



NEW SOUTH WALES

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## OPTOMETRISTS REGISTRATION BOARD

PO BOX K599  
HAYMARKET NSW 1238  
AUSTRALIA  
Level 6, 477 Pitt Street, Sydney NSW 2000  
Telephone: 02 9219 0233  
Facsimile: 02 9211 9318  
E-mail: [optomreg@hprb.health.nsw.gov.au](mailto:optomreg@hprb.health.nsw.gov.au)  
Internet: <http://www.optomreg.health.nsw.gov.au>

13 November 2008

Ms Bronwyn Naird  
Chair, Practitioner Regulation Subcommittee  
Health Workforce Principal Committee

### **Consultation Paper on proposed arrangements for handling complaints and dealing with performance, health and conduct matters**

Dear Ms Naird

The NSW Optometrists Registration Board is concerned that the proposed model for handling disciplinary matters fails to achieve the stated objective of a robust and publicly accountable system and fails to meet the Ministers' three key factors of public protection, transparency and accountability.

The NSW Board contends that the statement "boards will be responsible for prosecuting serious misconduct matters, before the relevant state or territory tribunal, and will deal with less serious matters directly" (p. 6 of consultation paper), is imprudent. This could lead to boards determining whether or not a matter proceeds to a hearing, regardless of what recommendation may emanate from an investigations unit. It also suggests that potentially inexperienced, unqualified board or committee personnel, unfamiliar with procedural fairness and case law, will prosecute serious matters and hear less serious matters.

Clause 6.8 of the IGA states *inter alia* that the States and Territories will enact legislation to provide for entities to *investigate* (my emphasis) and hear serious disciplinary matters. In NSW, the Health Care Complaints Commission (HCCC) has an investigatory arm as well as a prosecutorial function, which together serve to protect the public's interests in a transparently independent manner. If, as a result of their investigation, the HCCC recommends that a matter be prosecuted, the Boards are unable to overrule that decision. The Commission also prosecutes matters without fear or favour and untainted by bias, apprehended or otherwise.

The balance of this submission must therefore be read bearing in mind that the NSW Optometrists Registration Board opposes the disciplinary model that has been advanced and upon which, a large number of the NRAIP's proposals are based.

The NSW Board submits that states and territories should be asked to use their best endeavours to ensure legislation as appropriate provides for courts to notify the relevant registration authority when a registrant is convicted of an offence.

Yours faithfully

A handwritten signature in cursive script, appearing to read 'Christine Craigie'.

Christine Craigie  
**President**

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## **SECTION 1 – PRINCIPLES**

### **PROPOSAL 1.5.1**

The Board supports the proposed framing of the legislation relating to the management of complaints and matters of conduct, health and performance.

## **SECTION 2 TERMINOLOGY**

### **PROPOSAL 2.1.1**

The Board supports the proposed terminology: “notification” and “notifier”.

### **PROPOSAL 2.1.2**

The Board supports the proposed terminology: “preliminary assessment”.

### **PROPOSAL 2.1.3**

The Board supports the proposed terminology “notifications assessment committee” to describe the committee that will screen all new notifications.

### **PROPOSAL 2.1.4**

The Board supports the proposed terminology: “responsible HCC”.

### **PROPOSAL 2.1.5**

***Performance Management Committee:*** The Board considers that the establishment of this committee introduces an unnecessary level of bureaucracy. The appropriate committee to undertake the role of overseeing the management of practitioners whose performance may be unsatisfactory is the Notifications Assessment Committee.

### **PROPOSAL 2.1.6**

The Board prefers the term “competence” to “performance”. The Board also considers that the appropriate body to request a performance (or preferably, *competence*) assessment is the Notifications Assessment Committee.

### **PROPOSAL 2.1.7**

The Board prefers the terminology: “Competency Panel”.

### **Proposal 2.1.8**

***Health Management Committee:*** The Board considers that the establishment of this committee introduces a further unnecessary level of bureaucracy. As stated at 2.1.5, the appropriate committee to undertake the role of overseeing the management of practitioners whose performance may be unsatisfactory is the Notifications Assessment Committee.

### **PROPOSAL 2.1.9**

The Board supports the proposed terminology: “health assessment”.

### **PROPOSAL 2.1.10**

The Board supports the proposed terminology: “Health Panel”.

### **PROPOSAL 2.1.11**

***Conduct Management Committee:*** The Board considers that the establishment of this committee introduces a further unnecessary level of bureaucracy. As stated at 2.1.5 and 2.1.8, the appropriate committee to undertake the role of overseeing the management of investigations and hearings into the conduct of practitioners who may have engaged in unsatisfactory professional conduct is the Notifications Assessment Committee.

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### **PROPOSAL 2.1.12**

The Board considers that the investigation of conduct matters should be undertaken predominantly by the relevant jurisdictional entity created by legislation to investigate disciplinary matters as per clause 6.8 of the IGA. This includes the investigation of “less serious” offences.

### **PROPOSAL 2.1.13**

The Board supports the proposed terminology: “Conduct Panel”.

### **PROPOSAL 2.1.14**

The Board supports the proposed terminology: “responsible tribunal”.

### **PROPOSAL 2.1.15**

The Board supports the proposed terminology: “not of good character”.

### **PROPOSAL 2.1.16**

The Board supports the proposed terminology: “impairment”.

### **PROPOSAL 2.1.17**

The Board supports the proposed terminology “unsatisfactory professional performance” and the definition at attachment 1 of the consultation paper.

### **PROPOSAL 2.1.18**

The Board supports the proposed terminology “unsatisfactory professional conduct” and the definition at attachment 1 of the consultation paper.

### **PROPOSAL 2.1.19**

The Board supports the proposed terminology “professional misconduct” and the definition at attachment 1 of the consultation paper.

## **SECTION 3 - OVERVIEW OF PROPOSED SYSTEM**

The NSW Board broadly supports the key features of the proposed scheme, but is concerned that the investigative role and prosecutorial functions of the NSW Health Care Complaints Commission will be under-utilised and possibly abandoned entirely, resulting in a significant loss of robustness & transparency, protection of the public and consumer confidence. The Board agrees with the premise that “the national regulatory scheme is designed to protect the public as distinct from resolution of complaints” (see P.11 of consultation paper). On that basis, the Board contends that legislation should **not** mandate that boards be “responsible for *preparing and presenting* the case against the practitioner before the tribunal” (vide P.13 of consultation paper).

The possible outsourcing of investigatory functions to entities outside the public sector, where the primary interest is maximising profits, or to engage qualified, experienced counsel to prosecute matters before a tribunal, would place an additional financial burden on boards that should more appropriately be borne by the state or commonwealth.

### **PROPOSAL 3.3.1**

The Board supports the proposed definitions

## **SECTION 4 - NOTIFICATIONS**

### **PROPOSAL 4.1.1**

The Board supports the proposal to allow for anyone to make a notification.

### **PROPOSAL 4.2.1.**

The Board disagrees that the identity of the notifier be an essential element of a notification.

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**PROPOSAL 4.2.2**

The Board supports the rendering of assistance to persons making a notification.

**PROPOSAL 4.3.1**

The Board supports the proposed grounds on which a notification may be made.

**PROPOSAL 4.3.2**

The Board supports the proposal to act upon notifications about practitioners who have ceased to be registered.

**PROPOSAL 4.4**

The Board supports   Option 1b – All registrants – Extended Obligations  
                                  Option 2b – Employers - Extended Obligations

The Board considers that the only justification for introducing student registration into the regulatory scheme would be to impose obligatory extended reporting requirements.

**PROPOSAL 4.5.1**

The Board supports protecting notifiers, when acting in good faith, from defamation actions.

**PROPOSAL 4.6.1**

The Board supports the proposal to provide for “own motion powers”.

**PROPOSAL 4.7.1**

The Board supports the proposal to include powers of immediate suspension for six months.

**PROPOSAL 4.7.2**

The Board supports the proposed appeal mechanisms.

**PROPOSAL 4.7.3**

The Board supports the proposed discretionary power for boards to accept undertakings.

## **SECTION 5 – PRELIMINARY ASSESSMENT OF NOTIFICATIONS**

**PROPOSAL 5.1.1**

The Board supports the proposed process for screening notifications.

**PROPOSAL 5.2.1**

The Board supports the proposed power to dismiss etc complaints considered frivolous.

**PROPOSAL 5.3.1**

The Board rejects the proposal that responsible boards deal with matters involving questions of unsatisfactory professional conduct or professional misconduct. That should be the primary role of the HCC. The Board further rejects the concept that the HCC’s primary role in disciplinary matters is to initiate processes of conciliation.

**PROPOSAL 5.5.1**

The Board rejects the proposal that responsible boards, during the preliminary assessment of notifications phase, be empowered to refer professional misconduct matters to a tribunal

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**PRIOR** to investigating the allegations. The proposal denies the registrant natural justice, ie the right to be heard, to have a decision made on evidence and by an unbiased person. The Board further rejects the proposal that matters be referred to the responsible HCC for conciliation **ONLY**.

**PROPOSAL 5.5.2**

The Board rejects the proposal that responsible boards, during the preliminary assessment of notifications phase, be empowered to refer questions of character, professional misconduct or health to a tribunal **PRIOR** to investigating the allegations. See 5.5.1.

**PROPOSAL 5.5.3**

The Board supports open communication, but does not agree that it needs to be enshrined in legislation.

**PROPOSAL 5.6**

The Board supports option 1.

**SECTION 6 – PERFORMANCE MATTERS**

**PROPOSAL 6.1.1**

The Board supports performance management, but opposes the proposal that responsible boards be empowered to request performance assessments **PRIOR** to the proposed Performance Panel considering the evidence/notification etc and determining whether an assessment or indeed hearing is required. The concept usurps the role of the Panel.

**PROPOSAL 6.2.1**

See response to proposal 6.1.1.

**PROPOSAL 6.2.2**

The Board supports the proposal that the Notifications Assessment Committee be given power to determine the appropriate course of action following its receipt of a performance assessment.

**PROPOSAL 6.3.1**

The Board supports the proposal that the responsible committee be empowered to appoint and pay for performance assessor(s).

**PROPOSAL 6.3.2**

The Board supports timely submission of reports but does not consider it prudent to legislate a 7-day turnaround. What are the penalties for failure?

**PROPOSAL 6.3.3**

The Board supports the proposal to redirect performance issues into the disciplinary pathway when appropriate.

**PROPOSAL 6.4.1**

The Board reiterates its opposition to the proposed model, but supports performance management **AFTER** a Performance Panel has dealt with the matter.

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**PROPOSAL 6.5.1**

The Board reiterates its opposition to the proposed model, and considers that the Notifications Assessment Committee be the body empowered to issue orders following its consideration of the Performance Panel's report.

**PROPOSAL 6.5.2**

The Board reiterates its opposition to the proposed model, and considers that Performance Panels have assessment and advisory functions only and that the Board or its responsible committee be empowered to issue orders.

**PROPOSAL 6.5.3**

The Board supports the proposal that Panels be required to submit their reports within 28 days.

**7 - HEALTH OR IMPAIRMENT MATTERS****PROPOSAL 7.1.1**

The Board supports the proposal to deal flexibly with impaired practitioners.

**PROPOSAL 7.1.2**

The Board supports option 2 on a user pays basis. The cost of managing impairment cases is already a considerable burden in some professions.

**PROPOSAL 7.2.1**

The Board considers that the proposed health assessment model duplicates the proposed performance management model. Accordingly, the Board's views are as stated above.

**8 – CONDUCT MATTERS****PROPOSAL 8.1.1**

The Board supports the proposal that legislation provide for the investigation of disciplinary issues, but considers that role should be undertaken by the state HCC.

**PROPOSAL 8.2.1**

The Board has previously expressed its opposition to the proposed model. However, the Notifications Assessment Committee should be empowered to appoint an investigator.

**PROPOSAL 8.2.2**

The Board supports the proposal that the responsible committee have powers to determine the appropriate course of action.

**PROPOSAL 8.3.1**

The Board supports the proposal that the Notifications Assessment Committee should be empowered to appoint an investigator.

**PROPOSAL 8.3.2**

The Board opposes the proposal that would empower a board to proceed to refer a matter to a tribunal **PRIOR** to conducting an investigation. See 5.5.1.

**PROPOSAL 8.3.3**

The Board supports the proposal that notice of an investigation be issued, providing proposal 8.3.4 is adopted.

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**PROPOSAL 8.3.4**

The Board supports the proposal that notice of an investigation may be waived in the prescribed circumstances.

**PROPOSAL 8.3.5**

The Board does not support legislating timelines, but rather, that there be an onus on boards to act with due haste in all aspects.

**PROPOSAL 8.4.1**

The Board supports the proposed powers of an investigator, but opposes inclusion of the caveat that the occupier's consent be obtained. "Enter and inspect at any reasonable time" is preferred.

**PROPOSAL 8.4.2**

The Board supports the proposed powers to obtain search warrants.

**PROPOSAL 8.5.1**

The Board supports legislation enabling a panel to hear disciplinary matters and the panel's membership be constituted as proposed.

**PROPOSAL 8.6.1**

The Board supports the proposal that a disciplinary panel be empowered to issue orders as proposed.

**PROPOSAL 8.6.2**

The Board supports the proposal that panels consider earlier performance assessments etc.

**9 – ENSURING ACCOUNTABILITY, TRANSPARENCY AND PROCEDURAL FAIRNESS****PROPOSAL 9.1.1**

The Board has previously expressed its opposition to certain aspects of the proposed model. However, the Board supports option 2 to improve procedural fairness and public interest mechanisms.

**PROPOSAL 9.1.2**

The Board considers the need to legislate public interest criteria as superfluous.

**PROPOSAL 9.2.1**

The Board supports the proposal to conduct joint investigations.

**PROPOSAL 9.3**

The Board supports option 4b, ie accompanied, but not legally represented.

**PROPOSAL 9.4.1**

The Board supports the proposed closed panels and penalties for disclosures.

**PROPOSAL 9.5.1**

The Board supports the proposed restrictions on notifiers.

**PROPOSAL 9.6.1**

The Board supports the proposed practitioner's avenue for appeal.

**PROPOSAL 9.7.1**

The Board supports the proposed disclosure of disciplinary panels' decisions.

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**PROPOSAL 9.8**

The Board supports option 2 ie apply existing state & territory ombudsman legislation.

**10 - TRIBUNAL HEARINGS****PROPOSAL 10.2.1**

The Board supports the proposed arrangements for Tribunals.

**PROPOSAL 10.2.2**

The Board supports the proposed application of state laws detailing procedures of tribunals.

**PROPOSAL 10.3.1**

The Board supports inclusion of the alternative option.

**PROPOSAL 10.4.1**

The Board supports inclusion of the alternative option.

**PROPOSAL 10.4.2**

The Board supports the proposed range of reviewable decisions.

**PROPOSAL 10.5.1**

The Board supports the proposed range of Tribunal findings.

**PROPOSAL 10.5.2**

The Board supports the proposed range of Tribunal determinations.

**PROPOSAL 10.5.3**

The Board supports the proposed range of Tribunal determinations.

**PROPOSAL 10.5.4**

The Board supports the proposed range of Tribunal findings.

**PROPOSAL 10.5.5**

The Board supports the proposed power to order costs.

**PROPOSAL 10.6.1**

The Board supports the proposed constitution of a tribunal.

**PROPOSAL 10.7.1**

The Board supports the proposed range of provisions relating to tribunals.

**PROPOSAL 10.8.1**

The Board supports the proposed parties to a tribunal hearing.

**PROPOSAL 10.9.1**

The Board supports the proposed power to issue prohibition orders.

**PROPOSAL 10.10.1**

The Board supports the proposed right of appeal and appeal jurisdiction.

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**PROPOSAL 10.11.1**

The Board supports the proposed requirement that tribunals publish their reasons for decision **AND** that they be required to do so within four months of handing down their findings.

**PROPOSAL 10.12.1**

The Board supports the proposal that boards notify relevant stakeholders about the outcome, publish details on their website and update the register.

**11 - OFFENCES AND REGULATED CONDUCT**

**PROPOSAL 11.3.1**

The Board supports inclusion of the proposed holding out offences.

**PROPOSAL 11.4.1**

The Board does not support orthoptists having prescribing rights (refer to CORA submission on *Registration Arrangements*), but supports the remaining restricted practice offences.

**PROPOSAL 11.5.1**

The Board supports inclusion of offences relating to directing or inciting unsatisfactory professional behaviour.

**PROPOSAL 11.6.1**

The Board supports the more flexible and educative approach to advertising that is embodied in option 1.

**PROPOSAL 11.7.1**

The Board supports inclusion of offences relating to enforcement activities.

**PROPOSAL 11.8.1**

The Board supports the compulsory return of registration certificates in the defined circumstances.

**PROPOSAL 11.8.2**

The Board supports the inclusion of offences relating to a breach of a prohibition order.

**PROPOSAL 11.8.3**

The Board supports exclusion of both types of offences providing the proposed deterrents are in place.

**PROPOSAL 11.9.1**

The Board supports the ability of boards to bring certain matters before the relevant state & territory courts.

**PROPOSAL 11.10.1**

The Board supports the inclusion of compliance monitoring powers AND penalties for obstruction.

**12 - TRANSITION ARRANGEMENTS**

**PROPOSAL 12.1**

The Board supports the proposed transition arrangements relating to health, performance and conduct matters.