

Explanatory note

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

Overview of Bill

The object of this Bill is to amend the Health Practitioner Regulation Act 2009 (the 2009 Act). The 2009 Act adopted as a law of New South Wales most of the Health Practitioner Regulation National Law (the National Law) set out in the Schedule to the Health Practitioner Regulation National Law Act 2009 of Queensland, but did not adopt certain provisions of the National Law (relating to the health, conduct and performance of registered health practitioners and students, including the complaints and disciplinary scheme) that the NSW Government agreed to deal with separately. (The National Law, as adopted by this State, is called the National Law (NSW) in this explanatory note.)

This Bill:

(a) makes provision for the matters not previously adopted (by further modifying the application of the National Law in this State) so as to establish a separate system for dealing with:

(i) complaints about registered health practitioners and students, and

Explanatory note page 2

Health Practitioner Regulation Amendment Bill 2010

Explanatory note

(ii) concerns about the possible impairment of health practitioners and students, and

(iii) assessments of the professional performance of health practitioners, and

(b) provides for the regulation of the acquisition of interests in pharmacy businesses, and

(c) declares that this State is not participating in the health, performance and conduct processes provided by the National Law, and

(d) declares certain NSW bodies established by the National Law (NSW) to be adjudication bodies, co-regulatory authorities and responsible tribunals for the purposes of the application of the National Law (NSW) in NSW, and

(e) further deals with the application of other NSW legislation to the National Law (NSW), and

(f) amends other legislation as a consequence of the proposed commencement of the National Law (NSW), and

(g) repeals certain legislation that will be redundant when the National Law (NSW) commences.

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. The amendments to the 2009 Act commence on the date of assent to the proposed Act. The consequential amendments to other legislation, and the consequential repeal of legislation, commence on the day the 2009 Act commences (which is 1 July 2010 or a later date appointed by proclamation made before 1 July 2010).

Schedule 1 Amendment of Health Practitioner

Regulation Act 2009 No 86

Modification of National Law (NSW)

Schedule 1 [2] provides that terms used in Part 2 of the 2009 Act and in the National Law (NSW) have the same meaning in Part 2 as they have in that Law.

Schedule 1 [3] provides that the National Law (NSW) applies as a law of NSW with the modifications set out in the Schedule of modifications inserted by this Bill.

Schedule 1 [4] provides (in proposed section 6) that New South Wales is not participating in the health, performance and conduct process provided in the National Law. Instead the National Law (NSW) establishes specific processes relating to the health, performance and conduct of registered health practitioners and students in

New South Wales, including a complaints and disciplinary scheme (see Schedule 1 [6]).

Explanatory note page 3

Health Practitioner Regulation Amendment Bill 2010

Explanatory note

Schedule 1 [6] inserts Schedule 1 into the 2009 Act, which contains the following modifications to the National Law for the purposes of the application of that Law in New South Wales.

Registration fees

The Schedule of modifications provides that, if the Ministerial Council gives a policy direction about registration fees that provides that a registration fee is to separately identify a registration and accreditation element and a complaints element, then the amount of the complaints element for registration fees payable by NSW health practitioners for a particular profession is to be decided by the relevant Council for that profession (see proposed section 26A). The Ministerial Council gave a relevant fees policy direction on 13 November 2009.

Establishment of Councils

The Schedule of modifications provides for the establishment of State Councils in relation to each of the professions of chiropractic, dental, medical, nursing and midwifery, optometry, osteopathy, pharmacy, physiotherapy, podiatry, and psychology (see proposed Schedule 5C). Provision is made for the following:

- (a) the powers and functions of the Councils (which include the handling of complaints about registered health practitioners and students),
- (b) the membership, proceedings, administration and finances of the Councils (which are also dealt with in the modification made by inserting proposed Schedule 5C to the National Law (NSW)),
- (c) the preparation of annual reports by the Councils,
- (d) the information concerning the imposition of conditions on health practitioners, or certain other orders, that the Councils must make available to the public,
- (e) the matters that the Councils must take into account when dealing with a complaint about a registered health practitioner or student.

Administration of anaesthesia or sedation on dental patients

The Schedule of modifications requires that the administration of a general anaesthesia on patients of a registered dentist must be carried out by a registered medical practitioner with qualifications in anaesthesia and that registered dentists who administer simple sedation by the intravenous route must have special qualifications and must be assisted by qualified persons (see proposed section 121A).

Professional indemnity insurance arrangements

The Schedule of modifications provides that a registered health practitioner must not practise in New South Wales unless the practitioner is covered by approved professional indemnity insurance arrangements under the Health Care Liability Act 2001 (in the case of a medical practitioner) or professional indemnity insurance arrangements that comply with a registration standard approved by the Ministerial

Explanatory note page 4

Health Practitioner Regulation Amendment Bill 2010

Explanatory note

Council are in force in relation to the practitioner (in the case of any other health practitioner). A contravention of this requirement does not constitute an offence but is unsatisfactory professional conduct for which disciplinary action may be taken under the National Law (NSW) (see proposed section 129 (1) and (4)).

Definitions and key concepts

The Schedule of modifications modifies Part 8 of the National Law (NSW) by defining key terms and concepts relating to professional competence and conduct

(see proposed Part 8, Division 1). The terms and concepts defined include the following:

- (a) competence to practise a health profession,
- (b) confidential information,
- (c) unsatisfactory professional conduct,
- (d) professional misconduct.

Handling of complaints about registered health practitioners and students

The Schedule of modifications sets out a procedure for the handling of complaints about registered health practitioners, persons who were formerly registered health practitioners and students (see proposed Part 8, Division 3).

Provision is made for the grounds on which complaints may be made about registered health practitioners and students, who may make a complaint and the procedure for making complaints (which can be made either to the relevant Council or to the Health Care Complaints Commission (the Commission)).

A Council to whom a complaint has been made must notify the Commission, and the National Board for the relevant health profession, about that complaint and must before any further action is taken consult with the Commission. All serious complaints must be referred to the relevant Tribunal.

The courses of action available to a Council on a complaint include making its own inquiries about the complaint and conducting an inquiry or referring the complaint to the Commission, the relevant Tribunal, a Professional Standards Committee or an Assessment Committee or the relevant National Board, directing the practitioner or student to attend counselling or taking no action in respect of the complaint. The Council also has the power to require a practitioner or student to undergo a health examination. Sanctions are provided in relation to a practitioner or student who fails to do so.

The courses of action available to the Commission on a complaint include referring the complaint to the relevant Council, Tribunal, Professional Standards Committee, Assessment Committee or National Board, referring the complaint for conciliation or taking no action.

Provision is made for how Professional Standards Committees (relating to the medical profession and nursing and midwifery profession only) to whom complaints

Explanatory note page 5
Health Practitioner Regulation Amendment Bill 2010
Explanatory note

may be referred are to handle complaints and the disciplinary powers of the Committees, which include cautioning or reprimanding the health practitioner, imposing conditions on the person's practising of the person's profession, ordering medical or psychiatric treatment, requiring the completion of educational courses, requiring periodic reporting or the seeking of advice on management, imposing fines and recommending suspension or cancellation of the health practitioner's registration on the grounds of lack of physical or mental capacity.

If a complaint about a registered health practitioner is referred by a Council to an Assessment Committee (relating to professions other than medical, nursing and midwifery), the complaint is to be dealt with by investigating and endeavouring to settle the complaint. The Committee has the power to direct the practitioner to undergo skills testing and may make recommendations to the Council that the Council deal with the complaint by inquiry, direct the health practitioner to attend counselling or dismiss the complaint.

A complaint about a registered health practitioner or student may also be dealt with by inquiry at a meeting of a Council. The Council may, after conducting the inquiry, caution or reprimand the practitioner or student, make an order withholding or refunding fees, impose conditions on the practitioner's or student's registration,

order the practitioner or student to seek and undergo medical or psychiatric treatment or counselling, complete educational courses, report on his or her practice or seek advice relating to management, impose fines on the practitioner or recommend suspension or cancellation of the health practitioner's or student's registration on the grounds of lack of physical or mental capacity. Provision is also made for the giving of notice of the Council's decision.

The disciplinary powers of the Tribunals in relation to health practitioners or students include cautioning or reprimanding the health practitioner or student, imposing conditions on the practitioner's or student's registration, ordering the practitioner or student to seek and undergo medical or psychiatric treatment or counselling, complete educational courses, report on his or her practice or seek advice relating to management, imposing fines or recommending suspension or cancellation of the health practitioner's or student's registration on the grounds of incompetence or being guilty of professional misconduct.

The Council also has powers to act where it is necessary to take urgent action for the protection of the public. These emergency powers including the power to suspend, or to impose conditions on, a registered health practitioner's or student's registration. Provision is made for the review or reversal of the exercise of that power and the referral of the matters that formed the basis for the exercise of the emergency powers to the Commission, the requiring of the registered health practitioner or student to undergo a performance assessment or the referral of the matter to an Impaired Registrants Panel.

A duty is imposed on the management of a mental health facility to inform the relevant Council if a registered health practitioner or student becomes a mentally incapacitated person or is involuntarily admitted to a mental health facility. A duty is also imposed on courts who convict registered health practitioners of certain offences to refer the matter to the Executive Officer of the relevant Council.

Explanatory note page 6

Health Practitioner Regulation Amendment Bill 2010

Explanatory note

Handling of concerns about the impairment of registered health practitioners or students

The Schedule of modifications sets out a procedure for dealing with a registered health practitioner or student who has or may have an impairment (see proposed Part 8, Division 4).

Provision is made for the giving of notice of impairment matters and the referral of impairment matters by the Commission to the Council for the relevant health profession. A Council that believes a registered health practitioner or student may be impaired has the power to require the practitioner or student to undergo an examination by a registered health practitioner or may refer the practitioner or student to an Impaired Registrants Panel. Certain matters relating to impairment must be dealt with as complaints.

The procedure for the conduct of an inquiry by an Impaired Registrants Panel is specified, as is the requirement for the giving of notices relating to the inquiry. The consequences of an inquiry by an Impaired Registrants Panel include the counselling of the practitioner or student by the Panel, a recommendation that the practitioner or student agree to the voluntary suspension of, or the imposition of conditions on, his or her registration or the making of recommendations to the Council as to the actions it should take. Any conditions imposed on registration as a result of a Panel's action may subsequently be reviewed and any reports made by a Panel to a Council are confidential.

Assessments of professional performance

The Schedule of modifications provides matters relating to the professional performance of registered health practitioners (see proposed Part 8, Division 5).

Provision is made for the degree of professional performance that is considered unsatisfactory and the power of a Council to have the professional performance of a health practitioner assessed. Any person may notify a Council of concerns about the professional performance of a registered health practitioner and the Commission may also refer concerns to the relevant Council. If the matter is too serious to be referred for assessment the Council must deal with the matter as a complaint.

The conduct of assessments of professional performance by an assessor is specified, including how a Council obtains an assessment, the information to be given to the health practitioner the subject of the assessment, the making of reports and recommendations by the assessor and the action that may be taken by the Council after receiving the report of an assessor, which includes requiring a Performance Review Panel to conduct a review of the professional performance of the practitioner, the making of a complaint, a referral to an Impaired Registrants Panel, counselling the practitioner or taking no further action.

After receiving an assessor's report a Council may decide to refer the matter to a Performance Review Panel for the conduct of a performance review. The action that may be taken by a Panel includes recommending the imposition of conditions, ordering further education, ordering a report on the practitioner's practise of the relevant health profession or ordering the practitioner to seek and take advice.

Explanatory note page 7

Health Practitioner Regulation Amendment Bill 2010

Explanatory note

After a performance review is concluded, the relevant Council may monitor compliance with any decisions or orders made by the Performance Review Panel and evaluate the effectiveness of the orders in improving the professional performance of the registered health practitioner.

Further provision is made in proposed Schedule 5B for matters relating to performance assessments.

Appeals and reviews

The Schedule of modifications provides for the following appeals and reviews of decisions:

- (a) appeals to a Tribunal against actions of a Committee, Council or Performance Review Panel (see proposed Division 6 of Part 8),
- (b) appeals to the Supreme Court on points of law and against a Tribunal's decisions and actions (see proposed Division 7 of Part 8),
- (c) reviews by a Council, a National Board or Tribunal of prohibition orders or orders of Committee or a Performance Review Panel (see proposed Division 8 of Part 8).

Enforcement

The Schedule of modifications makes provision for enforcement powers (see proposed Part 8, Division 9) including the following:

- (a) providing for the appointment of authorised persons and specifying their powers,
- (b) providing for the conduct of searches with the authority of a search warrant,
- (c) creating offences relating to enforcement.

Establishment of Tribunals

The Schedule of modifications provides for the establishment of Tribunals for each of the professions of chiropractic, dental, medical, nursing and midwifery, optometry, osteopathy, pharmacy, physiotherapy, podiatry, and psychology (see proposed Part 8, Division 10). The matters provided for include the following:

- (a) the constitution and administration of the Tribunals,
- (b) the membership of the Tribunals,
- (c) the functions of the Tribunals, which include the handling of complaints,
- (d) the proceedings of the Tribunals (which is also dealt with in proposed

Schedule 5C to the National Law (NSW)),
(e) the conduct of inquiries and appeals by the Tribunals.

Explanatory note page 8

Health Practitioner Regulation Amendment Bill 2010

Explanatory note

Establishment of Professional Standards Committees

The Schedule of modifications provides for the establishment of Professional Standards Committee for the medical and nursing and midwifery professions (see proposed Part 8, Division 11). The matters provided for include the following:

- (a) the membership and administration of the Committees,
- (b) functions of the Committees, which include the handling of complaints against medical practitioners, nurses and midwives,
- (c) the proceedings of the Committees (see also proposed Schedule 5C to the National Law (NSW)),
- (d) the conduct of inquiries before the Committees.

Establishment of Assessment Committees

The Schedule of modifications provides for the establishment of Assessment Committees for professions other than the medical and nursing and midwifery professions (see proposed Part 8, Division 12). Matters provided for include the membership and administration of the Committees.

Establishment of Impaired Registrants Panels

The Schedule of modifications provides for the establishment of Impaired Registrants Panels by a Council for a health profession and makes provision for membership and decisions of the Panels (see proposed Part 8, Division 13).

Establishment of Performance Review Panels

The Schedule of modifications provides for the establishment, membership and procedure of Performance Review Panels and the appointment of assessors (see proposed Part 8, Division 14).

Regulation of pharmacy businesses

The Schedule of modifications provides for the regulation of pharmacy businesses (see proposed Schedule 5F). In particular, provision is made for the following:

- (a) a requirement for pharmacies to be approved by the Pharmacy Council,
- (b) a requirement for the holders of pecuniary interests in approved pharmacies to be registered,
- (c) a requirement for the notification of the Pharmacy Council of any acquisition of a pecuniary interest in a pharmacy business,
- (d) a restriction on the persons who may have pecuniary interests in a pharmacy business (with exemptions for certain friendly societies and bodies corporate),
- (e) a limit on the corporations or firms that may indicate that they are pharmacy businesses,
- (f) a restriction on the number of pharmacy businesses in which pharmacists may have a pecuniary interest,

Explanatory note page 9

Health Practitioner Regulation Amendment Bill 2010

Explanatory note

(g) the regulation of the provisions of leases or licences relating to pharmacy businesses and certain arrangements that create a security interest in pharmacy businesses,

(h) a requirement that a pharmacist be in charge of each pharmacy business,

(i) the procedures for the approval of premises as suitable for carrying on a pharmacy business and the registration of pecuniary interests in pharmacy businesses,

(j) a requirement that the Pharmacy Council keep a register containing particulars of approved premises and registered holders of pecuniary interests,

- (k) a requirement that annual returns be submitted by the holders of pecuniary interests in pharmacy businesses,
- (l) enabling the Pharmacy Council to require persons to supply information about pecuniary interests in pharmacy businesses.

NSW regulations

The Schedule of modifications empowers the Governor to make regulations for or with respect to any matter required or permitted by a NSW provision (that is, a provision included in the Schedule of modifications). In particular, the regulations may make provision for or with respect to the following:

- (a) the standards applicable to premises used for pharmacy businesses,
- (b) the infection control standards to be followed by health practitioners,
- (c) the records to be kept by health practitioners,
- (d) the reimbursement by the Councils of the costs incurred by the Department of Health in establishing the national registration and accreditation scheme for registered health practitioners and students.

The first regulations made for the purposes of the NSW provisions will not require a regulatory impact statement under the Subordinate Legislation Act 1989.

Savings and transitional provisions

The Schedule of modifications provides for savings and transitional matters that are specific to New South Wales (see proposed Schedule 5A).

Matters for which savings and transitional arrangements are made include:

- (a) complaints and disciplinary proceedings, including complaints received by a former board before the commencement of the National Law (NSW) but not yet dealt with, and
- (b) the continuation of appointments of Board members, Tribunal members, members of Professional Standards Committees and other committees and assessors appointed under repealed Acts in the equivalent offices under the National Law (NSW), and

Explanatory note page 10

Health Practitioner Regulation Amendment Bill 2010

Explanatory note

- (c) the employment of staff of certain former Boards and the Health Professional Registration Boards Division of the Government Service, including preserving the entitlements of those staff, and
- (d) the transfer of amounts held in Education and Research Accounts under repealed Acts to accounts established under the National Law (NSW), and
- (e) matters relating to approvals, authorisations and consents given under the repealed Pharmacy Practice Act 2006.

Miscellaneous modifications

In addition, the Schedule of modifications provides a number of other matters including the following:

- (a) protection from liability (including liability in defamation) for any publication in good faith of a written statement of a decision made by a Council, Committee, Panel or Tribunal (see proposed section 176E),
- (b) the need for an adjudication body to consult with certain third parties if the decision proposed to be made by the body will impose an appreciable burden on the third party in connection with a registered health practitioner's practice or the clinical training undertaken by a student (see proposed section 176C),
- (c) by specifying the decisions of which notice is required to be given by an adjudication body (see proposed section 176 (2)),
- (d) by excluding the disclosure of information by a person exercising functions under the National Law (NSW) to the National Agency or a National Board from a provision about confidentiality (see proposed section 216 (2) (ba)),
- (e) by providing that persons exercising functions under a NSW provision are not

personally liable for anything done or omitted to be done in good faith in the exercise or purported exercise of a function under a NSW provision (see proposed section 236A),

(f) by providing for the evidentiary value of certain certificates (see proposed section 244A),

(g) by omitting transitional provisions that relate to the dissolution of local registration authorities (see proposed omission of sections 295, 297 and 298 of the National Law),

(h) by omitting a requirement for the keeping of certain records relating to registration (see proposed modification of section 296 of the National Law),

(i) by making enforcement provisions relating to performance assessments and performance reviews (see proposed Schedule 5B), including the following:

(i) entry to premises,

(ii) the power to conduct assessment exercises,

(iii) the conduct of performance reviews,

Explanatory note page 11

Health Practitioner Regulation Amendment Bill 2010

Explanatory note

(iv) the power to summon witnesses and take evidence and to obtain documents,

(j) by making provision for matters relating to the membership and procedure of Councils (see proposed Schedule 5C),

(k) by making provision for matters relating to proceedings before a Professional Standards Committee or a Tribunal (see proposed Schedule 5D),

(l) by making provision for matters relating to Assessment Committees (see proposed Schedule 5E).

Other amendments

Schedule 1 [1] changes the name of the 2009 Act to the Health Practitioner Regulation (Adoption of National Law) Act 2009.

Schedule 1 [4] declares certain NSW entities established under the National Law (NSW) to be adjudication bodies, co-regulatory authorities and responsible tribunals for the purposes of the National Law.

Schedule 1 [5] deals with the application of other NSW legislation to the National Law (NSW) by adding to the list of legislation that does not apply to the National Law (NSW) at all, and specifies the NSW legislation that only applies to the NSW provisions (which are the modifications made by Schedule 1 [6] to the proposed Act).

Schedule 2 Amendments to other legislation

Schedule 2 makes amendments to the other Acts and instruments specified in that Schedule. The amendments are generally consequential on the adoption of the National Law and the commencement of the National Law (NSW). The amendments fall into the following categories.

Amendments about health care complaints

Schedule 2.22 amends the Health Care Complaints Act 1993 as follows:

(a) to extend the power of seizure granted to an authorised officer by enabling a search warrant to permit the taking of stocks of any substance or drugs,

(b) to extend the power of seizure granted to an authorised officer by enabling a search warrant to permit the removal of records for the purpose of taking copies or notes,

(c) to enable the Health Care Complaints Commission to issue an interim prohibition order with respect to an unregistered health practitioner (which may include prohibiting the practitioner from providing health services or imposing conditions on the provision of health services by the practitioner),

(d) to update references to bodies established under legislation that is to be

repealed with references to new bodies established under the National Law (NSW),

Explanatory note page 12

Health Practitioner Regulation Amendment Bill 2010

Explanatory note

(e) to update existing references to registered health practitioners to references to newly defined terms for those practitioners in the Interpretation Act 1987,

(f) to update references to health registration Acts to references to the National Law (NSW).

Miscellaneous amendments updating terms and references

Schedule 2.29 amends the Interpretation Act 1987 to insert definitions of words and expressions used in any NSW Act or statutory rule to describe registered health practitioners in the National Law (such as enrolled nurse, registered medical practitioner and registered pharmacist).

The remaining amendments made by Schedule 2:

(a) update existing references to registered health practitioners in legislation by reference to the newly defined terms in the Interpretation Act 1987, and

(b) update references to bodies established under legislation that is to be repealed with references to new bodies established under the National Law (NSW), and

(c) update existing references to health registration Acts with references to the National Law or National Law (NSW).

Schedule 3 Repeals

Schedule 3 repeals existing legislation that deals with the registration of health practitioners. The legislation will be redundant when the National Law (NSW) comes into force.