

**THE PHARMACEUTICAL COUNCIL
OF WESTERN AUSTRALIA**

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Complaints Arrangements Submission

Attention: Practitioner Regulation Subcommittee

Electronic Submission

Attached is this Council's response to your invitation to comment on the consultation paper on proposed registration arrangements.

Thank you for the opportunity to comment.

Yours sincerely

A handwritten signature in black ink, appearing to read 'R J Brennan', with a long horizontal flourish extending to the right.

R J Brennan
Registrar
27 November 2008

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

Pharmaceutical Council of Western Australia response to

CONSULTATION PAPER

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

27 November 2008

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

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

1.4 The Intergovernmental Agreement

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

1.25 The role of the boards will be to:

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

External complaints and review processes under the national scheme

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

6. IMPLEMENTATION

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

It is apparent from the above clauses that:

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

The IGA does not give detailed consideration to the conciliation of complaints or alternative dispute resolution which is a common feature of most State and Territory schemes, nor how those elements will interact with the national model in the future. It is anticipated that jurisdictions are likely to retain some State-based body to address the

conciliation function, or consider institutional complaints or a combination of both. The paper therefore also addresses the interaction between these State-based bodies and the national scheme.

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

1.5 Principles

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

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

2. Proposed terminology

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

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

2.1.1 Notification – This term is proposed to be used in legislation instead of 'complaint' to describe a matter referred to a board about a registered practitioner, because it encompasses matters referred from a range of sources, not just from clients or patients of the registrant. It also covers self referrals and referrals from colleagues, employers, Medicare, the Professional Services Review scheme, Department of Immigration and Citizenship (DIAC), etc. The terms 'notification' and 'notifier' also reflect the fact that matters may not always come to the board in the form of a complaint from a consumer. If the term 'notification' is adopted, then a definition will be required in the legislation to make clear that it encompasses consumer complaints. Using the term 'notification' for the purposes of legislation does not preclude the Agency and the boards from using every day language in their dealings with consumers, for example, having information on the website for consumers on 'how to make a complaint'.

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

Support the use of the terms notification and notifier in the legislation, with flexibility for use of the terms complaint and complainant in contact with consumers.

Whilst it may not be relevant for inclusion in legislation, transition planning must recognise that large numbers of contacts with Boards arise because members of the public are not sure whether there are grounds for a complaint / notification arising from their interaction with a practitioner. Appropriate staff resources need to be made available to assist potential “notifiers” to understand whether there are grounds for a “notification” or whether their dissatisfaction is better categorised as a communication failure.

Assistance to potential “notifiers” is best provided at the local level, by staff with an understanding of specific aspects of practice, legal and ethical obligations within a profession etc. therefore any proposal for establishment of a single national call centre is not supported as this may well deter consumers from making a notification. This is currently provided in a timely, efficient manner.

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

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

2.1.3 Notifications assessment committee – This term is proposed to be used to describe the committee or committees that may be established by a board under the legislation to make the preliminary assessment of a matter and what course of action is required.

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

Support the proposal, not the alternative, if the terms notification and notifier are adopted as proposed in 2.1.1 and where a national board determines that a committee is required for this purpose.

Query whether every profession will require a committee / committees to perform this function. Recommend that Boards are empowered to delegate this function to appropriately qualified and experienced staff employed to provide support in either the

national or local office. Otherwise the costs will expand rapidly and unnecessary time delay will occur.

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

2.1.5 Performance management committee – This term is proposed to be used to describe a committee that may be appointed by a responsible board to oversee the management of practitioners whose performance may be unsatisfactory.

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

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

General comment – there appears to be significant scope for delay and duplication of effort in the proposed establishment of both committees and panels to manage and make determinations with respect to performance, health and conduct. Query whether every profession will require any or all of these committees and panels to perform all these functions. Recommend that Boards are empowered to delegate at least some of the preliminary assessment and investigation functions to appropriately qualified and experienced staff employed to provide support in either the national or local office.

Further, whilst recognising that volume may dictate that some professions require each of these proposed committees and panels, others will not. It is recommended that each Board have sufficient flexibility with respect to the number and size of committees and their roles. For example, a Board may choose to appoint a single committee / panel which could fulfil more than one of the functions outlined in this paper. This may overcome some of the concerns raised about potential delay and duplication of effort and should ensure that sufficient professional input can be secured, even in small professions and small jurisdictions.

2.1.8 Health management committee – This term is proposed to be used to describe a committee that may be appointed by a responsible board to oversee the management of practitioners whose performance may be unsatisfactory.

The definition does not appear to match the function. This term would be appropriate 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.

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

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

The term health assessment is preferred.

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

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

Again, there is concern that the establishment of a Panel, separate to the Committee, suggests significant possibility of delay and duplication. Whilst it is important to ensure that separate and distinct pathways relating to performance, health and conduct are maintained, Boards should also have the flexibility to allocate functions under multiple pathways to a single committee and/or panel.

The term “Health Panel” is preferred as it maintains consistency of terminology between committee, assessment and panel.

2.1.11 Conduct management committee – This term is proposed to be used to describe a committee that may be appointed by a responsible board to oversee the management of investigations and hearings into the conduct of practitioners who may have engaged in unsatisfactory professional conduct.

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

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

2.1.14 Responsible tribunal – This term is proposed to be used to describe the relevant State or Territory tribunal responsible for hearing and determining matters of

serious professional misconduct by registered practitioners, and appeals from certain board decisions.

2.1.15 Not of good character – This term is proposed to be used to describe a registrant who is not considered suitable to practise because of a defect in their character.

Alternative option: Alternative terminology for consideration (used in some Acts) is ‘not a fit and proper person’.

Prefer “not of good character”

2.1.16 Impairment – This term is proposed to be used to describe a physical or mental condition, or habitual misuse of drugs or alcohol which affects the capacity of a practitioner to practise safely and competently.

Propose definition should refer to conditions which “detrimentally affect or are likely to detrimentally affect” capacity.

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

These definitions are problematic in that unsatisfactory professional conduct is defined to include unsatisfactory professional performance. Again, this blurs the distinction between performance, health and conduct pathways.

This definition should apply to notifications that suggest professional performance is not satisfactory or the practitioner is not competent to practise (where competence is sufficient physical capacity, mental capacity and skill to practise and sufficient communication skills including adequate command of the English language).

2.1.18 Unsatisfactory professional conduct – This term is proposed to be used to describe conduct that is less serious and unlikely to result in suspension or cancellation of a practitioner’s registration, and therefore does not require referral to an external tribunal for hearing. See Attachment 1 for proposed definition.

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

Prefer “unsatisfactory professional conduct” as the public understands “unprofessional” to include allegations the practitioner was rude etc

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

3. Overview of proposed system

3.1 Background

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

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

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

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

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

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

3.2 Key features of proposed system

A diversity of forms

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

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

The proposal that a Board could choose to establish a single committee and/or a single panel as its delegate in all matters is supported.

Key features of the proposed scheme are as follows:

Receipt of notification (includes a complaint)

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

Preliminary assessment of notification

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

- whether the notification has arisen from a consumer complaint and requires consultation with the responsible State or Territory HCC (all consumer complaints would require consultation)
- which other external bodies have an interest or involvement in the matter, such as other complaints bodies, Commonwealth State or Territory agencies
- whether the matter raises questions of the performance or competence of the practitioner Assessment of the notification by a local committee or delegate of a

national board would be an appropriate pathway to deal with single dispensing error notifications in pharmacy. Such errors can have a number of contributing factors and it is important to identify which are relevant in order to minimize recurrence.

- whether the matter raises questions that the practitioner may have an impairment that is affecting his/her capacity to practise
- whether the matter raises questions of possible unsatisfactory professional conduct or professional misconduct
- whether continued practice by the registrant presents such a serious risk to public health and safety that their registration be immediately suspended pending investigation and hearing (see section 4.7)
- whether the matter should be referred to an external body for investigation or other action, and
- whether the notification warrants no further action because it is considered by the board to be frivolous, vexatious, lacking in substance or otherwise does not warrant investigation or other action.

Consultation with HCC or equivalent State and Territory bodies

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

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

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

then the board may refer the matter, or part of the matter to the responsible complaints commissioner.

Determination of which is the responsible committee/panel/tribunal/HCC requires consideration of questions about where practice occurs. For example, if a pharmacist conducting internet pharmacy in one state supplies medication to a consumer in another state, and that supply gives rise to a notification, is the responsible committee/panel/tribunal/HCC the one where the consumer is located or the one where the pharmacist conducts the business or the one where the pharmacist has their principal place of residence? The legislation should provide direction for resolution of this question to ensure it is managed in the same way for all professions.

Performance management

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

The role of the board or the performance management committee in such cases would be to oversee the assessment and management of poor performance. The board or the committee would have the power to appoint an assessor or assessors to undertake a performance assessment.

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

Again, there is concern that the establishment of a Panel, separate to the Committee, suggests significant possibility of delay and duplication. Whilst it is important to ensure that separate and distinct pathways relating to performance, health and conduct are maintained, Boards should also have the flexibility to allocate functions under multiple pathways to a single committee and/or panel. Sometimes there is an overlap between conduct and performance and a single committee is able to consider both matters.

Health management

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

The role of the board or the health management committee in such cases would be to oversee the assessment and management of impaired registrants. A board or a health management committee would have the power to appoint a health assessor or assessors to undertake an assessment of the health of the practitioner. Following completion of the

health assessment and receipt and consideration of the report of the assessor, the board or committee would decide whether a formal health panel hearing is required, or what other action is necessary to address any capacity to practise issues identified.

Conduct management

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

Boards should be enabled to delegate to a committee and/or an appropriately qualified and experienced staff member, the power to appoint an investigator or investigators.

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

Board hearings

If a board or a performance management, health management or conduct management committee determines that a hearing of the matter is required, then it would appoint a panel to conduct the hearing. The legislation would specify the make up of a health panel, performance panel and conduct panel, along with the formal findings and determinations that each may make.

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

Whilst it is acknowledged that mechanisms must exist to ensure practitioners are accorded procedural fairness, this should not extend to allowing practitioners to unilaterally decide on the venue for hearing of matters. The makeup of the responsible tribunal, versus the Board or one of its committees or panels, is likely to involve less profession specific input. The primary function of the tribunal, in first instance matters, is expressed to be determination of those matters likely to give rise to suspension or cancellation. The tribunal is therefore unlikely to have experience in determining matters which fall short of this standard or the educative / rehabilitative orders which are appropriate to remediate conduct which whilst unsatisfactory is not cause for removal from the register.

Referral for tribunal hearing

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

There is concern about the proposed multiple sources of referral to a tribunal, without any reference to the national board. If one of the purposes of a national scheme is to ensure national consistency, there needs to be a mechanism which ensures that matters of similar nature are dealt with in a similar way. It is recommended that, where a Board establishes multiple committees and/or panels, any determination that a matter should be referred to a tribunal for hearing should be first endorsed by the National Board or at least a national assessment committee. This referral may not be required if the proposal to establish a Director of Proceedings or similar is adopted, provided that no time delay is incurred.

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

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

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

Monitoring agreements and conditions

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

3.3 Proposed definitions for what constitutes a departure from professional standards

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

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

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

Refer previous comments about inappropriate inclusion of “unsatisfactory professional performance” within definition of “unsatisfactory professional conduct”

Subparagraph (c) should be extended to include failure to comply with any practice standards / guidelines established by the Board and endorsed, as required, by the Ministerial Council

Subparagraph (e) should be extended to refer to criminal findings as well as convictions.

4. Notifications

4.1 Who may make a notification

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

4.2 In what form may a notification be made

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

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

Generally support but do not support that notification must be in writing, it should be in writing but sometimes this may not be possible. Frequently the notifier does not know the identifier of the practitioner because it may be a health service eg. a pharmacy

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

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

Support

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

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

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

Support

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

Support

4.4 Mandatory reporting obligations

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

Options for mandatory reporting

A number of options with respect to mandatory reporting by registered practitioners are set out below. One or a combination of these could be provided for in the legislation:

Option 1a: All registrants – limited obligations (treating relationships)

Under this option, the legislation would include provisions that require a registered health practitioner to notify the responsible board where they are in a treating relationship with a registrant from any of the regulated professions whom they reasonably believe to be placing the public at risk in their practice due to a physical or mental impairment, health condition or habitual use of alcohol or other drugs.

Option 1b: All registrants – extended obligations

Under this option, the legislation would include provisions that require, from any of the regulated health professions, a registered health practitioner to notify the responsible board of a registrant whom they reasonably believe is placing the public at risk in their practice:

- due to a physical or mental impairment or health condition, or
- by practising while intoxicated by drugs or alcohol, or
- by practising in a manner that constitutes a gross or flagrant departure from accepted professional standards, or
- by engaging in sexual misconduct in connection with their practice.

Option 2a: Employers – limited obligations (impairment)

Under this option, the legislation would include provisions that require a registered health practitioner's employer to notify the responsible board where they reasonably believe that the registrant's practice is placing the public at risk in their practice due to a physical or mental impairment, health condition or habitual use of alcohol or other drugs.

Option 2b: Employers – extended obligations

Under this option, the legislation would include provisions that require an employer to notify the responsible board of a registrant whose conduct may constitute unsatisfactory professional conduct or professional misconduct.

Registrants would only be expected to report major departures from professional standards where it is within their competence to make such a judgement.

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

The notion that “public risk” is the determinant of the nature of conduct / concern which must be reported needs to be clearly articulated in the legislation. These provisions need to balance the encouragement to notify where there is evidence to suggest that the public may be at risk with deterrents against vexatious / unsubstantiated notifications.

Options 1b and 2b are preferred. It is the experience of existing jurisdictional boards that health practitioners often identify concerns about the performance, impairment or conduct of another practitioner but are reluctant to report that conduct for fear of breaching general privacy / confidentiality obligations.

For employers, option 2b would address situations where an employer deals with unsatisfactory performance, conduct or impairment by dismissing the practitioner but the practitioner remains free to practise and expose the public to risk in subsequent engagements.

Mandatory reporting provisions should extend to requirements for courts to notify the relevant Board where any registered practitioner is convicted or made the subject of a finding for a criminal offence.

Student registrants and mandatory reporting

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

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

The intentions of student registration include enabling Boards to deal with performance, conduct or health issues to ensure the immediate protection of the public and to provide mechanisms to deal with matters which might ultimately affect the student's eligibility for full registration. For these mechanisms to operate effectively, registered practitioners and educational institutions should be required to report to the relevant board any matters relating to:

- the physical or mental capacity of the student to engage in clinical practice,
- habitual misuse of alcohol or other drugs,
- convictions or criminal findings for an offence where the circumstances of the offence are such as to render the student unfit to be registered

Enabling the Board to deal with these matters which may impact upon ultimate eligibility for full registration, at an early stage will enable students every opportunity to address perceived barriers to full registration in a timely manner and will enable Boards and educational institutions to address unrealistic expectations of students about eligibility for registration.

Even if student registration is not part of the regulatory scheme, these mandatory reporting requirements with respect to students should still apply to enable the Board to exclude a student from clinical practice if health or conduct concerns suggest that continuing involvement in clinical practice poses a risk to the public.

4.5 Protection for notifiers and registrants

Proposal 4.5.1: It is proposed that the legislation provide that a person making a notification is not liable for defamation because of the notification, and the making of a notification does not constitute a ground for civil proceedings for malicious prosecution or for conspiracy. It is proposed that this protection extend to any person who, in good faith, provided the notifier with any information on the basis of which the notification was made, or was otherwise concerned with the making of the notification.

Support, however, note that this is lower than the current protections provided in some jurisdictions and should be extended to ensure that notifiers, who act in good faith, are also protected from criminal or administrative proceedings.

General protections also need to be provided for persons who provide information to the Board and /or its delegate for other purposes under the Act such as supervision, health assessment reports or any other third party lawfully assisting the Boards under the Act.

4.6 Own motion powers

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

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

Strongly support and submit that own motion powers should extend to enable a Board to initiate or continue an investigation in circumstances where an original notification is withdrawn or the notifier is unwilling to cooperate with the ongoing investigation.

4.7 Immediate suspension powers

Most State and Territory legislation gives powers to registration boards to suspend, in advance of a disciplinary or other process, those registrants whose continued practice is

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

Proposal 4.7.1: It is proposed that the legislation include provisions that empower a responsible board or a notifications assessment committee to immediately suspend the registration of a practitioner for a period of up to three months, and to impose a second or subsequent period if it considers the registrant's continued practice poses a significant risk to public health and safety and the proceedings have not yet been finalised.

Alternative options: Alternative options for the length of time a board may immediately suspend a practitioner pending completion of an investigation and/or disciplinary process are:

- six months
- 12 months, or
- specify no term at all and leave it to the board's discretion.

Support proposal and not the alternatives as the proposal affords a degree of procedural fairness and ensures that there is a review of progress of investigations and/or the status of the practitioner at least 3 monthly. However the mechanism for achieving initial suspension and any subsequent suspensions needs to be specified. Any specified mechanism needs to be sufficiently flexible to allow for timely decisions to be made as a result of telephone / electronic meetings. However, procedural fairness would dictate that the practitioner has a right to be heard, at least on the occasion when suspension is initially imposed. As a matter of administrative efficiency, further hearings may not be required if there have been no significant changes to matters dealt with at the initial hearing.

In the case of pharmacists, legislation needs to clearly indicate the implications of suspension or cancellation of registration for pharmacists who hold pecuniary interests in a pharmacy. For example, section 25(5) of the Pharmacy Practice Act 2006 (NSW) provides that a pharmacist may continue to hold pecuniary interests during a period not exceeding 6 months immediately following the day on which the cancellation or suspension took effect while in WA the effect of s97(3)(b) of the Pharmacists Bill 2006 is that suspension of the owner of a pharmacy for a period longer than 12 months removes the right to ownership.

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

Support

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

Support the use of enforceable undertakings where any breach of the undertaking is automatically deemed to be unsatisfactory professional conduct (at least).

The fact of the existence of an undertaking should be entered on the public register against the practitioner's name but particulars of such undertaking should only be published if the Board or its delegate is of the opinion that it is in the interests of the clients of the health practitioner or the public to know the particulars of the undertaking.

5. Preliminary assessment of notifications

5.1 Powers following receipt of a notification

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

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

Proposal 5.1.1: It is proposed that the legislation provide for boards to receive a notification and determine whether the notification is within its jurisdiction to deal with and if so, what action should be taken.

Support

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

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

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

Proposal 5.2.1: It is proposed that the legislation provide for boards to decide not to investigate a notification on the following grounds:

- the board determines the notification to be frivolous, vexatious, misconceived or lacking in substance, or
- given the amount of time that has elapsed since the matter arose, it is not practicable for the board to investigate or otherwise deal with the matter, or
- the board determines the notification does not warrant investigation, or
- the health practitioner is not or is no longer registered by the board and it is not in the public interest to pursue the matter.

Generally support but the legislation should provide for Boards to decide not to take any action following a notification (as available actions extend beyond investigation).

Dot point 3, as currently expressed is a decision rather than grounds for a decision. Suggest it should be expanded to allow that the board determines the notification does not warrant investigation as it does not raise an issue which suggests potential harm to the public.

A further ground for decision to take no further action should be that the subject matter of the notification has been or is currently being dealt with by the Board or another appropriate authority.

Where a Board resolved not to take further action because the practitioner is no longer registered, legislation should allow that the Board may activate an investigation if the practitioner seeks to re-register within (say) 5 years.

5.3 Liaison with HCCs

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

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

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

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

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

National registration legislation

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

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

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

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

State and Territory health complaints legislation

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

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

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

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

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

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

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

Support - Consistent with the overall structure of the proposed scheme, provisions dealing with liaison between Boards and HCC's needs to extend to what happens to matters which give rise to performance and/or health concerns and not just conduct matters.

5.4 Who conducts the preliminary assessment of a notification

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

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

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

- a. empower a responsible board to:
 - i. appoint one or a number of notifications assessment committees, and
 - ii. appoint persons to sit on a notifications assessment committee, from a list of persons who have been approved by the Ministerial Council
- b. allow a notifications assessment committee to regulate its own proceedings, while requiring it to observe the principles of natural justice and procedural fairness, and
- c. allow members appointed to notifications assessment committees to be paid the sitting fees and allowances approved the Ministerial Council.

Under the proposed structure, if each National Board established only one national committee plus one committee per jurisdiction, appointments would need to be made to 90 separate committees. The suggestion that persons appointed by the National Board to notification assessment committees need to first be approved by the Ministerial Council appears to introduce an unnecessary and time consuming additional administrative step.

The Ministerial Council will have appointed members to the National Board after considering their suitability and experience to deliver all aspects of the national scheme. The proposal is for the appointment of committees at the local level and it is difficult to understand what added value consideration by the Ministerial Council would bring to this process. The need for Ministerial Council approval also reduces flexibility for the national board to efficiently conduct its operations, introducing new committees and/or

members as workload dictates, given that the Ministerial Council is only expected to meet twice per year.

5.5 Powers following preliminary assessment of a notification

Proposal 5.5.1: It is proposed that, following preliminary assessment of a notification, the board or a notifications assessment committee would be empowered, to take one or a number of the following actions:

- decide that the matter is a performance management matter and, where appropriate, refer the matter to a performance management committee or directly seek a performance assessment (performance matters)
- decide that the matter is a health management matter and, where appropriate, refer the matter to a health management committee or directly seek a health assessment (impairment matters)
- decide that the matter is a conduct management matter and, where appropriate, refer the matter to a conduct management committee or directly authorise investigation (disciplinary matters)
- refer the matter to the responsible State or Territory tribunal for hearing (professional misconduct matters)
- refer the matter for investigation or prosecution by another body (such as for example, the police or Medicare Australia)
- require the practitioner to give an enforceable undertaking to the board, which might include, for example, the placement of conditions on registration
- immediately suspend the practitioner's registration pending investigation and hearing
- refer the matter, or part of the matter to the responsible HCC for conciliation, and
- take no further action.

If one of the roles of the national scheme is to ensure consistency in the way matters are dealt with, there is some concern about multiple committees having the ability to refer matters directly to multiple tribunals. To ensure that similar matters are dealt with in a consistent manner in all jurisdictions, it is suggested that the national board be required to endorse / ratify any recommendation from a local committee to refer a matter to an external tribunal. This step would not be required if the proposal to introduce a Director of Proceedings is adopted.

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

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

Support – does this need to include suspension in the third dot point?

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

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

Support and note that the Board should also be required to advise the practitioner of any rights of appeal.

5.6 Notifiers' rights of review of preliminary assessment decisions

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

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

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

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

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

It is considered important that the legislation be transparent about these matters, that those affected know where they stand, and that the legislation balance the rights of registrants and those of consumers. It is also important to attempt to address, at least in

part, the perception that registration boards may at times act to protect the interests of registrants rather than those of notifiers, particularly when the board decides no further action is required, and the notifier disagrees.

There are two options with respect to review rights for notifiers arising from board or committee decisions at the stage of preliminary assessment:

Option 1: No right of review of preliminary assessment decisions for notifiers.

Option 2: A right of review of preliminary assessment decisions for notifiers – along the lines of the model outlined above, that is, a review panel established internal to the board, with or without a level of independent input from, for example, a nominee of the responsible HCC. Reviewable decisions would be the decision to take no further action following preliminary assessment, and the decision to refer a matter to a conduct management committee or performance management committee of the board rather than to an external tribunal for hearing. The notifier would have no right of review with respect to matters being dealt with by the board under the health stream.

Support an amendment to option 2 so that notifiers only have a right of review where the preliminary assessment decision is to take no further action. The determination about whether a matter gives rise to performance, conduct or health concerns should be reserved exclusively to the Board or its delegate. To do otherwise would arguably allow notifiers to attempt to influence the forum in which a matter may ultimately be determined.

However the suggestion that a review panel has the power to investigate further is opposed. What is the point of granting power to yet another panel to investigate? The review panel can either agree or request the Board, committee or delegate to further investigate the matter.

6. Performance matters

6.1 Overview of management of performance related matters

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

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

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

All systems have in common however, the need for clear and flexible processes to address as disciplinary matters any concerns that the practitioner may be placing the public at risk. Thus, where a board's assessment or monitoring processes identify a risk and/or the practitioner is resistant to addressing this, the board should have the option of dealing with this as a disciplinary matter rather than a performance matter. Equally, all schemes recognise that performance assessment processes can also provide a useful adjunct to a matter which is primarily disciplinary.

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

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

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

Support and note that this is an appropriate option for pharmacy to deal with dispensing errors which, generally, do not give rise to sufficient grounds for prosecution as unsatisfactory professional conduct. In these matters, the objective is to determine how the error occurred and what steps need to be taken to minimise the prospect of a recurrence.

The legislation should also include power for a board to settle the matter by agreement between the practitioner and the board or its delegate.

6.2 Performance management

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

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

Support – see notes under 6.2.2

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

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

See previous comments about unnecessary duplication and delay in utilising multiple committees and panels.

It is submitted that the Board or one of its committees should be empowered to consider reports from any previous performance assessments and/or the outcomes of consideration of any previous unsatisfactory professional performance notifications for the purpose of determining whether the evidence demonstrates a pattern of poor performance which warrants hearing by the panel or, where it is sufficiently serious to warrant suspension or cancellation of registration, referral to the Tribunal.

6.3 Performance assessments

Proposal 6.3.1: It is proposed that the legislation would empower a board (or performance management committee of a board) to appoint one or a number of assessors,

who are not members of the responsible board (or committee of the board), to conduct a performance assessment of the practitioner, and that the board would pay for the assessment.

Proposal 6.3.2: It is proposed that the legislation would require the performance assessors to provide a report of the assessment to the board or performance management committee, and, within 7 days to the practitioner. The chair or nominee of the board or committee would be required under the legislation to discuss the report with the practitioner, and in the case of an adverse finding, possible ways of dealing with that finding, including whether the practitioner is prepared to alter the way they practise.

It is not appropriate for discussion of such reports to occur on a 1:1 basis. Responsibility for discussing a report with the practitioner should rest with the board or a committee, not with the chair or a nominee.

The practitioner needs to be afforded an opportunity to be heard in relation to any issues arising from the assessment but such opportunity may involve the provision of written submissions and/or a meeting with the board or committee to discuss the report. To ensure that the practitioner is informed of the opportunity and means to be heard, at the same time as receipt of the assessment, responsibility for providing the assessment to the practitioner should reside with the Board or committee rather than with the assessor.

Is it necessary for the practitioner to receive the report directly from the assessor or is it more appropriate for the board or committee to provide the report to the practitioner, together with the committee or board?

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

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

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

Support

6.4 Performance panel hearings

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

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

- for the committee (or the board) to appoint, if it considers necessary, a performance panel, to hear a matter relating to the professional performance of a registrant with that

panel to contain no members of the board or committee referring the matter to the panel

- that a panel must:
 - have at least one registrant member from the same profession as the practitioner
 - have at least one member who is not and has never been a registrant in a regulated health profession, and
 - have no more than half of the members being registrants from the profession concerned
- for notice of the hearing to be issued to the registrant
- for a panel to set its own procedure, be required to observe the principles of natural justice, but not to be bound by the rules of evidence
- for a panel to be empowered to consider, amongst other things the report/s of performance assessment, and
- for a panel to be required to refer the matter to the responsible tribunal for hearing if the practitioner requests, or if, at any time, the panel identifies a pattern of poor performance sufficiently serious to warrant suspension or cancellation of the practitioner's registration.

Generally support but, as panels will be responsible for making decisions which may be appealed to a Tribunal and for providing written reasons for such decisions, recommend every panel established within the scheme should include in its membership an Australian legal practitioner. Ideally there should be two registrant members, one non-practitioner member and an Australian legal practitioner. Whilst non-practitioner members do not all support inclusion of a legal practitioner, given that findings and determinations need to be properly documented and reasons recorded a legal practitioner can often ensure that this is done appropriately.

6.5 Decisions available to performance panel following a hearing

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

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

- take no further action.

Support but recommend that the option to counsel the practitioner be extended to include the power to provide advice or make recommendations to the practitioner.

Proposal 6.5.2: It is proposed that the legislation provide for a panel to consider reports from any previous performance assessments and where the panel considers the evidence demonstrates a pattern of poor performance sufficiently serious to warrant suspension or cancellation of registration, require the panel to refer the matter for hearing by the responsible State or Territory tribunal.

Support

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

Does this mean within 28 days of hearing or 28 days of making a decision?
Depending on the length of any hearing and the complexity of the issues, a panel may not make a decision on the date of hearing so precision is required when setting timeframes within which decisions must be communicated.

7. Health or impairment matters

7.1 Overview of management of health related matters

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

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

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

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

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

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

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

Support

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

Proposal 7.1.2: In addition to boards having the powers to conduct health assessments, deal cooperatively and flexibly with impaired registrants (rather than through the disciplinary stream) and monitor their compliance with conditions (if any) on their registration, it is proposed that the legislation provide for boards, at their discretion, to offer health programs for impaired registrants nationally.

There are two options for funding such programs:

Option 1: Health programs, if provided for by a board, are funded by the board through a component of all registrants' fees for their respective profession.

Option 2: Health programs, if provided for by a board, will be funded by the board through charges to the registrants receiving health programs in addition to a component of all registrant fees from the profession.

Option 2 preferred – and currently utilised where practitioners are required, for example, to pay for urinalysis where provisions of results to the Board has been agreed or become a condition on their registration or a prerequisite to return of rights/unrestricted rights to practice.

7.2 Health management

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

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

Again duplication of tasks by having multiple committees with delays for consideration at meetings must be minimized. As previously stated it is important for efficiency, cost effectiveness and time management for there to be a minimum number of committees each with appropriate delegations to enable them to function.

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

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

Support but recommend that the option to counsel the practitioner be extended to include the power to provide advice or make recommendations to the practitioner.

7.3 Health assessments

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

Support but question whether it is appropriate or necessary to allow that the practitioner needs to agree upon the identity of the assessor. For example, a health management committee may consider that a practitioner may be suffering from a mental illness but the practitioner refuses to agree to be assessed by a psychiatrist. It may be appropriate to provide a list of three names with one to be chosen. In the alternative, the legislation could provide for consequences to flow if a practitioner fails, without reasonable excuse, to undergo the assessment required by the committee.

Proposal 7.3.2: It is proposed that the legislation would require the assessor/s to provide a report of the assessment to the health management committee, and, within seven days to the practitioner. The chair or a nominee of the committee would be required under the legislation to discuss the report with the practitioner, and in the case of an adverse finding, possible ways of dealing with that finding, including whether the practitioner is prepared to address the matters identified in the report.

It is not appropriate for discussion of such reports to occur on a 1:1 basis. Responsibility for discussing a report with the practitioner should rest with the board or a committee, not with the chair or a nominee.

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

Determination as to whether a report may contain information which might be prejudicial if disclosed to the practitioner should be made by the person providing the assessment, not by the committee. The advice of the assessor should also be taken to identify the appropriate health practitioner to whom such information should be provided (eg a practitioner other than a medical practitioner may nominate a peer rather than a practitioner more suitably qualified to manage the information provided in the report)

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

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

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

7.4 Health panel hearings

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

Proposal 7.4.1: It is proposed that following a decision to handle a matter as a health management matter, the legislation provide:

- for the board or committee to appoint, if it considers necessary, a panel and refer to it for hearing a matter relating to the capacity of the registrant to practise with that panel to contain no members of the board or committee referring the matter to the panel
- that a panel must have:
 - at least one registrant member from the same profession as the practitioner
 - a member who is a registered medical practitioner with relevant expertise
 - at least one member who is not and has never been a registrant in a regulated health profession, and
 - have no more than half of the members being registrants from the profession concerned (excluding the registered medical practitioner with relevant expertise in the case of a medical registrant)
- for notice of the hearing to be issued to the registrant
- for a panel to set its own procedure, be required to observe the principles of natural justice, but not to be bound by the rules of evidence
- for a panel to be empowered to consider a report of the board or health management committee including the results of health assessments, and
- for a panel to be required to refer the matter, at any time, to the responsible tribunal for hearing if the practitioner requests, or if the panel forms the view that the practitioner's capacity to practise is affected to such an extent by physical or mental impairment or habitual use of alcohol or other drugs, that suspension or cancellation of the practitioner's registration may be warranted.

Submit that referral to the tribunal at the practitioner's request is inappropriate. Not all external tribunals will be appropriately constituted to enable them to make an initial decision about impairment.

7.5 Decisions available to a health panel following a hearing

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

- require the practitioner to undertake treatment and/or supervised practice
- counsel the practitioner
- require the practitioner to give an undertaking to the board
- place conditions on the practitioner's registration

- refer the matter to be handled as a performance management matter (performance matters)
- refer the matter to be handled as a conduct management matter for investigation (disciplinary matters)
- refer the matter, or part of the matter to the responsible HCC for conciliation
- refer the matter for investigation by an external body, or
- take no further action.

Reference in dot point one to “treatment” should be “approved / specified” treatment to ensure the board or committee is able to specify the nature of treatment to be undertaken and ensure it is recognised as appropriate in response to the identified health issue(s).

Recommend that the option to counsel the practitioner be extended to include the power to provide advice or make recommendations to the practitioner.

Proposal 7.5.2: It is proposed that the legislation provide for a panel to consider reports from any previous performance assessments and where the panel considers the evidence demonstrates a pattern of poor performance sufficiently serious to warrant suspension or cancellation of registration, require the panel to refer the matter for hearing by the responsible State or Territory tribunal.

As this is a health pathway, consideration of previous health assessments should also be permitted.

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

Does this mean within 28 days of hearing or 28 days of making a decision?
Depending on the length of any hearing and the complexity of the issues, a panel may not make a decision on the date of hearing so precision is required when setting timeframes within which decisions must be communicated.

8. Conduct matters

8.1 Overview of management of conduct related matters

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

While the proposals outlined in sections 6 and 7 above provide powers for boards to deal cooperatively and flexibly with practitioners to address health matters that affect their capacity to practise, or deficits in their skills and knowledge that compromise their performance, there are times when the practitioner may be competent and well, but has

behaved in an unethical or unprofessional matter, or has failed to cooperate with the board in addressing identified performance or health issues.

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

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

8.2 Conduct management

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

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

Refer to previous comments about delay and duplication of effort. The Board requires sufficient flexibility so as to be able to appoint a single committee to perform multiple functions described in this consultation paper (eg a notification assessment committee may refer matters to a single committee which performs the management functions adopting varying procedures based upon whether the matter raises performance, health or conduct issues).

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

- request the practitioner to undertake further education and/or supervised practice or alter the way they practise
- counsel the practitioner
- refer the matter to be handled as a performance management matter (performance matters)
- refer the matter to be handled as a health management matter (impairment matters)
- refer the matter for hearing by a conduct panel (unsatisfactory professional conduct matters)
- refer the matter to the responsible State or Territory tribunal for hearing (professional misconduct matters)

- refer the matter, or part of the matter to the responsible HCC for conciliation
- refer the matter to another external body (for example, the police, Medicare, State or Territory drugs and poisons units) for investigation, or
- take no further action.

Refer previous comments about referral directly from a committee / panel to the tribunal. The national board or its delegate should have a role in such referrals to ensure consistency in the nature of matters dealt with by external tribunals. Adoption of a proposal to establish a Director of Proceedings may address this concern.

Recommend that the option to counsel the practitioner be extended to include the power to provide advice or make recommendations to the practitioner.

8.3 Investigations

Appointment of investigators

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

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

It is not appropriate that any conduct matter be referred to a tribunal without some level of investigation. The tribunal will be established to hear evidence and submissions, which can only be presented after the conduct of an investigation. Even where a notification is based on a conviction, the basis for a professional misconduct complaint requires investigation to determine whether the circumstances of the conviction render the practitioner unsuitable to be registered. It is not the fact of the conviction which is relevant but the consideration of the circumstances involved.

Notice of an investigation

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

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

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

Support

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

Support – but the decision not to give notice to the practitioner should rest with the board or committee and not with the individual investigator (although the decision may take account of any advice received from an investigator).

Timelines for the conduct of investigations

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

Proposal 8.3.5: It is proposed that the legislation require an investigation to be conducted as quickly as practicable having regard to the nature of the matter, and that at least the following timelines be included in legislation:

- provide notice of a decision on the outcome of an investigation (with reasons if required) to the registrant and notifier – within 14 days of the decision
- provide progress reports to notifier and registrant – at least three monthly, and
- require the responsible board to keep both the notifier and the registrant informed of progress with the investigation, at a minimum of three monthly intervals.

Other proposed notification requirements have 28 day timeframes. Why is 14 days proposed / considered necessary at this stage?

Is there any difference in meaning/intent between dot points 2 and 3? Support the proposal that notifiers should receive progress reports but do not consider that mandatory 3 monthly reporting is appropriate or necessary in all circumstances. It is more appropriate that notifiers receive progress reports when the notification moves through each stage of the process rather than at specified time intervals.

8.4 Powers of investigators – search, entry, seizure

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

premises if immediate action is required, and without a warrant, or without a warrant but with five days notice in writing.

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

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

Reference to premises needs to be broader than “premises of a registrant’s practice” and should extend to any premises where the inspector believes on reasonable grounds are being used for the carrying on of practice or where medicines are supplied. Investigators also require powers to examine or inspect any apparatus or equipment used or apparently used in the course of practice.

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

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

8.5 Conduct panel hearings

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

Proposal 8.5.1: It is proposed that following referral of a matter to a conduct management committee, the legislation provide:

- for the board or committee to appoint, if it considers necessary, a panel and refer to it for hearing a matter relating to the professional conduct of the registrant with that panel to contain no members of the board or committee referring the matter to the panel
- that a panel must:
 - have at least one registrant member from the same profession as the practitioner
 - have at least one member who is not and has never been a registrant in a regulated health profession, and
 - have no more than half of the members being registrants from the profession concerned
- for notice of the hearing to be issued to the registrant
- for a panel to set its own procedure, be required to observe the principles of natural justice, but not to be bound by the rules of evidence
- for a panel to be empowered to consider the report of the conduct management committee including the results of any investigations, and
- for a panel to be required to refer the matter to the responsible tribunal for hearing if the practitioner requests, or if the panel forms the view that the practitioner's capacity to practise is affected to such an extent by physical or mental impairment or habitual use of alcohol or other drugs, that suspension or cancellation of the practitioner's registration may be warranted.

Small boards may not have conduct management committees as the board itself will direct investigations. This proposal should simply allow for referral, without the prerequisite of initial referral to a conduct management committee. Final dot point should refer to the panel forming a view that the practitioner's conduct is such that suspension or cancellation of registration may be warranted. References here to impairment appear misplaced.

Because panels are required to provide reasons for their decisions and those decisions may be appealed to the Tribunal, it is recommended that membership of all panels established under the scheme should include an Australian legal practitioner.

8.6 Decisions available to a conduct panel following a hearing

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

- require the practitioner to undertake further education, supervised practice or alter the way they practise
- caution the practitioner
- reprimand the practitioner

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

Options available to the panel need to include the referral of the matter to the Tribunal if it is considered that suspension or cancellation of registration may be warranted.

Proposal 8.6.2: It is proposed that the legislation provide for a panel to consider, amongst other things, reports from any previous performance assessments and where the panel considers the evidence demonstrates a pattern of poor performance sufficiently serious to warrant suspension or cancellation of registration, require the panel to refer the matter for hearing by the responsible State or Territory tribunal.

Panel should be able to consider all previous and current notifications / complaints on the national database, not just any previous performance assessments. This will ensure that conduct occurring in multiple jurisdictions is not considered in isolation.

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

Is this 28 days from date of hearing or date of making decision?

9. Ensuring accountability, transparency and procedural fairness

9.1 Achieving separation of functions

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

This requires the legislation to address issues of due process (for example avoidance of bias in decision making and pre-judgement), given the IGA structure provides that one body will have the capacity, not only to investigate but also prosecute and make determinations on less serious matters. By way of example, criminal matters are generally

pursued by separate offices for each stage of the process, that is, the police investigate allegations, decisions as to prosecution are referred to a separate body (generally a Director of Public Prosecutions) and all decisions as to findings of guilt and penalties are made by the courts. This separation of process not only addresses possible issues of prejudice, but also ensures a level of oversight of the investigative process, which all provides for a more robust and accountable system. Such processes can add to public confidence in systems of regulation.

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

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

This model is generally supported in New South Wales where the HCCC is generally responsible for investigation and prosecution. However, for those professions where overall notification / complaint numbers are low, the HCCC acknowledges that its investigators do not have the opportunity to develop the expertise referred to above. In pharmacy matters, for instance, it is accepted that the Pharmacy Board still conducts all dispensing error investigations and some (at least preliminary) investigations where preliminary assessment indicates departure from appropriate professional standards but suspension / cancellation are considered unlikely.

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

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

Proposal 9.1.1: The following options are suggested relating to the procedural fairness and public interest mechanisms in the scheme:

Option 1: No additional provisions are required beyond the review, appeal and other mechanisms already described in this paper.

Option 2: Provisions that establish a statutory office, possibly within the national agency, to assess prosecution decisions, along the lines of the ‘director of proceedings’ in the Health Care Complaints Act 1993 (NSW) and Health and Disability Commissioner Act 1984 (NZ). The director of proceedings not the boards would make the decisions on referrals to tribunals.

Option 3: Provisions that establish a mechanism for automatic review of all board decisions on conduct matters in relation to whether or not they should be brought to a tribunal, with processes for resolution of disagreement between a board and the reviewer.

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

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

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

Support Option 2 on the basis that it provides the boards with advice that proposed proceedings are legally sound and assessment of any further evidence requirements. The placement of the director of proceedings in the national agency should also allow for

consistency across professions as the nature of matters considered sufficiently serious to warrant prosecution in a tribunal.

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

Relevant criteria could for example include:

- the protection of the health and safety of the public
- the seriousness of the alleged conduct, and
- the likelihood of proving the alleged conduct.

Support

9.2 Matters involving registrants from different professions

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

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

Support

9.3 Legal representation for registrants at panel hearings

With respect to the rights of a registrant in a board panel hearing, different arrangements are in place across jurisdictions. It is intended that panel hearings be low key and informal, at least as far as is possible given the need for proper consideration of the matter. Allowing a registrant to have legal representation at a panel hearing is likely to increase considerably the level of formality and technicality of such proceedings. Arguably if a registrant wishes to be legally represented, then they can choose to have the matter dealt with before the responsible tribunal.

There are a number of options with respect to legal representation:

- Option 1:** The legislation is silent on the matter of a registrant's right to legal representation at a board hearing.
- Option 2:** The legislation specifies that the registrant has the right to be legally represented at a board hearing.
- Option 3a:** The legislation specifies that the registrant has no right to be legally represented at a board hearing.
- Option 3b:** The legislation specifies that the registrant has no right to legal representation except with the leave of the panel.
- Option 4a:** The legislation specifies that the registrant has no right to legal representation, but can have a person who is not an Australian legal practitioner accompany them and, with the leave of the panel, that person may speak on their behalf.
- Option 4b:** The legislation specifies that the registrant has no right to legal representation, but can have a person accompany them, who may or may not be an Australian legal practitioner, and that person may speak on their behalf with the leave of the panel.

Option 4b is preferred.

Another option, is that the registrant has no right to legal representation but can have a person accompany them, who may or not be an Australian legal practitioner, but that person may not speak on their behalf. This option allows the practitioner to have access to legal advice but requires the practitioner to respond directly to matters raised in the hearing.

It has been recommended throughout these submissions that all panels established under the scheme should include an Australian legal practitioner in its membership. If any form of legal representation is allowed, including as stated in option 4b, it would be essential to ensure that the hearing panel includes an Australian legal practitioner.

9.4 Confidentiality of panel hearings

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

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

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

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

Proposal 9.4.1: It is proposed that the legislation make provision for the proceedings of a panel hearing to be closed to the public, and for it to be an offence for any person to publish the name of a notifier, witness or the practitioner concerned. With respect to conduct hearings, it is proposed that the legislation enable a notifier, with the leave of the panel, to make a submission to the panel if the notifier is not called as a witness.

Support

9.5 Status of notifiers at panel hearings

While some consumer complainants may perceive that the role of a board is to resolve grievances between the consumer and the registrant, or to punish a practitioner, this is not the case. In all jurisdictions, the role of boards is to protect the public in general, by dealing with practitioners who depart from accepted standards.

In this context, a board's role is limited to determining whether a practitioner has engaged in unsatisfactory professional conduct or unsatisfactory professional performance, or has an impairment that is affecting their capacity to practise, and deciding how this should be addressed in order to maintain acceptable professional standards and protect the public.

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

Support

9.6 Review rights for registrants

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

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

Support – It is also appropriate to specify that no appeal rights lie to higher courts unless an appeal has first been heard and determined by the relevant Tribunal. Is it proposed to make any recommendations about where appeal rights lie from tribunal decisions or will that vary on a jurisdictional basis having regard to where the tribunal sits in each state hierarchy?

9.7 Notice of decisions of hearing panels

Proposal 9.7.1: It is proposed that the legislation require a responsible board to give notice of its decision in relation to a conduct hearing to the registrant, their employer and the notifier, and provide discretion for the board to provide notice to a range of other persons or organisations including an equivalent registration authority overseas, a government agency or regulatory body.

Support

9.8 Role of Commonwealth, State and Territory ombudsmen

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

There are two options for dealing with the scope and application of ombudsman legislation with respect to the national registration scheme:

Option 1: Apply the Commonwealth Ombudsman Act 1976 to the national registration scheme.

Option 2: Apply existing State and Territory Ombudsman legislation to administrative decisions made by the boards and National Agency. This would require clarity about which Ombudsman Act would apply in individual circumstances, and if not carefully handled, might provide multiple avenues of review for an individual matter.

Simplicity suggests Option 2

10. Tribunal hearings

10.1 Establishment or continuation of State and Territory tribunals

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

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

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

10.2 Criteria for State and Territory tribunals

Clause 2.2 of the IGA (Attachment A) requires that all State and Territory tribunal arrangements comply with national criteria agreed by the Australian Health Ministers' Council (AHMC). Note: these criteria are yet to be developed.

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

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

Support - need to include the relevant board(s) in the list of bodies which must be notified of a decision

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

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

Support - References in dot points 1 and 2 should be to Tribunal rather than panel.

10.3 Original jurisdiction of tribunal

Proposal 10.3.1: It is proposed that with respect to the original jurisdiction of a responsible tribunal, the national legislation specify that the responsible board or the

practitioner may make application to the responsible tribunal for a hearing under its original jurisdiction.

Such provisions should cover circumstances where the board or panel, at any time during an investigation or panel hearing, is required to, or considers it necessary to refer a matter to the tribunal for hearing – where the board forms the view that the practitioner has engaged or may have engaged in professional misconduct, or where suspension or cancellation of registration may be required. It may also cover fraudulent registration and matters which call into question the practitioner's character.

Alternative option: The legislation which confers original jurisdiction on a responsible tribunal provide for certain bodies (in addition to the responsible board and the practitioner) to appear before the tribunal and to make submissions. Such bodies might include government and/or the relevant HCC.

Support proposal

10.4 Review jurisdiction of tribunal

Proposal 10.4.1: It is proposed that with respect to the tribunal's review jurisdiction, the national legislation specify that a practitioner who is subject to the decision or the responsible board (or a panel or committee of the board) be empowered to make application for a review of a decision.

Support

Alternative option: The legislation which confers review jurisdiction on a responsible tribunal provide for certain bodies (in addition to the responsible board and the practitioner) to appear before the tribunal and to make submissions. Such bodies might include government and/or the relevant HCC.

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

- refusal to register (including failure to make a registration decision within the specified period, for example three months)
- refusal to endorse registration
- refusal to renew registration
- refusal to renew an endorsement on registration
- imposition of conditions on a practitioner's registration or endorsement of registration
- refusal to lift or vary conditions on a registration or endorsement of registration
- cancellation of registration because the practitioner is no longer eligible for registration
- a finding or determination by a performance panel, health panel or conduct panel (see sections 6.5, 7.5, and 8.6 of this paper)

- a decision to suspend the practitioner’s registration if the responsible board has not instituted an investigation in relation to the practitioner within a reasonable period, and
- a decision to continue a suspension beyond the period specified under the Act (see [section 4.7](#) of this paper on immediate suspension powers).

Support

10.5 Findings and determinations of a tribunal

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

Original jurisdiction

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

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

Support – however, needs to include the option for the tribunal to find that the practitioner has engaged in unsatisfactory professional conduct.

Proposal 10.5.2: It is proposed that the responsible board would be empowered to make one or more of the following determinations in such matters:

- require the practitioner undergo counselling
- caution the practitioner
- reprimand the practitioner
- require the practitioner to undertake and complete specified further education or training within a specified period
- impose a fine on the practitioner recoverable by the board (with the maximum fine available to be set by legislation, for example, \$50,000)
- suspend the registration of the practitioner for a specified period
- cancel the registration of the practitioner
- order the practitioner undertake a specified period of supervised practice
- order the practitioner do or refrain from doing something in connection with their practice

- order the practitioner manage their practice in a specified way or subject to specified condition
- order the practitioner to report on their practice to a specified person at specific intervals
- order the practitioner not to employ or engage or recommend a specified person or class of persons
- disqualify the practitioner from applying for registration under the Act for a specified period, if their registration has been cancelled by the tribunal or by an equivalent competent registration authority in another country
- make a prohibition order preventing a practitioner whose registration has been cancelled or suspended from continuing to practise or provide health services, or using specified professional titles or operating a business that provides health services, and/or
- publish the findings of and determinations or orders made with respect to matters heard within the limits of privacy considerations.

This suggests that the responsibility of the Tribunal will stop at making the finding and the matter would then be referred back to the Board to determine the consequences which should flow from that finding. The Tribunal must, surely, be empowered both to make a finding and then to impose orders (where necessary administrative action and monitoring of compliance with those orders then falls to the Board).

Review jurisdiction – registration matters

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

Support

Review jurisdiction – performance, health or conduct matters

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

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

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

Support

Proposal 10.5.5: It is proposed that the tribunal would have powers to make an order for costs against any party to the proceedings.

Strongly support

10.6 Constitution and appointment of tribunal hearing panels

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

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

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

Support

10.7 Procedure for conduct of tribunal hearings

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

- appointment of members, presiding members, acting members
- application processes for appointment, remuneration, disclosure of interests, etc
- application fees and processes for hearing of matters, including notification of hearings, withdrawal of matters
- administration of the tribunal and its health professions list
- compulsory conferences, mediations and settlement

- service of documents
- use of experts
- conduct of hearings
- taking of evidence and witness summons
- reasons for decisions
- powers to award costs
- orders, injunctions, declarations, enforcement of orders
- offences, such as non-compliance with order, failure to comply with summons, failure to give evidence, false or misleading information, contempt, etc
- immunities, and
- appeals from tribunal decisions.

Support

10.8 Status of notifiers

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

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

Support

10.9 Powers in relation to deregistered practitioners

Proposal 10.9.1: In accordance with the proposed determinations of a responsible tribunal listed in [section 10.5](#) above, it is proposed that a responsible tribunal would have the power to issue a prohibition order at the time that it cancels the registration of a practitioner. A prohibition order might prevent the practitioner from providing health services or owning or operating a business that provides health services, or might attach conditions to their practice. Breach of a prohibition order would be an offence under the legislation, with breaches prosecuted through the courts in the relevant State or Territory.

Support

10.10 Review rights from tribunal decisions

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

Support

10.11 Reasons for decisions

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

Support

10.12 Notice of decisions

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

Support

11. Offences and regulated conduct

11.1 Current arrangements

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

- unauthorised use of restricted professional titles
- unauthorised holding out as having registration, a type of registration, endorsement, division of registration, specialist/specialty endorsement, unconditional registration, etc
- holding out another person as having registration, a type of registration, endorsement, division of registration, specialist/specialty endorsement, unconditional registration, etc
- breach of conditions on registration
- unauthorised practice, for example, of a regulated health profession generally, a restricted core practice, or 'restricted practice area'
- treatment of certain conditions/diseases/pregnancy by persons who are not registered
- prohibit breaches of confidentiality in relation to keeping and disposing of patient records, or in relation to information that a person obtains in the course of carrying out their functions under the Act
- signing of medical certificates when not registered

- failure to have professional indemnity insurance
- failure to return registration certificates when required
- failure to notify of change of specified registration details/circumstances
- false and misleading advertising
- directing or inciting a registrant to engage in unsatisfactory professional conduct or professional misconduct
- supplying health services when prohibited
- actions relating to the exercise of coercive powers (search, entry, seizure powers), for example, obstructing/impersonating an investigator, failing to return identity card, failing to answer questions or provide documents, and/or
- illegal election practices.

Illegal election practices seems misplaced under the new scheme.

11.2 The IGA

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

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

- (b) the primary basis for regulation will be ‘protection of professional title’, with statutory offences to prevent unregistered or unauthorised persons using professional titles, which in the first instance will be those listed in [Table 2](#), with further titles to be determined by the Ministerial Council (or in the event that the Ministerial Council has not been established, by AHMC)*
- (c) practice restrictions will be applied where they are currently adopted across all jurisdictions as follows:*
 - i) two professions, dentistry and optometry, will be subject to legislative definitions of core practices and offences to prevent practice by unregistered or unauthorised persons*

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- ii) elements of the practice of spinal manipulation may also require legislative protection, and further work will be undertaken to define these for this purpose*
- (d) general exemptions from title and practice offence will apply to regulated professionals undertaking their usual activities, students, assistants working under supervision, businesses employing registered practitioners and persons assisting in emergencies*

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

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

11.3 Holding out offences

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

- offences that prohibit persons who are not duly registered to use the titles listed in Table 2 of Attachment A of the IGA
- offences that prohibit persons from using any other title, name, symbol, description, whether in English or other language, which given the circumstances could be reasonably understood to indicate the person is a registered practitioner in a regulated profession
- offences that prohibit a person from holding out that they have a type of registration, for example in a profession, in a division, with an endorsement, free of conditions, etc, when they do not
- offences that prohibit a person from using the title 'specialist' in a context that could reasonably be understood to indicate the person is endorsed as a specialist in a recognised specialty of a regulated health profession, and
- offences that prohibit a person from holding out another person as registered, registered in a division, endorsed, a 'specialist', free of conditions, etc.

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

Support

11.4 Practice offences

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

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

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

Support

11.5 Direct or incite offences

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

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

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

Support the proposal and not the alternative. Health practitioners must be able to exercise their independent professional judgement, free of undue influence from any person, not just their employer.

11.6 Regulation of advertising

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

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

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

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

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

- advertises a service likely to harm another person.

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

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

Proposal 11.6.1: There are a number of options for dealing with advertising offences under the national legislation:

Option 1: Include no advertising offences in the national legislative scheme. If a registrant engages in questionable advertising, they can be dealt with under a board's general disciplinary powers, and by way of guidance, boards can issue guidelines about what might constitute unacceptable advertising. In addition, a State or Territory may legislate, as NSW has done, to provide additional protections, in public health or other legislation to regulate the advertising of health services generally, rather than simply targeting registered practitioners or the bodies corporate that employ them.

Option 2: Include narrowly framed advertising offences in the legislation, which just mirror trade practices/fair trading legislation (that is, false and misleading advertising) and a narrow application, only to registrants, and their employing bodies corporate.

Option 3: Include broadly framed advertising offences in legislation, that allow boards to deal with both registrants and bodies corporate who, for example, use testimonials, create an unreasonable expectation of beneficial treatment, or encourage the indiscriminate or unnecessary use of regulated health services.

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

Option 1 preferred to enable each Board to develop enforceable standards / guidelines relevant to the profession. Power should extend to allow for adoption of, for example, commonwealth codes such as the TGA Price Information Code of Practice.

11.7 Offences related to enforcement activities

Proposal 11.7.1: It is proposed that the legislation include a series of offences related to the role of authorised officers who investigate matters on behalf of a responsible board

and may enter and search premises and seize documents or other things. These might include, for example, offences for:

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

Support

11.8 Other offences

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

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

Support

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

Support

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

- offences for breach of conditions on registration – instead, it is proposed that the legislation provide for a panel or tribunal to identify ‘critical compliance conditions’ which, if breached, will allow the responsible board to suspend the practitioner’s registration. This is likely to be a much more immediate and effective sanction than prosecuting a registered practitioner through a magistrate’s court, or

Support – and suggest extend so that breach of critical compliance conditions is, of itself, unsatisfactory professional conduct / professional misconduct.

- offences for unregistered persons to issue medical certificates or treat patients with certain types of conditions such as HIV or cancer – instead, these matters can be dealt with in State and Territory public health legislation if a jurisdiction considers it necessary.

Support

11.9 Prosecution of offences

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

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

Support

11.10 Monitoring of registrants

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

- determinations or orders made by a responsible tribunal
- decisions made by a performance, health or conduct panel
- conditions placed on registration, at other times, such as at first registration, at renewal, by agreement, and
- other undertakings given or agreements entered into between the registrant and the board.

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

Support

12. Transition arrangements

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

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

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

Support

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

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

‘unsatisfactory professional conduct’ includes the following –

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

Suggest inclusion of a breach of a Ministerially approved code

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

‘professional misconduct’ includes –

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

Jurisdiction	Provision
ACT <i>Health Professions Act 2004</i>	Nil. Comment: Despite a reference in Section 76(2) to ‘requiring reporting’ of ‘behaviour that contravenes the required standard’, there does not appear to be anything in the section that compels a registered practitioner or other person to report such matters.
NSW <i>Medical Practice Act 1992</i>	<p>Section 71A(2) – A registered medical practitioner who believes, or ought reasonably to believe, that some other registered medical practitioner has committed reportable misconduct must, as soon as practicable, report the conduct to the boards.</p> <p>Note: Pursuant to sections 36 (1) (b) and 37, failure to comply with this section will constitute either unsatisfactory professional conduct or professional misconduct.</p> <p>Section 71A(1) defines ‘reportable misconduct’ as:</p> <ul style="list-style-type: none"> a) practising medicine while intoxicated by drugs (whether lawfully or unlawfully administered) or alcohol b) practising medicine in a manner that constitutes a flagrant departure from accepted standards of professional practice or competence and risks harm to some other person c) engaging in sexual misconduct in connection with the practice of medicine.
Northern Territory	Nil
Queensland	Nil

<p>South Australia <i>Medical Practice Act 2004</i></p>	<p>Section 49(1)– Imposes obligation to report to the board a practitioner or student who is ‘medically unfit to provide medical treatment’ on the following persons:</p> <p>a) a health professional who has treated, or is treating, a patient who is a medical practitioner or medical student, or</p> <p>b) a person who provides medical treatment through the instrumentality of a medical practitioner or medical student, or</p> <p>c) a hospital that has entered into an arrangement with a medical practitioner under which the medical practitioner provides medical treatment at the hospital to his or her patients, or</p> <p>d) the person in charge of an educational institution at which a medical student is enrolled in a course of study providing qualifications for registration on the general register under this Act.</p> <p>Maximum penalty: \$10 000.</p> <p>Section 49(4) – Defines <i>health professional</i> as:</p> <p>a) a medical practitioner, or</p> <p>b) a psychologist, or</p> <p>c) any other person who belongs to a profession, or who has an occupation, declared by the boards, by notice in the Gazette, to be a profession or occupation within the ambit of this definition.</p> <p>Section 77– If a medical practitioner or medical student becomes aware that he or she is or may be medically unfit to provide medical treatment, the practitioner or student must forthwith give written notice of that fact to the boards.</p> <p>Maximum penalty: \$10 000.</p>
<p>Tasmania <i>Pharmacists Registration Act 2001</i></p>	<p>Section 72 – A registered medical practitioner who signs an order under the Mental Health Act 1996 or a medical recommendation under the Alcohol and Drug Dependency Act 1968 in relation to a person the registered medical practitioner knows or believes is a registered pharmacist must, as soon as practicable after signing the order or recommendation, give the boards notice of the fact.</p> <p>Penalty: Fine not exceeding 5 penalty units.</p>

