



New South Wales

Nurses and Midwives Amendment (Performance Assessment) Bill 2004

Explanatory note

This explanatory note relates to this Bill as introduced into Parliament.

This Bill is cognate with the *Health Legislation Amendment (Complaints) Bill 2004*.

Overview of Bill

The object of this Bill is to amend the *Nurses and Midwives Act 1991* (***the Principal Act***) to include provisions enabling the performance assessment of nurses and midwives that mirror those existing in the *Medical Practice Act 1992*.

Outline of provisions

Clause 1 sets out the name (also called the short title) of the proposed Act.

Clause 2 provides for the commencement of the proposed Act on a day or days to be appointed by proclamation.

Clause 3 is a formal provision that gives effect to the amendments to the *Nurses and Midwives Act 1991* set out in Schedule 1.

Schedule 1 Amendments

Schedule 1 [2] inserts proposed Part 4A into the Principal Act which contains proposed sections 42E–42ZB dealing with performance assessment.

Proposed section 42E contains a definition of *professional performance*, being the knowledge, skill or care possessed and applied by the nurse or midwife in the practice of nursing or midwifery.

Proposed section 42F contains a definition of *unsatisfactory* professional performance, being performance below the standard reasonably expected of a nurse or midwife of an equivalent level of training or experience.

Proposed section 42G enables the Nurses and Midwives Board (*the Board*) to have the professional performance of a nurse or midwife assessed under the proposed Part if a matter comes to the Board's attention that indicates that the nurse's or midwife's professional performance is unsatisfactory.

Proposed section 42H provides that professional performance raising certain serious questions may not be the subject of performance assessment.

Proposed section 42I enables a person (if the person is identified) to notify a matter to the Board if the person thinks that the professional performance of a nurse or midwife is unsatisfactory.

Proposed section 42J enables the Health Care Complaints Commission to refer a matter to the Board if the Commission thinks that the professional performance of a nurse or midwife is unsatisfactory.

Proposed section 42K provides that the professional performance of a nurse or midwife referred for performance assessment is to be assessed by one or more assessors.

Proposed section 42L requires the Board to inform a nurse or midwife if the Board decides to have his or her performance assessed.

Proposed section 42M requires an assessor to conduct the assessment and report to the Board on the assessment.

Proposed section 42N sets out the options that the Board has following assessment. This includes taking no further action, requiring a Performance Review Panel to conduct a review of the professional performance concerned, making a complaint, referring the matter to an Impairment Panel or giving counselling.

Proposed section 42O requires a Performance Review Panel to conduct a review of the professional performance of a nurse or midwife if required to do so by the Board.

Proposed section 42P prevents a Performance Review Panel conducting a review of the professional performance of a nurse or midwife if the Health Care Complaints Commission is investigating a complaint against the nurse or midwife.

Proposed section 42Q requires a Performance Review Panel to terminate the review of the professional performance of a nurse or midwife and refer the matter to the Board if it forms an opinion that certain serious issues are raised or there is a prima facie case of professional misconduct or unsatisfactory professional conduct.

Proposed section 42R provides that a Performance Review Panel may make recommendations to the Board as to certain specified action to take in relation to the nurse or midwife concerned.

Proposed section 42S provides that a Performance Review Panel can also direct that the nurse's or midwife's professional performance be re-assessed at a future date.

Proposed section 42T requires a Performance Review Panel to provide a written statement of its decision on the performance review to the nurse or midwife concerned and the Board.

Proposed section 42U enables a Performance Review Panel to exclude certain confidential information from the statement of its decision.

Proposed section 42V requires the Board to monitor whether any orders made by a Performance Review Panel are being complied with.

Proposed section 42W gives effect to proposed Schedule 2A which contains provisions relating to performance assessment outlined below.

Proposed section 42X provides for the establishment of Performance Review Panels.

Proposed section 42Y provides for a decision of a majority of members of a Performance Review Panel to be the decision of the Panel.

Proposed section 42Z enables the Board to appoint suitably qualified persons as assessors.

Proposed section 42ZA enables a nurse or midwife who has been the subject of a performance review by a Panel to appeal to the Nurses and Midwives Tribunal. Such an appeal is to be dealt with by way of a rehearing.

Proposed section 42ZB enables a nurse or midwife who is the subject of a performance review by a Performance Review Panel to appeal to the Chairperson or Deputy Chairperson of the Nurses and Midwives Tribunal on a point of law.

Schedule 1 [9] inserts proposed Schedule 2A into the Principal Act which contains further provisions relating to performance assessments.

Part 1 of proposed Schedule 2A gives assessors certain powers, including powers of entry to premises and inspection of premises and equipment and powers to ask questions and require the production of substances and records. The powers of assessors also include requiring a nurse or midwife to take part in an assessment exercise. The proposed Part creates certain offences for obstructing assessors in the performance of their functions, furnishing false information and impersonating assessors. The proposed Part provides that an assessor's report to the Board or a Performance Review Panel is not admissible in civil proceedings without consent.

Part 2 of proposed Schedule 2A contains provisions in relation to the conduct of a performance review by a Performance Review Panel. A Panel may summon witnesses and take evidence, obtain documents, seek reports from experts and gain

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assistance from assessors. The nurse or midwife concerned is entitled to make representations to the Panel and the Panel may allow affected third parties to make submissions.

Schedule 1 [1] and [3]–[8] make consequential amendments.

Schedule 1 [10] enables regulations to be made of a savings or transitional nature consequent on the enactment of the proposed Act.



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No. , 2004

A Bill for

An Act to amend the *Nurses and Midwives Act 1991* with respect to the performance assessment of the professional performance of nurses and midwives; and for other purposes.

The Legislature of New South Wales enacts:

1 Name of Act

This Act is the *Nurses and Midwives Amendment (Performance Assessment) Act 2004*.

2 Commencement

This Act commences on a day or days to be appointed by proclamation.

3 Amendment of Nurses and Midwives Act 1991 No 9

The *Nurses and Midwives Act 1991* is amended as set out in Schedule 1.

Schedule 1 Amendments

(Section 3)

[1] Section 3 Definitions

Insert in alphabetical order in section 3 (1):

assessor means a person appointed as an assessor under Division 6 of Part 4A.

Performance Review Panel means a Performance Review Panel constituted under Division 6 of Part 4A.

[2] Part 4A

Insert after Part 4:

Part 4A Performance assessment**Division 1 Preliminary****42E Meaning of “professional performance”**

For the purposes of this Part, a reference to the *professional performance* of a nurse or midwife is a reference to the knowledge, skill or care possessed and applied by the nurse or midwife in the practice of nursing or midwifery.

42F Meaning of “unsatisfactory” in relation to professional performance

For the purposes of this Part, the professional performance of a nurse or midwife is *unsatisfactory* if it is below the standard reasonably expected of a nurse or midwife of an equivalent level of training or experience.

Division 2 Board may obtain performance assessment**42G Power to obtain assessment**

The Board may have the professional performance of a nurse or midwife assessed under this Part if any matter comes to its attention that indicates that the professional performance of the nurse or midwife, or any aspect of the nurse’s or midwife’s professional performance, is unsatisfactory. This is not limited to matters that are the subject of a complaint or notification to the Board.

42H Serious matters not to be referred for assessment

- (1) The Board must not have the professional performance of a nurse or midwife assessed under this Part if a matter giving rise to the proposed assessment:
 - (a) raises a significant issue of public health or safety, or
 - (b) raises a prima facie case of professional misconduct by the nurse or midwife, or unsatisfactory professional conduct by the nurse or midwife.
- (2) Any such matter is to be dealt with as a complaint.

42I Persons may notify the Board of professional performance matters

- (1) A person may notify the Board of any matter that the person thinks indicates that the professional performance of a nurse or midwife is unsatisfactory.
- (2) The Board is not to have the professional performance of the nurse or midwife concerned assessed on the basis of that notification if it is made anonymously.

Note. A complaint can be made by any person (see section 44). The complaint must be in writing and contain particulars of the allegations on which it is founded (see section 44). A complaint can be treated by the Board as a performance assessment matter (see section 45), but the Board must consult with the Commission before taking any action with respect to the complaint (see section 46).

42J Commission may refer professional performance matters to Board

- (1) If the Commission becomes aware of any matter that the Commission considers indicates that the professional performance of a nurse or midwife is unsatisfactory, the Commission may refer the matter to the Board.
- (2) This section does not affect the functions of the Board in relation to a complaint made to the Commission or a matter referred to the Commission for investigation.

Division 3 Assessment of professional performance by assessor

42K How Board obtains an assessment

The Board has the professional performance of a nurse or midwife assessed by having one or more assessors conduct an assessment of the nurse's or midwife's professional performance, or of any particular aspect or aspects of the nurse's or midwife's professional performance.

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| 42L | Information to be given to nurse or midwife | 1 |
| (1) | As soon as practicable after deciding to have the professional performance of a nurse or midwife assessed, the Board is to inform the nurse or midwife in writing of that decision. | 2
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| (2) | The information given to the nurse or midwife is to include the following: | 5
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| (a) | details of the matter or matters that gave rise to the assessment, | 7
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| (b) | information about how the performance assessment process under this Part works. | 9
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| 42M | Report and recommendations by assessor | 11 |
| (1) | An assessor who is required by the Board to conduct an assessment of a nurse's or midwife's professional performance is to: | 12
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| (a) | conduct an assessment of the nurse's or midwife's professional performance, and | 15
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| (b) | report in writing on that assessment to the Board. | 17 |
| (2) | The report is to include such recommendations as the assessor considers appropriate. | 18
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| (3) | If more than one assessor is appointed to assess the professional performance of a nurse or midwife, the report may be made jointly or separately, but in any case is to be made in the manner directed by the Board. | 20
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| 42N | Action that may be taken by Board | 24 |
| (1) | After receiving the report of an assessor, the Board may: | 25 |
| (a) | determine that no further action should be taken in respect of the nurse or midwife concerned, or | 26
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| (b) | require a Performance Review Panel to conduct a review of the professional performance of the nurse or midwife, or | 28
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| (c) | make a complaint against the nurse or midwife in accordance with Part 5, or | 30
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| (d) | refer the matter to an Impairment Panel, or | 32 |
| (e) | counsel the nurse or midwife concerned or direct the nurse or midwife concerned to attend counselling. | 33
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| (2) | The Board must make a complaint against the nurse or midwife concerned if the assessment: | 35
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| (a) | raises a significant issue of public health or safety, or | 37 |
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	(b)	raises a prima facie case of professional misconduct by a nurse or midwife, or unsatisfactory professional conduct by a nurse or midwife.	1 2 3
	(3)	This section does not limit the Board's powers under section 48.	4
Division 4	Performance review by Performance Review Panel		5 6
42O	Performance Review Panel to conduct performance review		7
	(1)	A Performance Review Panel is to conduct a review (referred to in this Part as a <i>performance review</i>) of the professional performance of a nurse or midwife if required to do so by the Board.	8 9 10 11
	(2)	The chairperson of the Performance Review Panel is to inform the nurse or midwife concerned in writing that a performance review will be conducted not less than 14 days before the time and place appointed for the performance review.	12 13 14 15
42P	Performance Review Panel not to take action while Commission investigating		16 17
		A Performance Review Panel is not to take any action in relation to a nurse or midwife if the Panel becomes aware that the nurse or midwife is the subject of a complaint that is being investigated by the Commission, unless the Commission agrees to the continuation of the performance review.	18 19 20 21 22
42Q	Performance Review Panel must refer certain matters to Board		23
	(1)	A Performance Review Panel must terminate a performance review if before or during the performance review the Panel forms an opinion that:	24 25 26
	(a)	the performance review raises a significant issue of public health or safety, or	27 28
	(b)	the performance review raises a prima facie case of professional misconduct by a nurse or midwife, or unsatisfactory professional conduct by a nurse or midwife.	29 30 31
	(2)	When the Performance Review Panel terminates a performance review because of subsection (1), it must refer the issue or case back to the Board with a recommendation that a complaint be made against the nurse or midwife concerned.	32 33 34 35
	(3)	The Board is to deal with the matter accordingly.	36

42R Actions by Performance Review Panel

- (1) At the completion of a performance review, a Performance Review Panel may make such recommendations to the Board in respect of the nurse or midwife concerned as the Panel considers appropriate.
- (2) Without limiting subsection (1), if the Performance Review Panel finds that the professional performance of the nurse or midwife, or a particular aspect of the professional performance of the nurse or midwife, is unsatisfactory, the Panel may do any one or more of the following things:
 - (a) direct that such conditions, relating to the person's practising nursing or midwifery, as it considers appropriate be imposed on the person's registration or enrolment,
 - (b) order that the nurse or midwife complete such educational courses as are specified by the Panel,
 - (c) order that the nurse or midwife report on his or her practice of nursing or midwifery at the times, in the manner and to the persons specified by the Panel,
 - (d) order that the nurse or midwife seek and take advice, in relation to the management of his or her practice of nursing or midwifery, from such persons as are specified by the Panel.
- (3) If the Performance Review Panel finds that a matter:
 - (a) raises a significant issue of public health or safety, or
 - (b) raises a prima facie case of professional misconduct by a nurse or midwife, or unsatisfactory professional conduct by a nurse or midwife,
 the Panel must recommend to the Board that a complaint be made against the nurse or midwife concerned, in which case the Board is to deal with the matter accordingly.
- (4) In any other case that the Board thinks it appropriate to do so, the Board may make a complaint in respect of a matter that has been considered by a Performance Review Panel, after consulting with the Commission.

42S Re-assessment

- (1) Without limiting section 42R, a Performance Review Panel may direct that a nurse's or midwife's professional performance be re-assessed at a future date.

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| (2) | The Board is to have one or more assessors conduct that assessment, when it is required, and report to the Board on the assessment. | 1
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| (3) | The Board may take any action in respect of that assessment that is available to the Board under section 42N, including requiring a Performance Review Panel to conduct a further performance review in relation to the nurse or midwife. | 4
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| 42T | Decision | 8 |
| (1) | A Performance Review Panel must provide a written statement of a decision on a performance review to the nurse or midwife concerned and to the Board, and must do so within one month after the decision is made. | 9
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| (2) | The statement of the decision must include reasons for the decision. | 13
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| (3) | The Board may provide a copy of the statement of decision to such other persons as the Board thinks fit. | 15
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| 42U | Statement need not contain confidential information | 17 |
| (1) | A Performance Review Panel is not required to include confidential information in the statement of a decision. If a statement would be false or misleading if it did not include the confidential information, the Panel is not required to provide the statement. | 18
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| (2) | When confidential information is not included in the statement of a decision provided to a person or the statement is not provided to a person because of subsection (1), the Performance Review Panel must give a confidential information notice to the person. | 23
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| (3) | A confidential information notice is a notice that indicates that confidential information is not included or that the statement will not be provided (as appropriate) and gives the reasons for this. The notice must be in writing and must be given within one month after the decision is made. | 27
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| (4) | This section does not affect the power of a court to make an order for the discovery of documents or to require the giving of evidence or the production of documents to a court, subject to the provisions of this Act relating to protected reports. | 32
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Division 5 Other provisions relating to performance assessment

42V Monitoring by Board

- (1) Following a performance review by a Performance Review Panel, the Board is to:
 - (a) monitor compliance with any orders made by the Panel, and
 - (b) from time to time evaluate the effectiveness of those orders in improving the professional performance of the nurse or midwife concerned to a standard that is commensurate with other nurses or midwives of an equivalent level of training or experience.
- (2) The Board may take any action under this Act in respect of a nurse or midwife that it considers appropriate as a result of the exercise of its functions under subsection (1).

42W Other provisions relating to performance assessments

Schedule 2A has effect.

Division 6 Performance Review Panels and assessors

42X Performance Review Panels

- (1) There are to be Performance Review Panels for the purposes of this Act.
- (2) A Performance Review Panel has and may exercise the jurisdiction and functions conferred or imposed on it by or under this or any other Act.
- (3) When the Board decides to require a Performance Review Panel to conduct a performance review of the professional performance of a nurse or midwife, the Board is to appoint 3 persons to sit as the Panel for the purpose of that performance review.
- (4) Of those 3 persons:
 - (a) 2 are to be nurses if the performance review concerns a nurse or are to be midwives if the performance review concerns a midwife, and
 - (b) one is to be a lay person (that is, a person who is not a nurse or midwife).
- (5) One of the members of the Panel is to be appointed by the Board as chairperson of the Panel.

(6)	A person may be appointed to sit on a Performance Review Panel whether or not the person is a member of the Board, but not if the person has previously dealt with the particular matter before the Panel in his or her capacity as a member of the Board.	1 2 3 4
(7)	A member of a Performance Review Panel, while sitting on the Panel, is entitled to be paid by the Board at a rate determined by the Board.	5 6 7
(8)	The rate is to be determined by the Board having regard to the rate paid to witnesses who give expert evidence in the Supreme Court.	8 9 10
42Y	Decisions of Performance Review Panels	11
(1)	A decision supported by a majority of members of a Performance Review Panel is the decision of the Panel.	12 13
(2)	The chairperson of a Performance Review Panel may exercise the following functions of a Panel:	14 15
(a)	power to terminate a performance review,	16
(b)	power to hand down a decision of the Panel on a performance review.	17 18
(3)	Any power of a Performance Review Panel that is exercised by the chairperson of the Panel under this Act is taken to have been exercised by the Panel.	19 20 21
42Z	Assessors	22
(1)	The Board may appoint suitably qualified persons to be assessors for the purposes of this Act.	23 24
(2)	Assessors are to be appointed on such terms and conditions as the Board thinks fit.	25 26
(3)	An assessor has such functions as are conferred on an assessor by this Act and such other functions, in connection with this Part, as may be conferred on an assessor by the Board.	27 28 29
Division 7	Appeal against actions of Performance Review Panel	30 31
42ZA	Appeals against decisions of Panel	32
(1)	A nurse or midwife who is the subject of a performance review by a Performance Review Panel may appeal to the Tribunal against a decision of the Panel or any order or direction made by the Panel under this Part.	33 34 35 36

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| (2) | An appeal must be made within 28 days (or such longer period as the Registrar may allow in a particular case) after notice of the decision or the making of the order or direction is given to the nurse or midwife concerned. | 1
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| (3) | The appeal must be lodged with the Registrar who is to refer it to the Tribunal. | 5
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| (4) | The appeal is to be dealt with by way of rehearing and fresh evidence, or evidence in addition to or in substitution for the evidence received at the performance review, may be given. | 7
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| (5) | The Tribunal may, as it thinks appropriate: | 10 |
| (a) | dismiss the appeal, or | 11 |
| (b) | make any finding or exercise any power or combination of powers that the Performance Review Panel could have made or exercised. | 12
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| (6) | An appeal under this section does not affect any finding or exercise of power with respect to which it has been made until the Tribunal makes an order on the appeal. | 15
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| 42ZB | Appeals on points of law | 18 |
| (1) | A nurse or midwife who is the subject of a performance review by a Performance Review Panel may appeal with respect to a point of law to the Chairperson of the Tribunal or a Deputy Chairperson nominated by the Chairperson. | 19
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| (2) | An appeal may be made: | 23 |
| (a) | during a performance review—within 28 days after the date of the Performance Review Panel’s decision on the point of law that is the subject of the appeal, or | 24
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| (b) | before the commencement of a performance review by a Performance Review Panel but after the date the nurse or midwife is informed of the performance review. | 27
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| (3) | If a performance review has not been completed when an appeal is made, the Performance Review Panel must not continue with the performance review until the appeal has been disposed of. | 30
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| (4) | The Performance Review Panel must not make any decision that is inconsistent with the Chairperson’s or Deputy Chairperson’s determination with respect to the point of law. | 33
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[3] Section 45 Referral or dismissal of complaints by Board	1
Insert after section 45 (1) (a):	2
(a1) refer the professional performance of the nurse or midwife concerned for assessment under Part 4A, or	3 4
[4] Section 46 Role of Health Care Complaints Commission	5
Insert “or the nurse or midwife concerned has been referred for performance assessment under Part 4A” after “Panel” in section 46 (4).	6 7
[5] Section 56 Decisions of a Committee	8
Insert “, subject to the provisions of this Act relating to protected reports” after “to a court” in section 181 (4).	9 10
[6] Section 66 Decisions of the Tribunal	11
Insert “, subject to the provisions of this Act relating to protected reports” after “to a court” in section 66 (8).	12 13
[7] Section 76A	14
Insert after section 76:	15
76A Confidentiality of protected reports	16
(1) A person must not directly or indirectly make a record of or disclose to any person any information contained in a protected report which has come to the person’s notice in the exercise of the person’s functions under this Act, except for the purposes of exercising functions under this Act.	17 18 19 20 21
Maximum penalty: 50 penalty units.	22
(2) This section does not prevent the disclosure of a protected report to the Commission.	23 24
Note. For types of protected reports see clauses 8 and 14 of Schedule 2A.	25 26
[8] Section 77 Protection from liability	27
Insert at the end of section 77 (e):	28
or	29
(f) a Performance Review Panel or a member of a Performance Review Panel,	30 31

[9] Schedule 2A

Insert after Schedule 2:

Schedule 2A Provisions relating to performance assessments

(Section 42W)

Part 1 Provisions relating to assessors

1 General

- (1) An assessor may exercise the powers conferred by this Part only for the purpose of conducting an assessment of the professional performance of a nurse or midwife when required by the Board or a Performance Review Panel.
- (2) An assessment is to be conducted in accordance with any directions given by the Board or a Performance Review Panel.
- (3) If the Board or a Performance Review Panel instructs an assessor to limit his or her assessment to a particular aspect or aspects of a nurse's or midwife's professional performance, the assessment is to be limited to that aspect or those aspects.
- (4) However, an assessor may assess other aspects of the professional performance of a nurse or midwife if during the course of an assessment the assessor forms the opinion that other aspects of the professional performance of the nurse or midwife may be unsatisfactory and should be assessed.

2 Entry to premises

- (1) An assessor may at any reasonable time enter and inspect:
 - (a) any premises that the assessor reasonably believes are used by a nurse or midwife in connection with his or her professional practice, and
 - (b) any premises in or on which the assessor reasonably believes records relating to the carrying out of a professional practice by a nurse or midwife are kept.
- (2) An assessor may enter premises only:
 - (a) with the consent of the occupier and the nurse or midwife to whom the assessment relates, or

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| (b) | after having given the occupier of the premises, and the nurse or midwife to whom the assessment relates, at least 14 days notice of the assessor's intention to enter the premises. | 1
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| (3) | On premises entered on the basis that they are used by a nurse or midwife in connection with his or her professional practice, an assessor has the following powers: | 5
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| (a) | power to examine any equipment that the assessor reasonably believes is, has been or may be used in connection with the professional practice, | 8
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| (b) | power to take photographs of the premises, or of any equipment on the premises (being equipment that the assessor reasonably believes is, has been or may be used in connection with the professional practice), | 11
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| (c) | power to require the production of and inspect any stocks of any substance or drugs in or about those premises, | 15
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| (d) | power to require any person on those premises to produce any records in the possession or under the control of that person relating to the carrying out of that professional practice, | 17
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| (e) | power to take copies of, or extracts or notes from, any such records, | 21
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| (f) | power to ask questions of any person on those premises, | 23 |
| (g) | power to require the owner or occupier of those premises to provide the assessor with such assistance and facilities as is or are reasonably necessary to enable the assessor to exercise the functions of an assessor under this clause. | 24
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| (4) | On premises entered on the basis that records relating to the carrying out of professional practice by a nurse or midwife are kept there, an assessor has the following powers: | 28
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| (a) | power to require any person on those premises to produce any records in the possession or under the control of that person and relating to the carrying out of that professional practice, | 31
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| (b) | power to take copies of, or extracts or notes from, any such records. | 35
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| (5) | This clause does not authorise an assessor to enter any part of premises that is being used for residential purposes except with the consent of the occupier. | 37
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| (6) | This clause does not authorise an assessor to require a person to answer any question, and a failure or refusal by a person to answer any question does not constitute an offence against clause 5. | 1
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| (7) | However, a failure or refusal by a nurse or midwife, without reasonable excuse, to answer any question asked by an assessor is evidence that the professional performance of the nurse or midwife is unsatisfactory. | 5
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| 3 | Power to conduct assessment exercise | 9 |
| (1) | An assessor may, by notice given to a nurse or midwife who is the subject of an assessment, require the nurse or midwife to take part in an assessment exercise. | 10
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| (2) | An assessment exercise is an exercise during which the assessor observes and assesses the professional performance of the nurse or midwife. | 13
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| (3) | If practicable, an assessment exercise is to be based on a simulated clinical situation. | 16
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| (4) | However, an assessment exercise may be based on an actual clinical situation if a simulated exercise is not practicable in the circumstances. | 18
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| (5) | The time and place for, and the length of, the assessment exercise must be reasonable. | 21
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| (6) | A failure or refusal by a nurse or midwife to take part in, or to continue with, an assessment exercise does not constitute an offence against clause 5. | 23
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| (7) | However, a failure or refusal by a nurse or midwife, without reasonable excuse, to take part in or to continue with an assessment exercise is evidence that the professional performance of the nurse or midwife is unsatisfactory. | 26
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| (8) | This clause does not authorise an assessor to be present during any clinical examination of a person, or at the giving or performance of any other service or treatment by a nurse or midwife in respect of a person, without the consent of the person. | 30
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| 4 | Answers to questions | 34 |
| (1) | Any information furnished by a person in answering a question asked by an assessor for the purposes of an assessment under Part 4A of this Act is not admissible against the person in any civil proceedings before a court except with the consent of the person. | 35
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- (2) Subclause (1) does not extend to any information furnished by a person that is a record required to be kept by or under this or any other Act. 1
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- (3) In this clause: 4
court includes any tribunal, authority or person having power to require the production of documents or the answering of questions, but does not include the Tribunal, a Committee or a Performance Review Panel or the Supreme Court (in respect of appeal proceedings under this Act). 5
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- 5 Offences** 10
- A person must not: 11
- (a) prevent an assessor from exercising any function conferred or imposed on the assessor under this Part, or 12
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 - (b) hinder or obstruct an assessor in the exercise of any such function, or 14
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 - (c) furnish an assessor with information knowing it to be false or misleading in a material particular. 16
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- Maximum penalty: 18
- (a) for an offence under paragraph (a) or (b)—50 penalty units, or 19
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 - (b) for an offence under paragraph (c)—20 penalty units. 21
- 6 Offence of impersonating assessor** 22
- A person must not impersonate or falsely represent that the person is an assessor. 23
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- Maximum penalty: 50 penalty units. 25
- 7 Certificates of authority** 26
- (1) An assessor is to be provided with a certificate of authority in a form approved by the Board. 27
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 - (2) An assessor must, on exercising in any place any function of the assessor under this Part, produce the assessor's certificate of authority to any person apparently in charge of the place who requests its production. 29
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- 8 Confidentiality of assessor's report** 33
- (1) A report by an assessor to the Board or a Performance Review Panel about his or her assessment of the professional performance of a nurse or midwife may not be admitted or used in any civil proceedings before a court except with the consent of: 34
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- (a) the person giving the report, and
 - (b) the nurse or midwife concerned.
 - (2) A person may not be compelled to produce the report or to give evidence in relation to the report or its contents in any such civil proceedings.
 - (3) A report referred to in this clause is a *protected report* for the purposes of this Act.
 - (4) In this clause:
court includes any tribunal, authority or person having power to require the production of documents or the answering of questions, but does not include the Tribunal, a Committee or a Performance Review Panel or the Supreme Court (in respect of appeal proceedings under this Act).
report includes a copy, reproduction and duplicate of the report or any part of the report, copy, reproduction or duplicate.

9 Employment-related performance assessment

- (1) In this clause, *employment-related assessment* means an assessment of the performance of a nurse or midwife that has been carried out by or on behalf of the employer of the nurse or midwife in connection with that employment.
- (2) The employer of a nurse or midwife may provide a copy of an employment-related assessment to an assessor who is conducting an assessment of the professional performance of the nurse or midwife for the Board or a Performance Review Panel.
- (3) The assessor may attach a copy of the assessment to the assessor's report to the Board or a Performance Review Panel as a part of the assessor's report.

Part 2 Provisions relating to performance reviews

10 Conduct of performance review

- (1) A performance review is to be conducted in the manner determined by the Performance Review Panel.
- (2) The performance review is to be conducted:
 - (a) with as little formality and technicality, and as much expedition, as the requirements of this Act and the proper consideration of the matter permit, and
 - (b) in the absence of the public.

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| (3) | In conducting a performance review a Performance Review Panel is not bound by the rules of evidence but may inform itself on any matter in any way it thinks appropriate. | 1
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| 11 | Power to summon witnesses and take evidence | 4 |
| (1) | The chairperson of a Performance Review Panel may summon a person to appear at a performance review and to produce such documents (if any) as are referred to in the summons. | 5
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| (2) | The chairperson of the Panel may require a person appearing at the performance review to produce a document. | 8
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| (3) | A person served with a summons to appear at a performance review to give evidence must not, without reasonable excuse: | 10
11 |
| (a) | fail to attend as required by the summons, or | 12 |
| (b) | fail to attend from day to day unless excused, or released from further attendance, by a member of the Panel. | 13
14 |
| | Maximum penalty: 20 penalty units. | 15 |
| (4) | A person appearing at a performance review to give evidence must not, without reasonable excuse: | 16
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| (a) | fail to answer a question that the person is required to answer by the chairperson of the Panel, or | 18
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| (b) | fail to produce a document that the person is required to produce by this clause. | 20
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| | Maximum penalty: 20 penalty units. | 22 |
| 12 | Power to obtain documents | 23 |
| (1) | A member of a Performance Review Panel may, by notice in writing served on a person, require the person: | 24
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| (a) | to attend, at a time and place specified in the notice, before a person specified in the notice, being a member of the Performance Review Panel or a person authorised by the Panel in that behalf, and | 26
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| (b) | to produce, at that time and place, to the person so specified a document specified in the notice. | 30
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| (2) | A person who fails, without reasonable excuse, to comply with a notice served on the person under this clause is guilty of an offence. | 32
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| | Maximum penalty: 20 penalty units. | 35 |

13 Nurse or midwife entitled to make representations

- (1) A nurse or midwife who is the subject of a performance review is entitled to attend at the performance review and make oral or written representations to the Performance Review Panel with respect to the subject matter of the performance review.
- (2) The nurse or midwife is entitled to be accompanied by a legal practitioner or other adviser, but is not entitled to be represented by the legal practitioner or other adviser.
- (3) This clause does not prevent a Performance Review Panel from conducting a performance review in the absence of the nurse or midwife, as long as the nurse or midwife has been informed of the performance review.

14 Panel may obtain reports

- (1) A Performance Review Panel may, for the purpose of conducting a performance review, obtain a report from a person who, in the opinion of the Panel, is sufficiently qualified or experienced to give expert advice on the matter that is the subject of the performance review.
- (2) Such a report may not be admitted or used in any civil proceedings before a court except with the consent of:
 - (a) the person giving the report, and
 - (b) the nurse or midwife concerned.
- (3) A person may not be compelled to produce the report or to give evidence in relation to the report or its contents in any such civil proceedings.
- (4) A report referred to in this clause is a *protected report* for the purposes of this Act.
- (5) In this clause:

court includes any tribunal, authority or person having power to require the production of documents or the answering of questions, but does not include the Tribunal, a Committee or a Performance Review Panel or the Supreme Court (in respect of appeal proceedings under this Act).

report includes a copy, reproduction and duplicate of the report or any part of the report, copy, reproduction or duplicate.

15 Assessors may assist Panel

- (1) The Board may appoint one or more assessors to assist a Performance Review Panel with a performance review.

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| <p>(2) The Performance Review Panel may direct such an assessor:</p> <p style="padding-left: 20px;">(a) to conduct an assessment of the professional performance of a nurse or midwife, and report on that assessment to the Panel, and</p> <p style="padding-left: 20px;">(b) to provide such other assistance in connection with the performance review as the Panel directs.</p> <p>16 Release of information</p> <p>(1) The chairperson of a Performance Review Panel may, if the chairperson thinks it appropriate in the particular circumstances of the case (and whether or not on the request of the nurse or midwife concerned or any other person):</p> <p style="padding-left: 20px;">(a) direct that the name of any witness is not to be disclosed in the performance review, or</p> <p style="padding-left: 20px;">(b) direct that all or any of the following matters are not to be published:</p> <p style="padding-left: 40px;">(i) the name and address of any witness,</p> <p style="padding-left: 40px;">(ii) the name and address of a nurse or midwife,</p> <p style="padding-left: 40px;">(iii) any specified evidence,</p> <p style="padding-left: 40px;">(iv) the subject matter of the performance review.</p> <p>(2) A direction may be amended or revoked at any time by the chairperson of the Performance Review Panel.</p> <p>(3) A direction may be given before or during a performance review, but must not be given before the performance review unless notice is given of the time and place appointed by the chairperson of the Performance Review Panel for consideration of the matter to the following persons:</p> <p style="padding-left: 20px;">(a) a person who requested the direction,</p> <p style="padding-left: 20px;">(b) the nurse or midwife concerned,</p> <p style="padding-left: 20px;">(c) such other persons as the person presiding thinks fit.</p> <p>(4) A person who contravenes a direction given under this clause is guilty of an offence.</p> <p style="padding-left: 20px;">Maximum penalty:</p> <p style="padding-left: 40px;">(a) in the case of a corporation, 150 penalty units, or</p> <p style="padding-left: 40px;">(b) in any other case, 20 penalty units.</p> | <p>1</p> <p>2</p> <p>3</p> <p>4</p> <p>5</p> <p>6</p> <p>7</p> <p>8</p> <p>9</p> <p>10</p> <p>11</p> <p>12</p> <p>13</p> <p>14</p> <p>15</p> <p>16</p> <p>17</p> <p>18</p> <p>19</p> <p>20</p> <p>21</p> <p>22</p> <p>23</p> <p>24</p> <p>25</p> <p>26</p> <p>27</p> <p>28</p> <p>29</p> <p>30</p> <p>31</p> <p>32</p> <p>33</p> <p>34</p> |
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17 Panel to consider impact of order or direction on third parties

- (1) If as a result of a performance review a Performance Review Panel proposes to give a direction or make an order that in the opinion of the Panel will impose an appreciable burden on an identifiable third party in connection with a nurse's or midwife's practice, the Panel:
 - (a) is to give the third party an opportunity to make submissions to the Panel with respect to the direction or order, and
 - (b) is to take any such submission into account before giving the direction or making the order.
- (2) If a Performance Review Panel decides to give a direction or make an order that will, in the opinion of the Panel, impose an appreciable burden on an identifiable third party in connection with a nurse's or midwife's practice, the Panel is to give the third party notice of the direction or order as soon as practicable after it is given or made.
- (3) An example of a direction or order that may impose an appreciable burden on an identifiable third party in connection with a nurse's or midwife's practice is a direction or order that has the effect of requiring the practice of a nurse or midwife to be supervised by an identified third party.
- (4) In this clause:

third party means a health service provider other than the nurse or midwife to whom a review relates, but does not include a person or body exercising functions conferred by this Act or the *Health Care Complaints Act 1993*.

[10] Schedule 3 Savings and transitional provisions

Insert at the end of clause 2 (1):

Nurses and Midwives Amendment (Performance Assessment) Act 2004