

Submission by the Health Practitioner Registration Boards¹

on the Proposed Arrangements for Handling Complaints, and Dealing with Performance, Health and Conduct Matters

Introduction

This submission is on behalf of all twelve health practitioner registration Boards except where identified. Where no comment is provided, the proposal as detailed in the consultation paper is endorsed by all Boards. In this regard, the Boards have chosen to submit only on those proposals which they believe require further consideration.

In submitting on the proposed arrangements, the Boards recognise that more detail will be incorporated in the legislation. However, to ensure that such detail is driven by sound policy positions, this submission will address both the broad policy positions proposed for registration arrangements and the lower level detail where it is considered necessary to inform the policy position.

The Boards were pleased to note the structure of the proposed scheme and in particular endorse inclusion of the performance stream and the two tiered approach to the hearing of conduct matters.

Section 2 Proposed Terminology

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.

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.

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.

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.

Submission of the Boards

The consultation paper proposes the establishment of one or more committees to deal with the assessment of notifications, the management of performance matters, the management of health matters and the management of conduct matters. It also proposes that a national

¹ Chiropractors Board of Queensland, Dental Board of Queensland, Dental Technicians and Dental Prosthetists Board of Queensland, Medical Radiation Technologists Board of Queensland, Occupational Therapists Board of Queensland, Optometrists Board of Queensland, Osteopaths Board of Queensland, Pharmacists Board of Queensland, Physiotherapists Board of Queensland, Podiatrists Board of Queensland, Psychologists Board of Queensland, and Speech Pathologists Board of Queensland.

board's discretion to appoint members be restricted to a list of persons who have been approved by the Ministerial Council.

These proposals are not supported on the basis that they create a bureaucratic, prescriptive, and inflexible approach which will increase both costs and complexity. For example, under the proposed model, a notifications assessment committee may initiate investigation or refer the notification to a conduct management committee for action. However, a conduct management committee may determine to refer the matter to a health management committee which in turn may decide it is a performance matter and refer it to a performance management committee.

To reduce both complexity and cost, the Boards submit that the legislation provide the national boards with an unfettered power to establish committees to assist them to effectively and efficiently perform their functions. This will also necessitate the inclusion of a liberal delegation power within the legislation to enable the national board to delegate sufficient functions and decision making to its committees. The inclusion of such a delegation power will be critical to successful implementation of the national scheme.

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'.*

Submission of the Boards

The Boards submit that the alternative option is preferable as the use of the term 'not a fit and proper person' has wide acceptance, is more relevant to a modern community and is a more generally used term in other legislation. In this regard, its use is found in the regulation of a number of professions including legal practitioners at a State level. It is also utilised in the Federal jurisdiction as a person can be held to be not fit and proper to be a manager of a corporation.

The development of criteria to be used to establish whether a practitioner is not a fit and proper person would be straight forward as a wealth of case law across all of the jurisdictions already exists. This could be easily adapted to the task to inform decision making both for the purposes of registration and in regard to the conduct of registrants.

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. See Attachment 1 for proposed definition.*

Submission of the Boards

The Boards endorse the approach of providing for separate definitions for unsatisfactory professional conduct and professional misconduct. This will be of assistance in decision making and in communicating the decision to notifiers. However, it is submitted that additional matters could be included in the definition to assist the national boards in achieving appropriate public protection.

First, limiting the conviction in subsection (e) to those that may affect the practitioner's suitability to continue to practise in a regulated health profession may narrow the scope of the matters which can be considered by a national board. It is submitted that consideration should also be given as to whether the definition should or should not differentiate between offences committed in the course of the person's professional conduct or practice. If there is no differentiation there may be some difficulty for a national board to take into account convictions for matters in the person's 'private life' given the relevant High Court decision (*A solicitor v The Council of the Law Society of New South Wales* unreported decision of the HCA dated 4 February 2004 S 406/2002).

Second, subsection (f) of the definition could be extended to include costs orders made by a Tribunal. Inclusion of this would enhance enforceability of the costs orders by enabling non payment of the order to form the basis of a disciplinary action.

Finally, while the definition provides for convictions of an offence against other acts which could include the *Health Insurance Act 1973* it does not specifically provide for a finding made under that Act that a registrant engaged in inappropriate practice within the meaning of that Act. Inclusion of this matter in the definition would provide an appropriate trigger for both receipt of notifications and initiation of conduct action given a number of the regulated professions could have such findings made against them.

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.*

Submission of the Boards

It is unclear from the consultation paper whether it is intended that a definition of impairment be included in the legislation. The Boards submit that such a definition would be of assistance to guide voluntary or mandatory reporting and to assist in decision making. The description of impairment included in the paper requires the condition to affect the capacity of the practitioner to practise safely and competently. If this is included in the legislation in its current form as the definition it will exclude action being taken if the condition is 'likely to affect' the capacity of the practitioner to practise safely and competently. The Boards further submit that the definition include this additional requirement as it would be in the public interest to deal with a practitioner who had an impairment which, on an objective judgement of relevant experts, was likely to impact on their ability to practise.

Section 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.

Submission of the Boards

The Boards acknowledge that mandatory reporting is a difficult matter to legislate to ensure fairness and to enable the national boards to adequately inform registrants of their obligations. In this regard, the mandatory reporting obligations, if legislated, will need to be sufficiently specific to achieve these objectives.

The Boards further acknowledge that there are a number of positive effects of a mandatory reporting obligation. First, it provides a mechanism for those who feel obliged to report to do so with confidence and with a sense of protection from the criticism of peers. Second, it may decrease the under-reporting of performance, health and conduct matters that all Boards consider occurs.

Having made these preliminary points, the Boards support Options 1b and 2b. Consideration should also be given to extending the obligation under 2b to ensure that the employer reporting obligation captures the situation where the registrant ceases employment either voluntarily or through termination as a result of their misconduct or unsatisfactory professional conduct.

To ensure that the national boards are not overwhelmed by the potential workload associated with the receipt of mandatory reports from employers, the Boards submit that a ground for a national board to refuse to deal with a notification of this type be that the subject matter of the notification has been or is being adequately dealt with by another appropriate entity such as the employer. This would enable the board to monitor the action of the employer rather than take action itself.

The Boards rely on their submission in response to the registration matters paper in regard to student registration and endorse the introduction of mandatory reporting obligations on educational institutions and the extension of this obligation to registered practitioners.

The Boards also recommend that consideration be given to the issue of vexatious notifiers under the mandatory reporting model.

Section 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.*

Submission of the Boards

The Boards strongly endorse the proposal that persons making notifications (and any person who provided the notifier with relevant information) receive statutory protection. However, the protection proposed is too narrow and should be extended to include: (a) both action under administrative process and disciplinary action; and (b) protection against reprisal.

The protections should also be extended to any person who provides assistance to a national board, committee or panel or the tribunal. Examples of statutory protections in this regard are detailed in ss. 387, 388, 389 and 390, *Health Practitioners (Professional Standards) Act 1999*.

In addition, as submitted in the Boards' response to the consultation paper on registration matters, sufficient protection should also be included for those who assist the national boards to perform their roles under the Act such as supervisors who provide reports about registrants who are being supervised as a condition of their registration; and health assessors providing health assessment reports about registrants.

Section 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.*

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.*

Submission of the Boards

The Boards submit that establishing a three month statutory review timeframe is excessive and will create a significant workload across the professions, particularly given that the current benchmark for completion of an investigation by most organisations is twelve months. On this basis, the Boards submit that a twelve month timeframe for statutory review would be sufficient if the national boards were not estopped from reviewing the suspension (or conditions or undertakings as will be proposed later in this submission) on their own motion.

There are a number of other matters the Boards submit should be considered in providing for a suspension power. These are as follows:

- The threshold for taking action under the suspension power is too high as the national boards will have to be able to demonstrate that the '*...registrant's continued practice poses a **significant** risk to public health and safety.*'
- This increases the threshold for action when compared to the current Queensland legislation which establishes a two part threshold being that: (a) the registrant poses a **serious potential risk** to the wellbeing of vulnerable persons; and (b) immediate action is necessary to protect the vulnerable persons.
- The powers available are restrictive as they only allow either a suspension or an undertaking and do not require the national board to take the least onerous action. As such, the balance between public protection and fairness to registrants is not achieved by the proposal.

Consistent with these matters, the Boards submit that the legislation provide for: (a) a 'serious potential risk' threshold for action to be initiated by a national board; (b) an increase in the range of actions available to the board being suspension, imposition of conditions or the acceptance of undertakings (which must be published); and (c) the national boards be required to take the least onerous action given the circumstances before them.

Section 5 Preliminary Assessment of Notifications

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.*

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.*

Submission of the Boards

The Boards submit that the powers available following receipt of notification do not enable a cost effective preliminary assessment to be progressed. In this regard, the Boards are of the view that powers should be provided for the national boards to seek further or better particulars from the notifier and to seek any relevant information from related third parties such as hospitals but not including the registrant. The ability for a national board to seek such information to inform the assessment decision will enable appropriate decisions to be made on assessment. This may reduce the number of matters that are referred for investigation merely to seek information which, if it had been available at assessment, would have informed the decision to take no further action or to take a different action to investigation.

It is also submitted that if a notifier is unco-operative and refuses to provide further or better particulars this refusal be legislated as a basis for the national board to take no further action. Incorporating this basis of the refusal in the legislation will be of assistance to public confidence and the review process proposed to be available under the legislation for notifiers who are dissatisfied with the assessment decision.

It would also be of assistance to the assessment process if there was a clear articulation within the legislation of a threshold test for a national board to take action, particularly in regard to unsatisfactory professional conduct and professional misconduct. In this regard, the conduct forming the basis of the notification must be capable, if proven, of leading to a disciplinary finding.

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.*

Submission of the Boards

The Boards submit that the proposals in the paper about placing restrictions on registration are confusing. In this regard, the consultation paper mentions ‘agreements’, ‘other written agreements’, ‘undertakings’, ‘enforceable undertakings’, ‘undertakings which may include conditions’, ‘conditions’, and ‘critical conditions’. While the proposal for critical conditions is endorsed, it is submitted by the Boards that a simple set of terms and processes for placing restrictions on registration be progressed. In this regard:

- Undertakings should be considered as a voluntary restriction. For the purposes of the legislation, all undertakings should be enforceable and not published on the register unless it is in the public interest to do so.
- Conditions should be considered as a national board imposed restriction and published on the register unless it is not in the public interest to do so.

Section 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.*

Submission of the Boards

The Boards submit that neither of the two options proposed may be appropriate. In this regard, the Boards support that there is an argument for the right of review to be limited to the situation where the national board determines to take no further action following preliminary assessment. A right of review for a decision to refer a matter to a conduct management committee or a performance management committee may be problematic if it leads to fettering the discretion of the decision maker, particularly in highly technical matters. In this regard, it is noted that both a performance management committee and a conduct management committee will be constrained to refer a matter to a tribunal if it is a matter of professional misconduct.

However, as it is very rare for sufficient information or evidence to be available at the time of assessment of a notification to refer it directly to a tribunal for hearing and determination it is not likely that any review will be upheld if it is progressed by a ‘litigious’ notifier. On that basis and given that the notifier does not have a right of review of the panel decisions, the Boards do not strongly oppose a right of review being included for a decision to refer a matter to a conduct or performance management committee.

Section 6.3 Performance Assessments

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.*

Submission of the Boards

The Boards submit that the obligation for the assessor to give a performance assessment report to the practitioner is inappropriate. It places a cost and workload on the assessor which rightfully should be placed on the national boards. Experience with a requirement of this nature in Queensland led the Boards to seek an amendment to the legislation as staff were constantly required to follow up assessors to ensure a copy of the report had been provided to the practitioner. Given this experience the Boards strongly submit that the obligation of providing a copy of the report be placed on the national boards.

Section 7 Health or Impairment Matters

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.*

Submission of the Boards

The Boards support option 2 as they are of the view that in contributing to the cost of their health program a registrant is demonstrating a commitment to rehabilitation. However, the national boards should not be constrained by the legislation in waiving these charges, in full or part, should the particular circumstances of any registrant support such a waiver.

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.*

Submission of the Boards

The Boards submit that the obligation for the assessor to give a health assessment report to the practitioner is inappropriate and is also inconsistent with proposal 7.3.3 which enables the

Board to withhold the report in certain circumstances and provide it to a health practitioner nominated by the registrant. It places a cost and workload on the assessor which rightfully should be placed on the national boards. Experience with a requirement of this nature in Queensland led the Boards to seek an amendment to the legislation as staff were constantly required to follow up assessors to ensure a copy of the report had been provided to the practitioner. Given this experience the Boards strongly submit that the obligation of providing a copy of the report be placed on the national boards.

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.*

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.*

Submission of the Boards

The Boards note that inclusion of an empowerment provision enabling the panel to consider a report of the national board or health management committee including the results of health

assessments is restrictive. The legislation should be broadly empowering enabling any information relevant to the particulars being considered by the panel to be put before the panel. In this regard, it may be relevant for the national board to produce to the panel performance assessment reports and/or notification history and/or previous conduct management issues. All may have relevance to the particulars of the matter and the practice of the impaired registrant.

Section 8.3 Investigation

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.*

Submission of the Boards

It is noted that the second and third dot point essentially create the same requirement. The Boards endorse the first and second requirement and will consider other requirements if they are proposed.

Section 8.5 Conduct Panel Hearings

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.*

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.*

Submission of the Boards

The Boards note that inclusion of an empowerment provision enabling the panel to consider a report of the conduct management committee including the results of an investigation is restrictive. The legislation should be broadly empowering enabling any information relevant to the particulars being considered by the panel to be put before the panel. In this regard, it may be relevant for the national board to produce to the panel performance assessment reports and/or notification history and/or previous conduct management issues. All may have relevance to the particulars of the matter and the conduct of the registrant.

Section 9.1 Achieving Separation of Functions

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.*

Submission of the Boards

The Boards strongly endorse option 1 as: (a) it is the only option consistent with the model of professional self regulation established through the InterGovernmental Agreement; (b) there is no evidence to support the position that procedural fairness is not delivered under current legislative arrangements in Queensland; and (c) any decision maker, whether it be a national board or a separate statutory position/body will at times be subject to unwarranted criticism from dissatisfied notifiers, registrants and/or the media (an example of this can be found under current arrangements in NSW where the Health Care Complaints Commission has been subject to a number of criticisms and reviews over the last five years).

The Boards further submit that there are more than sufficient balances included in the proposed legislation to ensure both procedural fairness and public confidence in the decision making of the national boards, the panels and the tribunals. In this regard:

- The membership of the national boards and panels include public members.
- A right of review is proposed for notifiers about the assessment of their notifications.
- Notifiers also have a right of review through the proposed Ombudsman arrangements and through judicial review.
- There is sufficient separation between investigation/ prosecution and decision making with the former being undertaken by the national boards and the latter being undertaken by the independent panels and independent tribunal.

The Boards would not oppose implementation of the current Queensland model where the Health Quality and Complaints Commission is empowered to provide comment on all investigation reports and the intended action of a Board for the Board to consider in finalising its decision on the investigation and the intended action. This model does contribute to public confidence in the decision making processes of national boards.

Section 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.*

Option 4b *is preferred.*

Submission of the Boards

The Boards submit that option 4b will provide the panel with adequate flexibility in undertaking its role.

Section 9.4 Confidentiality of Panel Hearings

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.

Submission of the Boards

The Boards endorse the proposal subject to the offence provision: (a) incorporating a penalty sufficient to deter publication; and (b) being extended to publication of the findings or conduct of the hearing where such publication could lead to the identification of the notifier, a witness or the practitioner concerned.

Section 9.8 Role of Commonwealth, State and Territory Ombudsman

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.*

Submissions of the Boards

The Boards submit that option 1 would be preferable subject to the Commonwealth Ombudsman having sufficient resources in each state and territory to respond to any matters raised with them.

Section 10.2 Criteria for State and Territory Tribunals

Clause 2.2 *of the IGA (Attachment A) requires that all State and Territory tribunal arrangements comply with national criteria agreed by the Australian Health Ministers' Council (AHMC). Note: these criteria are yet to be developed.*

Submission of the Boards

It is the experience of the Boards that access to, and timeliness of, the current tribunal in Queensland is negatively impacted by the number of funded hearing days. In this regard, it is taking an excessive time for a matter to be listed for hearing. The Boards submit that in developing the criteria for consideration by AHMC, that the issues of access and timeliness be addressed.

Section 10.3 Original Jurisdiction of 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.

Alternative option: *The legislation which confers original 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.*

Submission of the Boards

The Boards endorse the proposal as documented.

Section 10.4 Review Jurisdiction of Tribunal

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.*

Submission of the Boards

The Boards endorse the proposal as documented. The current model in Queensland provides for the Health Quality and Complaints Commission (and its predecessor) to intervene in disciplinary action being undertaken or prosecuted by a Board. Since the establishment of the Health Rights Commission in 1992, there has been only one occasion where a Commissioner sought to intervene and on that occasion, leave to intervene was not granted by the tribunal. Given this history, a power of intervention would not seem to be necessary.

Section 10.5 Findings and Determinations of a Tribunal

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.*

Submission of the Boards

The Boards submit that a fine of \$50,000 is not a sufficient deterrent, particularly for fraudulent registrants who can earn higher amounts than this through employment in the profession because of their fraudulent activity. It is proposed that the fine be set at a level for adequate deterrence and be at least \$150,000. The Boards do not resile from their position as submitted in the response to the consultation paper on registration matters that a summary offence provision for false and misleading applications be included in the legislation and that the penalty for the offence include a monetary fine and/or a prison sentence.

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.*

Submission of the Boards

The Boards endorse the proposal but submit that any cost order provision ensure the enforceability of the order. The lack of such enforceability in the current Queensland legislation has meant the Boards have limited ability to enforce cost orders of the Health Practitioners Tribunal. This matter is currently being addressed in amendments to the *Health Practitioners (Professional Standards) Act (Qld) 1999* which will provide that such cost orders: (a) may be filed in the registry of a District Court; and (b) on being filed are taken to be an order made by a District Court which may be enforced accordingly.

If it is determined that it is inappropriate to include the enforceability requirements within the legislation it is further submitted that this matter be addressed through the criteria to be approved by AHMC in regard to jurisdictional tribunals.

Section 10.9 Powers in Relation to Deregistered Practitioners

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.*

Submission of the Boards

The Boards endorse the proposal and submit that any penalty provision be set at a level to ensure it acts as an effective deterrent to breach of a prohibition order.

Section 11.6 Regulation of Advertising

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.*

Submission of the Boards

The Boards submit that option 1 is supported on the basis it is more cost effective than prosecuting matters before a magistrate and is likely to have more impact on compliance by registrants. However, to ensure the status of the 'guidelines' it is proposed that these be a registration standard which will require approval by the Ministerial Council on recommendation of the relevant national board.

Foreign Disciplinary Action

The Boards note that the consultation paper does not address powers for the national boards to deal with actions against registrants under foreign regulatory laws. The Boards submit that the model from the *Health Practitioners (Professional Standards) Act (Qld) 1999* as reproduced below should be included in the legislation on the basis that it is a simple, cost effective and procedurally fair mechanism for dealing with registrants who have action taken against them in a foreign jurisdiction.

Part 8 Powers resulting from action under foreign law

Division 1 Preliminary

309 Purpose of pt 8

The purpose of this part is to protect the public by enabling disciplinary action taken under a foreign law to be applied to a registrant's registration without taking disciplinary proceedings under this Act.

310 Definition for pt 8

In this part—

foreign law, in relation to a registrant's registration, means—

(a) for a medical practitioner—a law applying in a foreign country providing for the registration, licensing or certification of registrants under an authority established by a law applying in the country; or

(b) for another type of registrant—a law applying in a foreign country, other than New Zealand, providing for the registration, licensing or certification of registrants under an authority established by a law applying in the country.

Division 2 Action taken by board on basis of foreign law

311 Board may take action on basis of foreign law

(1) This section applies if—

(a) after a registrant is registered under the health practitioner registration Act establishing the registrant's board—

- (i) the registrant's registration, licence or certification under a foreign law relating to the registrant's profession is suspended or cancelled for a reason relating to a matter for which disciplinary action could be taken under this Act; or*
- (ii) conditions are imposed on the registrant's registration, licence or certification under a foreign law relating to the registrant's profession for a reason relating to a matter for which disciplinary action could be taken under this Act; and*

(b) the board reasonably believes that, to achieve the objects of this Act, it is necessary for the registrant's registration in Queensland to be affected in the same way.

(2) The board must give the registrant a written notice that states the following—

*(a) the board intends to suspend or cancel, or impose conditions on, the registrant's registration (the **proposed action**);*

(b) the ground for the proposed action;

(c) an invitation to the registrant to show, by written submission given to the board within a stated time of at least 14 days after the registrant receives the notice, why the proposed action should not be taken.

(3) The board must consider any submission made under subsection (2) and decide whether or not to take the proposed action.

(4) *As soon as practicable after the board makes the decision, the board must give written notice of the decision to the registrant and the commission (the **decision notice**).*

(5) *If the board decides to take the proposed action, the decision notice must state the following—*

- (a) the reasons for the decision;*
- (b) that the registrant may appeal against the decision to the tribunal;*
- (c) how the registrant may appeal.*

(6) *A decision to take the proposed action takes effect on the later of—*

- (a) the day the decision notice is given to the registrant; or*
- (b) the day of effect stated in the notice.*

(7) *Also, as soon as practicable after taking the proposed action, the board must give the commission written notice of the decision.*

(8) *This section does not limit the disciplinary action a disciplinary body may take under this Act.*

312 Further action by board relating to proposed action

(1) *Subsection (2) applies if the registrant's board takes the proposed action.*

(2) *The board must—*

(a) if the board suspends the registrant's registration—decide to end the suspension if the suspension under the foreign law is ended; and

(b) if the board cancels the registrant's registration—decide to reinstate the registrant's registration if the registrant's registration, licence or certification under the foreign law is reinstated; and

(c) if the board imposes conditions on the registrant's registration and the conditions under the foreign law are removed—remove the conditions; and

(d) if the board imposes conditions on the registrant's registration and the conditions under the foreign law are changed—change the conditions in the same way.

(3) *As soon as practicable after the board makes the decision the board must give written notice of the decision to the registrant and the commission.*

(4) *The decision takes effect on the later of—*

- (a) the day the notice is given to the registrant; or*
- (b) the day of effect stated in the notice.*

(5) *This section does not limit the disciplinary action a disciplinary body may take under this Act.*

It should be noted that for the purposes of this Part, action taken in regard to impairment is captured as impairment can be a basis for disciplinary action under the Act.