

Department of Health and Human Services

OFFICE OF THE SECRETARY - LEGISLATIVE REVIEW AND STATUTORY SERVICES



National Registration and Accreditation Scheme for Health Professions Disciplinary and Review Body Discussion Paper

A copy of the Discussion Paper is available online at <http://www.dhhs.tas.gov.au>.

A copy of the Inter-Governmental Agreement relating to the project is available for download at www.nhwt.gov.au/natreg.asp.

Interested individuals and organisations are invited to respond to the issues and options raised for consideration in this paper by way of written submission.

Written submissions may be posted, faxed or emailed to:

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The closing date for return of submissions is:

close of business on Friday, 29 May 2009

Options presented have not been formally discussed with, and are subject to consultation and approval by, other Government agencies including the Department of Justice, the Department of Treasury & Finance and the Department of Premier & Cabinet.

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I Introduction

- I.1. At its meeting of 14 July 2006, the Council of Australian Governments (COAG) agreed to establish a single national registration scheme for health professionals, beginning with the nine occupational groups registered in all jurisdictions¹.
- I.2. Responsibility for implementation of the scheme passed to Health Ministers with the signing of an Intergovernmental Agreement (IGA) on 26 March 2008. Health Ministers have agreed that the scheme will be fully operational by July 2010.
- I.3. COAG allocated \$19.8 million over four years to the implementation of the scheme, which will require national and jurisdictional action.
- I.4. Formal disciplinary and review bodies under the national scheme will be the domain of the States and Territories, with each able to determine a model most appropriate to that State or Territory's circumstances.
- I.5. The purpose of this discussion paper is to:
 - I.5.1. present options for Tasmania to manage local disciplinary and review issues relating to health care professionals under the national registration and accreditation scheme; and
 - I.5.2. seek feedback in relation to the options presented.

¹ Subsequently, Health Ministers agreed to the addition of podiatrists to this group bringing the total to ten professional groups.

2 Terminology

(As used in the Discussion Paper)

AAD	Administrative Appeals Division of the Magistrates' Court, Tasmania
AHMC	Australian Health Ministers' Conference
Bill B	The name given to the uniform national law that is to be enacted in the Queensland Parliament
Bill C	The name given to the State legislation that will incorporate provisions not included in, but necessary to give effect to, the national registration and accreditation for health professions scheme.
Board	In the Tasmanian context, includes reference to the Medical Council of Tasmania
COAG	Council of Australian Governments
HPD	Health Professions Division (HPD) of the Magistrates' Court
IGA	Inter-Governmental Agreement
NRAIP	National Registration and Accreditation Implementation Project
NSWADT	New South Wales Administrative Decisions Tribunal
PRSC	Practitioner Regulation Sub-Committee
The National Scheme	The national registration and accreditation scheme for health professions
VCAT	Victorian Civil & Administrative Tribunal

3 Background

- 3.1. In 2006, COAG commissioned the report “Australia’s Health Workforce” from the Australian Productivity Commission. The report proposed a national scheme for the registration and accreditation of health professionals (the National Scheme).
- 3.2. On 26 March 2008, COAG members signed an IGA to establish the National Scheme to be operational by July 2010. A uniform legislative model was proposed, with Queensland to host the substantive legislation [Bill B] and other jurisdictions to adopt and apply that model in their own legislation [Bill C] in order to enter the National Scheme.
- 3.3. The development of policy related to the National Scheme legislation, Bill B, is occurring based on the IGA. A central National Registration and Accreditation Implementation Project team (NRAIP) is developing policy and legislation for the approval of Health Ministers, guided by their delegates, the Practitioner Regulation Sub-Committee (PRSC) of the Australian Health Minister’s Conference (AHMC).
- 3.4. PRSC has agreed to timing for the national law [Bill B] in order to provide jurisdictions with the maximum opportunity to pass their Bills C by December 2009.
- 3.5. The National Scheme is to operate in concert with, and complementary to, a range of amendments to other State and Territory laws and will apply to the following professions:
 - 3.5.1. chiropractic;
 - 3.5.2. dental (including the profession of a dentist, dental hygienist, dental prosthetist and dental therapist);
 - 3.5.3. medical;
 - 3.5.4. nursing and midwifery;
 - 3.5.5. optometry;
 - 3.5.6. osteopathy;
 - 3.5.7. pharmacy;
 - 3.5.8. physiotherapy;
 - 3.5.9. podiatry; and
 - 3.5.10. psychology.
- 3.6. Each of the States and Territories is required to prepare for their respective Parliaments:
 - 3.6.1. legislation adopting the national law (Bill B) and nominating relevant state bodies for the purposes of the National Scheme;
 - 3.6.2. transitional and consequential amendments to existing legislative arrangements to ensure the national law only, and fully, applies; and
 - 3.6.3. other legislative amendments to incorporate terms that are not included in, but are necessary to give effect to, the National Scheme.
- 3.7. There will be differences for:
 - 3.7.1. Western Australia; which will be drafting a corresponding law; and

3.7.2. the Australian Government; which will not adopt Bill B, but will pass laws which allow the National Scheme to link with national privacy, information sharing and administrative tribunal laws.

3.8. Included in the 'other legislative amendments' required by the States and Territories under the National Scheme is an external complaints and review process. Attachment A to the IGA provides the following (at clauses 2.1 – 2.4):

“The hearing of serious disciplinary matters (those which may result in suspension or cancellation of registration) will be undertaken by an entity external to the agency, which will also be responsible for the hearing of appeals against less serious disciplinary matters where internal review has not resolved the matter.

It will be the responsibility of each State and Territory to determine which entity in their particular jurisdiction (in accordance with national criteria agreed by AHMC) will be responsible for the hearing of these matters.

However, to ensure national consistency, the legislation to establish the national scheme will specify common processes, findings and determinations that can be made.

Access to the courts will be available as under current arrangements.”

3.9. In Tasmania, the professions are regulated in accordance with the following Acts:

Chiropractors and Osteopaths Registration Act 1997 - Chiropractors and Osteopaths Registration Board;

Dental Practitioners Registration Act 2001 - Dental Board of Tasmania;

Dental Prosthetists Registration Act 1996 - Dental Prosthetists Registration Board;

Medical Practitioners Registration Act 1996 – Medical Council of Tasmania;

Nursing Act 1995 - Nursing Board of Tasmania;

Optometrists Registration Act 1994 - Optometrists Registration Board;

Pharmacists Registration Act 2001 - Pharmacy Board of Tasmania;

Physiotherapists Registration Act 1999 - Physiotherapists Registration Board of Tasmania;

Podiatrists Registration Act 1995 - Podiatrists Registration Board of Tasmania; and

Psychologists Registration Act 2000 - Psychologists Registration Board of Tasmania.

The Acts may be viewed on line at www.thelaw.tas.gov.au.

3.10. This paper is intended to offer several options for discussion by health professions and other relevant stakeholders. The paper is subject to ongoing consultation with the Department of Justice.

4 Complaints and Disciplinary Action

4.1 Current Situation - Tasmania

- 4.1.1. The complaints procedure for each of the health professions in Tasmania varies. There are, however, some common elements.
- 4.1.2. Pursuant to each of the pieces of existing State legislation, a person may complain against any health professional to the Board responsible for their registration. In each case, the Board is obliged to make an initial investigation of the complaint, either internally or via an appointed committee or investigator.
- 4.1.3. If this initial investigation determines that the complaint is frivolous or vexatious, or that there is no prospect of substantiating the complaint, the complaint is generally dismissed, or, at least, not acted upon at that time.
- 4.1.4. If the initial investigation determines that the complaint might be substantiated, the Boards may avail of other disciplinary action, depending, generally, on the nature and extent to which the conduct complained of breaches the professional's obligations.
- 4.1.5. If a substantiated claim is deemed to be not of a serious kind, or not sufficiently serious to warrant further investigation, a Board is generally able to conduct an informal inquiry into the complaint. The Board can generally require a respondent to:
 - 4.1.5.1. appear before it to give an explanation of the matter; or
 - 4.1.5.2. provide it with a written explanation.
- 4.1.6. The Board is then generally entitled to reprimand a professional, acquire an undertaking for the improvement of performance or dismiss the complaint, in appropriate circumstances.
- 4.1.7. For a substantiated claim that is deemed to be more serious, there exists a fairly neat dichotomy between the models for conducting further disciplinary action, despite there being some ongoing differences in procedure.
- 4.1.8. **Category I – The Independent Tribunal Model**
 - 4.1.8.1. This model of disciplinary action is found in both the *Medical Practitioners Registration Act 1996* and the *Nursing Act 1995*.
 - 4.1.8.2. Those professions each have recourse to an independent tribunal (the Medical Complaints Tribunal and the Professional Review Tribunal respectively) to hear and determine complaints that are '*prima facie*' substantiated and are of a more serious nature.
 - 4.1.8.3. The members of each Tribunal are appointed by the Medical Council of Tasmania and Nursing Board of Tasmania respectively and must not be members of the Board. Each Tribunal contains:
 - 4.1.8.3.1. two permanent members; one being a legal practitioner with at least 10 years experience (the 'chairperson') and the other being a person who is not a legal practitioner, nor a member of the profession (the 'consumer representative'); and

- 4.1.8.3.2. three special members; who are members of the relevant profession.
- 4.1.8.4. The Tribunals are funded by the Medical Council and Nursing Board which also provide secretarial support to the Tribunals.
- 4.1.8.5. The Tribunal in each case is formally constituted and its operations are established in the legislation. They are empowered to hear matters dealing with a complaint by or against a member of their relevant discipline only.
- 4.1.8.6. The Tribunals are not bound by the rules of evidence, may inform themselves of any matter they consider relevant, and may conduct themselves as informally and as expeditiously as possible. Both Tribunals are required to have regard to the principles of natural justice.
- 4.1.8.7. Importantly, in this model of disciplinary action, it is the Tribunal that has the power to make binding determinations pertaining to the complaint. The Tribunal may make orders in each case ranging from removal of the defendant's name from the register of professionals, fines and reprimands to dismissing the complaint.
- 4.1.8.8. Once a decision is made by the Tribunal, the Council or Board is compelled to take whatever action is necessary to give effect to that decision.
- 4.1.8.9. The decision may only be challenged by an appeal to the Supreme Court.
- 4.1.8.10. In the case of the Medical Council, some 56 complaints were received in 2007. Of those, only two were referred to the Tribunal. The disciplinary action undertaken by the Council (including matters held over from 2006) cost some \$98,000.00 in 2007.

4.1.9. Category 2 – The Board Discretion Model

- 4.1.9.1. This category of disciplinary action applies to the remaining Boards², despite the fact that there are some minor procedural differences between them. The unifying feature of their disciplinary models is that *the Board* is ultimately responsible for determining a complaint.
- 4.1.9.2. In the case of the Dental Board of Tasmania and the Pharmacy Board of Tasmania, where the initial investigation by an independent investigating committee determines that the matter warrants formal disciplinary proceedings, the Board is reconstituted as the Disciplinary Tribunal. The formal hearing of the complaint proceeds before the Tribunal whose powers are similar in scope to the independent Medical Complaints and Professional Review Tribunals.
- 4.1.9.3. In the case of remaining Boards, the initial decision that a matter is sufficiently serious to warrant appointment of a disciplinary committee is made by the Board. Formal disciplinary proceedings occur before a

² Chiropractors & Osteopaths Registration Board; Dental Board; Dental Prosthetists Registration Board; Optometrists Registration Board; Pharmacy Board; Physiotherapists Registration Board; Podiatrists Registration Board and Psychologists Registration Board.

Disciplinary Committee of at least three persons, at least some of whom must be registered members of the profession. The Disciplinary Committee must, after concluding the formal proceedings, make a recommendation to the relevant Board. The Board then maintains discretion to give effect to the recommendations of the Committee, or to take its own action.

- 4.1.9.4. Currently, funding for any formal disciplinary proceedings comes from the Boards.
- 4.1.9.5. A person aggrieved of a decision of a Board maintains the right to appeal that decision to the Supreme Court.
- 4.1.9.6. Under the National Scheme, it is unlikely that this model will be supported. The disciplinary procedure is to become more uniform so that the decision to hear and determine serious disciplinary matters will be vested in an authority independent of the Board.

4.1.10. Prevalence of Formal Proceedings in Tasmania

- 4.1.10.1. Statistics provided by the Boards for the past five financial years are as follows.

Professional Board	Number of complaints referred to formal disciplinary proceedings (2003/04 - 2007/08)	Average number of sitting days per complaint
Medical Council	13	3
Nursing Board	12	3
Dental Board	1	3
Chiropractors & Osteopaths	1	2
Dental Prosthetists	0	0
Optometrists	0	0
Pharmacy	3	2.5
Physiotherapists	4	2.5
Podiatrists	0 [^]	0
Psychologists	7	3

Notes: [^] One matter pending for the 2008/09 financial year

- 4.1.10.2. The figures in Table 1 represent the numbers of complaints referred for formal disciplinary proceedings under the existing Tasmanian legislation. This means that complaints are initially assessed by each of the relevant Boards at the local level.
- 4.1.10.3. It is possible that the numbers of complaints referred for formal disciplinary proceedings under the national scheme may escalate. Accordingly, these figures should be used as a guide only.

4.2 Current Situation – Other Jurisdictions

4.2.1 Australian Capital Territory

Part 7 of the *Health Professions Act 2004* establishes the Health Professions Tribunal, confers its functions and sets out its procedure including what matters it can hear and how applications are made. In 2008, the ACT Parliament passed the *Civil and Administrative Tribunal Act 2008*. It is understood that this Tribunal will continue to operate in the ACT following introduction of the National Scheme.

4.2.2 New South Wales

Part 11 of the *Medical Practice Act 1992* establishes the Medical Tribunal and sets out its functions, procedures, etc. Nine specific Tribunals are established under each of the other nine registration Acts. Appeals against decisions of the Tribunals are, initially, to the Tribunal that made the determination and then, to the Supreme Court of New South Wales. It is understood that proposed amendments to the *Administrative Decisions Tribunal Act 1997* (NSW) will establish a new Health Professions' Division of the NSW ADT. This new Division will have powers conferred upon it to hear complaints following introduction of the National Scheme.

4.2.3 Northern Territory

Part 4 of the *Health Practitioners Act 2004* establishes the Health Professional Review Tribunal and confers its functions, and the orders it can make with respect to matters referred to it under the Act. A person has a right of appeal to the Supreme Court of the Northern Territory by virtue of section 99 of the Act. It is understood that the Health Professional Review Tribunal will continue to operate following introduction of the National Scheme.

4.2.4 Queensland

Part 6 Division 6 of the *Health Practitioners (Professional Standards) Act 1999* sets out the powers, functions and procedure of the Health Practitioners Tribunal established under the Act to hear matters with respect to all regulated health professions. Appeals (only permitted on a question of law) are to the Queensland Supreme Court, Court of Appeal. On 12 March 2008, the Queensland Premier announced, that a Queensland Civil and Administrative Tribunal is to be created in the State. It is understood that this Tribunal will hear complaints following the introduction of the National Scheme.

4.2.5 South Australia

Part 5 Division 4 of the *Medical Practice Act 2004* sets out provisions relating to the powers, functions and procedure of the Medical Professional Conduct Tribunal, established (under another name) under a previous enactment and continued under the Act. Similarly, the *Dental Practice Act 2001* provides for the operation of the Dental Professional Conduct Tribunal. For remaining regulated health professions, there is no tribunal constituted separately to the Board, and all matters are dealt with by the responsible Board, with appeals from Board decisions to the District Court of South Australia (except for psychology matters where appeal lies to the Supreme Court). It is understood that South Australia are still developing options for dealing with complaints and reviews under the new national scheme.

4.2.6 Victoria

Under the *Health Professions Registration Act 2005*, matters may be referred for hearing to the Victorian Civil and Administrative Tribunal. VCAT is established under the *VCAT Act* but is conferred with jurisdiction with respect to health practitioner registration and disciplinary matters under the HPR Act. Matters arising from Board decisions for all the regulated health professions are referred to VCAT. Appeals are to the Supreme Court of Victoria, but only on a question of law and only with leave of the Supreme Court. It is understood that VCAT will continue to operate following introduction of the National Scheme.

4.2.7 Western Australia

Part 6 Division 10 of the *Medical Practitioners Act 2008* confers on the State Administrative Tribunal, established under the *State Administrative Tribunal Act 2004* powers to hear matters arising from the Medical Board of WA. Similar arrangements are in place in the Acts that regulate the other nine professions. It is understood that the State Administrative Tribunal will continue to operate following introduction of the National Scheme.

4.3 Situation under the Proposed National Scheme

- 4.3.1 The uniform Bill (Bill B) establishing the National Scheme is to provide that the national Boards will:
- 4.3.1.1 administer the registration of health professionals into each of the relevant health professions;
 - 4.3.1.2 oversee the receipt and investigation of complaints about persons registered in the health profession for which the Board is established and the determination of matters following investigations, including the referral of more serious matters for hearing by appropriate bodies;
 - 4.3.1.3 oversee disciplinary hearings about less serious matters in relation to health practitioners registered in the health profession for which the Board is established, and to determine less serious disciplinary matters relating to the health practitioners; and
 - 4.3.1.4 oversee the management of impaired health practitioners registered in the profession for which the Board is established, including monitoring conditions and suspensions imposed on impaired practitioners' registration.
- 4.3.2 Under the National Scheme, State based legislation creating each of the professional Boards is to be repealed. However, it is likely that a local committee of each National Board will exist in each State or Territory. It is likely that these committees will be delegated the power for making a preliminary assessment of a notification relevant to that jurisdiction to determine the most appropriate course of action.
- 4.3.3 Each notification will be pursued through one or more of three streams:

4.3.3.1 performance management (competence);

4.3.3.2 health management (impairment); or

4.3.3.3 conduct (discipline).

4.3.4 Performance management

4.3.4.1 If a preliminary assessment has found evidence that the practitioner's performance may be unsatisfactory, then the Board would have the power to appoint an assessor or assessors to undertake a performance assessment.

4.3.4.2 Following completion of the performance assessment and receipt and consideration of the report of the assessor, the Board would decide whether a formal performance panel hearing is required, or what other action is necessary to address any identified deficits in the practitioner's performance.

4.3.5 Health management

4.3.5.1 If a preliminary assessment has found evidence that the practitioner may have a physical or mental impairment, or may be habitually using alcohol or other drugs and that this is affecting or may affect their capacity to practise, then the Board may refer the matter to a health management committee.

4.3.5.2 The role of the Board or the health management committee in such cases would be to oversee the assessment and management of impaired registrants. A health management committee would have the power to appoint a health assessor or assessors to undertake an assessment of the health of the practitioner. Following completion of the health assessment and receipt and consideration of the report of the assessor, the Board would decide whether a formal health panel hearing is required, or what other action is necessary to address any capacity to practise issues identified.

4.3.6 Conduct management

4.3.6.1 The legislation will enable the Board to appoint an investigator or investigators, and to immediately suspend the registration of the practitioner if necessary, on the grounds of potential risk to public health and safety. The conduct management committee would oversee the investigation of practitioners who may have engaged in unsatisfactory professional conduct, and, if necessary, appoint a panel to conduct a hearing of the matter.

4.3.6.2 Boards would have powers to decide not to investigate matters on specified grounds, as well as 'own motion' powers to initiate an investigation (and if

necessary a panel or disciplinary body hearing) in the absence of a notification.

4.3.7 Consultation with Health Complaints Commissioner (HCC)

- 4.3.7.1 Complaints against health care professionals by members of the public are, generally speaking, the domain of the Tasmanian HCC. The HCC can investigate complaints and conduct 'own motion' enquiries into matters of public interest or public safety and must conduct an enquiry if directed to do so by the Minister for Health.
- 4.3.7.2 To maximise the benefits of the respective roles, the legislation will require two-way sharing of identified information on complaints between the national Boards and the HCC.
- 4.3.7.3 If a notification falls within the ambit of the HCC, the national legislation requires the responsible Board to notify the HCC and provide it with a copy. The HCC and the relevant Board can then, in consultation, determine the appropriate forum for the notification. A reciprocal statutory obligation to consult will apply to an HCC where they receive a notification regarding a health professional.
- 4.3.7.4 If the Board and HCC consider that the notification raises questions of possible unsatisfactory professional conduct or professional misconduct by the registered practitioner or the practitioner may be impaired, then the legislation requires that the matter be dealt with by the responsible Board. If, at any time, the Board considers the matter suitable for conciliation, then the Board may refer the matter, or part of the matter to the HCC.

4.3.8 Board hearings

- 4.3.8.1 If a Board or a performance, health or conduct management committee determines that a hearing of the matter is required, a panel is appointed to conduct the hearing. The legislation will specify the make up of such a panel, along with the formal findings and determinations that each may make.
- 4.3.8.2 The Board (or the respective committees of the Board) will also have the power to monitor compliance of registrants with any conditions placed on their registration or undertakings given, and to initiate assessment or hearing processes in cases of breach.
- 4.3.8.3 If a committee or panel forms the view that a practitioner may have engaged in professional misconduct, then it will be obliged to stop the proceedings and refer the matter to the responsible tribunal.

4.3.9 Referral for disciplinary body hearing

- 4.3.9.1 If during, any proceedings, the Board (or a committee or panel of the Board) decides, at any time, that there may be grounds for suspension or cancellation of the practitioner's registration (that is, the practitioner may have engaged in professional misconduct), the legislation would require the Board, committee or panel to refer the matter for hearing by a responsible State or Territory disciplinary body.
- 4.3.9.2 Additionally, the practitioner could also choose to have the matter dealt with by the disciplinary body, rather than a committee or panel of the Board.
- 4.3.9.3 The relevant State or Territory disciplinary body will be empowered under the legislation to hear and make findings and determinations with respect to:
 - (a) serious misconduct matters referred by the Boards, and
 - (b) appeals from decisions of performance, health or conduct panels.
- 4.3.9.4 Where matters have been referred to a disciplinary body for hearing, either by the Board or on appeal, the Board would be responsible for preparing and presenting the case against the practitioner before the disciplinary body.
- 4.3.10 It is necessary for Tasmania to determine the precise nature of this local disciplinary body.

5 Registration Decisions

5.1 Current Situation

- 5.1.1 A core function of the various State Boards is to administer the registration of health professionals within each of the disciplines. In performing these functions, Boards may decide to refuse an application for registration, or to impose conditions upon a registration that they consider reasonably necessary for the proper protection of the public.
- 5.1.2 There is considerable variability across States and Territories as to the rights of review of these types of decisions.
- 5.1.3 In Tasmania, registrants currently have the right to appeal to the Supreme Court of Tasmania. The (general) types of decisions that may be reviewed by the Court include a decision by a Board to:
- 5.1.3.1 refuse to register the person;
 - 5.1.3.2 impose a condition on the person's registration;
 - 5.1.3.3 remove the person's name from the register;
 - 5.1.3.4 refuse to restore the person's name to the register;
 - 5.1.3.5 suspend the person's registration;
 - 5.1.3.6 refuse to record in the register additional particulars or qualifications in respect of the person;
 - 5.1.3.7 refuse to issue the person with a new certificate of registration.

5.2 Situation under the Proposed National Scheme

- 5.2.1 Attached is an extract from the “National Registration and Accreditation Scheme for the Health Professions Consultation Paper: Proposed arrangements for handling complaints and dealing with performance, health and conduct matters”, issued by the *Practitioner Regulation Subcommittee, Health Workforce Principal Committee, Australian Health Ministers’ Advisory Council* on 7 October 2008.
- 5.2.2 In addition to determining the functions of the new disciplinary body in Tasmania, it will be necessary to determine whether it would have powers to review registration decisions made by the new national boards; or whether rights of review would be to the Magistrates’ or Supreme Court.

6 Options

6.1 Tasmanian Disciplinary Body (to handle complaints)

6.1.1 Option 1: Refer all to Civil Division of the Magistrates' Court

- 6.1.1.1 The Civil Division of the Tasmanian Magistrates' Court is established by the *Magistrates Court (Civil Division) Act 1992*. Matters in the Civil Division are heard and determined by a single magistrate.
- 6.1.1.2 The Court in this Division sits in an adversarial manner, whereby a magistrate hears the evidence presented by each of the parties (or their representatives) and makes a binding determination.
- 6.1.1.3 Procedures to this Division are governed by the *Magistrates Court (Civil Division) Rules 1998*. Whilst the Rules require that proceedings in this Division are to be conducted with the least possible delay, the usual delays associated with the Magistrates' Court are to be expected. Currently, the delay in fixing a matter for hearing is around 6 weeks, meaning that matters are generally unable to be dealt with in an expeditious manner.
- 6.1.1.4 Civil Division matters are conducted according to the formal rules of evidence. Despite the Rules providing that proceedings should be conducted in a manner that saves costs, the seeming necessity of legal representation for each of the parties coupled with the formal nature of the Court itself have a tendency to increase the costs of proceedings.

6.1.2 Option 2: Establish a new Health Professions Division (HPD) of the Magistrates' Court

- 6.1.2.1 The Magistrates' Court contains a number of other Divisions in addition to the Civil Division. This option proposes that a separate Division of the Court be created to hear all matters relating to complaints concerning health professionals. It is proposed that the Division would be established along the lines of the (existing) Magistrates' Court (Administrative Appeals Division) (AAD).
- 6.1.2.2 Like the AAD, the HPD would not be bound by the rules of evidence and could determine its own procedures, including making its own inquiries. A single magistrate who presides over a matter before the HPD would have powers to request evidence from suitable experts, lessening the adversarial nature of the Court. Whilst such powers exist, there is a perception that they, in fact, continue to operate in a more formal manner.
- 6.1.2.3 A similar provision to section 37 of the *Supreme Court Civil Procedure Act 1932* could be invoked in this division to allow the magistrate to call in assessors, or experts, to jointly hear and determine a matter before the Court. The section provides that, "...

a judge may ... call in the aid of one or more assessors specially qualified, and try and hear such cause or matter ... with the assistance of such assessor or assessors.”

- 6.1.2.4 Special rules could be included in the HPD to enable the magistrate to appoint a single assessor or a panel of assessors to hear a complaint and make a determination. The assessor(s) could be drawn from a panel including other members of the health profession of the person the subject of the claim, consumer representatives and/or legally qualified persons (potentially the president of the HPD or some other magistrate).
- 6.1.2.5 The use of the Magistrates’ Court means that the HPD is able to hear matters at any time during the court’s sitting calendar, subject to the availability of assessors.
- 6.1.2.6 Registries are already available in all Magistrates’ Court locations and are easily accessible to the public. In addition, existing infrastructure and staff may be utilised.
- 6.1.2.7 The creation of the new Division would involve some set up costs (as yet unquantifiable). Given the small number of matters that may, based on Table I above, end up being referred to the court, the additional workload may not be significant and the ongoing costs could be minimised.
- 6.1.2.8 Funding for the prosecution of complaints by the relevant Board needs to be further considered. Further, the provision of sitting day fees to assessors ought to be explored.
- 6.1.2.9 Whereas the current State model provides that complaints are funded by the Boards, that funding (derived chiefly from registration and renewal fees) is less likely to be available under the National Scheme. Alternative funding arrangement to pay the costs of hearings in the Division ought to be investigated.

6.1.3 Option 3: Establish a stand alone Health Professions Tribunal

- 6.1.3.1 This option proposes the creation of a stand-alone Tribunal, similar in model to the Anti-Discrimination Tribunal. Under that model, a chairperson (being a person who is an Australian lawyer of not less than 7 years' standing as an Australian legal practitioner, a magistrate or former judge) is appointed by the responsible Minister, along with other members of the Tribunal. The members in the present case would likely be representatives of each of the professions, or consumer representatives, who could be appointed to hear a complaint as required.
- 6.1.3.2 The primary advantage of this Option is that it allows the professions and the Department input in establishing the Tribunal’s procedures.
- 6.1.3.3 The use of a panel of members allows for the use of experts and consumer representatives in the hearing of a complaint. This maintains the *status quo* with respect to hearings and ensures that the hearings do not become unnecessarily formal.

- 6.1.3.4 A distinct disadvantage of this model is that it will involve significant set-up costs as well as ongoing maintenance costs. The Tribunal would require its own infrastructure and staffing, unless it could somehow be incorporated with the Magistrates' Court (as is the case with the Anti-Discrimination Tribunal) through the appointment of a Magistrate as its chair. The costs of the infrastructure and staffing of the Tribunal would most likely fall upon the State government and this may not be practical in the current economic climate.
- 6.1.3.5 It is likely that this model would be considerably more expensive than Option 1 or 2 because it would likely need infrastructure and staffing costs paid for. As an example, the Resource Management and Planning Appeal Tribunal has a full time staff of eight, plus sessional members and its annual budget is \$1.4million. This Tribunal does, however, receive several hundred applications annually.

6.1.4 Option 4: Maintain Category 1 Tribunals and divert other complaints to the Magistrates' Court or new Tribunal

- 6.1.4.1 This option proposes that the existing Medical Complaints Tribunal and Professional Review Tribunal remain. These Tribunals have established procedures for dealing with complaints referred to them by the Boards. They have a regular panel of members who can be appointed to hear a complaint and are familiar to the professions.
- 6.1.4.2 Under this model, the balance of professions (those with a Category 2 Discipline Model) would proceed to a disciplinary model under Options 1 – 3 above.
- 6.1.4.3 This model is currently being considered by at least one other jurisdiction and there is the possibility that Tasmania could share information regarding the benefits and disadvantages of this model going forward.
- 6.1.4.4 Alternatively, under this proposal, one of the existing Medical Complaints or Professional Review Tribunals could be reconstituted to allow it to hear complaints against all health professions, in a model similar to that proposed in Option 3 above. This would ultimately have the same pros and cons as are indicated in the discussion surrounding that Option.
- 6.1.4.5 Funding would continue to be an issue, as discussed in Options 1 – 3, particularly as the existing tribunals would require their ongoing costs to be met without the benefit of State levied registration fees. No funding formula from the national Board has yet been determined.
- 6.1.4.6 Further, this option has the potential to negate the objective of consistency between the professions. It is likely that processes operating in the existing tribunals would differ considerably to those in the other professions.

6.1.5 Option 5: Establishing a Tasmanian Administrative Decisions Tribunal

- 6.1.5.1 There are a number of tribunals established under State legislation to determine reviews of administrative decisions in Tasmania.³ This option provides that a new tribunal, similar to the VCAT or the NSW ADT, ought to be established to hear and determine matters that currently fall to those numerous tribunals.
- 6.1.5.2 This option would be extremely costly and complaints against health care professionals would likely form only a very minor part of the tribunal's business.
- 6.1.5.3 The responsibility for creating such a tribunal would fall well outside the scope of this Project, and, indeed, would fall to either the Department of Justice or Department of Premier and Cabinet to undertake.
- 6.1.5.4 Whilst the option would allow the streamlining of a number of processes, it is unlikely that it would be functional in time for the commencement of the National Scheme. In that case it would be necessary to come up with some stop-gap measure for complaints to be dealt with pending the commencement of the tribunal.

6.1.6 Other Options?

- 6.1.6.1 Are there other options that should be explored in determining the appropriate body to hear and determine complaints against the conduct of health professionals?

6.2 Review of Registration Decisions

6.2.1 Option 1 Reviews undertaken by new disciplinary body

- 6.2.1.1 This option would essentially make the disciplinary body (set out in 6.1 above) a one-stop-shop with respect to health professionals.
- 6.2.1.2 In addition to handling complaints against professionals, it would also be empowered to review registration decisions at the request of a professional.
- 6.2.1.3 There are some perceived benefits of this option. It would mean that all applications concerning health professions are dealt with by the one body in Tasmania. This body can be constituted with appropriate expertise (depending on the model adopted) to hear complaints and to review the appropriateness of registration decisions.
- 6.2.1.4 There is the potential for members of the public to view this option with some scepticism. There may be allegations of the professions looking after themselves

³ For example, see Resource Management and Planning Appeal Tribunal; Forest Practices Tribunal; Mental Health Tribunal.

where complaints were dealt with by other members of the profession in addition to reviews of registration sanctions.

- 6.2.1.5 This option would likely be the cheapest option for the professions to apply to, yet would probably have higher costs to establish and maintain.

6.2.2 Option 2 Reviews undertaken by the Administrative Appeals Division of the Magistrate's Court

- 6.2.2.1 The Administrative Appeals Division of the Magistrate's Court has been established to review precisely the types of decisions that are discussed here. They are decisions of an administrative nature.
- 6.2.2.2 This option would be considerably cheaper for professions and registrants than maintaining the current position, where reviews are undertaken by the Supreme Court.
- 6.2.2.3 The option is likely to be less flexible (depending on the model adopted) than if the review were undertaken by the new disciplinary body. It does however avoid perception perceptions that the professions seek to protect the profession ahead of the interests of the general public.
- 6.2.2.4 The option is likely to have minimal set-up and maintenance costs.

6.2.3 Option 3 Reviews undertaken by the Supreme Court

- 6.2.3.1 This option would maintain the status quo, as reviews of registration decisions are currently the domain of the Supreme Court.
- 6.2.3.2 A disadvantage of this option is that all applications to the Supreme Court are inherently expensive. They are also conducted with greater formality and potentially with a greater need for representation on the part of the professional.
- 6.2.3.3 This option is likely to have no additional set-up or maintenance costs.

6.2.4 Other Options?

- 6.2.4.1 Are there other options that should be explored in determining the appropriate body to hear and determine reviews of registration decisions?

7 Appeals

7.1 Appeals encompass:

7.1.1 appeals against decisions of a complaints / disciplinary body; and

7.1.2 appeals against decisions made in the course of a review of a registration decision.

7.2 Currently, the only decisions that are reviewable in Tasmania on appeal are appeals against a decision of a complaints / disciplinary body. These appeals are to the Supreme Court, which has the right to review a decision on its merits, not only on a question of law. There is no right of appeal against a decision of the Supreme Court in reviewing a registration decision.

7.3 There needs to be a determination made as to whether decisions of the new disciplinary body and the body that reviews registration decisions under the new scheme ought to be appealable.

7.4 If so, the appeal rights should vest in the Supreme Court. Should they be:

7.4.1 appeals on the merits of a decision (i.e. an aggrieved party has an unfettered right to apply to the Court to reconsider the decision) as is currently the case; or

7.4.2 appeals only on questions of law (i.e. where there is an assertion that in reaching its decision, the body erred in law)?

Attachment I
EXTRACT FROM

NATIONAL REGISTRATION AND ACCREDITATION SCHEME
FOR THE HEALTH PROFESSIONS

CONSULTATION PAPER

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

Issued by the Practitioner Regulation Subcommittee

Health Workforce Principal Committee

Australian Health Ministers' Advisory Council

7 October 2008

11.2 Criteria for State/Territory tribunals

Clause 2.2 of the IGA (Attachment A) requires that all State and Territory tribunal arrangements comply with national criteria agreed by the Australian Health Ministers' Council (AHMC).

Proposal 11.2.1: It is proposed that the national legislation (as opposed to legislation in each State and Territory) make provision for the following:

- the definition of a 'responsible tribunal'
- the grounds on which a responsible board may refer a matter to the responsible tribunal
- the grounds on which a responsible board must refer a matter to the responsible tribunal (for example professional misconduct matters)
- what matters a tribunal may hear in its review jurisdiction
- what matters a tribunal may hear in its original jurisdiction
- who may make an application with respect to the tribunal's original and review jurisdictions, and
- which bodies must be notified of a decision of the tribunal, for example, the registrant, the notifier, any employer, Medicare, the Professional Services Review Scheme, etc.

Proposal 11.2.2: It is proposed that with respect to other matters, the respective State and Territory legislation specify the detailed procedure of the tribunal, such as application processes, powers to close hearings and suppression of the identity of persons appearing, etc. It is proposed that State and Territory legislation make provision for at least the following:

- hearings to be open to the public but with power for the panel to close the hearing under certain circumstances
- powers for a hearing panel to suppress the identity of any party or witness to the proceedings, and
- decisions and reasons to be published.

11.3 Original jurisdiction of tribunal

Proposal 11.3.1: It is proposed that with respect to the original jurisdiction of a responsible tribunal, the national legislation specify that the responsible board or the practitioner may make application to the responsible tribunal for a hearing under its original jurisdiction.

Such provisions should cover circumstances where the board or panel, at any time during an investigation or panel hearing, is required to, or considers it necessary to refer a matter to the tribunal for hearing – where the board forms the view that the practitioner has engaged or may have engaged in professional misconduct, or where suspension or cancellation of registration may be required. It may also cover fraudulent registration and matters which call into question the practitioner’s character.

Alternative option: The legislation which confers original jurisdiction on a responsible tribunal provide for certain bodies (in addition to the responsible board and the practitioner) to appear before the tribunal and to make submissions. Such bodies might include government and/or the relevant HCC.

11.4 Review jurisdiction of tribunal

Proposal 11.4.1: It is proposed that with respect to the tribunal’s review jurisdiction, the national legislation specify that a practitioner who is subject to the decision or the responsible board be empowered to make application for a review of a decision.

Alternative option: The legislation which confers review jurisdiction on a responsible tribunal provide for certain bodies (in addition to the responsible board and the practitioner) to appear before the tribunal and to make submissions. Such bodies might include government and/or the relevant HCC.

Proposal 11.4.2: It is proposed that with respect to the exercise by the responsible tribunal of its review jurisdiction, the national legislation specify the following as reviewable decisions:

- refusal to register (including failure to make a registration decision within the specified period, for example three months)
- refusal to endorse registration

- refusal to renew registration
- refusal to renew an endorsement on registration
- imposition of conditions on a practitioner's registration or endorsement of registration
- refusal to lift or vary conditions on a registration or endorsement of registration
- cancellation of registration because the practitioner is no longer eligible for registration
- a finding or determination by a health panel or professional standards panel (see [sections 8.6 and 9.6](#) of this paper)
- a decision to suspend the practitioner's registration if the responsible board has not instituted an investigation in relation to the practitioner within a reasonable period, and
- a decision to continue a suspension beyond the period specified under the Act (see [section 6.7](#) of this paper on immediate suspension powers).

11.5 Findings and determinations of a tribunal

The IGA requires that the national legislation set out the findings, and determinations or orders that a responsible tribunal may make with respect to each type of matter heard under its original and review jurisdictions.

Original jurisdiction

Proposal 11.5.1: With respect to matters referred by the board for tribunal hearing, or where the practitioner has requested the matter be referred, it is proposed that the responsible tribunal would be empowered to make any of the following findings:

- the practitioner is not of good character
- the practitioner's registration was obtained by fraud
- the practitioner has engaged in professional misconduct
- the practitioner's performance has been unsatisfactory, or
- the practitioner's capacity to practise is affected by habitual misuse of alcohol or other drugs or physical or mental impairment.

Proposal 11.5.2: It is proposed that the responsible board would be empowered to make one or more of the following determinations in such matters:

- require the practitioner undergo counselling
- caution the practitioner
- reprimand the practitioner
- require the practitioner to undertake and complete specified further education or training within a specified period
- impose a fine on the practitioner (with the maximum fine available to be set by legislation, for example, \$50,000)
- suspend the registration of the practitioner for a specified period
- cancel the registration of the practitioner
- order the practitioner undertake a specified period of supervised practice

- order the practitioner do or refrain from doing something in connection with their practice
- order the practitioner manage their practice in a specified way or subject to specified conditions
- order the practitioner to report on their practice to a specified person at specific intervals
- order the practitioner not to employ or engage or recommend a specified person or class of persons
- disqualify the practitioner from applying for registration under the Act for a specified period, if their registration has been cancelled by the tribunal or by an equivalent competent registration authority in another country, and/or
- make a prohibition order preventing a practitioner whose registration has been cancelled or suspended from continuing to practise or provide health services, or using specified professional titles or operating a business that provides health services.

Review jurisdiction – registration matters

Proposal 11.5.3: With respect to registration decisions, it is proposed that the responsible tribunal would have the power to uphold or confirm the board’s original decision, or to substitute its own decision from the range of decisions that were available to the board (see Registration consultation paper).

Review jurisdiction – disciplinary, performance or health matters

Proposal 11.5.4: With respect to PSP or health panel decisions referred for review (by the board or the practitioner), it is proposed that the responsible board would have the power to either confirm the original finding and determination of the board, or substitute its own finding and/or determination from the list that were available to the board. The tribunal would be empowered to find any of the following:

- the practitioner is not of good character
- the practitioner’s registration was obtained by fraud
- the practitioner has engaged in professional misconduct
- the practitioner’s performance has been unsatisfactory, and/or
- the practitioner’s capacity to practise is affected by drug or alcohol dependency or physical or mental impairment

and on this basis make an order to suspend or cancel the practitioner’s registration, in addition to any of the determinations listed above under its original jurisdiction.

Proposal 11.5.5: With respect to health panel decisions referred for review (by the board or the practitioner), it is proposed that the responsible board would have the power to confirm the original findings and determinations, or substitute its own findings (as listed above for the PSP), and determinations (as listed above for the tribunal’s original jurisdiction).

Proposal 11.5.6: It is proposed that the tribunal would have powers to make an order for costs against any party to the proceedings.

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