

Podiatrists Registration Board of Victoria's response

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

CONSULTATION PAPER

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

Issued by the Practitioner Regulation Subcommittee
Health Workforce Principal Committee
Australian Health Ministers' Advisory Council
7 October 2008

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.

Response Supported

2. Proposed terminology

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'.

Response

The Act where ever possible should use plain language that is easily understood by the public. The term notifications is not readily understood by the public and it is the Boards preference that it should be replaced with the every day language of Complaints and complainant. The Act could then define complaints to include other forms of notifications.

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'.

Response

The term preliminary assessment does not adequately describe the process. It is more than just an assessment it is an investigation into the facts of the matter. The term assessment should be replaced with 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’.

Response

The term assessment does not adequately describe the process. It is more than just an assessment it is an investigation into the facts of the matter. The term assessment should be replaced with investigations committee.

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.

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 **a practitioner whose capacity to practise is** ~~practitioners whose performance may be~~ unsatisfactory.

Also is this committee to manage the health of the practitioner or the matter of that person's impairment?

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.

“Health assessment” is appropriate – “medical assessment” is limiting.

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’.

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’.

Response

Whatever term is used it needs to be defined. For example the legal practices act in Victoria defines Fit and Proper Person and there is extensive case law which sits behind this definition. Also the Australian National Mediator Standards defines Not of a 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.

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.

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'.

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.

Response

unsatisfactory professional conduct

- A number of the sub definitions attempt to encompass similar guidelines in the *Legal Profession Act 2004* which define the considerations taken into account when establishing whether or not a person is a fit and proper person. Suggest that that is a far better place to have guidelines rather than trying to define unsatisfactory professional conduct. In other words, perhaps it would be better to define unsatisfactory professional conduct in terms of a person having been found not to be a fit and proper person to practice rather than trying to define every contingency under unsatisfactory professional conduct
- suggest that if all of the subsections remain then upc should also include
 - *bringing the profession into disrepute*
 - *not of a trivial nature*
 - *practices whilst suspended*
 - *advertising contraventions*
 - *sexual misconduct* – define
- k limits a conflict of interest to pecuniary interest. As we know, conflict of interest may go well beyond pecuniary interest.
 - Suggested wording could be *conflict of interest including pecuniary interest*

Professional misconduct

c requires a definition all police guidelines of what is meant by *not of good character or fit and proper person up to*

..

3. Overview of proposed system

3.2 Key features of proposed system

A diversity of forms

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 a committee of the board including one located in a State or Territory) 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
- 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

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.

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.

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 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, 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.

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.

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 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.

Response

The Board is unclear why there needs to be streams to complaints. Although it may work for the larger Boards it seems to a complicated process for the smaller Boards.

3.3 Proposed definitions for what constitutes a departure from professional standards

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.

Response

These definitions seem to be very complicated with mixed up definitions and very resource intensive.

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.

Response

supported.

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.

Response

supported.

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).

Response

supported. Consideration should also be given to setting up a national help line that could provide assistance to complainants.

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.

Response

This provides over regulation. People should be able to complain about anything. It should be then up to the Board to sort out the vexatious frivolous and not relevant complaints.

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.

Response

supported.

4.4 Mandatory reporting obligations

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.

Response

As the above options provide onerous responsibilities on the professions there needs to be well founded evidence that these options will bring about the desired outcome.

Option 1a

Option 1a is preferred as reporting is based on a professional assessment.

Option 2a

Option 2a is supported as option 2b is completely unworkable..

Student registrants and mandatory reporting

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.

Response

This is a delicate area and it raises issues of the transfer of education responsibility to Boards. Learning and registration are distinctly separate areas with the learning being dealt with by Educational Institutions and the registration being dealt with by Boards.

It is the Boards view that the appropriate time for the Board to intervene is at the time of registration. Prior to this it is a matter for the educational institution.

There should not be mandatory reporting of health matters. Competence matters should be dealt with by the University. There should not be any reporting obligations placed on students.

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.

Response

Supported.

However, what happens if the notification has not been made in good faith, but for malicious reasons and without grounds – what action is then available to the respondent?

4.6 Own motion powers

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.

Response

Supported.

4.7 Immediate suspension powers

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.

Response

This should be up to the Boards discretion. However adequate safeguards need to be built in such as a right of appeal to ensure that the rights of the practitioner and risk to the public are properly considered.

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.

Response
Supported.

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.

Response
Supported.

5. Preliminary assessment of notifications

5.1 Powers following receipt of a notification

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.

Response
Supported. However, as this is a legal concept it may be outside of the expertise of the Board.

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

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. **It is not clear what the difference is here – does this infer “never been registered or is no longer registered” ?**

Response
Supported.

5.3 Liaison with HCCs

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.

Response **Supported.**

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.

Response

In relation to matters being referred to a Tribunal there should be no need for the Board to provide reasons as the matter has not concluded and the final reasons for the decision will be made by the tribunal. .

5.4 Who conducts the preliminary assessment of a notification

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.

Response
Supported.

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.

Response
Supported.

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).

Response
Supported.

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.

Response
Supported.

5.6 Notifiers' rights of review of preliminary assessment decisions

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.

Response

Option 1 is supported by the Board. Option 2 provides simply extends the complaints process without providing any notable benefits. In fact it undermines the complaints process by questioning decision made by the umpire. At some point in the process a decision has to be made and the Board should be making that decision.

The alternative to this approach is to remove the entire complaints process from the Boards and place it in an independent complaints body similar to the present NSW system.

6. Performance matters

6.1 Overview of management of performance related matters

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.

Response
Supported.

6.2 Performance management

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).

Response
Supported.

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.

Response
Supported.

-

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.

Response
Supported.

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.

Response
Supported.

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.

Response
Supported.

6.4 Performance panel hearings

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.

Response

The above does not provide for a lawyer to be a member of the panel. Without a lawyer being present on the panel who would have the expertise to be able to protect the principles of natural justice and the complainants and practitioners rights.

This is even more relevant in a system where the practitioner does not have legal representation.

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.

Response
Supported.

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.

Response
Supported.

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.

Response
Supported.

7. Health or impairment matters

7.1 Overview of management of health related matters

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.

Response

Supported.

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.

Response

The first option is supported however, the Board should have the ability to charge the registrant if deemed necessary. Non cooperation. Continual relapse etc.

7.2 Health management

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).

Response
Supported.

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.

Response
Supported.

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.

Response
Supported.

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.

Response
Supported.

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.

Response
Supported.

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.

Response
Supported.

7.4 Health panel hearings

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 the same profession as the practitioner ~~a regulated health profession, and~~
This is unnecessarily severe and limiting and infers that you cannot be a reliable and impartial member of a panel if you have ever been a registrant in a regulated health profession.
 - 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.

Response
Supported.

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.

Response

Supported.

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.

Response

Supported.

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.

Response

Supported.

8. Conduct matters

8.1 Overview of management of conduct related matters

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.

Response

Supported.

8.2 Conduct management

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.

Response
Supported.

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.

Response
Supported.

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.

Response
Supported.

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.

Response
Supported.

Notice of an investigation

Proposal 8.3.3: It is proposed that the legislation require the board 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.

Response
Supported.

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.

Response
Supported.

Timelines for the conduct of investigations

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.

Response

Supported.

8.4 Powers of investigators – search, entry, seizure

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).

Response

This is fraught with danger. These powers need to be exercised by properly trained people such as the Police.

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.

Response

Supported.

8.5 Conduct panel hearings

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.

Response

The above does not provide for a lawyer to be a member of the panel. Without a lawyer being present on the panel who would have the expertise to be able to protect the principles of natural justice and the complainants and practitioners rights.

This is even more relevant in a system where the practitioner does not have legal representation.

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.

Response
Supported.

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.

Response

This should be amended to allow the panel to consider performance assessment reports. The panel should have discretion depending on the circumstances to consider what evidence that it deems necessary.

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.

Response

Supported. However, without a lawyer on the panel there may be no one with the required expertise to write the decision.

9. Ensuring accountability, transparency and procedural fairness

9.1 Achieving separation of functions

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.

Response

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.

Response

Support

However, the tribunal must understand that they are taking over responsibility for hearing a disciplinary matter which would otherwise have been heard before a Board. The situation is analogous to the Board being the informant before the Magistrates or County Court. Board's do not make application to the tribunal as a party seeking an agreement or conciliation. The Boards are there because there is a statutory obligation that they proceed with a disciplinary hearing before the tribunal when the matter is considered by the Board to be so serious that it may warrant suspension or cancellation of registration. Otherwise the Board would have conducted a Panel hearing.

9.2 Matters involving registrants from different professions

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.

Response

Supported.

9.3 Legal representation for registrants at panel hearings

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.

Response

As long as serious matters that can result in suspension and cancellation are being dealt with by a State tribunal then the Board supports option 4b

9.4 Confidentiality of panel hearings

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.

Response
Supported

9.5 Status of notifiers at panel hearings

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.

Response
Supported

9.6 Review rights for registrants

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.

Response
Supported

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.

Response
Supported

9.8 Role of Commonwealth, State and Territory ombudsmen

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.

Response

It is a national system therefore to ensure a consistent approach it should be the Commonwealth Ombudsman.

10. Tribunal hearings

10.1 Establishment or continuation of State and Territory tribunals

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.

Response

Supported

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.

Response

Supported

-

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.

Response

Supported

-

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.

Response
Not Supported

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.

Response
Supported

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.

Response
Not Supported

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.

Response
Supported

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).

Response
Supported

10.5 Findings and determinations of a tribunal

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.

Response
Supported

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.

Response
Supported

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).

Response
Supported

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.

Response
Supported

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.

Response
Supported

10.6 Constitution and appointment of tribunal hearing panels

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.

Response

Panels should be constituted with a minimum of three members, one from the same profession as the practitioner, one a community member who has never been a registrant in the same profession as the practitioner and a member of the legal profession. Community members are involved at all other levels of the process and to sustain public confidence in the process and outcomes. To discard this standard for two members of the same profession as the practitioner will increase the perception of bias in dealing with the most serious cases. The member of the legal profession brings to the panel legal knowledge and skills and their experience of the law – that is their role and it should not be assumed that they can, or should, also take on the role of the community member.

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.

Response Supported

10.8 Status of notifiers

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.

Response
Supported

10.9 Powers in relation to deregistered practitioners

Proposal 10.9.1

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).

Response

No Comment

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.

Response

Supported, care needs to be taken in relation to hearings that are closed to the public and protecting the identity of the complainant or practitioner in cases where there is no case to answer.

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).

Response

Supported. However, care needs to be taken in relation to hearings that are closed to the public.

11. Offences and regulated conduct

11.1 Current arrangements

11.2 The IGA

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.

Response
Supported

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.

Response
No Comment

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.

Response
Supported

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

11.6 Regulation of advertising

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.

Response

The question of advertising has been a difficult one as framed by the Victorian legislation. It is an extremely complex area and may be better if it was handled by other expert bodies that have the experience to handle these complaints.

Repeated legal advice received by the Board has indicated that it is extremely difficult if not impossible to prove a breach of the advertising provisions in the Victorian legislation.

The other fact is that in 99% of the complaints received in relation to advertising are received from other practitioners who are trying to protect their business. These sorts of complaints would be best dealt with under the Trade practices and Fair Trading by the Bodies that administers these acts.

The Act could provide referral powers to the specialist bodies that deal with trade practices and fair trading issues particularly for commercial type complaints. In this way there could be a mechanism for reporting back to the Boards and if there are any unprofessional conduct issues they could then be dealt with by the Boards.

The other thing to consider is that advertising is complex and practitioners can easily get it wrong without any intent to mislead. From our experience every practitioner that has been asked to change the way they advertised have complied with the Boards request. Therefore if provisions are to be included the legislation should be framed in a way that prosecution is a last resort.

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).

Response

Supported However, final point may read failing to return identity card after being requested by the Board.

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.

Response

Although the concept is supported the time frame should be made more reasonable to allow for delays in delivery etc. suggest 28 days

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.

Response

Supported

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
- 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.

Response

Supported

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.

Response

Supported.

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.

Response

Supported

12. Transition arrangements

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.

Response

Supported. However the legislation should be drafted in a way that allows constituted panels to continue until the matter is finalised.