



OPTOMETRISTS  
ASSOCIATION AUSTRALIA

*Submission to the  
Health Workforce Principal Committee  
Practitioner Regulation Subcommittee on  
PROPOSED ARRANGEMENTS FOR HANDLING  
COMPLAINTS AND DEALING WITH PERFORMANCE,  
HEALTH AND CONDUCT MATTERS  
November 2008  
from  
Optometrists Association Australia*

## **Introduction**

The Optometrists Association Australia is pleased to submit comments on behalf of the optometry profession on the matters raised in the consultation paper *Proposed Arrangements for Handling Complaints and Dealing with Performance, Health and Conduct Matters*. This submission comments wherever relevant on the proposals in the Consultation Paper from the perspective of optometry. Proposals considered not relevant to optometry are not addressed.

Optometrists Association re-affirms its support for the national registration and accreditation scheme. While many details are still to be settled and we believe some aspects are not entirely as we would prefer, we remain convinced the proposed scheme as it is evolving will be a major advance on present arrangements for both the community and professions. Optometrists Association will continue to assist where it can with the implementation of the new scheme.

In respect of complaints handling, Optometrists Association supports generally the approach proposed in the discussion paper. We agree the approach proposed will allow flexibility and scalability needed for smaller professions such as optometry and do not support more centralized alternatives.

Specifically we note the national boards will have primary responsibility for managing complaints against practitioners and that this will involve assessment, investigation and/or management of matters relating to a practitioner's performance, health or conduct including determining less serious cases of misconduct and prosecuting before State or Territory tribunals more serious misconduct. The national boards will interact with and complement State and Territory health complaints or services commissions and tribunals that will not be part of the new arrangements. We endorse the restatement in the paper that the national regulatory scheme is designed to protect the public and not to resolve consumer complaints.

## **Principles**

### Proposal 1.5.1

The Association endorses these principles.

## **Terminology**

### Proposal 2.1.1

Optometrists Association Australia supports the use of the term "notification" in preference to "complaint". Notification is a more general term that encompasses reports that may not be complaints as well as genuine complaints.

The use of complaint in relevant public documents, as suggested, is a sensible proposal, as the public will better understand the term.

### Proposal 2.1.2

The term 'preliminary assessment' better reflects what happens at this stage of the process and is less pejorative than the other options presented.

### Proposal 2.1.3

The term ‘notifications assessment committee’ better reflects what happens at this stage of the process and is less pejorative than the other options presented.

### Proposal 2.1.7

Optometrists Association suggests that the term “performance assessment panel” be used instead of “performance panel as it is in keeping with earlier proposals and it better identifies what the panel is to do.

### Proposal 2.1.8

“Health management committee” is not a good name for this committee. The title does not adequately describe the work of the committee and one may think that its function is to look after the patient’s health rather than attend to issues relating to the practitioner’s health. We suggest that committee be called either the “practitioner health committee” or the practitioner health management committee”.

### Proposal 2.1.9

In line with the Association’s suggestion concerning proposal 2.1.8, we suggest that “practitioner health assessment” be used instead of the proposed words.

### Proposal 2.1.10

We suggest that “practitioner health assessment panel” would be a preferable title for the committee.

### Proposal 2.1.13

We suggest that “practitioner conduct panel” is a better name for the panel than the proposed title.

### Proposal 2.1.15

The concept of “good character” is nebulous and one cannot expect registration boards to know when and how to apply it. Optometrists Association Australia does not support its use in registration. Its application is an invitation for boards to act in an arbitrary manner. The legislation should specifically describe what factors lead to a conclusion that one is not of good character.

If the concept is to be applied the alternative of “not a fit and proper person” is preferable.

## **Proposed definitions for what constitutes a departure from professional standards**

### Proposal 3.3.1

Optometrists Association supports the proposed definitions of unsatisfactory professional conduct, professional misconduct and unsatisfactory professional performance with the following qualifications

The definition of ‘unsatisfactory professional performance’ does not require the words “of an equivalent level of training or experience’ at the conclusion. The words are unnecessary and have overtones that it is OK to register someone who is not safe to practice if they lack experience or training.

We suggest that the words “is not of good character to the end of the sentence be replaced with words to the effect “is likely to act in ways prejudicial to the welfare of patients”.

#### **What sort of matter may be subject of a notification**

##### Proposal 4.3.1

The Association suggests that the board be empowered to accept notifications such as those listed in the proposal rather than limits be set on the content of notifications referred to the board. This allows the board to judge whether the matter in question is within the purview of the board.

Again, the Association believes the requirement that a practitioner be of good character is not appropriate here.

##### Proposal 4.3.2

Optometrists Association supports the proposal. It is essential that the board has powers to act on notifications concerning practitioners who were registered at the time on the conduct in question. There have been many examples of practitioners who have removed their names from registers when they have become aware of complaints against them to prevent boards taking action.

#### **Mandatory Reporting**

##### Proposal 4.4

Mandatory reporting creates tensions between conflicting concerns about protection of the public, civil liberties and the welfare of the practitioner. A prescriptive mandatory reporting regime might be effective in protecting patients from occasional abuses but ineffective in creating a culture in which at-risk practitioners seek help early and so ideally reduce the incidence of such abuse.

The Association is of the view that public safety issues outweigh other considerations. Such an approach should seek to balance legislated protections for patients and practitioners with creation of a self-regulating culture in which practitioners may seek and provide assistance without triggering automatic notification.

We support mandatory reporting requirements for all registered health practitioners similar to those that currently apply to medical practitioners in New South Wales.

The New South Wales legislation (s71A) specifies three conduct issues which require mandatory reporting namely, intoxication, flagrant departure from accepted standards and sexual misconduct. In each case the danger to the public is immediate and the justification for intervention relatively clear. Such departures from accepted standards of professional behaviour in our view justifies intervention.

That justification is less clear with physical or mental impairment where none of the three reportable conduct issues exist. Here there is still potential for harm to patients if impairments go unchecked, but there is also potential for early and effective self-referral and self-help. The Association believes reporting here should not be mandatory but at the discretion of the treating

practitioner. This way the impaired or potentially impaired practitioner would be less likely to be discouraged from seeking professional help and more likely to return to or remain in productive practice without risk to the public.

The Association believes that such an approach should protect treating practitioners who consider that a professional practitioner under their treatment is a serious risk to the public from any charges of breaching confidentiality should they decide to report in that instance.

Similar obligations to report risks to the public should be placed on employers of registered health practitioners even though it may difficult for employers who are not registered health practitioners to identify departures from accepted standards of professional practice or competence.

### **Protection for notifiers and registrants**

#### Proposal 4.5.1

It is essential for the working of any notification system that a person who makes a notification in good faith is indemnified from legal action in relation to the notification.

### **Own Motion Powers**

#### Proposal 4.6.1

Supported.

### **Immediate Suspension Powers**

#### Proposals 4.7.1, 4.7.2 and 4.7.3

Optometrists Association supports the boards having the power to suspend a practitioner prior to completion of investigations and/or disciplinary action where they believe there is a significant threat to public health and safety. Given the nature of optometry, we believe such a power would be used rarely but should still be available to boards. Optometrists Association suggests this is an area where each board should have the flexibility to act according to the circumstances of their profession Accordingly, we prefer no term be specified under Proposal 4.7.1 and that any disclosure of undertakings as in proposal 4.7.3 be left to the board's discretion.

### **Grounds for a board to refuse to deal with a notification**

#### Proposal 5.2.1

This proposal is linked to Proposal 4.3.1 which determines the matters that may be subjects of notification. If Optometrists Association recommendations in relation to the earlier proposal were adopted the additional matters raised in Proposal 5.2.1 could be incorporated into the earlier part or vice versa.

Care should be taken that legislation enacting the dot point relating to taking no action because a practitioner no longer registered does not conflict with earlier proposals that boards be able to take action against practitioners no longer on the register. (Proposal 4.3.2)

## **Liaison with HCCs**

### **Proposal 5.3.1**

Supported

## **5.6 Notifiers' rights of review of preliminary assessment decisions**

The paper in 9.5 well explains that the role of the boards is not “to resolve grievances between the consumer and the registrant, or to punish a practitioner” but to protect the public. This being the case then the notifier has no rights, except in special circumstances, in regard to decisions of the board in relation to a complaint. The Association is of the view that the notifier, except in special circumstances, should have no rights of review of preliminary assessments of the board or any other decisions of the board. In addition, any advice to the notifier relating to decisions of the board should be at the discretion of the board.

## **Overview of management of performance related matters**

### **Proposal 6.1.1**

Supported

## **Health or impairment matters**

### **Proposals 7.1.1**

We support the intention to enable boards to deal flexibly with practitioners who have a health condition.

### **Proposal 7.1.2**

While both options have merit, on balance Optometrists Association prefers Option 2 in that it requires the registrant to take some responsibility for their rehabilitation while providing some financial and moral support from their professional colleagues

## **Timelines for the conduct of investigations**

### **Proposal 8.3.5**

Optometrists Association endorses the proposal that investigations should be conducted as quickly as practical and the practitioner subject to the notification is informed quickly of outcomes of investigations and decisions. The Association supports the proposal.

## **Achieving separation of functions**

### **Proposal 9.1.1**

Optometrists Association supports Option 2. If the scheme is set up so that the Boards and panels have clearly defined procedures, board and panel members are adequately informed of their responsibilities to the public and adequate review and appeal mechanism are in place then there is no need for additional oversight by or referral to other authorities.

### **Proposal 9.1.2**

**Supported**

**Matters involving registrants from different professions**

Proposal 9.2.1

Supported

**Legal representation for registrants at panel hearings**

Proposal 9.3

Optometrist Association is of the view that Option 4 b is the optimal choice i.e. registrants have no right to legal representation at board panel hearings but may have a person, who may be an Australian legal practitioner, accompany them. The entitlements of that person to speak on behalf of the practitioner should be very limited.

Justice and the public interest would be best served at panel hearings if legal formalities were kept to a minimum hence the support for minimal legal practitioner involvement. At the same time, the practitioner should have guarantees that his or her rights were respected. The presence of an accompanying legal practitioner would give some assurances that the panels conduct is reasonable and proper.

**Confidentiality of panel hearings**

Proposal 9.4.1

Supported

**Status of notifiers at panel hearings**

Proposal 9.5.1

Supported

**Review rights for registrants**

Proposal 9.6.1

Supported.

**9.8 Role of Commonwealth, State or Territory ombudsmen**

Optometrists Association supports Option 1 i.e. allowing complaints to the Commonwealth Ombudsman only.

**Original jurisdiction of panel**

Proposal 10.3.1

Optometrists Association supports the proposal. If we understand correctly, the alternative option presented is in fact additional to the initial proposal rather than an alternative. We support the additional proposal as well.

## **Review jurisdiction of panel**

### Proposal 10.4.1

Optometrists Association supports the proposal. As with 10.3.1, our reading is that the alternative option presented is additional to the initial proposal. We support the principle espoused in what is listed as the alternative option.

## **Constitution and appointment of tribunal hearing panels**

### Proposal 10.6.1

The Association agrees with the proposal that tribunals should be constituted with a minimum of three members of whom two must be from the same profession as the practitioner, Because of the seriousness of the matters that a tribunal will consider, it is advisable that tribunals include a legal practitioner to avoid breaches of natural justice and to ensure decisions are made in a proper manner with due regard to proper process. If the expertise of some other person is required in a particular instance then an additional person with that expertise may be added to the tribunal.

## **Status of notifiers**

### Proposal 10.8.1

Supported. The notifier should have no rights to apply for hearings. It is important that Board panels and tribunals be able to call notifiers as witnesses.

## **Review rights from tribunal decisions**

### Proposal 10.10.1

Supported.

## **Practice offences**

### Proposal 11.4.1

Optometrists Association has proposed in response to the consultation paper *Proposed Registration Arrangements* a way by which the current practice of orthoptists may continue consistent with the new scheme. In brief, that involves orthoptists continuing only to prescribe optical appliances under the supervision of an optometrist or medical practitioner.

## **Direct or incite offences**

### Proposal 11.5.1

Supported. Some optometrists practice in corporate operations. This proposal would help ensure they are not put under pressure to act in a manner that might be inappropriate professionally.