NSW GOVERNMENT | Health

Report on the Statutory Review of the Health Practitioner Regulation National Law (NSW)

Contents

1. Introduction

On 1 July 2010, the National Registration and Accreditation Scheme (NRAS) commenced in NSW. The NRAS is established in the Schedule to the Health Practitioner Regulation National Law Act 2009 of Queensland. All States and Territories have adopted[1] the Queensland Schedule, subject to various amendments, as their own law which ensures a nationally consistent scheme across Australia in relation to registration and accreditation.

While the NRAS operates as a national registration and accreditation scheme, the scheme was established to allow jurisdictions to decide whether to adopt the national provisions relating to conduct, health and performance and complaints handling. If a jurisdiction decided not to adopt the national provisions relating to conduct, health and performance and complaints handling, they would be become a "co-regulatory" jurisdiction. NSW is a "co-regulatory" jurisdiction.

The Health Practitioner Regulation (Adoption of National Law) Act 2009 (Adoption Act) establishes the NRAS in NSW. However, as a co-regulatory jurisdiction, the Adoption Act introduces NSW specific provisions which modify the Schedule to the Health Practitioner Regulation National Law Act 2009 of Queensland to implement the unique NSW Part 8 (Health Performance and Conduct) and Part 5A. The law as a whole, as it operates in NSW, is known as the Health Practitioner Regulation National Law (NSW)[2].

The Health Practitioner Regulation National Law (NSW) has been in operation for over 5 years now and a formal review of the legislation has taken place. However, the Health Practitioner Regulation National Law (NSW) has been consistently reviewed and monitored over the last 5 year with changes being made to the legislation as required. The Ministry will continue to monitor and review the legislation to ensure it appropriately protects the public.

2. Statutory Review of the Health Practitioner Regulation National Law (NSW)

Section 9 of the Adoption Act states:

(1) The Minister is to review this Act to determine whether the policy objectives of the Act remain valid and whether the terms of the Act remain appropriate for securing those objectives.

(2) The review is to be undertaken as soon as possible after the period of 5 years from the date of assent to this Act.

(3) A report on the outcome of the review is to be tabled in each House of Parliament within 12 months after the end of the period of 5 years.

---

[1] Except Western Australia. Western Australia passed legislation to mirror the Queensland Schedule. See Health Practitioner Regulation National Law Act (WA) 2010

[2] Section 4 of the Health Practitioner Regulation (Adoption of National Law) Act 2009

In accordance with the statutory requirements, the Ministry of Health, on behalf of the Minister for Health, has undertaken a review of the Health Practitioner Regulation National Law (NSW) to *determine whether the policy objectives of the Act remain valid and whether the terms of the Act remain appropriate for securing those objectives.*

As part of the review, a Discussion Paper was released to canvass stakeholder's views on a range of issues. As noted in the Discussion Paper, as a national review of NRAS was undertaken in 2014 by Mr Kim Snowball, this review focused on the NSW specific provisions in Part 8 and 5A.

Over 40 submissions were received on the Discussion Paper. This Report on the review has been prepared to detail the findings of the review and is required to be tabled in Parliament. Submission received as part of the discussion paper, have been considered in developing this Report.

In this Report, the following terms are used:

- the 'National Law' refers to the nationally consistent provisions of the Schedule of the Health Practitioner Regulation National Law (Qld) and the complaints handling provisions for all jurisdictions other than NSW and Qld[3],
- the 'NSW specific provisions' refer to the modifications that have been made to the National Law in NSW (and which primarily relate to the handling of complaints in respect of registered health practitioners),
- the 'Health Practitioner Regulation National Law (NSW)' refers to the law as a whole as it applies in NSW, that is the National Law as modified by the NSW specific provisions,
- 'NRAS' or the 'National Scheme' refers to the national registration and accreditation scheme, and
- the 'National Board jurisdictions' refer to those jurisdictions that utilise the National Board processes for complaints handling under the National Law.

3. Issues considered as part of the Statutory Review

3.1 Objectives of the National Law

Section 3 of the Health Practitioner Regulation National Law (NSW) sets out the objectives and guiding principles that apply to the National Law:

(1) The object of this Law is to establish a national registration and accreditation scheme for—

(a) the regulation of health practitioners; and

[3] It is noted that following the commencement of the Health Ombudsman Act 2013 (Qld), Queensland recently became a co-regulatory jurisdiction and has its own provisions relating to complaints handling.

(b) the registration of students undertaking—

(i) programs of study that provide a qualification for registration in a health profession; or

(ii) clinical training in a health profession.

(2) The objectives of the national registration and accreditation scheme are—

(a) to provide for the protection of the public by ensuring that only health practitioners who are suitably trained and qualified to practise in a competent and ethical manner are registered; and

(b) to facilitate workforce mobility across Australia by reducing the administrative burden for health practitioners wishing to move between participating jurisdictions or to practise in more than one participating jurisdiction; and

(c) to facilitate the provision of high quality education and training of health practitioners; and

(d) to facilitate the rigorous and responsive assessment of overseas-trained health practitioners; and

(e) to facilitate access to services provided by health practitioners in accordance with the public interest; and

(f) to enable the continuous development of a flexible, responsive and sustainable Australian health workforce and to enable innovation in the education of, and service delivery by, health practitioners.

(3) The guiding principles of the national registration and accreditation scheme are as follows—

(a) the scheme is to operate in a transparent, accountable, efficient, effective and fair way;

(b) fees required to be paid under the scheme are to be reasonable having regard to the efficient and effective operation of the scheme;

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

These objectives are consistent across the National Law as it applies to all States and Territories, including NSW. There is, however, an additional NSW objective. Under amendments made in 2012[4], the NSW Parliament added another objective in s3A. Section 3A relates to the NSW specific provisions and provides:

> *In the exercise of functions under a NSW provision, the protection of the health and safety of the public must be the paramount consideration.*

[4] As contained in the Health Legislation Amendment Act 2012

This additional objective is consistent with an objective clause inserted into the Health Care Complaints Act 1993 and the old Medical Practice Act in 2008[5]. The Discussion Paper asked whether the objectives of the Health Practitioners Regulation National Law are appropriate.

Most submissions received agreed that the objectives of the Health Practitioner Regulation National Law (NSW) were appropriate, clear and valid and no changes where necessary. However, a small number of submissions suggested additional objectives should be added. These were: recognising the importance inter-professional collaboration; facilitating the shared responsibility of patient care; and that practitioners should work within their scope of practice and within an accepted standard of science and evidence.

The objectives of the Health Practitioner Regulation National Law (NSW) are, in the main, nationally consistent objectives. While NSW has added s3A as a NSW specific provision, the Ministry does not consider that additional NSW objectives should be added unless there is a clear need. While inter-professional collaboration and the facilitation of shared patient care are important and supported, the absence of specific objectives to this effect does not preclude inter-professional collaboration and facilitation of shared patient care. Likewise, the need for practitioners to work within their scope of practice and within accepted standards of science and evidence are not precluded by reason of the current objectives. Further, these are issues that can be considered by the National Board in making guidelines and standards for health practitioners. Accordingly, the Ministry does not consider that any additional objectives are required.

Recommendation

1) The objectives of the Health Practitioner Regulation National Law (NSW) remain appropriate, valid and no changes are required.

3.2 Process for amending the Health Practitioner Regulation National Law (NSW)

The Discussion Paper considered how the Health Practitioner Regulation National Law (NSW) should be amended in NSW. As noted in the Discussion Paper, the Health Practitioner Regulation National Law (NSW) adopted the Schedule to the Queensland Health Practitioner Regulation National Law (with the exception of the provisions relating to the complaints processes) as updated from time to time. The result is that any future changes made to the Queensland Schedule automatically become law in NSW without reference to the NSW Parliament[6].

The Discussion Paper considered whether, in view of NSW being a co-regulatory jurisdiction, this process was appropriate. While applying the Queensland law ensures

[5] See s3(2) of the Health Care Complaints Act and s2A of the repealed Medical Practice Act 1992. Both these sections where amended in 2008 by the Medical Practice Amendment Act 2008

[6] Other than changes to Part 8 of the Schedule to the Health Practitioner Regulation National Law Act 2009 (Qld), as this Part was not adopted into NSW law. See s6 of the Adoption Act.

consistency of the legislation, it can result in a lack of Parliamentary oversight and can lack flexibility. For changes to be made to the Queensland law, under the COAG intergovernmental agreement, all States and Territories must agree to the change[7]. However, if proposed changes inadvertently affect the NSW specific provisions relating to complaints handling, at the moment there is a lack of flexibility in how NSW can respond. NSW can either refuse to consent to the changes being made to the Queensland law or agree to the changes and then introduce legislation amending the Health Practitioner Regulation National Law (NSW). However, neither option is without difficulty. The first option may adversely impact other States and Territories. The second option may cause problems in NSW as the changes may have already commenced before the legislation is introduced and passed by the NSW Parliament.

As such, the Discussion Paper considered whether there should be a mechanism in the Health Practitioner Regulation National Law (NSW) that respects State sovereignty, allows flexibility to recognise the NSW specific system but also ensures that NRAS operates, so far as appropriate in NSW, as a nationally consistent law. As part of this, the Discussion Paper asked whether there should be a mechanism requiring regulations to be made before NSW accepts any changes to the Queensland law or alternatively allowing regulations to be made disallowing in NSW any changes made to the Queensland law.

Some of the submissions received on this issue argued that allowing regulations to be made to either apply or disallow changes to the Queensland law would further fragment the notion of national consistency of the NRAS. On the other hand, other submissions agreed that the special nature of NSW's co-regulatory scheme meant that it was important to have a mechanism by which changes to the Queensland law are properly considered in NSW before taking effect. This would help ensure that there are not unintended consequences of the changes on the NSW specific provisions.

The Ministry agrees with the latter arguments. Allowing regulations to be made to either apply or disallow changes to the Queensland law would ensure that NSW can properly consider how the changes will affect the NSW specific Part 8. A regulation making power also allows flexibility for other jurisdictions as a regulation making power means that if proposed changes would impact on Part 8, NSW can still agree to Queensland making the changes that would apply in other States and Territories but then NSW could decide, by regulation, whether the changes should apply to NSW. Further, a regulation making power allows for Parliamentary oversight as Parliament can disallow any regulations made. However, as regulations are constantly reviewed and remade, this may not be the most appropriate mechanism. Rather, a Governor's order that is disallowable by Parliament may be a more appropriate mechanism.

---

[7] Under the COAG intergovernmental agreement, decisions of the Ministerial Council, including to make legislative amendments, are by consensus: https://www.coag.gov.au/sites/default/files/iga_health_workforce.pdf

As such, the Ministry considers the Health Practitioner Regulation National Law (NSW) should be amended to provide that regulations or a Governor's order must be made before any changes to the Queensland law apply in NSW. It is considered that this should be a power to require regulations/order to be made prior to any changes taking effect in NSW rather than a power to dis-applying any changes to the Queensland law. This is because the former will allow for proper scrutiny by ensuring that the NSW Parliament can decide whether it agrees to the changes or not. However, given that NRAS was adopted in NSW via an "applied law" model, such a change may have implications for the interaction with the Queensland Law. As such, the Ministry will work to address any issues in relation to the interaction between the Health Practitioner Regulation National Law (NSW) and the Queensland Law.

Recommendations

2) In principle support is given to the Health Practitioner Regulation National Law (NSW) being amended to require regulations or a Governor's order to be made before any changes to the Schedule of Health Practitioner Regulation National Law Act 2009 (Qld) take effect in NSW. The Ministry will work to address any issues in relation to the interaction between the Health Practitioner Regulation National Law (NSW) and the Queensland Law.

3.3 Structural and organisational matters: Health Professional Councils

Around the time of the review of the Health Practitioner Regulation National Law (NSW), a national review of the NRAS was being undertaken by Mr Kim Snowball. The discussion paper issued as part of that review, noted that, at the national level, 5 of the professions (medicine, nursing and midwifery, pharmacy, dentistry and psychology) represented 87.5% of registrants and 95.5% of all notifications and complaints[8]. The national discussion paper considered that the other nine professions (chiropractors, occupational therapist, osteopaths, physiotherapist, Aboriginal and Torres Strait islander health practitioners, Chinese medicine, practitioners, medical radiation practitioners, optometrists and podiatrists) were overregulated and paid disproportionately high fees, which could be decreased if the overregulation could be addressed. The discussion paper issued as part of the national review, considered whether there should be a consolidation of the National Boards for these nine smaller and lower complaints generating professions (chiropractors, occupational therapist, osteopaths, physiotherapist, Aboriginal and Torres Strait islander health practitioners, Chinese medicine, practitioners, medical radiation practitioners, optometrists and podiatrists).

[8] *Review of the National Registration and Accreditation Scheme for health professions: Consultation Paper August 2014*, prepared by Kim Snowball, accessed via www.ahmac.gov.au

The report on the national review had not been released at the time of writing the NSW Discussion Paper. However, in light of the issues raised during the national review of NRAS, the Discussion Paper asked whether there should be a consolidation of the Councils in respect of the professions in NSW. In this regard it was noted that the nine smaller professions accounted for only 4% of complaints in NSW over 2012-2014.

Most of the submissions received from the Councils affected by the proposal did not support consolidation and submissions received from professional associations that would be affected by the change did not support consolidation either. However, there were only 2 submissions received from the professional associations representing the professions that would be affected. These submissions argued that consolidation was not a financial necessity and that there would be a lack of professional "buy-in" if consolidation occurred. It was also argued that there did not need to be a full consolidation of the Councils but there could be a consolidation of some of the functions of the Council. However, other submissions were supportive provided that there remained professional input from each of the professions in a Combined Council. Others argued that any decision should be delayed until it is decided what will happen at the national level.

Since the time of writing the Discussion Paper, the final report into the review of NRAS has been released,[9] with the report recommending a consolidation of the nine smaller National Boards. However, Health Ministers have deferred the question of consolidation pending further advice from the Australian Health Ministers' Advisory Council[10].

The Ministry does see benefits in consolidating the Councils for all, or at least some, of the nine smaller professions, or at least some form of amalgamation of functions, such as shared services. Consolidation or amalgamation of functions can minimise duplication, reduce costs and increase the expertise of members. The smaller professions that have low volumes of complaints can lead to difficulties for the Councils in building up experience and expertise in dealing with complaints. Further, there are potential cost savings to be found in consolidating the smaller Councils, or the functions of the Councils, through reducing reporting obligations and benefits arising from economies of scale. As such, the Ministry's preliminary view is that there should be some form of consolidation, or amalgamation of functions, of the 9 smaller professions.

That said, there should be further consideration of the issues and engagement with stakeholders before any final decision is made. In this regard, as noted above, Health

---

[9] The Independent Review of the National Registration and Accreditation Scheme for health professionals: http://www.coaghealthcouncil.gov.au/Publications/Reports/ArtMID/514/ArticleID/68/The-Independent-Review-of-the-National-Registration-and-Accreditation-Scheme-for-health-professionals

[10] COAG Health Council communique, 7 August 2015, http://www.coaghealthcouncil.gov.au/Announcements/ArtMID/527/ArticleID/71/Reissued-Communique-Final-Report-of-the-Independent-Review-on-the-National-Accreditation-Scheme-for-health-professionals

Ministers have asked for further advice in relation to the question of consolidation of the National Boards. While NSW runs a separate complaints process and a consolidation of the National Boards is not a prerequisite for NSW to consolidate the Councils, the further advice is likely to be of assistance in NSW's consideration of the issue.

Recommendation

3) The Ministry supports in principle a consolidation of all, or some, of the smaller professions or an amalgamation of some of the functions of the Councils. However, there should be further consideration of the issues and engagement with stakeholders before a final decision is made. The Ministry will consider the issue further following receipt of advice to Health Ministers regarding the issue of consolidation of the National Boards.

3.3.2 Where a Council is not financially viable

The Discussion Paper noted NRAS is intended to be a financially self sufficient model, with fees from registrants covering the costs of running the scheme. However, it is noted that the Aboriginal and Torres Strait Islander health profession has not to date been self-funded and that the current scheme can result in financial difficulties for the smaller professions.

Accordingly, the Discussion Paper considered whether, regardless of whether a Combined Council is created, there should be some mechanism to "future proof" the legislation to deal with a situation of a Council not being financially viable. This could include allowing regulations to be made amending the complaints handlings, administrative or other processes for a particular profession in the event that a Council is not financially viable. In addition, the Discussion Paper asked what changes should be adopted to address the financial constraints of the Aboriginal and Torres Strait Islander Health Practice Council.

There was a general agreement in the submissions that there should be some form of "future proofing" in the legislation to deal with a Council that became unviable and most agreed that this should be done by way of a regulation making power. However, some submissions argued that a regulation making power may lead to less favourable outcomes or differences in complaints process between the professions.

In respect of the Aboriginal and Torres Strait Islander Health Practice Council there were different views regarding what changes should be adopted to deal with the financial constraints of the Council. There various suggestions were made, including increasing fees, having the Government financially support the Council, introducing a levy across all professions, transferring the administrative and reporting obligations to another Council or having the HCCC hear all complaints.

In respect of "future proofing" the legislation, the Ministry considers this is a sensible and reasonable idea. While NRAS is intended to operate on a "self-funded" model whereby fees from registrants cover the costs associated with the registration and complaints processes, there should be ability in the Health Practitioner Regulation (National Law) to respond if fees generated from registrants do not cover the costs of running a particular Council. The Ministry also considers that the best way to "future proof" the legislation is to have a regulation making power allowing regulations to be made to modify the complaints handlings, administrative or other processes for a particular profession in the event that a Council is not financially viable. This would need to be a broad and flexible power to allow regulations to be drafted to respond to various different financial situations a Council could find itself in. For example, depending on the financial difficulties experienced, a regulation making power may only be used to modify the reporting and audit requirements of a Council in order to reduce costs and ensure financial viability.

In respect of the Aboriginal and Torres Strait Islander Health Practice Council, if a regulation making power is included in the legislation, issues relating to how to respond to the financial constraints of the Council can be dealt with by of regulation. This would allow further consideration and consultation to occur with relevant stakeholders.

Recommendation

4) That the Health Practitioner Regulation National Law (NSW) should be amended to create a regulation making power allowing regulations to be made to modify the complaints handling processes, administrative or other processes for a particular profession in the event that a Council is not financially viable. In respect of the Aboriginal and Torres Strait Islander Health Practice Council, this regulation making can be used to respond to the financial constraints of the Council.

3.4 Part 8: Health, Performance and conduct

Part 8 of the Health Practitioner Regulation National Law (NSW) deals with health, performance and conduct of health practitioners.

The Discussion Paper noted that the Health Professional Councils operates three separate and largely distinct complaints management streams each of which is provided for in the NSW specific provisions. Those streams are conduct, performance and health.

The management of each of these streams by the Councils is, despite some similarities and crossovers, largely distinct:

- **The conduct stream** operates through NSW Civil and Administrative Tribunal (Tribunal) hearings for all professions; Professional Standards Committee (PSC) hearings for the medical profession and the nursing and midwifery professions; and

Council disciplinary inquiries for all professions other than medical, nursing and midwifery.

- **The performance stream** operates through performance assessments and performance review panels in all professions.
- **The health stream** operates through impaired registrants panels, with conditions or suspensions being imposed (with consent) by the relevant Council, for all professions.

It was also noted that the Health Care Complaints Commission (HCCC) plays a large and important role in the complaints processes. The HCCC is the independent public interest investigator and prosecutor of serious complaints against registered health practitioners and also plays an important role in consulting with the professional Councils on the management of health, performance and lower level conduct complaints.

The Discussion Paper asked whether the effective separation of the different streams was appropriate or whether it would be more effective to try and deal with any or all issues a practitioner may be facing in another way, such as via fitness to practice panel that can consider all issues facing a practitioner that may impact on their ability to practise.

In submissions received, the Health Professionals Council Authority (HPCA) and a number of the Councils argued that the current model can lack flexibility and a fitness to practice model should be considered as it would allow the Councils to more appropriately deal with a practitioner who has, for example, both health and conduct issues. Under this fitness to practice model, the composition of a panel would vary depending on the nature of the complaint received with hearings held in private (though there could be a requirement to produce written reasons for matters involving unsatisfactory professional conduct) and without legal representation. This would allow the panel to be moulded to suit the needs of the individual practitioner.

However, overall most submissions received on this issue supported the current three streams approach arguing that the current approach is effective, protects the public and ensures a fair process for practitioners. It was also argued that moving to a single fitness to practice model could blur the distinctions that exists between practitioners with health issues and those with conduct issues that may result in confusion for the public.

After considering the submissions received, the Ministry does not support any changes to the current three stream approach. While there may be benefits to a fitness to practice model, in particular in dealing more holistically with a practitioner who has multiple issues relating to conduct, performance and/or health, the current three streams is generally supported by stakeholders and there does not appear to be a pressing need to change the current approach. Further, the 3 stream approach clearly delineates conduct matters from health and performance with the former being seen and dealt with as a disciplinary matter. While health and performance issues may make a practitioner unfit to practice, there is a

public expectation and a public interest in ensuring that conduct matters are seen as separate and dealt with in a disciplinary approach. In this regard it is noted that the current model relating to conduct matters for nursing and midwifery and medical practitioners, by way of PSCs, are conducted openly and transparently, with hearings held in public and decisions published. Any move to a fitness to practice model that reduces transparency or conflates disciplinary matters with performance or health issues is not supported at this time. That said, the Ministry does recognise that there may be benefits of dealing with a practitioner more holistically. Therefore, the Ministry will continue to monitor and review the application of the three stream model and if necessary seek to make any necessary changes in the future to ensure that the complaints scheme continues to operate effectively.

Recommendations

5) There should be no change to the current complaints model of three different and distinct streams of health, conduct and performance.

3.4.1 The conduct stream

The conduct stream deals with complaints against health practitioners that relate to lower level allegations of unsatisfactory professional conduct as well as higher level allegations of professional misconduct. The medical, nursing and midwifery professions have access to PSCs to deal with lower level complaints relating to conduct matters whereas all other professions access Council inquires. Higher level complaints are dealt with by the Tribunal.

The Discussion Paper noted PSCs are intended to operate on a less formal level than Tribunal hearings. However, it has been argued that they have become more legalistic over the years and that there is little difference between PSCs and Tribunal hearings. The Discussion paper also considered whether it is appropriate to have two different processes - PSCs or Council inquiries - for dealing with complaints relating to a practitioner's professional conduct depending on the profession in which a practitioner is registered. Overall the Discussion Paper asked what changes should be made to the PSCs and Council inquiries to ensure that complaints are dealt with in a timely, cost effective manner that both protects the public and ensures natural justice for practitioners

There were a wide variety of different views expressed on these issues. While some supported abolishing PSCs, others were of the view that all professions should have access to PSCs. Some submissions thought that PSCs are less formal and legalistic than Tribunal hearings and no changes are required, whereas others argued that PSCs are overly legalistic and not appropriate for resolving lower end conduct complaints. Others still argued that while the current approach was supported, there needs to be appropriate triaging of matters so that only appropriate matters are considered by PSCs, with greater use made of counselling and inquiry processes.

Some submissions argued for minor changes in relation in Council inquires and PSCs. In relation to the former, it was argued that the quorum requirements for some of the larger Councils are too high and should be lowered. In respect of the latter, it was argued that PSCs should be required to keep an audio recording.

In terms of the differences between Council inquiries and PSCs these differences have developed over the years in response to various issues that have arisen. PSCs have been adapted to the larger and higher complaints volume professions of medicine and nursing and midwifery to ensure complaints are appropriately handled. It is not considered appropriate to make large scale changes to this model.

That said, the Ministry considers that there be good grounds to consider extending PSCs to other larger and higher complaints volume professions, such as dentistry, pharmacy and psychology. These professions, like medicine, nursing and midwifery, have larger number of practitioners, a higher volume of complaints and often deal with more serious issues (particularly complaints relating to misuse of drugs). Alternatively, even if these professions kept Council inquiries rather than moved to PSCs, some of the transparency provisions relating to PSCs could be extended to the professions, for example there could be a requirement for decisions involving matters relating to conduct to be published. Further, should a Combined Council be created for the nine lower regulatory professions (see Part 3.3), then there would be very good reasons to try and ensure consistency of approach between the other 5 professions.

As such, the Ministry will consider and consult further on increasing consistency between the dentistry, pharmacy and psychology professions and medicine and nursing and midwifery in respect of dealing with complaints relating to conduct.

In relation to other matters, and after considering the submissions received, the Ministry considers the following minor changes could be made to improve PSCs and Councils inquiries:

- The quorum to conduct a Council inquiry should be reduced for the larger Councils. Currently, the quorum is half the number of Council members, or, if half is not a whole number, the next highest whole number[11]. For larger Councils, such as dentistry this would be 6 members. It is not considered necessary or appropriate to require such a large number of Council members to be involved in a Council inquiry. Accordingly, for any Council that has more than 6 members, a Council inquiry should be able to be conducted by 3 or more members.
- Schedule 5D of the Health Practitioner Regulation National Law should be amended to give the Chairperson of a PSC the power to make interlocutory decisions, such as issuing directions or adjourning a matter, in order to increase flexibility of PSCs. The

[11] Clause 19 of Schedule 5C of the Health Practitioner Regulation National Law (NSW)

Chairperson should also have the deciding vote in the event of a 2:2 split between members.

- PSCs should be required to audio record their hearings. This will assist parties where a party seeks to appeal a decision of the PSC.

Recommendations

6) The Ministry consider and consult further on making changes to the Health Practitioner Regulation National Law (NSW) to extend PSCs, or some of the transparency provisions relating to conduct matters, to the larger professions of dentistry, pharmacy and psychology, in addition to medicine and nursing and midwifery.
7) The Health Practitioner Regulation National Law (NSW) should be amended to:

- Allow, for a Council that has more than 3 members, a Council inquiry to be conducted with 3 or more members,
- Give the Chairperson of the PSC the power to make interlocutory decisions and the deciding vote if members split 2:2 in relation to a decision, and
- Require PSCs to be audio recorded.

3.4.2 The health stream

The Discussion Paper considered the health stream, which deals with complaints involving a practitioner who has an impairment. Such complaints are dealt with by way of an Impaired Registrants Panel. The Discussion Paper asked whether the current requirement for a medical practitioner to sit on an Impaired Registrants Panel should remain and what other changes, if any, were required to ensure complaints raising impairment issues are handled in a cost effective, fair and timely manner. The Discussion Paper also considered whether the power in s152I to counsel the practitioner or recommend that conditions be placed on the practitioner's registration should be dependent on the Panel actually finding that the practitioner is impaired.

In the main, most submissions overall supported the operation of the health stream and were of the view that Impaired Registrants Panels operated in a safe and effective manner. There was a good deal of support for the requirement of a medical practitioner being required to sit on a Panel in order to bring appropriate expertise to the consideration of the issues involved in an impaired practitioner. However, some submissions argued that a medical practitioner was not required in all cases and that in some cases it may be more appropriate for a psychologist to sit on the Panel. Some submissions agreed that a Panel should be able to make recommendations even without a finding that the practitioner was impaired, while others argued that the Panel should be required to find that the practitioner is impaired before making recommendations.

Some submissions argued that an Impaired Registrants Panel should have the power to impose conditions directly (rather than make a recommendation) whereas others argued that such a power may in fact detract from the role of the Panel and make practitioners less

inclined to participate. Another argued for more flexibility in the provisions relating to Impaired Registrants Panels, including around s152F, which prevents a Panel from investigating or taking any action when the HCCC is investigation the matter.

The Ministry has considered these submissions. In respect of the composition of the Panel, the Ministry is of the view that a medical practitioner is best placed to provide advice about matters, such as drug and alcohol issues and cognitive decline that may affect impaired practitioners and does not consider it appropriate to remove the requirement for a medical practitioner to sit on the Panel.

In terms of the power of the Panel, the Ministry does not consider it appropriate to give the Panel the power to impose conditions, rather than make recommendations. The Ministry agrees with the submissions that argued that an Impaired Registrants Panel that can impose conditions has the potential for the Panel to be seen as a punitive body and may make impaired practitioners less likely to participate fully and cooperate with the Panel. The Ministry also considers that no changes are required to s152I. As the Panel cannot impose conditions, it would be unnecessarily limiting to only allow the Panel to make a recommendation or to counsel the practitioner if it first finds that the practitioner is impaired. The current requirements will allow a Panel to make recommendations and/or counsel a practitioner as needed to protect the public.

However, in relation to s152F, the Ministry considers there are benefits to allowing more flexibility. Currently, s152F prohibits an Impaired Registrants Panel from investigating or taking any action in relation to a matter when that matter is being investigated by the HCCC. This can cause delays, particularly if the HCCC is investigating a practitioner who has both a conduct issue and a health issue as it will mean that the investigation and resolution of the health issue may be delayed until the HCCC has determined what to do about the conduct. However, as the HCCC also has the power to investigate and, if appropriate, prosecute complaints relating to impairment, where the HCCC decides to do so it would not be appropriate for an Impaired Registrants Panel to also investigate or take action in respect of the complaint. Accordingly, in order to reduce delays, increase flexibility but ensure there is not dual handling of complaints, it is considered appropriate to amend s152F to provide that the Council can continue to investigate or take action in respect of a matter that the HCCC is investigating but only if the HCCC authorises the Panel to do so.

Issues for consideration?

8) Section 152F of the Health Practitioner Regulation National Law (NSW) should be amended to provide that the Panel can continue to investigate or take action in respect of a matter that the HCCC is investigating but only if the HCCC consents.

3.4.3 Performance stream

The Discussion Paper considered the performance stream which is designed to provide an environment in which individual performance deficits, not amounting to unsatisfactory professional conduct, can be identified and addressed in a supportive environment.

The performance program allows a Council to require a practitioner to undergo a performance assessment if a Council considers a practitioner's professional performance may be unsatisfactory. Matters that raise significant issues of public health or safety or raise a prima facie case of professional misconduct cannot be dealt with by way of a performance assessment[12]. Following the assessment, an assessor assesses the performance of the practitioner and provides a report to the Council. The Council can then take a variety of different actions, including deciding to take no further action, refer the matter to a Performance Review Panel or order the practitioner to undertake counselling[13].

The Discussion Paper noted that the performance program is well established in the Medical Council and the Nursing and Midwifery Council but used in other Councils to a limited extent, or not at all. The Discussion Paper asked whether some modifications could be made to the overall performance process, including abolishing Performance Review Panels, to streamline its operation and thereby result in it operating more expeditiously and cost effectively and promote greater usage,

While some argued for the removal of Performance Review Panels, and an expanded role of assessors, others strongly supported the retention of Performance Review Panels that were considered to provide a fair and balanced way of assessing performance. Others argued that the Health Practitioner Regulation National Law (NSW) should allow for practitioners to enter into enforceable undertakings. There was also a view that the processes could be streamlined by not requiring a Performance Review Panel if the practitioner accepts an assessor's report and agrees to conditions being imposed which would limit matters that are required to go before a Performance Review Panel.

After considering the submissions received, the Ministry does not consider it appropriate to abolish the Panels. However, there is merit in the suggestion of streamlining the process to allow for practitioners to agree to conditions following an assessor's report and giving the Council the ability to impose such agreed conditions. Such an amendment would limit the need to convene a Performance Review Panel to appropriate cases where the practitioner and Council do not agree.

Recommendations

9) Performance Review Panels should be retained. However, s155C of the Health Practitioner Regulation National Law should be amended to allow a Council to impose conditions, with the consent of the practitioner, following the receipt of an

[12] Section 154A of the Health Practitioner Regulation National Law (NSW)
[13] Section 155C of the Health Practitioner Regulation National Law (NSW)

assessor's report.

3.4.4 Assessment Committees

Assessment Committees can be utilised by all Councils other than medical and nursing and midwifery (who utilise PSCs instead). Assessment Committees can be used to investigate appropriate matters and compile appropriate material to bring before a Council. It is often used as a precursor to a Council inquiry. As Assessment Committees are utilised as a precursor to Council inquiries, the Committees are most appropriately thought of as sitting within the conduct stream. However, Assessment Committees, and the subsequent Council inquiries, can be utilised for complaints that raise elements of performance and it is noted that the legislation allows Assessment Committees to carry out skills testing. As all Councils now have access to the performance program, the Discussion Paper asked whether Assessment Committees should be retained or if alternate structures should be adopted.

A number of submissions argued that Assessment Committees formed a valuable role in the complaints process and should be retained. Further it was argued that abolishing Assessment Committees would restrict the investigatory powers available under the legislation and impede public protection, though others argued there were sufficient investigatory powers in the legislation. Others argued that as all Councils now have access to the performance program, Assessment Committees have been superseded and should be abolished. Others were of the view that the Assessment Committees should be abolished due to the overlap with Council inquiries. However, in so far as the Assessment Committee straddled both the conduct and performance streams, it was argued that this was seen as a strength not a weakness of current approach. Some argued that modifications could be made to the existing provisions, including amending the legislation to provide that Councils, rather than the Minister, should appoint members and removing s147B(1)(b) (which provides that the Assessment Committee is to encourage the complainant and the practitioner to settle the complaint by consent) from the legislation.

After considering the submissions received, the Ministry does not consider that any large scale changes are required to the role and functions of Assessment Committees at this stage. Assessment Committees allow appropriate investigation of a complaint and ensures that appropriate material can be before a Council inquiry. However, the Ministry accepts there is overlap between the role of skills testing and the performance stream and that in the longer term it may not be appropriate to retain Assessment Committees. In this regard it is noted that if PSCs are extended to the professions of dentistry, pharmacy and psychology (see 3.4.1), these professions would no longer have access to Assessment Committees and the on-going usefulness of Assessment Committees should be reassessed. As such, the on-going need for Assessment Committees will be considered further as part of the consideration of extending PSCs to the larger professions.

However, in the meantime, the Ministry considers some minor changes could be made to the provisions relating to Assessment Committees. In relation to the appointment of members of the Committee, the Ministry agrees that members should be appointed by the Council rather than Minister in order to streamline the appointment process. In relation to s147B(1)(b), this section requires an Assessment Committee to encourage a complainant and the practitioner to settle the dispute by consent. Section 147B(1)(b) is not considered appropriate. The complaints that are dealt with under the Health Practitioner Regulation National Law (NSW) are by and large matters of public interest, with the complaints processes intended to operate to protect the public rather than resolve individual disputes. Resolution of individual disputes by consent can be appropriate in certain areas, for example, consumer related matters (that are a fair trading issue) or low level patient and clinical care issue which may be within the purview of the HCCC which has conciliation powers. Where a health professional Council is involved, it is not appropriate for complaints to be resolved by consent between the complainant and the practitioner. Rather, the Council (or other body under the Health Practitioner Regulation National Law (NSW)) should review, investigate and if necessary take action in order to protect the public. As such, s147B(1)(b) should be removed from the legislation.

Recommendations

10) That the Health Practitioner Regulation National Law (NSW) be amended to require members of an Assessment Committee to be appointed by the Council rather than the Minister.
11) Section 147B(1)(b) should be removed from the Health Practitioner Regulation National Law (NSW)

3.5 Section 150 processes

Section 150 of the Health Practitioner Regulation National Law (NSW) allows a Council to take action to impose conditions on a practitioner's (or a student's) registration or to suspend that registration where it is *appropriate to do so for the protection of the health or safety of any person or persons (whether or not a particular person or persons) or if satisfied the action is otherwise in the public interest*[14].

Under s150, Councils can take action in circumstances where there is no need to prove that the practitioner is actually guilty of some form of misconduct; that he or she suffers from an impairment; or that his or her performance is inadequate. The only thing that is required is that the Council must be satisfied that it is appropriate to take action to protect a person or persons or that the action is otherwise in the public interest. It is also noted that s150 action is effectively only interim action, with the matter being required to be referred to the

[14] Section 150(1) of the Health Practitioner Regulation National Law (NSW)

HCCC for investigation, Impaired Registrants Panel or Performance Panel[15]. In addition, the practitioner has a right of review of any action taken under s150[16].

The s.150 process is also known as "immediate action". Similar provision exists in the National Law jurisdiction[17].

While immediate action can be taken under s150 without proving misconduct, impairment or that a practitioner's performance is inadequate, practitioners are still entitled to procedural fairness. The rules of procedural fairness are flexible and adaptable to the circumstances of each individual case. Therefore while some instances may warrant a face to face meeting with the practitioner others may appropriately and efficiently proceed on the papers.

The Discussion Paper noted the s150 procedures are an important part of the interim processes which works to protect the public but also recognised the need to ensure that practitioners and students received a fair hearing. The Discussion Paper asked whether changes are required to ensure that immediate action can be undertaken to protect the public while still ensuring natural justice for practitioners.

There was general and broad support for the retention of s150 in its current form with most submissions arguing that it was appropriate and provided protection to the public and practitioners. However, a small number of submissions argued that s150 should be more prescriptive in terms of when it should be used and that specific periods of time should be given for practitioners to provide written reasons while one submission argued that s150 was over used, being relied upon routinely rather than in exceptional matters.

The Ministry considers that s150 is an important provision that allows urgent action to be taken to protect the health or safety of the public or is otherwise in the public interest. While the legislation does not does not set out the specific requirements relating to natural justice requirements (such as specific time frames for providing submissions), this is considered to be appropriate as it ensure that the natural justice requirements can be tailored to individual cases. The Ministry agrees with the majority of submissions that no changes to s150 are required.

Recommendations

12) No changes to s150 are required.

3.6 Tribunals

Part 3.6 of the Discussion Paper considered the role of the Tribunal. It was noted that on 1 January 2014, the Civil and Administrative Tribunal Act 2013 commenced and each of the

[15] See subdivision 7,division 3 of Part 8 of the Health Practitioner Regulation National Law (NSW)
[16] Section 150A of the Health Practitioner Regulation National Law (NSW)
[17] See sections 155-159 of the National Law

previous 14 individual health profession Tribunals, including the Medical Tribunal and the Nursing and Midwifery Tribunal, ceased to exist and were replaced by the single Civil and Administrative Tribunal of New South Wales (also known as NCAT).

The Discussion Paper raised a number of other substantive issues relating to the Tribunal. These included:

- whether the Tribunal should be given the power to make an interim suspension order,
- whether Part 8 of the Health Practitioner Regulation National Law (NSW) should be amended to clarify that the Tribunal can hold an inquiry where a complaint has been admitted,
- whether a new section be included in Part 8 requiring the Tribunal to give written reasons when making orders in circumstances where a complaint has been admitted, and
- whether the legislation be amended to clarify who should have a right to appear before, or be heard, in matters where an application for a review is made under s163A.

In respect of interim suspension orders, section 149A of the Health Practitioner Regulation National Law (NSW) sets out the general powers of the Tribunal to caution, reprimand, counsel, impose conditions, order the practitioner/student to undertake an educational course. As well as the Tribunal being able to exercise these powers at the conclusion of proceedings, the Tribunal can also, in accordance with s165L, exercise these powers on an interim or "interlocutory" basis during a hearing. However, the interim powers of the Tribunal under s165L do not extend to the Tribunal being able to suspend a practitioner's (or student's) registration. The Discussion Paper asked whether the Tribunal should be given this power, if so at what stage in the proceedings and what safeguards should apply.

Some submissions argued that there was no need for an interim suspension power as the Tribunal's powers were broad enough already and that, in the event they were not, the powers in s150 could be utilised to protect the public and that an interim order may delay the making of final orders. Others argued that the Tribunal should have a power to make an interim suspension order when it is in the public interest to do so, while others agreed that the Tribunal should have a power but that it should only be exercised in limited cases, where the particulars of the complaint have been proven and the Tribunal is considering what its final orders will be.

After considering the submissions received, the Ministry is of the view that an interim suspension power is appropriate in very limited circumstances. These limited circumstances would be where the Tribunal has found that the particulars of a complaint has been proven and the Tribunal is considering what final orders to impose and that the order is necessary to protect the public. In this limited set of circumstances, if a practitioner was still practising

but the Tribunal has serious concerns about the safety of the public, it would be unreasonable and inefficient to require a s150 process to suspend the practitioner as this would require a new hearing by a Council. It would be more efficient, cost effective, timely and better protect the public to allow the Tribunal to make an interim suspension order.

In respect of the role and power of the Tribunal where complaints are admitted, most submissions agreed that the legislation should be clarified to provide that the Tribunal can hold an inquiry when a complaint is admitted and that the Tribunal should provide written reasons as this would aid a practitioner's and the public's understanding of why sanctions were imposed (and assist in any appeal process). However, it was also argued that the legislation does not need to be amended as it already gives the Tribunal these powers. There was concern expressed that practitioners who have admitted a complaint should be subject to costly cost orders if a Tribunal decides to hold an inquiry.

Section 165H provides that the Tribunal is not required to hold an inquiry where a complaint has been admitted. While this does not preclude an inquiry being held, the Ministry considers that it would be prudent to amend the legislation to expressly give the Tribunal such a discretionary power (that is, it should not be mandatory to hold an inquiry where a complaint has been admitted). In respect of written reasons, s165M provides that the Tribunal must provide written reasons when making a decision "on an inquiry or an appeal". Where a complaint has been admitted and no inquiry has been held, it is not clear that s165M applies. The Ministry agrees with the submissions that argued that the provision of written reasons where a complaint has been admitted aids the public understanding of why sanctions have been imposed on the practitioner and considers that the legislation should be amended to provide for this. In respect of the costs, the Ministry agrees that it would generally be unreasonable for a practitioner to be subject to a cost order if they have admitted a complaint. However, the Tribunal has a discretion regarding the awarding of costs and the fact that a practitioner has admitted a complaint would be taken into consideration.

In respect of the parties to an application for review, s163A gives a right of review, to an appropriate review body, to practitioners that are subject to a prohibition order, suspension, disqualification or an order imposing conditions. The appropriate review body will be either the Tribunal or a Health Professional Council. While the legislation states that a practitioner has a right of review, there is a lack of clarity in the legislation regarding who would be, or could be, the respondent to such a review. Most submissions that considered this issue agreed that the legislation should clarify who can be a party to such a review, however there were differences in relation to which body should be a party to the review. While some suggested the HCCC, others argued that the best placed body is generally the relevant Council. Others argued however that the relevant body would depend on the matter in question and could be the HCCC, a Council, a National Board or even the Health Secretary.

The Ministry considers that it is appropriate for the legislation to clarify who can be a party to a review under s163A and that the legislation should provide for the HCCC or a Council. The Secretary and a National Board are generally not involved in decisions being reviewed under s163A and therefore they are not considered appropriate respondents. Of course in a particular matter, either the Secretary or a National Board could seek leave under the Civil and Administrative Tribunal Act to be joined as a party.

Recommendations

13) The legislation should be amended to give the Tribunal a power to make an interim suspension order where a complaint has been proven but before final orders are imposed and that the Tribunal considers the order is necessary to protect the public.
14) The legislation should be clarified to provide that the Tribunal can hold an inquiry if a complaint has been admitted.
15) The Tribunal should be required to provide written reasons when making orders following a practitioner admitting a complaint.
16) Section 163A should be amended to provide that the HCCC or a health professional Council has a right to appear as a party to a review.

3.7 Deciding not to conduct an inquiry or appeal or to terminate an inquiry or appeal

Under clause 12 of Schedule 5D, a PSC or a Tribunal may decide not to conduct an inquiry or to terminate an inquiry or appeal in a number of circumstances, including where "*in the opinion of the* [PSC] *or Tribunal it is not in the public interest for the inquiry or appeal to continue*".

The Discussion Paper asked whether clause 12 of Schedule 5D should be amended to give a list of criteria a PSC or a Tribunal should consider in forming their opinion that it is not in the public interest for an inquiry or appeal to continue.

While a small number of submissions considered that it would be appropriate to include a mandatory list of factors for the Tribunal to consider in forming their opinion that it is not in the public interest for an inquiry or appeal to continue, most submissions did not consider that this was necessary or appropriate. The notion of "public interest" is a broad concept that should not be limited to a mandatory list of factors to consider and a mandatory list may constrain the Tribunal.

The Ministry agrees that it is not necessary or appropriate to set out a mandatory list of factors for the Tribunal to consider when deciding that it is not in the public interest for an inquiry or appeal to continue. The factors relevant to the Tribunal's decision making will depend on the situation before it. Further, s3A of the Health Practitioner Regulation National Law (NSW) would need to be considered by the Tribunal in exercising its power. Section 3A, which is a NSW specific provision, states that:

In the exercise of functions under a NSW provision, the protection of the health and safety of the public must be the paramount consideration

While each case should be determined individually, the Tribunal must always ensure that the protection of the health and safety of the public are the paramount consideration and it is not appropriate to constrain the Tribunal further.

The Ministry therefore considers that no change to Schedule 5D, clause 12 is required.

Recommendations

17) Schedule 5D clause 12 should not be amended to give a list of mandatory factors a PSC or Tribunal must consider in determining whether it is not in the public interest for an inquiry or appeal to continue.

3.8 When practitioners change their place of residence

The NSW specific provisions relating to complaints handling apply to:

(a) conduct that occurs in NSW; and/or
(b) registered health practitioners whose principal place of practice is in NSW.

Following on from a number of preliminary submissions, the Discussion Paper considered whether the processes, which are mostly administrative, in place to deal with practitioners who change their principal place of practice or residence, were appropriate.

Most submissions argued that the administrative processes to deal with the interstate movement of practitioners, particularly those with conditions, was cumbersome and there should be legislative amendment to deal with the interstate movement of practitioners.

The Health Practitioner Regulation National Law (NSW), and similar laws in other jurisdictions, does not expressly deal with the interstate movement of practitioners who are subject to conditions. As such, administrative arrangements have been found to respond to these situations. Relying on such administrative arrangements is not ideal. However, these issues are not confined to NSW legislation and so there are limits to what changes can be made to the NSW law without amendments also being made to the National Law in other jurisdictions. As such, the Ministry will continue to monitor and review this situation and determine if further action is required in the future.

Recommendations

18) The Ministry should continue to monitor and review the arrangements for dealing with practitioners who change their place of residence to determine if further action is required.

3.9 Mandatory notifications

3.8.1 Treating health practitioners and mandatory notifications

Division 2 of Part 8 relates to mandatory notifications and these provisions are not NSW specific provisions. Under the provisions, certain conduct and concerns must be notified to the Australia Health Practitioner Regulation Agency (AHPRA). Such mandatory notifications include, at s141, where a health practitioner forms the reasonable belief that a registered practitioner who is a patient has engaged in "notifiable conduct". Notifiable conduct means that the practitioner has[18]:

- practised the practitioner's profession while intoxicated by alcohol or drugs; or
- engaged in sexual misconduct in connection with the practice of the practitioner's profession; or
- placed the public at risk of substantial harm in the practitioner's practice of the profession because the practitioner has an impairment; or
- placed the public at risk of harm because the practitioner has practised the profession in a way that constitutes a significant departure from accepted professional standards.

In all states other than Western Australia and Queensland, the obligation to report to AHPRA under s141 applies equally to a practitioner's treating health practitioner. In Western Australia there is a blanket exemption for treating practitioners[19]. In Queensland, there is an exemption for treating practitioners where the treating practitioner does not believe the public is at substantial risk or there is professional misconduct[20].

Following preliminary submission received on this issue, the Discussion Paper considered the issue of whether NSW should have a treating practitioner exemption from the mandatory reporting requirements. It was noted that the argument given for giving an exemption to the mandatory notification requirements to treating practitioners is that the current requirements can be counterproductive in protecting the public as it may deter practitioners from seeking treatment. However, as noted in the Discussion Paper, the mandatory reporting obligations were introduced in NSW for medical practitioners in 2008 and these obligations simply reflected what was already an ethical obligation. The Discussion Paper asked what was the best way to protect the public from practitioners who may be placing the public at risk of substantial harm in their professional practice because the of the practitioner's impairment and whether additional information should be provided to practitioners to ensure they understood their reporting obligations.

Submissions were split on the issue of mandatory reporting. Some strongly argued that the mandatory reporting obligations can deter practitioners from seeking treatment and NSW

[18] Section 140 of the Health Practitioner Regulation National Law (NSW)
[19] Section 141(4)(da) of the Health Practitioner Regulation National Law (WA)
[20] Section 141(5) of the Health Practitioner Regulation National Law (Qld)

should have a treating practitioner exemption in line with Western Australia or Queensland. Others argued that the current requirements were appropriate and necessary to protect public health and safety.

It is noted that since the release of the Discussion Paper, Mr Kim Snowball's report on NRAS has been publically released[21]. The review of the National Law also considered the issue of mandatory reporting. The Snowball report recommended that the National Law be amended to apply the Western Australian treating practitioner exemption to all jurisdictions. Ministers did not accept this recommendation at this time and will consider a national approach to mandatory notification once additional advice has been provided[22].

After considering the submissions received, the Ministry remains was of the view that mandatory notification helps protect the public by ensuring that practitioners whose conduct places the public at risk of harm are notified to the AHPRA. It is also important to recognise that the threshold for mandatory reporting is quite high: the practitioner must have a reasonable belief that the other practitioner has engaged in notifiable conduct. Where the conduct involved relates to impairment, the mandatory notification provisions will only apply if the practitioner has placed the public at risk of substantial harm in the practitioner's practice because the practitioner has an impairment. This is not a low threshold. It is difficult to see how it could ever be appropriate for a treating practitioner not to report another patient practitioner if the treating practitioner had a reasonable belief that the patient practitioner was placing the public at risk of substantial harm in the practitioner's practice due to the practitioner's impairment. Further, even if the treating practitioner did not have a mandatory obligation to report such conduct, it is highly likely that there would be an ethical obligation to report.

However, in light of the Ministers' response to the Snowball recommendation, the Ministry will consider this matter further upon consideration of the additional advice received.

Recommendations

19) The Ministry at this time does not support any changes to the mandatory reporting requirements for treating practitioners. However, the Ministry will consider the matter further upon the receipt on any additional advice provided to Health Ministers.

3.8.2 Referral of mental health matters to Councils

The Discussion Paper also considered s151 of the Health Practitioner Regulation National Law (NSW), which is a NSW specific provision requiring mandatory reporting if a registered

[21] http://www.coaghealthcouncil.gov.au/Publications/Reports/ArtMID/514/ArticleID/68/The-Independent-Review-of-the-National-Registration-and-Accreditation-Scheme-for-health-professionals

[22] COAG Health Council communique 17 August 2015, http://www.coaghealthcouncil.gov.au/Announcements/ArtMID/527/ArticleID/71/Reissued-Communique-Final-Report-of-the-Independent-Review-on-the-National-Accreditation-Scheme-for-health-professionals

health practitioner or student becomes a "mentally incapacitated person" or is "involuntarily admitted to a mental health facility" under the Mental Health Act 2007. Such reporting is made by the NSW Trustee and Guardian in the case of mentally incapacitated persons or by the medical superintendent of the mental health facility in the case of a person involuntarily admitted to a mental health facility.

The Discussion Paper noted that the requirement in relation to detained mental health patients occurred at the initial point of detention, despite the fact that the Mental Health Act required a range of additional reviews by medical practitioners under s27 and a review by the Mental Health Review Tribunal. The Paper asked whether it was appropriate for s151 to remain in the legislation and, if so, whether the reporting requirement for involuntary mental health patients should be amended to require reporting after either the s27 examinations have occurred or the patient has been seen by the Mental Health Review Tribunal.

There was a divergence in the submissions received on this issue. While some Councils and the HPCA argued for the retention of s151 as it allowed for earlier intervention, others argued that it should be removed from the legislation. Others argued the reporting requirements should only apply either after the s27 examinations or after a review by the Mental Health Review Tribunal. Some noted that the mandatory notifications provisions would still apply and that if a person is detained they do not present a risk to the public.

After considering the submissions received, the Ministry considers that the current reporting threshold in s151 is set at too high a level. Requiring a mandatory report at initial stage of detention would generally mean that one person has made a determination that the patient is a mentally ill person or mentally disordered person. There has been no review of that decision in line with the requirements in the Mental Health Act and the practitioner will not necessarily be at risk or even suffer an impairment. As such, the Ministry considers that it would be more appropriate for any mandatory report to only occur after the examinations in s27 of the Mental Health Act. This will ensure that the patient is properly reviewed before a notification is made. Further notifications after the s27 examinations will still allow for early notification, and therefore intervention, of practitioners who may suffer from an impairment. Of course, if requirements for a mandatory report are met, a mandatory report will still be required to be made at an earlier stage.

Recommendations

20) Section 151 should be amended to only require a report in respect of a detained mental health patient if a patient is found to be a mentally ill person or a mentally disordered person after the examinations in section 27 of the Mental Health Act.

3.10 Requirement of National Board to keep a register of disqualified practitioners

The Discussion Paper noted that the requirements in the National Law on a National Board to keep public registers of practitioners whose registration has been cancelled (see sections 222 and 223), do not apply to disqualified practitioners.

Where a practitioner the subject of a complaint is no longer registered, the Tribunal can impose a disqualification order against the practitioner (if it would have imposed a cancellation order had the practitioner been registered). In NSW, a disqualification order applies until a "reinstatement order" is made by the Tribunal under s163B. If a reinstatement order is made, the practitioner can then, and only then, apply to the relevant National Board for registration.

The only material difference between a disqualification order and a cancellation of a practitioner's registration is that in the former, the practitioner was not registered at the time of making the order. The Discussion Paper asked whether there should be a requirement on the National Boards to keep a register of disqualified practitioners.

There was broad support for this proposal and the Ministry agrees that it would be appropriate to require such a register to be kept. However, the Ministry is also cognisant of the fact that these provisions are National Law provisions. In view of this, the Ministry will first conduct further consultation with AHPRA regarding how best to ensure that a register of disqualified practitioners is kept.

Recommendations

21) The Ministry consult with AHPRA on the best way to ensure that a register of disqualified practitioners is kept in NSW

3.11 Structure and content of Part 8 and miscellaneous changes

The Discussion Paper noted that a number of preliminary submissions received by the Ministry outlined concerns regarding the general structure of Part 8 of the Health Practitioner Regulation National Law (NSW). While the Ministry agreed that there was merit to the suggestion that Part 8 should be reviewed to ensure consistency of language, effect and intent of similar provisions, it was noted that some of the differences in language and the effect and intent of the provisions relate to the different processes that apply to the different professions, for example, PSCs vs Councils inquiries. As such, the nature and extent of possible changes was dependent on what changes were ultimately made to the legislation. The Ministry also proposed a number of minor "tidy up" amendments that are set out in Appendix A.

There was broad support for the proposed tidy up amendments in Appendix A. The need to ensure consistency, simplicity and ease of use of Part 8 remains and the Ministry supports such an approach. As part of the progression of the changes recommended in this Report, the Ministry will consider what steps can be taken to make Part 8 more user friendly.

Recommendations

22) The minor amendments set out in Appendix A should be made.

23) As part of progressing the amendments proposed in this Report, the Ministry will consider what changes can be made to make Part 8 more user friendly.

3.11 Pharmacy Council – Pharmacy Premises Licensing

Schedule 5F of the Health Practitioner Regulation National Law (NSW) sets out various provisions relating to pharmacies, in particular setting out licensing requirements in relation to pharmacy businesses, being:

- Provisions limiting, except in limited circumstances, a person other than a pharmacist from having a pecuniary interest in a pharmacy business and requiring the Pharmacy Council to approve registration of a holder of pecuniary interest in a pharmacy businesses; and
- Provisions establishing a licensing regime for pharmacy business premises. Under these provisions, premises can only operate as a pharmacy business if the Pharmacy Council has approved the premises as a pharmacy premises (and all pecuniary interests in the business are in the Register of Pharmacies kept by the Council).

In relation to pecuniary interests, a person who holds a pecuniary interest in a pharmacy must system submit annual returns to the Pharmacy Council specifying the interest they hold and the basis of their entitlement to hold the interest.

In respect of the pharmacy premises licensing provisions, the Pharmacy Council must not approve premises to operate as a pharmacy premises that:

- Fail to comply with a standard prescribed for the premises by the NSW Regulations or
- Are within, or partly within, or adjacent or connected to, a supermarket and that the public can directly access from within the premises of the supermarket.

An application fee must be paid, which is currently around $841. There are also annual licence renewal fees of $341 and fees to record changes of ownership (currently around $525 with higher fees for corporate arrangements).

The licensing of a pharmacy business helps to protect the public by ensuring that there is appropriate oversight by the Pharmacy Council of pharmacy businesses and ensures that the Council has the means to enforce standards operating in those premises as pecuniary interests must be held by pharmacists. However, it can be argued that the pharmacy licensing provisions are anticompetitive.

Prior to the release of the Discussion Paper, the Independent Pricing and Regulatory Tribunal (IPART) released its draft report from its Review of Licensing Rationale and Design.[23] The IPART draft report identified the Top 32 licences by regulatory burden and recommended that these licences be reviewed against a new Licensing Framework and Licensing Guide[24]. This included the Pharmacy Registration and Renewal licence. Those aspects of pharmacy licensing that were identified by IPART as providing scope for reform include:

- Duration – Registration is currently only for 1 year, there may be potential for longer periods;
- Review process – Although the licencing arrangements have been reviewed in the last 5 years (when the National Law was adopted), no public consultation occurred on the issue and the scope of the review was limited;
- Fee setting – Although fee setting has been reviewed in the last 2 years, the fee setting could be improved;
- Compliance –blanket inspections and targeted inspections are covered. There may be scope to reduce compliance burden in respect of inspections; and
- Administration – There may be scope for more online services and/or a simplified process for renewal for licences with good track record of compliance.

More broadly, consideration also needs to be given to Best Practice Licensing Framework[25] and Licensing Guide[26]. The Framework and Guide seek to ensure that licenses are only imposed on the community when necessary and that licenses do not inappropriately stifle competition or increase costs and that licenses are appropriately designed and implemented.

The Discussion Paper noted that the Ministry considered that there is a need to license pharmacy premises as it ensures the appropriate degree of oversight necessary for public protection. That is, the licensing of pharmacy premises ensures the appropriate safe

---

23 http://www.ipart.nsw.gov.au/Home/Industries/Regulation_Review/Reviews/Licence_Design/Licence_Rationale_and_Design/22_May_2014_-_Draft_Report/Draft_Report_-_Reforming_licensing_in_NSW_-_Review_of_licence_rationale_and_design_-_October_2013

24 The Framework and Guide sets out a four stage model for consideration of the appropriateness of a licence option including whether it is (1) appropriate, (2) well designed, (3) effectively and efficiently administered, and (4) the best response.

25 See http://www.ipart.nsw.gov.au/Home/Industries/Regulation_Review/Reviews/Licence_Design/Licence_Rationale_and_Design/22_May_2014_-_Consultants_final_licensing_framework/PWC_-_A_best_practice_approach_to_licensing_schemes_-_Conceptual_Framework_-_March_2013

26 http://www.ipart.nsw.gov.au/Home/Industries/Regulation_Review/Reviews/Licence_Design/Licence_Rationale_and_Design/22_May_2014_-_Consultants_final_licensing_guide/PWC_-_A_best_practice_approach_to_licensing_schemes_-_Guidance_Material_-_March_2013

handling, storage and dispensing of medications and that therefore the requirement for pharmacy licenses should continue.

However, the Discussion Paper asked whether changes were needed, including requiring fees to be set out in the regulations or changes to simplify the licensing system, to streamline the pharmacy provisions so as to lessen regulatory burden, while still maintaining public safety.

There were not a large number of submissions on these issues.

In relation to the setting of fees, while one submission agreed that the fees should be set out in the Regulations three submissions argued that this was not necessary. It was argued that transparency could be assured by having the fees set out on the Pharmacy Council's website and that the Pharmacy Council reviews fees annually and it requires flexibility to respond to CPI increases and increasing workload.

Requiring fees to be payable by pharmacists to be set out in the Regulation would still retain a large degree of flexibility as regulations are more easily amended than legislation. Further, while having fees set out on the Pharmacy Council's website may provide some transparency, it doesn't provide any degree of oversight regarding the setting of fees. Regulations, while made by the Governor, can be disallowed by Parliament which ensures appropriate oversight. Accordingly, the Ministry considers that the Health Practitioner Regulation National Law (NSW) should be amended to require fees in relation to the regulation of pharmacy businesses to be set by regulation.

In relation to other issues relating to pharmacy businesses, the Pharmacy Council noted that they are working on an online form to simplify annual declaration processes and will be reviewing its inspection regime to ensure that it is efficient, effective and appropriately targeted. The Ministry supports these efforts. The Council also suggested that some of the terminology in the Health Practitioner Regulation National Law (NSW) be updated, including replacing "pecuniary interest" with "financial interest" and "return" to replace "declaration". These changes are supported.

It was suggested that the legislation include new provisions to protect the title "pharmacy". The protection of title is a national issue and it would be inappropriate for NSW to progress any additions to title protection without a demonstrable need and in the absence of agreement with the other States and Territories.

Recommendations

24) The Health Practitioner Regulation National Law (NSW) should be amended to require the fees in relation to pharmacy licences and registration to be set out in the Regulation.
25) The terminology used in Schedule 5F should be updated to reflect current usage.

4. Conclusion

The objectives of the Health Practitioner Regulation National Law (NSW) remain valid and, on the whole, the provisions of the Health Practitioner Regulation National Law (NSW) are appropriate to secure the objectives. However, the review of the Health Practitioner Regulation National Law (NSW) has demonstrated that a number of changes could be made to the National Law to increase flexibility and streamline the handling of complaints.

Appendix A – Proposed Minor changes to the NSW specific provisions

Sections/Issue	Proposed change	Rationale
Sections 148E (general power of Council), 149A (general powers of Tribunal) and 150 (suspension or conditions of registration to protect public)	That s148E, s149A and s150 be amended to ensure a consistency of language relating to the power to impose conditions on a practitioner's registration and the power to make other orders.	Under all these sections, there is a power to impose conditions on a practitioner's registration and a power to make other orders (eg the practitioner to undergo counselling). The language used is not, but should be, consistent. The lack of consistency can lead to confusion (see for example Health Care Complaints Commission v Perceval [2014] NSWCATOD 38.
Jurisdiction of the Tribunal	Amendments to clarify the jurisdiction of the Tribunal in relation to matters under s145D of the Health Practitioner Regulation National Law is the general jurisdiction.	Under the Civil and Administrative Tribunal Act, the Tribunal's jurisdiction is either general, administrative review, appeal (external or internal) or enforcement jurisdiction. Sections 145D of the Health Practitioner Regulation National Law (NSW) does not specific what the jurisdiction of the Tribunal when matters are referred to it. As hearings of matters under s145D are not in the appeals jurisdiction, the legislation should specify that it is in the general jurisdiction.
Section 146D (PSC can recommend suspension or cancellation)	An amendment to section 146D(1) to allow a PSC to recommend suspension or cancellation if satisfied that the practitioner does not have sufficient physical *or* mental capacity to practice the practitioner's profession.	Under s146D(1), for a PSC to recommend suspension or cancellation, the PSC must be satisfied that the practitioner does not have sufficient physical *and* mental capacity to practice the practitioner's profession. The Ministry considers that if a practitioner does not have

		sufficient physical or mental capacity, either should be enough for the PSC to make a recommendation to suspend of cancel the practitioner's registration.
Interlocutory orders of the Tribunal – made by single List Manager member	An amendment to Part 8 to allow the Tribunal, constituted by a single member of the Tribunal who is the List Manager, to make interlocutory and ancillary orders in line with the definition of interlocutory and ancillary orders under the Civil and Administrative Tribunal Act	Interlocutory decisions are defined in s4 of the Civil and Administrative Tribunal Act as: (a) the granting of a stay or adjournment, (b) the prohibition or restriction of the disclosure, broadcast or publication of matters, (c) the issue of a summons, (d) the extension of time for any matter (including for the lodgment of an application or appeal), (e) an evidential matter, (f) the disqualification of any member, (g) the joinder or misjoinder of a party to proceedings, (h) the summary dismissal of proceedings, (i) any other interlocutory issue before the Tribunal. An ancillary matter is defined in s4 as a decision that is "preliminary to, or consequential on, a decision determining proceedings, including: (a) a decision concerning whether the Tribunal has jurisdiction to deal with a matter, and

		(b) a decision concerning the awarding of costs in proceedings." Allowing interlocutory and ancillary decisions to be made by the List Manager would save time and money.
Schedule 5D clause 13 – Costs	Schedule 5D clause 13 be amended to allow the Tribunal, when making a costs order, to order that costs be assessed under the Legal Profession Act 2004	There is currently no express power to allow the Tribunal, when making a costs order, to order that costs be assessed. Such a power would avoid the costs and time in the Tribunal acting as an "assessing officer".
Power of single member of the Tribunal to hear an application for a withdrawal of a complaint	That the Health Practitioner Regulation National Law (NSW) be amended to allow the List Manager to hear and determine an application to withdrawal a complaint.	Allowing a single member to hear and determine a complaint would save costs and time.
PSC hearings when one member becomes available before an inquiry is completed or a decision is made	Amend Division 11 of Part 8 so that in the event a one of the members of a PSC (other than the presiding members) vacates office or becomes unavailable before an inquiry is completed or a decision is made, the inquiry may continue and determination be made by the remaining members.	The ability to allow a PSC inquiry to continue if one member, other than the presiding member, becomes unavailable, will save unnecessary delay by preventing adjournments.
Appeal rights under Part 8: ss175, 158, 159, 159A, 160	These sections should be amended to use a consistent language to provide that: • an appeal is an external appeal to the Tribunal and • that the appeal is to be dealt with by way of a rehearing of the matter with fresh evidence	These sections all give a right to appeal decisions made by various bodies, such as a National Board, PSC or a Council, to the Tribunal in the external appeals jurisdiction (the external appeals jurisdiction is an appeal right to the Tribunal from a body external to the Tribunal). Most, but not all of these sections

	being able to be given.	make clear that the Tribunal can hear the matter *de novo* (that is, a new hearing is held with fresh evidence able to be submitted). However, there is an inconsistency in the language used in these provisions. The language used should be consistent to ensure clarity and consistency in appeal rights.
Part 1 of Schedule 5C – membership of certain Councils	Part 1 of Schedule 5C should be deleted	Part 1 of Schedule 5C sets out the membership of certain Councils. However, this Part is redundant as the membership of the Councils are now set out in the Health Practitioner Regulation (New South Wales) Regulation 2010 in accordance with s41E