The Pharmacy Guild of Australia

RESPONSE TO THE EXPOSURE DRAFT OF THE HEALTH PRACTITIONER REGULATION NATIONAL LAW

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COMMENTS ON THE HEALTH PRACTITIONER REGULATION NATIONAL LAW

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General comments and Guild preferred administrative model

The Pharmacy Guild of Australia has carefully considered the model for the creation of a national registration scheme for pharmacists (amongst other professions):

- agreed to in the *Intergovernmental Agreement for a National Registration Scheme for the Health Professions* signed by the Council of Australian Governments (COAG) on 26 March 2008 (the **COAG Agreement**); and

- as proposed to be implemented in legislative provisions contained in the exposure draft of the Health Practitioner Regulation National Law (the **National Law**), known as 'Bill B'.

The Guild supports of national registration of health practitioners so as to facilitate workforce mobility.

However, the Guild has concerns about other aspects of the National Scheme.

The Guild particularly notes:

- the extreme disruption inherent in creating a new bureaucracy from existing agencies, that is inferred by the powers contained in Part 12 of the National Law;

- the loss of local knowledge that will occur as the experience accumulated by staff members of jurisdictionally-based regulators is lost; and

- the reliance that the National Pharmacy Board must have on the National Agency, that could compromise the National Board in making decisions that are in the best interests of Australian health consumers.

The Guild believes there is a better administrative model that could enhance the protection of health consumers, while retaining the advantages of workforce mobility implicit in a single scheme of national registration.

Preferred alternative model – the 'co-regulatory model'

In many Australian jurisdictions, the process of health practitioner registration and discipline forms part of an integrated scheme of ensuring the quality of health delivery to consumers.

For example, in NSW both the Pharmacy Board and the Health Care Complaints Commission must discuss which agency should investigate a particular pharmacist against whom a complaint has been made, with the Commission having the additional responsibility of considering complaints in circumstances where the complaints illustrate systematic problems within a health organisation.

Existing health registration boards, such as a State or Territory Pharmacy Board, possess significant knowledge as to how a profession operates in that jurisdiction.

Registration boards discharge particular responsibilities conferred by legislation passed by State or Territory parliaments.

In the context of pharmacy, Boards are responsible for ensuring that pharmacies are only owned by properly qualified pharmacists, and in some but not all jurisdictions, ensure that pharmacies are properly registered and meet the standards required by law.

For this reason, the Guild recommends that the existing State and Territory Pharmacy Boards, which are established under the State Law, remain including their resources, exercising powers against any registration standards, codes and guidelines made by the National Board.

This would mean the mechanical registration, investigation and discipline functions would be reposed in the state registration bodies.

As a consequence, the functions of the National Board set out in paragraphs 49(a), (c), (e), (k), (l), (m) (o), (p), (q) and (r) of the National Law would remain; the other functions could be omitted from the Law.

It would also mean that the concept of the National Agency would be superfluous and could be removed from the legislation.

Many of the transitional provisions contained in Part 12 of the National Law would also be unnecessary.

The proposed administrative structure is similar to the 'national delegated agency' model approved by COAG in the *Intergovernmental Agreement for a National Licensing System for Specified Occupations,* which creates a central agency to establish national licensing policy, while retaining the existing agencies to perform registration and enforcement responsibilities.[1]

[1] See definition (l) 'licensing policy or national licensing policy', paragraphs 5.10 and 5.11 and paragraphs 5.14 – 5.33 of the *Intergovernmental Agreement for a National Licensing System for Specified Occupations* signed by COAG on 30 April 2009

The Guild notes that the Decision Regulatory Impact Statement (RIS) for the Specified Occupations Scheme tested a single agency model (that is, the proposed model for health professionals) and a delegated agency model and concluded:

> The advantages of this approach (the delegated agency model) are that it minimises the risk of disruption in the transition and initial implementation phases for all stakeholders while providing opportunities for the identification of further reform once the national licensing system has been established. It reduces the initial costs of establishing the new system and maintains the benefits of integrated operational functions at the jurisdictional level.[2]

This would not hinder co-location of the various National Boards of health professionals and rational use of administrative resources, such as IT, if that was desirable.

This model would also mean that:

- divisions 6 and 7 of Part 7 should be amended so references are made to state registration boards; and

- the concept of the Public Interest Assessor, and the complaints mechanisms contained in Part 8 of the National Law are unnecessary and could be removed from the National Law.

Should a jurisdiction wish to utilise the registration/discipline provisions of the National Law, they could apply those provisions in the law of that jurisdiction.

[2] *National Licensing System for Specified Occupations Decision Regulation Impact Statement* April 2009 p.20

This would mean the current National Law would not be implemented as a 'national applied law'. Rather, it would be treated as 'national model legislation' to be taken into the laws of a participating jurisdiction as necessary.[3]

The net effect would be that the COAG Agreement would need to be amended so that the method of implementing the provisions of the National Law would be similar to the *Intergovernmental Agreement for Regulatory and Operational Reform in Occupational Health and Safety*.

The relevant part of the Intergovernmental agreement referred to above is contained in the **attachment** to this submission.

Under this co-regulatory model, the National Pharmacy Board would be **conferred with legal personality**, with the capacity to enter into contracts, hold property, etc.

- This is an important recommendation even if the current model for the national registration of health practitioners is not changed. It is noted that in Queensland, which has a model in which boards receive administrative assistance from an entity like the National Agency, the boards have legal personality.[4] This is discussed in detail in the later comments on the operation of the National Agency and the Boards.

[3] To use the taxonomy contained in paragraph 1.3 of Parliamentary Counsel's Committee *Protocol on Drafting National Uniform Legislation* 3rd edition July 2008

[4] Whilst Part 3 of the *Health Practitioners Registration Boards (Administration) Act 1999* (Qld) requires state registration boards to use the services of the Office of Health Practitioner Boards for administrative services, sections 10 and 14 of the *Pharmacists Registration Act 2001* (Qld) confers legal personality on the Pharmacists Board of Queensland.

The National Board would be comprised of a person appointed from each of the jurisdictional health registration boards appointed by the Minister of that jurisdiction.

In particular, the Board would be reposed with the power to determine its own budget (including fee levels, subject to any policy directions issued by the Australian Health Workforce Ministerial Council (the **Ministerial Council**)). It would have imposed on it directly the governance provisions otherwise addressed to the National Agency contained in Divisions 3, 5 and 6 of Part 4 and Part 9.

Accommodating NSW and other jurisdictions which opt to retain functions at a State level

The co-regulatory model more efficiently and effectively accommodates the reality of the NSW circumstance for which jurisdiction it has been agreed that the current State infrastructure will apply to complaints, disciplinary, and impairment functions, and that the National Scheme will need to accommodate those functions in NSW.

It recognises that these functions in NSW are fully integrated with a mix of Board and Health Care Complaints Commission responsibilities in ways that are tailored to the requirements of the individual professions and are expressed in the existing State legislation establishing these various bodies.

It recognises that with the retention of existing State Boards and their legislative framework, there is no operational requirement dictated by efficiency or effectiveness criteria for replicating these State bodies in new State Committees/Boards under the scheme for the purpose of registration operational functions.

The co-regulatory model suggested readily accommodates the policy requirements of the scheme while avoiding what in the case of NSW would be the unnecessary dismantling of existing State bodies and legislative frameworks. It minimises the cost imposts on practitioners in those jurisdictions which retain their current disciplinary and registration functions while applying agreed national standards of registration and accreditation processes at a State level. It ensures NSW practitioners do not fund national scheme functions which they do not use and which are provided and funded at a State level.

It manages costs and unnecessary growth in a new bureaucracy, while preserving the individuals, the networks, and the advisory resources at a State level where accountability lies.

Recommendation

The Guild recommends that COAG reconsider the proposed model to implement a national scheme of registration of health professionals, and implement instead the 'co-regulatory model of regulation, which reflects the 'national delegated agency' model contained in the *Intergovernmental Agreement for a National Licensing System for Specified Occupations.*

Should the co-regulatory model for the registration of health professionals not be adopted, the Guild makes the following specific comments on the contents of the exposure draft of the National Law.

COMMENTS ON SPECIFIC CLAUSES OF THE NATIONAL LAW

Clause 4 - Objectives and guiding principles of national registration and accreditation scheme

Paragraph 4(2)(b) requires fees and charges to be 'reasonable having regard to the efficient operation of the scheme.'

The reference to 'the Scheme' must mean all elements of the national registration and accreditation scheme referred to in the *Intergovernmental Agreement for a National Registration Scheme for the Health Professions* – that is, each of the professions currently regulated, and to be subsequently regulated, by the Scheme.

Whatever the administrative intentions that are present at the beginning of the scheme, there is no statutory guarantee that pharmacists will only be charged with the costs of administering the national scheme of pharmacists.

The possibility that professions with limited administrative costs could cross subsidise professions with higher costs remain – in the name of the efficient operation of the scheme *as a whole*.

The National Law should be amended so that a guiding principle of the national scheme should be that the level of fees and charges able to be levied are those directly necessary to administer a scheme of national registration for a particular profession in a particular jurisdiction.

It is also noted that paragraph 4(2)(c) of the National Law reads:

> (c) restrictions on the practice of a health profession are to be imposed under the scheme only if it is necessary to ensure health services are provided safely and are of an appropriate quality.

Paragraph 5.4(c) of the COAG Agreement reads:

> (b) it (the national scheme) should recognise that restrictions on the practice of a profession **should only occur where the benefits of the restriction to the community as a whole outweigh the costs**

The instruction 'benefits of the restriction to the community as a whole outweigh the costs' is a standard threshold that must be satisfied before a regulation is made.

This instruction requires that, before a requirement is imposed on a pharmacist, there is a full and rigorous analysis to ensure that the proposal genuinely benefits the community.

Without this weighing exercise, some restrictions could have the unintended consequence of transferring significant costs to consumers, thereby affecting their access to health care.

So as to ensure that undue costs are not imposed, the terminology contained in paragraph 5.4 (c) of the COAG Agreement should be reintroduced.

Clause 5 – How functions to be exercised

As a general rule, object clauses serve a purpose in statutory interpretation where there is ambiguity.

However, clause 5 imposes a positive duty on an entity with functions under the Law to 'exercise its functions having regard to the objectives and guiding principles of the national registration and accreditation scheme.'

Case law requires a party having to 'have regards' to specified matters to give weight to relevant (objectives and principles) when making administrative decisions: see *The Queen v. Toohey; Exparte Meneling Station Pty Ltd* 158 CLR 327 at 333; *Visa International Service Association v. Reserve Bank of Australia* [2003] FCA 977 paras 612-621.

Requiring a repository of power to 'have regards' to the objects and principles of the legislation appears to be a superficially desirable feature to the Law.

However, the majority of the functions and powers contained in the National Law are drawn in relatively objective terms.

Imposing this mandatory duty could have the unintended consequence of encouraging legal challenges on the basis that an entity has failed to take into account a relative consideration when exercising powers or functions under the Law (namely one of the objectives and guiding principles contained in the National Law), adding uncertainty and costs in the administration of the Law.

In the context of the National Law, the objectives should assist a decision maker in coming to a decision that will best achieve the purpose of the Law in circumstances of ambiguity, as per clause 7 of Schedule 4 to the National Law (Miscellaneous provisions relating to interpretation).

This clause should be removed, and the usual canon of statutory construction followed.

Clause 6 – Definitions

The core definitions relevant to the discipline of pharmacists require careful examination.

The first is the definition of 'professional misconduct'. It reads:

> *Professional misconduct*, of a registered health practitioner, **includes**
>
> (a) unprofessional conduct by the practitioner that amounts to conduct that is substantially below the standard reasonably expected of a registered health practitioner of an equivalent level of training or experience, and
>
> (b) more than one instance of unprofessional conduct that, when considered together, amounts to conduct that is substantially below the standard reasonably expected of a registered health practitioner of an equivalent level of training or experience, and
>
> (c) conduct of the practitioner, whether occurring in connection with the practice of the health practitioner's profession or not, is inconsistent with the practitioner being a suitable person to practice the profession.

The use of term 'includes' at the commencement of the definition is noted.

The term 'includes' is used to enlarge the ordinary meaning of the word[5]

That means that the term 'professional misconduct' captures:

(a) behaviour that falls within one of the three paragraphs of the definition; and

(b) any other behaviour that could be reasonably regarded as being professional misconduct of a nature that should give rise to sanction under a scheme of registration.

Left without definition, the term 'professional misconduct' is a term of indefinite scope with no particular meaning that would be difficult to precisely identify what would constitute relevant behaviour.

This is highly undesirable as it leads to uncertainty in public administration and costs to both pharmacists and the regulatory agency as a lengthy and costly legal analysis as to whether a particular form of behaviour:

- constitutes professional misconduct; but
- falls outside the three concepts enumerated in the definition.

The contents of the definition seem to exhaustively (and suitably) cover what should be regarded as professional misconduct.

If the definition read professional misconduct <u>means</u> (as opposed to professional misconduct <u>includes</u>) there would be clarity as to the ambit of the definition, thus reducing costs and doubt without in any way jeopardising consumer health safety.

[5] DC Pearce RS Geddes *Statutory Interpretation in Australia (*5th edit) para 6.56

This is because the term 'means', when used in a definition, exhaustively determines the ambit of the term.[6]

Paragraph (c) of the definition attempts to capture behaviour 'inconsistent with the practitioner being a suitable person to practise the profession'.

Again, as the concept of 'suitable person' is of uncertain ambit, it would be wise to include a definition in clause 6 of the concept of a suitable person contained in clause 72 of the Law, which directs a decision maker to consider not only relevant registration standards, but to whether a person is a 'fit and proper person', a well known concept to the Law.[7]

With respect to the definitions of 'unprofessional conduct' and 'unsatisfactory professional performance' it is noted that paragraph (i) of the definition of unprofessional conduct anticipates that a single act of unsatisfactory professional performance be regarded as unprofessional conduct.

There is no lesser sanction or disciplinary pathway if a pharmacist is found to have committed 'mere' unsatisfactory professional performance.

It follows that there is no work for the definition for unsatisfactory professional performance to perform.

The definition of unsatisfactory professional performance can be wound into the definition of unprofessional conduct, making the Law less complex.

[6] *Ibid*

[7] See for instance *Ziems v. Prothonatory of the Supreme Court of NSW* (1957) 97 CLR 279

Clause 10 – Policy directions; clause 11 approval of registration standards

Clause 10 sets out the powers the Australian Health Workforce Ministerial Council has to set policy for the national scheme of registration.

These powers are very broad, and can confer on the Ministerial Council a wide capacity to give direction to entities performing functions under the Law.

Taken together, subclauses 10(2) and 10(3) enable the Ministerial Council to 'give directions to a National Board about the policies to be applied in exercising its functions' its widest ambit.

This power is so wide that it could significantly impact on the capacity of a National Board to professionally discharge its function in a manner that maximises the health outcome of Australians.

It is noted that clause 286 now permits the parliament of a participating jurisdiction to disallow regulations made by the Ministerial Council but only if a majority of parliaments of participating jurisdictions agree.

This is a positive addition to the National Law, as it gives the parliaments of the respective jurisdictions some opportunity to review the manner by which health services are to be provided within the jurisdiction, and to disallow provisions in those (rare) circumstances where it is in the public interest to do so. It should not however be dependent on majority jurisdictions support.

This legislative oversight is equally appropriate in the case of Ministerial Council policies as they can control the manner in which health services are supplied to Australian consumers as much as any legislative instrument.

Subclause 10(6) compels entities to comply with directions made with respect to the policies to be applied.

Given that the Ministerial Council is not an elected body, this capacity for parliamentary oversight is desirable.

Directions made by the Ministerial Council should be the subject of disallowance by individual parliaments in the same manner as regulations made by the Council.

For similar reasons, registration standards made by the Ministerial Council, which have significant effect on the manner by which pharmacy is practised in Australia, should also be subject to parliamentary disallowance.

The Guild is otherwise satisfied with the structure of clause 11.

Finally, the interrelationship between paragraph 10(3)(d) and subclause 10(4) is unclear.

Paragraph 10(3)(d) allows the Ministerial Council to give policy directions on accreditation standards, while subclause 10(4) only allows the direction to be given if 'the accreditation standard will have a substantive and negative impact on the recruitment or supply of health practitioners to the workforce.'

The intention of this qualification is to presumably restrain the Ministerial Council in dealing with technical health issues.

However, there is doubt whether paragraph 10(3)(d) and subclause 10(4) applies to the construction and operation of an accreditation standard **once made**, or whether it is to apply to both the development **and** subsequent administration of accreditation standards.

The intention of paragraph 10(3)(d) and subclause 10(4) requires clarification.

Clause 17 – Function of Advisory Council

Clause 17 of the National Law confers on the Advisory Council a wide area of responsibility.

It is also noted that the Advisory Council is a small body, constituting only seven members.

The Advisory Council could not be reasonably expected to provide specific technical advice on the contents of standards that have been developed for any particular regulated profession, as there is likely to be only one or two members with qualifications in the particular profession.

It should be made clear that the Council's area of responsibility should be focussed on broader workforce issues that impact the provision of health services in Australia.

The system proposed by the National Law makes it clear that the National Boards provide advice to the Ministerial Council on the specific professional issues that impact directly on the regulated professions.

Subclause 17(2) of the National Law should be amended so that advice should not relate to:

(a) a particular registration standard upon which a National Board has recommended for Ministerial Council approval; or

(b) a particular accreditation standard developed by a National Board or an independent accreditation entity.

Functions of National Agency - paragraph 23(c)

Paragraph 23(c) confers on the National Agency the following functions:

> (c) to establish procedures for the development of accreditation standards, registration standards and codes and guidelines approved by National Boards, for the purpose of ensuring the national registration and accreditation scheme operates in accordance with good regulatory practice

The concept of operating 'in accordance with good regulatory practice' does not appear to have been used in legislation before, nor has been judicially considered.

Page 3 of the COAG *Best Practice Regulation – A Guide for Ministerial Councils and National Standard Setting Bodies* states that the Guide 'outlines' the principles of good regulatory practice.

This is probably the source of the concept.

However, the term 'good regulatory practice' as used in paragraph 23(c), is ambiguous, as it is difficult to identify what objectively constitutes what is 'good regulatory practice' and what is not.

In addition, the capacity to 'establish' procedures appears to repose a power in the National Agency capable of independent exercise without discussion with a National Board.

For instance, a reasonable interpretation of the provision would state that to ensure that the scheme 'operates in accordance with good regulatory practice', the National Agency could establish a procedure by which it must pre-approve the content of prepared standards because, in the opinion of the Agency the standard could be regarded as being 'burdensome' and therefore not 'good regulatory practice'.

The National Law requires a National Board to follow any policies set out by the Ministerial Council. In addition, there is a requirement for wide consultation when making instruments under the provisions of the Law.

These are the relevant control devices to ensure instrument quality.

This paragraph is an ambiguous provision adding an administrative hoop to the process of administering a scheme of national registration.

There is no clear value added by the imposition of this process. It can be removed from the Law.

Paragraph 23(c) of the Law should be removed.

Paragraph 23(d) – Functions of National Agency; clause 24 Health profession agreements

Another function of the National Agency is to:

> (d) **negotiate in good faith with, and attempt to come to an agreement with**, each National Board on the terms of a health profession agreement for the health profession for which the Board is established.

Clause 24 requires each National Board to negotiate a health profession agreement with the National Agency, which sets the fees to be paid by pharmacists, the budget for the Board and the services to be provided to the National Board by the National Agency.

Without its own staff or support, it would be difficult for a Board to cogently negotiate with the National Agency as to the level of fees, service levels, etc. The operations of the Pharmacy Board could be significantly affected if the National Agency wanted to be a 'hard bargainer' for resources.

The lack of a capacity to gain assistance in this area is particularly contrasted with clause 52, which allows a Board to gain assistance in relation to the technical health issues that it deals with.

The Guild notes Part 3 of the *Health Practitioner Registration Boards (Administration) Act 1999* (Qld), which reads as follows:

> **Part 3 Office's relationship with the boards**
>
> **Division 1 Administrative and operational support to the boards**
>
> **22 Office to provide administrative and operational support under a service agreement**

The office must provide administrative and operational support to each board under a service agreement.

23 Board to use office for administrative and operational support

(1) Each board must obtain all administrative and operational support from the office.

(2) Subsection (1) does not limit the following powers of a board—

(a) power under a health practitioner registration Act or the *Health Practitioners (Professional Standards) Act 1999* to establish a committee to advise the board on anything within the scope of the board's functions;

(b) power under the *Health Practitioners (Professional Standards) Act 1999* to appoint an inspector or investigator, or a person to carry out a health assessment;

(c) power under the *Health Practitioners (Professional Standards) Act 1999* to engage a person to provide expert advice to the board;

(d) power under a health practitioner registration Act to appoint an inspector or a person to conduct a health assessment.

(3) Also, subsection (1) does not prevent a member of a board from advising or informing the board about anything.

(4) Further, despite subsection (1), a board may engage a person to help the board in negotiating a service agreement.

24 Minister may authorise other support

(1) However, the Minister may authorise a board to obtain administrative and operational support from another source approved by the Minister, if the Minister is satisfied the office cannot provide the administrative and operational support necessary to help the board to perform its functions.

(2) The Minister must, before authorising a board to obtain administrative and operational support from another source, consider—

(a) the board's functions under the relevant health practitioner registration Act, the *Health Practitioners (Professional Standards) Act 1999* and any other Act; and
(b) the services to be provided to the board as stated in the existing service agreement concerning the board; and
(c) the extent to which the office can provide the administrative and operational support necessary to help the board to perform its functions.

25 Minister may give directions to give effect to Authorisation

(1) To give effect to an authorisation under section 24 the Minister may give the executive officer or the board written directions.

(2) Without limiting subsection (1), the directions may be about the following—

(a) varying the existing service agreement or entering into a new service agreement;

(b) adjusting the amounts paid or payable to the office by the board under the existing service agreement.

(3) The executive officer or the board must comply with the directions.

Assuming that the concept of the Board entering into a service agreement with the National Agency is to remain, the concept should be fully and sensibly implemented.

In particular, subsection 24(4) of the Queensland law directly addresses the rather unpractical expectation that a Board without its own resources will be able to seriously discuss resource issues with the Agency.

The fact that the National Law mandates 'good faith bargaining' and a mechanism that clearly anticipates disputes means that it is a flawed method of determining how resources are to be provided to National Boards, and in fact is a strong reason for the establishment of independent National Boards and the abolition of the National Agency.

National Boards should be fully empowered to control their resources.

However, if the National Agency model is to be retained, paragraph 23(1)(c), 23(4) and section 24 of the *Health Practitioner Registration Boards (Administration) Act 1999* (Qld) should be inserted into the National Law[8]

[8] Clause 50 of the National Law confers on the Board the powers necessary to perform its functions. However, as the scheme goes out of its way in conferring on the Agency the capacity to make contracts and hold property etc. (see particularly clause 61 – the Agency may enter into contracts with external accreditation agencies if the contract falls within the health profession agreement) it is unlikely that this general facultative provision will confer on the Pharmacy Board a backhanded manner by which it can exercise all the powers of an individual.

Part 4 Division 2 – Agency Management Committee

The National Agency will be governed by an Agency Management Committee.

However, the Ministerial Council possesses a wide power of direction.

There is a query as to what value is added having a Committee with power (conferred by paragraph 29(1)(a) of the National Law to develop more policies (that the employees of the National Agency will feel obliged to follow) to facilitate the administration of a national scheme of registration.

It is noted that the Ministerial Council appoints the Management Committee, and that the reporting obligation is to the Ministerial Council.

There is some argument as to whether the Chief Executive should be appointed by, and be responsible to, the Council.

Part 4 of Division 2 of the Bill should be removed.

Part 4 Division 4 – Public interest assessor

Division 4 of Part 4 creates an office called Public Interest Assessor.

Page 2 of the Frequently Asked Questions (FAQs) document accompanying the draft National Law states that the Public Interest Assessor:

> (i) is a person appointed by the Ministerial Council to assess complaints and in conjunction with the relevant national board, decide the action to be taken. The assessor is there to ensure that the interest of the public is being upheld. If the public interest assessor thinks a complaint is more serious than the Board considers it to be, the Assessor's view will prevail. If the Board thinks it is more serious, the Board will prevail…..

The definition of 'independent assessor' contained in clause 6 reads:

> *independent assessor*, for a participating jurisdiction, means:
> (a) a person nominated under section 151 by the responsible Minister for the participating jurisdiction as being the independent assessor for the jurisdiction, or
> (b) if a person has not been nominated under paragraph (a) for the jurisdiction, the Public Interest Assessor.

The independent assessor, appointed by a State or Territory Minister, is referred to throughout Part 8 as the counterparty to determine the most appropriate method of dealing with a complaint.

Despite the information contained in the FAQs document, the only time that the Public Interest Assessor is mentioned in the National Law is in the provisions establishing the statutory office.

The way the term 'independent assessor' is used in the National Law gives rise to an inference that jurisdictions will appoint an independent assessor, with the Public Interest Assessor being a fallback position.

If each jurisdiction appoints an independent assessor, it would appear that the independent assessor would have limited work, other than whatever flows under the catchall provision of 'any other function given by the Ministerial Council.'

It is noted that the Commonwealth Ombudsman has been conferred with jurisdiction over the national scheme of registration and presumed that the Ombudsman will not only investigate individual complaints but will also review purported systemic failings as necessary.

It is difficult to determine why the national scheme requires independent assessors **and** the Commonwealth Ombudsman **and** the Public Interest Assessor.

Unless a jurisdiction proposes not to appoint an independent assessor, the statutory office of the Public Interest Assessor should be removed.

There should be a clear statutory provision inserted indicating that fees from the Scheme should not fund this office as:

(a) it is more appropriately funded by those jurisdictions that propose using the office as the protector of the consumer interest of the health consumers of that jurisdiction; and

(b) it is clear from the objects clause of the legislation (clause 3) and the objectives and guiding principles (clause 4 that fees from the scheme should go no further than to fund functions directly connected to the registration of practitioners.

Finally, given the creation of this statutory office, there should be further consideration as to the role the Commonwealth Ombudsman is expected to have under the Scheme.

Clause 45 – Establishment of National Boards

Clause 45 requires a National Board to have representatives from every large State, but not the smaller States and Territories (Tasmania, the Northern Territory and the Australian Capital Territory).

Australia remains a federation composing of eight provincial governments.

In addition, each provincial jurisdiction still has responsibility for the provision of primary health services. It is as important to present the issues of that jurisdiction than it is for there to be a single member of the board whose only qualification is 'liv(ing) in a regional or rural area[9].

It is important for the interests of each jurisdiction be represented on the National Board with significant responsibility for establishing the standards that a health professional should meet at the micro-level.

Each jurisdiction should be represented on the National Board.

[9] Paragraph 45(5)(a). It is noted the terms 'rural' and 'regional' are not defined

Clause 49 – Functions of National Boards

Paragraph 49(r) permits a State or Territory to vest a National Board with powers or functions to perform functions under a law of the relevant jurisdiction.

It is also noted that paragraph 1.33 of Attachment 1 to the COAG Agreement retains the responsibility for regulating the licensing and ownership of pharmacies to the States and Territories.

Paragraph 49(r) must be amended so that a law relating to the ownership and licensing of pharmacies cannot be conferred on the National Board in order to reflect the intent and spirit of the COAG Intergovernmental Agreement.

Clause 54 – State and Territory Boards

Clause 54 permits a National Board to create a State/Territory committee that can be called a State or Territory Board.

It is noted that this is a *discretionary* power: a National Board may choose not to appoint a State Board for a particular jurisdiction – which contrasts against the requirement to establish a National Agency office in every jurisdiction.[10]

In a federalised scheme, it is important that the experiences and issues important to a particular jurisdiction can be fed into the decision-making process in a formalised manner.

It is also appropriate for a statutory committee of practitioners in each jurisdiction to be recognised – even if a decision is made that a particular Board in a particular jurisdiction will not exercise any particular delegated powers of the National Board with respect to registration, discipline, etc.

Subclause 54(1) of the National Board should be amended by substituting the word 'may' with the word 'must', requiring a National Board to set up a State Board in each jurisdiction.

It is also noted that subclause 54(3) creates a duty on a State or Territory Minister to appoint the members of the State or Territory Boards created under clause 54.

[10] Cf. subclause 26(2)

In that case, it would be reasonable to allow the parliament of a participating jurisdiction to directly vest in that Board functions and powers contained in the legislation of that jurisdiction, rather than a roundabout method of conferring power onto the National Board under paragraph 49(r) of the National Law and then subsequently delegating the power or function under paragraph 55(1)(a).

A State or Territory parliament should be able to confer powers or functions contained in the legislation of that jurisdiction to the new State Boards for that jurisdiction created by clause 54 of the National Law or retain these functions in existing State Boards when it has been agreed that a State will retain relevant Board functions.

Clause 55 – Delegation of functions

Clause 55 confers on the Board a very broad capacity to delegate functions and includes a person engaged as a contractor by the National Agency.

This would appear to include decisions relating to the discipline of pharmacists made in Part 8 of the National Law

The Guild considers it undesirable for a contractor to exercise the very wide powers contained in Part 8 of the National Law – there is no legal preclusion for the Board to delegate, for example, a decision made under clause 178 of the National Law, and allowing the delegate to impose a condition on a registration under subparagraph 179(1)(a)(iv) of the National Law.

Subclause 55(1)(d) of the National Law should be amended so that a contractor cannot exercise a delegation to exercise any of the powers contained in Part 8 of the National Law.

Division 3 – Registration standards and codes and guidelines

Division 3 of Part 5 of the National Law allows the National Board to develop registration standards, codes and guidelines.

Clause 57 requires 'wide ranging consultation' to be undertaken when making a code or guideline.

This duty should be extended to include a duty to consult with an organisation that represents the majority of practitioners subject to the relevant instrument.

Clause 58 states that registration standards, codes and guidelines are 'admissible in evidence in disciplinary proceedings' – meaning proceedings conducted under the National Law against a particular pharmacist.

On one construction of the clause, it is an indirect way of making a breach of a code or guideline (leaving aside a registration standard) grounds for establishing unprofessional conduct –it is presumed that failing to follow a relevant registration standard, etc would itself be grounds for disciplinary action against the pharmacist.

However, it is not certain what the clause means.

So as to clarify the issue, the breach of a code, guideline or registration standard should be stated in the definition for unprofessional conduct contained in clause 6 of the National Law.

Codes and guidelines could have the same sort of standing as codes of practice made under the authority of occupational health and safety legislation.

For example, section 152 of the *Occupational Health and Safety Act 2004* (Vic) provides that adherence to a compliance code made under the Act is taken to be compliance with the relevant duty the subject of the code.

This could be a suitable 'safe harbour' for (particularly) small pharmacists, who could have confidence that they are acting ethically if they follow the instruments made by the Pharmacy Board.

It would also encourage constant revision of the documents.

The consequences of failing to follow codes and guidelines (in particular) made under the National Law must be made clear. Preferably, adherence to codes and guidelines made under the Act is taken to be compliance with the relevant duty and the subject of the code

General observation – legal status of a National Board

It is finally noted the National Board has no legal power to own property and enter into contracts.

This can give rise to unusual situations, for example:

Clause 61 of the National Law provides that the National Agency, and not the National Board, will formulate a contract with an external accreditation entity '**only if it is in accordance** with the health profession agreement between the National Agency and the Board…..'

This is probably necessary as only the Agency has legal personality to employ staff to conduct negotiations, sign contracts, etc.

However, the involvement of the Agency *per se* in the contract formulation process and the requirement to consider the health profession agreement add unnecessary administrative work when appointing an external accreditation agency.

As referred to earlier, it is noted that in Queensland (which has a model in which boards receive administrative assistance from an entity like the National Agency) the boards have legal personality.[11]

[11] Whilst Part 3 of the *Health Practitioners Registration Boards (Administration) Act 1999* (Qld) requires state registration boards to use the services of the Office of Health Practitioner Boards for administrative services, sections 10 and 14 of the *Pharmacists Registration Act 2001* (Qld) confers legal personality on the Pharmacists Board of Queensland.

There is no reason why a National Board should not have equal legal personality to the National Agency. Indeed, equal legal personality will be necessary if the Board is granted the capability to directly engage professional advisers to perform its functions.

Provisions similar to clauses 21 and 22 of the National Law should be added after clause 44 of the National Law conferring legal personality on the National Pharmacy Board.

Clause 60 – Ministerial Council may appoint external accreditation entity

Clause 60 of the National Law provides that the Ministerial Council, and not the National Board, will appoint the external entity that will develop accreditation standards and courses of study.

The National Law now generally permits the National Board with responsibility for developing accreditation standards.

In particular, clause 65 vests in a National Board power to approve accreditation standards, whilst clause 67 permits a National Board to approve accredited programs of study.

In that context, a National Board would be most conveniently placed to appoint an external accreditation entity, as it would have the expertise to ensure that the best qualified service provider would be appointed.

A National Board should be permitted to appoint external accreditation entities.

Clause 61 - National Agency may enter into contracts with external accreditation agencies

Clause 61 provides that the National Agency, and not the Board, will formulate a contract with an external accreditation entity '**only if it is in accordance** with the health professional agreement between the National Agency and the Board…..'

It is noted that the development of a contract with an external accreditation agency is not listed in clause 24 of the Law as something to be provided for in a health profession agreement.

As previously discussed, the Agency probably has to perform the function because the Agency, and not the Board, has the legal personality and employs the relevant staff to conduct negotiations and enter into contracts.

However, it must mean that Agency will develop the gist of agreement as the process of negotiation is undertaken and not the Board *per se.* The opportunity is therefore available for the Agency to involve itself in more than mere 'financial' issues and delve into policy issues.

The National Board should have the legal capacity to enter into a contract with an external accreditation entity.

Clause 64 – Approval of accreditation standards

Clause 64 requires wide ranging consultation to be conducted before an accreditation standard is developed.

It would appear desirable to impose a mandatory duty for the Board to consult with an organisation representing the majority of practitioners subject to an accreditation standard.

Part 7 Division 4 – Limited registration

Division 4 sets out the circumstances where a person can receive limited registration.

Clause 90 and 91 restrict a period of limited registration to a period of two years, which may be a subjective limitation for those seeking registration for research or teaching purposes, or providing services in areas of need.

The two year limitation should be reviewed for those seeking limited registration under clauses 84 and 85 of the National Law.

Clause 94 – Application for registration

Division 6 sets out the mechanism by which a person may apply for registration.

A person may apply for registration by using the approved form, accompanied by the relevant fee, proof of identity and a declaration of the person's criminal history.

Subclause 94(4) disapplies the law generally relating to spent convictions.

The idea behind spent conviction legislation is that a person should be able to start afresh following a discretion committed years ago by not having to admit to stale convictions.

However, the effect of the subclause means that an applicant must admit to offences they would not have to in any other circumstance.

The definition of 'criminal history' contained in clause 6 also requires every charge laid against an applicant to be revealed. As not every charge is particularly well founded, this also appears harsh.

There is a query as to whether this is necessary for each and every criminal category.

Definition (c) of the definition of 'criminal history' and the definition of 'criminal history law' contained in clause 6 should be removed, as should subclause 94(4), or, alternatively the classes of criminal history for which full disclosure is required should be specified in greater detail.

The National Law should be amended so that an applicant can take advantage of spent conviction laws, so as to reduce what needs to be admitted with respect to '*every* plea of guilty or finding of guilt contained in definition (b) of the definition of 'criminal history'.

Clause 122- Application for renewal of registration or endorsement

Paragraph 122(2)(d) requires a renewing pharmacist to provide 'any other information reasonably required by the Board.'

The level of information that could be required under the power to ask for 'other information reasonably required by the Board' might become onerous, particularly if the information is required by the Ministerial Council through a policy direction made under clause 10 of the National Law.

It is also noted that clause 263 gives an option for a pharmacist to provide information for 'workforce planning' purposes – a concept of somewhat indefinite scope.

As the scheme proceeds over time, the Board could increasingly request workforce planning information could be asked by practitioners upon renewal unless there is clear legal guidance as to who can ask for what information, and when.

Paragraph 122(2)(d) should be amended so that the capacity for the Board to ask information be restricted to information reasonably required by the Board 'for the purposes of the assessing the health practitioner's application to renew legislation.

A note, similar to the note contained in subclause 11(3) should be should be inserted after the foot of subclause 122(2) noting that clause 263 gives a pharmacist an option to provide 'workforce planning information' if asked under the terms of that provision.

Clause 125 – Decision about renewal

Clause 125 permits the Pharmacy Board to refuse a renewal.

It is noted that there is no similar provision to clause 99, which permits people who are about to have an original application refused by the Board to receive a statement of reasons why the application was refused, and a right to comment before the final decision is made.

This is an exemplary provision of procedural fairness.

Given that the loss of registration precludes the ability to practise the profession it would appear desirable for a similar provision to be available if the Board is about to refuse a renewal.

A provision similar to clause 99 of the National Law should be inserted in Division 9 of Part 7 of the National Law.

Clause 143 – Changing in mailing address (and the concept of 'disciplinary action')

Clause 143 requires a person to advise a change in postal address. Failure to do so can give rise to 'disciplinary action'.

Disciplinary action is defined in clause 6 as meaning:

> any action that a National Board or a disciplinary body may take in relation to a registered health practitioner at the end of a proceeding under Part 8.

This is a vague concept.

It presumably means that this behaviour will be subject to a preliminary assessment process, and then treated as professional misconduct, unprofessional conduct or unsatisfactory professional performance.

This is a cumbersome way to deal with the issue of a person forgetting to provide the Pharmacy Board with a new mailing address.

If this oversight (as well as failures to advise of changes in employment and criminal record) are to be worthy of sanction, the consequences should be clear.

In this case, it would be better if the National Law deemed (for instance) failure to notify a postal address to a Board as unprofessional conduct, with the Board empowered to impose a penalty specified in the National Law.

The concept of 'disciplinary action' should be removed, and specified sanctions imposed for failure to adhere to mechanical failures of practitioners (such as failing to advise of a change in postal address)

Clause 145 - Advertising

Subdivision 4 of Division 2 generally regulates advertising.

Paragraph 145(1)(c) prohibits testimonials or purported testimonials for a business providing a regulated health service.

Pharmacy differs from other regulated professions as the 'business' not only provides a regulated health service (the dispensing of prescriptions), it also provides a number of different services, such as the provision of health related products.

A pharmacy is in competition with other suppliers of these lines.

The commencement of subclause 145(1) should be amended to read 'A person must not advertise a regulated health service, or a regulated health service provided by a business, in a way that…..'

It is noted that subclause 145(3) grants a court a discretion to 'have regard' to a guideline that a National Board has made about the advertising of regulated health services.

However, the prohibitions contained in the clause are cast in reasonably objective terms; it is difficult to see what utility subclause 145(3) has to offer with respect to the interpretation of the Division.

The subclause 145(3) requires reconsideration.

Part 7 – General observation – day from which a registration will run

It is inferred that registration begins from the day the Board decides accepts the application, although this is not clearly specified in the Law.

- Subsection 138(3) requires the date the registration was 'granted' to be recorded on a registration certificate. This is a relatively indirect way of determining the date of registration of a pharmacist.

It would be helpful if the date of registration was specified, as it is important to determine for example, the day that registration will lapse.

Clause 155 – Grounds for complaint

Clause 155 establishes the grounds under which a complaint can be made against a pharmacist.

The inclusion of the term 'fit and proper person' in paragraph 155(1)(c)is curious, as whilst being fit and proper is a ground for registration, the term is not employed in the definitions of unsatisfactory professional performance, unprofessional conduct or professional misconduct.

The grounds for complaint should be aligned with the circumstances where, if substantiated, could lead to action against the relevant pharmacist under the National Law.

Part 8 Division 3 – Other matters taken to be complaints

Subclause 156(5) states that a report made under the terms of clause 156 is taken to be a complaint for the purposes of the Law. That means that the indemnity contained in clause 281 protects the reporter against defamation.

Clause 157 does not confer the advantage of the indemnity on an employer.

An employer should probably also be covered by the clause 281 indemnity.

Clause 168 – Immediate suspension or imposition of condition

Clause permits the National Board to immediately suspend a pharmacist under certain conditions.

Subclause 168(6) sets out the period of effect of an immediate suspension.

Paragraph 168(6)(a) permits a decision to stand 'until the matter is set aside on review'. It is unclear what this phrase means.

Given that paragraph 168(6)(b) deals with what happens after a relevant external tribunal has 'dealt with' the matter, this can be interpreted to mean that a decision stands unless stayed.

The phrase 'until the matter is set aside on review' contained in paragraph 168(6)(a) requires clarification.

Clause 178 – National Board's decision; clause 179 – Action that may be taken by National Board at the end of proceeding

If, after considering a performance assessment ordered under clause 174, a National Board considers that a person has inappropriately obtained registration, the combined operation of paragraphs 178(1)(d) and 179(1)(c) requires the matter to be referred for either further investigation or to a performance standards panel.

The reference to a performance standards panel is confusing, given that paragraph 170(1)(b) requires the Board to otherwise refer the complaint to the relevant responsible tribunal.

The reference to a performance standards panel contained in paragraph 179(1)(c) should be changed to a reference to a responsible tribunal.

Clause 184 – Legal Representation

Clause 184 deals with legal representation that a pharmacist may have before a professional standards panel.

The clause creates a qualified right of legal representation.

A lawyer may 'accompany' a person who is the subject of the hearing, and may, if the panel permits, make an address, but cannot otherwise 'appear on behalf' of the person.

By implication, the biggest preclusion imposed on the lawyer would be the opportunity to cross-examine witnesses.

It is acknowledged that this is the practice in some jurisdictions.

However, this is the opportunity to establish national best practice.

Given the consequences of an adverse finding from a performance panel, it is difficult to see why someone who is subject to a performance panel review does not have the same rights as a person the subject of a health panel review, given that the consequences that may flow from an adverse finding are essentially the same.

The right to legal representation before a performance standards panel should be the same as those available to a health professional bound to appear before a health panel.

Clause 184 of the National Law should be structured in identical terms to clause 204.

Division 9 - Investigations

Division 9 establishes the powers of investigators.

The National Law permits a member of the National Agency's staff to conduct investigations on behalf of the National Board, which must be conducted 'as quickly as practicable' – that is, there is no objective time period within which an investigation must conclude.

This gives very wide powers.

An investigator can issue **any** person with a notice to attend an investigator and to provide **any** information and produce documentation other than where it could prejudice the person's right against self-incrimination.

Division 9 also confers on investigators a wide variety of powers including, for example, the right to enter premises when it is open to the public, and may then search the place and seize 'items'.

These powers are generally provided to investigators who have responsibility to monitor compliance with legislation, and generally comply with the principles contained in the report entitled *Entry and Search Provisions in Commonwealth Legislation* (Senate Standing Committee for the Scrutiny of Bills, report 4/2000, 6 April 2000).

It is also acknowledged some jurisdictions grant these powers to officers investigating complaints against health practitioners.

However, the powers are drawn so wide, an over zealous investigator could seize, in the name of collecting 'evidence that is being collected by the investigator' could include patient records contained in a pharmacy. It needs to be determined as to whether a medical practitioner's consulting room or a pharmacy dispensary (compared to the receptionist area of a surgery or the pharmacy trading area are 'public places'. If they are not, a warrant would be needed to gain access and to seize documents.

The need of investigators to have powers of this width requires further consideration.

Part 8 Division 10 – Review

The gist of the Division 10 is to create a requirement for an internal review of decisions relating to the registration of a pharmacist before the pharmacist can gain access to external review.

It is observed that ultimately only officers of the National Agency will make decisions relating to the registration of practitioners.

This is because whilst the commencement of subclause 245(1) states that 'if the review is made other than by the National Board acting itself….' the subclause requires the internal review to not be dealt with by the person who made the decision or a **person in a less senior office than the person who made the original decision**.[12]

The clause anticipates that the National Board itself will not make registration decisions, which should be the usual case.

However, the Guild hopes that in the usual case decisions to refer pharmacists to a professional standards or health panel, or to impose a condition of a licence would be made by a State Board created by clause 54 (if not a committee created by clause 53) pursuant to a delegation made by the National Board under clause 55.

The concept of a committee making a decision does not correlate with Division 10 which is clearly designed to deal with decisions made by officers.

[12] The definition of 'person' contained in Schedule 4 does not assist. A Committee is unlikely to be characterised as a 'body politic', and does not assist in identifying where in the overall hierarchy a committee created under either clause 53 or 54 sits.

Division 10 should be amended to clarify which entity hears a review from an original decision made by:

(a) the most senior officer with a delegation to make the relevant decision;

(b) a committee of the National Board created by either clause 53 or 54; or

(c) the National Board itself.

General comment – disciplinary pathways

It is noted that although the investigatory/disciplinary process can be quite lengthy, the rights to appeal process can be inconsistent and unsystematic.

For instance, if after a preliminary assessment or a full investigation the Board believes there are grounds for either unprofessional misconduct or unsatisfactory professional performance:

- a pharmacist may be sent to a performance assessment - a decision that cannot be administratively appealed under the Law; after which
- the Board can take a number of actions against the health professional (including the imposition the conditions) – a decision that can be reviewed internally, with that internal review being able to be reviewed by the relevant external appeal tribunal; with
- the ultimate decision of the performance panel capable of review by the relevant external appeal tribunal.

While this is a structure in place in some jurisdictions, there is some argument that there is one level of review too many.

Paragraph 1.25 (g) of Attachment A of the COAG Agreement anticipates the Board to deal with 'less serious disciplinary matters', while paragraph 1.25 (l) and Part 2 of Attachment A anticipate State-based administrative review of 'serious matters' or appeals from Board decisions. The performance panel and health panel concept was not anticipated in the COAG decision.

There is some scope to consider whether the disciplinary structure should be rationalised. It may be appropriate that, if after a preliminary assessment there are grounds to take further action, a matter should be immediately referred to a performance panel or health panel (as the case requires) or to an appropriate external tribunal. Alternatively, the creation of health and performance assessment panels could be reviewed.

Part 10 and 11 – Appointment of Commonwealth officers

Clauses 259 and 261 adopt Commonwealth Privacy and Freedom of Information Law (as amended by the regulations), while clause 279 adopts the Commonwealth's Ombudsman legislation.

Constitutionally, there must be legislation in place to ensure that a State law (which the proposed National Law is) appropriately confers power on commonwealth entities, and that commonwealth legislation properly accepts the investment of responsibilities conferred by a State law: *Re Wakim; Ex P. McNally* 198 CLR 511; *R.v. Hughes* 202 CLR 535.

It is presumed that all the Bill C's being prepared by the Commonwealth and the States and Territories will ensure constitutional competence.

It is also presumed that the various Commonwealth entities, such as the Privacy Commission, the Ombudsman and the Administrative Appeals Tribunal will have the resources necessary to deal with any work generated under the National Law.

Clarification is sought as to how these Commonwealth agencies will be funded to perform functions and powers under the national registration scheme.

Clause 266 – National Board to publish certain decisions.

Paragraph 266(1)(c) states that a National Board must publish on its website 'decisions made about health established by the Board.'

The paragraph has been written incorrectly and requires correction.

Part 12 Division 13 – Complaints and disciplinary proceedings

Division 13 sets out how complaints are made at or around the commencement of the national scheme contained in the National Law.

Clauses 327 and 328 makes clear that complaints being dealt with prior to commencement of the national scheme, or about behaviour committed before commencement will be judged against the terms of the previous State-based registration laws.

Clause 326, dealing with complaints made but not being dealt with, is not as clear.

Clause 326 should be clarified so that complaints made but not being dealt with at the commencement of the National Scheme will be determined according to the law in force prior to the commencement of the National Scheme.

Schedule 3

Schedule 3 sets out the constitution and procedure of a National Board, including how members of the Council will be appointed, and how meetings will be conducted.

Clause 6 deals with how conflicts of interest will be dealt with.

As at least half the Board will constitute pharmacists for a National Pharmacy Board, there would be an advantage for a clause indicating that so as to remove any doubt, the fact that some members of the National Board will be pharmacists (and thus subject to regulation) and that does not in itself constitute a conflict of interest.

ATTACHMENT – EXTRACT FROM THE INTERGOVERNMENTAL AGREEMENT FOR REGULATORY AND OPERATIONAL REFORM IN OCCUPATIONAL HEALTH AND SAFETY

5.1 Model OHS Legislation

5.1.1 The Parties commit to work cooperatively to harmonise OHS regulation through the adoption and implementation of model OHS legislation.

5.1.2 The Parties support the National Review into Model Occupational Health and Safety Laws, announced by the Commonwealth Minister on 4 April 2008.

5.1.3 Model OHS legislation will comprise a model principal Act supported by model OHS regulations and model codes of practice. Model OHS legislation will be developed by [*ASCC replacement body*] in accordance with the terms of this Agreement.

5.1.4 The development process for model OHS legislation will allow for interested persons to make representations concerning any proposed model legislation. Prior to submitting any proposed model legislation to WRMC, [*ASCC replacement body*] will give due consideration to any representations duly made to it and make such alterations to the proposed legislation as it sees fit.

5.1.5 The Parties agree that a national compliance and enforcement policy will be developed to ensure a consistent regulatory approach across all jurisdictions.

5.1.6 For the purpose of ensuring that model OHS legislation applies throughout Australia, each Party to this Agreement will, subject to its parliamentary and other law-making processes, take all necessary steps to enact or otherwise give effect to model OHS legislation within its jurisdiction within the timeframes agreed by WRMC.

5.1.7 For the purposes of subclause 5.1.1, the adoption and implementation of model OHS legislation requires each jurisdiction to enact or otherwise give effect to their own laws that mirror the model laws as far as possible having regard to the drafting protocols in each jurisdiction.

5.1.8 The adoption and implementation of model OHS legislation is not intended to prevent jurisdictions from enacting or otherwise giving effect to additional provisions, provided these do not materially affect the operation of the model legislation, for example, by providing for a consultative mechanism within a jurisdiction.

5.1.9 [*ASCC replacement body*] will make model OHS legislation publicly available on its website when it is agreed by WRMC. [*ASCC replacement body*] will hold and maintain all original copies of agreed model OHS legislation, including any subsequent amendments.

5.2 Model OHS Act

5.2.1 WRMC will consider and respond to the recommendations of the National Review and will subsequently decide on the optimal structure and content of a model OHS Act to be adopted by all jurisdictions.

Following its agreement on the optimal structure and content of a model OHS Act, WRMC will request [*ASCC replacement body*] to develop the proposed model OHS Act in accordance with its decision.

As part of its development of the model OHS Act, [*ASCC replacement body*] will undertake consultation processes to allow for interested persons to make representations concerning the proposed model OHS Act. This will include the development and release of an exposure draft bill and a regulatory impact statement (RIS) in accordance with COAG guidelines, for public consultation. [*ASCC replacement body*] must consult with the states and territories in developing the RIS.

[*ASCC replacement body*] will submit the proposed model OHS Act to WRMC for consideration and decision.

5.2.5 Where WRMC agrees to the proposed model OHS Act by consensus, it becomes the agreed model OHS Act. WRMC will make a public announcement of its decision which will include the commitment of all jurisdictions to fully implement the agreed model OHS Act no later than December 2011.

5.3 Model OHS Regulations

Model OHS regulations to support the Act will be developed by [*ASCC replacement body*] and submitted to WRMC progressively in three stages:

(a) Stage one will set out an overall framework for a consolidated body of regulations and will incorporate detail on those matters broadly common to all current jurisdictional regulations, as well as recently reviewed national standards material;

(b) Stage two will include consideration of matters that are broadly included in some, but not all, jurisdictions' regulations, as well as material from national standards currently under review; and

(c) Stage three will cover those matters identified as requiring considerable policy development and will complete the remainder of the regulations identified in the framework.

As part of its development of model OHS regulations, [*ASCC replacement body*] will undertake consultation processes to allow for interested persons to make representations concerning proposed model OHS regulations. This will include the development and release of an exposure draft bill and a regulatory impact statement (RIS) in accordance with COAG guidelines, for public consultation.

Where WRMC agrees to proposed model OHS regulations by consensus, they become agreed model OHS regulations. WRMC will make a public announcement of its decision which will include the commitment of all jurisdictions to fully implement the agreed model OHS regulations no later than December 2011.

5.4 Model OHS Codes of Practice

5.4.1 Model OHS Codes of Practice will be developed by [*ASCC replacement body*].

As part of its development of model OHS Codes of Practice, [*ASCC replacement body*] will undertake consultation processes to allow for interested persons to make representations concerning proposed model OHS Codes of Practice. Model OHS Codes of Practice will be developed in accordance with COAG guidelines.

[*ASCC replacement body*] will submit proposed model OHS Codes of Practice to WRMC for consideration and decision.

Where WRMC agrees to proposed model OHS Codes of Practice by consensus, they become agreed model OHS Codes of Practice. WRMC will make a public announcement of its decision which will include the commitment of all jurisdictions to fully implement the agreed model OHS Codes of Practice within timeframes established by WRMC.

5.5 Maintenance of Nationally Uniform OHS Legislation

5.5.1 The Parties commit to ensure that their laws and other instruments giving effect to the agreed model OHS legislation will remain nationally uniform over time.

5.5.2 Any Party that proposes to amend its legislation or introduce new legislation so as to materially affect the operation of model OHS legislation will submit the proposed amendments or new legislation to WRMC for decision. Each Party agrees that it will not progress implementation of any such amendment or such new legislation unless WRMC has endorsed the proposed amendment or new legislation.

5.5.3 Where WRMC approves an amendment to legislation or new legislation that affects the operation of the agreed model OHS legislation, all Parties will (unless otherwise agreed by WRMC) undertake all necessary steps to introduce appropriate changes to their legislation with a view to ensuring that OHS legislation remains nationally consistent.