

# **COMPLAINTS ARRANGEMENTS SUBMISSION**

by Nick O'Neill

on the Consultation Paper

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

relating to the

## **National Registration and Accreditation Scheme**

### **Introduction**

1. This is a personal submission; however I am currently the Chairperson of the New South Wales Nurses and Midwives Tribunal. I was the founding Chair of the NSW Chapter of the Council of Australasian Tribunals. From 1989 to 2004 I was the establishment Deputy President and then for 10 years the President of the NSW Guardianship Tribunal. Prior to that I taught Administrative, Constitutional and Human Rights law as a Senior Lecturer at the University of Technology, Sydney.
2. The proposed national registration and accreditation scheme for health professionals is an excellent idea. The Australian Governments are wise to seek to achieve it. My comments are intended to assist in the achievement of this goal and will be confined to some general matters and some particular aspects of the discussion paper about which I have some expertise or some suggestions to make.

### **Investigation of complaints**

3. There is a problem with performance, impairment and conduct complaints that the existing Boards consider should be the subject of Board or Tribunal processes. There does not seem to be any significant problems with the consumer satisfaction processes which do not have consequences for the health professional's practice and in relation to which I have no comments.
4. It may be useful to have some idea of the scope of the investigations issue as it applies to nurses in New South

Wales. In 2007-2008, the NSW Nurses and Midwives Board received 80 “complaints” (in the old language) from Area Health Services, Hospitals, institutions like aged care facilities and individuals together with a further 148 notifications from other Boards about registration and impairment matters and 1 notification of a serious court conviction. Each of these 229 matters, and particularly the first 80 of them, has the potential to be the subject of investigation which may lead to a Complaint drafted by the Health Care Complaints Commission (HCCC) being made to either the NSW Professional Standards Committee or the Nurses and Midwives Tribunal.

5. In calendar 2007 the NSW Nurses and Midwives Tribunal had 36 matters lodged with it. Of these 27 were Complaints brought by the HCCC and 2 were HCCC Complaints referred up to the Tribunal by the Professional Standards Committee. The rest were appeals or applications for reregistration.
6. Of the 32 matters lodged with the Tribunal up to the end of October 2008, 18 were Complaints brought by the HCCC and 2 were appeals in to the Tribunal from decisions made by the Professional Standards Committee. The rest were other appeals or applications for reregistration.
7. In calendar 2007 the Professional Standards Committee had 13 Complaints brought by the HCCC lodged with it. Up to the end of October 2008, the number of Complaints lodged with it was 9.
8. Some of the tribunals for the health professions in NSW other than the nursing and midwifery and the medical professions have Complaints lodged with them every year or so. For example the Dentists Tribunal, Pharmacy and Chiropractors Tribunals have each had 1 Complaint lodged with them so far in 2008. However, it should be noted that so far in 2008 the Psychologists Tribunal has received 3 Complaints with 6 under investigation and more to follow. In calendar 2007 the Psychologists Tribunal dealt with 7 Complaints.
9. From the perspective of the Nurses and Midwives Tribunal, the process by which the HCCC conducts investigations and brings Complaints to the Tribunal for hearing and

determination works well. The Nurses and Midwives Board is consulted during the investigation process, but is not so involved as to allow an argument that it appears to be both prosecutor and judge. The HCCC is an arm's length prosecutor before the Tribunal, three of whose members are appointed by the Nurses and Midwives Board to conduct the hearing.

10. While this avoidance of bias issue is important, it is the quality of the HCCC's work that ensures that the evidence in the cases is the best available and that matters are pursued with the appropriate vigour.
11. This way of dealing with serious complaints against nurses and midwives, and other health professionals, works well in NSW. Given the number of investigations and hearings that have occurred under this approach, if it did not work that fact would be clear by now. That is an important reason for adopting it throughout the country, but the investigation element of the process is crucial to the efficiency of the complaint process as well as its effectiveness and fairness. Also, the nationalisation of the registration process creates an opportunity to put the best system in place.
12. It would not be satisfactory to have private investigators conduct the investigations as suggested in the discussion paper. Investigations need to be conducted by the staff of an organisation that sets the standards, controls the activities of its staff and builds their skills. The organisation must be publicly accountable and transparent in the sense of setting out its standards and the criteria it applies in deciding whether or not to commence or continue an investigation.
13. Such an organisation must also be required to consult with the National Board of the profession of whose member it is investigating and develop that Board's confidence in it while not relenting in the pursuit of practitioners whose unsatisfactory conduct, incompetent performance or impairment justifies persistence.
14. Investigators must be invested with powers to require responses from health professionals the subject of complaints

and there must consequences for the health professional if they do not comply. These powers and their consequences are so significant that they must be exercised only with great care, and not by unsupervised or inexperienced individuals operating for profit. Investigators must also have enter, search and seizure powers, subject to obtaining the appropriate warrant. Again these powers are so infringing of the rights of individuals that they must be exercised in circumstances in which there is supervision and accountability for the exercise of those powers that goes beyond simply seeking a warrant from a magistrate or other authorised officer.

15. One of the consultations between the investigations body and the relevant National Board that should occur prior to the Complaint being lodged with either the relevant tribunal or panel is to determine whether the Board and the investigations body are agreed on the manner in which the matter that has been investigated is to be finalised. If the bodies cannot agree, then the more serious approach proposed should prevail and the matter should proceed as a Complaint to the tribunal and not the panel. A consequence of this is that the tribunal must have all the powers of a panel as well as its own extra powers. This matter will be returned to at paragraphs 35 and 54.
16. If the difference is between prosecuting and not prosecuting, the decision not to prosecute should prevail. A proposal not to prosecute made at this stage can only be based on an opinion that, after investigation, there is insufficient evidence available to prove any Complaint against the health professional.
17. All of these considerations make it imperative that an organisation, independent of the National Boards and of which the NSW HCCC is an example, be responsible for investigations and the prosecution of Complaints in the proposed national system.
18. To have a “director of proceedings” as a prosecutor not supported by an investigation team would not be workable as the “director” would not be able to direct any necessary investigations and so would sometimes be unable to prosecute complaints that would be successful if the additional evidence

became available through further investigation. This seems like a compromise suggestion that is, in fact, not feasible.

### **Comments concerning panel hearings**

19. Legal representation 9.3 – Suggest “McKenzie friend” approach by which a lawyer can be present to assist a health professional but not speak on their behalf be used, as it is before the Professional Standards Committee in NSW.<sup>1</sup>
20. Proposal 9.5.1 – The notifier should be present to give evidence if relevant. The body prosecuting should be the plaintiff and the health professional the defendant/respondent. The presentation of the case should be in the hands of a proper authority who will have been responsible for the investigation and who will know what the outcomes of the case can be. Protection of the health and safety of the public is the focus of these proceedings. They are not proceedings between two private citizens who are in dispute.
21. Proposal 9.6.1 – Again these proceedings are about public protection, consequently the evidence available at the time of the review, even if some of it is new, should form the basis of the hearing, not the question of what was the best or most appropriate decision at the time of the initial hearing.
22. If the panels begin to operate like the tribunals, applying the same procedures and becoming more formal with legal representation the norm, the question of whether they should continue to exist arises or whether just the tribunal should exist arises. This may be an issue to consider profession by profession. Being represented by a lawyer, without union support, is beyond the financial capacity of most nurses, for example.

### **The tribunal stage**

23. In many ways a national tribunal would be the best way to deal with notifications that could result in suspension or removal from a register or roll. It would have jurisdiction to hear matters arising anywhere in the country and involving people from more than one health profession. It would be able

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<sup>1</sup> There is probably no right to legal representation before a panel established in Victoria as a result of the Charter of Rights and Responsibilities Act 2006 (Vic) s 24.

to act with the same procedural flexibility as a State or Territory tribunal and not be bound by the (strict) rules of evidence. Being a unitary tribunal, it would be able to develop its own procedures to apply throughout the country. It is also more likely to apply the relevant law in a consistent way than would the up to 8 different tribunals that would exist under the State and Territory based system. The main disadvantages would be that its decisions would be categorised as administrative in nature as it would not be a court<sup>2</sup>, and it would have to be set up under Commonwealth legislation after a referral of power from the States, something that is not yet required for the achievement of the rest of the proposed scheme.<sup>3</sup>

24. Such a tribunal could be invested with all of the original and review jurisdiction suggested in the discussion paper, including the additions and variations to that jurisdiction I recommend below.
  
25. While giving the jurisdiction of the health tribunals and similar bodies to existing, but other, State tribunals looks a simple solution, it has its own difficulties. There are no appropriate existing tribunals in South Australia, Tasmania and the Northern Territory. They may not generate many tribunal level cases. In the other States and the ACT where it is possible to point out tribunals that already exist or are in development that would do the job, the fit may not be as good as it looks at this time when matters are actually sent to those tribunals. Consequently, it is wise to have a hard look at this issue now rather than tick it off as solved, regardless of how understandably enticing such step would be.
  
26. First the tribunal/tribunals should comprise 4 members:
  - a presiding member responsible particularly for procedural fairness, the quality of the evidence, keeping the tribunal within jurisdiction, advising the other members about the relevant substantive and procedural law and being finally responsible for adequate and legally correct reasons for decision – all in addition to responsibility for taking a full part

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<sup>2</sup> Such a tribunal does not meet the requirements of Chapter III of the Constitution to qualify as a court.

<sup>3</sup> Constitution s 51(xxxvii).

in the determination of the matter;

- two members of the relevant health profession not only to take their full part in the determination of the outcome of the matter but also to assist the other members to understand some of the more technical or profession-based elements of the evidence, as well as the expert and peer review evidence;
- a member lay to the relevant health profession to provide some community perspective and, with the other members, bringing a juror's assessment to the evidence when taking a full part in the determination of the outcome of the matter and, in particular in concert with the presiding member, making sure that the professional members are neither too harsh nor too lenient on their colleague in their findings of fact and in their views as to what action, if any, the tribunal should take as a result of those findings.

27. I believe that none of the existing State tribunals sit more than 3 members on any form hearing, while 4 are necessary for a balanced tribunal in the health matters. One health professional has too much influence. Two health professionals are necessary for the other members to have confidence that the views expressed are correct. My experience sitting on Nurses and Midwives Tribunal shows that views are regularly adjusted in discussion between the two health professionals, so too are their views about how the proven facts are perceived from the professional perspective. These adjustments lead to better decisions. The lay member is essential to keep all the others honest and people of capacity and judgment have to be appointed to these positions. The legal member is necessary to keep the show on the right track and to ensure the decision taken is according to law.
28. An even number of members is rarely a problem as most decisions are unanimous. In 15 years on the Guardianship Tribunal I had 1 case which was not unanimous. In 3 years on the Nurses and Midwives Tribunal I have also had 1 that was not unanimous. The resolution of a 2-all decision is set out in the NSW Acts.
29. The appointment of Tribunal members is an issue because of the need for competent and experienced members of the health profession to be involved and who have the confidence of their

peers and relevant expertise to sit on particular hearings. This matter will be returned to at paragraph 31. Appointing the legal and lay members is easier as these can be appointed to the relevant tribunal to sit on cases that go beyond just one health profession, or one division or list of the Tribunal. Their appointments should be formally made by the relevant head of state (or by the processes developed in the ACT) via Cabinet on the advice of the relevant minister. They will develop their tribunal hearing and judgment skills and their knowledge of the health professionals' jurisdiction through sitting on cases involving different health professions.

30. The professional members present problems that may need resolution in other ways. I used to think it was a good idea for the professional members to be appointed to the tribunal to sit on appropriate cases during the period of their appointment rather than be appointed to hear particular cases. The main advantage of that approach is that they would develop their skills as tribunal members and their knowledge of the statute law and decided cases relevant to the jurisdiction as well as an esprit de corps with the tribunal. However, as has already been noted, for some health professions, because of the numbers or the nature of the profession, Complaints and appeals come to the relevant tribunal infrequently at the rate of one or less than one a year. When a matter does come, specific experience on the part of the professional members is often needed and is unlikely to be always found in the members already appointed. Also, the professional members already appointed may not be available for the hearing or, particularly in small professions, the relationship between the professional member and the person the subject of the proceedings may be such as to make it either essential or wise for the professional member not to sit.
31. Bearing these considerations in mind, and the fact that the National Boards, or their delegates, of the larger professions would be able to develop a corpus of members capable of sitting as generalists as well as find professionals with specific expertise to sit in particular cases while the National Boards, or their delegates, of the smaller professions would be able to appoint members to sit on particular cases when they arose, I suggest that the appointment of the professional members lie

with the National Board for each of the health professions to be exercised as and when necessary. I have worked with this kind of process in NSW over the last three years and it works satisfactorily. Some of the nurse and midwife professionals would appreciate access to training on the legal and procedural aspects of their work and there can be a loss of expertise if new professional members are appointed to sit at every hearing, but these are matters of detail that can be worked out through discussion between the relevant bodies and the application of common sense and goodwill. Nevertheless, the matters raised in this paragraph argue for a national health professions tribunal.

32. If the State and Territory tribunal approach is adopted, it will prove not only appropriate but also very convenient for each State and Territory to provide in its legislation that all members of the equivalent division/list of every other State or Territory tribunal is deemed to be a member of the relevant division/list of its appropriate tribunal. It will also prove appropriate and convenient for each State and Territory to provide that the relevant division/list of the equivalent tribunal in all other States and Territories can operate in their State or Territory or hear and determine matters arising in their State or Territory. This could help South Australia, Tasmania and the Northern Territory decide whether they actually need their own tribunals. It would also allow one tribunal to deal with related matters that happen to occur in more than one State or Territory. With increasing part-time work, nurses in particular and possibly other health professionals may work in different adjacent States and Territories.

### **Tribunal powers**

33. As the discussion paper implies, if there is no national tribunal, all the State and Territory tribunals whether currently in existence or to be created, must have the same powers, and if procedures are mandated in the legislation, the same procedures. They should also be expected to seek consistency in the way they interpret the legislation and to treat like factual situations alike unless there are rational reasons for different treatments.

34. The legislation should state that the tribunal must find the subject-matter of the Complaint proved before they may make any protective orders.
35. The findings available to the tribunal should include all those set out in 10.5.1 as well as a finding of unsatisfactory professional conduct. Sometimes the tribunal will form the view that what is alleged against the health professional amounts to unsatisfactory professional conduct and not professional misconduct as charged. In this situation the tribunal should be able to make appropriate protective orders rather than dismiss the Complaint because it didn't come up to proof as alleged. There is another reference to this matter at paragraph 54.
36. "Not of good character" at 2.1.15 and 10. 5.1: that term is preferred over "fit and proper person" in this context. There is a good and useful amount of jurisprudence on this matter in the decided cases. It would be unwise to change the term now in the absence of good reasons for doing so because a change of wording carries with it an assumption of a change of meaning.
37. Also, while on the question of "not of good character", there is now an opportunity to clarify in the legislation whether a finding of not of good character by the tribunal removes one of the essential requirements for registration or enrolment and thus leads automatically to removal from the register or roll.
38. The tribunal should have explicit power to review and vary or remove any condition that it may place on a health professional's registration or enrolment. This jurisdiction should be in addition to the tribunal's power to review conditions imposed by a panel in the exercise of its jurisdiction to hear and determine appeals from panels. This matter is unclear in some of the NSW legislation.
39. Proposal 10.5.2 refers to "responsible board" rather than "responsible tribunal". That appears to be a mistake as Chapter 10 is about tribunals. If it is not a mistake, then the National Boards certainly must not have the power to fine or to suspend or cancel a health professional's registration or enrolment in

the manner proposed. Also, they must not have the power to make prohibition orders. All these are matters for protective orders made by the tribunal after a full hearing of a Complaint with the parties being represented if they wish.

40. Nevertheless, the National Boards must have the power to suspend health professionals, and to do so urgently when necessary. The health professionals involved must have a right of appeal against such suspensions, but one that does not result in the health professional being able to practise pending the hearing of the appeal.
41. Another essential element of the suspension process is that it must be for short periods only – currently 8 weeks in NSW. Also, any extension of up to 8 weeks must be approved by a presiding (legal member) of the tribunal. This requirement is essential for there to be transparency in the scheme and to ensure that suspensions do not turn into de facto cancellations of registration or enrolment and that either the notification process proceeds against the health professional or they are allowed to return to practice.
42. Assuming that proposal 10.5.2 applies to the tribunal, I have some comments. The difference between a caution and a reprimand needs to be clarified.
43. The power to “strike off” that is order that a health practitioner’s name be removed from a register or roll is an important element of the protection of the public and carries with it a statement about the seriousness of their behaviour, incompetence or impairment – a statement that goes beyond just providing a period that must elapse before they may apply for reregistration or re-enrolment. In NSW a nurse or midwife’s registration or enrolment is cancelled if they do not pay their annual fees when they become due. It is not unusual for nurses or midwives to become “unfinancial” during the time a notification about them is being investigated. Their registration or enrolment is then cancelled by administrative action. Because of the way some of the NSW legislation is drafted, there is an argument that once a health professional is administratively removed from the register or roll, they cannot be removed by order of the tribunal. The discussion paper

implies that “strike off” should be available to the tribunal. The drafting of the legislation should reflect this.

44. The drafting should also make it clear that if the tribunal strikes off a health professional, they must apply to the tribunal for restoration and prove their case according to the law established in the decided cases.
45. Prohibition orders are needed to stop some health professionals practising in another form despite being “struck off” or from providing any kind of health service because of their dangerousness to the public. However, as prohibition orders can, in effect, prevent a former health professional from earning a living, they must be made only where the evidence shows that they are necessary. Consequently, the tribunal would need to be comfortably satisfied that the former health professional posed a substantial risk to the health of members of the public before it could make an order – or to meet a similar test.
46. As to proposal 10.7.1, it is unwise to be too prescriptive about some of the matters listed, particularly the use of expert witnesses and the conduct of hearings. The tribunal will be required to be procedurally fair as a matter of common law, but what is fair can vary from case to case as the case law establishes. Tribunals need to be flexible limiting their room to move is a sure way to create unfairness in circumstances not contemplated by the prescribed rules.
47. The need for compulsory conferences, mediation and settlement is not made out in the paper. In the matters that would go to the tribunal, “striking off” in the public interest will always be an option. That is not a matter for settlement between the health professional and the prosecuting authority, there has to be a public protection input which is done in public and determined by the tribunal. Even if the health professional makes admissions and they and the prosecuting authority agree on the orders, it must be the tribunal that has to be satisfied from its consideration of the evidence assisted by the admissions and the submissions of counsel that makes the decision and makes the orders. Although the tribunal will usually make the orders proposed, the process and the nature

of the jurisdiction which is no longer disciplinary makes the approach just outlined essential.

48. The tribunal, the panels and all others involved in the process will need the appropriate immunities – for the tribunal these are the immunities extended to judges.
49. As to the offences, it is important to provide an offence of providing false and misleading information to the tribunal rather than rely on the common law based offence of perjury.
50. It would be wise to consider empowering the presiding members to be able to dispose of appeals or requests early where they are fundamentally without merit and have no chance of success, an abuse of process in that they are matters the tribunal cannot or should not deal with or which are frivolous or vexatious.
51. On the costs issue, in NSW the Nurses and Midwives Tribunal may award costs only if is satisfied that “there are special circumstances warranting an award of costs”. While there is no similar provision in the other health professions legislation in NSW, I would expect the nurses to want to hold onto this concession which they have gained.
52. Attachment 1 – “Unsatisfactory professional conduct”, d) and f) should have a “without reasonable excuse” element. Also, g) should be added in the following terms “any other improper or unethical conduct relating to the practice of the relevant health profession”. This will catch matters not included in the suggested list.
53. It is probably going further than needed to separate “unsatisfactory professional performance” from “unsatisfactory professional conduct”. The former should be returned to being part of the latter. Impairment must be provided for but in a way that does not limit the nature of the impairment, but requires that it either to detrimentally affect or be likely to detrimentally affect the physical or mental capacity of the health professional to practise their profession before it can lead to protective orders.

54. As to professional misconduct, there are difficulties in creating a new definition, including creating a gap between unsatisfactory professional conduct and professional misconduct. The NSW approach of making it unsatisfactory professional conduct of a sufficiently serious nature as to justify “striking off” seems to work well and to ensure the ability of the Tribunal to find unsatisfactory professional conduct where professional misconduct is alleged but the evidence is not of sufficient to prove it.

Dated 30 October 2008

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