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National Registration and Accreditation Scheme for the Health Professions

Health Services Commissioner, Victoria response to

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

DATE: 17 NOVEMBER 2008

The overriding objectives of complaints handling and dealing with the performance and conduct of health practitioners are the safety of the public and the provision of high quality health care. 1.5 on page 4 sets out principles A to E. The Health Services Commissioner (HSC) supports the aspirations of the principles but is concerned that the consultation paper in its current form will not achieve these principles. The evolution of the complaints process has developed from total control by the disciplinary boards to a cooperative arrangement between health complaints commissioners and boards.

There has been a litany of scandals in the past which have been criticised in many publications including those by Deidre O'Connor in March and May 2008, work currently being done in South Australia, reforms in Victoria and the initiatives in Queensland. It is vital that the health complaints commissions are able to act as the gatekeepers in determining whether a complaint should proceed to a board or should remain with the commissioners as is the current situation.

The consultation paper provides for very little communication between boards and commissions and incorrectly assumes the commissions are only involved with complaints received from consumers. HSC can intervene in disciplinary measures (as can other states) but this is not reflected in the consultation paper and it needs to be made explicit.

2. Proposed terminology

HSC supports the use of the terms notification and notifier in the legislation but there should be some flexibility as well so that "complaints" and "complainants" can be used with respect to consumer complaints. The new national scheme provides an excellent opportunity for genuine cooperative federalism with a sharing of resources. Notifiers of complaints very often prefer to use local level agencies such as the health complaints commissioners because they are known to them and tend to be more accessible. The proposal for a single national call centre would seem to be distant and is therefore not preferred.

2.1.2 Preliminary assessments

HSC supports the use of the term assessments. HSC also recommends consideration be given to the smaller boards and the difficulties that they will face in trying to meet the recommendations for such a proliferation of committees.

2.1.4 Responsible HCC

HSC accepts this term with 2.1.5 to 2.1.7. Again, HSC is concerned that the number of committees etc required will be overly burdensome for the smaller boards. It will therefore be necessary for boards to have the ability to make their own determinations with respect to the number and size of committees required for their role.

2.1.8 Health management committee

It is unclear from the proposal whether the health management committee merely "oversees the management of practitioners who performance may be unsatisfactory" or whether it would also look at practitioners whose ability to practice may be affected by impairment or misuse of drug or alcohol.

2.1.9 Health assessment

HSC supports the term "health assessment."

2.1.10 Health panel

It is necessary to have distinct pathways relating to performance, health and conduct separate from the disciplinary functions. The term health panel is preferred as it seems to be more non-judgemental.

2.1.15 Not of a good character

It would appear that "not of good character" accords with current usage, however HSC prefers "not a fit and proper person" mainly because there is a wealth of legal precedence to explain what this means.

2.1.16 Impairment

HSC agrees with the use of the term and with the definition.

2.1.17 Unsatisfactory professional performance

This may need to be looked at the make sure there is no confusion or blurring of the distinction between performance, health and conduct pathways.

2.1.18 Unsatisfactory professional conduct

HSC has no strong views either way but tends towards unsatisfactory professional conduct as this would be clearer to public understanding and makes it broader.

There will need to be clarification about which jurisdiction applies when services are provided interstate or by such means as the internet.

The current proposals reinstate the boards in the key gatekeeping role for the reception of complaints and decisions about how they should be pursued. As noted, there have been numerous scandals in the past and subsequent reports which have modified that arrangement as being unworkable. There should be much more interaction between the boards and the commissioners with the commissioners retaining the power to decide who should keep the complaint. This is done very successfully in Victoria with the cooperation of all the boards.

4.4 Mandatory reporting obligations

HSC has some real concerns about this section. The objective is to keep the public safe and part of doing this is to ensure that practitioners who may need assistance because of impairment, illness or drug and alcohol abuse should be able to do so as early as possible. Mandatory reporting is likely to hinder this. There is also a risk that reports may be made for vindictive purposes and there will be a culture of shaming and blaming that will be counter productive and will not achieve the desired objectives. There needs to be very careful consideration if mandatory reporting is to be included in the legislation. There are already criminal sanctions and I would rather see a concentration on better protection for practitioners who make reports about other practitioners rather than placing sanctions on them if they fail to do so. There is evidence that many practitioners are afraid to report their colleagues because of being threatened with action such as defamation. This needs to be addressed. Whistleblower protection is clearly not sufficient.

Student registrants and mandatory reporting

The same considerations apply in this section.

4.5 Protection for notifiers and registrants

This is supported, however there are stronger provisions currently and these should be examined to ensure notifiers who act in good faith are protected from civil, criminal and administrative proceedings. Protections may also need to be extended to witnesses.

4.6 Own motion powers

This is supported.

4.7 Immediate suspension powers

The proposal 4.7.1 is supported rather than the alternatives. Procedural fairness is important as is follow-up reviews. Proposal 4.7.2 is supported. Proposal 4.7.3 is supported.

5. Preliminary assessment of notifications

HSC supports 5.1, 5.1.1, 5.2 and 5.2.1.

5.3 Liaison with HCCs

The HSC strongly disagrees with the resurrection of the boards of key gatekeepers and supports the current Victorian model.

5.4 Who conducts the preliminary assessment of a notification

See the point made above.

6. Performance matters

HSC supports these.

6.3 Performance assessment

Supported.

7. Health or impairment matters

7.1.1 is supported and under 7.1.2 option 2 is preferred.

7.2 Health management

Is supported but the difficulties for the smaller boards in having so many committees must be taken into account.

7.3 Health assessments

This is supported but why is it necessary for the practitioner to agree upon the identity of the assessor. A mentally ill person with no insight for example may not consent to be examined by any psychiatrist. Perhaps a list of names could be submitted to the practitioner to choose from with a requirement that one at least must be chosen.

Proposal 7.3.2 is supported. Proposal 7.3.3 is supported.

7.5 Decisions available to a health panel following a hearing

The proposals are generally supported in so far as the HSC has any expertise.

8. Conduct matters

Again, consideration will need to be given to the possible delays and duplications of efforts and the problems this poses for the smaller boards which have fewer resources.

8.3 Investigations

Generally supported but investigation should take place before a conduct matter is referred to a tribunal.

Proposal 8.3.3 is supported. Query 8.3.4 whether the decision to given notice to the practitioner should be by the board of committee rather than the investigator.

Timelines for the conduct of investigations

14 days may be insufficient and a 28 day time frame may be better. It is important that notifiers are given feedback and progress reports.

8.4 Powers of investigators – search, entry, seizure

Supported. The definition of "premises of a registrant's practice" may be too narrow. Proposal 8.4.2 is supported however, HSC notes section 145 of the *Health Professions Registration Act* 2005.

8.5 Conduct panel hearings

Again small boards will have difficulties in meeting all these requirements.

8.6 Decisions available to a conduct panel following a hearing

See above.

9. Ensuring accountability, transparency and procedural fairness

Option 2 is the preferred option as it provides the boards with advice and the ability to make legally sound decisions.

9.2 Matters involving registrants from different professions

Concerning legal representation for registrants at panel hearings, HSC has reservations about this because legal representatives tend to make these proceedings prolonged, expensive and adversarial. The registrant could have a support person or an advocate who is not a legal practitioner to support them rather than to speak on their behalf.

9.4 Confidentiality of panel hearings

Supported.

9.5 Status of notifiers at panel hearings

Supported.

9.6 Review of rights for registrants

Supported.

9.7 Notice of decisions of hearing panels

HSC supports this.

9.8 Role of Commonwealth, State and Territory ombudsmen

Option 2 is supported as it includes State ombudsmen as well as the Commonwealth Ombudsman.

10. Tribunal hearings

Supported. Proposal 10.2.2 is supported.

10.3 Original jurisdiction of tribunal

Supported.

10.4 Review jurisdiction of tribunal

Supported. Proposal 10.4.2 is supported

10.5 Findings and determinations of a tribunal

Supported.

HSC makes no further comment on the tribunal proposals except to say that the important voice of the lay member should not be excluded from these proceedings. One reason for major reforms in Victoria was the perception that boards look after their own members rather than the public interest. This perception may be misconceived, however it would be completely ironic if the reforms which were meant to improve that perception denied the consumer or the lay person a right to sit on tribunals.

The HSC supports the "Direct or incite offences" section. This is particularly important in an era of corporatisation of health practices. The rest of the proposals are supported.