

NATIONAL REGISTRATION AND ACCREDITATION SCHEME FOR THE HEALTH PROFESSIONS

FEEDBACK ON CONSULTATION PAPER

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

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INTRODUCTION

The Nurses and Midwives Board of Western Australia recognises the importance of a robust, comprehensive and publicly accountable complaints management system to actively manage complaints, notifications, reports about the health, professional performance and professional conduct of health professionals registered under the National Registration and Accreditation Scheme for the health professions.

We note that the policy outlined covers:

- receipt and management of complaints, reports and notifications
- the three streams for handling of matters impacting upon the professional practice of health practitioners ie:
 - professional performance (competence) matters
 - health (impairment) matters, and
 - professional 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; Health Complaints Commissioners (HCCs); ombudsmen; local court and police systems; and the Nurses and Midwives Board of Western Australia suggests coroners in each jurisdiction and other relevant Australian Government, State and Territory agencies and statutory authorities
- offences for breach of the legislation, and
- enforcement powers of boards.

The Nurses and Midwives Board of Western Australia strongly supports the view that the system must:

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

To ensure that there is a cogent correlation between the Consultation Paper and the Nurses and Midwives Board Western Australia comments this document will use the same numbering system and slightly modified headings, moving through the issues and cross referring as necessary. Please do not hesitate to contact the Nurses And Midwives Board Western Australia should clarification be required on any of the points made in this response.

PART 2 - PROPOSED TERMINOLOGY

Proposal 2.1.1 – Complaint, report or notification

The Nurses and Midwives Board Western Australia is of the view that the term ‘complaint’ and associated terms such as ‘complainant’ (or even ‘complainer’) are more clearly understood and more regularly used by the community generally. If the primary function of the legislation it to

protect the community, the terminology should be unequivocal and well understood by the community.

While the Nurses and Midwives Board Western Australia acknowledges that some matters may come to the boards' attention as reports, referrals or notifications from a range of sources including colleagues, employers and other agencies, the use of terms such as 'report', 'referral' or 'notifications' can be defined in the interpretation section of the legislation. These secondary sources are more able to be introduced to the meaning of the terminology through eg the legislation itself, the relevant board, Government communications, their professions and industry bodies and their work places.

The Nurses and Midwives Board Western Australia notes that some health professions have argued that 'complaint' is too harsh a word to be used in the context of some matters referred to the boards; may go to a professional's reputation; and increase their anxiety about the management of the matter. However, the risk of using euphemisms not well understood in the community in this context is regarded by the Nurses and Midwives Board Western Australia as being greater.

The point made in the consultation in regards to educating people about the use of the use of 'notification' can also apply to the use of 'complaint' ie if that term "...*is adopted, then a definition will be required in the legislation to make clear that it encompasses [reports, notifications and referrals]. Using the term['complaint'] 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 [health professionals, work colleagues, treating clinicians on 'how to make a referral, notification or referral']*".

To this end the Nurses and Midwives Board Western Australia will be referring to complaints, notifications, referrals and reports as 'complaints' in the remainder of this document.

RECOMMENDATION:

The Nurses and Midwives Board Western Australia recommends the use of the term 'complaint' as the primary term used in the legislation.

Proposal 2.1.2 - Preliminary Assessment

The Nurses and Midwives Board Western Australia notes that the word 'preliminary' tends to be somewhat misleading. On receipt of a complaint, the board (or a committee of the board) are more likely to be making an 'initial assessment', ie the first assessment of the matter on its receipt; while the term 'preliminary assessment' tends to suggest that this assessment precedes a main assessment. In most instances this will be the only assessment before the primary management of the complaint commences or the complaint is dismissed.

The Nurses and Midwives Board Western Australia does recognise that further assessment may be required in some instances when a decision is made by the board or one of the committees or panels set up to deal with specific types of complaints, to refer a matter to another stream of management, or to cease dealing with the complaint. In such a case review of the initial assessment decision may need to be recognised as a 're-assessment'.

If further and better particulars are required to make an initial assessment about the most appropriate means of managing a complaint then the legislation should have provisions that enable the obtaining of these appropriately; eg by seeking further information from a complainant; or as a formal preliminary investigation process with the requisite safeguards.

In the regulatory mapping project recently undertaken by the Nurses and Midwives Board Western Australia of the current regulatory systems for managing complaints concerning the professional practice of nurses and midwives in each jurisdiction in Australia, it was found that the issue of seeking further and better particulars, preliminary investigation and investigation are dealt with in a number of ways with a lack of consistency or clarity across the spectrum. For example, what one jurisdiction describes as 'preliminary investigation' is what another jurisdiction defines as 'investigation'; while another jurisdiction describes seeking further information from a complainant as a 'preliminary investigation'. For several, the meaning is not clear on the face of the legislation.

The Nurses and Midwives Board Western Australia strongly recommends that the powers to seek further information prior to making an assessment decision are limited to assisting a complainant to clarify the issues in relation to the matter they are bringing to the board's attention to enable the board (or committee) to make a reasonable initial assessment decision. Should it be recognised that an incorrect initial assessment decision was made as a matter progresses, there should be the capacity to re-assess the complaint and amend the management stream; enable referral back to the board if another party to whom a complaint has been referred finds it is outside their jurisdiction; or in the case of a complaint that was discontinued for lack of adequate evidence to support an alternative management strategy, the capacity for review on the basis of new evidence being presented, also should be available. The board must have an 'own motion' power to enable it to pursue a matter where a complainant raises a serious issue where they are a third party to the events; extremely fearful of the consequences of making a complaint but have well founded reasons to do so; or have insufficient information to support an assessment decision in the first instance.

The Nurses and Midwives Board Western Australia recommends that the term 'investigation' should be quarantined to a formal investigative process that takes place as part the inquiry into the circumstances of an alleged matter pertaining to the professional conduct of a health practitioner that may lead to disciplinary action, after an assessment decision has been made that the complaint should be managed in that way. In such cases the powers, oversight processes and safeguards that surround such investigations are explicitly available to the parties.

RECOMMENDATIONS:

The Nurses and Midwives Board Western Australia recommends the use of the term 'preliminary assessment' is amended to 'initial assessment'.

The Nurses and Midwives Board Western Australia recommends that the scope of the powers for the board (or committee) seeking further and better particulars from complainants or other parties before an initial assessment decision is made are clearly articulated in the legislation.

The Nurses and Midwives Board Western Australia recommends that the term

'investigation' is limited to the formal investigative process that follows an assessment decision for a complaint to be managed in the professional conduct stream.

Proposal 2.1.3 – Complaints assessment committee

The Nurses and Midwives Board Western Australia is of the view that this committee should be called a 'complaints assessment committee' for the reasons outlined in 2.1.1. As the assessment committee will be dealing with matters that go across all streams of the board's complaints management systems; complaints about which a decision is made to take no action; as well as complaints that are referred to other organisations and agencies for management and resolution, the term 'investigations committee' is totally inappropriate and misleading.

RECOMMENDATION:

The Nurses and Midwives Board Western Australia recommends the use of the term 'complaints assessment committee' as the name of any committee that may be established by a board to make an initial (and perhaps further) assessment(s) of a matter.

Proposals 2.1.4 – 2.1.7

Supported.

Proposal 2.1.8 - Health management committee

The Nurses and Midwives Board Western Australia generally support this proposal but assumes there is a typographical error in the statement and should read instead: "*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 capacity to practise is affected by a physical or mental impairment or ~~habitual~~ misuse of alcohol or other drugs substances.*" The Nurses and Midwives Board Western Australia is of the view that practising after even an occasional binge may be just as dangerous to the community; also the broader definition of substances allows for the inclusion of conduct such as petrol and glue sniffing.

RECOMMENDATION:

The Nurses and Midwives Board Western Australia recommends that the terminology is amended as above.

Proposals 2.1.9 – 2.1.14

Supported

Proposal 2.1.15 - Not of good character

The Nurses and Midwives Board Western Australia supports the use of the term 'not of good character' and its pertinence to defects in character. The Nurses and Midwives Board Western Australia notes that this term has a long and well recognised common law history in Australia in the area of professional conduct and goes to broad overarching issues of conduct including an individual's honesty, integrity, professionalism, moral strength and respect for others.

Proposal 2.1.16 - Impairment

Supported – see also comments concerning terminology above against 2.1.8.

Proposal 2.1.17 - Unsatisfactory professional performance

Supported – however, see comments and recommendations concerning the definition itself against Proposal 3.3 below.

Proposal 2.1.18 - Unsatisfactory professional conduct

Supported - the hierarchy of seriousness is not as clear if the term 'unprofessional conduct' is used. However, see comments and recommendations concerning the definition itself against Proposal 3.3 below.

Proposal 2.1.19 – Professional misconduct

Supported – however, see comments and recommendations concerning the definition itself against Proposal 3.3 below.

General comments concerning terminology

Use of the term 'patient'

The Nurses and Midwives Board Western Australia has concerns about the constant use of the term 'patient' used throughout the discussion document and recommends that this is not used in the legislation. This term is not generally accepted by health consumer organisations in Australia who tend to prefer the use of the terms 'persons requiring or receiving care/treatment' and 'health consumer'. Also, the term, while well recognised by health providers, especially in the context of hospital care and general practice care, is not appropriate to use across all the contexts of care, for example a school nurse, a community mental health professional, an optometrist, an Aboriginal health worker, a public health nurse providing vaccinations or health professionals involved in health promotion and community screening programs. The use of the word 'patient' is increasingly being rejected because of its paternalistic overtones, and importantly, is not used by most health consumer organisations.

In the recently published Codes of professional conduct and ethics for nurses and midwives in Australia, the Nurses and Midwives Board Western Australia has deliberately moved away from

the use of the term 'patient'. An example in the interpretive statement in the *Code of Ethics for Nurses in Australia* (2008) is:

Person (health consumer): refers to the person requiring or receiving health care, treatment, advice, information or other related services; and includes the full range of alternative terms such as client, resident and patient. This term may include the family, friends, relatives and other members of a person's nominated social network and who are associated with the person who is the recipient of care.

RECOMMENDATION:

The Nurses and Midwives Board Western Australia recommends that the term 'patient' is not used in the legislation, but that an interpretive statement is included that clarifies the use of the term for people who are the recipients of care, treatment or services provided by registered health professionals..

PART 3 – OVERVIEW OF PROPOSED SYSTEM

General comments

Background – 3.1

The Nurses and Midwives Board Western Australia notes in paragraph 2 (page 9) the explanation does not include issues of unprofessional conduct except in reference to unethical conduct. This is probably an omission. However, it may be a useful point to note in any Parliamentary or other explanatory documents that many, if not all of the professions that are to be regulated under the legislation have codes of professional conduct and ethics that may provide guidance to the community, employers and the professionals themselves in relation to appropriate conduct, health, performance and ethical practice.

Paragraph 4 (page 10) in this section is problematic due to the explicit statement:

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 situation for health practitioners, whose performance or health is so problematic that there is a need to transfer them into the conduct stream of management, is not disputed. However, for others, management in the health or performance stream may be the most effective risk management strategy once their problem has been identified and referred to the board. To say explicitly the practitioner must *have not caused harm to any person or potentially caused harm to a person* may lock a board into a situation where they have no choice but to refer the person straight into the disciplinary stream. A 'seriousness' test with some discretion may enable a board to achieve the best outcome in protecting the community while at the same time enable management of the health professional's performance or impairment to occur within the relevant

stream; always with the understanding that if that stream does not provide the necessary safeguards, re-direction and referral to the disciplinary stream is always an option that is open to the board.

Section 87 of the *Health Practitioners Act 2004* (NT) has such a 'seriousness test' in relation to professional performance:

The Board must not have a health practitioner's professional performance assessed if a matter giving rise to the proposed assessment raises a prima facie case of professional misconduct by the health practitioner or unsatisfactory professional conduct by the health practitioner of a significant nature. Such matters must be dealt with as a professional conduct matter.

Section 32H of the *Nurses and Midwives Act 1991* (NSW) also has such a provision in relation to professional performance.

The Nurses and Midwives Board Western Australia notes that similar challenges arise in relation to impairment where a health professional's health is such that the only means of protecting the community while allowing the individual's legal rights to be respected is referral to the conduct stream where the seriousness of the conduct can be tested and suitable remedies applied within an appropriate justice framework. However, early and appropriate management in the health stream may preempt that major step, even if the outcome of the person's impairment may have had some impact upon the care, treatment or services they were providing to people.

RECOMMENDATION:

The Nurses and Midwives Board Western Australia recommends that there is a 'seriousness test' introduced for assessment of complaints received that would allow the exercise of some discretion to refer matters to the performance or health stream even if there was some evidence that the sequelae of the practitioner's conduct may have generated some harm or potential harm to person's in their care.

Key features of proposed system 3.2 - Power to obtain health assessments as part of a complaint that has been assessed as requiring performance or conduct management

The Nurses and Midwives Board Western Australia notes that the issue of a health practitioner's health may remain a question during the course of a performance assessment or conduct investigation and recommends that the power to refer a health practitioner for a health assessment as they do as part of the health management stream may be of great value. The *Nurses and Midwives Act 2006* has the capacity for an impairment review committee to seek the practitioner to consent to a voluntary assessment (s 67). Enabling a health assessment to be conducted without having to formally transfer the management of the complaint across to the health stream may expedite resolution of the matter.

RECOMMENDATION:

The Nurses and Midwives Board Western Australia recommends that a board (or, as their delegate, a performance management, conduct management and health committee or panel) have the power to require a health practitioner who is the subject of a complaint

being managed by the board or one of the three streams, to undertake a health assessment, when reasonable cause exists. The capacity to seek a health assessment as part of an investigation is also recommended.

Monitoring agreements and conditions

The Nurses and Midwives Board Western Australia strongly supports the need for the boards (or the committees of the board) have the power to monitor compliance by registered health practitioners of any conditions placed upon their registration, practice or in respect to any undertakings they have been given and to initiate assessment or hearing processes in a timely way, in cases of breach. Without such power the board becomes a ‘toothless tiger’.

Proposal 3.3.1 – proposed definitions for what constitutes a departure from professional standards

Unsatisfactory professional conduct

The Nurses and Midwives Board Western Australia noted that the criteria under the rubric of ‘unsatisfactory professional conduct’ were generally very specific to medical practice and did not give such recognition to particular issues that are specific to a number of the other health professionals that will be regulated under this regulatory schema.

The Nurses and Midwives Board Western Australia is of the view that this definition is far too cumbersome and wordy to enable a clear understanding of what constitutes unsatisfactory professional conduct. The Nurses and Midwives Board Western Australia is of the view that the multiple criteria (ie a) to k)) should be distilled down into a few broad criteria that can be heads for each of the specific behaviours or actions currently articulated. If there is a view that the detail is required in the body of the legislation for educational purposes, it could be included as explanatory notes in the way that such matters are captured in the *Health Professionals Act 2004* (ACT) as well as in board policy statements that will be required to support the interpretation and operationalisation of the legislation. It certainly does not currently pass the ‘light touch of legislation’ test.

Whatever the criteria that are agreed upon that are needed to define unsatisfactory professional conduct, and while it recognises that the definition is inclusive rather than exclusive with the use of the word ‘includes’ the Nurses and Midwives Board Western Australia strongly recommends that the words of the definition need to have as a lead in statement *‘unsatisfactory professional conduct includes but is not limited to:’* to reinforce the critical point that it is not an exclusive definition.

The Nurses and Midwives Board Western Australia are also seeking clarification on why the definition of ‘unsatisfactory professional conduct’ included ‘unsatisfactory professional performance’ as point b). Perhaps it was intended that a threshold descriptor was to be added also eg where the consequences of the unsatisfactory professional performance’ placed people in their care at grave risk of harm’?

RECOMMENDATIONS:

The Nurses and Midwives Board Western Australia recommends that the definition of 'unsatisfactory professional conduct' be condensed into a few broad categories of conduct, behaviour, actions or omissions under which the current list can be captured as a subset and other means used to ensure the meaning of the broad categories are clearly understood.

The Nurses and Midwives Board Western Australia also recommends reinforcement that the list of criteria is not exhaustive ie not limited to those on the list.

Unsatisfactory professional performance

The Nurses and Midwives Board Western Australia generally supports the definition but suggests some minor amendments and the inclusion of several words as indicated below to bring it into line with current language and community expectations:

'unsatisfactory professional performance' means professional performance that demonstrates that the knowledge, skill or judgement possessed and applied, or care exercised by the practitioner is significantly below the standard reasonably expected of a practitioner of an equivalent level of education and experience and poses a risk to the community.

RECOMMENDATION:

The Nurses and Midwives Board Western Australia recommends that the definition of unsatisfactory professional performance be amended as proposed above.

Professional misconduct

The Nurses and Midwives Board Western Australia is of the view that there must be an explicit link between the definition of 'unsatisfactory professional conduct' and 'professional misconduct' as the latter is often found to be at the serious end of the former, therefore an explicit threshold is required. A considerable body of common law has evolved around the meaning of both terms that reinforces that they are a continuum rather than differentiated as appears in the proposed definition. The language of the proposed definition is clearly based upon that in Section 3 of the *Health Professions Registration Act 2005 (Vic)* has merit, however it would be significantly enhanced with a threshold statement such as 'professional misconduct is such misconduct as would reasonably be regarded as disgraceful or dishonorable by or would reasonably incur the strong reprobation of fellow practitioners of good repute and competence'

RECOMMENDATION:

The Nurses and Midwives Board Western Australia recommends that there is an additional and unequivocal statement that professional misconduct is at the serious end of a continuum of conduct that may be identified as unsatisfactory professional conduct.

PART 4 - NOTIFICATIONS

Proposals 4.1.1 and 4.2.1 – Who may make a complaint and the form of the complaint

Supported.

Proposal 4.3.1 – Subject matter of a complaint

The Nurses and Midwives Board Western Australia generally supports this proposal but suggests the following:

A notification complaint 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 substances, or *(NOTE: practising after even an occasional binge may be just as dangerous to the community; also the broader definition of substances allows for the inclusion of conduct such as petrol and glue sniffing)*
- the registrant's professional performance demonstrates they lacks the competence to practice because of insufficient knowledge and skill, including communication skills (such as competency in the English language), or *(NOTE: makes explicit that professional performance and competence are linked and reflects the definition)*
- the registrant has engaged in unsatisfactory professional conduct or professional misconduct (however termed), or
- the registrant is not of good character.

RECOMMENDATION:

The Nurses and Midwives Board Western Australia recommends that the provision relating to what sort of matter may be the subject of a complaint is amended as proposed above.

Proposal 4.3.2 – Practitioner not registered when complaint made

Supported.

Proposal 4.4.1 – options a and b – Mandatory reporting in a treating relationship

The Nurses and Midwives Board Western Australia supports the use of the extended obligations. The purpose of these provisions is to protect the community, and treating health practitioners may be privy to information and evidence that extends well beyond physical or mental impairment, health condition or habitual use of alcohol or other substances. While it may be argued this mandatory reporting obligation may put the free exchange of information in a therapeutic relationship; there is evidence from health professional tribunal cases heard over a number of years that the failure to act by a treating health practitioner has meant that the danger posed by the health professional misconduct (including sexual misconduct) has continued for significant periods of time.

As indicated above, the Nurses and Midwives Board Western Australia prefers the use of the term 'substances' to 'drugs' as it captures a broader classification of substances that may be used.

RECOMMENDATION:

The Nurses and Midwives Board Western Australia recommends that a treating practitioner should be obliged to report the broader range of matters that may come to their attention during the course of a therapeutic relationship with a registered health practitioner, in order to reduce the risk of harm to members of the community.

Proposal 4.4.2 – options a and b – Mandatory reporting by employers

The Nurses and Midwives Board Western Australia supports the use of the extended obligations, however they also argue that the clearer wording in option 2a in relation to impairment should be used in the broader statement in option 2b with the additional areas suggested below. It is often the employer who is the in a position as the first hand eye witness (or be reported to by that eye witness), to evidence of matters relating to the health, performance and/or conduct of a health practitioner in their employ that may place the safety of people requiring or in the care of the health service at risk. To that end, the Nurses and Midwives Board Western Australia is strongly of the view that this provision should include significant issues of health impairment, unsatisfactory professional conduct, professional misconduct **and unsatisfactory professional performance** – all of which may lead to actions, behaviour or conduct that could be regarded as constituting a major departure from professional standards.

The Nurses and Midwives Board Western Australia also strongly recommends that it is made explicit that it is mandatory to report to the board when a registered health practitioner leaves their employ because of incidents or issues that may fit into the above categories and could be regarded as constituting a major departure from professional standards. At times the early dismissal or resignation of such a person is seen as the end point that satisfies an employer's obligations of protecting their clients and staff. In these cases the full investigation and action may not have taken its full course. Tragically, the very real sequelae can be that the health practitioner then seeks employment with another employer and there is no record of any health, performance or conduct matters at the board.

This raises the question then of what information should be provided to that subsequent employer who may have no means of knowing what has previously occurred. The board may require a very specific power to inform current employers when they make an assessment decision to investigate that on the face of the complaint appears to indicate a major departure from professional standards, providing them with enough information to ensure people are protected.

As a safeguard, a concomitant obligation should be imposed upon the health practitioner to inform an employer of any investigation underway by a board providing them with enough information to ensure people are protected.

RECOMMENDATIONS:

The Nurses and Midwives Board Western Australia recommends that there are comprehensive requirements as proposed above for an employer to make a complaint when it comes to their attention that the health, performance or conduct of a registered health practitioner constitutes a risk to the community and may be a major departure from professional standards.

The Nurses and Midwives Board Western Australia also recommends that it is explicit in the legislation that an employer is obliged to make a complaint to the board when a registered health practitioner leaves their employ because of incidents or issues that could be reasonably judged on the information available, as constituting a major departure from professional standards.

The Nurses and Midwives Board Western Australia recommends that the board have a power to notify any current employer(s) when they make an assessment decision to investigate a matter that on the face of the complaint appears to indicate a major departure from professional standards.

The Nurses and Midwives Board Western Australia also recommends an obligation should be imposed upon the health practitioner to inform an employer of any investigation underway by a board providing them with enough information to ensure people are protected.

Mandatory reporting of student registrants

The Nurses and Midwives Board Western Australia support the same requirements for mandatory reporting in relation to student registrants as above. However the employer in this instance the obligation may have to be placed on:

- the head of a faculty in an academic institution, or
- a health service may have to be designated as a deemed employer ie where a student is fulfilling the obligations for their clinical practicum, or
- the health service employer of students working in a health service where they may be employed while a student

If the 'harm test' is applied, students with a matter that goes to their health, performance or conduct may be in a position to place people in the care of the health service at considerable risk, and therefore should be part of the mandatory reporting requirements.

RECOMMENDATION:

The Nurses and Midwives Board Western Australia recommends that similar obligations exist for treating practitioners, health service employers of students of a registered profession, the academic institution and any health service that hosts students for their clinical practicum during the course of their studies.

The Nurses and Midwives Board Western Australia also recommends an obligation should be imposed upon the student to inform their academic institution or any health service employer of any investigation underway by a board providing them with enough information to ensure people are protected.

Proposal 4.5.1 – Protection for notifiers and registrants

Supported.

Proposal 4.6.1 - Own motion powers

The Nurses and Midwives Board Western Australia strongly supports the boards having an 'own motion' power to initiate an investigation into a matter in the absence of a complaint from a third party. Anonymous complaints or complaints where a complainant is adamant their identity must be protected, while problematic can provide important insights into serious matters that may not otherwise come to the board's attention, or in a timely that reduces the often long term consequences. A board's capacity to initiate an investigation in its own right is an important power that requires clear guidelines to be developed that will enable transparency and consistency in the exercise of such an important discretion.

Proposal 4.7.1 - Immediate suspension powers

The Nurses and Midwives Board Western Australia strongly supports granting of this power to a complaints assessment committee with the requirement that the board overseeing the decision and endorsing it, having reviewed it according to standard criteria. The monitoring and management of the suspension should then be transferred over to the relevant management committee (health, performance or conduct) of the board with reporting obligations to the board at 3 monthly intervals.

An initial suspension should not be for longer than six (6) months with the power to impose subsequent periods only after a robust review by the committee on the progress of the investigation and assessment of ongoing risk. The exercise of such a power imposes an increased obligation on the investigator(s), the committee, the board and those involved in any inquiry processes to ensure that such investigations and any proceedings that follow are expedited and conducted as quickly as possible while ensuring rigour and fairness. Such investigations can be complex and difficult to undertake in a short timeframe so there does need

to be the capacity to ensure the ongoing safety of the community while recognising the rights of the practitioner under investigation or referred for inquiry.

It should be clear to any board and the committees the impact of such an action in relation to the livelihood of the practitioner concerned and there should be requirement for 'reasons for decisions' to be documented by the committee at the point that suspension was originally imposed and each review or change to the orders subsequently.

RECOMMENDATION:

The Nurses and Midwives Board Western Australia recommends 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 six (6) 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.

Proposal 4.7.2 – Right to seek a review by suspended practitioner

The Nurses and Midwives Board Western Australia supports this proposal as long as any review should be on the legal aspects of the matter such as the legitimacy of the decision making process, not to inquire into facts of the case or the matter 'de novo'. In most cases an investigation will be underway into the circumstances and facts relating to the complaint and these may not be at a point where the investigation is complete enough for any factual findings to be made.

RECOMMENDATION:

The Nurses and Midwives Board Western Australia recommends that any review is a review on legal issues not as a 'de novo' hearing or into the facts of the case.

Proposal 4.7.3 – Acceptance of undertaking as an alternative to suspension

The Nurses and Midwives Board Western Australia supports this proposal but recommends that the legislation is explicit that any breach of that undertaking is deemed to be professional misconduct and dealt with accordingly.

RECOMMENDATION:

The Nurses and Midwives Board Western Australia recommends that the legislation is explicit in stating that any breach of such an undertaking is deemed to be professional misconduct and dealt with accordingly.

PART 5 - INITIAL ASSESSMENT OF COMPLAINTS

Note the Nurses and Midwives Board Western Australia's recommendations concerning terminology in the comments relating to Part 2 of the Consultation Paper.

Proposal 5.1.1 – Powers of boards on receipt of a notification

Supported.

Proposal 5.2.1 – Grounds for a board to refuse to deal with a complaint

The Nurses and Midwives Board Western Australia supports the proposal however recommends that the opportunity to refer the matter to a HCC or another agency is included. For example, the addition of the following dot point:

- the board identifies the complaint is one that is more reasonably within the jurisdiction of another agency to which it will refer the matter.

RECOMMENDATION:

The Nurses and Midwives Board Western Australia recommends that the referral of a complaint to another agency is included in this provision.

Proposal 5.3.1 – relationship of a board with the State and Territory HCCs

The Nurses and Midwives Board Western Australia generally supports the proposals for developing the relationship between the national boards and the State and Territory HCCs. The differing powers and functions of these organisations in each jurisdiction is going to mean that the legislation and protocols that are developed for liaison and referral are going to have to be very carefully negotiated on a case by case basis.

The Nurses and Midwives Board Western Australia recognises that for several of the HCCs there may be a significant adjustment to their roles, especially in NSW where the Health Care Complaints Commission (HCCC) is currently the independent agency that carries out all investigations relating to unsatisfactory professional conduct and professional misconduct involving any registered health professional in that State. The HCCC's Director of Proceedings is the decision maker as to what outcome there should be for a disciplinary matter after investigation, such as being referred to a formal inquiry. Once a decision is made to take a matter to formal inquiry, the HCCC is the prosecutor of the matter before the inquiry.

The Nurses and Midwives Board Western Australia also notes that there are several matters in relation to the boards and their relationship with the HCCs (and to some extent, other agencies to who they may refer, or be referred complaints). The other agencies include the State Administrative Tribunal in Western Australia, which the Board refers to under the current Nurses and Midwives Act 2006.

Conciliation and other resolution strategies for the management of complaints

The document discusses conciliation as the primary resolution strategy to the means available to the boards through the conduct, health and performance streams. However, a number of the HCCs and other agencies may also use other resolution strategies such as mediation, assisted resolution and arbitration. When discussing other means of complaint resolution it should be acknowledged that conciliation is not the only one. Mentions of conciliation alone could be remedied by having the words 'conciliation or other complaint resolution technique recommended' in the places where conciliation alone is noted.

RECOMMENDATION:

The Nurses and Midwives Board Western Australia recommends that there is appropriate recognition of other means of complaint resolution other than conciliation alone.

Proposal 5.4.1 – Who conducts the initial assessment of a complaint

The Nurses and Midwives Board Western Australia strongly supports the legislation containing powers for a board to establish a number of 'complaint assessment committees' to oversee the initial assessment of complaints and make decisions on what actions to take. Given the number of currently registered nurses and midwives in Australia it is likely that these committees will operate in most of the State and Territory jurisdictions, with the potential for smaller jurisdictions working with the committees in larger jurisdictions. The Nurses and Midwives Board Western Australia also consider that these assessment committees would have a role in advising the board on the development of the policy and procedures in relation to the conduct of complaint assessment.

The Nurses and Midwives Board Western Australia supports the proposals in relation to the procedures for establishing the committees, but note that there is no mention of whether board members are eligible to sit on these assessment committees or not. The Nurses and Midwives Board Western Australia recommends that no board member should be appointed to such a committee. Firstly it would be potentially too burdensome for the members given the numbers and complexity of the complaints that can be received; and secondly having the board's hands clean should they be required to deal with the matter otherwise during the course of its management goes to fairness.

RECOMMENDATION:

The Nurses and Midwives Board Western Australia recommends that no board member is eligible to be appointed to assessment committees.

Proposal 5.5.1 – Powers of assessment committees to take action

The Nurses and Midwives Board Western Australia supports the proposal in relation to the powers of the assessment committee with consideration of previous recommendations such as terminology and broadening the descriptions of other resolution strategies that may be available through HCCs and other agencies. The Nurses and Midwives Board Western Australia also suggests further details in relation to the following:

Co-management or ‘splitting of complaints’

The Nurses and Midwives Board Western Australia notes that there is little or no discussion of co-management of complaints or as it is known in some jurisdictions, as ‘splitting’ complaints, other than with other boards (as outlined in Proposal 9.2.1. The reality is that some complaints raise a number of complex issues that involve a number of individuals and organisations. Maximum flexibility is required to ensure that the right ‘bits’ are referred to the most appropriate agency (as well as other boards), without losing the sense of what the ‘whole’ issue involved. One agency may be most appropriate to either coordinate the management of the whole complaint or at least oversee the outcomes from the whole. This will require that the necessary powers for enabling reasonable information to be exchanged in such circumstances are available to the boards and their cooperating agencies.

RECOMMENDATION:

The Nurses and Midwives Board Western Australia recommends that arrangements are clarified to enable the management of what may be a single complaint in the first instance but involve complex issues involving multiple individuals and organisations.

Proposal 5.5.2 – Referral of a matter to a responsible tribunal

The Nurses and Midwives Board Western Australia supports this proposal but strongly recommends that there is some clarification in the provision concerning the point at which the referral to the tribunal is made. The Nurses and Midwives Board Western Australia is not clear whether this is as an outcome of an initial assessment decision and the matter is handed over to the tribunal to conduct the investigation/inquiry; or after an investigation where the board or committee has a full understanding of all the facts of the case and the quality of the evidence that can support these. Whatever the situation, the Nurses and Midwives Board Western Australia considers this not explicit enough. Currently there are differing processes across the Australian States and Territories that make this proposal unclear and are the cause of confusion. Well crafted legislation does need to be clear and capable of having its meaning understood by a ‘reasonable person’.

The paper regularly refers to a board referring a matter to a tribunal or panel for hearing. Matters referred to a tribunal are usually done so as there is a view that the conduct, health or performance of a health professional is such that warrants their suspension from practice or the cancellation of their registration for a period of time. Even matters being referred to a panel of the board have the potential to affect the capacity of the health practitioner to practice in their profession. It should be made clear that prior to such referral that the board has an obligation to ensure that a robust, formal investigation has to be conducted and an appropriate decision is made to make that referral which in the conduct area is effectively a decision to prosecute a disciplinary matter. Few matters can be referred to a tribunal or panel without a body of evidence to support that decision, and that body of evidence is usually only obtained after a formal investigation process. Only occasionally the facts will speak for themselves. At times the investigation may have been conducted by another agency such as Medicare Australia, the police or a HCC, however, despite that, a review of the evidence would be required in each instance to ensure it meets the prosecution criteria for the panel or tribunal, as each jurisdiction will have specific evidentiary requirements to mount a successful prosecution.

RECOMMENDATION:

The Nurses and Midwives Board Western Australia recommends clarification of the point where a referral is made to the tribunal; ie after a formal investigation, review of evidence or assessment of the health practitioner's conduct, performance or health, and a formal decision to refer (or prosecute); or at any point where a decision is made that the matter warrants referral.

Proposal 5.5.3 – Notice of the decision to refer a matter to a tribunal

Supported.

Proposal 5.6 - Notifier's rights of review of initial assessment decisions

The Nurses and Midwives Board Western Australia supports Option 2. Managing the expectations of a complainant is a vital part of any system of complaints management. Even in a system where the focus is on the safety of the community more generally, any agency that accepts complaints recognises that the inadequate management of the relationship and communication between the original complainant and the agency has the capacity to increase the burden of managing the complaint greatly and the agency may have ongoing fall-out of that engagement long after the activities in relation to the complaint itself have supposedly been concluded.

While limiting the fall-out from a dissatisfied complainant, the right to review enhances the accountability and transparency of the complaint assessment procedures and is an excellent quality improvement initiative for the organisation.

PART 6 – PERFORMANCE MATTERS

See the Nurses and Midwives Board Western Australia's comments and recommendation about the 'seriousness test' in their response to Part 3 above.

Proposal 6.1.1 – Management of performance related matters

The Nurses and Midwives Board Western Australia supports this proposal.

Proposal 6.2.1 – Performance management

The Nurses and Midwives Board Western Australia support this proposal. The Nurses and Midwives Board Western Australia also request that their recommendation be considered (made in the response to Part 3) that a board or health management committee have the power to refer a practitioner for a health assessment if there is reasonable cause during the course of the performance assessment. It is the experience of members of the Nurses and Midwives Board Western Australia that health impairment may manifest as problems with the practitioner's performance and during the course of an assessment, evidence of this may emerge. Under

currently Legislation in Western Australia referral to the Impairment Review Committee occurs at any point during the assessment process.

RECOMMENDATION:

The Nurses and Midwives Board Western Australia recommends that a board (or a performance management committee or panel) have the power to require a health practitioner who is the subject of a complaint being managed in the performance stream to undertake a health assessment, when reasonable cause exists.

Proposal 6.2.2 – Powers of a performance management committee on receipt of a performance assessment

Supported.

Proposals 6.3.1 - 6.3.3 – Performance assessments

Supported.

Proposals 6.4.1 – Performance panel hearings

The Nurses and Midwives Board Western Australia supports this proposal and recommends that, as the IGA requires, the legislation is explicit that members of the board and members of any board assessment or management committees are not eligible to sit on these panels during the time they are members or have had any previous involvement with a complaint going to hearing. This is an important separation of powers that is important for procedural fairness.

RECOMMENDATION:

The Nurses and Midwives Board Western Australia recommends that that members of the board and members of board assessment or management committees are not eligible to sit on these panels during the time they are members; or where they have had any previous involvement with a matter going to a panel hearing.

Proposals 6.5.1 - 6.5.3 – Decisions available to a performance panel

Supported.

PART 7 – HEALTH IMPAIRMENT MATTERS

Proposal 7.1.1 – Management of practitioners with a health condition etc

The Nurses and Midwives Board Western Australia supports this proposal with some minor amendments already foreshadowed above in the commentary provided in relation to Proposal 4.3.1; ie the removal of the word ‘habitual’ and the change of the word ‘drugs’ for ‘substances’.

Proposal 7.1.2 – National health programs for impaired practitioners

The Nurses and Midwives Board Western Australia supports the proposal that the legislation provide for the provision of health programs at the board’s discretion. Despite a robust and philosophical discussion as to which of the two options were preferable, the Nurses and Midwives Board Western Australia was not able to reach a definitive decision as to whether funding for such programs was the responsibility of individual nurses and midwives or the board (along the lines of community rating for health insurance). It is Nurses and Midwives Board Western Australia’s view that this requires further economic modelling, analysis and debate before a decision is made. The impact could be quite different across the boards for the different professions.

Proposals 7.2.1 and 7.2.2 – Health management

Supported.

Proposals 7.3.1 to 7.3.4 – Health assessments

Supported.

Proposal 7.4.1 – Health panel hearings

The Nurses and Midwives Board Western Australia supports this proposal and recommends that, as the IGA requires, the legislation is explicit that members of the board and members of any board assessment or management committees are not eligible to sit on these panels during the time they are members or have had any previous involvement with a complaint going to hearing. This is an important separation of powers that is important for procedural fairness.

RECOMMENDATION:

The Nurses and Midwives Board Western Australia recommends that that members of the board and members of board assessment or management committees are not eligible to sit on these panels during the time they are members; or where they have had any previous involvement with a matter going to a panel hearing.

Proposals 7.5.1 - 7.5.3 – Decisions available to a health panel following a hearing

Supported. NOTE: in Proposal 7.5.2 – there is a reference to ‘previous performance assessments’; the Nurses and Midwives Board Western Australia assumed this was intended to mean ‘health assessments’.

PART 8 – CONDUCT MATTERS

Proposal 8.1.1 - Overview of the management of conduct matters

Supported.

Proposals 8.2.1 and 8.2.2 – Conduct management

Supported.

Proposal 8.3.1 – Appointment of investigators

The Nurses and Midwives Board Western Australia supports this proposal however questions why this is the first place that the appointment of investigators is mentioned. Is it envisaged that investigation may occur within all streams at any point during the process. This may be a particular issue if there is some equivocation as to what stream a complaint should be managed, or the management committee requires some level of exploration of events, past history or obtaining other information. Currently all the provisions pertaining to investigation are grouped under the provisions pertaining to conduct; and while conduct matters will obviously make up the greater part of any investigation team’s workload, the Nurses and Midwives Board Western Australia has some concerns that there may be no flexibility to utilise them effectively in the other streams when there is a need. As has been previously indicated by the Nurses and Midwives Board Western Australia the national board must have access to sufficient human and financial resources to allow it to regulate properly. This is particularly critical in the area of complaints, performance conduct and health matters as insufficient resources will result in a blow out of timelines, a denial of procedural fairness to practitioners and a diminution of the protection afforded to the community.

The Nurses and Midwives Board has concern about streaming of matters into health, conduct and competence, as often the management of a complaint may occur across all three streams. The Nurses and Midwives Board views streaming as a limitation of the process in some circumstances and would like flexibility to manage all three situations concurrently if so required.

RECOMMENDATION:

The Nurses and Midwives Board Western Australia recommends that clarification be made about the role of investigators and whether they will only operate within the conduct stream; or whether it is envisaged they will have a broader role across the

performance and health streams also.

The Nurses and Midwives Board Western Australia recommends that the national board have access to sufficient, appropriate resources to allow it to regulate properly in the interests of the community.

Proposal 8.3.2 – Initiate investigation on ‘own motion’ & referral without investigation

The Nurses and Midwives Board Western Australia supports this proposal, taking into account the comments made relating to Proposal 5.5.2. The Nurses and Midwives Board Western Australia does recognise that at times an investigation may be appropriately conducted by another agency and/or the evidence that is provided in the body or the original complaint is adequate to proceed to hearing. NOTE: there is a reference to a conduct management committee in this proposal – should that be a conduct panel instead?

Proposal 8.3.3 – Notice of investigation to registrant

Supported.

Proposal 8.3.4 – Power not to give notice

The Nurses and Midwives Board Western Australia considered that the legislation should empower the board (or conduct management committee), which in turn may empower an investigator.

The Nurses and Midwives Board Western Australia supports the proposal that in certain circumstances it may be essential to the safety of persons involved or the success of investigation that this notice is delayed or withheld.

Proposal 8.3.5 – Investigation timelines and reporting requirements

Supported.

Proposals 8.4.1 and 8.4.2 – Powers of investigators

Supported.

Proposal 8.5.1 – Conduct panel hearings

The Nurses and Midwives Board Western Australia supports this proposal and recommends that, as the IGA requires, the legislation is explicit that members of the board and members of any board assessment or management committees are not eligible to sit on these panels during the time they are members or have had any previous involvement with a complaint going to hearing. This is an important separation of powers that is important for procedural fairness.

RECOMMENDATION:

The Nurses and Midwives Board Western Australia recommends that that members of the board and members of board assessment or management committees are not eligible to sit on these panels during the time they are members; or where they have had any previous involvement with a matter going to a panel hearing.

Proposal 8.6.1 – Decisions available to a conduct panel

Supported.

Proposal 8.6.2 – Referral to a tribunal

Supported. NOTE: in Proposal 8.6.2 it is assumed there are several typographical errors it seems the term 'performance' is used instead of 'conduct' in error.

Proposal 8.6.3 – Reasons for decision to be provided

Supported.

Part 9 – Accountability, transparency and procedural fairness

The Nurses and Midwives Board Western Australia strongly supports having explicit separation of powers and strong accountability mechanisms explicit in the legislation for all the reasons outlined.

Proposal 9.1.1 – Review of outcomes of complaints management scheme

The Nurses and Midwives Board Western Australia supports Option 2 of the proposal as it provides an independent review mechanism by an expert body/individual concerning decisions to prosecute a matter that may ultimately affect the livelihoods and rights of individuals and is an important aspect of the separation of powers. This independent expert can assess the quality and suitability of the evidence to support a prosecution. This is a specific skill and with one body undertaking this task across all the boards, a body of knowledge and expertise can develop that enables consistency in decision making and enables benchmarking of like cases within a board and across boards. The role of the board and management committees is to review the outcome of the investigation, assessment, management process and make recommendations to the 'director of proceedings' but the ultimate decision of whether a matter is ready or capable of prosecution before a panel or tribunal is in the hands of that 'director of proceedings'. The board then has clean hands in relation to the ultimate decision that is made.

Option 3 is an interesting proposal, and indeed should be a goal in the long term for the purposes of ensuring consistency and quality improvement across the whole regulatory scheme. However, it is likely to be quite burdensome and could prove very difficult to achieve in the early stages of the development of the national regulatory scheme. A scheme such as this could work in conjunction with a 'director of proceedings' role having responsibility for managing prosecution

matters. It is recommended that board-by-board based review, appeal mechanisms and quality improvement schemes in conjunction with the 'director of proceedings' model should be stage 1. Whilst supporting this proposal the Nurses and Midwives Board Western Australia notes that this has implications in terms of resources and timeframes to progress complaints.

RECOMMENDATION:

The Nurses and Midwives Board Western Australia recommends that Option 2 is adopted in the first instance, with a view to moving to a tri-layered review process in the future.

Proposal 9.1.2 – Public interest criteria

The Nurses and Midwives Board Western Australia has no strong view on this proposal as these criteria are the fundamental principles that underpin a prosecution policy in the jurisdiction responsible for the regulation of health professionals and would underpin any decision to prosecute, whether that decision is made by a board, management committee or 'director of proceedings'.

Proposal 9.2.1 – Registrants from different professions

Supported – see also comments under Proposal 5.5.1 above on the co-management or 'splitting' of complaints.

Proposal 9.3 – Legal representation for registrants at panel hearings

The Nurses and Midwives Board Western Australia supports Option 4b.

Proposal 9.4.1 – confidentiality of panel hearings

The Nurses and Midwives Board Western Australia supports Proposal 9.4.1 which is an extension of Option 1.

There is a strong body of opinion that does support Option 2 which is where conduct panel hearings are open to the public with the panel having the power to close the proceedings or part of the proceedings from a public interest and transparency point of view. An alternative option to consider may be to grant a panel a discretion that enables it to open the hearing if there is strong public interest in doing so.

Proposal 9.5.1 – Status of complainants at panel hearings

The Nurses and Midwives Board Western Australia feels that the panel should have the discretion to decide whether or not attendance of the complainant is required at the hearing.

Proposal 9.6.1 – Review rights for registrants

Supported.

Proposal 9.7.1 – Notice of decisions of hearing panels

Supported.

Proposal 9.8

The Nurses and Midwives Board Western Australia supports Option 2 as this is a national regulatory system the potential to create multiple avenues of review for an individual matter if the State and Territory ombudsmen were included in the process creates an unnecessary and burdensome risk. Also for consistency in approach, having one arbiter of administrative decision making should enable a quality improvement approach to review to the national legislation and national policy around the regulatory system.

PART 10 – TRIBUNAL HEARINGS

Proposals 10.2.1 and 10.2.2 – Criteria for tribunals

Supported.

Proposal 10.3.1 – Original jurisdiction of the tribunal

The Nurses and Midwives Board Western Australia supports the proposal for the alternative option ie that *'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'*. There are times when the matters being heard by a tribunal attract the interest or have been co-managed by another agency who have a strong interest in the proceedings and therefore, should be able to participate in those proceedings.

Proposal 10.4.1 – Review jurisdiction of tribunal

The Nurses and Midwives Board Western Australia supports the proposal for the alternative option for the same reasons as above ie that *'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 – Reviewable decisions

Supported.

Proposal 10.5.1 – Findings and determinations of a tribunal – original jurisdiction

The Nurses and Midwives Board Western Australia recommends that a tribunal may also make a finding that a practitioner has engaged in unsatisfactory conduct. The tribunal may not always be able to establish the seriousness the conduct as meeting the threshold of professional misconduct, so should be able to make a finding of unsatisfactory professional conduct.

RECOMMENDATION:

The Nurses and Midwives Board Western Australia recommends that a tribunal may also make a finding that a practitioner has engaged in unsatisfactory conduct.

Proposals 10.5.2 – 10.5.5

Supported.

Proposal 10.6.1 - Constitution and appointment of tribunal hearing panels

Supported.

Proposal 10.7.1- Procedure for conduct of tribunal hearings

Supported.

Proposal 10.8.1 – Status of complainants

Supported.

Proposal 10.9.1 – Powers in relation to deregistered practitioners

The Nurses and Midwives Board Western Australia regards this as very important and strongly supports the Proposal.

Proposal 10.10.1 – Review rights from tribunal decisions

Supported.

Proposal 10.11.1 – Reasons for decisions

Supported.

Proposal 10.12.1 – Notice of decisions

Supported.

PART 11 – OFFENCES AND REGULATED CONDUCT

Proposals 11.3 – 11.5

The Nurses and Midwives Board Western Australia generally supports the primary proposals in each of these sections.

Proposal 11.6.1 – Regulation of advertising

The Nurses and Midwives Board Western Australia supports Option 1.

We note that the Codes of Professional Conduct and Ethics for nurses and midwives in Australia already provide a substantial platform for the board and any committees, panels and tribunals to use in assessing the conduct of nurses and midwives in Australia in relation to advertising.

We also note that there are already ACCC and HCC guidelines that were developed in 2000 for the health professions generally, *Fair treatment? Guide to the Trade Practices Act for the advertising or promotion of medical and health services*. These are available at: <http://www.accc.gov.au/content/index.phtml/itemId/309070/fromItemId/654313>

Proposals 11.7 – 11.10

The Nurses and Midwives Board Western Australia generally supports the primary proposals in each of these sections.

Proposal 12.1 – Transitional arrangements

Supported

