Maintaining consumer focus in health complaints: the key to national best practice

Response to the Consultation Paper on national health complaints handling

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Introduction

The Public Interest Advocacy Centre

The Public Interest Advocacy Centre (PIAC) is an independent, non-profit law and policy organisation that seeks to promote a just and democratic society by making strategic interventions on public interest issues.

PIAC identifies public interest issues and, where possible and appropriate, works co-operatively with other organisations to advocate for individuals and groups affected. In making strategic interventions on public interest issues PIAC seeks to:

- expose unjust or unsafe practices, deficient laws or policies;
- promote accountable, transparent and responsive government;
- encourage, influence and inform public debate;
- promote the development of law—both statutory and common—that reflects the public interest; and
- develop community organisations to pursue the interests of the communities they represent.

Established in July 1982 as an initiative of the Law Foundation of New South Wales, with support from the NSW Legal Aid Commission, PIAC was the first, and remains the only broadly based public interest legal centre in Australia. Financial support for PIAC comes primarily from the NSW Public Purpose Fund and the Commonwealth and State Community Legal Services Program. PIAC also receives funding from the NSW Government Department of Water and Energy for its work on utilities, and from Allens Arthur Robinson for its Indigenous Justice Program. PIAC also generates income from project and case grants, seminars, consultancy fees, donations and recovery of costs in legal actions.

PIAC's work on Health Consumer Rights and Patient Safety

PIAC has undertaken a considerable amount of work on patient or health care rights over its 26 years of operation, in particular around patient safety, complaints and investigations processes and the development of an Australian Health Consumers' Charter. PIAC welcomed the endorsement of the Australian Charter of Healthcare Rights by the Australian Health Ministers in July 2008. PIAC participated in the consultation process that led to the Commission's draft charter, including providing a written submission in response to the Consultation Paper on the draft charter.

PIAC was central to the consultation process leading to the enactment of the *Health Care Complaints Act 1993* (NSW). PIAC also provided legal representation in the New South Wales Royal Commission into Deep Sleep Therapy (the Chelmsford Royal Commission) and was involved in related processes dealing with the specific issues at the Chelmsford Hospital, but also more broadly, about the handling of serious complaints about medical practice in NSW.

PIAC is and has been supportive of the principle of a national registration scheme for health professionals. In June 2002, PIAC provided a response to a discussion paper released by the Australian Health Ministers' Advisory Council (AHMAC) Working Party Secretariat on a Nationally Consistent Approach to Medical Regulation in which PIAC supported a single national register of medical practitioners.[1]

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[1] PIAC, *Comments in response to Discussion Paper on a Nationally consistent approach to medical registration* (2002).

The current consultation

PIAC commends the Australian Health Ministers' Advisory Council, its Health Workforce Principal Committee and the Practitioner Regulation Subcommittee on their work and welcomes the opportunity to provide this submission in response to the Consultation Paper: *Proposed arrangements for handling complaints and dealing with performance, health and conduct matters*.

The move away from the peer review model of regulation of health professionals

PIAC is concerned that the model for handling complaints about health professionals proposed in the Consultation Paper is a move away from more consumer focussed models that have been adopted in several states and territories in the past 20-30 years. Several of the Australian jurisdictions have been trailblazers in this regard, particularly with the development of independent health complaints bodies. PIAC is concerned with the suggestion in the Consultation Paper that the national registration boards conduct assessment, investigation and prosecution of complaints and that the state complaints commissions are left only to deal with conciliation matters and resolution of complaints about public sector health facilities and a secondary consultative role in complaints about health professionals. That concern is primarily that the suggested model would, if implemented, be a step away from the consumer-focused reforms achieved in recent years. It would also be inconsistent with recent international trends where other jurisdictions are beginning to seriously question unfettered self-regulation by health professionals, particularly in dealing with health complaints.

The model that has been proposed in the Consultation Paper could be described as a 'peer review' or self-regulatory model for the regulation of health professionals. The criticism of this model in the past in Australia, and more recently overseas, has not been focused on the standard-setting or accreditation role of health practitioner boards but their continued role in complaint assessment, investigation and prosecuting disciplinary matters.

There has been in recent years a movement way from this model both in Australia and internationally; nowhere more so than in NSW. PIAC sees this as a positive development, reflective of trends emphasising greater consumer sovereignty and a refocusing of the regulation of the professions on the public interest rather than the reputation and standing of the professions and their members.

Peer review remains an important element of the regulation of health professionals in Australia.

The NSW system does have an independent Health Care Complaints Commission (HCCC) but is often described as a 'co-regulatory system' with the relevant boards actively participating in decisions about assessment, investigation and disciplinary matters. The significant change from the 'peer review' model of is the balance provided by an independent body carrying out the complaints assessment, investigation and prosecution functions. PIAC believes this balance is essential to achieve best practice in complaints management in the health area.

Much of the focus of the literature in this area has centred on the regulation of the medical profession. The peer review model was directly borrowed from the British model of regulation of the medical profession developed in the 19th century. Reflecting legislative definitions of misconduct, matters relating to practice standards or competence were not matters considered by the various manifestations of Medical Boards in Australia and the UK for the first three- quarters of the twentieth century. The boards in Australia applied legislative definitions of misconduct that referred to 'infamous conduct in … professional respect'. This approach had no focus on competence in medical practice.

The courts upheld the principle of self- regulation. In NSW in 1917 Mr Justice Pring in an appeal by a medical practitioner against his deregistration for 'infamous conduct' stated that:

> … this court is very loath to disturb the finding of professional men whose knowledge of what may be termed as professional conduct must be very much greater than the court can possess.[2]

This led Thomas to comment:

> Secure behind this legal precedent, the Medical Board over the next sixty years applied disciplinary action against doctors mainly on the grounds of financial fraud and addiction to drugs and alcohol, while ignoring issues of negligent or competent practice.[3]

Up to the 1980s in NSW and the rest of Australia, the professions were entirely self regulated in respect of disciplinary matters and performed all the functions proposed in the Consultation Paper to be performed by the national boards.

The rise of the consumer movement in the 1970s and 1980s together with the Chelmsford Hospital 'deep sleep' controversy, in which the NSW Medical Board was seen to be either powerless or unwilling to deal with the doctors concerned, lead to both legislative and regulatory changes.

In 1983, the NSW Government was given power by the Parliament to appoint the members of the Medical Board and new medical practice legislation was introduced that allowed doctors to be scrutinised in areas of competence and performance. The Health Complaints Unit was established in NSW Health. This Unit could deal complaints about individual health practitioners as well as complaints about public health providers such as hospitals

The Chelmsford Royal Commission recommended that the Complaints Unit, then attached to the Department of Health, be made an independent statutory authority. The Royal Commission also stated that a body with powers that affect the rights of individuals should have its powers defined and should be accountable to Parliament.

In 1993, the NSW Parliament passed legislation for the establishment of the Health Care Complaints Commission (HCCC) as an independent statutory body in 1994. The HCCC, as well as dealing with complaints and systemic issues concerning public sector health providers, was given powers to deal with initial assessment, investigation and, if necessary, prosecution of complaints about health providers (both registered and non-registered).

Controversies similar to Chelmsford, most notably the concerns about Ward 10B in Townsville, arose in other Australian states about this time, leading to the establishment of statutory health complaints commissions, albeit without the investigation and prosecution functions held by the NSW HCCC.

In 2004, the NSW HCCC was subject to review by a Special Commission of Inquiry into allegations about Camden and Campbelltown Hospitals (the Walker Inquiry). Although critical of the operations and policies

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2 (1917) 314 WN NSW 127.

3 David Thomas, 'The co-regulation of medical discipline in New South Wales, Australia' (Paper presented at the Greek Conference, Crete, May 2004) <http://greekconference.com.au/papers/2004/thomas.htm> at 21 November 2008, 3.

of the HCCC in several respects, the Walker Inquiry concluded in its final report that the statutory patient care complaints system was well designed and did not require major change.

Legislative changes did follow the Walker Inquiry, strengthening the HCCC's powers of initial assessment and establishing a Director of Proceedings within the HCCC. The Director of Proceedings, independently of the Commissioner and after consultation with the relevant board, makes the final decision about whether or not to prosecute a practitioner in disciplinary proceedings. Thomas saw these changes as a further move away from the peer review model and an enhancement of the independence of the HCCC.[4]

This move away from peer review or self-regulation in NSW reflects a broader movement. Freckelton in NSW notes that 'the international trend appears to be away from unfettered self-regulation of health professionals'.[5] Carlton also comments that:

> High Profile cases such as the Bristol Infirmary case in the United Kingdom have fuelled the notion that registration boards are, in fact, unable to deal properly with professionals whose conduct or performance is sub-standard, and that boards are failing in their duty to protect the public.[6]

Carlton cites a study by the Victorian Department of Human Services that found that many complainants to registration boards were dissatisfied with how their complaints were handled and viewed boards as biased and lacking independence.[7] This led to legislative change in Victoria, increasing the Victorian Government's power over the appointment of registration boards.

PIAC views the model of regulation set out in the consultation paper as move back to an unfettered system of peer review. PIAC supports a more balanced system where registration boards remain as part of the overall system of health complaints, with an independent body undertaking assessment, investigation and prosecution. PIAC submits that a best practice co-regulatory system should be introduced as part of the national registration regime for health professionals that conform to the set of principles set out below.

PIAC's response to the consultation paper

As stated above, PIAC supports the establishment of a national system of registration of health professionals.

PIAC sees merit in the view that the professions are central to setting clinical and accreditation standards as well as dealing with 'fitness to practice' issues for those entering the professions. The establishment of a national registration scheme would also allow for greater mobility of health professionals, which in turn could, if well managed, lead to enhanced access to health care by consumers. It is also important from a patient safety perspective that we have a national approach to recognition and verification of overseas qualifications. In a national marketplace it is vital that regional centres and the less populated capital cities have access to skilled and qualified health professionals.

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4 David Thomas, 'Peer Review as an Outmoded Model for Health Practitioner Regulation', in Ian Freckelton (ed), *Regulating Health Practitioners* (2006) 68 and 69.

5 Ian Freckelton, 'Regulation of health practitioners ' in Ian Freckelton and Kerry Peterson (eds) *Disputes and Dilemmas in Health Law* (2007) 500.

6 Anne-Louise Carlton, 'National Models for Regulation of the Health Professionals' in Ian Freckelton (ed) *Regulating Health Practitioners* (2006) 28.

7 Ibid, citing Health Issues Centre and Resolution Resource Network Bringing the Consumer perspective: Consumer Experiences of Complaints Processes in Victorian Practitioner Registration Boards <http://www.health.vic.gov.au/pracreg/hp-review.htm> at 19 November 2008.

In the context of complaints, performance and conduct matters, PIAC has previously called for a new national standard in Australian for the management of complaints within a health care context.[8] The adoption by all Australian Health Ministers of a Charter of Healthcare Rights and the decision of the Council of Australian Governments (COAG) to implement a national registration scheme for health professionals by 2110 provides the opportunity to achieve this goal and to reflect best practice in complaints management in the national framework.

Principles of good complaint management

PIAC notes that a set of principles are set out in the Consultation Paper as a guide to the model of health complaint management and the management of conduct matters, saying that the legislation should 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.[9]

PIAC agrees generally with these principles but submits that they are not reflected in the model proposed in the Consultation Paper.

PIAC submits that the model in the Consultation Paper is not sufficiently robust. PIAC sees the approach proposed in the Consultation Paper as adopting the lowest common denominator of the various state schemes rather than adopting the strengths of the various state schemes. PIAC submits that the overall effect of the model in the Consultation Paper is to give undue weight to the rights and interests of practitioners as against the rights and interests of health consumers. PIAC agrees with the statement in the Consultation Paper that a complaints/notification management system in health must operate 'above all else to protect the public from practitioners who are incompetent (to a greater or lesser degree), unethical, or impaired in their capacity to practice'.[10]

PIAC submits that a health complaints system that is compatible with nationally and internationally accepted standards should comply with the following principles:

- **Transparency and accountability**: That any organisation or authority that affects the rights of individuals should have clearly defined powers and be accountable.
- **Separation of powers**: That there is a clear separation of the role of regulation of accreditation and standard-setting matters from the role of assessment, investigation and prosecution of disciplinary and performance matters.
- **Independence, expertise and timeliness:** That assessment, investigation and prosecution should be carried out by an independent body that employs dedicated officers to carry out these tasks in a timely manner.

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8 PIAC, *A tool for healthcare improvement: Comment on the Draft National Patient Charter of Rights* (2008) 5.

9 Australian Health Ministers' Advisory Council, *National Registration and Accreditation Scheme for the Health Professionals Consultation Paper: Proposed arrangements for handling complaints, and dealing with performance, health and conduct matters* (2008) 7.

10 Ibid, 9.

- **Free from perceived bias:** That there should be no potential for perception by consumers that the system is structured so that the professions can protect their members at the expense of protecting the public interest and patient safety.
- **Procedurally fair, open and transparent:** That the processes to determine serious disciplinary and competence matters should comply with the rules of procedural fairness and be conducted in an open and transparent manner. Written reasons should be provided for all decisions. Hearings should be open unless there is a compelling reason for them not to be. All parties including the complainant/ notifier should have a right to request a review of a decision, which is conducted at arms length from the decision-maker.

All of these principles are to some extent embodied in the current NSW model of health complaints management. Whilst PIAC does not submit that the NSW model is a perfect one, it maintains that the NSW system is the best model for a national system that is currently operating in Australia. PIAC further maintains that NSW consumers should not be subject to a reduction in the protection of their healthcare rights in order to achieve a national framework.

PIAC submits that a national registration scheme is possible with the states and territories maintaining their own health complaints mechanisms. Therefore, if the scheme set out in the Consultation Paper is the preferred model for a national complaints regime, then PIAC will be urging the NSW Government to opt out of a national complaints scheme. Alternatively, similar to the proposition that the States maintain their existing disciplinary tribunals, the scheme could proceed with the States maintaining their existing complaint assessment, investigation and disciplinary systems, with the relevant complaints bodies consulting with the national registration boards.

PIAC submits that the model in the Consultation Paper reflects the lowest common denominator of all the state and territory models rather than being a best practice model and does not comply to the principles set out above for the following reasons:

1. **Transparency and accountability**: The powers of the nine national registration boards are not clearly set out and the model proposed has no accountability mechanisms.

   The HCCC in NSW does have defined powers under the *Health Care Complaints Act 1993* (NSW) and is accountable to a designated Joint Committee of the NSW Parliament as well as being directly responsible to the Minister of Health.

2. **Separation of powers**: The model provides no clear separation of the assessment, investigation and prosecutorial roles of the Boards from the other functions of the boards.

   In NSW, the HCCC has the roles of initial assessment of complaints, investigation of complaints and the carriage of the prosecution of disciplinary matters. The relevant registration board is consulted at the crucial decision making stages of theses processes. The relevant registration boards retain the functions of registration and maintenance of standards.

3. **Independence, expertise and timeliness**: The model leaves the crucial decision of whether to investigate a complaint or not, and the initial assessment of a complaint, to part-time boards and committees rather than dedicated trained officers. There is no mention of powers that the boards might need to effectively assess a complaint. The Consultation Paper canvasses the possibility of investigation functions of the boards being contracted out. Given it is proposed that these functions be carried out by part-time bodies, there is a greater possibility in unnecessary delay in dealing with complaints.

In NSW, the initial assessment decision is made by the HCCC with specific pre-investigation statutory powers to gather information before undertaking the assessment of the complaint. Investigations are carried out by HCCC Investigation Officers who have varied backgrounds including policing, nursing and the law. The *Health Care Complaints Act 1993* (NSW) imposes time limits on initial assessment and investigation of complaints.

4. **Free from perceived bias**: The model provides that decisions regarding assessment, investigation and prosecution are to be made by either the national registration boards or delegated committees and panels, all of which have a majority of membership from the relevant profession. Health consumers will inevitably and quite rationally perceive this as the professions judging themselves.

   In NSW, the HCCC is an independent statutory body that carries out these functions. The HCCC consults the registration boards on these matters, but if the HCCC wants to take more serious action, its view prevails.

5. **Procedurally fair, open and transparent**: The panels proposed to deal with serious performance issues are neither open nor transparent. The Consultation Paper recommends that the panels be, *prima facie*, closed bodies. Legal representation is to be allowed only in exceptional circumstances. There is nothing mandating the provision of written reasons for decisions. The Consultation Paper leaves open the question of reviews initiated by complainants/notifiers from the panels but does not support any reviews in 'health', ie, impairment, matters.

   In NSW, the equivalent to the panels in the Consultation Paper are called Professional Standards Committees (PSCs). Criticism of closed PSCs for medical practitioners after the Dr Graham Reeves controversy has led to changes to the *Medical Practice Act 1992* (NSW) making PSCs, *prima facie*, open bodies under that Act. There is, however, no provision for complainant-initiated reviews of PSC decisions in NSW and this is, in PIAC's submission, a weakness of the current arrangements.

Accountability and transparency

PIAC is concerned that the Consultation Paper does not include any proposal for the establishment of accountability mechanisms for the proposed nine boards exercising their assessment, investigation and communication functions.

It is unclear whether the Commonwealth Ombudsman would have any oversight role because the enabling legislation for the national registration scheme will be uniform state legislation rather than Commonwealth legislation.

This is of particular concern because, under the proposed model, the majority of the decisions of the boards in the complaints area will be made in private with little opportunity for public scrutiny. The review processes that are canvassed in the Consultation Paper are (with the one exception of a practitioner's right of appeal from a panel decision to a Tribunal) internal reviews with no further right to an external review or an appeal.

PIAC prefers the NSW model where an independent commission is responsible to the Minister of Health with a specific Joint Parliamentary Committee providing further accountability. The NSW Ombudsman can also review the administrative actions of the HCCC.

Separation of Powers

PIAC notes the reference in to the Consultation Paper to the existence of a 'separate investigation body' in 'some jurisdictions'.[11] PIAC understands that this refers to the system that operates in NSW and to some extent in the ACT. The Consultation Paper describes this as a 'tightly constructed model'.

The Consultation Paper includes the assertion that there are several aspects of the proposed model that deal with the lack of separation of powers. These are:

(a) Provisions for review and appeal as anticipated in the Intergovernmental Agreement (IGA);

(b) Provisions that there is no overlap between the membership of panels and the commissioning board or committee;

(c) Options for seeking review by notifiers.[12]

PIAC does not accept that these provisions, as set out in the Consultation Paper, in any way meet the principles that should underpin best practice in complaints management.

The Consultation Paper suggests only limited rights of appeal and review with regard to both notifiers/complainants and practitioners. It suggests less review rights than those that currently exist in NSW where there is an independent health complaints body.

Provisions to prevent overlap of membership are not clearly set out in the Consultation Paper. As has been already noted, there is nothing outlined in the Consultation Paper that indicates the national boards will have any accountability mechanisms. There is no mechanism proposed to prevent board members who are not on the panels nevertheless influencing decisions of a panel. The Consultation Paper includes the suggestion that many of the board decisions, in particular preliminary assessments, will be taken at a local level.[13] This in itself could lead to decreased opportunity for accountability and external scrutiny of decision-making.

The concerns about the lack of separation of powers are certainly linked to concerns about public perceptions of the complaints processes. Particularly in the case of medical practitioners, there is a public perception that 'doctors look after doctors'. In NSW, there has been a long line of public controversy going back to the Chelmsford Royal Commission where that perception has been reinforced by the perceived light treatment of 'rogue doctors', which has been seen as to the public detriment.

Carlton cites a British study by Rosenthal who 'found that medical practitioners experience an "overwhelming feeling of personal vulnerability" in their role, and "identify strongly with their colleagues" situation when an accident occurs and are quick to forgive'.[14]

PIAC submits, however, that the concerns about potential conflicts of interest are real concerns. There are actual conflicts of interest in the same body being in charge of registration, accreditation, maintenance of standards, assessment of complaints, investigation of serious complaints, impairment matters, performance matters, and the prosecution of complaints.

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11 Ibid, 31.
12 Ibid, 31.
13 Ibid, 18.
14 Carlton, above n6, 28, citing M Rosenthal, *The Incompetent Doctor: Behind Closed Doors* (1995) 21.

In Australia—even in the more heavily populated cities—and in particular within specialties in the larger professions and in the smaller professional groups, there is often both professional and personal contact between members of a profession. This contact is rightly encouraged for professional education and development, and sometimes just to maintain morale. However, a close-knit profession can lead to actual conflicts of interest if professional bodies are the bodies empowered to deal with serious allegations about conduct or questions of professional competence. Although it is often said that it is the interests of the professions to weed out the 'bad apples', there is often a countervailing concern for the professions not to let public controversies bring their particular profession into public disrepute. Changes in the law in the Australian jurisdictions following public inquiries—Chelmsford Hospital in NSW, Dr Reese in NSW and Ward10B in Queensland—that have resulted in the establishment of independent bodies to deal with health complaints, have all come after instances where the registration boards have been criticised for not doing enough about their 'bad apples'.

In NSW, there is very close consultation by the HCCC with the registration boards about assessment, investigation and prosecution but either a board or the HCCC can override the other body if the HCCC decides it is appropriate to take further disciplinary action against a practitioner. This is a very significant safeguard against possible conflicts of interests working against the public interest and the protection of consumers.

PIAC submits that an independent complaints authority, with a clear, statutorily defined close relationship with the relevant registration boards, should be an essential part of a national health complaints regime.

Independence, Expertise and Timeliness

Independence

There are strong reasons why the body that assesses, investigates and prosecutes a complaint should be independent of the professional registration body. Firstly, the existence of an independent body ensures the appropriate separation of powers (see above).

An independent body also assures members of the public that decisions are not being made to protect professional interests over the public interest (see below).

An independent body is able to deal with a range of complaints across professions and across service providers. An independent body can take a consumer's complaint that originally takes the form of a set of questions about a certain incident and deal with the systemic issues the complaint raises through investigation. If, in the course of that investigation, conduct or performance concerns about a particular health professional comes to light, it can, after the completion of the investigation, refer that practitioner to the performance stream of a board, refer the practitioner to a board as an impaired practitioner, or refer the practitioner to a tribunal for disciplinary action.

An independent body can deal with a complaint against a hospital, a nurse, a doctor or any other health professional at the same time. It can deal with systemic issues as well as disciplinary issues at the same time.

The system that is proposed in the Consultation Paper, in contrast, effectively means a complaint, after initial assessment, will either be dealt with as a disciplinary, performance or impairment matter by a board, or conciliated or resolved by a complaints commission. Although there is scope for the related conduct arising out of one incident to be dealt with by different boards dealing with different professions, as well as a complaints commission dealing with a health provider on the same issue, this will be confusing, frustrating and time consuming for complainants, often requiring them to tell the same story and give the same

evidence time and time again. There is also a danger that each separate body will reach separate conclusions regarding the seriousness of the complaint, leading to less certainty for complainants, health providers and health professionals.

Expertise

A very significant decision for a consumer reporting what they perceive is misconduct by a health professional is the decision about whether or not to investigate the complaint. The Consultation Paper provides a list of eight issues that would have to be considered in a preliminary assessment of a complaint.[15]

PIAC submits that proper consideration of all of these issues requires independent and dedicated decision-makers.

To reach decisions on these issues in an appropriate manner requires an application of the principles of natural justice (including advising the practitioner of the complaint and providing a mechanism for a response). It often requires the gathering of additional information from both the complainant and third parties. This in itself usually would require statutory powers regarding initial assessments. Understanding of privacy principles is also important in this regard. Often there is an opportunity to resolve the complaint after discussion with both parties and perhaps an exchange of information. All of the above requires both time and skills that PIAC submits would not necessarily be available through part-time boards and panels.

The investigation function requires dedicated employees with particular skills. To be an effective investigator in the medical area, a person needs to have knowledge of the medical system, both private and public, rather than the particular skills of a particular health professional. Investigators also have to be aware of the legislative framework in which they are operating. An investigator has to be aware of the rules of natural justice and how to apply them. Members of the professions can offer peer advice on both ethical and standards. (The HCCC in NSW employs its own medical and nursing advisors to assist with both assessment and investigations.) While the larger national boards could certainly employ dedicated officers with a range of these skills, this would not be possible with the less populated professions.

Timeliness

Having part-time bodies (including panels) carrying out initial assessments would inevitably lead to time delays in the complaints and disciplinary processes. PIAC submits that any national complaints system that eventually is introduced should have clear statutory timeframes in which particular processes have to be completed. PIAC also submits that without either oversight from an outside body or penalties for non-compliance, there is no incentive for any organisation or body to keep to timelines even if they are based on statute. Independent authorities remain vulnerable to time delays but if those bodies are accountable through independent oversight, response times and compliance with timeframes can be monitored. If individual dedicated workers are responsible for time delays this can dealt with within a performance management context. This may not be possible with part-time board members and panels.

Public Perception of Partiality

The Consultation Paper makes it clear that the majority of members on a national registration board would be members of the relevant profession. The same applies to panels and, presumably, committees that are tasked to make significant decisions. This is totally appropriate for the boards' roles in registration and maintenance of professional standards.

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15 Australian Health Ministers' Advisory Council, above n9, 11.

However, if a board, panel or a committee that has a majority of members of the relevant profession makes a decision not to investigate or not to take disciplinary proceedings after an investigation, there will often be a concern from members of the public, in particular the complainant, that the board have acted in a partial manner to protect a colleague. If there is no external review or appeal available to complainants, this is exacerbated.

PIAC submits that public confidence in the complaints system is vital to its success. People will not complain if they do not have confidence in the complaints system. Yet, despite efforts to increase reporting by other health professionals through the introduction of mandatory reporting, the reality is that the major source of notifications about the conduct and competence of health professionals will continue to be complaints by health consumers. Therefore public confidence in the complaints system is vital to the maintenance of public safety in the health system and the protection of the public from unethical and incompetent health professionals.

If the boards are to remain in the form envisaged in the Intergovernmental Agreement, then the only way to maintain public confidence in the health complaints system would be to include within that system an independent authority separate from the boards, to assess, investigate and prosecute complaints/notifications.

Openness and Transparency

Reasons for decisions

PIAC believes that in all decisions affecting the rights of practitioners and the healthcare rights of consumers, the body making the decision should be required to provide written reasons for the decision. There is no provision mandating written reasons for decisions in the Consultation Paper, except that practitioners are to be given reasons if they are to be referred to a Tribunal.

Open panels and committees

Under the model in the Consultation Paper, if the relevant board does decide to investigate a complaint/notification it then could be referred to a panel that would conduct its hearings in private. The Consultation Paper refers to conduct panels and performance panels. Conduct panels appear to be similar to what are called Professional Standards Committees in NSW. There is no equivalent to performance panels in the NSW model.

PIAC has no objection to the procedure in NSW that less serious concerns regarding a health practitioner's conduct or competence be referred to a performance stream managed by a registration board. The only caveat to this is that the complainant/ notifier be advised of the outcome of the complaint and any final action taken by the board.

However, it is proposed that conduct panels deal with more serious matters. As currently is NSW practice, a conduct committee would be able to place conditions on a practice and to give undertakings that might restrict their practice. Apart from de-registration, suspension and imposition of fines, these are the same as the powers of a disciplinary tribunal.

PIAC submits that if the panels are to deal with serious allegations about competence and unsatisfactory conduct, then the panels should be open unless there are compelling reasons not to do so. Any exceptions to a panel being open should be set out in the enabling statute. The reasons for a panel's decision should also be made public. A recording of the proceedings of the panel should be made, and a transcript be made available to the parties.

Openness of the conduct panels would not only increase the confidence the public has in the complaints process; it would also provide those participating in the process with the information they need to make further decisions. Complainants / notifiers would have a full picture as to how the issues that they raised were dealt with. It provides other health practitioners with clearer guidance with regard to standards and ethical issues.

Recent amendments to the *Medical Practice Act 1992* (NSW) have made Professional Standards Committees under that Act *prima facie* open bodies.

Former Justice Deidre O'Connor, in reviewing the amendments to this legislation, made the following comments, contrasting the openness of the Medical Tribunal dealing with serious matters with closed PSCs:

> However, as the PSC decision in the Reeves case demonstrates, PSCs also deal with serious matters. Indeed, it could be argued that any allegation that a registered medical practitioner has engaged in unsatisfactory professional conduct is a matter of public interest, and that there should be public access to such proceedings, in just the same way there is in respect of court and tribunal proceedings generally. It is in the public interest, and it likely to further the paramount consideration of public protection, for there to be greater transparency and accountability in respect of the conduct of PSCs under the Medical Practice Act.[16]

PIAC is in firm agreement with Justice O'Connor on this point.

Legal representation

Under the model in the Consultation Paper, on the face of it no legal representation would be allowed in the panel or committee or before the board.

PIAC believes a party who has their rights potentially affected by a decision-making body should have a right to have legal representation before that body. If this creates inequality of representation, then this should be addressed through appropriate resourcing of and availability of assistance from free legal assistance providers, not through depriving all parties of the right to be legally represented.

Rights of appeal and review

The Consultation Paper is open about the possibility of practitioners seeking a review of significant decisions in the complaints and disciplinary process.

With regard to rights of review for complainants/ notifiers, Option 2 in the Consultation Paper suggests a possible review of the preliminary assessment decision where that decision is to take no further action and where the decision is to refer matters to conduct or performance committees rather than a referral to a disciplinary committee.[17]

PIAC submits that there should be a right of review for all relevant parties—notifiers, complainants, and practitioners—after every significant decision in the complaints process that affects any or all of those parties' rights.

PIAC disagrees with the proposition that it is inappropriate for a notifier/complainant to request a review of a decision to refer a practitioner to a 'health' or impairment panel. A complaint about serious conduct can

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16 Deidre O'Connor, *Review of Medical Practice Amendment Bill 2008* (2008) 9.

17 Australian Health Ministers' Advisory Council, above n9, 20.

still be dealt with in this way, despite its seriousness. If a complainant believes that a compliant should be dealt with by a disciplinary body, he or she should have the opportunity to make that point to a decision-making body on review.

PIAC submits that, after an internal review, in respect of decisions that cannot be appealed to a tribunal or court, there should be a mechanism where an Independent Review Panel, with persons of appropriate expertise as well as practitioner and consumer representatives, can be asked to review the decision.

In NSW, there is an internal review provided for complainants after an initial assessment decisions and after a post-investigation decisions by the HCCC. The HCCC did have an external review panel that did not have a statutory base, but it no longer operates.

Other issues

Notifiers and / or complainants

PIAC notes that the Consultation Paper suggests that the words 'notification' and 'notifier' are to be used exclusively to describe matters before a board and the person or organisation who brings matters to the attention of a board.

PIAC submits that the words 'complaint' and 'complainant 'should continue to be used interchangeably with 'notification' and 'notifier', as these are familiar terms to health consumers. Information about how to make a health complaint should be widely disseminated and health complaints should be promoted as an important factor in improving patient safety. State and territory health complaints commissions have been involved in public promotions in these areas for some time. If only 'notification' and 'notifier' are used in the legislation and official publications, the risk is that health consumers may not identify themselves as a 'notifier' making a 'notification' and therefore not take any action about a serious concern about a health practitioner.

Advertising

PIAC welcomes the inclusion of the regulation of advertising in the Consultation Paper. PIAC submits that, whatever the form that a national registration of health practitioners finally takes, one of the challenges that the complaints regime will face is the increased commercialisation and corporatisation of medicine. PIAC agrees with the principles in Option 3 in the Consultation Paper on this topic.[18] PIAC believes that the body or bodies that are charged with the disciplining of health professionals should work closely with the Australian Competition and Consumer Commission (ACCC) and state fair trading departments or agencies in regulating the advertising of health services.

PIAC notes that CHOICE has submitted a response to the Consultation Paper and agrees with the general thrust of CHOICE's comments and recommendations in this area of policy.

Conclusion

PIAC submits that the best practice model for a system of national registration of health professional is one where:

(a) an independent statutory body is responsible for the initial assessment of notifications/complaints, the conduct of investigations and the prosecution of disciplinary and serious performance matters;

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[18] Australian Health Ministers' Advisory Council, above n9, 41-42.

(b) the national boards remain responsible for registration, accredititation and setting and maintenance of standards;
(c) the boards and the independent complaints body are co-regulators applying a legislative framework that ensures , that if the two bodies disagree, then the precautionary principle applies, and the most serious course of action is taken in relation to the complaint.

PIAC submits that, as an independent body to assess, investigate and prosecute complaints is essential to the establishment of a best practice co-regulatory scheme for handling health complaints that:

- either a national independent health complaints body is established to carry out the assessment and investigation of complaints/ notification (possibly with an independent Director of Proceedings to prosecute disciplinary matters); or

- the national scheme allow the existing health care complaints bodies in the states to function as co-regulators with the national boards, using the existing separate state and territory regimes for assessment, investigation and prosecution of complaints.