

NEW SOUTH WALES MEDICAL BOARD

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

18 November 2008

Detailed commentary on the Consultation Paper (CP) follows, but the New South Wales Medical Board makes the following broad remarks on issues of principle raised by it.

1. Performance Assessment

The CP 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 the New South Wales Medical Board, and is currently being developed and implemented by other Medical Boards in Australia, and overseas.

The Board notes that at the National Forum on the CP, representatives of NRAIP indicated that some of the thinking in relation to Performance Assessment and its interaction with the general complaints/notification handling system had changed, but it believes that it is important that its views on the underlying principles of a Performance Assessment Program are made clear.

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”. The New South Wales Medical Board seeks to distinguish 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 Board views the matter 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 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 has 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 involves a full onsite practice audit for those cases where there is evidence of significant deficits to the extent that conditions relating to education, remediation, and possibly prohibition from undertaking procedures, etc, is the likely outcome.

2. Investigations

Independence of investigation / prosecution

The CP envisages an investigatory structure where serious complaints are investigated and prosecuted by the Board.

The New South Wales Medical Board considers that the NSW system involving an independent Health Care Complaints Commission responsible for investigation and prosecution of serious complaints in a co-regulatory model involving checks and balances and mandatory consultation processes is to be preferred over the CP model. The Board notes that the IGA envisages that the investigation and prosecution of complaints would be handled within the NRAS structure and believes that this can be achieved by having a dedicated investigative and prosecutorial unit or structure within NRAS. This should be functionally independent of the various Professional Boards, but there should be comprehensive consultation requirements to act as checks and balances, with the Boards having final say in regard to matters of professional standards.

Such an arrangement would meet the requirements of the IGA, while also providing transparency and an ability to deal with complaints involving practitioners from several different professions. It would also mean that the investigatory and prosecutory activities would be undertaken within the regulatory philosophy of NRAS as a whole, thereby avoiding any possibility of an independent Health Complaints body pursuing political or other agendas.

Preliminary assessment and flexibility between pathways

The CP envisages a system of assessment of notifications which in the view of the New South Wales Medical Board, and on its understanding of the processes involved, appears to place too much reliance on this initial assessment. While acknowledging that preliminary assessment is a vital part of the process, it comes at a very early stage when the Board is in possession of a very limited amount of information, generally the original notification, and in the current NSW arrangements, the doctor's response and clinical records if available. While this information is generally sufficient to enable a broad decision to be made as to which of the Conduct, Health or Performance streams the matter is to be initially referred, it will very rarely provide enough information to be able to decide that there is a matter warranting referral to the Medical Tribunal, or immediate suspension.

Matters which on their face are serious will be referred for investigation, but until this investigation has taken place, the decision as to whether it can be handled through an internal Panel as a matter of unsatisfactory professional conduct or a Tribunal as professional misconduct (or any range of lesser outcomes) is not clear. Similarly, many initial notifications may suggest on their face that the practitioner should be suspended, but the interests of fairness require that in all but the most extreme cases (eg. a practitioner who has been involuntarily committed to a psychiatric institution) there be some sort of hearing conducted. Matters where urgent action may be required should be identified at preliminary assessment and

dealt with urgently by a process within the Board which is rapid enough to meet the goal of protecting the public, but which also allows the practitioner the opportunity to put his or her point of view.

Preliminary assessment should be a process which occurs soon after the receipt of a notification, and based on the material available at the time. While the decision as to whether a matter can be principally characterised as conduct, health or performance can usually be made at this time, the system must allow for reassessment and reallocation to a different pathway at any subsequent time.

The New South Wales Medical Board commentary on the Consultation Paper follows with the Board's comments interwoven **in red**:

**NATIONAL REGISTRATION AND ACCREDITATION SCHEME
FOR THE HEALTH PROFESSIONS**

CONSULTATION PAPER

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

CONTENTS

1. **Background**
 - 1.1 **Scope of paper**
 - 1.2 **Overview of the implementation of the National Scheme**
 - 1.3 **How to have your say**
 - 1.4 **The Intergovernmental Agreement**
 - 1.5 **Principles**
2. **Proposed terminology**
3. **Overview of proposed system**
 - 3.1 **Background**
 - 3.2 **Key features of proposed system**
 - 3.3 **Proposed definitions for what constitutes a departure from professional standards**
4. **Notifications**
 - 4.1 **Who may make a notification**
 - 4.2 **In what form may a notification be made**
 - 4.3 **What sort of matter may be the subject of a notification**
 - 4.4 **Mandatory reporting obligations**
 - 4.5 **Protection for notifiers and registrants**
 - 4.6 **Own motion powers**
 - 4.7 **Immediate suspension powers**
5. **Preliminary assessment of notifications**
 - 5.1 **Powers following receipt of a notification**
 - 5.2 **Grounds for a board to refuse to deal with a notification**
 - 5.3 **Liaison with Health Complaints Commissioners**
 - 5.4 **Who conducts the preliminary assessment of a notification**
 - 5.5 **Powers following preliminary assessment of a notification**
 - 5.6 **Notifiers' rights of review of preliminary assessment decisions**
6. **Performance matters**
 - 6.1 **Overview of management of performance related matters**
 - 6.2 **Performance management**
 - 6.3 **Performance assessments**
 - 6.4 **Performance panel hearings**
 - 6.5 **Decisions available to performance panel following a hearing**
7. **Health or impairment matters**
 - 7.1 **Overview of management of health related matters**
 - 7.2 **Health management**
 - 7.3 **Health assessments**
 - 7.4 **Health panel hearings**
 - 7.5 **Decisions available to a health panel following a hearing**
8. **Conduct matters**
 - 8.1 **Overview of management of conduct related matters**
 - 8.2 **Conduct management**
 - 8.3 **Investigations**
 - 8.4 **Powers of investigators – search, entry, seizure**
 - 8.5 **Conduct panel hearings**

NSWMB Commentary on NRAIP Complaints Consultation Paper

- 8.6 Decisions available to a conduct panel following a hearing
 - 9. Ensuring accountability, transparency and procedural fairness
 - 9.1 Achieving separation of functions
 - 9.2 Matters involving registrants from different professions
 - 9.3 Legal representation for registrants at panel hearings
 - 9.4 Confidentiality of panel hearings
 - 9.5 Status of notifiers at panel hearings
 - 9.6 Review rights for registrants
 - 9.7 Notice of decisions of hearing panels
 - 9.8 Role of Commonwealth, State and Territory ombudsmen
 - 10. Tribunal hearings
 - 10.1 Establishment or continuation of State and Territory tribunals
 - 10.2 Criteria for State and Territory tribunals
 - 10.3 Original jurisdiction of tribunal
 - 10.4 Review jurisdiction of tribunal
 - 10.5 Findings and determinations of a tribunal
 - 10.6 Constitution and appointment of tribunal hearing panels
 - 10.7 Procedure for conduct of tribunal hearings
 - 10.8 Status of notifiers
 - 10.9 Powers in relation to deregistered practitioners
 - 10.10 Review rights from tribunal decisions
 - 10.11 Reasons for decisions
 - 10.12 Notice of decisions
 - 11. Offences and regulated conduct
 - 11.1 Current arrangements
 - 11.2 The IGA
 - 11.3 Holding out offences
 - 11.4 Practice offences
 - 11.5 Direct or incite offences
 - 11.6 Regulation of advertising
 - 11.7 Offences related to enforcement activities
 - 11.8 Other offences
 - 11.9 Prosecution of offences
 - 11.10 Monitoring of registrants
 - 12. Transition arrangements
-
- ATTACHMENT 1: Draft definitions of 'unsatisfactory professional conduct', 'unsatisfactory professional performance' and 'professional misconduct' proposed for inclusion in the national legislation
 - ATTACHMENT 2: Mandatory reporting obligations in registration legislation by State and Territory
 - ATTACHMENT 3: Statutory provisions setting out the relationship between registration boards and the respective Health Complaints Commissioners in each State and Territory
 - ATTACHMENT 4: Existing definitions of unsatisfactory professional conduct (or equivalent) contained in State and Territory registration legislation
 - ATTACHMENT 5: State and Territory Ombudsman legislation
 - ATTACHMENT 6: Current tribunal arrangements by State and Territory

NSWMB Commentary on NRAIP Complaints Consultation Paper

1. Background

1.1 Scope of paper

This paper is the second in a series of consultation papers on matters that require decision in order to prepare the second stage of legislation to establish the National Registration and Accreditation Scheme for the health professions.

It addresses policy with respect to the following functions of the national registration scheme:

- receipt and management of notifications and complaints
- the three streams for handling of health practitioner notifications including complaints:
 - performance (competence) matters
Performance and Competence are not interchangeable terms. Competence applies to knowledge. Performance is about the application of knowledge.
 - health (impairment) matters, and
 - conduct (disciplinary) matters
- relationships with external bodies who may also have a role in managing or addressing these matters, such as State and Territory health authorities and Health Complaints Commissioners (HCCs), ombudsmen, and local court and police systems
- offences for breach of the legislation, and
- enforcement powers of boards.

The paper is designed to outline and seek guidance on the range of regulatory tools that should be available in a national registration scheme to properly deal with the broad span of competence, health and performance matters, as well as mechanisms to support a robust and publicly accountable complaints management and disciplinary system.

It is recognised that at present, different jurisdictions have differing systems. This paper seeks to consolidate and take the best of these approaches for the national system. In doing so, the matters outlined by Ministers as key factors in the further development of the new scheme have also been addressed, that is the system needs to:

- ensure that public protection is paramount
- maintain a high degree of transparency, and
- be appropriately accountable.

1.2 Overview of the Implementation of the National Scheme

The new scheme was agreed by the Council of Australian Governments (COAG) at its meeting on 26 March 2008. On this date COAG signed the Intergovernmental Agreement (IGA) for a National Registration and Accreditation Scheme for the Health Professions. The IGA can be downloaded from the following website: www.nhwt.gov.au/natreg.asp.

To implement the scheme, national legislation will be introduced in the Queensland Parliament in two stages. The first stage will cover those aspects of the COAG Agreement that address the structural elements of the scheme, and will be introduced in the Queensland Parliament in October 2008.

The second stage, to be introduced in the Queensland Parliament in August 2009, will cover matters where further work and discussion is required beyond the terms of the COAG Agreement. These include:

- registration arrangements

NSWMB Commentary on NRAIP Complaints Consultation Paper

- accreditation arrangements
- complaints, conduct, health and performance arrangements
- privacy and information sharing arrangements, and
- other matters.

Health Ministers have announced a process to ensure that professions, consumers, registration boards and education providers, as well as members of the general public, have the opportunity to contribute to the implementation of the new scheme.

Ministers will use as their guiding principles in developing the legislation and the scheme that the safety of the public is paramount, that high quality health care must be protected and advanced and that governments should be accountable and processes transparent.

Ministers have given a commitment that consultation papers on key issues will be made available, with the opportunity for anyone to provide a submission if they wish. All submissions will be due before the end of 2008 with different dates for different topics. In the case of two main topics, complaints arrangements, and privacy and information sharing arrangements, two national public consultation meetings will be held, one in October and one in November 2008.

When the feedback and submissions have been analysed, Ministers will develop a final set of proposals for the overall policy directions for the second piece of legislation. These proposals will also be made available for comment. A national forum and State and Territory forums will be held in March 2009 to discuss the proposals. Further submissions will be accepted at this time, prior to finalisation of the details of the scheme and preparation of further legislation.

The project website www.nhwt.gov.au/natreg.asp will carry all consultation papers as they are issued on the new scheme and the implementation process.

1.3 How to have your say

As described above this paper is the second in a series of consultation papers on matters that will require decisions from Governments, to develop the second stage of legislation governing the national scheme.

The paper presents a number of proposals, some with alternative options, regarding the arrangements for complaints handling, and dealing with conduct, health and performance matters under the new scheme. Governments are seeking comments and submissions from interested parties, particularly on those proposals highlighted in boxes within the text, prior to finalising their decisions on national laws to regulate the scheme.

If you wish to provide comments on this paper, please lodge a written submission in electronic form, marked “Complaints Arrangements Submission, Attention: Practitioner Regulation Subcommittee”, at nraip@dhs.vic.gov.au by close of business on Monday, 17 November 2008. Please note that your submission will be placed on the website after the closing date for all submissions unless you indicate otherwise.

1.4 The Intergovernmental Agreement

There are a number of clauses in the IGA relating to dealing with complaints or notifications about health practitioners as follows:

1.25 *The role of the boards will be to:*

- (a) *establish local and national committees as required to enable the delivery of a board's functions in relation to registration, investigation of conduct, competence or impairment*

NSWMB Commentary on NRAIP Complaints Consultation Paper

- matters, conduct of disciplinary hearings, course of study accreditation and assessment of overseas trained practitioners, in a manner that provides effective and timely local responses*
- (f) oversee the receipt and investigation of complaints about registered practitioners and the determination of matters following investigation, including referral of serious matters for hearing by the relevant external tribunal*
 - (g) oversee disciplinary processes in relation to less serious matters, including the conduct of disciplinary hearings and settlement of matters by consent and determine less serious disciplinary matters relating to individual practitioners*
 - (h) oversee the management of impaired registrants, including the monitoring of conditions and suspensions imposed through disciplinary processes*
 - (i) provide an internal merits review of decisions made in relation to registration, conditions on registration, complaints investigation and management, and management of impaired registrants upon application from a practitioner, notifier, or on its own motion*
 - (k) refer matters as appropriate to police and criminal justice systems*
 - (l) refer the hearing of serious matters (those which may result in suspension or cancellation of registration) to an entity (determined by each State and Territory) external to the agency (which will also be responsible for hearing of appeals against less serious disciplinary matters determined by the board)*
 - (m) receive complaints made to other bodies as appropriate*
 - (n) make representations regarding an individual practitioner to the entity that is hearing a serious matter or reviewing a decision made by the board in relation to that practitioner*

External complaints and review processes under the national scheme

- 2.1 The hearing of serious disciplinary matters (those which may result in suspension or cancellation of registration) will be undertaken by an entity external to the agency, which will also be responsible for the hearing of appeals against less serious disciplinary matters where internal review has not resolved the matter.*
- 2.2 It will be the responsibility of each State and Territory to determine which entity in their particular jurisdiction (in accordance with national criteria agreed by AHMC) will be responsible for the hearing of these matters.*
- 2.3 However, to ensure national consistency, the legislation to establish the national scheme will specify common processes, findings and determinations that can be made.*
- 2.4 Access to the courts will be available as under current arrangements.*

6. IMPLEMENTATION

- 6.8 The States and Territories will use their best endeavours to ensure legislation as appropriate provides for entities in their jurisdiction to investigate and hear serious disciplinary matters and the hearing of appeals against less serious disciplinary matters arising from the registration function. Each State and Territory will be responsible for deciding which entity will be responsible for that function in their jurisdiction, in accordance with national criteria agreed by AHMC.*

It is apparent from the above clauses that:

- boards will be required to undertake or oversee key decisions in the management of complaints against registered practitioners, including the assessment, investigation and/or management of matters that raise questions concerning a practitioner's competence, capacity to practise or ethical conduct
- that the scheme should provide for performance (competence), health (impairment), and conduct (discipline) streams, allowing matters to be addressed as separate processes, while recognising there may be some overlap and cross referral between them
- a distinction should be made between serious misconduct matters and other matters that are less serious, and a State or Territory tribunal that is separate from the boards will hear serious misconduct matters

NSWMB Commentary on NRAIP Complaints Consultation Paper

- these State and Territory tribunals will exercise original jurisdiction, with respect to serious misconduct matters, and review jurisdiction, with respect to disciplinary and other decisions made by boards, and
- the boards will be responsible for prosecuting serious misconduct matters, before the relevant State or Territory tribunal, and will deal with less serious matters directly.

The IGA does not give detailed consideration to the conciliation of complaints or alternative dispute resolution which is a common feature of most State and Territory schemes, nor how those elements will interact with the national model in the future. It is anticipated that jurisdictions are likely to retain some State-based body to address the conciliation function, or consider institutional complaints or a combination of both. The paper therefore also addresses the interaction between these State-based bodies and the national scheme.

The proposals below are designed to give effect to the requirements of the IGA.

1.5 Principles

Proposal 1.5.1: It is proposed that the provisions of the legislation relating to the management of complaints and matters of conduct, health and performance be framed in a way that:

- a. provides for a robust system to protect public safety that deals effectively with complaints, conduct, health and performance matters and focuses on prevention and early intervention
- b. builds on the best aspects of State and Territory schemes, rather than replicating one existing disciplinary scheme
- c. balances the rights and interests of consumers with those of health practitioners
- d. is compatible with nationally and internally accepted standards and consistent with Australia's international obligations, and
- e. reflects the wording and intent of the Intergovernmental Agreement.

2. Proposed terminology

There is variability across State and Territory legislation as to the terms used to describe certain functions or processes of the boards. It will be necessary for the legislation to adopt agreed terminology to describe these functions.

Proposal 2.1: It is proposed that the following terminology be adopted with respect to the complaints handling and disciplinary functions of the boards:

2.1.1 Notification – This term is proposed to be used in legislation instead of 'complaint' to describe a matter referred to a board about a registered practitioner, because it encompasses matters referred from a range of sources, not just from clients or patients of the registrant. It also covers self referrals and referrals from colleagues, employers, Medicare, the Professional Services Review scheme, Department of Immigration and Citizenship (DIAC), etc. The terms 'notification' and 'notifier' also reflect the fact that matters may not always come to the board in the form of a complaint from a consumer.

If the term 'notification' is adopted, then a definition will be required in the legislation to make clear that it encompasses consumer complaints. Using the term 'notification' for the purposes of legislation does not preclude the Agency and the boards from using every day language in their dealings with consumers, for example, having information on the website for consumers on 'how to make a complaint'.

Alternative options: Alternative legislative terms for consideration are 'complaint' and 'complainant', or 'report' and 'reporter'.

NSWMB Commentary on NRAIP Complaints Consultation Paper

2.1.2 Preliminary assessment - This term is proposed to be used to describe the action taken by a board (or a committee of the board) when a matter comes to its attention, in order to determine how it can be best dealt with, whether via a performance, health or disciplinary process. Note: It is proposed there be flexibility to move between the performance, health and disciplinary streams as the circumstances dictate.

Alternative options: Alternative terms for consideration (used in some Acts) are 'investigation' or 'preliminary investigation'.

The term "preliminary assessment" is preferred over the alternatives, which are not appropriate for Health or Performance.

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.

Alternative options: Alternative terms for consideration are 'complaints assessment committee', 'investigations committee'.

As for 2.1.2, the word "investigations" is too limiting.

2.1.4 Responsible HCC – This term is proposed to be used to describe a health complaints or health services commissioner or other similar body, established under relevant State or Territory legislation and responsible for, amongst other things, conciliating consumer complaints against health service providers.

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.

2.1.6 Performance assessment – This term is proposed to be used to describe the assessment that a board or a performance management committee may, under legislation, request a practitioner undergo, in order to determine whether the practitioner has sufficient knowledge, skill and judgement to practise in the regulated health profession.

'Request' implies that the practitioner can refuse.

2.1.7 Performance panel – This term is proposed to be used to describe a panel or panels appointed by a responsible board, to hear and determine a performance (competence) matter.

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.

2.1.9 Health assessment – This term is proposed to be used to describe the assessment that a board or health management committee may request a practitioner undergo, in order to determine whether the practitioner's capacity to practise is affected by a physical or mental impairment or habitual misuse of alcohol or other drugs. It may include, but is not limited to an examination by a medical practitioner. Alternatively, it may be a neuropsychological assessment by a registered psychologist, for example, of a practitioner who has suffered a head injury.

Alternative options: Alternative terms for consideration are 'medical examination' and 'impairment assessment'. The term 'medical examination' is not preferred because it may be perceived as too narrow in scope.

NSWMB Commentary on NRAIP Complaints Consultation Paper

The definition of “health assessment” should include the concept of the practitioner’s capacity to practise being affected by **or likely to be affected by** physical or mental impairment” This is picked up elsewhere in the paper.

The alternative options are not appropriate as they are too limited.

2.1.10 Health panel – This term is proposed to be used to describe a panel appointed by the board (or a health management committee) to conduct a hearing with respect to a practitioner whose capacity to practise may be affected by a physical or mental impairment or habitual misuse of alcohol or other drugs.

Alternative options: Alternative terms for consideration (used in some Acts) are ‘impaired registrants panel’, ‘impairment review panel’, ‘health assessment panel’ or ‘personal assessment panel’.

The term “health panel” is preferred over the alternative options.

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.

2.1.12 Conduct investigation – This term is proposed to be used to describe the investigation that is undertaken by the board or a conduct management committee, in order to determine whether disciplinary action should be taken against the practitioner.

2.1.13 Conduct panel – This term is proposed to be used to describe the panel appointed by a board following investigation, to hear allegations that a practitioner has engaged in unsatisfactory professional conduct.

2.1.14 Responsible tribunal – This term is proposed to be used to describe the relevant State or Territory tribunal responsible for hearing and determining matters of serious professional misconduct by registered practitioners, and appeals from certain board decisions.

The word “serious” should be deleted, as professional misconduct is by definition serious, and the structure envisaged indicates that the Conduct Panel will consider matters of unsatisfactory professional conduct while the responsible tribunal will consider matters of professional misconduct.

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’.

Either term is satisfactory.

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.

The definition of impairment should be amended to read “... which affects **or is likely to affect** the capacity ...”

2.1.17 Unsatisfactory professional performance – This term is proposed to be used to describe departures from an acceptable standard of professional competence or performance that are not so serious as to warrant suspension or cancellation of registration. See [Attachment 1](#) for proposed definition.

NSWMB Commentary on NRAIP Complaints Consultation Paper

This definition suggests that performance is seen as a less serious form of misconduct – see discussion below regarding the relationship between performance and conduct.

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.

Alternative Option: An alternative term for consideration (used in some Acts) is ‘unprofessional conduct’.

2.1.19 Professional misconduct – This term is proposed to be used to describe conduct that is so serious that if the allegations are proven, might warrant suspension or cancellation of the practitioner’s registration, and therefore requires the board to refer the matter for hearing by the responsible tribunal. See Attachment 1 for proposed definition.

3. Overview of proposed system

3.1 Background

The purpose of the registration system is to register and regulate health practitioners in the public interest. A notifications management system, comprising separate streams for addressing concerns about practitioners’ performance, their health or conduct is a crucial element of such a system.

In serving the public interest, the notifications management system must operate above all else to protect the public from practitioners who are incompetent (to a greater or lesser degree), unethical, or impaired in their capacity to practise.

Where matters that raise questions about the professional performance, health or conduct of a practitioner, are brought to the attention of a board, whether through a report from a third party, complaint or self referral, it is intended that boards have the option of pursuing the matter through one or more of three streams: performance management (competence), health management (impairment) or conduct (discipline).

Matters which suggest possible professional misconduct or unsatisfactory professional conduct would be addressed, in the first instance through the investigation and disciplinary stream. Matters that primarily involve professional performance or impairment would be managed through separate processes that none the less, can feed into the disciplinary stream if necessary.

The three streams of the notifications management system are designed to achieve the public protection objective from different directions. The performance management stream and the health management stream aim to protect the public by identifying registrants whose practice or approach to practice causes concern but who have not caused harm to any person or potentially caused harm to a person, to address and overcome those matters of concern before harm or the potential for harm eventuates. These streams are proactive. The disciplinary stream approaches public protection from the other direction - where a complaint has been made that a practitioner has engaged in misconduct and harm has been caused, or may potentially have been caused, to a patient.

This paragraph suggests that the Performance stream is only available where unsatisfactory performance has not led to harm to a patient. While unsatisfactory performance may not cause harm, this is not necessarily the case, and performance processes should not be limited in this way. In fact, the effort and expense of performance assessment is unlikely to be justified with this narrow interpretation. (See overview document)

NSWMB Commentary on NRAIP Complaints Consultation Paper

The notifications management system also has a number of secondary but important objectives. These include maintenance of public confidence in the health system as a whole, ensuring that competent and ethical practitioners can operate within the health care system and resolving patient grievances in a manner that is satisfactory to those patients. A further objective of the notifications system is to maintain practitioner confidence in the system by ensuring that practitioners are held to account against fair and reasonable standards that are accepted by their profession.

3.2 Key features of proposed system

A diversity of forms

In developing the requirements for the new arrangements it is important to distinguish between functions and powers that must be provided for and forms of arrangements which may be used on an optional basis to give effect to these functions and powers. The mandatory features of the scheme must suit the circumstances of all professions and the distribution of registrants in those professions across Australia. For example, the ten professions vary in size from around 350,000 nurses and midwives currently registered across Australia (including double registrations) and less than 5000 registrants in each of the chiropractic, optometric, osteopathic and podiatric professions. The number of committees which boards choose to use to carry out the range of functions assigned to them will be very different across professions. Were it otherwise, the weight of committee structures would be beyond the smaller professions to find people to serve on them or the funds to cover their activities.

The proposed scheme therefore provides for very distinct functions to be performed but leaves it open to boards whether or not they set up separate committees to deal with these functions. A board could for example, chose to establish a single committee as its delegate in all matters in a particular State or Territory. The exception to this rule, is the requirement that panels appointed to deal with a particular matter may not contain any of the persons on the committee or board which directly referred the matter to the panel.

Key features of the proposed scheme are as follows:

Receipt of notification (includes a complaint)

Each national board (or one or more notifications assessment committees of the board) would be responsible for receiving notifications about registered practitioners (or practitioners who were registered at the time that the conduct complained of occurred).

Preliminary assessment of notification

The national board (or a committee of the board including one located in a State or Territory) would be responsible for making a preliminary assessment of the matter, to determine the most appropriate course of action. At this point, the board or committee would determine:

- whether the notification has arisen from a consumer complaint and requires consultation with the responsible State or Territory HCC (all consumer complaints would require consultation)
- which other external bodies have an interest or involvement in the matter, such as other complaints bodies, Commonwealth State or Territory agencies
- whether the matter raises questions of the performance or competence of the practitioner
- whether the matter raises questions that the practitioner may have an impairment that is affecting his/her capacity to practise
- whether the matter raises questions of possible unsatisfactory professional conduct or professional misconduct

NSWMB Commentary on NRAIP Complaints Consultation Paper

- whether continued practice by the registrant presents such a serious risk to public health and safety that their registration be immediately suspended pending investigation and hearing (see section 4.7)
- whether the matter should be referred to an external body for investigation or other action, and
- whether the notification warrants no further action because it is considered by the board to be frivolous, vexatious, lacking in substance or otherwise does not warrant investigation or other action.

The paper suggests that a committee will be responsible for preliminary assessment of all notifications. While this may be reasonable in jurisdictions with a limited number of notifications, it may become impracticable in a large jurisdiction. The proposed system is not dissimilar from the current NSW system of joint assessment of all complaints/notifications with the Health Care Complaints Commission, which involves a meeting of between two and three hours every week to undertake the preliminary assessment process of up to 50 complaints a week. The Board has delegated this preliminary assessment to a medically qualified senior member of staff, as it is very difficult to have several committee members able to regularly commit this amount of time, and a more sporadic roster led to concerns about consistency of decision-making. (See overview document)

Consultation with HCC or equivalent State and Territory bodies

Experience demonstrates that the contribution of health care complaints bodies to the maintenance and improvement of health services is important and valuable. Remedies such as conciliation can play an important role in resolving disputes between practitioners or institutional service providers and their patients. It is proposed that this role continue at the State and Territory level in a way that complements the new national scheme. At the same time, it is important to recognise that the national regulatory scheme is designed to protect the public as distinct from resolution of complaints. To maximise the benefits of the respective roles it is important to ensure there is direct sharing of information between the State and Territory health complaints bodies and the national system. To this end, the legislation will require two-way sharing of identified information on complaints and consultation between the national boards and the State and Territory health complaints bodies.

With respect to a notification that falls within the ambit of the relevant State or Territory HCC, the legislation would require the responsible board, on receipt of the notification, to notify the responsible commissioner, give a copy of the notification to the commissioner, and, in consultation with the commissioner, determine whether or not the notification is to be dealt with by the board, or by the commissioner as a complaint under the relevant State or Territory health complaints legislation. With respect to a complaint received directly by an HCC that relates to a registered health practitioner, a reciprocal statutory obligation to consult would apply to an HCC under their State and Territory Act.

Following consultation with the responsible HCC, if the board considers the notification or complaint raises questions of possible unsatisfactory professional conduct or professional misconduct by the registered practitioner, or the practitioner may be impaired, then the legislation would require that the matter be dealt with by the responsible board. If, at any time, the board considers the matter suitable for conciliation, then the board may refer the matter, or part of the matter to the responsible complaints commissioner.

The overall scheme for joint assessment of all notifications by the Board and the HCC is supported.

The Paper suggests that outcomes of consultation only include disciplinary (UPC or PM) or impairment or conciliation. Referral to Performance should be another outcome.

NSWMB Commentary on NRAIP Complaints Consultation Paper

While the paper envisages that the HCC should only be involved in notifications made by consumers, in the interests of transparency, the consultation must cover all notifications regardless of their source.

Performance management

If the board's preliminary assessment has found evidence that the practitioner's performance may be unsatisfactory, then the board may refer the matter to a performance management committee.

The role of the board or the performance management committee in such cases would be to oversee the assessment and management of poor performance. The board or the committee would have the power to appoint an assessor or assessors to undertake a performance assessment. Lower level interventions such as interviewing the practitioner should also be provided for, according to the nature of the matter under consideration.

Following completion of the performance assessment and receipt and consideration of the report of the assessor, the board or committee would decide whether a formal performance panel hearing is required, or what other action is necessary to address any identified deficits in the practitioner's performance.

Health management

If the board's preliminary assessment has found evidence that the practitioner may have a physical or mental impairment, or may be habitually using alcohol or other drugs and that this is affecting or may affect their capacity to practise, then the board may refer the matter to a health management committee.

The role of the board or the health management committee in such cases would be to oversee the assessment and management of impaired registrants. A board or a health management committee would have the power to appoint a health assessor or assessors to undertake an assessment of the health of the practitioner. Following completion of the health assessment and receipt and consideration of the report of the assessor, the board or committee would decide whether a formal health panel hearing is required, or what other action is necessary to address any capacity to practise issues identified.

Conduct management

For matters to be dealt with by the board rather than the HCC, the legislation would enable the board to appoint an investigator or investigators, and to immediately suspend the registration of the practitioner if necessary, on the grounds of potential risk to public health and safety. The board or a conduct management committee would oversee the investigation of practitioners who may have engaged in unsatisfactory professional conduct, and, if necessary, appoint a panel to conduct a hearing of the matter.

Boards would have powers to decide not to investigate matters on specified grounds, as well as own motion powers to initiate an investigation (and if necessary a panel or tribunal hearing) in the absence of a notification.

The need for formal appointment of an investigator or investigators by the Board is not clear. Also, the immediate suspension of a practitioner on the grounds of potential risk to public health and safety presumably requires some sort of urgent hearing.

Board hearings

If a board or a performance management, health management or conduct management committee determines that a hearing of the matter is required, then it would appoint a panel to

NSWMB Commentary on NRAIP Complaints Consultation Paper

conduct the hearing. The legislation would specify the make up of a health panel, performance panel, along with the formal findings and determinations that each may make.

If during any of these proceedings a committee or panel forms the view that the practitioner may have engaged in professional misconduct, then the committee or panel would be obliged to stop the proceedings and refer the matter to the responsible tribunal (see exception for health matters that can continue to be dealt with internally unless cancellation of registration may be warranted). The practitioner could also choose to have the matter dealt with by the tribunal, rather than a committee or panel of the board.

The section in brackets is unclear. Presumably the intention is that if a practitioner's health is considered to warrant suspension or deregistration, then this, or a recommendation to the responsible tribunal to this effect, would be the outcome, rather than referring the matter for a full disciplinary investigation and hearing.

Referral for tribunal hearing

If the board (or a committee or panel of the board) decides, at any time, that there may be grounds for suspension or cancellation of the practitioner's registration (that is, the practitioner may have engaged in professional misconduct), the legislation would require the board, committee or panel to refer the matter for hearing by the responsible State or Territory tribunal. The exception would be in the case of a registrant who is impaired, where, if suspension is warranted, this could be dealt with by a health management panel of the board.

The relevant State or Territory tribunal would be empowered under the legislation to hear and make findings and determinations with respect to:

- serious misconduct matters referred by the boards, and
- appeals from decisions of performance, health or conduct panels.

Where matters have been referred to a tribunal for hearing, either by the board or on appeal, the board would be responsible for preparing and presenting the case against the practitioner before the tribunal.

Monitoring agreements and conditions

The board (or the respective committees of the board) would have the power to monitor compliance of registrants with any conditions placed on their registration or undertakings given, and to initiate assessment or hearing processes in cases of breach.

The reason for having a specific power to monitor compliance is not clear. Monitoring should be an inherent function of the Board.

If undertakings are to be a part of the system, they need to have a very clear definition which indicates their status, their transparency to the public, other registering authorities, etc, and clear consequences of failure to comply with them. The value of undertakings as a step short of the imposition of conditions is recognised, but their existence should be apparent to the public, etc, so that breaches can be reported to the Board if necessary.

3.3 Proposed definitions for what constitutes a departure from professional standards

Attachment 4 sets out the various definitions and standards in State and Territory registration Acts, against which judgements are made as to whether a registrant's performance, capacity or conduct is deficient and whether they have a case to answer. Jurisdictions deal differently with these matters.

NSWMB Commentary on NRAIP Complaints Consultation Paper

Some jurisdictions have a two tiered standard, for example, ‘unsatisfactory professional conduct’ and ‘professional misconduct’, others do not distinguish between serious and less serious matters. Also, one jurisdiction imposes a positive obligation on registrants to meet ‘the required standard of practice’, while most others focus on defining, more specifically, what constitutes sub-standard practice. There is, however, a level of consistency across jurisdictions in many of the elements that are considered sub-standard.

Proposal 3.3.1: The definitions of unsatisfactory professional conduct, professional misconduct, and unsatisfactory professional performance contained in [Attachment 1](#) are proposed for inclusion in the legislation.

4. Notifications

4.1 Who may make a notification

Proposal 4.1.1: It is proposed that the legislation provide for any person (including an organisation) to make a notification to a board, rather than listing in legislation the particular persons or classes of person who may make a notification.

4.2 In what form may a notification be made

Proposal 4.2.1: It is proposed that the legislation provide that a notification must:

- be made in writing
Including electronically
- contain the particulars of the allegations
- identify the practitioner against whom the notification is made, and
- identify the notifier.

Proposal 4.2.2: It is proposed that the legislation provide a role for the responsible board to ensure that a person who wishes to make a notification is given reasonable assistance to do so.

This would allow assistance to be provided to a person who is not able, on their own, to put their complaint in writing, or who needs assistance to clarify the nature of their complaint (for example, persons with a disability or from a non-English speaking background).

4.3 What sort of matter may be the subject of a notification

The use of the terminology “notification” is supported.

Proposal 4.3.1: It is proposed that the legislation set out the grounds on which a notification may be made about a registered health practitioner, and that these include an allegation that:

- the person’s registration was improperly obtained, or
- the registrant’s capacity to practise is affected because of:
 - physical or mental impairment, or
 - habitual misuse of alcohol or other drugs, or
- the registrant lacks the competence to practice because of insufficient knowledge and skill, including communication skills (such as competency in the English language), or
- the registrant has engaged in unsatisfactory professional conduct or professional misconduct (however termed), or
- the registrant is not of good character.

Any matter relating the professional status of the doctor should be capable of being the subject of a notification. While there may be arguments for specifying heads of notification, these must not be in any way limiting.

NSWMB Commentary on NRAIP Complaints Consultation Paper

Proposal 4.3.2: It is proposed that the legislation provide for a notification to be made (and accepted by the board and acted upon) in relation to a practitioner who was registered at the time of the conduct in question but has since ceased to be registered under this Act or a previous enactment.

The power to receive and deal with a notification notwithstanding the fact that the practitioner has ceased to be registered is supported. There must be appropriate powers for committees and tribunals to make meaningful determinations or orders in relation to a practitioner whose registration has ceased or lapsed.

4.4 Mandatory reporting obligations

There is considerable variation across jurisdictions as to the mandatory reporting obligations that are contained in registration legislation, to whom they apply, and for what types of matters. For example, some jurisdictions have no mandatory reporting obligations for any practitioners, and others have extensive provisions applying to medical practitioners and their employers. Some mandatory reporting obligations apply only to medical practitioners who are in a treating relationship with a practitioner who is impaired (in order to overcome the treating practitioner's confidentiality obligations). Others extend beyond impairment, to professional conduct matters such as sexual misconduct, practising while intoxicated, or other serious breaches of professional standards. [Attachment 2](#) sets out the existing arrangements for mandatory reporting across jurisdictions.

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.

NSWMB Commentary on NRAIP Complaints Consultation Paper

Interested parties are invited to advise of their views with respect to the options for imposing mandatory reporting obligations.

The mandatory reporting obligations recently introduced into the NSW Medical Practice Act address three specific types of behaviour, namely, practising whilst intoxicated, practising in a manner that constitutes a flagrant departure from accepted standards and which causes harm, or engaging in sexual misconduct in the course of practice. It is suggested that if there is to be mandatory notification, careful consideration needs to be given to the spectrum of conduct, etc, that should be the subject of mandatory notification and a decision made about the point on the spectrum beyond which notification should occur, eg. sexual misconduct should be reported, whether it occurs in the course of practice or not.

If there are to be obligations placed on employers, then careful thought will need to be given to the enforcement provisions, particularly in relation to private sector, corporate, etc, employers.

Student registrants and mandatory reporting

If student registration is to apply under the regulatory scheme, then decisions will also be required on whether mandatory reporting obligations should extend to requiring registered practitioners and/or educational institutions to notify the responsible board with respect to a registered student and under what circumstances (impairment, or impairment and conduct matters, such as criminal charges or convictions laid for example, for drug trafficking). The obligations on students would also need to be considered.

Interested parties are invited to advise on whether registered practitioners and/or educational institutions should be required to report registered students to their respective boards, and if so, for what types of matters. Advice is also sought on whether any reporting obligations should be placed on student registrants.

The inclusion of student registration in the scheme is supported, as is the reporting of impairment by educational institutions. The question of whether this reporting should extend to conduct matters is not so clear-cut. There is compelling evidence that student misconduct is a good predictor of subsequent misconduct (Papadakis). While it may not be appropriate for Boards to deal with or manage student misconduct, there is a strong argument for Boards to be informed, so that this information can be used in making the decision to grant registration. (Also covered in Board's response to Registration CP)

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.

4.6 Own motion powers

Most State and Territory Acts provide for boards to deal with matters where there is no external notifier or complainant. However the mechanism through which this is achieved varies as does what the boards are empowered to do in the event of an anonymous complaint. Some Acts provide for the board to make a complaint to itself and in that way initiate proceedings if necessary, others provide 'own motion' powers to initiate investigations or proceedings in the absence of a formal notification. While anonymous complaints are not to be encouraged, own motion powers allow a board to look into potentially serious matters that may come to its

NSWMB Commentary on NRAIP Complaints Consultation Paper

attention from a range of sources, including from data generated through the board's own monitoring of registrants' continuing competence.

Proposal 4.6.1: It is proposed that a board have the power to initiate an investigation into a matter on its own motion, without a notification.

4.7 Immediate suspension powers

Most State and Territory legislation gives powers to registration boards to suspend, in advance of a disciplinary or other process, those registrants whose continued practice is considered to present a serious risk to the community. However, the level of flexibility provided varies, as does the mechanism through which the suspension is achieved. Some jurisdictions empower their boards directly to suspend, others require the board to seek an emergency order from the responsible tribunal. Also, some jurisdictions place a time limit on the suspension (eight weeks, six months, 12 months), in others, no time limit is specified and the board may apply a suspension until the proceedings are completed. Some jurisdictions with time limits allow a second and subsequent period of suspension to be imposed.

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.

The power to suspend in urgent situations is essential. Recent legislation in NSW provides for suspension "in the public interest" as well as for practice posing a significant risk to public health and safety. The scope of this new provision has yet to be tested.

Other than in defined situations (eg. involuntary admission), there must be a process/hearing prior to suspending.

An appropriate period of suspension would be from two to three months, with rollover provisions, and provision to allow the practitioner to place information before the Board which would enable it to review and possibly lift the suspension and replace it by conditions. In addition to this form of review, there should also be a right of appeal against a suspension decision to the responsible tribunal.

Proposal 4.7.2: It is proposed that a practitioner whose registration has been suspended pending completion of an investigation and/or disciplinary process have the right to seek a review of this decision by the responsible State or Territory tribunal. However the suspension would continue to apply while the matter is being heard by the tribunal.

Proposal 4.7.3: It is proposed that the legislation include provisions that empower a responsible board (or a notifications assessment committee) to accept an undertaking from a practitioner as an alternative to immediate suspension of the practitioner's registration. Details of any undertaking would be entered on the public register against the practitioner's name.

NSWMB Commentary on NRAIP Complaints Consultation Paper

5. Preliminary assessment of notifications

5.1 Powers following receipt of a notification

The legislation will need to make provision for a board (or a committee of the board) to make a preliminary assessment of a notification, with a view to determining:

- whether it is within the jurisdiction of the board to deal with the notification
- if so, whether the notification is also within the jurisdiction of an HCC, and if so, whether it should be retained and dealt with by the board, or referred to the responsible HCC for conciliation, and
- whether the notification should be dealt with, in the first instance, as a performance matter, a health matter or a conduct matter.

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.

The details of how these decisions are proposed to be made under the legislation are set out below.

5.2 Grounds for a board to refuse to deal with a notification

Most State and Territory Acts make provision for boards to 'reject', 'refuse' or 'dismiss' a notification (or complaint) and set out the grounds for this. Most allow a board to decide not to proceed with a complaint that it considers to be frivolous or vexatious.

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.
This should not be limited to "investigation" but should indicate that the notification does not warrant any action under the legislation 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. –

5.3 Liaison with HCCs

State and Territory registration Acts contain various statutory arrangements for registration boards and the responsible HCC (in whatever form this occurs) to work together with respect to a complaint against a registered practitioner. Attachment 3 sets out the respective arrangements in each jurisdiction.

While most jurisdictions' Acts specify a requirement for liaison between the respective bodies, these arrangements vary as to:

- which body has first option in dealing with a complaint received in the first instance by either party
- what role the HCC takes in the ongoing management of a complaint that is dealt with by a registration board
- whether the HCC takes on the role of prosecuting serious misconduct matters before a disciplinary tribunal in addition to the conciliation function, and

NSWMB Commentary on NRAIP Complaints Consultation Paper

- the obligations on the respective parties to keep the other informed.

Proposal 5.3.1: In light of the IGA, it is proposed that both the national registration and accreditation legislation and the State and Territory health complaints legislation set out the nature of the relationship between the national boards and the respective State and Territory HCCs and the obligations and powers of the respective bodies, along the following lines:

National registration legislation

The national registration legislation would provide that on receipt by a board of a notification that falls within the ambit of an HCC under a State or Territory health complaints Act (that is, complaints from consumers), the responsible board would be required to notify the responsible HCC and give a copy of the notification, as soon as practicable after the board has received it. The legislation would provide for all information available to the board at this point to be shared with the responsible HCC.

The legislation would then require the board to consult with the responsible HCC, in order to determine whether or not the notification is to be dealt with by the responsible board (as a notification), or by the commissioner (that is, dealt with as a complaint under the relevant health complaints legislation)

The legislation would empower a responsible board to deal with the matter, if, after consultation with the HCC, the board considers the matter raises questions of possible unsatisfactory professional conduct or professional misconduct. However, the board would be empowered to refer a matter, or part of a matter, to the responsible HCC, if the board and the HCC consider the matter suitable for conciliation.

The legislation would also provide for a board, subsequent to this initial consultation with the HCC, to refer a matter, or part of a matter to the HCC at any time, including following a panel hearing, if conciliation is considered appropriate in the circumstances.

State and Territory health complaints legislation

Under local State and Territory health complaints legislation, complementary provisions would empower an HCC to receive and deal with complaints from consumers that relate to registered health practitioners. The primary role of the HCC in this context would be to assess the complaint, and if appropriate, conduct conciliation or other processes between the complainant and the registered health practitioner, with a view to achieving a conciliated settlement or other resolution of the matter.

An HCC might also continue to carry out any other roles conferred under its legislation, such as to investigate and report to the relevant Health Minister on health system failures.

On receipt by an HCC of a complaint against a registered practitioner (or a person who was a registered health practitioner at the time that the conduct complained of took place), the responsible HCC would be required to notify the responsible board and give it a copy of the complaint as soon as practicable after the HCC has received it. The legislation would provide for all information available to the HCC at this point to be shared with the responsible board.

Following consultation with the responsible board, the HCC would be required to refer the matter to the board if the board considers that the matter raises questions of possible unsatisfactory professional conduct or professional misconduct by the practitioner.

In effect, the legislation would encourage the responsible board and HCC to agree on who is best placed to deal with the matter, but that if there are questions about the professional competence of the practitioner or their capacity or suitability to practise, then the board would keep and deal with the matter, or the HCC would relinquish and refer it. The board would retain powers to refer part of a matter to the HCC for conciliation, while continuing to deal with the

NSWMB Commentary on NRAIP Complaints Consultation Paper

professional standards elements.

It is expected that the boards, in consultation with the respective HCCs, would agree a protocol to support these liaison and referral arrangements with the broad parameters set out in the legislation.

In order to give effect to this arrangement, consequential amendments will be required to the respective State and Territory HCC legislation, to complement the provisions in the national legislation.

The role of the HCC in the proposed scheme is significantly different from that of the NSW Health Care Complaints Commission. The NSW model was introduced over twenty years ago following the Chelmsford case, and in response to a perceived need for a body independent of the Board to carry out investigations and prosecutions, albeit within a framework of checks and balances. While the Board and the HCCC have had their differences over the years, this model is seen as being fundamentally sound from a jurisprudential point of view, as well as meeting public expectations of transparency and independence.

It is recognised that the proposed model reflects the IGA, and the prevailing system in most jurisdictions other than NSW. It is suggested that if the role of investigating and prosecuting serious complaints is to remain within the Scheme rather than hiving it off to an independent Health Care Complaints body, the possibility of creating a Health Care Complaints body within the Scheme, but separate from the individual Boards, should be explored. This will provide a measure of transparency and independence from the Boards, while at the same time facilitating the consideration of notifications which cross several different professions and meeting the intent of the IGA.

If the model proposed in the Consultation Paper is adopted, then the HCC should have an alternative dispute resolution function that is not limited to conciliation.

At several points, reference is made to matters being considered by the Board where they raise questions of possible UPC or PM. Matters of health or performance should also be added in these circumstances. (See overview paper)

5.4 Who conducts the preliminary assessment of a notification

The statutory power to determine how notifications are to be dealt with will reside with the respective national boards and in the case of notifications from consumers, following consultation with the responsible HCC. Because of the workload associated with the performance, health and conduct processes for some professions, and the need for local input, it is likely that the legislation will need to make provision to allow for preliminary assessment to occur at the State and Territory level if the board so chooses.

Proposal 5.4.1: It is proposed that the legislation contain powers for a responsible board to establish any number of 'notification assessment committees' to oversee the preliminary assessment of notifications and make decisions on what actions to take. It is proposed that, when duly constituted under the legislation, a notifications assessment committee would be empowered to make all the initial decisions that the responsible board would otherwise be empowered to make, as to how a matter should be dealt with.

In order to achieve this, the legislation would require provisions that:

- a. empower a responsible board to:
 - i. appoint one or a number of notifications assessment committees, and
 - ii. appoint persons to sit on a notifications assessment committee, from a list of persons who have been approved by the Ministerial Council

NSWMB Commentary on NRAIP Complaints Consultation Paper

- b. allow a notifications assessment committee to regulate its own proceedings, while requiring it to observe the principles of natural justice and procedural fairness, and
- c. allow members appointed to notifications assessment committees to be paid the sitting fees and allowances approved the Ministerial Council.

The need for delegation to undertake this role in jurisdictions receiving large volumes of complex complaints has already been referred to in paragraph 3.2.

The proposed Scheme suggests that members of notification assessment committees be appointed from a list of persons approved by the Ministerial Council. This is considered to be cumbersome and unnecessary. The appointment of appropriate persons to be involved in the initial assessment of notifications should be a matter that is within the capabilities of the Boards and their State Committees. It should be remembered that a flexible system will enable a change in course should an inappropriate decision have been made at the outset.

As the very first stage in a possible discipline or other process, assessment will be undertaken on the basis of the available evidence, but the application of principles of natural justice and procedural fairness at this preliminary point is queried. The NSWMB view is that the preliminary assessment should ideally be made on the basis of the notification and any response to that notification by the practitioner.

There is a reference to sitting fees for persons undertaking preliminary assessment. Presumably sitting fees will be payable for all tasks undertaken by appointed persons rather than staff of the agency, etc, and there should be general provisions to cover this. As indicated previously, if there is to be consistency in assessment, then it is important to have a limited and experienced pool of assessors.

5.5 Powers following preliminary assessment of a notification

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)

This dot point indicates that a matter may be referred directly to the responsible tribunal for hearing following preliminary assessment. Presumably this would be a simultaneous referral with a referral to investigation, and it would only arise in very clear-cut cases, eg. where there is a clearly demonstrated breach of conditions. At the time of preliminary assessment, while there may be strong indications that a referral to the tribunal will be warranted, generally this cannot be finally determined until a detailed investigation has been carried out.

- refer the matter for investigation or prosecution by another body (such as for example, the police or Medicare Australia)

NSWMB Commentary on NRAIP Complaints Consultation Paper

- 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

There should be some form of hearing before exercising this very significant power (other than in defined circumstances).

- refer the matter, or part of the matter to the responsible HCC for conciliation, and
- take no further action.

Proposal 5.5.2: It is proposed that the legislation require a board (or committee of the board) to refer a matter to the responsible tribunal for hearing if the board or committee forms the view that:

- the practitioner is not of good character, or
- the practitioner may have engaged in professional misconduct, or
- the practitioner's capacity to practise is affected to such an extent that cancellation of registration may be warranted (health matters).

This paragraph suggests again that there is some basis upon which preliminary assessment can reach a conclusion based on a notification only without investigation. Many notifications received on their face suggest that a practitioner has engaged in, for example, professional misconduct, but until they have been investigated, it cannot be established whether this has actually occurred. Unless this proposal is misunderstood, it is suggested that it is misplaced and referral to the tribunal should only occur at the completion of an investigation.

Proposal 5.5.3: It is proposed that the legislation require the responsible board to:

- give to the notifier notice of the decision, the reasons for the decision and rights of review (if any), and
- give to the practitioner notice of the decision and, in the case of referral to a tribunal or committee of the board, the reasons for the decision.

5.6 Notifiers' rights of review of preliminary assessment decisions

The right of a practitioner to seek a review of a board's decision with respect to a notification generally arises at the end of a performance, health or conduct process, when the board or tribunal has made its findings and determinations. Rights of review for practitioners are dealt with in [section 9.6](#) below.

With respect to notifiers, for some, their complaint may be finalised early, if a board decides to close the matter with no further action. With respect to notifiers' rights at this point, there is variability across jurisdictions. Some Acts are silent on the question of notifier rights concerning a decision made by a board in these early stages. In others, the legislation is explicit about the rights of notifiers at this point.

For example, in one jurisdiction, notifiers have a right to seek a review of the following decisions:

- a decision not to investigate a notification
- a decision to close a matter with no further investigation, and
- a decision to hear a conduct or performance matter by a panel of the board, rather than referring it externally, for tribunal hearing - such a decision involves a judgement by the board about the seriousness of the matter and a complainant may not agree with the board.

NSWMB Commentary on NRAIP Complaints Consultation Paper

In this jurisdiction, review of these early decisions is conducted internally, by a board appointed review panel, but the legislation provides that a nominee of the responsible HCC must sit as a member of each panel, a move designed to bring a level of independence to bear in scrutiny of the board's assessment or investigation process and decisions. The review is conducted, initially, 'on the papers'. However, if a review panel finds a problem with the initial assessment, investigation or the resulting decision, it has the power to investigate further, or substitute its own decision. In practice, complaints from consumers represent only a proportion of all notifications to a board, and of those, only a small proportion of consumers choose to exercise their right of review.

It is considered important that the legislation be transparent about these matters, that those affected know where they stand, and that the legislation balance the rights of registrants and those of consumers. It is also important to attempt to address, at least in part, the perception that registration boards may at times act to protect the interests of registrants rather than those of notifiers, particularly when the board decides no further action is required, and the notifier disagrees.

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.

The Paper does not clearly differentiate between review rights and appeal rights.

Notifiers should have the right to have an administrative review undertaken of the preliminary assessment decision made by the Board. Beyond that point, the role of the notifier changes to a possible witness in proceedings, but he or she is not a party with standing to seek further review or to make an appeal against an adjudicated decision.

The practitioner should have the opportunity to make submissions during the course of an investigation, or the process of assessment of impairment or performance, but the right of appeal should only arise once proceedings have been held, and formal decisions made, including orders or conditions.

Review of process on merits – It is unclear from option 2 why a notifier would only have a review right in relation to a decision to take no further action or to refer the matter to the Conduct or Performance Management Committees but not a decision to refer to a matter into a Health stream. It would appear that this approach is predicated on the concept that these are seen as different levels of seriousness rather than quite different processes.

6. Performance matters

6.1 Overview of management of performance related matters

From time to time, a board may identify a practitioner whose knowledge, skill, judgement or care is or may be below the standard that their peers would expect, and which raises questions as to their continuing competence to practise.

NSWMB Commentary on NRAIP Complaints Consultation Paper

(suggest “continuing ability to practise”, rather than “ continuing competence to practise”)

A number of registration Acts across State and Territories, particularly those dealing with larger professions such as medicine and nursing include specific provisions to address poor or substandard performance. There are a variety of models – some provide for boards to deal cooperatively and flexibly with such practitioners to make arrangements to assess the performance of a registrant and, where deficits in their skills and knowledge are identified, reach agreement with the registrant, on a course of action to address these. This may or may not involve the placement of conditions on the practitioner’s registration.

In other jurisdictions, the process operates more formally, separate from the disciplinary process, and deals with performance issues which very clearly *do not* fall into a disciplinary category, in a framework of early intervention and remediation, the primarily aim being to improve overall professional performance. While they rely on the practitioner’s co-operation and willingness to learn and improve, they can also be more directive.

All systems have in common however, the need for clear and flexible processes to address as disciplinary matters any concerns that the practitioner may be placing the public at risk. **This sets the Performance Assessment threshold too low.** Thus, where a board’s assessment or monitoring processes identify a risk and/or the practitioner is resistant to addressing this, the board should have the option of dealing with this as a disciplinary matter rather than a performance matter. Equally, all schemes recognise that performance assessment processes can also provide a useful adjunct to a matter which is primarily disciplinary. **However, Performance Assessment should not be a trawling exercise for issues to be fed back into the parallel disciplinary process.**

Some jurisdictions have also identified practitioners who may be reluctant to participate and co-operate in the process that lacks a clear distinction between performance assessment and disciplinary matters, raising concerns the assessment is no more than a preliminary exercise to trawl for evidence to support the prosecution of a disciplinary matter.

Proposal 6.1.1: It is proposed that the legislation make provision for boards to deal with practitioners whose performance is unsatisfactory (though not sufficiently serious to amount to professional misconduct or unsatisfactory professional conduct) through a cooperative and educative process, rather than through a disciplinary process. The legislation would include powers for a board:

- at the time of annual renewal of a practitioner’s registration (in response to data generated through application of continuing competence requirements), or through receipt and investigation of a notification, to request a practitioner undergo a performance assessment, and
- to provide guidance and/or direction to the practitioner designed to address any deficits identified in their skills or knowledge, via further education or supervised practice or other matter, which could include conditions on the practitioner’s registration.

As previously suggested, ‘request’ implies that the practitioner can refuse.. Failure to cooperate with Performance Assessment should be grounds for suspension until the practitioner is willing to cooperate. Current NSW provisions have proved inadequate in this regard.

The practitioner should be ‘required’ to address deficits in their performance, rather than the Board providing guidance.

NSWMB Commentary on NRAIP Complaints Consultation Paper

6.2 Performance management

If the board's preliminary assessment has found evidence that the practitioner's performance may be unsatisfactory, then the board may refer the matter to a performance management committee.

As previously suggested, provision for lower level interventions is essential.

Proposal 6.2.1: It is proposed that the role of the board or a performance management committee be to oversee the assessment and management of registrants whose performance may be unsatisfactory. A board or a performance management committee would have the power to appoint an assessor or assessors to undertake a performance assessment of the practitioner. Following completion of the performance assessment and receipt and consideration of the report of the assessor, the board or the committee would decide whether a formal performance panel hearing is required, or what other action is necessary to address the performance issues identified (if any).

Proposal 6.2.2: It is proposed that a board or a performance management committee have powers, following receipt of a performance assessment report to:

- request the practitioner to undertake further education and/or supervised practice
- counsel the practitioner
- request the practitioner give an undertaking to the board, which might include, for example, the placement of conditions on registration
- refer the matter for hearing by a performance panel (performance matters)
- refer the matter **or part of it** to be handled as a health management matter (impairment matters)
- refer the matter to be handled as a conduct management matter for investigation (disciplinary matters)
- refer the matter, or part of the matter to the responsible HCC for conciliation, and
- take no further action.

Undertakings must be binding and publicly available.

6.3 Performance assessments

Proposal 6.3.1: It is proposed that the legislation would empower a board (or performance management committee of a board) to appoint one or a number of assessors, who are not members of the responsible board (or committee of the board), to conduct a performance assessment of the practitioner, and that the board would pay for the assessment.

Specific provisions are required to set out the powers of the assessors.

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.

It is not clear whether the 7 day provision is timed from the date of the performance assessment (impractical) or date of receipt of the final report.

NSWMB Commentary on NRAIP Complaints Consultation Paper

The practitioner should be provided with a copy of the Report, but whether a discussion is the most appropriate way of doing this will depend very much on circumstances.

Proposal 6.3.3: It is proposed that the legislation would provide a process for dealing with circumstances where a practitioner:

- does not agree to a performance assessment, or
- does not abide by an agreement to undergo a performance assessment.

In such circumstances, the board would be empowered to refer the matter to a conduct management committee for investigation, or to a tribunal for hearing.

There should also be provision for the suspension of or imposition of conditions on the practitioner.

6.4 Performance panel hearings

At times, the matter may be sufficiently serious to warrant a more formal board hearing process, with appearance by the practitioner before a panel of the board.

Proposal 6.4.1: It is proposed that following referral of a matter for consideration as a performance matter, the legislation provide:

- for the committee (or the board) to appoint, if it considers necessary, a performance panel, to hear a matter relating to the professional performance of a 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, amongst other things the report/s of performance assessment, and
- for a panel to be required to refer the matter to the responsible tribunal for hearing if the practitioner requests, or if, at any time, the panel identifies a pattern of poor performance sufficiently serious to warrant suspension or cancellation of the practitioner's registration.

6.5 Decisions available to performance panel following a hearing

Proposal 6.5.1: It is proposed that, following a hearing, a performance panel be empowered to take the following actions:

- require the practitioner to undertake further education and/or supervised practice
- counsel the practitioner
- require the practitioner to give an undertaking to the board
- place conditions on the practitioner's registration
- refer the matter to the board or health management committee for health assessment (impairment matters)
- refer the matter to the board or conduct management committee for investigation (disciplinary matters)
- refer the matter, or part of the matter to the responsible HCC for conciliation

NSWMB Commentary on NRAIP Complaints Consultation Paper

- refer the matter an external body (for example, the police, Medicare, State or Territory drugs and poisons units) for investigation, and
- take no further action.

Proposal 6.5.2: 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.

Proposal 6.5.3: It is proposed that the legislation make provision for a panel to be required to give reasons for its decision to the practitioner and the notifier, within 28 days.

It would seem that the Paper envisages that matters are suitable for performance assessment

where the performance has not caused harm to anyone, and where the practitioner is prepared to cooperate in some sort of a voluntary assessment process, ie. it seems that performance is an option for the practitioner. The Paper correctly notes that it is not a disciplinary process, but suggests that this means that it has to be voluntary.

The New South Wales Medical Board's position is that Performance must be a quite distinct process with strong powers including powers to deal with non-cooperation, and the ability to handle cases where there have been significant shortcomings in performance and serious outcomes, but there is no element of wilful, unethical, reckless or criminal conduct. (Covered in overview paper)

The notifier should be advised of the outcome of the PA, but circumstances in which providing reasons for decision would be justified would be rare.

7. Health or impairment matters

7.1 Overview of management of health related matters

A registered practitioner may suffer from an illness, injury or disability which affects or may affect their capacity to practise safely. Most commonly, impairment is the result of mental illness, addiction or neurological illness, all of which may affect the practitioner's insight as well as their capacity for safe practice.

Impaired practitioners generally come to the attention of a board through a consumer complaint, notification of a colleague or employer, or self-notification. This may be in response to a single serious or non serious incident, or a pattern of poor performance.

In fact, this is rarely the case. Most notifications come from colleagues, employers or treating doctors. Self-notification is a common presentation as well. Health issues are rarely immediately apparent in incident or performance notifications.

Where a registrant is suffering from a physical or mental condition that affects their capacity to practise, most State and Territory Acts make provision for boards to deal flexibly with such practitioners (rather than via a formal disciplinary process).

The legislation usually allows the boards the flexibility to make arrangements by agreement with the registrant, to suspend or limit the registrant's practise if necessary, and to work cooperatively with them to assist their return to unrestricted practice, without the need for a formal hearing or tribunal process. Conditions may or may not be placed on their registration.

NSWMB Commentary on NRAIP Complaints Consultation Paper

Processes should certainly be empathetic and non-adversarial, but should, nevertheless be formalised into conditions on the practitioner's registration when impairment (according to its definition) is identified. Informal unenforceable deals should not be a feature of the new system

These arrangements are entered into and monitored locally, and are designed to protect the public while enabling impaired practitioners to return to or remain in the workforce if it can be made safe for them to do so.

Proposal 7.1.1: It is proposed that the legislation make provision for boards to deal flexibly with practitioners who have a health condition, or whose habitual use of alcohol or other drugs, is compromising or may compromise their capacity to practise. Such provisions would enable a board to:

- accept a self-referral from a practitioner who is unwell, and enter into an agreement with the practitioner (or their representative if they have arranged for power of attorney) to:
 - suspend their registration for an agreed period, or
 - limit their practice via the imposition of conditions on their registration, and/or
 - accept an undertaking or enter into some other form of agreement
- refer the practitioner to a range of support programs designed to assist with resolution of their health issues and successful return to unrestricted practice if possible, and
- monitor compliance of the registrant with any agreement reached or conditions placed on registration.

As above in relation to accepting an undertaking or enter into some other form of agreement

In some jurisdictions there are various types of health programs that provide assistance and referral services, and in some cases, treatment and monitoring of registrants. Some are conducted externally to the board while others are run directly by the board as part of its impairment pathway.

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.

If by 'Health programs' Options 1 and 2 envisage the provision of treatment services by or through the Board, then neither option is supported. The role of the board should be the assessment, management and monitoring of practitioners who are impaired according to the statutory definition. Boards should not offer treatment services as to do so blurs their relationship with the practitioner. For monitoring to be effective, it must be approached within a regulatory, public protection, rather than a treatment framework, so that regulatory decisions are not adversely influenced by a concurrent treating relationship.

Similarly, external services that are fundamentally treatment-based cannot not be relied upon to undertake a regulatory and monitoring role. There is potential for non-compliant practitioners to be hidden from Board attention because of an emphasis on treatment and advocacy rather than

NSWMB Commentary on NRAIP Complaints Consultation Paper

regulation and public protection. This potential has been recognised and realised in programs that have adopted this model. In addition, it is an important principle that Boards should make every decision about a practitioner in the full knowledge of their history and current issues. Devolving impairment issues off to an external or quarantined agency defeats this principle.

The only circumstance in which it may be acceptable for boards to offer 'health programs' is through financial support of organisations such as the Doctor's Health Advisory Service which have no regulatory role whatsoever.

7.2 Health management

If the board's preliminary assessment has found evidence that the practitioner may have a physical or mental impairment, or may be habitually using alcohol or other drugs, and that any of these is affecting or may affect their capacity to practise, then the board may refer the matter to a health management committee.

Proposal 7.2.1: It is proposed that the role of a board or a health management committee in relation to a health matter be to oversee the assessment and management of registrants whose capacity to practise may be affected by physical or mental impairment, or habitual use of alcohol or other drugs. A board or a health management committee would have the power to appoint an assessor or assessors to undertake a health assessment of the practitioner. Following completion of the health assessment and receipt and consideration of the report of the assessor, the board or the committee would decide whether a formal health panel hearing is required, or what other action is necessary to address the health issues identified (if any).

Proposal 7.2.2: It is proposed that a board or a health management committee have powers, following receipt of a health assessment report, to:

- request the practitioner to undertake further education and/or supervised practice
- counsel the practitioner
- request the practitioner to give an undertaking to the board, which might include, for example, the placement of conditions on registration
- refer the matter for hearing by a health panel for hearing (health matters)
- refer the matter to be handled as a performance management matter for performance assessment (performance matters)
- refer the matter to be handled as a conduct management matter for investigation (disciplinary matters)
- refer the matter, or part of the matter to the responsible HCC for conciliation
- refer the matter to an external body (for example, the police, Medicare, State or Territory drugs and poisons units) for investigation, or
- take no further action.

Practitioner education is not the primary goal of Health program. Undertakings must be binding and on the public record.

7.3 Health assessments

Proposal 7.3.1: It is proposed that the legislation would empower a board or a health management committee of a board to appoint one or a number of assessors, who are not members of the responsible board or committee and who are agreed upon by the board and the practitioner, to conduct a health assessment. It is proposed that the legislation would require the board to pay for the assessment.

NSWMB Commentary on NRAIP Complaints Consultation Paper

The system could be paralysed by allowing the practitioner to 'agree to' the person conducting the health assessment. Unless there is a legitimate conflict of interest in relation to the assessor chosen by the board, the practitioner should be compelled to attend.

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.

It is not clear why such a specific requirement is included, and implies that deals will be negotiated outside a formal framework. See also comments in relation to 6.3.2.

Proposal 7.3.3: It is proposed that the legislation would provide for circumstances where a report of a health assessment contains information of a medical or psychiatric nature which the committee considers, if disclosed to the practitioner, might be prejudicial to their physical or mental health or wellbeing. In such cases, the board or committee would be empowered to decide not to give the report directly to the practitioner, but rather, to give it to a registered practitioner nominated by the health practitioner.

Proposal 7.3.4: It is proposed that the legislation would provide a process for dealing with circumstances where a practitioner:

- does not agree to a health assessment, or
- does not abide by an agreement to undergo a health assessment.

In such circumstances, the board or committee would be empowered to refer the matter for hearing by a health panel, or to a tribunal.

7.4 Health panel hearings

At times, the matter may be sufficiently serious to warrant a hearing, with appearance by the practitioner before a panel of the board.

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

NSWMB Commentary on NRAIP Complaints Consultation Paper

- 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.

Undertakings must be binding and on the public record.

7.5 Decisions available to a health panel following a hearing

Proposal 7.5.1: It is proposed that, following a hearing, a health panel have the power, to take the following actions:

- require the practitioner to undertake treatment and/or supervised practice
- counsel the practitioner
- require the practitioner to give an undertaking to the board
- place conditions on the practitioner's registration
- refer the matter to be handled as a performance management matter (performance matters)
- refer the matter to be handled as a conduct management matter for investigation (disciplinary matters)
- refer the matter, or part of the matter to the responsible HCC for conciliation
- refer the matter for investigation by an external body, or
- take no further action.

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.

This is appropriate provided that the Tribunal proceeds on the basis of the evidence before the Performance Panel rather than requiring the matter to be referred into the disciplinary pathway for investigation, etc.

Proposal 7.5.3: It is proposed that the legislation make provision for a panel to be required to give reasons for its decision to the practitioner and the notifier, within 28 days.

See comments in relation to 6.5.3

8. Conduct matters

8.1 Overview of management of conduct related matters

From time to time, a board may identify a practitioner whose professional conduct falls below the standard that their peers or the public would expect, and which raises questions as to their suitability to practise.

While the proposals outlined in [sections 6 and 7](#) above provide powers for boards to deal cooperatively and flexibly with practitioners to address health matters that affect their capacity to practise, or deficits in their skills and knowledge that compromise their performance, there are times when the practitioner may be competent and well, but has behaved in an unethical or unprofessional matter, or has failed to cooperate with the board in addressing identified performance or health issues.

NSWMB Commentary on NRAIP Complaints Consultation Paper

Proposal 8.1.1: It is proposed that the legislation make provision for boards to accept a notification that a practitioner has engaged in unsatisfactory professional conduct, to refer the matter to a conduct management committee for investigation, and if necessary, conduct hearing into the matter.

Where the conduct is so serious that it might constitute professional misconduct, the board would be required to refer the matter for a tribunal hearing.

The proposed Scheme suggests that at preliminary assessment, if the conduct is so serious that it might constitute professional misconduct, the Board is required to refer the matter for a tribunal hearing. As previously indicated, many matters at the time of preliminary assessment could on their face constitute professional misconduct, but investigation is required to establish whether this is in fact the case and whether there is evidence to back up the claims made in the notification. Referral to the tribunal should occur after the matter has been investigated other than in the most clear-cut and exceptional cases.

8.2 Conduct management

If the board's preliminary assessment has found evidence that the practitioner may have engaged in unsatisfactory professional conduct, then the board may refer the matter to a conduct management committee.

Proposal 8.2.1: It is proposed that the role of the board or a conduct management committee in relation to a conduct matter be to oversee the investigation of a registrant who may have engaged in unsatisfactory professional conduct. A board or a conduct management committee would have the power to appoint an investigator to undertake an investigation. Following completion of the investigation and receipt and consideration of the report of the investigator, the board or the committee would decide whether a panel hearing is required, or what other action is necessary to address the conduct issues identified.

When a matter has been referred to the conduct management committee, it would have power to appoint an investigator. It is suggested that this formal step could be circumvented by simply giving the committee the power to initiate and oversee an investigation, thereby enabling a degree of flexibility in how and by whom the investigation was conducted. Presumably most investigations would be conducted by specifically trained staff members, under the oversight of the committee.

Proposal 8.2.2: It is proposed that a board or a conduct management committee have powers, following receipt of a report of an investigation, to:

- request the practitioner to undertake further education and/or supervised practice or alter the way they practise
- counsel the practitioner
- refer the matter to be handled as a performance management matter (performance matters)
- refer the matter to be handled as a health management matter (impairment matters)
- refer the matter for hearing by a conduct panel (unsatisfactory professional conduct matters)
- refer the matter to the responsible State or Territory tribunal for hearing (professional misconduct matters)
- refer the matter, or part of the matter to the responsible HCC for conciliation
- refer the matter to another external body (for example, the police, Medicare, State or Territory drugs and poisons units) for investigation, or
- take no further action.

The first dot point envisages an agreed cooperative arrangement. It is noted also that the conduct management committee should have the power at any time in the course of an

NSWMB Commentary on NRAIP Complaints Consultation Paper

investigation to refer the matter to performance or health pathways, as investigations will often reveal that such a referral is appropriate.

8.3 Investigations

Appointment of investigators

Proposal 8.3.1: It is proposed that the legislation empower a board or notifications committee to appoint, in writing, a person or persons to investigate a notification.

Proposal 8.3.2: As outlined above, it is proposed that the legislation empower a responsible board to initiate an investigation without a notification, and to proceed to refer a matter to a conduct management committee or tribunal without an investigation.

For reasons outlined above, it is difficult to see the circumstances in which a matter would be referred by the Board to a tribunal without an investigation, unless this proposal is envisaging certain strict liability offences, or the breach of critical compliance conditions. Even in such cases, there would presumably be a need to conduct some sort of investigation to establish the facts of the breach.

Notice of an investigation

Most State and Territory Acts make provision for a practitioner who is subject to an investigation to be given notice of the investigation, including details of the allegations. Some also make provision for the practitioner not to be given notice in certain circumstances.

Proposal 8.3.3: It is proposed that the legislation require the board to give notice of an investigation to the registrant, and that the notice must:

- be in writing
- be provided to the practitioner within 28 days of the decision to conduct an investigation, and
- advise the practitioner of the nature of the matter being investigated.

Proposal 8.3.4: It is proposed that the legislation empower the board or an investigator to decide not to give notice to the practitioner of the investigation if such notice might prejudice an investigation or place at risk a person's health and safety, or place a person at risk of intimidation or harassment.

Timelines for the conduct of investigations

There is a need to ensure the timeliness of board investigations, disciplinary and other processes under the national scheme. However, it is problematic to specify legislative timeframes for completion of an investigation or disciplinary or other process, since at times the delays will be beyond the control of the board.

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.

The requirement for three monthly progress reports to both the notifier and registrant could prove to be a significant burden in a jurisdiction with a substantial number of matters under

NSWMB Commentary on NRAIP Complaints Consultation Paper

investigation unless the progress reports are very brief. At the consultation meeting, consumer representatives suggested that a 3 monthly reporting interval was too long.

8.4 Powers of investigators – search, entry, seizure

All jurisdictions provide powers for inspectors/investigators to enter and search premises and seize documents and other 'things', however the extent of these powers varies as does the detail. For example, some jurisdictions provide powers for non-residential premises to be entered during business hours without a warrant. Others go further and provide powers for an inspector to use reasonable force to break into non-residential premises if immediate action is required, and without a warrant, or without a warrant but with five days notice in writing.

Proposal 8.4.1: It is proposed that the legislation provide for investigators to exercise the following powers:

- by written notice, require a person to:
 - provide information, and
 - attend the investigator to answer questions or produce documents
- enter the premises of a registrant's practice (unless it is also their private residence), during ordinary business hours and, with the consent of the occupier, inspect and search premises generally and request the production of documents or other items and the provision of information, and
- obtain a warrant to enter and search premises and seize evidence (see below).

Proposal 8.4.2: It is proposed that the legislation empower investigators or other persons authorised by a board to obtain and execute a warrant to enter and search premises and seize documents or other items. The legislation would provide for, amongst other things:

- in general terms, where a warrant may be obtained (via local State or Territory Magistrates Court or similar authority)
- what a warrant may authorise (subject to the applicable State/Territory law), that is, powers to:
 - enter premises
 - require information including name and address
 - require production of documents and other items, and
 - seize evidence
- how seized evidence is to be handled, for example, receipts, storage, damage, compensation, etc
- safeguards on the exercise of enforcement powers
- evidentiary requirements, and
- various offences for failure to comply, obstruction of an authorised inspector, etc.

8.5 Conduct panel hearings

At times, a matter may be sufficiently serious to warrant a hearing, with appearance by the practitioner before a panel of the board.

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

NSWMB Commentary on NRAIP Complaints Consultation Paper

- 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.

A specific provision is envisaged in relation to the panel considering the report of the conduct management committee, including the results of any investigations. This suggests that the panel may be considering the matter on paper rather than requiring evidence to be presented to it with the registrant having the right to present evidence, make submissions, etc. It is noted that the panel may set its own procedures which could in fact encompass more extensive proceedings.

The power to refer a matter to the tribunal if suspension or cancellation of registration is envisaged based on impairment should also include a general power to refer if evidence emerges which suggests suspension or deregistration is warranted (in the absence of evidence of impairment). Presumably most impairment matters will have been dealt with through the health procedures, but there may be some matters before the conduct panel where impairment is involved.

8.6 Decisions available to a conduct panel following a hearing

Proposal 8.6.1: It is proposed that, following a hearing, a panel have the power to take the following actions:

- require the practitioner to undertake further education, supervised practice or alter the way they practise
- caution the practitioner
- reprimand the practitioner
- counsel the practitioner
- require the practitioner to give an undertaking to the board
- place conditions on the practitioner's registration
- refer the matter to be handled as a performance management matter (performance matters)
- refer the matter to be handled as a health management matter (health matters)
- refer the matter, or part of the matter to the responsible HCC for conciliation
- refer the matter for investigation by an external body (for example, the police, Medicare, or a State or Territory drugs and poisons unit), or
- take no further action.

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.

NSWMB Commentary on NRAIP Complaints Consultation Paper

Panels should be required to consider all previous disciplinary, performance and health history so that a complete picture of the practitioner is available to it.

Proposal 8.6.3: It is proposed that the legislation make provision for a panel to be required to give reasons for its decision to the practitioner and the notifier, within 28 days.

9. Ensuring accountability, transparency and procedural fairness

9.1 Achieving separation of functions

The terms of the IGA provide for a structural separation of the assessment, investigation, prosecution and determination of disciplinary matters at only one point, that is, serious misconduct matters are to be dealt with by a State or Territory tribunal that is independent of the agency. As a result, the functions of assessment, investigation, prosecution (of both serious and less serious issues) and determination of less serious issues, will all fall to the relevant national board.

This requires the legislation to address issues of due process (for example avoidance of bias in decision making and pre-judgement), given the IGA structure provides that one body will have the capacity, not only to investigate but also prosecute and make determinations on less serious matters. By way of example, criminal matters are generally pursued by separate offices for each stage of the process, that is, the police investigate allegations, decisions as to prosecution are referred to a separate body (generally a Director of Public Prosecutions) and all decisions as to findings of guilt and penalties are made by the courts. This separation of process not only addresses possible issues of prejudgment, but also ensures a level of oversight of the investigative process, which all provides for a more robust and accountable system. Such processes can add to public confidence in systems of regulation.

It is recognised that the analogy of the criminal law is not directly appropriate, given the criminal law is a punitive model while professional regulation is focussed on public protection. The issues however, particularly in relation to due process, have some relevance given the potentially serious impact of the outcome of a disciplinary process on a practitioner.

To this end, some jurisdictions have addressed this by separating the investigation and prosecution function from the registration board and establishing internal checks in the assessments and decision making processes to ensure due process. The separate investigative body is also seen as having the advantage of being able to develop a body of expertise in investigations in a single organisation, enhancing consistency of approach to investigations across all professional groups.

Given the terms of the IGA, this paper is not proposing to pursue such a tightly constructed model. It is considered however, that public and professional confidence in the new national system can be achieved through other processes. Some of these have already been outlined in this paper: provisions for review and appeal as anticipated in the IGA; provisions that there be no overlap between the membership of panels and the commissioning board or committee, options for seeking review for notifiers (see section 5.6) etc.

There remains a question as to whether these arrangements sufficiently safeguard procedural fairness and public confidence in the scheme or whether additional mechanisms are required.

As previously indicated, the NSWMB considers that there is a case for making clearer the separation between investigation/prosecution and adjudication, and noting the position taken in the IGA, believes this could be achieved by having an independent investigatory arm within the NRAS structure rather than having each Board conducting its own investigations.

NSWMB Commentary on NRAIP Complaints Consultation Paper

The option proposed in the Paper of creating a Director of Proceedings reflects the current NSW legislation and would be supported as a second option. However the NSWMB experience has been that it may not be in the interests of the overall integrity of the regulatory system if the Director of Proceedings only becomes involved at the final stage and either determines not to proceed with matters because of lack of evidence obtained during a poorly conducted investigation, or has to refer the matter back for further investigation to prepare a more solid case.

In any circumstance, the Director of Proceedings should have a clear professional regulatory charter, rather than a strict “are we going to win this case” mandate. (Covered in overview document)

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.

Option 2 (above) is designed to ensure that important decisions are publicly accountable, and are made following an assessment against specific legal criteria. This should reduce the capacity for criticism that irrelevant matters have been considered in the decision to prosecute before a tribunal, and ensure that any prosecution taken is legally sound. In NSW and New Zealand, matters are referred to the director of proceedings at the end of an investigation, for the purposes of deciding whether disciplinary proceedings should be taken. The director, independently of the board then makes a decision having regard to legal principles, any submissions made by the practitioner, the wishes of the notifier (if any), and public health and safety, and other criteria (see 9.1.2 below).

It may be seen that this process in some way removes the national boards from an oversighting role in the investigative process. This is not intended to be the case however. It is better to view the process as similar to the criminal law, where most jurisdictions have a director of public prosecutions who assesses the findings of an investigation at law, and determines whether based on the evidence available, a prosecution can reasonably be made out. It effectively provides the boards with a protection that proceedings commenced are legally sound, and an opportunity to assess what additional evidence may be required before a formal tribunal process is commenced.

Option 3 (above) is designed to increase the level of independent input into the management of serious matters without taking away from the boards their role in decision-making in relation to tribunals. The review would have regard to legal principles and other criteria but would not involve separate submissions from the parties. The boards would need to be able to have a right of appeal against the decision of such a review.

Proposal 9.1.2: It is proposed that the legislation establish public interest criteria on which any decision to prosecute a matter before a State or Territory tribunal should be based.

Relevant criteria could for example include:

- the protection of the health and safety of the public

- the seriousness of the alleged conduct, and
- the likelihood of proving the alleged conduct.

9.2 Matters involving registrants from different professions

It is not unusual for a complaint – particularly those involving care in a hospital or other health care facility – to involve a number of different professional groups, such as nurses, medical practitioners and allied health professionals, as well as questions of systemic or institutional deficiencies. Ensuring systemic issues are properly addressed will largely be dealt with by ensuring State based bodies with a role in reviewing these type of matters are notified when these cases arise. It is important that there be a co-ordinated and consistent approach to the assessment, management and investigation of these types of cases.

Proposal 9.2.1: It is proposed that the legislation include provisions that allow boards to deal jointly with matters that relate to two or more practitioners who are registered by different boards. This would allow boards to conduct joint investigations of several practitioners arising from a single notification, and any other registrants identified during the investigation as involved in the same events that led to the notification.

The practical difficulties in several boards conducting joint investigations could be considerable and would be overcome with a single investigatory body.

9.3 Legal representation for registrants at panel hearings

With respect to the rights of a registrant in a board panel hearing, different arrangements are in place across jurisdictions. It is intended that panel hearings be low key and informal, at least as far as is possible given the need for proper consideration of the matter. Allowing a registrant to have 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 the responsible tribunal.

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.

Panel hearings are to be conducted in accordance with procedures set by the panel, and in compliance with the principles of natural justice. It is in keeping with this that there be no right of legal representation but that a person may speak on behalf of the registrant with leave of the panel as per option 4b.

NSWMB Commentary on NRAIP Complaints Consultation Paper

9.4 Confidentiality of panel hearings

Whether board panel hearings are open to the public or closed varies across jurisdictions. This depends in part on whether the board deals with both serious misconduct matters as well as less serious matters.

There are a number of options for dealing with the confidentiality of panel hearings:

Option 1: All panel hearings are closed to the public.

Option 2: All performance and health panel hearings are closed to the public but conduct hearings are open to the public but the panel has powers to close the proceedings or part of the proceedings.

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.

NSWMB notes recent legislation in NSW requiring the equivalent of the conduct panel hearing to be open to the public.

9.5 Status of notifiers at panel hearings

While some consumer complainants may perceive that the role of a board is to resolve grievances between the consumer and the registrant, or to punish a practitioner, this is not 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.

Proposal 9.5.1: It is proposed that the legislation provide for the notifier to be present at a hearing to give evidence (if required by the board), and to speak with the leave of the panel. It is not proposed that the notifier would have a right under legislation to seek a review of a decision of a hearing panel.

The status of the notifier should depend upon the nature of the matter, and would generally at its highest be that of a witness. It is agreed that the notifier should not have a right to seek a review of (or appeal against) the decision of a hearing panel.

9.6 Review rights for registrants

While most State and Territory Acts make provision for a right of review for a practitioner from a performance, health or conduct proceeding, the body to which the matter is referred varies.

Proposal 9.6.1: It is proposed that the legislation provide for a practitioner to seek a review of a hearing panel decision, to the responsible State or Territory tribunal, and for this to be a review of the matter on the merits.

9.7 Notice of decisions of hearing panels

Proposal 9.7.1: It is proposed that the legislation require a responsible board to give notice of its decision in relation to a conduct hearing to the registrant, their employer and the notifier, and

NSWMB Commentary on NRAIP Complaints Consultation Paper

provide discretion for the board to provide notice to a range of other persons or organisations including an equivalent registration authority overseas, a government agency or regulatory body.

9.8 Role of Commonwealth, State and Territory ombudsmen

In addition to the role of State and Territory HCCs or their equivalent who are empowered to deal with consumer complaints against health service providers, most jurisdictions have ombudsman legislation which provides for a statutory appointee (an ombudsman) to receive complaints, and investigate or inquire into any administrative action taken by a government department or public statutory body, including a registration board. The jurisdiction of an ombudsman will not extend to the disciplinary decisions of a tribunal (which are subject to formal appeal processes). Ombudsman legislation generally allows recommendations to be made to the decision maker on matters of process but does not allow an ombudsman to overturn a decision. [Attachment 5](#) sets out the relevant arrangements in each jurisdiction.

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.

It is understood that the role of the Ombudsman is to consider and make recommendations in relation to administrative decision-making processes. While this is appropriate for administrative matters such as assessment decisions or investigatory procedures, the Ombudsman should have no role in reviewing decisions made by “adjudicatory” bodies such as conduct panels, health panels or performance panels. Rights of appeal to the decisions of these panels should lie to the tribunal.

10. Tribunal hearings

The NSW Medical Tribunal consists of a District Court Judge as Chairperson, two medical and one lay members. Serious matters which may warrant deregistration are prosecuted in the Tribunal by the Health Care Complaints Commission, and the Tribunal also hears appeals from Board decisions, Professional Standards Committee decisions, etc, and applications for restoration to the Register by practitioners who have previously been struck off. The NSWMB contributes to the costs of the Medical Tribunal (currently \$650,000 per annum) and pays sitting fees for the medical and lay members. The Tribunal sits approximately three days per week.

10.1 Establishment or continuation of State and Territory tribunals

In accordance with the IGA (as outlined in [section 1.4](#)), each State and Territory is to determine the tribunal within its jurisdiction that will be conferred with jurisdiction to hear locally, matters arising from decisions of the boards with respect to the registration, discipline, performance and health functions.

[Attachment 6](#) sets out current arrangements by jurisdiction with respect to the hearing of unsatisfactory professional conduct/misconduct matters (however described) and appeals from board decisions.

In order to give effect to the provisions of the IGA, the task will be different in each jurisdiction. Some jurisdictions may wish to continue current arrangements, while others may establish new arrangements.

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.

Proposal 10.2.1: It is proposed that the national legislation (as opposed to legislation in each State and Territory) make provision for the following:

- the definition of a 'responsible tribunal'
- the grounds on which a responsible board may refer a matter to the responsible tribunal
- the grounds on which a responsible board must refer a matter to the responsible tribunal (for example professional misconduct matters)
- what matters a tribunal may hear in its review jurisdiction
- what matters a tribunal may hear in its original jurisdiction
- who may make an application with respect to the tribunal's original and review jurisdictions, and
- which bodies must be notified of a decision of the tribunal, for example, the registrant, the notifier, the responsible HCC (where relevant), any employer, Medicare, the Professional Services Review Scheme, etc.

Proposal 10.2.2: It is proposed that with respect to other matters, the respective State and Territory legislation specify the detailed procedure of the tribunal, such as application processes, powers to close hearings and suppression of the identity of persons appearing, etc. It is proposed that State and Territory legislation make provision for at least the following:

- hearings to be open to the public but with power for the panel to close the hearing under certain circumstances
- powers for a hearing panel to suppress the identity of any party or witness to the proceedings, and
- decisions and reasons to be published.

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.

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

NSWMB Commentary on NRAIP Complaints Consultation Paper

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.

Proposal 10.4.2: It is proposed that with respect to the exercise by the responsible tribunal of its review jurisdiction, the national legislation specify the following as reviewable decisions:

- refusal to register (including failure to make a registration decision within the specified period, for example three months)
- refusal to endorse registration
- refusal to renew registration
- refusal to renew an endorsement on registration
- imposition of conditions on a practitioner's registration or endorsement of registration
- refusal to lift or vary conditions on a registration or endorsement of registration
- cancellation of registration because the practitioner is no longer eligible for registration
- a finding or determination by a performance panel, health panel or conduct panel (see [sections 6.5, 7.5, and 8.6](#) of this paper)
- a decision to suspend the practitioner's registration if the responsible board has not instituted an investigation in relation to the practitioner within a reasonable period, and
- a decision to continue a suspension beyond the period specified under the Act (see [section 4.7](#) of this paper on immediate suspension powers).

10.5 Findings and determinations of a tribunal

The IGA requires that the national legislation set out the findings, and determinations or orders that a responsible tribunal may make with respect to each type of matter heard under its original and review jurisdictions.

Original jurisdiction

Proposal 10.5.1: With respect to matters referred by the board for tribunal hearing, or where the practitioner has requested the matter be referred, it is proposed that the responsible tribunal would be empowered to make any of the following findings:

- the practitioner is not of good character
- the practitioner's registration was obtained by fraud
- the practitioner has engaged in professional misconduct
- the practitioner's performance has been unsatisfactory, or
- the practitioner's capacity to practise is affected by habitual misuse of alcohol or other drugs or physical or mental impairment.

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:

Presumably this is referring to the responsible tribunal rather than the responsible board. The determinations listed in this proposal should be simplified to enable the tribunal to impose conditions on registration, rather than trying to identify circumstances in which orders may be made.

NSWMB Commentary on NRAIP Complaints Consultation Paper

- 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.

Review jurisdiction – registration matters

Proposal 10.5.3: With respect to registration decisions, it is proposed that the responsible tribunal would have the power to uphold or confirm the board's original decision, or to substitute its own decision from the range of decisions that were available to the board (see Registration consultation paper).

Review jurisdiction – performance, health or conduct matters

Proposal 10.5.4: With respect to performance, health, or conduct panel decisions referred for review, it is proposed that the responsible tribunal would have the power to either confirm the original decision of the panel, or substitute its own finding and/or determination from the list that were available to the panel. The tribunal would be empowered to find any of the following:

- the practitioner is not of good character
- the practitioner's registration was obtained by fraud
- the practitioner has engaged in professional misconduct
- the practitioner's performance has been unsatisfactory
- the practitioner's capacity to practise is affected by drug or alcohol dependency or physical or mental impairment
- the conditions imposed by the board were unjust, onerous or inadequate, and/or
- the board erred in making its findings

NSWMB Commentary on NRAIP Complaints Consultation Paper

and on this basis make an order to suspend or cancel the practitioner's registration or vary or place conditions on a practitioner's registration, in addition to any of the determinations listed above under its original jurisdiction.

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.

10.6 Constitution and appointment of tribunal hearing panels

There is some variability across jurisdictions as to the legislative requirements for membership of the panels that hear serious misconduct matters. Factors to consider in determining the legislative requirements for constitution of the tribunal include:

- ensuring sufficient professional input into decision-making – having at least two members from the profession concerned allows a dialogue on professional standards that may contribute to better decision making than a single practitioner member, and
- there is also a case for a presence on a panel for the consumer or community voice. Given that the tribunal is separate from the boards, and probably chaired by a legal member, community standards are likely to be reflected in the determinations.

Proposal 10.6.1: It is proposed that the legislation make provision for a tribunal hearing panel to be constituted with a minimum of three members, at least two must be from same profession as the practitioner who is a party to the proceedings.

10.7 Procedure for conduct of tribunal hearings

Proposal 10.7.1: It is proposed that State and Territory legislation concerning the responsible tribunal would also make provision for the procedure of the tribunal, in accordance with national criteria agreed by AHMC (Clause 2.2 Attachment A of the IGA), and taking into account existing tribunal arrangements (if any). Matters to be addressed include:

- appointment of members, presiding members, acting members
- application processes for appointment, remuneration, disclosure of interests, etc
- application fees and processes for hearing of matters, including notification of hearings, withdrawal of matters
- administration of the tribunal and its health professions list
- compulsory conferences, mediations and settlement
- service of documents
- use of experts
- conduct of hearings
- taking of evidence and witness summons
- reasons for decisions
- powers to award costs
- orders, injunctions, declarations, enforcement of orders
- offences, such as non-compliance with order, failure to comply with summons, failure to give evidence, false or misleading information, contempt, etc
- immunities, and
- appeals from tribunal decisions.

10.8 Status of notifiers

There are differences across State and Territory legislation as to the status of notifiers or complainants in disciplinary and other proceedings of a board.

Proposal 10.8.1: It is proposed that the parties to a tribunal hearing would be the responsible board, and the registrant. It is not intended that a notifier have a right to make application for a hearing with respect to a registration or disciplinary decision of a board, or with respect to allegations of professional misconduct against a practitioner. The notifier may be called as a witness in the board's case before the tribunal.

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.

It is not clear whether the prohibition order attaching “conditions to their practice” means that conditions could be attached to the practice of a deregistered practitioner in relation to some form of other practice which does not require registration. In any case, there ought to be a power to make orders that would come into effect in the event that the deregistered practitioner subsequently restored to the Register.

10.10 Review rights from tribunal decisions

Proposal 10.10.1: It is proposed that a party to a proceeding before a responsible tribunal would have the right to appeal a decision of the tribunal on points of law only. It is proposed that the appeal would be to the responsible State or Territory Supreme Court (or other body as determined by each jurisdiction).

10.11 Reasons for decisions

Proposal 10.11.1: It is proposed that the State and Territory legislation require the responsible tribunal to publish reasons for its decisions.

10.12 Notice of decisions

Proposal 10.12.1: It is proposed that the legislation require the responsible board to notify a range of persons and organisations of the outcome of a tribunal hearing, publish details of decisions on its website, and enter on the register (or a separate part of the register) details of any current conditions, suspension or cancellation of registration (except for details of health-related conditions).

11. Offences and regulated conduct

11.1 Current arrangements

There is significant overlap across jurisdictions in the types of offences that apply in State and Territory registration Acts. Such offences can be grouped along the following lines:

- unauthorised use of restricted professional titles
- unauthorised holding out as having registration, a type of registration, endorsement, division of registration, specialist/specialty endorsement, unconditional registration, etc
- holding out another person as having registration, a type of registration, endorsement, division of registration, specialist/specialty endorsement, unconditional registration, etc
- breach of conditions on registration

NSWMB Commentary on NRAIP Complaints Consultation Paper

- unauthorised practice, for example, of a regulated health profession generally, a restricted core practice, or 'restricted practice area'
- treatment of certain conditions/diseases/pregnancy by persons who are not registered
- prohibit breaches of confidentiality in relation to keeping and disposing of patient records, or in relation to information that a person obtains in the course of carrying out their functions under the Act
- signing of medical certificates when not registered
- failure to have professional indemnity insurance
- failure to return registration certificates when required
- failure to notify of change of specified registration details/circumstances
- false and misleading advertising
- directing or inciting a registrant to engage in unsatisfactory professional conduct or professional misconduct
- supplying health services when prohibited
- actions relating to the exercise of coercive powers (search, entry, seizure powers), for example, obstructing/impersonating an investigator, failing to return identity card, failing to answer questions or provide documents, and/or
- illegal election practices.

11.2 The IGA

The IGA specifies the following with respect to offences under the national scheme:

1.28 The substantive legislation to establish the national registration and accreditation scheme will have the following features to ensure the appropriate protection of the public:

- (b) *the primary basis for regulation will be 'protection of professional title', with statutory offences to prevent unregistered or unauthorised persons using professional titles, which in the first instance will be those listed in [Table 2](#), with further titles to be determined by the Ministerial Council (or in the event that the Ministerial Council has not been established, by AHMC)*
- (c) *practice restrictions will be applied where they are currently adopted across all jurisdictions as follows:*
 - i) *two professions, dentistry and optometry, will be subject to legislative definitions of core practices and offences to prevent practice by unregistered or unauthorised persons*
 - ii) *elements of the practice of spinal manipulation may also require legislative protection, and further work will be undertaken to define these for this purpose*
- (d) *general exemptions from title and practice offence will apply to regulated professionals undertaking their usual activities, students, assistants working under supervision, businesses employing registered practitioners and persons assisting in emergencies*

1.29 The Ministerial Council, in consultation with stakeholders, may determine further modifications to registration categories and practice restrictions within the parameters of clause 1.28.

1.30 Jurisdictions will continue to have discretion to regulate additional core practices through local public health, drugs and poisons.

11.3 Holding out offences

Proposal 11.3.1: It is proposed that the following types of holding out offences be included in the legislation:

- offences that prohibit persons who are not duly registered to use the titles listed in Table 2 of Attachment A of the IGA
- offences that prohibit persons from using any other title, name, symbol, description, whether in English or other language, which given the circumstances could be reasonably understood to indicate the person is a registered practitioner in a regulated profession

NSWMB Commentary on NRAIP Complaints Consultation Paper

- offences that prohibit a person from holding out that they have a type of registration, for example in a profession, in a division, with an endorsement, free of conditions, etc, when they do not
- offences that prohibit a person from using the title 'specialist' in a context that could reasonably be understood to indicate the person is endorsed as a specialist in a recognised specialty of a regulated health profession, and
- offences that prohibit a person from holding out another person as registered, registered in a division, endorsed, a 'specialist', free of conditions, etc.

Exemptions would apply, as set out in Clause 1.28(d) of Attachment A of the IGA.

11.4 Practice offences

Proposal 11.4.1: It is proposed that the legislation include the following practice offences:

- An offence for practising in a restricted practice area of dentistry, along with related exemptions, for example to ensure the practice of other occupational groups such as dental technicians or dental assistants is not unnecessarily restricted. **Note:** Refer to consultation paper on Registration Arrangements for proposed definition.
- An offence for practising in a restricted practice area of prescribing optical appliances, along with related exemptions, for example to ensure the practice of other occupational groups such as orthoptists or optical dispensers is not unnecessarily restricted. **Note:** Refer to consultation paper on the Registration Arrangements for proposed definition.

It has not yet been decided whether there will also be statutory restrictions on the practice of spinal manipulation to which offences might apply.

11.5 Direct or incite offences

Proposal 11.5.1: It is proposed that the legislation include a series of offences for any person who directs a registered practitioner to act in a manner that might constitute unsatisfactory professional conduct or professional misconduct (however termed). This would include:

- powers for a court or tribunal to issue a 'prohibition order' on a person found to have directed or incited a registered practitioner in this matter. Such an order might prevent, for example, the person from providing health services or carrying on a business that provides health services
- an offence for breach of a prohibition order
- differential sanctions for bodies corporate and individuals
- provisions that extend liability for an offence to each officer of the body corporate, and
- provisions that require the maintenance of a register of prohibitions.

Alternative option: This offence could be framed more narrowly, to apply only to persons who employ a registered practitioner.

11.6 Regulation of advertising

Under some State and Territory legislation, boards are empowered to develop guidelines about what constitutes acceptable advertising of regulated health services, in the context of increasingly aggressive advertising of such services as cosmetic surgery, impotence treatment, heart checks, hair loss treatment services, etc. Some guidelines:

- prohibit spruiking practices such as free on the spot health checks in shopping centres, designed to sign prospective patients up to contracts of care, or
- place obligations on practitioners to use warning labels when advertising directly to the public services such as cosmetic surgery.

NSWMB Commentary on NRAIP Complaints Consultation Paper

Under the national legislation, boards will have powers to develop (in consultation with stakeholders) codes of practice with respect to a variety of professional standards matters.

Most Acts contain offences with respect to registrants (or persons generally) who advertise in a manner that is false or misleading. Some Acts provide further detail with respect to what constitutes unacceptable advertising, such as advertising that:

- creates an unreasonable expectation of beneficial treatment
- offers gifts, discounts or other inducements without setting out the conditions
- uses testimonials
- directly or indirectly encourages the indiscriminate or unnecessary use of regulated health services, medicines or other therapeutic goods
- disparages other health services or registrants, and
- advertises a service likely to harm another person.

Often higher penalties apply to bodies corporate who are found to commit a breach than those that apply to individuals.

In the context of National Competition Policy, most jurisdictions reviewed their legislative restrictions on advertising during the 1990s. Most made the case for retaining provisions that, in effect, apply a higher standard to registrants than that which applies under general trade practices and fair trading legislation to the rest of the community. Given the risks associated with some forms of health service, this position was accepted by competition bodies and government.

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.

Factors to consider in the policy debate include the effectiveness of current discipline specific advertising regulation, the cost of enforcement – to government and/or the professions, the proper scope of regulatory activity for the national scheme, and the need to protect the public.

11.7 Offences related to enforcement activities

Proposal 11.7.1: It is proposed that the legislation include a series of offences related to the role of authorised officers who investigate matters on behalf of a responsible board and may enter and search premises and seize documents or other things. These might include, for example, offences for:

- obstructing an authorised officer/inspector

NSWMB Commentary on NRAIP Complaints Consultation Paper

- impersonating an authorised officer
- providing false Statements or misleading an authorised officer
- failing to comply with a lawful request, or
- failing to return identity card (after ceasing employment as an inspector/authorised officer).

11.8 Other offences

There is a range of other types of offences included in some State and Territory legislation.

Proposal 11.8.1: It is proposed that the legislation include offences for registrants who fail to return, within 7 days, to the responsible board their certificate of registration when issued with a notice to do so.

Proposal 11.8.2: It is proposed that the legislation include offences for breaches of prohibition orders issued by the responsible State or Territory tribunal when a practitioner is deregistered, as referred to in [section 10.9](#) above.

Proposal 11.8.3: It is not proposed to include the following types of offences in the national legislation:

- offences for breach of conditions on registration – instead, it is proposed that the legislation provide for a panel or tribunal to identify ‘critical compliance conditions’ which, if breached, will allow the responsible board to suspend the practitioner’s registration. This is likely to be a much more immediate and effective sanction than prosecuting a registered practitioner through a magistrate’s court, or
- offences for unregistered persons to issue medical certificates or treat patients with certain types of conditions such as HIV or cancer – instead, these matters can be dealt with in State and Territory public health legislation if a jurisdiction considers it necessary.

This paper envisages critical compliance conditions which if breached would allow the Board to suspend registration.

The paper specifically recommends that it not be an offence for an unregistered person to issue medical certificates or treat patients with certain conditions such as HIV and cancer, as these matters can be dealt with through public health legislation. It is suggested that the issue of medical certificates by unregistered persons could create a significant problem if it is not enforced by the Professional Board.

11.9 Prosecution of offences

Proposal 11.9.1: It is proposed that the legislation make provision for a responsible board to initiate a prosecution in the relevant State or Territory court for offences under the Act.

In some cases, the responsible police service will investigate and charge a person under the Act and bring the case to court. In others, it may be appropriate for the responsible board to initiate the action.

11.10 Monitoring of registrants

Proposal 11.10.1: It is proposed that the legislation include powers for a responsible board to monitor compliance of a registrant with:

- determinations or orders made by a responsible tribunal
- decisions made by a performance, health or conduct panel
- conditions placed on registration, at other times, such as at first registration, at renewal, by agreement, and

NSWMB Commentary on NRAIP Complaints Consultation Paper

- other undertakings given or agreements entered into between the registrant and the board.

It is expected that the boards would develop and implement a risk based compliance program that would determine a risk profile of registrants, assess how regularly individual registrants need to be monitored and a compliance strategy to ensure this monitoring occurs. There is scope within such a scheme to build in closer linkages between the boards and bodies such as Medicare, with potential, for example, for Medicare data to be used to assist the boards in monitoring compliance with conditions on registration in some professions.

The comment has already been made that it would seem unnecessary to have a specific power to monitor.

12. Transition arrangements

In order to ensure a smooth transition from State and Territory schemes to the new national arrangements, it will be necessary for the legislative scheme to make provision for the new national boards (delegated as they see fit) to continue to deal with, and finalise any investigations and disciplinary/performance/impairment matters that were in process prior to 1 July 2010, including any matters outstanding from previously repealed legislation within a jurisdiction. The alternative, that current boards continue to handle existing cases, is not considered practical because of the long timeframes associated with some cases.

Proposal 12.1: It is proposed that the legislation include transitional provisions that allow the relevant board to complete all matters that originate under the repealed legislation. This will include powers to:

- receive and deal with notifications that relate to conduct that occurred prior to 1 July 2010, and to initiate and complete an investigation, and a hearing if necessary, and make findings and determinations (however termed). With respect to such matters, it is likely that the investigator or hearing panel's powers will be limited to those they might have exercised under the repealed legislation
- complete all investigations that were in train prior to 1 July 2010, with decisions as to course of action constrained by what was available under the repealed legislation
- complete all disciplinary, impairment and performance processes that were in train prior to 1 July 2010, in accord with the processes, findings and determinations available under the repealed legislation, and
- complete all tribunal hearings (where applicable) and deal with any appeals as if the relevant State and Territory legislation had not been repealed.

Clause 6.10 of the IGA provides for all existing members of jurisdictional boards and supporting hearing panels for the regulated professions to be appointed (if they agree), to a list of persons from which national boards may form committees for a period of two years from commencement of operation of the scheme. It is expected that such persons will be an essential resource for boards to draw on in completing investigations and hearings under the repealed legislation as outlined above. In addition the provisions yet to be determined that ensure continuity of staffing for the boards will be important in managing the caseload in the transition to the new scheme. It may take a number of years for all matters that arose under the previous enactments to be finalised, including appeals.

NSWMB Commentary on NRAIP Complaints Consultation Paper

ATTACHMENT 1: Draft definitions of 'unsatisfactory professional conduct', 'unsatisfactory professional performance' and 'professional misconduct' proposed for inclusion in the national legislation

'unsatisfactory professional conduct' includes the following –

- a) professional conduct that is of a lesser standard than that which might reasonably be expected of the practitioner by the public or the practitioner's professional peers
- b) unsatisfactory professional performance

The inclusion of UPP within the definition of UPC suggests that performance is seen as some lesser form of unsatisfactory professional conduct/ professional misconduct.

- c) any contravention by the practitioner (whether by act or omission) of a provision of this Act or the regulations, whether or not the practitioner has been prosecuted for or convicted of an offence in respect of the contravention
- d) any contravention or failure to comply with:
 - i. a condition to which the practitioner's registration is subject
 - ii. an agreement or undertaking entered into by the practitioner with the responsible board
- e) any conviction for an offence under any other Act or regulation, the nature of which may affect the practitioner's suitability to continue to practise in a regulated health profession
- f) failure to pay, within the time specified, a fine imposed on the practitioner under the Act
- g) providing a person with health services of a kind that are excessive, unnecessary or not reasonably required for the person's well-being
- h) influencing or attempting to influence the conduct of another health practitioner in a way that may compromise client care
- i) accepting a benefit as inducement, consideration or reward for referring another person to a health service provider or recommending another person use or consult with any health service provider
- j) offering or giving any person a benefit as inducement, consideration or reward in return for the person referring another person to the registered health practitioner or recommending to another person that the person use any health service provided by the registered health practitioner
- k) referring a person to, or recommending that a person use or consult another health service provider, health service or health product when the practitioner has a pecuniary interest in giving that referral or recommendation, unless the practitioner discloses the nature of that interest to the person before or at the time of giving the referral or recommendation.

Inclusion of a catch-all such as 'any other unethical or improper conduct', should be considered.

'unsatisfactory professional performance' means professional performance that demonstrates that the knowledge, skill or judgement possessed, or care exercised by the practitioner is significantly below the standard reasonably expected of a practitioner of an equivalent level of training or experience.

'professional misconduct' includes –

- a) unsatisfactory professional conduct of a health practitioner, where the conduct involves a substantial or consistent failure to reach or maintain a reasonable standard of competence or diligence
- b) conduct that violates or falls short of, to a substantial degree, the standard of professional conduct observed by members of the profession of good repute or competency
- c) conduct of a health practitioner, whether occurring in connection with the practice of the health practitioner's health profession, or occurring otherwise than in connection with the practice of a health profession, that would, if established, justify a finding that the practitioner is not of good character or is otherwise not a fit and proper person to engage in the practice of that health profession.

NSWMB Commentary on NRAIP Complaints Consultation Paper

ATTACHMENT 2: Mandatory reporting obligations in registration legislation by State and Territory

Jurisdiction	Provision
ACT <i>Health Professions Act 2004</i>	Nil. Comment: Despite a reference in Section 76(2) to 'requiring reporting' of 'behaviour that contravenes the required standard', there does not appear to be anything in the section that compels a registered practitioner or other person to report such matters.
NSW <i>Medical Practice Act 1992</i>	<p>Section 71A(2) – A registered medical practitioner who believes, or ought reasonably to believe, that some other registered medical practitioner has committed reportable misconduct must, as soon as practicable, report the conduct to the boards.</p> <p>Note: Pursuant to sections 36 (1) (b) and 37, failure to comply with this section will constitute either unsatisfactory professional conduct or professional misconduct.</p> <p>Section 71A(1) defines 'reportable misconduct' as:</p> <ol style="list-style-type: none"> a) practising medicine while intoxicated by drugs (whether lawfully or unlawfully administered) or alcohol b) practising medicine in a manner that constitutes a flagrant departure from accepted standards of professional practice or competence and risks harm to some other person c) engaging in sexual misconduct in connection with the practice of medicine. <p style="color: red;">In addition, there are provisions relating to the notification of practitioners and students who are admitted as involuntary patients to a psychiatric hospital.</p>
Northern Territory	Nil
Queensland	Nil
South Australia <i>Medical Practice Act 2004</i>	<p>Section 49(1) – Imposes obligation to report to the board a practitioner or student who is 'medically unfit to provide medical treatment' on the following persons:</p> <ol style="list-style-type: none"> a) a health professional who has treated, or is treating, a patient who is a medical practitioner or medical student, or b) a person who provides medical treatment through the instrumentality of a medical practitioner or medical student, or c) a hospital that has entered into an arrangement with a medical practitioner under which the medical practitioner provides medical treatment at the hospital to his or her patients, or d) the person in charge of an educational institution at which a medical student is enrolled in a course of study providing qualifications for registration on the general register under this Act. <p>Maximum penalty: \$10 000.</p> <p>Section 49(4) – Defines health professional as:</p> <ol style="list-style-type: none"> a) a medical practitioner, or b) a psychologist, or c) any other person who belongs to a profession, or who has an occupation, declared by the boards, by notice in the Gazette, to be a profession or occupation within the ambit of this definition. <p>Section 77 – If a medical practitioner or medical student becomes aware that he or she is or may be medically unfit to provide medical treatment, the practitioner or student must forthwith give written notice of that fact to the boards.</p> <p>Maximum penalty: \$10 000.</p>

NSWMB Commentary on NRAIP Complaints Consultation Paper

Jurisdiction	Provision
Tasmania <i>Pharmacists Registration Act 2001</i>	Section 72 – A registered medical practitioner who signs an order under the Mental Health Act 1996 or a medical recommendation under the Alcohol and Drug Dependency Act 1968 in relation to a person the registered medical practitioner knows or believes is a registered pharmacist must, as soon as practicable after signing the order or recommendation, give the boards notice of the fact. Penalty: Fine not exceeding 5 penalty units.
Victoria <i>Health Professions Registration Act 2005</i>	Section 36 – Reporting of ill-health of health practitioners Imposes reporting obligation on registered medical practitioners who are treating a registered health practitioner who has seriously impaired ability to practise or registered student to undertake clinical training. Obligation is to report practitioner or student to responsible board.
WA <i>Medical Practitioners Act 2008</i>	Nil

NSWMB Commentary on NRAIP Complaints Consultation Paper

ATTACHMENT 3: Statutory provisions setting out the relationship between registration boards and the respective Health Complaints Commissioners in each State and Territory

Jurisdiction	Statutory relationship between boards and Health Complaints Commissioner
ACT <i>Health Professions Act 2004</i>	<p>Section 79 – Requires a health profession board to refer a report (ie a complaint) to the Human Rights Commission, and provide all documents to the Commission.</p> <p>Section 86 – Requires the health profession board to consult with the Commission when considering what to do and endeavour to agree with the Commission about the action to be taken in relation to the report. If the board and Commission cannot agree, the most serious action proposed by either must be taken.</p> <p>Section 116 – Role of Commission at a standards inquiry – Commission may be represented, may give evidence under <i>Human Rights Commission Act 2005</i>, and may be present at the inquiry even if not giving evidence.</p> <p>Section 123(2) – Within 28 days after standards inquiry, professional standards panel must give report to the Commission.</p>
NSW <i>Medical Practice Act 1992</i>	<p>Section 42 – Complaints can be made to the board or the Health Care Complaints Commission.</p> <p>Section 46 – Requires board and Commission to notify each other when a complaint is made to either, as soon as practicable after complaint is made, and any matter that comes to either’s attention that may involve professional misconduct of a registered practitioner.</p> <p>Section 49 – Board and Commission required to consult on a complaint before any action is taken, to see if they can reach agreement on course of action.</p> <p>Section 50 – Board may refer complaint to the Commission for investigation.</p> <p>Section 51 – Commission may refer complaint to board, a committee or tribunal, or for conciliation.</p> <p>Section 52 – Both Commission and board must refer serious complaints to tribunal.</p> <p>Section 66B – Commission investigates matters referred by board and may refer complaint to tribunal or committee.</p> <p>Section 66BA – Matter can be dealt with by board, by way of performance assessment unless board or Commission believe matter should be dealt with as complaint and investigated by Commission.</p> <p>Section 66C – Matter can be referred to Impaired Registrants Panel unless board or Commission believe matter should be dealt with as complaint and investigated by Commission.</p> <p>Section 74 – Commission may refer impairment matters to board.</p> <p>Section 76 – Impaired Registrants Panel cannot investigate while matter is being investigated by Commission.</p> <p>Section 86F – Commission may refer professional performance matters to board.</p> <p>Section 86L – Performance Review Panel cannot take action while complaint is being investigated by Commission.</p>
Northern Territory <i>Health Practitioners Act 2004</i>	<p>Section 62 – After board has received and considered report on preliminary investigation of a complaint, it must determine whether to refer complaint to tribunal, Commissioner for Health and Community Services Complaints, or other body.</p>

NSWMB Commentary on NRAIP Complaints Consultation Paper

Jurisdiction	Statutory relationship between boards and Health Complaints Commissioner
<p>Queensland <i>Health Practitioners (Professional Standards) Act 1999</i></p>	<p>Section 51 – The board must refer a complaint to the Health Quality and Complaints Commission (established under the <i>Health Quality and Complaints Commission Act 2006</i>) unless following consultation between the board and the Commission, they agree it is in the public interest for the board to keep the complaint and deal with it (investigate it, start disciplinary proceedings, deal with it under impairment provisions, etc), or refer it to another entity.</p> <p>Section 51(4) – Board and Commission may agree for complaint to be dealt with under impairment provisions unless they believe it provides grounds for suspending or cancelling registration.</p> <p>Section 51(7) – If board keeps complaint, must give copy to Commission.</p> <p>Section 52 – Board must take no further action on a complaint referred to Commission unless Commission refers complaint back to board. Board may give Commission information, comments, recommendations.</p>
<p>South Australia <i>Health and Community Services Complaints Act 2004</i></p>	<p>Section 31 – If the Commissioner has referred a complaint to another person or body (including a registration authority) the Commissioner may give to the other person or body all the documents or information in the possession of the Commissioner that relate to the complaint.</p> <p>Section 51 – Reference to another authority for investigation –</p> <p>(1) If the Commissioner considers that a matter raised by, or during the course of, an investigation should be investigated by the State Ombudsman, a registration authority or another person or body that has functions under any law of South Australia, another State, a Territory or the Commonwealth, the Commissioner may refer the matter to the State Ombudsman, registration authority or other person or body (as the case requires) for investigation.</p> <p>(2) The Commissioner must not refer a matter to a registration authority without first consulting that authority.</p>
<p>Tasmania <i>Medical Practitioners Registration Act 1996</i></p>	<p>Section 44 – Allows a complaint to be made to both the Council and the HCC (appointed under the <i>Health Complaints Act 1995</i>).</p> <p>In relation to complaints made directly to Council, or referred from HCC to Council, the following provisions apply (section 47):</p> <p>Section 48 – Council to refer complaint to investigator in the first instance</p> <p>Section 48B – Allows investigator, following investigation, to recommend complaint be referred to, or back to, HCC.</p> <p>Section 49 – Allows Council, following receipt of investigators report, to refer matter to, or back to, HCC.</p> <p>Section 49C – Requires Council to give complainant and practitioner notice of referral to HCC with explanation. Council may give HCC information or evidence in its possession.</p>
<p>Victoria <i>Health Professions Registration Act 2005</i></p> <p><i>Health Services (Conciliation and Review) Act 1987</i></p>	<p>Section 43(1) – If board receives a notification about a registered practitioner and it falls within jurisdiction of Health Services Commissioner (HSC) (section 16 of the <i>Health Services (Conciliation and Review) Act 1987</i>), board must notify HSC and give copy of notification as soon as practicable.</p> <p>Section 43(2) – Board in consultation with HSC must determine whether notification to be dealt with by HSC or board.</p> <p>Section 43(5) – Board must not deal further with a notification that is to be dealt with by HSC unless HSC refers it back.</p> <p>Section 43(6) – HSC must advise board when matter completed of outcome.</p> <p>Section 43(7) – Does not apply to self-referrals by impaired practitioners.</p> <p>Section 19(6) of Health Services (Conciliation and Review) Act 1987 – If complaint relates to registered practitioner, HSC must refer complaint to appropriate registration board if, after consultation with board, HSC considers board has power to resolve or deal with matter and matter not suitable for conciliation under HS(C&R) Act.</p>

NSWMB Commentary on NRAIP Complaints Consultation Paper

Jurisdiction	Statutory relationship between boards and Health Complaints Commissioner
<p>Western Australia <i>Health Services (Conciliation and Review) Act 1995</i></p>	<p>Section 31 – Referral of complaint to registration board – If a complaint, or an element of a complaint, relates to a registered provider and in the Director’s opinion the complaint –</p> <ul style="list-style-type: none"> a) is not suitable for conciliation or investigation, or b) should be dealt with by a registration board <p>the Director may –</p> <ul style="list-style-type: none"> c) after consultation with that board, and d) with the written consent of the person who made the complaint refer the complaint, or the element of the complaint, to that board for action under section 54(1).

NSWMB Commentary on NRAIP Complaints Consultation Paper

ATTACHMENT 4: Existing definitions of unsatisfactory professional conduct (or equivalent) contained in State and Territory registration legislation

Jurisdiction	Definitions
<p>ACT <i>Health Professions Act 2004</i></p> <p><i>Health Professions Regulations 2004</i></p>	<p>Section 18 – What is the <i>required standard of practice</i>?</p> <p>(1) The <i>required standard of practice</i>, for a health professional, is the exercise of professional judgment, knowledge, skill and conduct at a level that maintains public protection and safety.</p> <p>Example A doctor who falsifies research data would not be exercising professional conduct at a level that maintains public protection and safety.</p> <p>Note An example is part of the Act, is not exhaustive and may extend, but does not limit, the meaning of the provision in which it appears (see Legislation Act, s 126 and s 132).</p> <p>(2) A regulation may prescribe, but does not limit, what behaviour does and does not meet the required standard of practice.</p> <p>Example A registered health professional does something that the regulations do not deal with but that clearly demonstrates a lack of professional judgment. The health professional contravenes the required standard of practice.</p> <p>(3) However, if a regulation prescribes something that is inconsistent with the health code under the <i>Human Rights Commission Act 2005</i>, the regulation is ineffective to the extent of the inconsistency.</p> <p>Clause 135 – Pattern of practice or particular acts In deciding whether a registered health professional's standard of practice meets the required standard of practice, the health professions tribunal, the relevant health profession board or a panel formed by the relevant health profession board may consider the health professional's act or acts and the health professional's pattern of practice.</p> <p>Note Act includes fail to act (see dict).</p> <p>Clause 136 – Endangering public A registered health professional breaches the required standard of practice if the health professional engages in a standard of practice that endangers public health and safety.</p> <p>Clause 137 – Lack of competence to practise, etc A registered health professional breaches the required standard of practice if the health professional engages in a standard of practice that demonstrates a lack of competence to practise, knowledge, skill, judgment or care by the health professional.</p> <p>Part 4.2 Specific breaches of the required standard of practice</p> <p>Clause 138 – Purpose of pt 4.2, etc</p> <p>(1) The purpose of this part is to prescribe a minimum for the required standard of practice.</p> <p>(2) If a health professional breaches this part, the health professional breaches the required standard of practice and is not competent to practise unless the health profession board decides otherwise.</p> <p>Clause 139 – Breach of standards statements A registered health professional must not breach a standards statement that applies to the professional.</p> <p>Clause 140 – Telling board about proceedings relating to health professional</p> <p>(1) A registered health professional must tell the health profession board for the health professional if the health professional is charged with an offence.</p> <p>(2) A notice under subregulation (1) must –</p> <p>(a) identify the charge sufficiently to allow the health profession board to decide whether the charge indicates that the health professional may be contravening the Act, and</p> <p>(b) be made as soon as practicable after the day the health professional is charged, but in any case within 7 days after that day.</p> <p>Note A reference to an Act includes a reference to the statutory instruments made or in force under the Act, including regulations (see Legislation Act, s 104).</p> <p>Clause 141 – Infection control and notifiable diseases</p>

A registered health professional must comply with legislation that prescribes requirements for infection control and reporting of notifiable disease.

Clause 142 – Drugs and health professional

- (1) A registered health professional must not practise while under the influence of a drug (whether a prescription drug, an illegal drug or another drug) if the drug affects the health professional's ability to practise.
- (2) A registered health professional must not practise while dependent on a drug (for example, a drug of dependence) that may adversely affect the health professional's professional performance.

Note An example is part of the regulations, is not exhaustive and may extend, but does not limit, the meaning of the provision in which it appears (see Legislation Act, s 126 and s 132).

Clause 143 – Drugs and patients

- (1) A registered health professional must not give a drug of dependence or a prohibited substance to a drug-dependent person.
- (2) This regulation does not apply if the drug is required for the medical treatment of the drug-dependent person and is given as part of a treatment plan for the person.
- (3) In this regulation:

drug-dependent person – see the *Drugs of Dependence Act 1989*, section 3 (1).
give includes sell, offer for sale, prescribe and administer.

prohibited substance – see the *Drugs of Dependence Act 1989*, section 3 (1).

Clause 144 – Inappropriate behaviour

- (1) A registered health professional must not engage in inappropriate behaviour involving someone who is, or was, a user of a health service provided by the health professional.
- (2) A standards statement may set out what kind of behaviour is inappropriate in relation to a health profession.

Clause 145 – Reporting other health professionals

A registered health professional is taken to have contravened the required standard of practice if—

- (a) the health professional believes on reasonable grounds that—
 - (i) another registered health professional has contravened or is contravening a required standard of practice or a suitability to practice requirement, and
 - (ii) the contravention has had, or is likely to have, a substantial affect on a member of the public
- (b) the contravention does not relate to an administrative matter
- (c) the health professional does not tell a health professional board about the belief, and
- (d) the contravention has, or has had, a substantial effect on a member of the public.

Clause 146 – Clinical records

- (1) A registered health professional must maintain adequate clinical records.
- (2) A registered health professional must not change a clinical record to deceive anyone.

Clause 147 – Misrepresenting facts in certificates

A registered health professional must not, while practising as a health professional, sign a certificate that misrepresents a fact.

Clause 148 – Treatment by assistants

- (1) A registered health professional must not allow someone else (an **assistant**) to treat a user of a health service provided by or on behalf of the health professional, or perform a procedure, on the health professional's behalf if the treatment, or procedure, requires professional discretion or skill.
- (2) Subregulation (1) does not apply if—
 - (a) the treatment is given, or the procedure performed, as part of a program to train the assistant to become a registered health professional, or
 - (b) the assistant is a registered health professional.
- (3) A registered health professional must adequately supervise anyone providing health services on behalf of the health professional.

Clause 149 – Misleading advertising

A registered health professional must not advertise a health service in a way that is misleading.

Clause 150 – Behaviour that contravenes another law

	<p>(1) A registered health professional must not engage in behaviour that contravenes another law in a way that reflects on the ability or commitment of the health professional to provide an adequate standard of care for patients.</p> <p>(2) Without limiting the behaviour mentioned in subregulation (1), a health professional engages in behaviour of that kind if—</p> <p>(a) while registered—</p> <p>(i) the health professional is convicted, or found guilty, of an offence punishable by imprisonment for 6 months or longer, and</p> <p>(ii) the behaviour on which the conviction, or finding of guilt, is based reflects adversely on the professional's suitability to practise, or</p> <p>(b) the health professional is convicted, or found guilty, of an offence against the <i>Health Insurance Act 1973</i> (Cwlth) committed while registered, or</p> <p>(c) the health professional breaches the health rights and responsibilities code while registered.</p> <p>(3) In subregulation (2) (c): health rights and responsibilities code—see the <i>Community and Health Services Complaints Act 1993</i>, section 4, definition of code.</p>
<p>NSW <i>Medical Practice Act 1992</i></p>	<p>Section 36 – Unsatisfactory professional conduct</p> <p>For the purposes of this Act, "unsatisfactory professional conduct" of a registered medical practitioner includes each of the following:</p> <p>a) Any conduct that demonstrates that the knowledge, skill or judgment possessed, or care exercised, by the practitioner in the practice of medicine is significantly below the standard reasonably expected of a practitioner of an equivalent level of training or experience.</p> <p>b) Any contravention by the practitioner (whether by act or omission) of a provision of this Act or the regulations, whether or not the practitioner has been prosecuted for or convicted of an offence in respect of the contravention.</p> <p>c) Any contravention by the practitioner (whether by act or omission) of a condition to which his or her registration is subject.</p> <p>d) Any conduct that results in the practitioner being convicted of or being made the subject of a criminal finding for any of the following offences:</p> <p>(i) an offence under section 204 of the <i>Mental Health Act 1990</i></p> <p>(ii) an offence under section 175 of the Children and Young Persons (Care and Protection) Act 1998</p> <p>(iii) an offence under section 35 of the <i>Guardianship Act 1987</i></p> <p>(iv) an offence under section 128A, 128B, 129, 129AA or 129AAA of the <i>Health Insurance Act 1973</i> of the Commonwealth</p> <p>(v) an offence under section 46 of the <i>Private Hospitals and Day Procedure Centres Act 1988</i></p> <p>(vi) an offence under section 43 of the <i>Nursing Homes Act 1988</i>.</p> <p>e) A contravention by the practitioner of section 34A (4) (Power of Commission to obtain information, records and evidence) of the <i>Health Care Complaints Act 1993</i>.</p> <p>f) Accepting from a health service provider (or from another person on behalf of the health service provider) a benefit as inducement, consideration or reward for:</p> <p>(i) referring another person to the health service provider, or</p> <p>(ii) recommending another person use any health service provided by the health service provider or consult with the health service provider in relation to a health matter.</p> <p>g) Accepting from a person who supplies a health product (or from another person on behalf of the supplier) a benefit as inducement, consideration or reward for recommending that another person use the health product.</p> <p>h) Offering or giving any person a benefit as inducement, consideration or reward for the person:</p> <p>(i) referring another person to the registered medical practitioner, or</p> <p>(ii) recommending to another person that the person use any health service provided by the practitioner or consult the practitioner in relation to a health matter.</p> <p>i) Referring a person to, or recommending that a person use or consult:</p> <p>(i) another health service provider, or</p>

	<p>(ii) a health service, or (iii) a health product</p> <p>j) when the practitioner has a pecuniary interest in giving that referral or recommendation (as provided by subsection (2)), unless the practitioner discloses the nature of that interest to the person before or at the time of giving the referral or recommendation.</p> <p>k) Engaging in overservicing, as provided by subsection (3).</p> <p>l) Permitting an assistant employed by the practitioner (in connection with the practitioner's professional practice) who is not a registered medical practitioner to attend, treat or perform operations on patients in respect of matters requiring professional discretion or skill.</p> <p>m) By the practitioner's presence, countenance, advice, assistance or co-operation, knowingly enable a person who is not a registered medical practitioner (whether or not that person is described as an assistant) to:</p> <p>n) perform any act of operative surgery (as distinct from manipulative surgery) on a patient in respect of any matter requiring professional discretion or skill, or</p> <p>o) issue or procure the issue of any certificate, notification, report or other like document, or to engage in professional practice, as if the person were a registered medical practitioner.</p> <p>p) Refusing or failing, without reasonable cause, to attend (within a reasonable time after being requested to do so) on a person for the purpose of rendering professional services in the capacity of a registered medical practitioner in any case where the practitioner has reasonable cause to believe that the person is in need of urgent attention by a registered medical practitioner, unless the practitioner has taken all reasonable steps to ensure that another registered medical practitioner attends instead within a reasonable time.</p> <p>q) Any other improper or unethical conduct relating to the practice or purported practice of medicine.</p> <p>Note: Sections 37A and 38 provide for some exceptions to the above provisions.</p> <p>(2) A registered medical practitioner has a "pecuniary interest" in giving a referral or recommendation:</p> <p>a) if the health service provider, or the supplier of the health product, to which the referral or recommendation relates is a public company and the practitioner holds 5% or more of the issued share capital of the company, or</p> <p>b) if the health service provider, or the supplier of the health product, to which the referral or recommendation relates is a private company and the practitioner has any interest in the company, or</p> <p>c) if the health service provider, or the supplier of the health product, to whom the referral or recommendation relates is a natural person who is a partner of the practitioner, or</p> <p>d) in any circumstances prescribed by the regulations.</p> <p>(3) A registered medical practitioner engages in "overservicing" if the practitioner, in the course of professional practice:</p> <p>a) provides a service in circumstances in which provision of the service is unnecessary, not reasonably required or excessive, or</p> <p>b) engages in conduct prescribed by the regulations as constituting overservicing.</p> <p>(4) For avoidance of doubt, a reference in this section to a referral or recommendation that is given to a person includes a referral or recommendation that is given to more than one person or to persons of a particular class.</p> <p>(5) In this section: "benefit" means money, property or anything else of value. "recommend" a health product includes supply or prescribe the health product. "supply" includes sell.</p> <p>Section 37 – Professional misconduct For the purposes of this Act, "professional misconduct" of a registered medical practitioner means:</p> <p>a) unsatisfactory professional conduct, or</p> <p>b) more than one instance of unsatisfactory professional conduct that, when the instances are considered together, amount to conduct of a sufficiently serious nature</p>
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NSWMB Commentary on NRAIP Complaints Consultation Paper

	to justify suspension of the practitioner from practising medicine or the removal of the practitioner's name from the Register.
<p>Northern Territory <i>Health Practitioners Act 2004</i></p>	<p>Section 56(2) – Professional misconduct Without limiting the matters that may constitute professional misconduct, a health practitioner is guilty of professional misconduct if the health practitioner -</p> <ul style="list-style-type: none"> a) contravenes this Act b) contravenes a foreign health care practice law c) contravenes a code that applies to the health care practice authorised by the health practitioner's category of registration or enrolment d) contravenes a condition subject to which the health practitioner is registered or enrolled e) when required to have a practising certificate - practises without a practising certificate f) practises in a restricted practice area without an authorisation to practise in the area g) contravenes a condition of an authorisation h) fails to pay, within the time specified, a fine imposed on the health practitioner under section 65(1)(d) i) fails to comply with a requirement made of the health practitioner under section 65(1)(f) j) fails to honour an undertaking given to the boards or tribunal k) is negligent or incompetent in health care practice, or l) behaves in a fraudulent or dishonest manner in the health care practice authorised by the health practitioner's category of registration or enrolment. <p>Section 83 – meaning of professional performance is the knowledge and skill possessed and applied by the health practitioner in the category of health care practice for which he or she is registered or enrolled.</p> <p>Section 84 – meaning of unsatisfactory in relation to professional performance is if it is below the standard reasonably expected of a health practitioner of an equivalent level of training or experience.</p>
<p>Queensland <i>Health Practitioners (Professional Standards) Act 2001</i></p>	<p>Dictionary Unsatisfactory professional conduct includes the following:</p> <ul style="list-style-type: none"> a) professional conduct that is of a lesser standard than that which might reasonably be expected of the registrant by the public or the registrant's professional peers b) professional conduct that demonstrates incompetence, or a lack of adequate knowledge, skill, judgment or care, in the practise of the registrant's profession c) infamous conduct in a professional respect d) misconduct in a professional respect e) conduct discreditable to the registrant's profession f) providing a person with health services of a kind that are excessive, unnecessary or not reasonably required for the person's wellbeing g) influencing, or attempting to influence, the conduct of another registrant in a way that may compromise patient care h) fraudulent or dishonest behaviour in the practise of the registrant's profession, and i) other improper or unethical conduct.
<p>South Australia <i>Medical Practice Act 2004</i></p>	<p>Section 3 – Interpretation Unprofessional conduct includes:</p> <ul style="list-style-type: none"> a) improper or unethical conduct in relation to professional practice b) incompetence or negligence in relation to the provision of medical treatment c) a contravention of or failure to comply with— <ul style="list-style-type: none"> (i) a provision of this Act, or (ii) a code of conduct or professional standard prepared or endorsed by the board under this Act, and d) conduct that constitutes an offence punishable by imprisonment for one year or more under some other Act or law.

<p>Tasmania <i>Medical Practitioners Registration Act 1996</i></p>	<p>Section 44 (1) – allows a complaint to be made to Council</p> <p>Section 45 – Specific matters of complaint</p> <p>Subsection (1)(e) – a person may complain to Council that a registered medical practitioner is guilty of professional misconduct.</p> <p>Subsection (2) – Without limiting the matters that may constitute professional misconduct, a medical practitioner is guilty of such misconduct if the medical practitioner –</p> <ul style="list-style-type: none"> a) contravenes a provision of this Act, or b) contravenes a foreign medical law, or c) contravenes a condition of his or her registration, or d) fails to pay, within the time specified for payment, a fine imposed on the medical practitioner under section 52(1)(c) or costs or expenses ordered to be paid under section 53(1), or e) fails to comply with a requirement made of that medical practitioner under section 52(1)(e), or f) fails to honour an undertaking given to the Council or tribunal, or g) is incompetent in the practice of medicine, or h) behaves in a deceptive or misleading manner in the practice of medicine, or i) engages in conduct that is capable of bringing the medical profession into disrepute, or j) advertises his or her practice or services in an inappropriate or fraudulent way, or k) fails, without reasonable excuse and within a reasonable time, to comply with a request by the Council to provide it with information, or l) practises while his or her registration is wholly suspended, or m) practises, while his or her registration is partially suspended, in the area of practice to which the partial suspension relates, or n) tries, by means of any threat or inducement, to stop a person from making or proceeding with a complaint against that medical practitioner.
<p>Victoria <i>Health Professions Registration Act 2005</i></p>	<p>Section 3 – Definitions</p> <p>professional misconduct includes:</p> <ul style="list-style-type: none"> a) unprofessional conduct of a health practitioner, where the conduct involves a substantial or consistent failure to reach or maintain a reasonable standard of competence and diligence b) conduct that violates or falls short of, to a substantial degree, the standard of professional conduct observed by members of the profession of good repute or competency, and c) conduct of a health practitioner, whether occurring in connection with the practice of the health practitioner's health profession or occurring otherwise than in connection with the practice of a health profession, that would, if established, justify a finding that the practitioner is not of good character or is otherwise not a fit and proper person to engage in the practice of that health profession <p>professional performance means the knowledge, skill or care possessed and applied by a registered health practitioner in the provision of regulated health services</p> <p>unprofessional conduct includes:</p> <ul style="list-style-type: none"> a) conduct of a health practitioner occurring in connection with the practice of the practitioner's health profession that is of a lesser standard than a member of the public or the health practitioner's peers are entitled to expect of a reasonably competent health practitioner of that kind b) professional performance which is of a lesser standard than that which the registered health practitioner's peers might reasonably expect of a registered health practitioner, c) providing a person with health services of a kind that are excessive, unnecessary or not reasonably required for that person's well-being d) influencing or attempting to influence the provision of health services in such a way that client care may be compromised e) a contravention of section 94 or the guidelines issued under section 95 f) the failure to act as a health practitioner when required under an Act or regulations to do so g) a finding of guilt of:

	<ul style="list-style-type: none"> i. an offence where the health practitioner's suitability to continue to practise is likely to be affected because of the finding of guilt or where it is not in the public interest to allow the health practitioner to continue to practise because <ul style="list-style-type: none"> 1. of the finding of guilt, or 2. an offence under this Act or the regulations, or 3. an offence as a health practitioner under any other Act or regulations h) the contravention of, or failure to comply with a condition imposed on the registration of the health practitioner by or under this Act i) in the case of a registered pharmacist, if the pharmacist owns or has a proprietary interest in a pharmacy business approved under Part 6, failure to comply with a condition of approval of that pharmacy business, and j) the breach of an agreement made under this Act between a health practitioner and the responsible board that registered that practitioner.
<p>Western Australia <i>Medical Practitioners Act 2008</i></p>	<p>Section 4 – Interpretation</p> <p>Section 76 – Disciplinary matters</p> <p>1) The following are disciplinary matters –</p> <ul style="list-style-type: none"> a) that a person has contravened a condition applying to that person's registration or the practice of medicine by that person b) that a person in the course of his or her practise as a medical practitioner – <ul style="list-style-type: none"> i) acted carelessly ii) acted incompetently iii) acted improperly iv) breached this Act v) failed to comply with an undertaking given to the boards under this Act vi) provided services that were excessive, unnecessary or not reasonably necessary for the recipient's wellbeing c) that a person has been convicted of an offence the nature of which renders the person unfit to practise as a medical practitioner d) that a person has engaged in conduct in a professional respect that falls short of the standard – <ul style="list-style-type: none"> i) that a member of the public is entitled to expect of a medical practitioner, or ii) that a member of the medical profession would reasonably expect of a medical practitioner iii) that a person has engaged in sexual misconduct. <p>2) The matters referred to in subsection (1)(a), (b)(i) to (iii), (v) and (vi), and (c) to (e) are disciplinary matters whether or not they occur in this State or in a State or Territory that has a corresponding law.</p> <p>Section 77 – Competency matters</p> <p>The following are competency matters –</p> <ul style="list-style-type: none"> a) that a person does not have sufficient knowledge and skill to practise medicine safely and competently either generally or in a particular area of medicine in which the person is practising or is likely to practise b) if the person is a specialist, the person does not have sufficient knowledge and skill to practise his or her specialty. <p>Section 78 – Impairment matters</p> <p>The following are impairment matters –</p> <ul style="list-style-type: none"> a) that a person is affected by his or her use of or dependence on alcohol or any other drug to such an extent that the ability of the person to practise medicine is, or is likely to be, affected adversely b) that a person suffers from an impairment to such an extent that the ability of the person to practise medicine is, or is likely to be, affected adversely. <p>Section 4 – Interpretation</p> <p>Sexual misconduct means –</p> <ul style="list-style-type: none"> a) sexual intercourse or other forms of physical sexual relations between a medical practitioner and a patient, or b) touching of a sexual nature, of a patient by a medical practitioner, or c) behaviour or remarks of a sexual nature by a medical practitioner towards a patient.

NSWMB Commentary on NRAIP Complaints Consultation Paper

ATTACHMENT 5: State and Territory Ombudsman legislation

Jurisdiction	Main provisions
ACT <i>Ombudsman Act 1979</i>	<p>The Act provides for the appointment of an ombudsman and defines the functions and powers of that office.</p> <p>Section 5 – functions to investigate complaints against agencies about action that relates to a matter of administration. Ombudsman not authorised to investigate action taken by a tribunal in exercise of deliberative functions.</p> <p>Section 18 – Report of investigation referred to agency, with reasons and recommendations.</p>
C'wealth <i>Ombudsman Act 1976</i>	<p>The Act provides for the appointment of a Commonwealth Ombudsman, a Defence Force Ombudsman and a Postal Industry Ombudsman, and provides for their respective functions and powers.</p> <p>Section 3 – definition of 'prescribed authority' includes a body corporate or an unincorporated body, established for a public purpose by, or in accordance with the provisions of an enactment.</p> <p>Section 5 – functions of Ombudsman, to investigate action, being action that relates to a matter of administration, taken by a prescribed authority.</p> <p>Section 7A – Ombudsman may make preliminary enquiries.</p> <p>Section 8 – Ombudsman's investigation powers.</p> <p>Section 8A – Ombudsman may make an arrangement with the Ombudsman of a State, or the Ombudsmen of two or more States, for investigation of action taken by a prescribed authority.</p> <p>Section 15 – reports by Ombudsman to prescribed authority, with reasons and recommendations.</p>
NSW <i>Ombudsman Act 1974</i>	<p>The Act provides for the appointment of an Ombudsman and defines functions.</p> <p>Section 5 – definition of 'public authority' includes any statutory body representing the Crown.</p> <p>Section 12 – provides right to complaint to Ombudsman about the conduct of a public authority.</p> <p>Section 13 – provides power for Ombudsman to investigate a complaint.</p> <p>Section 15 – provides powers for Ombudsman to conciliate complaints.</p> <p>Section 26 – report of investigation given to Minister and head of public authority.</p>
Northern Territory <i>Ombudsman (Northern Territory) Act</i>	<p>The Act provides for the appointment of an Ombudsman for the Northern Territory, and defines his functions and powers.</p> <p>Section 3 – defines 'administrative action'. Definition of 'authority' includes a person or body, whether incorporated or unincorporated, that is constituted or established for a public purpose by or under a law of the Territory, not being a body which is a prescribed authority within the meaning of the <i>Ombudsman Act 1976</i> of the Commonwealth.</p> <p>Section 13 – the Act applies to all Departments and authorities.</p> <p>Section 14 – empowers the Ombudsman to investigate any administrative action taken by an authority to which Act applies. Excludes administrative action for which complainant has right of appeal or review.</p> <p>Section 26 – procedure on completion of an investigation. Ombudsman makes report and recommendations to principal officer of authority.</p>

NSWMB Commentary on NRAIP Complaints Consultation Paper

<p>Queensland <i>Ombudsman Act 2001</i></p>	<p>The Act establishes the office of ombudsman for investigating administrative actions taken by agencies and recommending to agencies ways of improving administrative processes.</p> <p>Section 8 – Meaning of agency includes public authority –</p> <p>Section 9 – Public authority is an entity established for a public purpose under an Act, but does not include a court.</p> <p>Section 14 – Ombudsman may investigate administrative actions of agencies, but not tribunal deliberative functions.</p> <p>Section 50 – following investigation, Ombudsman may give principal officer of agency report with recommendations</p>
<p>South Australia <i>Ombudsman Act 1976</i></p>	<p>The Act provides for the appointment of an Ombudsman to investigate the exercise of the administrative powers by certain agencies, and provides for the powers, functions and duties of the Ombudsman.</p> <p>Section 3 – Agency to which this Act applies – any incorporated or unincorporated body established for a public purpose by an Act.</p> <p>Section 13 – Ombudsman may investigate any administrative act, on receipt of a complaint or on own initiative, except administrative acts where the complainant has a right of appeal to a tribunal, court, etc.</p> <p>Section 17A – powers to conciliate complaints.</p> <p>Section 19 – powers of a Royal Commission.</p> <p>Section 19A – powers to direct an agency to refrain from performing an administrative Act but agency may determine not to comply with direction.</p> <p>Section 24 – following investigation, power to report opinion and reasons for it and recommendations to principal office of agency.</p>
<p>Tasmania <i>Ombudsman Act 1978</i></p>	<p>The Act provides for the appointment and functions of an Ombudsman and for the investigation of complaints with respect to administrative action taken by or on behalf of government departments or other authorities.</p>
<p>Victoria <i>Ombudsman Act 1973</i></p>	<p>The Act provides for the appointment in Victoria of an Ombudsman with power to investigate the administrative actions taken by or on behalf of government departments and other authorities.</p> <p>Section 2 – Public Statutory Body means a body of persons, whether corporate or unincorporated, constituted or established under an Act for a public purpose, in respect of which the Governor in Council or a Minister has a right to appoint all or some of its members.</p> <p>Section 13 – principal function of Ombudsman is to enquire into or investigate any administrative action taken in any government department or Public Statutory Body to which Act applies. Includes any administrative action incompatible with the Charter of Human Rights and Responsibilities. Excludes courts, tribunals resided over by a Judge or magistrate and matters where aggrieved person has right of appeal.</p> <p>Section 23 – procedure on completion of an investigation – powers to report opinion and reasons to principal officer of authority.</p>
<p>Western Australia</p>	<p>Ombudsman Western Australia – Office not established under legislation. Parliamentary Commissioner Act 1971 provides the basis for the existence of the office and a variety of laws impact on its activities.</p> <p>Main functions – to assist Western Australians to resolve complaints with State public sector agencies, statutory authorities, local governments and public universities, and to initiate investigations into these bodies even when no complaint received, and to help those agencies be accountable for and improve the standard of their administrative decision-making practices and conduct.</p>

ATTACHMENT 6: Current tribunal arrangements by State and Territory

ACT	Part 7 of the <i>Health Professions Act 2004</i> establishes the Health Professions Tribunal , confers its functions and sets out its procedure including what matters it can hear and how applications are made.
NSW	Part 11 of the <i>Medical Practice Act 1992</i> establishes the Medical Tribunal and sets out its functions, procedures, etc. Nine discipline specific tribunals are established under each of the other nine registration Acts.
Northern Territory	Part 4 of the Act establishes the Health Professional Review Tribunal and confers its functions, and the orders it can make with respect to matters referred to it under the Act.
Queensland	Part 6 Division 6 of the <i>Health Practitioners (Professional Standards) Act 1999</i> sets out the powers, functions and procedure of the Health Practitioners Tribunal established under the Act to hear matters with respect to all regulated health professions.
South Australia	Part 5 Division 4 of the <i>Medical Practice Act 2004</i> sets out provisions relating to the powers, functions and procedure of the Medical Professional Conduct Tribunal , established (under another name) under a previous enactment and continued under the Act. Similarly, the <i>Dental Practice Act 2001</i> provides for the operation of the Dental Professional Conduct Tribunal . For remaining regulated health professions, there is no tribunal constituted separately to the board, and all matters are dealt with by the responsible board, with appeals from board decisions to the District Court of South Australia (except for psychology matters where appeal lies to the Supreme Court).
Tasmania	Part 4 Division 2 of the <i>Medical Practitioners Registration Act 1996</i> establishes the Medical Complaints Tribunal and confers its functions. The <i>Nursing Act 1995</i> establishes and confers jurisdiction for hearing serious matters on a Professional Review Tribunal . In the remaining Acts, there is no separately constituted tribunal, and boards hear complaints through either an informal or formal process as set out in the respective legislation.
Victoria	Under the <i>Health Professions Registration Act 2005</i> , matters may be referred for hearing to the Victorian Civil and Administrative Tribunal , VCAT is established under the <i>VCAT Act</i> but is conferred with jurisdiction with respect to health practitioner registration and disciplinary matters under the HPR Act. Matters arising from board decisions for all the regulated health professions are referred to VCAT.
Western Australia	Part 6 Division 10 of the <i>Medical Practitioners Act 2008</i> confers on the State Administrative Tribunal , established under the <i>State Administrative Tribunal Act 2004</i> powers to hear matters arising from the Medical Board of WA. Similar arrangements are in place in the Acts that regulate the other nine professions.