complaints from the public in conjunction with the Health Care Complaints Commission. The Board is of the opinion that the complaint handling process as implemented in New South Wales is efficient and cost effective. Indeed, the process prescribed in the Dental Practice Act has been recognized by government and adopted by other health profession jurisdictions.

The Board understands that this is not the case in all jurisdictions and the following submission assumes that dental complaint handling will be managed, in the main, by the representative body of the National Dental Council as it is currently in New South Wales.

1. Section 2 - Proposed Terminology

a. 2.1.1 Notification

- i. The Board does not support the term 'Notification'. The essential process is a Complaint, whatever or whoever the party involved in the reporting of an event or concern. The investigation process is designed to resolve the Complaint and, historically, all parties on both sides have recognized the issue as a complaint. The Board sees no need, advantage or purpose in changing the terminology.

b. 2.1.3 Notifications assessment Committee

- i. The Board does not support the term Notification assessment committee for the reasons outlined in 1.a.i.

above. The Board prefers the term Complaints assessment committee.

c. 2.1.8 Health management committee

- i. The Board would recommend a change to the wording in this definition as follows:

‘This term is proposed to be used to describe a committee that may be appointed by a responsible board to oversee management of a practitioner whose capacity to practice is affected by a physical or mental impairment or habitual misuse of alcohol or other drugs.’

The Board is of the opinion that this is consistent with Section 2.1.9.

d. 2.1.9 Health assessment

- i. The Board is of the opinion that the last sentence is unnecessary as the sentiment is covered by the previous sentence commencing “It may include,.....”. The Board recognizes the flexibility provided by the wording of this definition but would emphasize, that it would be unwise not to use the highest recognized expert professional in any area when a practitioners livelihood is as stake.

e. 2.1.10 Health panel

- i. The Board prefers the term “Health Assessment Panel as this more correctly describes the function of the Panel.

f. 2.1.17 Unsatisfactory professional performance

- i. The Board does not support this category of practitioner management. See comment under Section 2. a. of this document.

g. Unsatisfactory professional conduct

- i. See section 3. below.

h. Professional misconduct

- i. See section 3. below.

2. Section 3.2 Key features of proposed system

a. Performance management

- i. The Board understands the concept proposed for an additional level of performance management. The Board is supportive of a Health management process aimed at protecting the public from impaired practitioners whilst attempting to proactively assist valuable practitioners to either avoid harming patients or rejoining the profession as a responsible and functioning practitioner.

However, the Board's experience is that all practitioners that come to the Board's notice in respect to substandard performance, do so as a result of a complaint and that the processes in place to deal with the complaint are sufficient to handle the poor performance aspects of a complaint such as requirements for retraining, conditions on practice etc.

The Board is of the view that performance management as a separate process is an unnecessary tier of complaint management and merely adds to the bureaucratic burden of Board operations.

- b. Referral for Tribunal hearing

- i. The Board is of the opinion that provision needs to be made to allow a Health Complaints Commission to prosecute a matter before a Tribunal. Current legislation in New South Wales requires this and the Board assumes similar provisions are in place in other States.

3. Section 3.3 Proposed definitions for what constitutes a departure from professional standards as set out in Attachment 1.

- a. Unsatisfactory professional conduct

- i. The Board is generally happy with the provisions for this category as defined in this category of conduct sanction but would make the following recommendations:

- 1. The Board prefers the phrasing contained in the NSW Dental Practice Act (2001) to define practicing standards viz:

“ Any conduct that demonstrates that the knowledge, skill or judgment possessed, or care exercised, by the practitioner in their professional practice is significantly below the standard reasonably expected of a practitioner of an equivalent level of training or experience”

The Board has already had legal precedent set as to the meaning of 'significantly below...' and predict that any change to definitions that did not reflect this previous Court opinion would be immediately challenged. The Board suggests that, in the interests of a smooth transition of complaint handling, the above definition is adopted.

2. The Board believes clause b) is unnecessary and undefined. The Board recommends that it is deleted.
3. The Board is of the opinion that definition k) is covered by i) and is redundant. The Board believes disclosure of a pecuniary benefit to a patient does not outweigh the disadvantage to the patient inherent in a financial or other arrangement between practitioners for mutual referrals. The Board is of the opinion that a referral should always be in the best health interests of the patient unencumbered by pecuniary or other interests which always tend to colour good clinical decisions.

However, there is an exception with respect to dentists and auxiliaries in an employee / employer relationship. The Board is of the opinion that these relationships are self evident to a patient as they are usually carried out within the same premises / practice. The Board would recommend the following clause is be added to the definition of unsatisfactory professional conduct:

'it is not considered unsatisfactory professional conduct to refer patients to a practitioner in an employee / employer relationship.'

4. The Board is of the opinion that a clause needs to be inserted in support of the relevant Health Complaints Commission legislation in the various States. The wording could be:

"a contravention by the dentist of any Health Complaints Commission legislative provisions to obtain information, records and evidence."

5. The Board is of the opinion that a further clause is required to allow flexibility to sanction other improper

conduct not specifically covered by the proposed clauses and recommended changes. The wording could be:

'any other improper or unethical conduct by a dentist in the course of the practice or purported practice of dentistry.'

b. Professional misconduct

- i. The Board is of the opinion that the definition only needs to refer back to the definitions for unsatisfactory professional conduct but recognize that the conduct needs to be of a consistent and significant nature to warrant suspension or cancellation of the practitioner's registration. The Board would recommend the following wording:

a) Unsatisfactory professional conduct of a health practitioner as defined under the provisions for 'unsatisfactory professional conduct', of a sufficiently serious nature to justify suspension or cancellation of the practitioner's registration.

b) Such conduct referred to in clause a) would include a substantial or consistent failure to reach and maintain a reasonable standard of knowledge, skill or judgment possessed, or care exercised.

4. Section 4.3 What sort of matter may be the subject of a notification

a. Proposal 4.3.1

- i. The Board would recommend the addition of the following grounds for making a complaint:

1. A practitioner has been convicted of or made the subject of a criminal finding for an offence, and the circumstances of the offence are such as to render the practitioner unfit in the public interest to be registered as a health care provider.

2. A complaint need not be made in terms that are strictly in accordance with the terminology of this section

3. In determining for the purposes of this section whether a practitioner is of good character regard

may be had to conduct of the dental care provider before becoming registered as a dental care provider.

This will cover the conduct of health care students, some of whom are required to be registered under current legislation in New South Wales.

5. Section 4.4 Mandatory reporting obligations

- a. The Board would support Option 1b and Option 2b of the proposed obligations.
- b. The Board regards the reporting of student impairment to be as important as that of qualified practitioners save that the conduct obligations need to be very carefully limited to impairment likely to lead to harm to patients. Thus health issues such as carriage of certain infectious diseases, alcohol and drug issues and mental impairment are important. Clinical incompetence may not be an issue whilst the practitioner remains a student and, rightly, should be dealt with by the educational body. The Board believes that it is important for educational bodies to take some responsibility for the ultimate competence of graduates in all areas; not just their academic abilities.

The Board would recommend mandatory reporting by educational bodies for students in areas of health impairment and criminal activity.

The Board does not feel that it is appropriate to place a reporting obligation on student registrants.

6. Proposals 4.7.1, 4.7.2 and 4.7.3 Immediate suspension powers

- a. The Board supports these proposals.

7. Proposal 5.5.1 Powers of a Complaints assessment committee

- a. The Board supports most of the proposed powers for a Complaints assessment committee save for the following:
 - i. The Board does not support there being a performance management stream for complaint management.
 - ii. The Board is of the opinion that a complaint on a matter of conduct will constitute the majority of complaints and that it would be more efficient for the Complaints assessment committee to also be the Conduct management committee.

However, the Complaints assessment committee (Conduct management committee) must be required to refer matters to an independent complaints investigation panel who would carry out an investigation of the merits of the complaint and make recommendations to the Complaints assessment committee. It would then be appropriate for the Complaints assessment committee to refer the matter to the various bodies outlined in Proposal 5.5.1.

8. Section 5.6 Notifiers' rights for review of preliminary assessment decisions

- a. The Board supports Option 2 of the proposed rights of review of preliminary assessment decisions.

9. Section 6 - Performance matters

- a. The Board does not support this management stream as it is of the opinion that the conduct management stream can and does perform this role already.
- b. The Board does agree that the powers outlined in this section need to be available but should be provided to the Conduct management committee since the Board is of the opinion that the powers overlap with those of the Conduct management committee as proposed in the Consultation document and thus having two separate management streams is inefficient and a duplication of costs.

10. Proposal 7.1.2 funding for Health programs

- a. The Board is of the view that Health programs provided to impaired practitioners be funded partly through charges to registrants receiving health programs and partly by government. The Board does not believe it is appropriate to tax ethical, responsible practitioners for the misdemeanors of a few members of their profession. It is in the interests of the public and thus the responsibility of government to assist impaired practitioners back into the workforce in order to provide the services for which they have been trained.

11. Section 8 – Conduct matters

- a. The Board would recommend that a Conduct management committee and a Conduct Panel also have a power to attempt a conciliation of a complaint in addition to the power to refer a matter to an HCC for conciliation. The Board's experience would be that conciliation by a practitioner Board is likely to be more effective than that provided by an HCC.

- b. The Board would recommend that investigations of a complaint be carried out by an independent panel to include at least one member who represents the community.

12. Proposal 9.1.1 Separation of functions.

- a. The Board would support Option 1 in this regard.

13.9.3 Legal representation

- a. The Board supports Option 4b in this regard.

14. Proposal 9.5.1

- a. The Board is of the opinion that the legislation should provide for the ability for a complainant to be present at a panel hearing should a panel require it but not a requirement that a complainant be present. The Board's experience is that the presence of a complainant at a panel hearing is unduly confrontational and stressful for a complainant and usually does not assist the panel in the conduct of a hearing.

15. Proposal 11.6.1

- a. The Board supports Option 1 in this regard.

The Board would be happy to provide further input into the consultation process if required.

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