



Medical Board of South Australia

Our ref: MBSA 528/08

20 November 2008

Ms Bronwyn Nardi
Chair
Complaints Arrangements Submission
Attention: Practitioner Regulation Subcommittee
of the Health Workforce Principal Committee

By email: nraip@dhs.vic.gov.au

Dear Ms Nardi

Further to your request for a written submission in relation to the proposed arrangements for handling complaints, and dealing with performance, health and conduct matters please find attached a submission from the Medical Board of South Australia¹. I take this opportunity to thank you for the extension of the 17 November 2008 deadline. If there are any points of clarification required please don't hesitate to contact me by telephone or email.

Yours faithfully

JOE HOOPER
REGISTRAR/CHIEF EXECUTIVE OFFICER

Enc¹ MBSA Submission

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NATIONAL REGISTRATION AND ACCREDITATION SCHEME FOR THE HEALTH PROFESSIONS

CONSULTATION PAPER

Complaints Arrangements Submission

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

by

Medical Board of South Australia

The Medical Board of South Australia (MBSA) makes the following submission in relation to the Consultation paper:

Introduction

Key areas of concern to the MBSA in the proposed model have been identified. They require careful and serious consideration in order to achieve the objectives of the scheme. They are:

- Purpose of regulation as distinct from complaints resolution
- Separation of Powers and delegation to panels/Tribunal
- Mandatory reporting
- Students
- Impairment programs
- Monitoring

Each of the key areas is addressed below.

Detailed comment specific to the itemised proposals is contained in **appendix 1**. The comments specific to the key issues highlight the complexity of the processes for managing conduct, performance and impairment and advise that current efficiencies and standards may be lost under the proposed arrangements. There seems to be a high probability that the proposed structures and processes will lead to unnecessarily complex, costly and high risk outcomes.

1 Purpose of Regulation as distinct from Complaints resolution

The proposed use of the term 'notification' is agreed and has significance in understanding the role of a regulatory authority as distinct from that of a Health Complaints Commission (HCC) and the consequent consumer expectations of each.

The role of the regulatory authority is to regulate in the public interest. It does this by developing and maintaining appropriate standards of professional conduct and performance and ensuring that registrants are fit to practice. Action may be taken against the registrant who fails to meet standards of practice or behavior where a public risk or public interest is exposed.

Action taken is to remove risk and is not punitive to the registrant, although that may be a secondary result. Action may be deterrent in nature to ensure the rest of the profession is aware of the seriousness of the conduct.

Complaint handling has a different philosophy and outcome objectives - the goal is satisfactory resolution for the complainant, regardless of whether a public risk exists or not, and action is focused on the individual consumer and service provider not the general risk to the public.

Complaints handling procedures in the health care system are well understood in Australia and standards were developed by the former Australian Council on Quality and Safety in Health Care.

Having accepted the difference in roles between HCCs and Regulators, it is possible to distinguish those matters which require referral to each and the mechanism by which each matter is addressed.

It is critical for the proper functioning of a regulatory system that the above distinctions between regulation and complaints handling are understood and reflected accurately in governing legislation.

The discussion in the paper under 2.1.1 appears to totally misunderstand the above distinctions. The paper refers to the *source* of the 'complaint' as being broad and so 'notification' is used to capture all sources. Whilst multiple sources of notification are to be anticipated, and encouraged, this is not the reason for use of the term 'notification' which is expressly used to distinguish it from a 'complaint'. It is concerning that the paper appears to reflect a fundamental lack of understanding of the difference between complaint resolution and regulatory investigation and management of notifications!

2 Separation of Powers

There are significant concerns in relation to the proposed governance arrangements, structure and complexity of the scheme. Attached as **appendix 2** is a map representing what we believe is proposed as the process for notification handling. The delays, resources and logistics involved will prove costly, inefficient and overly bureaucratic for the majority of notifications and represent a downgrading of current practices for MBSA. Our preferred model for receipt,

assessment, investigation and determination is outlined at 5.5.1 and 6.2.1 in Appendix 1 and represented diagrammatically in **appendix 3** attached.

2a Relationship between Regulator and HCC

The distinction between the functions and powers of the regulator and any State/Territory HCC is necessary in order to clarify public access issues and outcome objectives.

There should be a formal relationship between the two bodies. The regulator being responsible for assessment, investigation and determination of notifications related to conduct, performance and health. The HCC investigates system issues and lower level matters which are more amenable to direct resolution.

There are working examples of the above and we attach a copy of the arrangements which exist in South Australia between the MBSA and the Health and Community Services Complaints Commissioner (HCSCC) (**appendix 4**). These arrangements have proven to be efficient, resource effective and allow for early resolution of matters.

NB: At no point in the process should the regulator become involved in conciliation and mediation between the notifier and the registrant. This would confuse the roles of HCC and regulator.

2b “Chinese Walls”

The argument that a single body may not fairly assess, investigate and conduct proceedings is unfounded. There are significant resource, expertise and public safety reasons why the National Board and its delegated officers, committees or panels can and should oversee all aspects of any matters. Indeed this model exists today and in conjunction with the appropriate transparency, oversight and rights of appeal, which exist in any natural justice environment, has been proven to be successful when properly enforced.

Investigation can be undertaken by either externally appointed or internal investigators/solicitors who are accountable to the Board via the delegate (statutory officer or Committee) and act on their instructions.

Prosecutions are undertaken by the delegated statutory officer for less serious matters that cannot be resolved by consent at management committee level. Panel members have no involvement in or knowledge of the notification until they hear the matter.

The hearing panel should have delegated authority to lay serious matters – warranting suspension or cancellation of registration - before the Tribunal.

Appeals on merit would be determined by the Tribunal for panel decisions or by the Supreme Court for decisions of the Tribunal.

A similar model currently exists in SA which meets natural justice expectations and can be implemented quickly to avoid disruption to local matters during any transition to the national scheme.

2c Delegation of Powers

The proposed model is highly complex and cumbersome when assessing and progressing notifications. There appears to be a lack of recognition of the operational expertise necessary to progress matters efficiently on a day to day basis.

We propose that notifications are managed in accordance to our response to proposal 5.5.1 (appendix 1). Integral to this process is the appointment of statutory officers with appropriate powers to oversee the day to day management of matters and take immediate action if required. Under the model currently proposed decisions will be unnecessarily delayed whilst committee meetings are called unless actions necessary to protect the public are initiated by the statutory officer.

Furthermore the availability of a person with delegated authority with whom the Minister's office, Health Department, employers and doctors can discuss management of current cases is necessary to provide an efficient and safe regulatory environment.

2d Ministerial Separation

It is a fundamental premise that the National Board and its delegated officers or Panels will operate independent of outside political influence. The model arrangements create a potential conflict with any appointed officers being responsible to the National Agency not the Board. The National Agency in turn reports to Ministers via the Ministerial Council. This is not consistent with independent office holders exercising their delegated functions on behalf of the Board. The appointed officer holders should be accountable and report to the Board and delegated local committee, not to the agency.

3 Mandatory Reporting

The issue of mandatory reporting has broad support and appears to revolve around the questions of who, what and when?

3a Who should report?

The MBSA currently has mandatory reporting for certain matters by:

- Self

- Employer, including public and private medical service providers
- Treating practitioner (including any professional treating an impaired practitioner reporting to the relevant professional Board)
- Educational institution

MBSA would like to see other agencies broadly responsible for public safety added to the above categories. These would include:

- Colleagues, including members of other professions working with or otherwise aware of a matter
- Police, where they are investigating a possible offence with serious consequences for public safety or one which carries a maximum penalty of imprisonment of 2 years or more.
- Coroner
- Professional organisations (Colleges, Associations, Training providers) where there are public risk considerations relating to a member's practice.
- Medicare Australia

One important consideration is the protection of the reporter in the legislation. The MBSA does not consider that the current proposal goes far enough. It should provide protection from all civil, criminal and disciplinary liability. Mandatory reporting in the absence of strong protections for the notifier against any recriminations (such as assisted legal action for workplace bullying) requires further consideration.

3b What should be reported?

In broad terms health impairment, poor conduct and poor performance are the proper subject of mandatory reporting to a Board.

The matter of criminal checks at time of registration or renewal has previously been opposed by MBSA in the submission relating to registration arrangements. Whilst the Board believes that criminal history checks are relevant, they should be undertaken by:

- The Department of Immigration and Citizenship (DIAC) for any international medical graduates (IMGs) entering Australia.
- Employers seeking specific criminal history checks in relation to the area of practice or matters of relevance to that employer. If undertaken by an employer the check will be specific and current.

It is not proven that there has been information likely to affect registration decisions revealed in those jurisdictions where criminal history checks have

commenced. Therefore whilst politically appealing, it has negligible benefit for regulation purposes.

The burden upon the state and Commonwealth police for undertaking criminal checks for some 600,000 health professionals on a regular basis seems overly burdensome, bureaucratic, costly and for little or any positive gain.

However, criminal matters should be the subject of mandatory reporting by police and other agencies and dealt with upon notification of the breach. This will be of more value than an annual check to confirm negative results from the majority of practitioners.

4 Students

MBSA supports students being included in all aspects of regulation including being responsible to the regulatory body for conduct, health and performance throughout their undergraduate years. The literature suggests that those students who have cause to be notified to the regulator have a higher than expected probability of coming before the regulator later in their career. Therefore, as a preventative and early intervention strategy students should be fully accountable to the regulator to the same extent as the registered health professional.

5 Impairment Programs

MBSA currently supports the *Doctors Health Advisory Service* which is a voluntary group of general practitioners and specialists. Their role is to advise and assist medical practitioners as necessary.

MBSA is also in discussions with the SA government concerning an expanded program similar to, but different from, the Victorian Doctors Health Program. It will be important to carefully consider any legislation to ensure that successful and innovative models such as these are allowed to continue. Specific attention must be given to local capacity to form memoranda of agreement where this is in the public interest.

6 Monitoring

Monitoring of professionals whether for reasons of conduct, health or performance is not a function to be borne solely by regulatory bodies. This is neither reasonable nor appropriate. The capacity of any single body to properly provide the necessary oversight is extremely limited. The reality is that regulators rely on mechanisms involving others to monitor practice. These mechanisms include assessments, supervision reports, limitations of practice, audits and, where required, competence examinations.

The roles and responsibilities of the profession and of the employer must be recognized and proper governance arrangements instituted within the legislation.

Employers have been singularly and jointly responsible for many of the well known medical cases of recent years. The capacity of the employer to allow medical practitioners to practice outside prescribed limitations of practice, away from proper supervision and scrutiny, and to avoid any reporting duty to a board where poor performance or indeed criminal negligence has occurred has been a root cause of the problems leading to radical changes being proposed under national regulation. To ignore or overlook the importance of the employer's obligations as an element of the regulatory system would be negligent. MBSA is therefore pleased to note that duties on employers are contained in the proposed model and for this reason we support option 2b with broad reporting obligations on employers covering both health *and* conduct matters. *We would support performance also being included in the descriptor of what must be reported.* This would capture initial notifications and continue as an obligation on employers for monitoring purposes

Therefore, any legislative model must include the mandatory reporting requirements of employers, including State and Territory public sector employers, and powers of enforcement. If this proves impossible then the regulator must be given the power to notify health department Chief Executives or Health Ministers of breaches of conditions which have the potential to cause public harm.



JOE HOOPER
REGISTRAR/CHIEF EXECUTIVE OFFICER

Encs

- Appendix 1 MBSA response to specific proposals
- Appendix 2 NRAS proposed complaints and discipline model
- Appendix 3 MBSA proposed notification management process
- Appendix 4 Health & Community Services Complaints Act 2004 – Part 7 section 57(5) Protocol with MBSA

**Proposed arrangements for handling complaints,
and dealing with performance, health and conduct matters
- MBSA responses to specific proposals**

NB Where no response is made the MBSA agrees with the proposal contained in the Consultation Paper.

Proposal 2.1.1

'Notification' preferred term – see paper for concerns related to ensuring distinction between regulatory and complaints handling frameworks and objectives.

Proposal 2.1.3

'Notifications Assessment Committee' preferred term

Proposal 2.1.9

Agree with the broader term 'health assessment'. Health assessment should be defined to include invasive procedures eg being required to undergo blood tests, MRI and X-ray investigations.

Proposal 2.1.15

The term "not fit and proper" is recommended. This term incorporates broader concepts of moral integrity and possession of requisite knowledge of duties and responsibilities of holding a particular registration as well as the issue of maintaining public confidence in the profession and the regulator.

Proposal 2.1.18

The MBSA agrees with use of term '*unsatisfactory professional conduct*'. However we do not agree that the term is interchangeable with unprofessional conduct which is subject to a higher legal test more akin to the term professional misconduct.

Clause 3.1

The separation of matters into three separate streams is artificial and reveals a flaw in the proposed model. For example, the proposal suggests all matters of unprofessional or unsatisfactory professional conduct would be referred through the disciplinary stream, when in fact the matter may have a health or performance origin. Also there is a suggestion that one can only refer to the health or performance stream in the absence of public harm. Matters may result in public harm, but be caused by illness of the registrant. To treat such matters as disciplinary is retrograde and inconsistent with present modern day regulatory practice. Any matter may enter any stream following assessment. There seems to be confusion in the approach described between administrative law (regulation) and civil and criminal law approaches.

The final paragraph of this clause stipulates that a secondary objective of the notifications management system is resolving patient grievances "*in a manner that is satisfactory to notifiers*". This objective is not compatible with regulation in the broader public interest. Whilst it would be ideal to reach a resolution satisfactory to all interested parties, the principal overriding factor must be that the Board takes whatever action it considers necessary to protect the public health and safety. The role of resolving grievances is more appropriately within the purview of the Health Complaints

Commissioners. If the term 'notifications management system' is intended to include the HCC then this should be clearly defined.

Proposal 3.3.1

The definition of unsatisfactory professional conduct should not include (b) '*unsatisfactory professional performance*' which is actionable as a performance issue or (d) '*breaching conditions or undertakings*' which should be considered as professional misconduct.

Unsatisfactory conduct should include failure to comply with a provision of a Code of Professional Conduct or Professional Standard endorsed by the Board.

The definition of professional misconduct should include improper or unethical conduct that demonstrates a substantial or consistent failure to meet accepted standards of professional conduct.

The MBSA submit that the definitions of unsatisfactory professional conduct, unsatisfactory professional performance and professional misconduct need to be reconsidered and examples of conduct that would fall within each definition would be a useful addition.

Proposal 4.3.1

The reference to 'habitual misuse of alcohol or other drugs' is too narrow. This would require proof of habitual misuse. It is more appropriate to have a broader provision encompassing all **use of alcohol of other drugs** which affects a registrant's capacity to practice.

The reference to 'not of good character' should be changed to 'not a fit and proper person' (see below).

Proposal 4.3.2

It is submitted that this proposal can apply to conduct matters. The Tribunal will require disciplinary sanctions that can be applied to a person who no longer holds registration such as censure, fine and disqualification.

However, the investigation of health or performance matters is problematic. For example, a performance assessment can only occur in circumstances where a person is registered. A former registrant with performance concerns could be put in a position where a performance assessment cannot be conducted until they are registered, however registration will not be granted until the performance concerns have been addressed. Further, what action could the Board take if a former registrant refuses to submit to a health assessment? Health/ performance concerns would be more appropriately investigated on application for reinstatement to the register where the Board should have power to require a health/ performance assessment be conducted and/or require the registrant to produce a report from treating registrants.

Proposal 4.4

Option 1b is preferred for registrants.

Registrants have an ethical obligation to report a colleague whom they reasonably believe is placing the public at risk. The intent of the legislation should be that all concerns are brought to the Board's attention and determinations made after due investigation. The extended obligations create a legal duty which will afford the notifier legal protection for doing so.

It is agreed that there should be obligations to report across professions (eg nurses reporting doctors) and a requirement that such reports must be investigated (cf Bundaberg Hospital Inquiry).

Option 2b is preferred for employers (also including obligation to report impairment). Again, the Bundaberg Hospital Inquiry demonstrates the importance of conduct concerns that are brought to the attention of employers being reported and duly investigated by the appropriate regulatory authority.

For students there should be an obligation on the educational institution to report suspected impairment and unsatisfactory professional conduct/professional misconduct. Research shows that underperforming students are more likely to experience difficulties throughout their professional career. Early intervention could either address these concerns or, in extreme circumstances, lead to action to prevent the student progressing through the course.

Proposal 4.5

Where the notifier has acted in good faith, protection should be extended to all civil or criminal liability. Further, the legislation should provide that the notifier cannot, by virtue of doing so, be held to have breached any code of professional etiquette or ethics, or to have departed from any accepted form of professional conduct.

Proposal 4.7.1

It is the experience of the MBSA that in most instances the protection of the public interest can be achieved by the registrant voluntarily providing undertakings (eg to not practice without first obtaining permission of the Registrar, not to consult patients under the age of 18 years, not to prescribe drugs of dependence etc).

In cases involving the performance or conduct of a registrant, where the registrant refuses to give appropriate undertakings or the conduct is sufficiently serious (ie convicted of a serious criminal offence), it is submitted that the Board may make application to the Tribunal seeking immediate suspension of a registrant's registration pending the hearing and determination of proceedings. The Board and the registrant would then be required to present submissions to the Tribunal. The Tribunal should also have the power to impose conditions in lieu of suspension.

In cases involving health, where the registrant refuses to give appropriate undertakings it is submitted that a Statutory Officer have the power to make an application to a panel of the Board seeking an order immediately suspending a person's registration on health grounds. A similar procedure would apply before the panel of the Board. Any appeal to such a decision may be laid before the Tribunal.

In South Australia the legislation was recently amended to provide that the power to immediately suspend is exercisable where it is '**in the public interest to do so**'. A public interest test incorporates broader concepts than protection of the health and safety of the public, for example maintenance of public confidence in the profession and in the regulator.

Proposal 5.1.1

The proposed structure places a heavy workload on Committees of the Board. It is unclear what role, if any, is proposed for jurisdiction-based employees of the National Agency. It is suggested that the power to conduct preliminary assessments of notifications be delegated to Statutory Officers/Registrars and/or senior staff members.

This will ensure that the assessment of notifications is timely, efficient and has the necessary flexibility for immediate action pending investigation where required in the public interest.

It is proposed that the purpose of a preliminary assessment is to determine:

- Whether it is within the jurisdiction of the Board to deal with the notification;
- Whether consultation with the HCC is necessary;
- Whether the notification should be referred to an external body (eg Police or Medicare);
- Whether any immediate action such as completion of undertakings is required pending investigation of the notification (including whilst the matter is being investigated by an external body);
- Whether there are grounds to refuse to deal with the notification; and
- Whether the notification should be dealt with, in the first instance, as primarily a performance, health or conduct matter.

Proposal 5.3.1

The proposal to consult on all notifications is administratively burdensome for both the Boards and HCCs. An alternative would be for the Boards and HCCs to individually assess notifications relating to health registrants against established criteria and consult regarding referral only on those matters where the appropriate body to investigate the notification is unclear. The Board and HCC would then exchange summaries of new notifications received each month. A copy of the referral protocol that currently exists in South Australia is annexed as appendix 2.

Proposal 5.4.1

Refer to 5.1.1 above

Proposal 5.5.1

Clarification of the role and powers of the notification assessment committee (NAC) is needed. The role of the NAC appears to overlap with those of the management committees and potentially Statutory Officers/Registrars.

The proposed structure does not have a mechanism for the early clarification of misunderstandings that may have led to a notification being made. This is likely to result in significant delays and expenditure of resources on unnecessary investigations.

It is submitted that the legislation provide Statutory Officers/Registrars with powers to make day to day decisions on the management of notifications and the ability to take immediate action where necessary to protect the public as outlined in 5.1.1 above

Where the Statutory Officers/Registrars determine that a notification be investigated, a copy of the notification should be sent to the registrant inviting a response and requesting the production of relevant records. The notification, response and relevant records would then be considered by the relevant management committee. The management committee then determines whether further investigation (including performance assessment or health assessment) is required, and if so, appoints a lawyer or investigator to investigate. The management committees would oversee the investigation, performance assessment and/or health assessment and provide recommendations to the Statutory Officers/Registrars as to appropriate action to ensure public protection.

It is proposed that the majority of matters could be resolved at management committee level with the agreement of the registrant. This should include formal findings by consent that a registrant has engaged in unsatisfactory conduct, unsatisfactory performance or is medically unfit to provide medical treatment. Available sanction would be the same as those available to hearing panels.

If an appropriate resolution cannot be achieved by agreement, or the matter is sufficiently serious to warrant sanctions greater than can be imposed by a management committee, the Statutory Officer/Registrar would have the power to lay a matter before a hearing panel. The hearing panel will then determine whether to hear and determine the matter or, if the matter is sufficiently serious, lay the matter before the Tribunal on behalf of the Board.

All of this would occur after due investigation and the registrant being provided with an opportunity to respond.

The MBSA position in relation to immediate suspension is addressed at 4.7.1 above.

Proposal 5.5.2

The reference to the term 'not of good character' should be replaced with 'not a fit and proper person' (see below).

The power to refer a matter to the responsible tribunal should occur after a notification is duly investigated (see 5.5.1 above).

Proposal 5.6

Option 1 is preferred

The legislation must be framed in a manner that makes it clear that the Board performs its regulatory functions in the public interest. This requires the Board to take into consideration a range of factors which generally extend beyond the interests of the notifier.

The inclusion of a merits review of a Board decision would be to misunderstand the role of regulation and add significant costs for the profession and delays to final outcomes. Giving notifiers a right to merit review of committee decisions may undermine the committee's decision making and result in inappropriate factors being taken into account when making public interest decisions.

Independence can be achieved by ensuring that committees/ panels are comprised of no more than 50% of members from the same health profession as the registrant.

It is agreed that notifiers should have the right to seek review via the Ombudsman on matters of process but not the merits of a decision.

Proposal 6.1.1

The reference to professional misconduct or unsatisfactory professional conduct should be removed. Performance should not be seen as a lesser pathway for dealing with lower level conduct matters. Serious performance issues should still follow a performance pathway rather than being addressed through a disciplinary process. Similar powers should be available to take necessary action to protect the public until the registrant has addressed the performance concerns and can satisfy the Board that they are safe to return to full practice.

Sometimes both streams are applicable and individual Board arrangements may combine functions as necessary (see further below 6.2.1).

Proposal 6.2.1

It is the experience of MBSA that matters of conduct, performance and health can be intertwined. In order to ensure timely responses to notifications and avoid unnecessary duplication of resources, it is submitted that the distinction between the role and powers of conduct/performance/health management committees is unnecessary and would be better conferred on management committees with the ability to deal with any type of notification (conduct, performance or health). For example, during the course of investigating conduct allegations it may become evident that the issues actually relate to performance. Rather than a new committee having to familiarise itself with the matter, there should be flexibility to allow the original committee to arrange a performance assessment and make performance related decisions.

There should however be a separate health program where registrants are referred by the management committees for ongoing monitoring and facilitated return to practice.

Proposal 6.2.2

These powers should be available to all management committees – refer to 5.5.1 and 6.2.1 above. The management committees should also have the ability to make a finding by consent that a registrant is medically unfit to provide medical treatment and exercise those powers as listed in 7.5.1.

Proposal 6.3.1

Refer to 5.5.1 above

Proposal 6.3.2

The registrant should be provided with an opportunity to submit a written response to an assessment report within 14 days of receipt of the report.

The registrant would then attend the relevant management committee to discuss the report and options for remediating any deficient areas of practice.

Proposal 6.3.3

The legislation should provide for the Statutory Officer/Registrar to make application to the Board seeking the immediate suspension of a registrant's registration until such time as they submit to a performance assessment. A right of appeal should then lie with the Tribunal.

Proposal 6.4.1

Refer to 5.5.1 above. It is proposed that the Statutory Officer/Registrar may lay a matter before a hearing panel where an appropriate resolution cannot be achieved by consent or the matter is sufficiently serious to warrant sanctions greater than can be imposed by a management committee.

All hearing panels should be presided over by an experienced legal practitioner.

Proposal 7.1.1

Reference to 'habitual use of alcohol or other drugs' be changed to 'use of alcohol or other drugs' (see 4.3.1) and consequent changes to 7.2 and Proposal 7.2.1.

Proposal 7.1.2

Option 1 is preferred

Proposal 7.3.1

The legislation should empower the management committees to require the registrant to undergo an invasive procedure (eg blood tests, MRI and X-ray) as part of a health assessment.

Proposal 7.3.2

A registrant should be provided with an opportunity to submit a written response to an assessment report within 14 days of receipt of the report.

The registrant would then attend before the relevant management committee to discuss the report and options to address any concerns identified.

Proposal 7.3.4

The legislation should provide for the Statutory Officer/Registrar to make application to the Board seeking the immediate suspension of a registrant's registration until such time as they submit to a performance assessment. A right of appeal should then lie with the Tribunal.

Proposal 7.4.1

Refer to 5.5.1 above. It is proposed that the Statutory Officer/Registrar may lay a matter before a hearing panel where an appropriate resolution cannot be achieved by consent or the matter is sufficiently serious to warrant sanctions greater than can be imposed by a management committee.

All hearing panels should be presided over by an experienced legal practitioner.

The registrant should be given the opportunity to elect for a health matter to be heard before the Tribunal.

Proposal 7.5.1

Health panels should be given the power to suspend a registrant's registration for a specified period or until further order. The legislation should provide for a right of appeal to the Tribunal from a decision of the health panel.

Proposal 7.5.2

Should reference to 'previous performance assessments' in this proposal in fact be 'previous health assessments'?

Clause 8.1

The scope of conduct should be limited to matters of ethics and professionalism. Matters of performance or health should be addressed through their respective pathways. Failure to cooperate with a board in addressing identified performance or health issues would lead to matters being laid by Statutory Officers/Registrars before hearing panels on performance or health grounds.

Proposal 8.1.1

It is submitted that the process for investigating notifications should be as outlined in 5.5.1 and 6.2.1 above.

Proposal 8.2.1

Refer to 5.5.1 above. It is important that investigators or lawyers engaged by the Statutory Officers/Registrars or management committees to conduct further investigations are accountable to the Statutory Officers/Registrars and only act in accordance with their instructions.

Proposal 8.2.2

These powers should be available to all management committees – refer to 5.5.1 and 6.2.1 above. The management committees should also have the ability to make a finding by consent that a registrant has engaged in unsatisfactory conduct and exercise those powers as listed in 8.6.1.

Proposal 8.3.1

See 8.2.1 above.

Proposal 8.3.2

It is submitted that the Statutory Officers/Registrars have the ability to initiate an investigation without a notification and to refer a matter to a management committee without investigation.

It is submitted that the decision to refer a matter to a hearing panel or tribunal should occur only after a preliminary investigation has occurred in accordance with 5.5.1.

Proposal 8.3.3

See 5.5.1 above. The registrant should be given a copy of the notification at the earliest opportunity and invited to respond in writing.

Proposal 8.3.4

Such a decision should be made by Statutory Officers/Registrars.

Proposal 8.3.5

It is the experience of the MBSA that notifiers wish to receive progress reports more frequently than three monthly.

The MBSA service standards currently require a notification to be assessed by a management committee within 60 days of receipt. In the event that this is not achievable, or further investigation is requested, this fact is to be communicated to the notifier and registrant and progress reports be provided on at least a two monthly basis.

Proposal 8.4.1

The legislation should provide for investigators to investigate and exercise powers in investigating conduct, performance or health matters as well as offences against the Act. In addition to those powers outlined, an investigator should be empowered to require, by written notice, a person to provide a written response to a notification, answer questions in writing and/or produce documents.

Proposal 8.4.2

If a person is required to provide information or produce a document, record or equipment through the exercise of investigation powers, and the information, document, record or equipment would tend to incriminate the person or make them liable to a penalty, the person must nevertheless provide the information or produce the document, record or equipment, but the information, document, record or equipment so provided or produced will not be admissible in evidence against the person in proceedings for an offence, other than an offence against this Act or an offence against any Act relating to the provision of false or misleading information.

Proposal 8.5.1

All hearing panels should be presided over by an experienced legal practitioner.

Should the final dot point require the panel to refer the matter to the tribunal where the registrant may have engaged in professional misconduct?

Proposal 8.6.2

Should the reference to 'previous performance assessments' in fact be 'previous conduct investigations' and reference to 'pattern of poor performance' in fact be 'pattern of conduct'?

Clause 9.1

The public protection focus of the board makes its processes more analogous to those of a Coroner than to the criminal law. In most cases, these actions can be achieved at a committee level by agreement of the registrant. However, matters may need to be referred to hearing panels or the tribunal where a resolution cannot be reached by agreement or the conduct is sufficiently serious to warrant suspension or cancellation of registration. In each case, the matter is heard by a separately constituted panel/tribunal. This is sufficient to ensure that members have not prejudged a particular matter.

Proposal 9.1.1

Option 1 is preferred.

There is no evidence other than 'concern' to support the position of a 'director of proceedings'. This would seem unnecessary, expensive and unnecessarily bureaucratic.

The review, appeal and other mechanisms are sufficient to ensure procedural fairness and transparency/ accountability of decision making.

Proposal 9.2.1

Agreed.

It is likely that in small jurisdictions investigators would be required to undertake investigations for multiple professions.

Boards could establish joint management committees with power to investigate and make determinations regarding all registrants arising from a single notification. However, this would be a rare occurrence. Matters of a systemic nature are more appropriately handled by the HCC.

Proposal 9.3

Option 2 is preferred.

It is submitted that all hearing panels/tribunals should be presided over by an experienced legal practitioner. It is also envisaged that legal practitioners will lead evidence and make submissions before hearing panels/tribunals on behalf of the Statutory Officers/Registrars or Board. It would be unfair in these circumstances if the registrant is denied the right representation by a person of his or her choosing. Further, a registrant may be unfairly disadvantaged if he/she does not have knowledge of legal principles/ processes or has difficulty in articulating his/her case.

It is proposed that a registrant be entitled to representation by a person of his/her choosing (legal or otherwise) at any stage of the investigation/conciliation/hearing process and that this representative have the right to make written/oral submissions regarding a decision that will affect the registrant's rights or interests.

It is the experience of the MBSA that matters where the registrant is represented are more likely to be resolved by consent as the representative is able to view the matter

objectively and provide the practitioner with appropriate advice and guidance regarding resolution.

Proposal 9.4.1

It is submitted that all conduct and performance hearings should be open to the complainant only and further open if the hearing panel decides that it is in the public interest to do so.

It is submitted that health hearings are closed due to the confidential and highly sensitive nature of the matters.

The hearing panels should have the power to make suppression orders, breaches of which are enforceable as an offence.

The notifier should not have the right to make submissions if not called to give evidence. It needs to be clear that the Board is acting in the public's and not the notifier's interest.

Proposal 9.6.1

The Statutory Officer/Registrar should also be able to appeal to the Tribunal on the merits from a decision of a hearing panel.

Proposal 9.7.1

For all matters written reasons for decision should be provided to both the registrant and the notifier.

Any resolution that involves a change in the registration status of a registrant should be conveyed to employers, interstate and overseas regulatory bodies and, where relevant, other government bodies (eg Medicare, Drugs of Dependence Unit) and colleges.

Clause 9.8

Option 1 is preferred to ensure consistency and avoid situations where decisions may potentially fall within the purview of multiple ombudsmen.

Proposal 10.2.2

All conduct and performance matters should be open to the public, however health matters should be closed to protect the registrant's confidential and sensitive information. Similarly, only decisions and reasons relating to conduct and performance matters should be published.

It is agreed that the Tribunal should have the ability to suppress the identity of any party or witness to the proceedings.

Proposal 10.3.1

The alternative option is not favoured. The other bodies may have different agendas to that of the Board and do not specifically act in the public interest.

Proposal 10.5.1

In addition to changing the references to 'not of good character' to 'not a fit and proper person' and 'habitual misuse' to 'use', the Tribunal should be empowered to find that a registrant has engaged in unsatisfactory professional conduct and unsatisfactory professional performance.

Proposal 10.5.2

Should the reference to 'responsible board' in fact be 'responsible tribunal'?

Proposal 10.6.1

The legislation should provide that tribunal hearing panels are to be chaired by an experienced legal practitioner, have at least two members from the same profession as the registrant who is a party to the proceedings and have at least one member who is not a registered health professional or legal practitioner.

Proposal 10.10.1

It is submitted that there should be the ability to appeal on the merits from decisions of a Tribunal.

Proposal 11.5.1

Alternative option is not favoured

Proposal 11.6.1

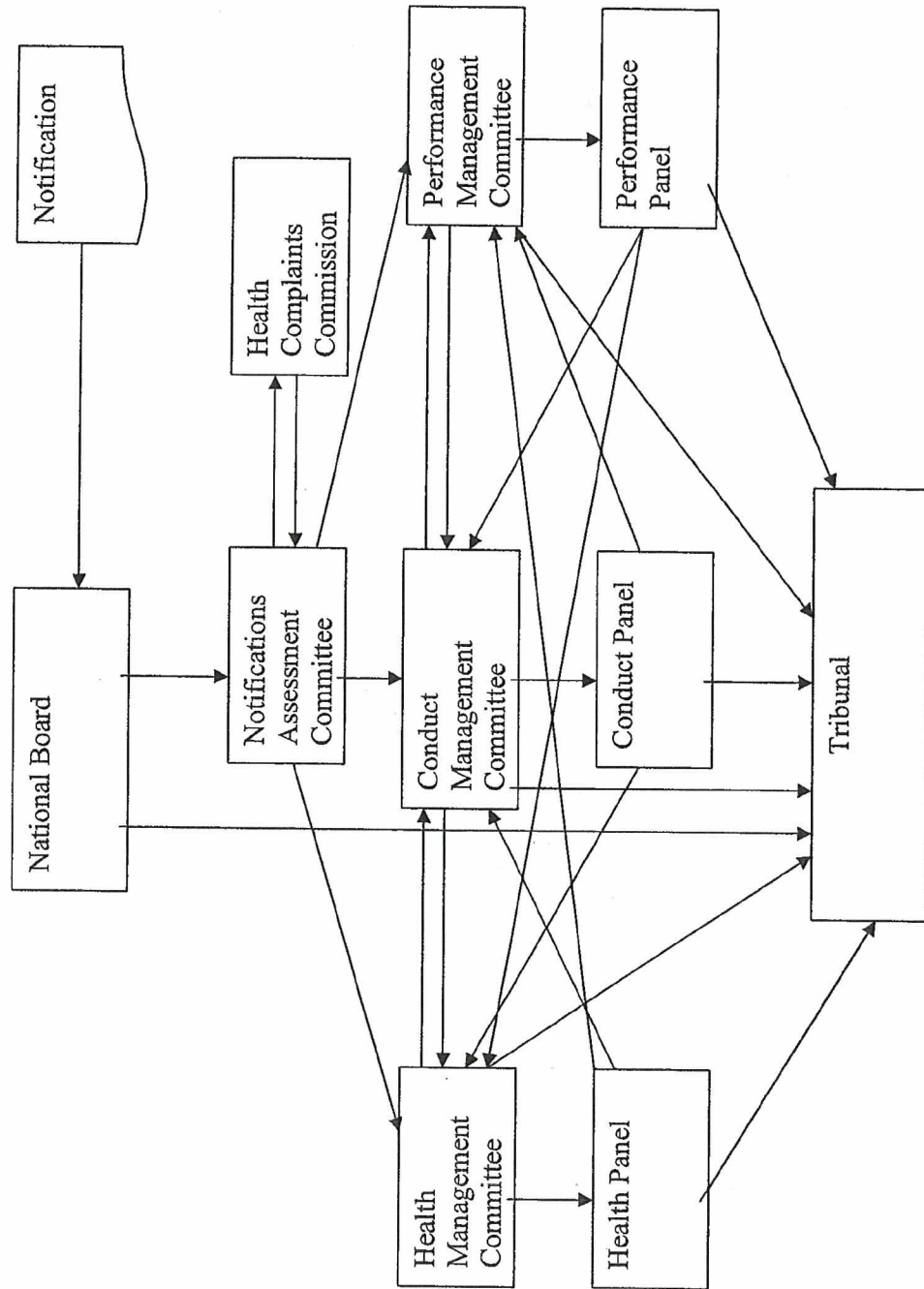
Option 1 is preferred with advertising being dealt with under a board's general disciplinary powers by reference to Codes of Conduct or Professional Standards

Proposal 12.1

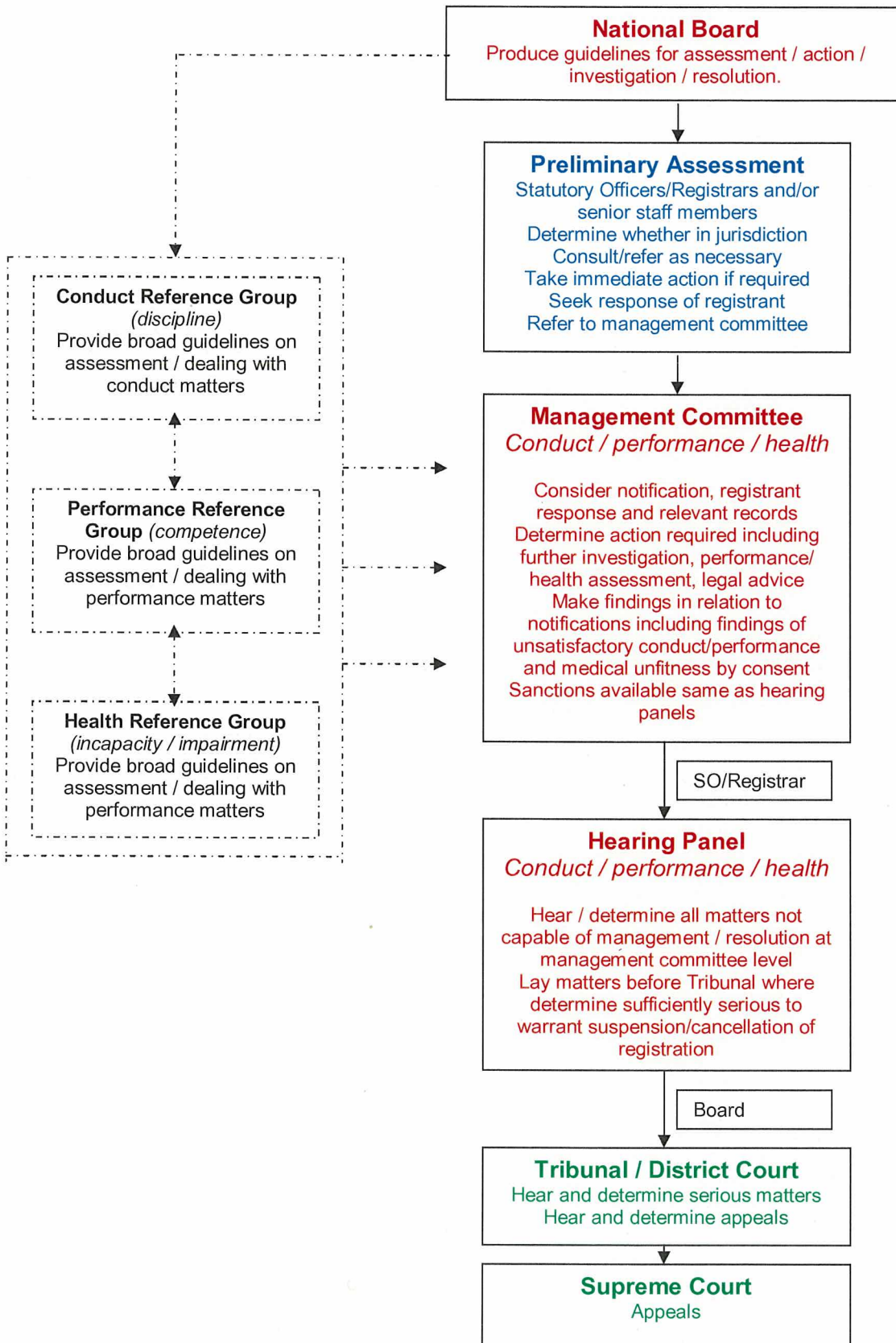
The legislation should provide that all notifications received after 1 July 2010, even if related to conduct that occurred before that time, and notifications that are still under investigation at that time will be wholly managed under the new scheme and that the use of the new powers be enabled.

The legislation should provide that only matters in which formal proceedings have been commenced will continue to be heard under the repealed Act.

National Registration and Accreditation Scheme – proposed complaints and discipline model



MBSA proposed notification management process



**Health & Community Services Complaints Act 2004 –
Part 7 section 57(5)
Protocol with the Medical Board of South Australia**



The aim of this protocol is to provide guidance to HCSCC and registration authorities to meet the requirements of Part 7 of the Health & Community Services Complaint Act 2004 (H&CSC Act). The protocol does not address all of the provisions of Part 7 of the H&CSC Act.

1. Complaints to HCSCC about an individual registered service provider

- a. HCSCC will assess and deal with the complaint according to the H&CSC Act.
- b. HCSCC will consult with the Board on receipt of a complaint, or during preliminary inquiries, if the complaint appears to reveal a significant issue of public safety, interest or importance and/or a significant question as to the practice of an individual registered service provider such as:
 - incapacity - physical/mental/drug affected
 - competence - serious adverse outcome(s), serious clinical error/judgement; multiple complaints of a similar nature
 - conduct - serious physical/verbal/sexual violations, fraud
 - ethics - bias, dishonesty, financial gain, discrimination, referral practices.
- c. HCSCC will have regard to the applicable Code of Professional Conduct, or equivalent and other Board policies and guidelines applicable to a complaint when considering if the complaint requires consultation with the Board.
- d. If HCSCC and the Board agree that the complaint should be referred to the Board:
 - i. HCSCC will provide all relevant documents to the Board within 3 working days of the decision
 - ii. HCSCC will notify the complainant and the individual registered service provider in writing within 14 working days of the decision to refer the complaint to the Board
 - iii. HCSCC may split the complaint under section 32 of the H&CSC Act to address other aspects of the complaint.
- e. When a complaint has been referred to the Board, the Board must provide HCSCC with details of its findings and any action taken or proposed. The Board will provide these details to the HCSCC in a monthly report.

2. If the Board receives a complaint that is covered by sections 24 and 25 (1) of the H&CSC Act:

- a. The Board will investigate complaints it receives about an individual provider that are of a serious nature and do not reveal systemic issues. The Board will notify HCSCC of these matters in a monthly report.
 - b. When the Board investigates a complaint about an individual registered provider, HCSCC may split the complaint under section 32 of the H&CSC Act to address other aspects of the complaint.
 - c. When the Board receives a less serious complaint or one that involves systemic issues, the Board will consult with HCSCC within 10 working days to decide who will deal with the complaint.
 - i. When requested, the Board will provide HCSCC with all relevant details of the complaint, including all related documentation to assist with consultation and/or when HCSCC accepts the complaint.
 - d. If HCSCC agrees to accept a referral from the Board:
 - i. The Board will provide all relevant documents to the HCSCC within 3 working days of the decision
 - ii. The Board will notify the complainant and the individual registered service provider in writing within 14 working days of the decision to refer the complaint to HCSCC
 - iii. HCSCC will consult with the Board if the inquiry process reveals a significant issue of public safety, interest or importance and/or a significant question as to the practice of an individual registered service provider such as:
 - o incapacity - physical/mental/drug affected
 - o competence - serious adverse outcome(s), serious clinical error/judgement; multiple complaints of a similar nature
 - o conduct - serious physical/verbal/sexual violations, fraud
 - o ethics - bias, dishonesty, financial gain, discrimination, referral practices.
3. HCSCC must comply with the Board's request for a report on the progress or result of an investigation that involves an individual registered service provider.
4. If HCSCC or the Board disagree on any aspect of consultation, referral or handling of a complaint refer to s 57 (3) and s 60 (4) of the H&CSC Act.

Attached: Part 7 H&CSC Act 2004