

The Royal Australian College of General Practitioners

**Response to CoAG consultation paper regarding
the proposed complaint arrangements**

21 November 2008

1. INTRODUCTION

The Royal Australian College of General Practitioners (RACGP) welcomes the opportunity to continue to contribute to discussion regarding the implementation of a national registration system for medical and allied health professionals. The RACGP congratulates and supports the government in its ongoing efforts to maintain a highly qualified and skilled health care workforce.

The RACGP is the specialty medical college for general practice, responsible for defining the nature of the discipline, maintaining standards for quality clinical practice, setting the standards and curriculum for education and training, and supporting general practitioners in their pursuit of excellence in patient care.

The proposals referred to in this submission are numbered according to the numbering system provided in the consultation paper *Proposed arrangements for handling complaints, and dealing with performance, health and conduct matters*, which can be found at www.nhwt.gov.au/natreg.asp.

2. RESPONSE TO PROPOSED ARRANGEMENTS

The consultation paper on proposed arrangements for handling complaints, and dealing with performance, health and conduct matters, details 114 proposals covering 12 sections regarding the specific elements of the arrangements. Of these 114 proposals, feedback is particularly sought on 35 proposals.

The RACGP supports a system of national registration, with consistent standards and processes throughout Australia, allowing greater workforce flexibility and mobility. However, the national registration scheme can be implemented without compromising current independent arrangements for accreditation according to high quality and safe standards.

In previous responses, and as co-signatories with the Australian Medical Association (AMA) on 9 February 2007, 10 March 2008, 5 September 2008, and 3 November 2008, the RACGP has clearly outlined its concerns regarding CoAG's proposed model, including the disenfranchisement of the medical colleges and their roles in medical professional standards, and the ability of CoAG's proposed profession specific boards to expand the scope of health practitioner's practice without reference or input from the other professions.

As these issues have still not been addressed, the RACGP will reiterate its concerns, and the concerns of other professional organisations including the AMA. There are five major areas of concern with the proposed arrangements, namely:

1. Lack of acknowledgment for the continued role of the accredited medical colleges in setting and maintaining standards for quality care and professional education and training
2. Possible increased scope of practice for a number of health profession without adequate consultation
3. The proposed system appears to ignore the quality assurance and continuing professional development programs established by the accredited medical colleges, and seeks to introduce new and onerous continuing professional development programs for the medical profession without discussion or consultation
4. Registration will provide a direct legislative link to Medicare and pharmaceutical benefits for patients of all registered health professions
5. The medical board will be able to register a person who may not meet the requirement for registration in certain circumstances.

The continuing proposals and consultation documents released confirm our belief that there is a real risk that the new scheme will erode the ability of the relevant health board's to protect patient safety.

Despite the importance and seriousness of a complaints system for the regulated health practitioners, there is a concerning lack of detail regarding how complaints will be managed from the receipt of the complaint through to the panel and tribunal hearings. Furthermore, there appears to be a disregard for the extensive work done by the states and territories, registration boards, professional associations, colleges and other organisations to the current frameworks and processes that exist throughout Australia.

The RACGP cannot support the proposed CoAG model at this stage.

However, in relation to the specific questions and recommendations posed in the proposed complaint arrangements, the college has made a number of comments and recommendations.

Section 2 – Proposed terminology

Proposal 2.1.1 – Terminology regarding complaints handling and disciplinary functions

The RACGP is supportive of using the term **notification** to describe matters referred to a board regarding a health practitioner, because it:

- is a generic term covering a breadth of possible issues related to the health practitioner
- relates to the actions of the person or persons making notification without pre-empting the outcome.

It is understood that if this terminology was adopted, a definition of 'notification' and of 'notifier' will be required within the relevant legislation, and that the official term 'notification' would not preclude the national boards from using everyday language on documentation for the public regarding notification.

Proposal 2.1.3 – Notifications assessment committee

Although the RACGP does not have any comments regarding this terminology, the college believes that at least half of the members of a committee assessing a notification should be from the relevant profession to ensure that there is a balanced viewpoint from both health professionals and consumers during the initial vetting process.

Proposal 2.1.15 – Terminology used to describe a registrant who is not considered suitable to practice because of a character defect

In relation to terminology for registrants not suitable to practice due to a character defect, the RACGP recommends the first option 'not of good character', rather than the alternative options proposed.

Section 3 – Overview of proposed system

Performance management

It is recognised that there should be mechanisms to both **identify** those health practitioners whose performance may be found to be unsatisfactory, and to **assist** them, both in response to specific instances and repeated patterns of unsatisfactory performance.

Using the term 'assist' indicates that the college strongly believes that outcomes should not necessarily be punitive in nature. There should be ample opportunity for peers to be involved in the process. This will ensure that there is sufficient expertise to adequately assess the issues and context associated with the investigation and/or hearing, and will ensure that the assistance provided is appropriate, in proportion and in context.

Conduct management

The ability for swift action regarding conduct issues, including the suspension of registration, is sometimes necessary in obvious or extreme circumstances.

As previously stated in the RACGP's submission regarding the proposed registration arrangements (dated 29 October 2008), the RACGP does not support the concept of delegating registration suspension decisions to individuals, as they may not have the capacity to make a balanced and informed decision regarding the issue. To ensure a balanced viewpoint, the RACGP recommends that registration decisions, particularly those in relation to conditions of registration, suspension and revocation of registration, can only be delegated to an appropriately structured committee which includes suitably qualified and experienced peers, as well as lay people.

Tribunals

The consultation document states that where the relevant health board considers that the health practitioner has engaged in professional misconduct, that is misconduct that is considered to be substantially below reasonable standards and/or accepted conduct, the matter should be referred to the appropriate tribunal.

The RACGP notes with concern that the current tribunal arrangements vary from one state and territory to the next, due to the different legislation, which is contrary to the intended purpose of a national system.

In a nationally based health registration system, tribunal arrangements must be consistent throughout Australia to ensure that health practitioners receive fair and consistent treatment regardless of their geographical location.

Section 4 – Notifications

4.4 Mandatory reporting

In relation to the proposed mandatory reporting obligations for registrants, the college cannot recommend a specific option at this point in time due to insufficient engagement with the profession. Mandatory reporting is a complex and multifaceted issue, which requires ongoing and meaningful discussion with the profession to ensure that the rights of the individual practitioner are balanced with the rights of the patient and the public. The RACGP believes that mandatory

reporting is a significant issue within itself, and recommends that the government engage the profession to discuss the issue in detail.

Proposal 4.5.1 – Protection for notifiers

The college agrees with proposal 4.5.1 which states that all notifiers, who make a notification in good faith, will not be liable for defamation because of the notification made. It is important that members of the community and the profession can notify the national health boards regarding any genuine concerns they may have.

The natural corollary would be that notification is not made public unless an unfavourable outcome is determined after a proper investigation is conducted and a penalty is handed down.

Proposal 4.7.1 – Immediate suspension powers

As stated in Section 3 and previous submissions, the RACGP believes powers relating to registration decision can only be delegated to an appropriately structured committee which includes at least 50% representation from the relevant health profession.

Additionally, as the proposed suspension powers are particularly punitive in nature, detailed systems and guidelines must be developed to ensure that suspension is only used under defined and specific circumstances, with adequate and timely appeals processes available to the health practitioner.

Proposal 4.7.3 – Voluntary undertakings as an alternative to suspension

National health boards should be empowered to accept an undertaking from a registered health practitioner regarding alternatives to immediate suspension of the practitioner's registration, as this may allow the practitioner to continue to provide health services within a limited scope to ensure continued patient and public safety, while giving the practitioner the opportunity to regain the competencies and standards required.

It should be understood that any agreed conditions or undertakings would be listed on the public register.

Section 5 – Preliminary assessment of notifications

Proposal 5.2.1 – Grounds for refusing to deal with a notification

It is important for a number of reasons that the national health boards can decide not to investigate an issue regarding a health practitioner, including frivolous and vexatious notifications, notifications lacking in substance or relevance, notifications that provide no evidence, and notifications regarding health practitioners who are no longer registered and will not be seeking registration in the future.

5.6 – Notifiers' rights of review of preliminary assessment decisions

In relation to reviews of preliminary assessments and investigations, the RACGP believes that while it is necessary to ensure that there is transparency for notifiers and that perceptions of 'doctors protecting doctors' should be addressed, a review should only be conducted if there is further evidence presented.

Therefore, the RACGP recommends option 1, that there be no right for a review of a preliminary assessment, unless the notifier presents to the relevant national health board evidence that was not previously considered.

Section 6 – Performance matters

Proposal 6.1.1 – Practitioners whose performance is unsatisfactory

It is important that health practitioners whose performance is unsatisfactory but not serious enough to constitute professional misconduct or unsatisfactory conduct, are supported and educated. A cooperative process should be designed on a case-by-case basis to provide guidance and direction using a number of mechanisms which could include:

- targeted continuing professional development
- counselling
- mentoring
- Temporary supervision.

The college therefore supports proposal 6.1.1 with the caveat that the process in relation to less serious matters should be educational, rather than punitive.

Proposal 6.5.1 – Decisions available to performance panels following a hearing

The college notes that proposal 6.5.1 effectively provides performance panels the power to place conditions on a health practitioner's registration. While it is recognised that in some cases it may be appropriate to place conditions on a health practitioner's registration, the RACGP strongly believes that there should be sufficient professional expertise on a panel that has the power to impose conditions on a health practitioner's registration, ensuring that an informed decision can be made. Therefore, it is recommended that each panel has an appropriate mix of members, including at least 50% membership from the relevant health profession.

Section 7 – Health management

Proposal 7.1.1 – Dealing with health practitioners who have a health condition

As stated in proposal 4.7.3, the college is supportive of a system that allows flexibility when dealing with health practitioners who may be suffering from a health condition, including drug or alcohol abuse, while ensuring that patient and public safety is maintained.

Proposal 7.1.2 – Health programs for impaired health professionals

It is important that the relevant national health board offers support mechanisms to practitioners suffering from impaired health.

In relation to funding such programs, the RACGP believes that funding options would depend on what types of systems are being proposed, and how much funding will be required. However, in general, the RACGP recommends a blended system, utilising both option 1 and option 2. In other words, a percentage of the health programs would be funded through registration fees, while the rest is charged to the health practitioners involved in the health program in a user pay system.

It may be possible that an insurance system could be set up to fund support mechanisms.

Proposal 7.5.1 – Decisions available to health panel hearings

The college reiterates its previous statements – please see proposal 6.5.1 above for further details.

Section 8 – Conduct matters

Proposal 8.3.4 – health practitioner notification of an investigation

With any complaints system, it is critical that there is natural justice and procedural fairness for both the notifier and the health practitioner. Failure to provide a fair, just and transparent system for those involved is unacceptable. Therefore, the RACGP recommends that the boards should only be empowered to ‘not give notice’ to the health practitioner of an investigation in very extreme circumstances, and that these circumstances must be clearly defined to ensure transparency and procedural fairness.

Proposal 8.3.5 – Timelines and investigations

Investigations into the professional conduct of a health practitioner can often be a stressful period for the health practitioner involved. Currently, it is not uncommon for preliminary investigations into the professional conduct of medical practitioners to be unacceptably lengthy, even when there is little substance to the allegations.

It is therefore important that all investigations are completed in a swift and timely manner to reduce stress and uncertainty for those health practitioners involved, and to ensure that the investigation itself, rather than any alleged notified behaviour, does not become a safety concern for the health practitioners and the communities they serve. Although the timelines recommended in proposal 8.3.5 seem reasonable, the RACGP would also recommend that each national health board develop mechanisms to ensure that investigations are conducted as quickly as practical according to strict deadlines.

Proposal 8.6.1 – Decisions available to hearings of conduct panels

The college reiterates its previous statements – please see proposal 6.5.1 for further details.

Section 9 – Ensuring accountability, transparency and procedural fairness

Proposal 9.1.1 – Procedural fairness

The college believes that the appropriate option is dependent on how functional the system is. A well structured system will not need additional provisions beyond the review and appeal mechanisms outlined in the consultation paper, and therefore option 1 would suffice.

However, if the system does not function optionally, option 3 would be more appropriate to ensure that there was independent input, with mechanisms to review serious decisions and to determine whether an issue should be brought to a panel or tribunal.

9.3 – Legal representation for registrants at panel hearings

It is understood that panel hearings are intended to be low key, and informal, and that the intention of these hearings is to allow the panel to clarify a number of issues directly with the health practitioner directly.

However, the RACGP believes that legal representation is vital to procedural fairness for the involved health practitioner, especially when there is the potential for the health practitioner's registration status to be affected. Therefore, the college believes that the health practitioner should have the right to legal representation throughout the entire process, from initial notification of the complaint through to the board panel hearing. Therefore, the college would recommend option 2, that the legislation specify that the health practitioner has the right to be legally represented.

Proposal 9.4.1 – Confidentiality of panel hearings

The college agrees with proposal 9.4.1, and believes that all information regarding panel hearings should remain confidential, including the names of the notifier and the health practitioner involved.

However, a de-identified summary of the allegations, investigation process and findings, and the panel decision, may be beneficial for educational purposes and could be published by the national health board.

Proposal 9.5.1 – status of notifiers at panel hearings

It is important that notifiers are given the opportunity to present at hearings, with permission from the panel, to ensure that a balanced viewpoint is provided.

The RACGP believes that notifiers should not be given the right under legislation to independently seek a review of a panel's decision. It may be appropriate, however, for notifiers to have opportunities to present new evidence to the panel.

9.8 – Role of commonwealth, state and territory ombudsman

To ensure national consistency when reviewing the administrative processes of a national health board, the RACGP recommends option 1 – applying the commonwealth *Ombudsman Act 1976* to the national registration scheme. The college does not believe that option 2 is viable, as each state and territory has different legislation.

Section 10 – Tribunal hearings

Legal representation at tribunal hearings

As tribunal hearings are likely to be chaired by a legal member (as stated in Section 10.6 of the consultation document), the RACGP recommends that health practitioners should have the right to legal representation at all tribunal hearings, and that this should be explicitly stated when developing the national criteria for state and territory tribunals.

10.2 – Criteria for State and Territory Tribunals

The consultation paper states that the Inter-Governmental Agreement will require that all state and territory tribunals comply with the national criteria agreed by the Australian Health Ministers' Council (AHMC).

The college believes that developing a consistent tribunal process throughout Australia can potentially be a simple process, where each jurisdiction accepts the appropriate standards. Instead, the proposed system is going down a very complex path, incorporating a patchwork of national and state legislation, with no clear indication of what the impact will be on existing tribunal and hearing arrangements.

The RACGP is keen to see further detail regarding the proposed criteria, and recommends that the national criteria should be sufficiently detailed to ensure that all state and territory tribunals are managed consistently across Australia, including details of tribunal membership, legal representation, appeals, the processes for tribunal hearings, privacy matters, and reporting requirements.

Proposal 10.2.1 – national legislation for tribunals

In relation to bodies that must be notified following the decision of a tribunal, the RACGP recommends that the relevant college also be notified of a tribunal decision. If the registration status of the health practitioner was affected, the relevant medical college, depending upon the tribunal's decision, may wish to:

- provide support and remediation
- reconsider Fellowship of the RACGP.

Proposal 10.6.1 – constitution of tribunal hearing panels

As previously stated, any panel or committee with the power to make fundamental registration decisions should include appropriate representation from the relevant profession. Therefore, a panel with a minimum of three members, including two members of the same profession, is appropriate.

Proposal 10.8.1 – status of notifiers at tribunal hearings

As the national health board is responsible for protecting the public, and guiding health practitioners, it is not appropriate for the notifier to have the right to directly make an application for a tribunal hearing. However, it is understood that the notifier may be called upon as a witness for the national health board.

Proposal 10.10.1 – Review of tribunal decisions

The RACGP supports the proposal that a party to a proceeding before a tribunal has the right to appeal via the state or territory supreme Court.

Section 11 – Offences and regulated conduct

Proposal 11.6.1 – Dealing with advertising offences

The college recommends option 3 in relation to advertising offences. Advertising offences should be broadly framed in the primary legislation, and should enable boards to deal with both registrants and corporate bodies.

Any legislation should be discussed with the profession in the draft stages to ensure relevance and viability, and must be consistent across all states and territories.

Proposal 11.10.1 – monitoring registrants

The college believes that the national health boards should have the power, for an appropriately determined period of time, to monitor health practitioners who have had conditions placed on their practice, or who have been recently re-instated to conditional or full registration.

Attachment 1 – Draft definitions of ‘unsatisfactory professional conduct’

While the RACGP notes that the intention of the draft definitions is to define inappropriate professional conduct, performance, and misconduct, the proposed definitions are too general to be effective in promoting high standards of clinical practice.

For example, two definitions of unsatisfactory professional conduct are defined as:

- ‘influencing or attempting to influence the conduct of another health practitioner in a way that may compromise client care’
- ‘referring a person to, or recommending that, a person use or consult another health service provider, health service or health product when the practitioner has a pecuniary interest in giving that referral or recommendation, unless the practitioner discloses the nature of that interest to the person before or at the time of giving the referral or recommendation’.

With the complex nature of medicine, including patient management, referrals and business arrangements, these definitions are extremely subjective, and may cause conflict and confusion both for the profession and the registration boards.

It is recommended that all definitions in Attachment 1 be more clearly refined and articulated via detailed and meaningful consultation with the relevant health professions to ensure that they are consistent with the colleges’ codes of conduct.