

PSYCHOLOGISTS REGISTRATION BOARD OF VICTORIA



This submission is made by the Psychologists Registration Board of Victoria ('PRBV') in relation to the Consultation Paper on Proposed arrangements for handling complaints, and dealing with performance, health and conduct matters under the National Registration and Accreditation Scheme for the Health Professions.

If you have any queries on these responses please contact the Chief Executive Officer: Ms Melanie Saba, 03 9629 8722 or melanie.saba@psychreg.vic.gov.au

The PRBV concurs in general with the submission of the Council of Psychologists Registration Boards of Australasia Inc ('CPRB') but in addition offers these comments and some differences of opinion in regards the matters of the Health Complaints Commissioner ('HCC') role, the Role of a Director of Proceedings and the definitions of unprofessional conduct.

PRBV comments on key issues

PRBV comments on 2 Proposed terminology:

PRBV suggest that 'notification' should be the term used rather than 'complaint' which has specific meaning in regards individual/group dissatisfaction with a health practitioner. 'Notification' is a broader term and one which leaves the decision as to whether there is a "complaint" to answer to the regulatory authority or investigating body/person. In addition, for many people who make a notification to a regulator, they are more comfortable with being referred to as a "notifier" rather than a "complainant".

PRBV comments on 2.1.2 Preliminary assessment:

PRBV would prefer the term preliminary investigation, to ensure no confusion with any other preliminary assessment that could be undertaken, for example of an application for registration.

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PRBV comments on 2.1.3 Notifications assessment committee:

PRBV would support Notifications assessment committee if decision at 2.1.1 is to use the term notifications- for consistency.

PRBV comments on 2.1.15 Not of good character:

PRBV supports the use of “fit and proper person” as it is a term well defined in case law and is referred to frequently in higher courts. In comparison, “not of good character” is not well defined in the same way in case law.

PRBV comments on 2.1.16 Impairment:

PRBV believes that terms such as drug and alcohol affected should be benchmarked against relevant legislation.

PRBV comments on 3.1 Background:

PRBV would note that it is not the notification system alone, but the system of health practitioner regulation that must operate in a way to protect the public. It is all aspects of regulation, registration, notifications management, accreditation, and standards setting that contribute to public protection.

PRBV comments on 3.2 Key features of proposed system - A diversity of forms:

Please note the previous comments in regards to enshrining the types and names of committees to legislation, rather than providing the flexibility to form committees if required.

PRBV comments on Consultation with HCC or equivalent State and Territory bodies:

PRBV notes that this approach would make this legislation the decision making legislation in interactions with the HCC or equivalents, whilst the current situation in Victoria is that this power resides with the Health Services Commissioner. Given this consultation is related to consumer complaints, PRBV would suggest that it would be more appropriate for the HCC or equivalents to make the determination, following consultation with the responsible board.

Consideration must be given to the process to be followed if the HCC and Board cannot come to agreement of whose jurisdiction a matter falls within.

PRBV notes that many notifications received by the Board are not contained within a single stream i.e. that may be both elements of conduct and health

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that are evident within a notification. PRBV believes that a prescriptive silo approach as outlined within this paper will make it more administratively burdensome to administer such a scheme, and result in a prolonged investigation time for multifaceted complaints. The PRBV therefore disagrees with the structure as laid out in this paper whereby the three streams appear to be separate.

PRBV comments on Board hearings:

PRBV suggests changing the wording from “*The legislation would specify the make up of a health panel, performance panel, along with the formal findings and determinations that each may make.*” To “*The legislation would specify the make up of a health panel, performance panel, along with the formal findings and determinations that each may make **following a hearing.***”

PRBV comments on Proposal 4.2.2:

PRBV supports providing assistance that ensures that this legislation is compliant with requirements in complimentary legislation and statements such as the Human Rights Charter and Equal Opportunity legislation.

PRBV comments on 4.3 What sort of matter may be the subject of a notification:

PRBV would not support making onerous requirements on a notifier as outlined in 4.3.1, such as developing allegations or determining whether a registrant has engaged in unsatisfactory professional conduct or professional misconduct.

PRBV refer to its previous comments regarding the term “not of good character”.

PRBV comments on 4.4 Mandatory reporting obligations:

Mandatory reporting can only be effective within a framework of full protection for the notifier, inclusive of protection against claims of negligence.

However, there are many issues that would need to be considered if considering option 1b, and these include:

- is there a risk a health practitioner may avoid necessary treatment if they believe that any health practitioner they seek assistance from may be required to report them?
- that there needs to be parameters developed that frame the circumstances in which this mandatory reporting needs to be applied;

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- how is the measure of “within their competence” going to be determined by both registrants and the Board?
- that there must be disincentives against frivolous and vexatious reporting, such as situations of business disputes between practitioners; and
- that a strong vetting process must remain in the regulatory system to allow a Board to consider and dismiss these types of matters at an assessment point.

PRBV comments on Student registrants and mandatory reporting:

Whilst the possibility of mandatory reporting of students has the advantage of making students aware, as prospective registrants of the standards (in regards to areas such as health and character), there are other issues that must be considered. Namely how this is applied, e.g. is it only during clinical placements, and how this would interact with the normal processes of universities in dealing with students who are not progressing throughout a tertiary course.

PRBV comments on Proposal 4.6.1:

PRBV agrees with this proposal and that the Boards have all of the same powers to respond to an own motion notification, inclusive of all relevant protections as outlined in 4.5.

PRBV comments on 4.7 Immediate suspension powers:

PRBV believes that there should be no time frame specified within the legislation, but that the registrant has relevant rights of appeal, including making submissions to the Board if the situation changes and the suspension is no longer required. If it is determined to impose set time frames, then there must also be powers for Boards to lift that suspension prior to the completion of a mandatory time frame if the suspension is no longer warranted.

PRBV comments on Proposal 4.7.2:

As stated in previous responses, the PRBV supports the right of the practitioner to present evidence to the responsible Board at any time during a period of suspension if they believe that the suspension is no longer warranted. However the PRBV does not support an external review of the decision to suspend, unless this is based on a error of law, as it believes that it is difficult to determine the matter of a suspension without prejudging the matter under investigation.

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PRBV comments on Proposal 5.1.1:

PRBV refers to its previous comments in relation to the role of the HCC in the determination of jurisdiction for notifications from consumers.

PRBV comments on Proposal 5.2.1:

PRBV notes the definition of vexatious by the courts, it would appear that the term is misused as included in this proposal. Without access to definitions used in the formation of this proposal, it is difficult to understand the difference between “misconceived or lacking in substance” and “does not warrant investigation”.

PRBV supports the inclusion of time considerations – and that actual time period should not be prescribed i.e. assessed on a case-by-case basis, as per the way this is framed.

PRBV comments on Proposal 5.3.1:

PRBV refers to its previous comments about the role of HCCs and would also note there are situations where notifications could be dealt with by both Boards and HCCs.

PRBV comments on 5.4 Who conducts the preliminary assessment of a notification:

The PRBV refers to its previous comments in relation to HCCs.

PRBV comments on Proposal 5.4.1:

Needs to be at the Board’s discretion whether or not to establish having regard to considerations of case numbers etc.

PRBV comments on Proposal 5.5.2:

PRBV refers to its previous comments in regards to “not of good character” and the preference for “fit and proper person”

PRBV comments on 5.6 Notifiers’ rights of review of preliminary assessment decisions:

PRBV supports the option of providing the right for review with the exclusion of health matters.

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PRBV comments in Proposal 6.2.2:

PRBV supports this proposal, however notes that there must be consequence for non compliance with requirements such as education, this may include referral to conduct management or performance pathways.

PRBV comments on Proposal 6.4.1:

PRBV suggests that the wording in the second dot point should be changed from “- *have at least one member who is not and has never been a registrant in a regulated health profession*” to “- *have at least one member who is not and has never been a registrant in **that regulated health profession***”.

PRBV comments on Proposal 7.4.1:

PRBV suggests that the wording in the second dot point should be changed from “- *at least one member who is not and has never been a registrant in a regulated health profession*” to “- *at least one member who is not and has never been a registrant in **that regulated health profession***”. In addition, PRBV believe that it could be beneficial to ensure a lawyer is appointed to a health panel to ensure proper process where dealing with a potentially vulnerable practitioner.

PRBV comments on Proposal 8.3.5:

PRBV believe that these timelines should be a matter of policy rather than legislation, as there can be a delay in changing legislation if the timeframes are in appropriate.

PRBV comments on Proposal 8.4.1:

PRBV believes that there must be penalties for non compliance with these provisions.

PRBV comments on Proposal 8.5.1:

PRBV suggest that the wording in the second dot point should be changed from “- *have at least one member who is not and has never been a registrant in a regulated health profession*” to “- *have at least one member who is not and has never been **a registrant in that regulated health profession***”. In relation to dot point five- what status would this report have? Would it include opinions and untested evidence?

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PRBV comments on Proposal 8.6.2:

PRBV believe that this power would need to be very specific and should be put in the context of panels being able to consider patterns of poor conduct and/or performance.

PRBV comments on Proposal 9.1.1:

PRBV believes that this proposal does not achieve a separation of functions. By including this process within legislation, there will be an imposition of a criminal process onto an administrative process. PRBV believes that whilst a role such as Director of Public Prosecutions is appropriate in criminal law due to the standard of proof required and to ensure that there is no political interference in the criminal justice system, it is not appropriate in an administrative law process.

The system is robust for three reasons:

- the rules of natural justice apply;
- decisions are subject to merit review; and
- the whole process is subject to judicial review.

The process outlined above are cumbersome, expensive and seem at odds with the purpose of a registration scheme. It could also be argued that it removes the transparency of the system with a single source of decision making power.

PRBV also notes that the basic skills of lawyers includes the ability to assess evidence to ensure that it is credible, probative and makes submissions based on this evidence to panels.

PRBV comments on Proposal 9.1.2:

PRBV notes that the criteria for referring a matter for hearing are well and clearly established in case law. The first criterion is well established. The second and third criteria are both matters that are basic to the consideration of undertaking any litigation. They are not public interest, but litigation process questions.

PRBV comments on 9.3 Legal representation for registrants at panel hearings:

Given that panel hearings for less serious matters can impose conditions on the registration of the practitioner, the right to legal advice and a legal person to accompany the person and perhaps speak on their behalf with leave of the panel is deemed reasonable in that it is to be made clear to the practitioner that the preference of the Board is to hear from him/her but if this is not

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possible or requires the augmentation of a person speaking on their behalf, this would assist the panel or Board. Therefore PRBV agree with Option 4b.

PRBV comments on 9.4 Confidentiality of panel hearings:

PRBV supports Option 2.

PRBV comments on 9.5 Status of notifiers at panel hearings:

Right of review to the tribunal is for the practitioner, the notifier should not have right of review of a decision of a hearing panel.

PRBV comments on 9.6 Review rights for registrants:

PRBV notes that consistency in decision making could be problematic with separate tribunals hearing matters within Australia. Consideration, for consistency, should be given to having matters heard by a Federal tribunal.

PRBV comments on 9.8 Role of Commonwealth, State and Territory ombudsmen:

PRBV supports option 1, application of the Commonwealth Ombudsman Act 1976 to the national registration scheme.

PRBV comments on Proposal 10.2.1:

PRBV believes that the role of community members on tribunal panels must be considered when establishing tribunal panels. The purpose of these registration schemes is public protection and believes that this purpose is enhanced by the inclusion of community members on tribunal panels.

PRBV comments on Proposal 10.3.1 and 10.4.1:

PRBV believe in response to 10.3.1 and 10.4.1 that allowing submissions in relation to these matters are not relevant and should not be allowed. It would distort the process and could result in a denial of natural justice.

PRBV comments on Proposal 10.5.1:

PRBV refers to previous submissions in this paper in relation to the term “not of good character” and support “fit and proper person”.

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PRBV comments on Proposal 10.5.2:

PRBV submits that only decisions and findings of hearings that were open to the public should be published.

PRBV comments on 10.5.4:

PRBV submits that the findings at dot point 6 and 7 are not appropriate for merit review and can only be made by a court when judicially reviewing a decision.

PRBV comments on 10.6.1:

PRBV support the proposal that a legal member should chair a panel, however do not agree that the legal member should be considered as a de facto community member.

PRBV comments on 10.11.1:

PRBV supports the publication of reasons in relation to hearings that were open to the public.

PRBV comments on Draft definitions of 'unsatisfactory professional conduct', 'unsatisfactory professional performance' and 'professional misconduct' proposed for inclusion in the national legislation:

PRBV submits the following comments in relation to the draft definitions listed:

- PRBV supports the division of inappropriate professional conduct into two categories, the first, and less serious, to be dealt with internally by the Boards, and the second, and more serious, to be dealt with externally, however PRBV has concerns with the complex mixing of concepts of “competence” and “diligence”. It appears to overlap significantly with seriously unprofessional performance, although, it is not framed in the same language as the definition of “unsatisfactory professional performance”
- PRBV believes that the definitions included are too specific and should be more general and inclusive to ensure that unforeseen circumstances can be accommodated within the definitions. The PRBV suggest that definitions f) through to k) be deleted. If the definitions of the two levels of inappropriate professional conduct are to be changed, the PRBV prefer the use of the terms “unprofessional practice” and that unprofessional conduct and professional misconduct should be defined in terms of “unprofessional practice”

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- PRBV refers to its previous submissions in regards to the use of “fit and proper person” as opposed to “good character”. The term ‘not of good character’ is not well defined in the case law. The term ‘fit and proper person’ has been used in the case law since at least 1912 and continues to be regularly referred to in the higher courts.
- PRBV believes that the term “unsatisfactory professional performance” should be replaced by “unprofessional performance” and “unsatisfactory professional conduct” replaced by “unprofessional practice”. The word unsatisfactory may be too far reaching and could be considered to include employer performance issues. If “unsatisfactory” were to be used, the Board may receive complaints from employers wishing to have workplace issues resolved by the Board which would be inappropriate.
- Further work needs to be done on the definitions above.