JOINT MEDICAL BOARDS ADVISORY COMMITTEE

NRAIP Consultation Paper - Proposed arrangements for handling complaints, and dealing with performance, health and conduct matters

5 December 2008

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1. INTRODUCTION

Individual medical boards have made, or will be making, their own submissions in relation to the Consultation Paper. The following document represents views expressed at JMBAC meetings on several themes arising from the Paper

2. PERFORMANCE ASSESSMENT PROGRAM

The consultation paper envisages Performance Assessment as a form of voluntary low level management of complaints where there is no likelihood of harm to patients. This represents a fundamental misunderstanding of the way in which Performance Assessment is carried out by medical boards in Australia, and elsewhere.

While a small number of practitioners engage in misconduct involving “bad” behaviour, such as boundary violation, improper prescribing of drugs, fraud, etc, most complaints/notifications to medical boards involve poor professional performance where there is no suggestion that the doctor has acted in a way that could be characterised as “bad”. A distinction should be drawn between misconduct and poor performance by examining the issues raised in the notification to establish whether there are elements of reckless practice, or unethical, wilful or criminal behaviour. In the absence of these, the matter should be viewed as a performance matter. This may occur notwithstanding the fact that there have been significant adverse clinical outcomes (including death). The more serious the outcome, the more likely that there may be elements of reckless or wilful behaviour which may the move the matter across from a performance to a conduct pathway, but the gravity of outcome does not of itself justify such a reassessment.

The Performance Assessment pathway should have an extensive range of options depending upon the degree to which the performance is below an acceptable standard of practice. With most notifications, they will relate to a single incident where options might include counselling or a letter pointing out the need for improvement. The other end of the scale for Performance Assessment will involve a full, onsite practice audit for those cases where there is evidence of significant deficits in the doctor’s practice, which are likely to lead to conditions relating to education, remediation, and possibly prohibition from undertaking procedures. If the assessment process indicates a standard of performance so far below an acceptable level as to warrant barring the doctor from practice, the legislation should provide for a mechanism to achieve this which does not involve referral into the Complaints/disciplinary pathway, for investigation and prosecution in the current incident-based, adversarial model, which is essentially incompatible with the performance assessment concept.

3. SEPARATION OF FUNCTIONS

Separation of functions is paramount to current Boards' processes and in the interests of accountability, transparency and procedural fairness will need to be incorporated into the new scheme. There are several levels of proposed separations, including State and Board; regulatory and disciplinary; and investigation and adjudication.

Investigation/Adjudication

The separation required is a clear division between the board's investigation and referral processes (of complaints made to the board); and the ultimate adjudication of the complaints matters referred by the board for disciplinary hearing.

Board Investigation

Boards investigate complaints on behalf of complainants / notifiers; or of their own volition. The public is entitled to expect that those responsible for investigating complaints of professional misconduct do this appropriately, without bias and with vigour. The practitioners about whom complaints have been made are entitled to procedural fairness and a separation of the decision making bodies (referral decision from adjudication). Both the public and the practitioners have an interest in the appropriate processes being put in place.

This can be achieved without the necessity of creating another body ("director of proceedings"… a statutory office within the national agency") complicating and delaying the complaints investigation and referral process. There is no basis for stipulating that a board cannot, after consultation (health complaints body and board) and thorough investigation (in many cases on receipt of legal and medical advice), refer a matter, which it considers may involve conduct which amounts to a breach of the Act, to a disciplinary hearing.

The complaints process is initiated in conjunction with the health complaints body (to varying degrees in each state currently) and board (delegate of the board but independently appointed and none being members of the board – complaints assessment committee). This process provides a dual balanced approach at the outset when considering whether a matter should be further investigated.

Board delegate (in these circumstances, staff of the state or territory office) will then undertake the investigation unless the complaint falls clearly within the jurisdiction of the health complaints body.

Following investigation, the board (which comprises lay, legal and medical representatives) will consider all information and may refer to a disciplinary hearing; or form a view that it appears a breach of the Act has not occurred and accordingly no further action will be taken.

Adjudication

There are two levels of adjudication: the tribunals and the professional standards panels. The tribunals (acknowledged in the IGA) are created by statute and members are appointed by the Minister. This represents independence of appointment.

Applications to suspend, deregister or impose fines on practitioners are heard by a body which is separate from, and independent of, the investigating board.

The Professional Standards panels are not specifically acknowledged in the IGA but could and should be appointed through delegation. The panels currently hear the lesser conduct matters. They must also be independently (of the board) appointed to enable the complete separation of functions, the desired impartiality and the protection of the interests of the public.

The separation of powers is an insurance for both the complainant and the medical practitioners, in that those who form a view to investigate and compel the investigation, do not then sit in judgment of the matter once it reaches hearing stage. This separation is adequately and competently managed in all jurisdictions which currently oversee and manage these processes.

Separation Between the State and the Medical Board

Most Acts contain specific provisions ensuring this separation. This should be continued in the new legislation and in particular a provision precluding the Minister from compelling boards to manage disciplinary proceedings at his or her direction (or indeed to register a practitioner at his or her direction). Boards need to function independently of the States.

4. PUBLIC ACCESS TO PANEL HEARINGS

This is a brief commentary on “Public Access to Panel Hearings”. By panel hearings we mean informal hearings or professional standards panels. Of note, panel hearings are less formal, closed to the media and the public. The identity of the notifier and practitioner is not in the public domain thus setting the scene for a more informal hearing – indeed they were termed so under the previous Victorian legislation.

JMBAC advocates maintenance of the status quo. The risk of making these hearing open to the public are that informality will be lost and the risk of “legalising” the matter will become a concern. It is certain that the media will become involved.

Specifically the following is offered in relation to sections 9.3, 9.4 &9.5 (all of which relate to increased freedom re access to panel hearings / professional standards panels):

As it is intended that panel hearings be low key and informal, the presence of legal representation at a panel hearing is likely to increase considerably the level of formality and technicality of such proceedings. Arguably if a registrant wishes to be legally represented, then they can choose to have the matter dealt with before a ‘higher’ tribunal.

Registrars recommend support of Option 4b as outlined in proposal 9.3.

Confidentiality of panel hearings

JMBAC advocates that there be support for the proposal that hearings be closed to the public. Given that the hearing is an extension of the investigation it should be protected.

Information of importance for the protection of the public is the publication of any conditions which would be made available on the public register.

Status of Notifiers at Panel Hearings

As stated in the original call for comment paper, some consumer notifiers may perceive that the role of a board is to resolve grievances between the consumer and the registrant, or to punish a practitioner. We know that this is not currently the case. In all jurisdictions, the role of boards is to protect the public in general, by dealing with practitioners who depart from accepted standards.

In this context, a board's role is limited to determining whether a practitioner has engaged in unsatisfactory professional conduct or unsatisfactory professional performance, or has an impairment that is affecting their capacity to practise, and deciding how this should be addressed in order to maintain acceptable professional standards and protect the public.

In relation to proposal 9.5.1, JMBAC advocates that there be support for the system of inviting notifiers' to give evidence as currently occurs under the current Victorian legislation, recognising that the notifier does not have 'party' standing.