



The Pharmacy
Guild of Australia

**Response to the Consultation Paper on
Proposed arrangements for handling complaints,
and dealing with performance, health and conduct matters
for the National Registration and Accreditation Scheme for health professions**

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DEFINITIONS

Proposal No.	Brief Description of Proposal	Proposal	Comment
1.5.1 ¹	General legislative principles	<p>Legislation relating to the management of complaints and matters of conduct, health and performance will be framed in a way that:</p> <p>(a) provides for a robust system to protect public health &c;</p> <p>(b) builds on the best aspects of Territory and State Schemes rather than replicating one existing scheme;</p> <p>(c) balances the rights of health consumers and practitioners;</p> <p>(d) is compatible with nationally and internally accepted standards; and</p> <p>(e) and consistent with Australia's international obligations and reflects the words and intent of the IGA.</p>	The proposal is satisfactory.

¹ The proposal numbers are those contained in the Consultation Paper

Proposal No.	Brief Description of Proposal	Proposal	Comment
2.1.14	<p>Statutory definition - not of good character characterisation</p>	<p>This is a term to describe a person who is considered not suitable for practise because of a defect in their character, in substitution of the term ‘fit and proper person’.</p>	<p>The question arises as to whether it is desirable to have as a ground to discipline a practitioner something that is somewhat subjective in its nature – almost literally ‘there’s something about him’ rather than objective (e.g. convicted of an offence, become bankrupt, proven consorting with known offenders and so forth).</p> <p>As a general proposition, it is desirable for grounds to register/deregister someone should be as objective as possible, so there is clarity as to the standards a person must meet. It is acknowledged that most occupational licensing schemes have a concept such as this. There fore, the issue is how the concept should be ‘described’.</p> <p>It is not appropriate to consider the term ‘not of good character’ as being a mere ‘description’ or statutory tag. Rather, it is an expression of the statutory test that a person must pass, otherwise be guilty of (presumably) professional misconduct.</p> <p>Assuming it is desirable for there to be such a ground of professional misconduct, the Guild would strongly recommend the use of the term ‘fit and proper person’.</p>

Proposal No.	Brief Description of Proposal	Proposal	Comment
2.1.14 Contd.			<p>This is because this is the term that has traditionally been used in occupational licensing systems, and has a clearly understood judicial meaning that can control the exercise of what is otherwise a somewhat nebulous disciplinary ground see for instance the High Court decision of <i>Australian Broadcasting Tribunal v. Bond</i> 170 CLR 321 at 348-9.</p> <p>The concept of being ‘not of good character’ is a hazy concept. It would require a number of judicial decisions to determine the precise meaning (the ‘amplitude’) of the statutory phrase, introducing a highly undesirable level of uncertainty. It should not be used.</p> <p>It is noted that this disciplinary ground is only suitable for use within the concept of ‘professional misconduct’ – that is, grounds for the suspension or cancellation of a licence.</p>
2.1.16	Impairment	The term proposed to be used to describe physical and mental conditions and practices (eg drug use) that can affect the practitioner from practising appropriately.	The proposal is satisfactory.

Proposal No.	Brief Description of Proposal	Proposal	Comment
2.1.17 2.1.18 3.3.1	<p>Unsatisfactory professional conduct</p> <p>Unsatisfactory professional performance</p>	<p>This is defined to include:</p> <p>(a) unsatisfactory professional performance, which is defined as meaning 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;</p> <p>(b) professional conduct that is of a lesser standard than that which might be reasonably be expected of the practitioner by the public or the practitioner’s professional peers;</p> <p>(c) any contravention of a provision of this act or regulations, whether or not the practitioner has been prosecuted for or convicted of an offence;</p> <p>(d) any contravention or failure to comply with a condition of registration or an agreement or undertaking given to the board;</p> <p>(e) any conviction for an offence under any Act or regulation, the nature of which may affect the practitioner’s suitability to continue to practise;</p> <p>(f) a failure to pay a fine payable under the Act;</p>	<p>As a general proposition, the definition is satisfactory.</p> <p>However, the paper suggests that the concept of unsatisfactory professional conduct only includes the concepts contained in the paragraphs referred to in the proposal column.</p> <p>Conversely, the term unsatisfactory professional performance is said to mean the description contained in paragraph (a) of the proposal column.</p> <p>In law, when a definition ‘means’ something, the definition is meant to be exhaustive.</p> <p>If a definition ‘includes’ things, it is intended to enlarge the ordinary meaning of the phrase.</p> <p>The definition of unsatisfactory professional conduct must exhaustively specify the concepts that are to fall within the term of the phrase. Otherwise, there will be undesirable uncertainty as to the amplitude of the provision.</p>

Proposal No.	Brief Description of Proposal	Proposal	Comment
2.1.17 2.1.18 3.3.1 Contd.		<p>(g) providing health services of a kind that are excessive, unnecessary or not reasonably required for the person's wellbeing;</p> <p>(h) Influencing or attempting to influence the conduct of another health practitioner in a way that may compromise health care;</p> <p>(i) accepting a benefit as an inducement, consideration or reward for referring another person use or consult with any health service provider;</p> <p>(j) offering or giving any person a benefit as inducement, consideration or reward in return for the person referring another person to a health practitioner or recommending to another person that the person use any health service provided by the registered health practitioner;</p> <p>(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.</p>	<p>In regard to the paragraph (k) of the proposal column, the issue need to be further explored as it would appear that this ground could capture, for instance referrals by pharmacists to a program in which the pharmacist receives a commission or has a pecuniary interest.</p>

Proposal No.	Brief Description of Proposal	Proposal	Comment
2.1.19 3.3.1	Professional misconduct	<p>Professional misconduct is defined as being:</p> <p>(a) unsatisfactory professional conduct (that is, the conduct discussed above) involving a <i>substantial</i> or <i>consistent</i> failure to reach or maintain a reasonable standard of competence or diligence;</p> <p>(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; or</p> <p>(c) conduct of a health practitioner, whether occurring in connection with the practice of a health profession that would, if established, justify that the person is not of good character or is otherwise not a fit and proper person to engage in practice.</p>	<p>These are the grounds that can give rise to suspension or cancellation of a licence by an independent State or federal tribunal.</p> <p>They are generally satisfactory. It is noted that the distillation ‘fit and proper person’ is used here.</p>

NOTIFICATIONS AND PRELIMINARY ASSESSMENTS

Proposal No.	Brief Description of Proposal	Proposal	Comment
2.1.1	Statutory Definition - 'notification'	It is proposed to describe the initiating process as a 'notification' rather than a 'complaint' or 'report	Agreed.
2.1.2	Statutory Definition - 'preliminary assessment'	It is proposed to describe the preliminary steps in a process to be a 'preliminary assessment process' rather than a 'process' or 'investigation'.	Agreed.
2.1.3	Use of the term 'notification assessment committee'	It is proposed to call the body considering a preliminary assessment a 'notification assessment committee' rather than a 'complaints assessment' or investigations committee'	Agreed.
4.1.1	Who may make a notification	Anyone (or any body) can make a notification that can commence a disciplinary process.	<p>Because of the financial and emotional consequences that can flow from the making of a vexatious or frivolous notification, the right to make a notification should be restricted to a person who has reasonable grounds to believe that a registered practitioner has displayed misconduct/professional misconduct, or is impaired.</p> <p>There should also be a criminal offence created to penalise a person who either makes a knowingly false notification, or who makes a frivolous or vexatious notification. However, criminality for frivolous or vexatious complaints should be restricted to recidivist offenders.</p>

Proposal No.	Brief Description of Proposal	Proposal	Comment
4.2.1	Form of notification	A notification must be in writing, contain the particulars of the allegation, the practitioner involved and the identity of the notifier.	Agreed.
4.2.2	Board to give reasonable assistance to informants	<p>It is proposed that the Board provide reasonable assistance to informants to allow them to make a complaint.</p> <p>The examples given in the paper as people requiring assistance include disabled people and people from a non-English speaking background.</p>	Agreed.
4.3.1	Grounds for notification	<p>It is proposed to include these grounds as grounds for notification –</p> <p>(a) improperly obtained registration;</p> <p>(b) capacity to practise in affected because of physical or mental impairment or habitual misuse of alcohol or other drugs;</p> <p>(c) a person lacks the competence to practice because of insufficient knowledge and skill, including communication skills (such as competency in the English language);</p> <p>(d) has engaged in either unsatisfactory professional misconduct or professional misconduct; or</p> <p>(e) the registrant is not of good character.</p>	<p>It is undesirable for there to be one set of grounds establishing when a complaint can be notified and another set of grounds to determine the fate of the complaint.</p> <p>To ensure consistency, a person should be able to notify a board where there are reasonable grounds to believe that a practitioner has displayed unsatisfactory professional conduct, unprofessional performance, or is impaired (as defined).</p> <p>It might also be necessary to allow for a notification where an unregistered person is providing a regulated health service.</p>

Proposal No.	Brief Description of Proposal	Proposal	Comment
4.5.1	Protection for informants	It is proposed that notifiers and registrants who report a practitioner are protected from being sued in the civil courts as a result of making the report. The protection applies to anyone providing, in good faith, information used by the informer.	<p>Whilst satisfactory, it is appropriate that registrants are protected from malicious complaints.</p> <p>It is acknowledged this indemnity from civil suit is appropriate in the circumstances. However, because of the effect that a mischievous complaint can have on the professional standing of a pharmacist, there should also be offences created for knowingly false reports and frivolous notifications, with penalties set at levels similar to those found in similar pieces of legislation.</p>
5.2	Refusing to deal with a notification	<p>It is proposed that a notification not proceed if it is regarded to be:</p> <p>(a) frivolous, vexatious, misconceived or lacking in substance;</p> <p>(b) not practicable to investigate because of the lapse of time;</p> <p>(c) does not warrant investigation or</p> <p>(d) because the practitioner is not registered and it is not in the public interest to investigate the matter.</p>	Agreed.

Proposal No.	Brief Description of Proposal	Proposal	Comment
5.4.1	Notification assessment committees	<p>These committees are to oversee the preliminary assessment of notifications and decide what to do about a particular complaint.</p> <p>It will have all the powers of the Board to take relevant actions.</p> <p>A Committee will have a board member on the committee and other board members drawn from a list approved by the Ministerial Council.</p> <p>They must act with procedural fairness and may be paid sitting fees and allowances.</p>	<p>Agreed.</p> <p>However the Guild presumes there will be a statutory requirement for professional bodies to be consulted before the Ministerial Council makes a list of possible committee members.</p>

Proposal No.	Brief Description of Proposal	Proposal	Comment
5.5.1	Powers of a notification assessment committee	<p>The Committee can decide to refer:</p> <p>(a) a performance management matter to a performance management committee and/or directly seek a performance assessment;</p> <p>(b) health management matter to a health management committee and/or directly seek a health assessment;</p> <p>(c) a conduct management matter to a conduct management committee and/or directly to an investigation;</p> <p>(d) refer a professional misconduct matter to a State or Territory tribunal;</p> <p>(e) refer the matter elsewhere for appropriate investigation or conciliation;</p> <p>(f) require the practitioner to give an enforceable undertaking;</p> <p>(g) immediately suspend the practitioner pending investigation and hearing;</p> <p>(h) take no further action</p>	<p>Generally satisfactory.</p> <p>However, the legislation should require the practitioner subject of the notification to be informed of the allegation put against him, and to provide evidence and submissions to the committee.</p> <p>This is so:</p> <p>(a) a notifications assessment committee has full evidence before it; and</p> <p>(b) a practitioner is afforded procedural fairness (natural justice)</p> <p>before the time and cost intensive process (and professionally embarrassing circumstance) of having to participate in the committee/panel/ tribunal process commences.</p>

Proposal No.	Brief Description of Proposal	Proposal	Comment
5.5.2	Reference to state and federal tribunals	<p>A board (or a committee) will appear to be obliged to refer a matter to a State or Territory tribunal where the practitioner is not:</p> <p>(a) of good character (a fit and proper person)</p> <p>(b) engaged in professional misconduct;</p> <p>(c) capacity to practise is so affected by health matters that cancellation of registration may be warranted.</p>	Agreed.
5.5.3	Notifier's and practitioners rights of notification of decisions	<p>A notifier is to be given the reasons for decision and any right of review held by the notifier (if any – see next section).</p> <p>A practitioner is to be given notice of the decision, and if further action is to be taken, the reasons for the decision</p>	Agreed.

Proposal No.	Brief Description of Proposal	Proposal	Comment
5.6	Notifier's rights of review of preliminary assessment decisions	<p>The rights of complainants to seek review of decision that (in effect) dismiss a complaint, or not take the matter to an independent tribunal to consider possible deregistration varies across jurisdictions.</p> <p>There are two options identified for adoption in the national scheme.</p> <p>The first is for no right of review to exist.</p> <p>The second is for there to be an internal review of the original decision, which may (or may not) have outside representation.</p>	<p>Whilst it would seem appropriate for a notifier to be given reasons for a decision not to proceed with a complaint, to provide a further right of review, even if it is only an internal review would appear an unnecessary prolongment of a review process.</p> <p>On the other hand, the second option does provide some transparency of process for a disappointed complainant, giving some demonstration of justice being seen to be done.</p> <p>Therefore the Guild would agree with the second option.</p>

MANAGING UNDERPERFORMING PRACTITIONERS/PERFORMANCE MANAGEMENT COMMITTEES

Proposal No.	Brief Description of Proposal	Proposal	Comment
6.1.1	Managing underperforming registrants	<p>The paper suggests that most registration schemes have provision to ‘assist’ practitioners who may not fall within the definition of professional misconduct or unsatisfactory professional misconduct but may have been identified as underperforming.</p> <p>This could be identified through, for example:</p> <ul style="list-style-type: none"> (a) the results of an investigation or notification assessment; or (b) performance in continuing competence requirements. <p>The intention is to seek practitioner improvement through a ‘cooperative and educative process’ separate from the disciplinary process.</p> <p>It is proposed to permit a board to:</p> <ul style="list-style-type: none"> (a) request a practitioner to undergo a performance assessment; and (b) ‘to provide guidance and/or direction to the practitioner designed to address any deficits identified in their skills and knowledge via: <ul style="list-style-type: none"> (i) further education; (ii) supervised practice; or (iii) the placing of conditions on the practitioner’s registration. <p>This could take place at the time of re-registration, or after a notification assessment process.</p>	<p>This would appear satisfactory only if was voluntary – that is:</p> <ul style="list-style-type: none"> (a) it would be appropriate for the Board to have a discretion to suggest to a practitioner that some form of further education/restraint of practice may be appropriate; but (b) a board would not be able to condition a registration if the practitioner elected not to accept the recommendation. <p>This is because the proposed national scheme only permits a panel or tribunal to have the capacity to condition a licence after due process has been followed.</p> <p>It would not appear appropriate for a practitioner to have a registration conditioned in any other circumstance, particularly given the capacity for a board to be able to refer a practitioner to a committee or a panel without the need of a notification.</p>

Proposal No.	Brief Description of Proposal	Proposal	Comment
6.2.1 6.3.3	Requiring a registrant to undertake a performance assessment	<p>It is proposed to confer a power on a board, notification assessment committee or a performance management committee to appoint a person to conduct a performance assessment on a practitioner whose performance may be ‘unsatisfactory’.</p> <p>This could take place at the time of re-registration, or after a notification assessment process.</p>	<p>The precise meaning of ‘unsatisfactory’ requires to be clarified, so it is clear when there are grounds to require a person to undertake a performance assessment.</p> <p>The paper is also inconsistent as to whether a notification assessment committee can order a performance assessment. Proposal 5.5.1 suggests that a notification assessment committee can do so, but proposal 6.2.1 suggests that only a Board or a performance management committee has the power to do so.</p> <p>The entities able to order a performance audit need to be made clear.</p>
6.3.1 6.3.2 6.3.3	Powers of a performance assessment committee	<p>Following receipt of a performance assessment report, a board or a performance management committee can:</p> <ul style="list-style-type: none"> (a) request a practitioner to undertake further education or supervised practice, (b) counsel the practitioner (c) ask the practitioner to give an undertaking, (d) refer the matter to a performance panel, health management panel or conduct panel (as appropriate) or to an HCC; or (e) take no further action. 	Agreed.

HEALTH AND CONDUCT MANAGEMENT COMMITTEES

Proposal No.	Brief Description of Proposal	Proposal	Comment
2.1.5	Statutory Definition Performance Management Committee	This is the name of the body to manage unsatisfactory health practitioners	Agreed.
2.1.8	Statutory Definition Health Management Committee	This is the name of the body to oversee practitioners with unsatisfactory performance	Agreed.
2.1.11	Statutory Definition Conduct Management Committee	This is the name of the Committee to consider unsatisfactory professional conduct matters	Agreed.
2.1.12	Statutory Definition Conduct investigation	This is the name of the process used by either a board or a conduct management committee to discover facts by a board or a conduct management committee	Agreed.

Proposal No.	Brief Description of Proposal	Proposal	Comment
2.1.9 7.2.1 7.2.2 7.3.1 7.3.2 7.3.3 7.3.4	<p>Health Management Committee</p> <p>Health Assessments</p>	<p>Following a preliminary assessment, a board or a health management committee may appoint (with the agreement of the registrant under review) an assessor (paid for by the Board via registration fees) to consider whether a capacity to practise may be affected by physical or mental impairment or habitual use of alcohol or drugs.</p> <p>Within seven days of receipt, the Committee (or nominee) would discuss the report with the registrant, (or in specific cases, the registrant's health practitioner) to determine whether any adverse findings can be managed.</p> <p>The health management committee can then either:</p> <p>(a) request the practitioner to undertake further education and/or supervised practice or give an undertaking to the board;</p> <p>(b) refer the matter for performance assessment, for investigation as a conduct management matter;</p> <p>(c) refer the matter to an outside authority; or</p> <p>(d) take no further action.</p> <p>A matter can be referred to a health tribunal or to a tribunal, for cancellation of a licence where a person does not agree to a health assessment.</p>	<p>Agreed.</p>

Proposal No.	Brief Description of Proposal	Proposal	Comment
8.2.1	Conduct management committees	<p>It is proposed that where a preliminary assessment has found evidence of unsatisfactory professional conduct, the Board can refer the matter to a conduct management committee.</p> <p>An investigator would then report and then either request a practitioner to seek further education or supervised practice, or refer the matter to a performance management matter or a conduct panel, or for hearing as professional misconduct or refer the matter externally.</p>	Agreed.

CONDUCT PANELS

Proposal No.	Brief Description of Proposal	Proposal	Comment
2.1.10	Statutory Definition Health Panel	This is the name of the committee to consider whether a practitioner is physically or mentally impaired (as opposed to 'impaired registrants panel', 'impairment review panel', 'health assessment panel' or 'personal assessment panel')	Agreed.
2.1.13	Statutory Definition - Conduct Panel	This is the name of the body to consider issues of unsatisfactory professional conduct.	Agreed.

Proposal No.	Brief Description of Proposal	Proposal	Comment
6.4.1	Performance panels	<p>The Board or performance management committee will be able to refer a poorly performing practitioner to a performance panel.</p> <p>The panel will have at least one member of the public, one health practitioner who is not (in our case) a pharmacist, and no more than half the members of the panel being (in our case) pharmacists.</p> <p>It will be able to:</p> <ul style="list-style-type: none"> (a) require a practitioner to undertake further education; (b) give an undertaking to the board; (c) place conditions on a practitioner's registration; (c) refer a matter to a health management committee or conduct management committee. (d) refer the matter to an external body; or (e) take no further action. <p>A practitioner has been the subject of any previous performance assessments (but not otherwise) that 'demonstrates a pattern of poor performance' can also be referred to a tribunal.</p>	Agreed.

Proposal No.	Brief Description of Proposal	Proposal	Comment
7.4.1 7.5.2 7.5.3	Health hearings	<p>The Board or a health management committee can refer an impaired practitioner to a health panel.</p> <p>A health panel has the same composition as a performance panel. It can require a practitioner to:</p> <ul style="list-style-type: none"> (a) undertake further education and/or supervised practice or give an undertaking to the board; (b) place conditions on the registration of the practitioner; (c) refer the matter as either a performance or conduct matter; (d) refer the matter to an outside authority; or (e) take no further action. <p>It will also be able to refer to the Tribunal cases where the panel believes that suspension or cancellation of a licence is appropriate because of impairment.</p>	Agreed.
8.5.1 8.6.1 8.6.2 8.6.3	Conduct panel	<p>A practitioner who may be guilty of professional misconduct may be referred to a conduct panel.</p> <p>A conduct panel has the same constitution as a health or performance panel and has the same overall powers.</p> <p>Decisions must be provided to a practitioner within 28 days.</p>	Agreed.

Proposal No.	Brief Description of Proposal	Proposal	Comment
9.3.1	Legal representation at panel hearings	<p>Six options are proposed:</p> <p>(a) the legislation is silent, which has the probable effect of allowing the matter to be dealt with at the discretion of the tribunal</p> <p>(b) A right to legal representation is given</p> <p>(c) there is no right to legal representation</p> <p>(d) legal representation is provided with leave</p> <p>(e) there is no right of legal representation, but anyone else who isn't a lawyer can, with leave 'speak on their behalf'.</p> <p>(f) there is no right of legal representation, but anyone (who may or may not be a lawyer) can, with leave 'speak on their behalf.'</p> <p>The last option is preferred in the paper.</p>	<p>The Guild would strongly recommend that a legal right of representation be given at panel hearings.</p> <p>A panel can impose conditions on a registration.</p> <p>It can also refer a practitioner to a hearing that is generally open to the public.</p> <p>The income and professional standing of a practitioner can be affected by a decision made by such a panel. Therefore, it is appropriate for a pharmacist to have a person of their choosing to not only speak on their behalf, but to be able to have the evidence that is presented to a panel tested and to ensure that the procedural fairness guaranteed in the legislation is in fact provided.</p>

Proposal No.	Brief Description of Proposal	Proposal	Comment
9.4	Confidentiality of hearings	<p>There are two options proposed:</p> <p>The first is for all panel hearings are to be closed to the public.</p> <p>The second is for performance and health panels to be closed, but for conduct hearings to be open to the public but with the panel to have the power to conduct some parts of the proceedings in public.</p>	<p>All hearings should be closed.</p> <p>This is because the IGA has clearly drawn a distinction between serious matters that should be dealt with by an external tribunal, with less serious matters being dealt with in a more summary nature by a panel.</p> <p>Recognising this, there is no public interest served in having panel hearings heard in public.</p>
9.5	Status of notifiers at panel hearings	<p>It is proposed that the person or body be allowed to speak with the leave of the Tribunal.</p> <p>They would not be permitted to appeal a decision of a panel to the Tribunal.</p>	<p>There is no real reason why a notifier should be given a right to speak.</p> <p>It may be the case that the notifier who made the complaint that caused the matter to commence could be required to give evidence. However, it is wrong for the person to be regarded as being, in some sense, a prosecutor or a party to a proceeding.</p> <p>Therefore, it should be left to the panel to consider the evidence alone, given the consequences that a registered practitioner faces if there is an adverse finding. The notifier should only speak if required to give oral evidence or answer queries from the panel.</p>

Proposal No.	Brief Description of Proposal	Proposal	Comment
9.6.1	Hearing panel provisions to be reviewed by tribunals	It is proposed to allow panel decisions to be reviewed on merit by State and Territory tribunals	Agreed.
9.7.1	Who will receive notice of hearing panel decisions	It is proposed to require panel decisions to be provided to the involved practitioner, the notifier and the employer, and the discretion to inform overseas registration agencies and similar regulatory bodies.	Agreed.

TRIBUNALS

Proposal No.	Brief Description of Proposal	Proposal	Comment
<p>9.1.1 9.1.2</p>	<p>‘Prosecuting matters’ before Tribunals</p>	<p>The paper notes that the IGA requires an independent tribunal to decide whether there is professional misconduct of such a nature that a practitioner should be:</p> <p>(a) suspended; or</p> <p>(b) have their registration cancelled.</p> <p>It ponders whether the ‘prosecution’ of a serious misconduct before a State or Territory tribunal should be brought by an office something like the NSW ‘Director of Proceedings’ acting much like a Director of Public Prosecutions in the criminal law, who would only refer the matter to a Tribunal where it would be in the public interest to do so.</p> <p>Alternatively, it proposes ‘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’.</p>	<p>The alternative proposal is most unclear.</p> <p>So as to ensure that there is the evidence present before taking the ultimate step of seeking to suspend or cancel a practitioner’s licence, it is appropriate for an independent entity to impartially review the evidence against the practitioner.</p>

Proposal No.	Brief Description of Proposal	Proposal	Comment
10.2.1 10.2.2 10.3.1 10.4.1 10.4.2 10.5.1 10.5.2 10.5.3 10.5.4 10.5.5 10.6.1 10.8.1 10.9.2 10.10.1 10.11.1 10.12.1	Jurisdiction of the Tribunal	<p>It is proposed that hearings will usually be open and reasons for decisions published.</p> <p>A tribunal will constitute at least three people, two of whom must be of the same profession as the practitioner who is party to the proceedings.</p> <p>It is proposed that a board or panel can at any time remove a matter to a tribunal where there may be professional misconduct, with the Tribunal particularly empowered to make findings that a practitioner:</p> <ul style="list-style-type: none"> (a) is not of good character (<i>not a fit and proper person</i>) (b) had registration obtained by fraud; (c) engaged in professional misconduct; (d) performance has been unsatisfactory; or (e) whose capacity to practise is affected by habitual misuse of alcohol or other drugs or physical or mental impairment. <p>A Tribunal will have available these forms of sanctions:</p> <ul style="list-style-type: none"> (a) require counselling; (b) caution; (c) reprimand; (d) require further education; 	<p>It is noted that most jurisdictions will use as the independent review body an administrative tribunal established within the legal system, in which cases usually conducted by a legally trained deputy president or senior member.</p> <p>So as to ensure that matters are considered according to law, a relevant review tribunal should be chaired by a legally trained person, preferably a full time member of the administrative tribunal before which the hearing is being conducted.</p> <p>This is particularly necessary where a tribunal can decide to cancel a practitioner's registration, thus precluding them from earning an income from the profession.</p>

Proposal No.	Brief Description of Proposal	Proposal	Comment
10.2.1 10.2.2 10.3.1 10.4.1 10.4.2 10.5.1 10.5.2 10.5.3 10.5.4 10.5.5 10.6.1 10.8.1 10.9.2 10.10.1 10.11.1 10.12.1 Contd.		<p>(e) impose a fine (of possibly \$50,000);</p> <p>(f) the suspension or cancellation of a licence;</p> <p>(g) order a period of supervised practice;</p> <p>(h) order a practitioner to either do or not do something;</p> <p>(i) manage a practice in a particular way;</p> <p>(j) report to someone on the operation of a practice for a specific intervals;</p> <p>(k) order that a person or class of person not be employed;</p> <p>(l) disqualify a person from applying for registration for a period if the registration has been cancelled by the tribunal or the registration authority of another country;</p> <p>(m) prohibit a person who has had their suspension cancelled or suspended from trading within the medical profession (a breach of which will become a criminal offence)</p> <p>It may also ‘cover fraudulent registration and matters which call into question the practitioner’s character’.</p> <p>The possibility of the ‘Government’ or a Health Complaints Commission being able to appear as a party is raised, although the paper proposes that notifiers will not be party to proceedings.</p>	<p>It is also inappropriate for a tribunal to be able to impose a fine on a practitioner.</p> <p>Case law makes clear that the basis of occupational licensing is to protect the community and not to punish offences. Although some jurisdictions do permit the infliction of fines, a fine can only be construed as a penalty (or punishment) and thus inappropriate.</p>

Proposal No.	Brief Description of Proposal	Proposal	Comment
10.2.1 10.2.2 10.3.1 10.4.1 10.4.2 10.5.1 10.5.2 10.5.3 10.5.4 10.5.5 10.6.1 10.8.1 10.9.2 10.10.1 10.11.1 10.12.1 Contd.		<p>The Tribunal will be have a review jurisdiction to review:</p> <p>(a) registration decisions (including the imposition of conditions on registrations)</p> <p>(b) a finding or determination by a performance panel, health panel or conduct panel (particularly decisions to place conditions or restrictions on a registration); or</p> <p>(c) interim decisions to suspend the practitioner by a board or panel.</p> <p>Decisions will need to be published on a website, with relevant entries made on the register.</p> <p>A Tribunal will be able to order costs.</p> <p>A party will only be able to appeal to a Supreme Court on an error of law – there will be no access to another opportunity to rerun the case.</p>	<p>The Guild is of the view that the Tribunal may order costs in appropriate circumstances.</p>

GENERAL

Proposal No.	Brief Description of Proposal	Proposal	Comment
2.1.4	Statutory Definition Responsible HCC	This is to identify the state health complaints or health service commission involved in a particular proceeding	Agreed.
4.3.2	Previously registered people subject to the disciplinary scheme	It is proposed that people who are no longer registered can still be subject to the provisions contained in the legislation even if they are no longer registered. This will catch those who let their registration lapse with the intention of avoiding disciplinary action.	Agreed.
4.4.1	Mandatory Reporting obligations	The paper acknowledges difference between jurisdictions in this area. A number of options are offered. The first requires any registered health practitioner to report on another practitioner with whom they are in a treating relationship where there are reasonable grounds to believe that the public is at risk in their practice due to a physical impairment, health condition or habitual use of drugs or other alcohol.	The paper indicates that a survey of mandatory reporting obligations is contained in Attachment 2. That attachment shows that few jurisdictions actually have a reporting requirement. The genesis of the proposals come from Victoria and SA, which requires the reporting of impaired medical practitioners by treating practitioners and NSW, which requires the reporting of misconduct more generally (including sexual misconduct).

Proposal No.	Brief Description of Proposal	Proposal	Comment
4.4.1 Contd.	Mandatory Reporting obligations <i>Contd.</i>	<p>Another option is for all registrants to be under a duty to report a registered practitioner where:</p> <p>(a) there are reasonable grounds to believe the public is at risk due to physical or mental impairment, practising whilst intoxicated by drugs or alcohol;</p> <p>(b) practising in a manner that constitutes a gross or flagrant departure from accepted professional standards or</p> <p>(c) by engaging in sexual misconduct in connection with their practice.</p>	<p>This particular discussion highlights the problems of ‘one size fits all’ regulation, where strict reporting rules implemented as a result of problems arising in one profession (medical profession) are brought across to other professions such as pharmacy, which, whilst having a close relationship with patients, does not have the same level of physical contact with patients which has caused problems in other regulated professions.</p> <p>In general terms, the four options are:</p> <ol style="list-style-type: none"> 1. A treating pharmacist must report a patient who happens to be a health professional when he reasonably believes the public is at risk because of the patient’s medical or physical impairment. 2. A pharmacist must report another professional where he reasonably believes the public is at risk where there the practitioner has displayed professional or sexual misconduct, mental or physical impairment, or drug abuse. 3. An employing pharmacist must report an employee where he reasonably believes the public is at risk because of the employee’s mental or physical impairment, a health condition or substance abuse.

Proposal No.	Brief Description of Proposal	Proposal	Comment
		<p>With respect to employers, it is proposed that there be mandatory reporting where:</p> <p>(a) there are reasonable grounds to believe that the public is at risk due to a physical or mental impairment, health condition or habitual use of alcohol or other drugs; or</p> <p>(b) where the employee displays either unsatisfactory professional misconduct or professional misconduct.</p> <p>The paper concludes with the observation that ‘registrants would only be expected to report major departures of professional standards when it is within their competence to make such a judgement’.</p> <p>It is possible that all, or a selection of these options could be accepted.</p>	<p>4. Employers must report all employee’s unprofessional conduct or professional misconduct.</p> <p>(It should be noted that if this proposal became the law, an employer who reports an employee on grounds of professional incompetence would themselves be liable to a professional misconduct charge if they do not make a report to the Pharmacy Board).</p> <p>On the one hand, this can create a ‘dobbing’ culture within the profession, which may not lead to the creation of close confidences between professionals and thus perhaps inhibit the professional development of practitioners</p> <p>It could create a perverse incentive for a practitioner with (particularly) a substance abuse problem to hide the relevant behaviour, robbing the opportunity for such a problem to be identified earlier, and dealt with through counselling etc.</p>

Proposal No.	Brief Description of Proposal	Proposal	Comment
			<p>On the other hand, the protection of the public is maximised, as those who probably know best of all whether a health professional is acting according to the common standards of the profession.</p> <p>On balance, the Guild accepts options 2, 3 and 4 as being appropriate. Option 1 may not be appropriate, as that would place the professional/ patient relationship at jeopardy.</p> <p>It is noted that ‘gross or flagrant departures from accepted professional standards’ (the test in force in NSW) should be reported, with practitioners required to report, ‘major departures of professional standards’ when it is within their competence to make such a judgement.</p> <p>It is noted that in NSW failing to make a mandatory report is itself an act of professional misconduct. In SA it is a criminal offence with a maximum penalty of \$10,000.</p> <p>Given the consequences that flow from the failure to make a mandatory report (should there be such a requirement) the law must be very clear when such a report should be lodged, and not left to nebulous concepts such as ‘gross and flagrant’ or ‘major’ departures of standards. If there is to be a mandatory reporting requirement, it must be based on objective, rather than subjective, requirements.</p>

Proposal No.	Brief Description of Proposal	Proposal	Comment
4.6.1	Own motion power	It is proposed that a Board have the capacity to commence action against a registrant without the need of a complaint.	This is the case in most jurisdictions now. The proposal is satisfactory.
4.7.1 4.7.2 4.7.3	Immediate suspension powers	<p>It is proposed that where a board or notification assessment committee believes that there is a significant risk to public health and safety if a registrant under review continues to practise, the board (or committee will be able to suspend the person for three months.</p> <p>After the first three months period, the Board (or committee) will be able to continue the suspension for:</p> <ul style="list-style-type: none"> (a) three months; (b) six months; (c) 12 months; or (d) some other period determined by the Board <p>Where:</p> <ul style="list-style-type: none"> (e) proceedings are yet to be finalised; and (f) there are grounds to believe that the registrant's continued practice poses a significant risk to public health. <p>A suspension can be appealed to the relevant State or Territory tribunal.</p> <p>It is proposed that a Board may accept an undertaking for a professional to act in a particular manner in lieu of a suspension.</p> <p>This would be entered against the practitioner's name on the public register.</p>	<p>This is currently the case in most jurisdictions and is satisfactory.</p> <p>It is the view of the Guild that such a suspension should be for as long as it takes for the matter to be concluded.</p>

Proposal No.	Brief Description of Proposal	Proposal	Comment
5.3	The relationship between national boards and State Health Complaints Commissions	<p>It is proposed that the respective bodies will notify each other of complaints made, and then determine which body should deal substantively with the matter.</p> <p>In brief, if it is a matter that deals with systemic failure, or is a consumer complaint capable of mediation the HCC will deal with the matter. If it is a matter that deals with professional misconduct, the National Board is the more appropriate body to consider the matter</p>	<p>Agreed.</p> <p>The Guild wishes to emphasise that there is a significant responsibility for State and Territory Governments ensure that the interrelationship between a national scheme of registration and a state based health complaints structure operate as seamlessly as possible.</p>
7.1.1 8.1.1	Self referring practitioners with health or conduct related matters	<p>It is proposed that a practitioner who acknowledges a health problem can self refer themselves to the Board, and enter into an agreement with the Board to either have their registration either suspended or qualified</p>	<p>Agreed.</p>

Proposal No.	Brief Description of Proposal	Proposal	Comment
7.1.2	Capacity to offer impaired health practitioner health programs	<p>It is proposed that impaired registrants will be eligible to receive the benefit of health programs.</p> <p>Two options for funding are identified.</p> <p>The first is to fund programs from registration fees.</p> <p>The second requires the beneficiary of the program to contribute to the cost of the program</p>	<p>It is presumed only those registrants who are identified as having health problems, and are being actively monitored by the relevant board would be eligible to receive the program.</p> <p>The Guild supports the second funding option where the recipient makes a co-contribution.</p>

Proposal No.	Brief Description of Proposal	Proposal	Comment
8.3.1 8.3.2 8.3.3 8.3.4 8.3.5 8.4.1 8.4.2	Investigations	<p>A notification assessment committee, board or conduct management committee are able to order an investigation of a practitioner.</p> <p>A practitioner will be told about the investigation within 28 days of making the decision to investigate, and advise the practitioner of the nature of the matter being investigated, unless that would place a person's health and safety at risk, or place at risk intimidation or harassment.</p> <p>Investigations are to be undertaken as quickly as possible, with both the investigated practitioner and the notifier kept informed about the outcome every three months.</p> <p>The decision on the outcome of an investigation is to be provided to a registrant and notifier within 14 days of the result.</p> <p>It is proposed that a person will be required to appear before an investigator and answer questions or produce documents.</p> <p>An investigator can also enter business premises during ordinary business premises and seek to inspect documents.</p> <p>Alternatively, an investigator will be able to seek a court warrant to enter premises and seize documents &c.</p> <p>Various offences about blocking authorised investigators.</p>	<p>There is proposed to be a requirement to enable an investigator to be able to compel a practitioner to answer questions and provide documents.</p> <p>This is a very powerful power tool for an investigations officer to have – it is far more powerful than the powers of a police officer conducting a police investigation.</p> <p>It is noted that there is provision for an investigator to be able to seek a warrant to seize documents etc.</p> <p>There is no reason given for why this power is considered necessary. Its presence in the legislation requires explanation, or should be removed.</p>

Proposal No.	Brief Description of Proposal	Proposal	Comment
9.8.1	Ombudsman	<p>The paper notes that in all jurisdictions, State Ombudsman may review administrative actions of bodies such as Boards, although not to disciplinary proceedings the subject of internal review.</p> <p>Two options are offered.</p> <p>The first is for the Commonwealth Ombudsman to have jurisdiction to review the operations of a national board.</p> <p>The second is to permit State Ombudsmen to have jurisdiction, designed in a way to ensure there is no right for multiple review of decisions.</p>	<p>Either option would appear satisfactory.</p> <p>However, the Ombudsman is an office created by the Commonwealth Parliament.</p> <p>If this option is adopted, the appropriate constitutional steps will need to be taken to ensure that the office is validly invested with the capacity to exercise powers that are conferred under State or Territory legislation.</p>

Proposal No.	Brief Description of Proposal	Proposal	Comment
11.3.1 11.4.1 11.5.1 11.9.1	Offences	<p>It is proposed that it will be an offence for non registered people from using protected titles (such as pharmacist) or to claim that they are registered.</p> <p>It will also be an offence for someone (or someone who employs a practitioner) to direct a practitioner to do something that could be regarded as being professional conduct or professional misconduct.</p> <p>Offences will be prosecuted in State courts.</p>	<p>Agreed.</p> <p>It is assumed that there would be an offence covered in the legislation for an unregistered person performing the core functions of a registered health professional for example, supplying scheduled medicines.</p>
11.6	Regulation of advertising	<p>Jurisdictions differ on whether there should be any advertising restrictions imposed in licensing legislation.</p> <p>A number of options are proposed:</p> <p>The first is for the legislation not to deal with the issue of advertising.</p> <p>The second is to mirror trade practices legislation.</p> <p>The third is to allow the board to ‘deal’ (presumably as a professional misconduct matter) with registrants who</p> <p>(a) ‘create an unreasonable expectation of beneficial treatment’; or</p> <p>(b) encourage the indiscriminate or unnecessary use of regulated health services.</p>	<p>The Guild supports the option three to allow the board to deal with the issue.</p>

Proposal No.	Brief Description of Proposal	Proposal	Comment
11.7.1 11.8.1 11.8.2 11.8.3	Other offences	<p>It is proposed to make it an offence for someone who fails to return a certificate of registration within seven days of being asked to do so by a Board.</p> <p>There are various offences for obstructing or hindering officers.</p>	These are satisfactory.
11.10	Monitoring of registrants	<p>Powers will be contained in legislation to monitor registrants who are subject to various conditions or undertakings imposed by various bodies within the system.</p> <p>The paper says that it is expected that Boards will ‘develop and implement a risk based compliance profile of registrants, assess how regularly individual registrants need to be monitored and a compliance strategy to ensure this monitoring occurs.</p>	The paper has not provided details as to how this is to occur.
12.1	Transitional provisions	It is proposed that under the new structure, disciplinary matters on foot prior to 1 July 2010 will be dealt with under the terms of the law in force at the time proceedings commenced.	Agreed.