Review of the Medical Act 1894

Final recommendations to the Minister for Health

June 2001

MEDICAL ACT REVIEW WORKING PARTY

REVIEW OF THE MEDICAL ACT 1894

Final recommendations to the Minister for Health

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ABBREVIATIONS AND ABBREVIATED TERMS USED IN THIS REPORT

ACCC	-	Australian Competition and Consumer Commission
Act	-	Medical Act 1894
AMA	-	Australian Medical Association (Western Australian branch)
AMC	-	Australian Medical Council
Board	-	Medical Board of Western Australia
CAC	-	Refers to the Medical Board's Complaints Assessment Committee
Core practice regulation	-	Form of regulation of health practices in which specific clinical (typically procedural) activities are identified that may only be undertaken by registered health professionals of a particular class or classes (see Review Working Paper at Annexure E for a fuller explanation)
Final recommendation	-	Refers to a final recommendation of the Medical Act Review Working Party as presented in this report
Medical Practitioners Registration Act	-	Proposed legislation to replace the Medical Act 1894 based on the recommendations contained in this report
NCP	-	National Competition Policy
New Act	-	Proposed Medical Practitioners Registration Act for Western Australia based on recommendations contained in this report
Preliminary report	-	Report of the Medical Act Review Working Party containing draft recommendations for new medical practitioner legislation for Western Australia (released in January 2000)
Present review	-	The current review of the Medical Act 1894
Previous review	-	Review of the Medical Act 1894 conducted between 1991 and 1993
Registered medical practitioner	-	Refers to a natural person who is registered as a medical practitioner under the Medical Act 1894 or proposed Medical Practitioners Registration Act
Review	-	The current review of the Medical Act 1894
Working Party	-	Working Party established by the Minister for Health to review the Medical Act 1894 and prepare proposals for new medical practitioner legislation for Western Australia (membership shown at Annexure A)

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REVIEW OF THE MEDICAL ACT 1894

Final recommendations to the Minister for Health

EXECUTIVE SUMMARY

This report presents final recommendations for a new Medical Practitioners Registration Act for Western Australia arising from a comprehensive review of the Medical Act 1894.

The review has been undertaken by a Working Party established by the Minister for Health under the chairmanship of Professor Bryant Stokes, the Health Department of Western Australia's Chief Medical Officer. Other members of the Working Party are shown at Annexure A.

The review has built on an earlier review that was completed in 1993. It has also taken extensive account of legislation regulating medical practice in other States and Territories and New Zealand, including changes that have been made to other jurisdictions' legislation following National Competition Policy reviews.

The review has incorporated public consultation on draft proposals for a new Medical Act and further development of these proposals in the light of submissions made to the review.

Summary of recommendations

1. Preliminary matters (Chapter 2)

The report recommends that:

1.1. The new Medical Act should be entitled "Medical Practitioners Registration Act" to better indicate its purpose and subject matter.

1.2. The new Act should incorporate a statement of objective, which makes clear that the purpose of the legislation is to protect the public.

1.3. There should be no definition of medical practice in the new Act.

1.4. The preferred approach to the regulation of medicine and other regulated health practices in Western Australia should be focused on the identification of core "harmful" practices (known as core practice regulation).

1.5. The current prohibition on the practising of medicine and surgery by non-registrants should be retained for a period of 3 years pending completion of a review of core practices relevant to each regulated health profession. A further review and report to Parliament on this issue should be undertaken if the elements of core practice regulation have not been implemented at the end of 3 years.

2. Medical Board of Western Australia (Chapter 3)

The report recommends that:

2.1. The Act should incorporate a statement of the functions of the Medical Board.

2.2. The Medical Board should comprise 12 persons – 8 medical practitioners (including nominees of the Commissioner of Health[1] and of the Vice Chancellor of UWA), 1 legal practitioner, 2 representatives of consumers, and the Executive Director of the Ministry of Fair Trading[2] (or nominee).

2.3. Provision should be made for the appointment of deputies to the appointed members of the Board.

2.4. Remuneration of Medical Board and Board committee members should be determined by the Minister on the recommendation of the Minister for Public Sector Management.

2.5. The Medical Board should be subject to an express, but caveated and accountable, power of direction by the Minister for Health.

2.6. Medical Board members should be required to disclose interests in matters under consideration by the Board and not to make improper use of information to which they become privileged.

2.7. The Medical Board should be required to publish a quarterly summary of matters dealt with at Medical Board meetings, including a summary of complaints received and action taken in response.

2.8. A new power for the Medical Board to issue codes of professional conduct for the purpose of guiding medical practitioners, health consumers, and others in relation to the subject matter of the new Act should be included in the legislation.

3. Registration of medical practitioners (Chapter 4)

The report recommends that:

3.1. The distinction between general and conditional forms of registration should be retained in the new Act with the criteria for registration remaining largely unchanged.

3.2. Provision should be made for the commencement of registration by medical specialty.

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[1] The review of the Medical Act 1894 was completed before the release of the Machinery of Government Taskforce report (published in June 2001) which signalled that "Director-General" is the preferred title for chief executive officers of departments of State. It is understood that this title will be used in preference to "Commissioner of Health" in future. References in this report should be read accordingly.

[2] Pursuant to the Government's acceptance of the Machinery of Government Taskforce's report, this reference should now be to "the Director-General of the Department of Consumer and Employment Protection". In drafting the new Medical Practitioners Registration Act, it is assumed that the normal convention will be followed by Parliamentary Counsel, namely that the legislation would avoid references to specific titles and departments and refer instead to the "permanent head of the department principally assisting the Minister responsible for the administration of the Fair Trading Act 1987."

3.3. The Medical Board should have increased powers when assessing applications for initial, and renewal of, registration and to respond to concerns about the continuing competence of registered medical practitioners.

3.4. Provision should be made for registration to be granted for a period of up to 3 years in most cases.

3.5. The Medical Board should have a broader ability to attach conditions to registration in the interests of ensuring the safe and competent practice of medicine, subject to appropriate review and appeal procedures.

3.6. As the principal effects of registration, the new Act should:

- Retain the prohibition on non-registrants practising medicine (pending completion of a core practice review);
- Make it an offence for a non-registrant to use the title "registered medical practitioner" or any other title calculated to induce a belief that the person is a registered medical practitioner;
- Make it an offence for a non-registrant otherwise to advertise or hold himself or herself out as being entitled or qualified to be a registered medical practitioner.

3.7. Further consideration should be given to the question of the Medical Board having a role in setting standards for professional indemnity insurance under cover of which medicine is practised, and enforcing compliance with these standards through registration, as occurs in Victoria and is proposed to be introduced in NSW.

3.8. A new form of registration – non-practising registration – should be available to persons who are otherwise entitled to registration as a medical practitioner but who choose not to practise medicine, either temporarily or permanently.

3.9. Provision should be made to deem the registration of doctors who are registered in another State or Territory and who provide medical assistance in emergency situations or in connection with organ retrieval whilst in Western Australia.

3.10. Medical practitioners should be required to notify the Medical Board about certain matters (eg receipt of writ of summons alleging medical negligence).

3.11. There should be a broad right of appeal to the Medical Tribunal arising from registration decisions of the Medical Board.

4. Regulation of corporate providers of medical services (Chapter 5)

The report recommends that:

4.1. The new Act should include a requirement that corporations and other legal entities wishing to carry on a business involving the provision of medical services by registered medical practitioners must obtain authorisation from the Medical Board. This requirement should not apply to the Crown, entities with which the Crown contracts for the provision of hospital services, or activities which are subject to the private sector licensing provisions of the Hospitals & Health Services Act 1927.

4.2. Appropriate transitional arrangements should apply to legal entities that are involved in the provision of medical services in Western Australia at the point where the new legislation comes into operation.

4.3. The Medical Board should be able to refuse to grant authorisation to a corporate entity if it has reason to believe that the clinical autonomy of registered medical practitioners is likely in any particular case to be compromised to the detriment of patient care.

4.4. The Medical Board should have the ability to grant authorisation subject to conditions (eg requirement to establish a Medical Advisory Committee; compliance with code of practice dealing with permitted uses of patient records).

4.5. There should be a right of appeal to the Medical Tribunal against a decision by the Medical Board to refuse authorisation or to grant authorisation subject to conditions.

4.6. New offences should be created:

- Where a legal entity or a person in a position of authority in a legal entity that is a corporation directs or incites a registered medical practitioner to engage in conduct that would be grounds for the Medical Board taking action against the practitioner for unsatisfactory professional conduct (eg over-servicing);

- Where a person, legal entity or person in a position of authority in a legal entity, offers or accepts a benefit as an inducement or reward for patients being referred to particular registered medical practitioners or recommended to use particular health services.

4.7. The Medical Tribunal should have the ability to review and revoke the authorisation granted to a legal entity in certain circumstances.

5. Medical students (Chapter 6)

5.1. The report recommends that the Medical Practitioners Registration Act should provide the Medical Board with a limited jurisdiction to deal with medical students who may be suffering from an impairment that affects their involvement in clinical activities. The Board's involvement would be limited to students who are referred to the Board by the Faculty of Medicine and Dentistry to be dealt with under the impairment process.

6. Financial management (Chapter 7)

The report recommends that:

6.1. The new Act should identify the sources of funds available to the Medical Board and the purposes for which these funds may be used.

6.2. The Medical Board should continue to be required to maintain its financial accounts in accordance with Australian Accounting Standards.

6.3. The Auditor General should be nominated in the new Act as the Medical Board's auditor, with annual audits of the Board's finances being undertaken at the Board's expense either by the Office of Auditor General or by auditors engaged by the Auditor General.

6.4. The Medical Board should continue to be required to prepare and submit to the Minister an annual report of its activities. The Board's annual report should include information about the complaints it has received and the action it has taken in response.

6.5. The new Act should authorise the Minister to be able to access information that is in the possession of the Medical Board, other than information that would enable the identity of a person who is involved in a complaint to be ascertained.

7. Regulation of medical practice (Chapter 8)

The report recommends that:

7.1. The Medical Practitioners Registration Act should distinguish between the processes, investigative powers, and options for action that should be available to the Medical Board when addressing concerns about:

- The impact of a medical practitioner's physical or mental health on his or her practice of medicine (impairment process);
- The continuing competence of a medical practitioner to practise medicine (competence process); and
- The professional conduct of a medical practitioner (unsatisfactory professional conduct process).

7.2. The Medical Board should retain primary responsibility for deciding on the action that should be taken in response to complaints about medical practitioners following assessment and investigation under the Act. The Board will be supported in discharging this responsibility by:

- A Complaints Assessment Committee to conduct preliminary inquiries into complaints and to advise the Board on complaint management;
- An Impaired Registrants Panel to inquire into concerns about the possible impact of his or her health on a medical practitioner's practice of medicine; and
- A Professional Standards Committee to inquire into issues of competence and professional conduct.

7.3. A Medical Tribunal should be established for Western Australia to have:

- Primary jurisdiction to hear serious complaints or matters of concern where the option of suspension or cancellation of registration may be warranted;
- Appellate jurisdiction arising from key decisions of the Medical Board in relation to its principal responsibilities for registering medical practitioners and regulating medical practice.

7.4. Sexual exploitation of patients by medical practitioners should be identified in the new Act as unsatisfactory professional conduct.

7.5. The Medical Board should have power to:

- Issue an interim order imposing restrictions on a medical practitioner before the outcome of an inquiry by the Medical Tribunal is known if the Board has reason to believe that the activities of the medical practitioner pose a significant threat to the life or physical or mental health of a person;
- Order a medical practitioner or medical student to undergo a medical examination under the proposed impairment process;
- Order a medical practitioner to undergo a competence assessment under the proposed competence process;
- Appoint an investigator to investigate complaints relating to the professional conduct of a medical practitioner.

7.6. Options for action that may be ordered by the Medical Board or the Medical Tribunal at the conclusion of the impairment, competence and unsatisfactory professional conduct processes should be appropriately tailored.

7.7. Where the Medical Tribunal makes an adverse finding against a medical practitioner on grounds of unsatisfactory professional conduct, the Tribunal (but not the Medical Board) should be required to publish:

- The practitioner's name;
- The Tribunal's findings;
- The Tribunal's decision and the reasons for its decision; and
- The sanction imposed.

7.8. The Minister for Health should seek the Attorney General's advice on the question of whether information and reports etc that are generated for the purposes of the impairment and competence processes should be made inadmissible in civil proceedings, as they are in NSW.

7.9. Appeals from the Medical Tribunal should lie to the Supreme Court and should be limited to points of law only.

8. Miscellaneous matters (Chapter 9)

This chapter proposes that the Medical Practitioners Registration Act should:

8.1. Prohibit certain advertising of services provided by registered medical practitioners, but otherwise discontinue the restrictions on advertising in the Medical Rules 1987.

8.2. Give statutory recognition to the Medical Board's role in accrediting positions for the training of interns in hospitals and other health care settings.

8.3. Continue to provide protection from liability for members and staff of the Medical Board who administer the Act, discharge statutory functions, and exercise powers under the Act in good faith.

8.4. Provide that proceedings for offences may be initiated and taken in the name of the Medical Board by the Board's Registrar or other authorised persons.

8.5. Continue to provide that fines, penalties etc paid or recovered under the new Act shall be credited to the Medical Board.

8.6. Make provision for the Medical Board to have and use a common seal.

8.7. Incorporate provision to make appropriate subsidiary legislation.

8.8. Retain the requirement that the new Act be subject to 5-yearly statutory reviews.

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CHAPTER 1 : INTRODUCTION

1.1 Purpose

This report presents final recommendations to the Minister for Health for new medical practitioner legislation for Western Australia arising from a comprehensive review of the Medical Act 1894.

1.2 Background

The purpose of the Act is to protect the public of Western Australia by providing for the effective regulation of medical practice.

In broad terms, the Act vests the Medical Board of Western Australia with two principal statutory functions in order to achieve this protection:

- Registration – the Board is responsible for determining who may be registered as medical practitioners in Western Australia by reference to eligibility criteria that are contained in the Act;
- Discipline – the Board is authorised to inquire into complaints about medical practitioners and to apply disciplinary sanctions where grounds for action set out in the Act are established at an inquiry.

It has long been recognised that the outmoded structure and much of the content of the Act hinder the Medical Board in the efficient and effective discharge of its statutory functions.

Major amendment to the Act's registration provisions were introduced in 1994 which had the effect of bringing Western Australia into line with nationally agreed registration standards for medical practitioners. However, the Act's disciplinary provisions continue to require major reform.

The final recommendations presented in this report are, in fact, the product of two major reviews of the Act.

The first review was conducted between 1991 and 1993. It produced a series of recommendations principally relating to:

- The membership, powers and constitution of the Medical Board;
- The extent of the Medical Board's jurisdiction over corporate bodies that are involved in the provision of medical services; and
- Reform of the Act's disciplinary provisions, specifically to create an informal procedure for dealing with less serious complaints against doctors, and to strengthen appeal rights.

The outcome of the 1991 – 1993 Review was not progressed by way of amendment of the existing Act or preparation of a new Medical Act for Western Australia (however, as noted above, major changes to the Act's registration provisions were independently made in 1994).

The second review was initiated by the Minister for Health in 1997 to take account of developments since the completion of the 1993 review. These developments included the finalisation of template legislation for health practitioner registration legislation in Western Australia (namely the Osteopaths Act 1997) and the advent of National Competition Policy.

In addition, the review aimed at laying the foundations for a comprehensive re-write of the Medical Act and hence was broader in scope than the 1991 – 1993 Review had been.

The terms of reference of the present review and membership of the Medical Act Review Working Party are shown at Annexure A.

1.3 Present review – process & progress

The Working Party adopted a structured and systematic approach to addressing its terms of reference.

This resulted in a comprehensive report[1] setting out draft proposals for a new Medical Act for Western Australia in the form of 79 recommendations addressed to the Minister for Health.

That report is referred to in this document as the "preliminary report."

Structure and content of Working Party's preliminary report

The Working Party's report covered the following broad areas:

- Preliminary – objectives of the new Medical Act for Western Australia; defining the practice of medicine; application of the new Act to the Crown.
- Medical Board – membership, functions, constitution, and powers.
- Registration of medical practitioners – categories of registration; effects of registration; the Register; appeal rights.
- Financial administration – use of Medical Board funds and accountability requirements.
- Disciplinary proceedings – grounds for action by the Board; disciplinary structure; powers of investigation; disciplinary powers; appeal rights.
- Offences – proposed offences under the new Medical Act.
- Miscellaneous matters – eg approval of medical call services; regulation of advertising; Board's role in accrediting the training of interns; and other miscellaneous issues.

Consistent with its terms of reference, in relation to each issue that was the subject of a recommendation made by the Working Party, the preliminary report brought together information summarising:

- The current position (ie how the particular issue is addressed in the Medical Act 1894, if at all);
- Any recommendation, if any, made relevant to the issue by the 1991 – 1993 review of the Act;
- How the issue is addressed, if at all, in the template legislation (ie the Osteopaths Act 1997);

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[1] Medical Act Review Working Party (2000) Report of a review of the Medical Act 1894 prepared by a Working Party established by the Minister for Health. Published by the Health Department of Western Australia.

- How the issue is addressed in the medical practitioner legislation of other Australian States and Territories, including what was known about intended legislative changes resulting from National Competition Policy reviews of other States' legislation.

This structured approach enabled draft recommendations to be framed taking account of an extensive body of relevant information, and produced a sound basis for consulting on the content of a new Medical Act for Western Australia.

Public consultation

The Working Party's preliminary report was released for public consultation with the approval of the Minister for Health in January 2000.

The purpose of this consultation was twofold:

- To provide an opportunity for medical practitioners, other health professionals, health consumers, and the broader community to inform the development of new medical practitioner legislation prior to final proposals being presented for consideration by Government; and

- To inform the preparation of a review under the National Competition Policy of proposals for a new Medical Act for Western Australia.

Some 480 copies of the Working Party's preliminary report were distributed. Most of these (approximately 320) were mailed out at the start of the consultation to the key stakeholders and groups listed in Annexure B.

The remainder were distributed on request, mostly generated by a public notice concerning the consultation which appeared in the "West Australian" on Saturday 29 January 2000.

In addition, the preliminary report was made available via the Health Department's Internet homepage. Between 19 January 2000 and 23 May 2000, this site was accessed 222 times (as measured by the number of "user sessions") by 143 people.

The consultation included a public seminar held on Friday 3 March 2000 at the Novotel Langley Hotel in Perth. The seminar was attended by approximately 90 people.

A key aim of the seminar was to provide an opportunity for issues to be discussed in open session and points of clarification raised before the submission of responses by the deadline of 31 March 2000.

In practice, the consultation period extended into May 2000 to accommodate requests for the late submission of responses.

Fifty-three substantive responses were made to the review. A list of respondents is provided at Annexure C.

Follow-up to public consultation

A report on the public consultation was prepared by the Health Department's Legal & Legislative Services branch in May 2000 and circulated to members of the Medical Act Review Working Party.

This report summarised the comments that had been submitted to the review in relation to each of the 79 recommendations contained in the Working Party's preliminary report.

At Annexure D is an extract from the report on the public consultation summarising the principal issues in relation to which further consideration of underlying policy and options was indicated by submissions made to the review.

The Medical Act Review Working Party was invited to:

- Consider the report of the consultation and key submissions made to the review; and
- Indicate what changes should be made to the recommendations contained in its preliminary report to take account of points and concerns raised by public submissions to the review.

The Working Party was assisted in this task by the following additional persons:

Ms Karen Carey-Hazell	Board member Health Consumers' Council of Western Australia
Mr Simon Hood	Registrar Medical Board of Western Australia
Mr Peter Jennings	Deputy Chief Executive Australian Medical Association (WA)

The augmented Working Party held a series of meetings between August and November 2000 to examine submissions made to the review, focusing in particular on the key issues identified in Annexure D, and to decide on the final recommendations presented in this report.

A number of issue-specific working papers were prepared to assist the Working Party.

These are attached as Annexures E, F, G and H and deal with defining the practice of medicine, regulating corporate providers of medical services, legislative approaches to ensuring competence in NSW and New Zealand, and the Medical Board's jurisdiction in relation to medical students.

1.4 Final recommendations

This report presents the Working Party's final recommendations for the content of a new Medical Act for Western Australia.

It does so with minimal additional commentary except where significant change to the recommendations presented in the Working Party's preliminary report is advocated, the rationale for unchanged recommendations having been described fully in the earlier report.

CHAPTER 2 : PRELIMINARIES

Introduction

This chapter of the report makes recommendations in relation to the following matters:

- Title of the new Medical Act;
- Objective of the new Act;
- Whether the new Act should incorporate a definition of the practice of medicine.

Of these, the question of defining the practice of medicine is a key issue for consideration in the review as a whole. Whether and how the practice of medicine should be defined attracted significant commentary in public submissions made to the review, with divergent views expressed as to whether medicine should be defined for either of the following alternative purposes:

- To more effectively prevent unregistered persons infringing on the sphere of clinical activity that should be the exclusive domain of medical practitioners (this view was advocated most strongly by medical practitioners and their representatives); or
- To confine the practice of medicine, ie to more effectively limit the activities that medical practitioners are authorised by their registration to engage in (this view was advocated most strongly by the Chiropractors Association).

A fuller discussion of the policy issues follows in section 2.3 and the Review Working Paper at Annexure E.

Summary of recommendations in Chapter 2

This chapter proposes that:

- The new Medical Act should be entitled "Medical Practitioners Registration Act" to better indicate its purpose and subject matter;
- The new Act should incorporate a statement of objective which makes clear that the purpose of the legislation is to protect the public;
- There should be no definition of medical practice in the new Act;
- The preferred approach to the regulation of medicine and other regulated health practices in Western Australia should be focused on the identification of core "harmful" practices;
- The current prohibition on the practising of medicine and surgery by non-registrants should be retained for a period of 3 years pending completion of a review of core practices relevant to each regulated health profession in Western Australia. A further review and report to Parliament on this issue specifically should be undertaken if the elements of core practice regulation have not been concluded at that time.

2.1 Title of new Medical Act

Final recommendation 1 : Title of new Medical Act

The Working Party recommends that the new Medical Act for Western Australia should be entitled: "Medical Practitioners Registration Act".

Comment on final recommendation 1

The title of the new Medical Act was not the subject of a recommendation in the Working Party's preliminary report.

The recommendation is intended to provide a clearer indication through the Act's title of the purpose and focus of the new legislation.

It responds to a comment in the submission to review made by the Ministry of the Premier and Cabinet which suggested that public understanding of the purpose and scope of the new legislation may be enhanced by the new Act having a title which more readily indicates its subject matter.

2.2 Objective of the Medical Practitioners Registration Act

Final recommendation 2 : Objective of the Medical Practitioners Registration Act

The Working Party recommends that the following should be included in the Medical Practitioners Registration Act as a statement of its objective:

To protect the health and safety of Western Australians by:

- Providing for the registration of appropriately qualified and trained persons to be medical practitioners;
- Providing for the effective regulation of medical practice, including the carrying out of investigations into the professional conduct and fitness to practise of registered medical practitioners;
- Establishing a legal framework for medical practice that promotes the delivery of services by registered medical practitioners that are safe, of high quality, and responsive to patient and community needs;
- Ensuring the continuing competence of registered medical practitioners to practise medicine.

Comment on final recommendation 2

The final recommendation is consistent with the recommendation contained in the Working Party's preliminary report. It has undergone some structural and clarifying change to accommodate comments made by the Health Consumers' Council.

The recommendation is intended to establish in the new statute itself that the principal purpose of the legislation is to protect the public. This purpose is implicit in the current scheme of registration. It is important – not least in terms of the Medical Board's public accountability for its actions – that this purpose be expressly stated in the new Act. In addition, the National Competition Policy requires the objectives of legislation to be expressly stated.

The final recommendation retains the reference to the new Act's role in ensuring continuing competence. Submissions to the review from health consumers and others confirmed the Working Party in its view that the monitoring and assessment of practitioner's competence through the course of their professional lives should be an area of growing involvement for the Medical Board.

2.3 Defining the practice of medicine

Final recommendation 3 : Defining the practice of medicine

The Working Party supports the adoption of core practice regulation for medicine and other regulated health professions in Western Australia, and recommends that:

- The Medical Practitioners Registration Act should be drafted containing no statutory definition of the practice of medicine;
- The current prohibition on non-registrants practising medicine (undefined) contained in section 19(1) of the Medical Act 1894 should be retained in the new Act, but replaced within a period of 3 years following commencement of the new Act by regulation based on identified core practices. This period of time should, in the Working Party's view, be sufficient to allow completion of a review of core practices relevant to each regulated health profession in Western Australia, and the making of appropriate legislative amendment to all health practitioner registration Acts;
- The new Act should incorporate a requirement that the retention of the prohibition on non-registrants practising medicine (undefined) beyond the initial period of 3 years should be the subject of a further statutory review and report to Parliament if, in that period, the prohibition has not been replaced by a system of regulation based on defined core practices. This further statutory review should be completed and a report submitted to Parliament within 9 months of the end of the period of 3 years after commencement.

Comment on final recommendation 3

Policy issues relevant to the question of whether the practice of medicine should be defined in the new Act are considered extensively in the Review Working Paper at Annexure E.

Whether the new Act should attempt to define the practice of medicine needs to be considered in the context of the intended consequences of a statutory definition.

Traditionally, health professional registration Acts have incorporated practice definitions to identify the scope of practice that is reserved under each statute for the exclusive performance of registrants in each regulated profession.

Medicine is a notable exception to this general rule because, while the Medical Act 1894 prohibits non-registrants from practising medicine,[1] it contains no practice definition to identify the particular activities that are covered by this prohibition.

This lack of definitional certainty is of concern to other regulated practitioners, such as chiropractors, and also to unregulated health practitioners (eg naturopaths) since it potentially opens the practice of medicine to broad interpretation that could interfere or overlap with the practices of other health practitioners. It leaves the question of what constitutes the practice of medicine for the purpose of policing the Act's prohibition on such practice by non-registrants for judicial determination.

The submission made to the review by the Chiropractors Association noted its strongly held view that this situation acts as a potential constraint on the practice of chiropractic.

The absence of a statutory definition of medicine is also unhelpful to the Medical Board which is responsible under the Act for policing the prohibition on non-registrants practising medicine. As the paper at Annexure E notes, there have been no prosecutions attempted by the Board in recent years relying on section 19(1) of the Act. This is despite the fact that concern arises from time to time that the activities of unregulated health practitioners (in particular) may contravene the prohibition on non-registrants practising medicine. This lack of enforcement may be taken as an indication that the absence of a statutory definition tends to operate as a constraint on the Medical Board in its policing of the prohibition.

The recommendation in the Working Party's preliminary report had been that the practice of medicine should not be defined in the new Medical Act. This recommended position reflected the following considerations:

- Situation in other jurisdictions – for example, the medical practitioner legislation of neither NSW nor Victoria incorporates a statutory prohibition on the practising of medicine by unregistered persons, these jurisdictions relying wholly instead on title protection and "holding out" offences to deter the unauthorised practising of medicine;

- The difficulty in achieving a meaningful, appropriately scoped, definition of medical practice that could provide the basis for the more effective policing of the boundaries of such practice;

- The existence of other statutory controls on who can engage in medical practice, in particular harmful elements of medical practice (eg restriction on persons other than medical practitioners prescribing and administering drugs under the Poisons Act 1964 and the Pharmacy Act 1964).

However, the preliminary report's recommendation that the new Act should not attempt to define the practice of medicine was generally opposed by submissions made to the review.

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[1] S.19(1) of the Medical Act 1894 refers:

> "… No person other than a medical practitioner shall be entitled to … practise medicine or surgery in all or any one or more of its branches; "

The principal reasons for this opposition were, variously, because it was considered that a practice definition is necessary:

- To more effectively police the practising of “medicine” by persons who are not registered medical practitioners. This position was advocated most strongly by medical professionals and their representatives, including the AMA; or

- To more effectively identify and delineate the activities that registered medical practitioners are authorised by their registration to engage in. This position was advocated most strongly by the Chiropractors Association.

The first of these underlying positions is consistent with the traditional approach to regulating health practices. Its purpose primarily is exclusionary, ie to render unlawful the performance of activities that are determined to fall within the defined scope of medical practice by persons who are not registered medical practitioners.

The second underlying position is directed at confining the activities of registered medical practitioners to within a defined scope of practice. This position reflects concern on the part of other health professionals, notably chiropractors, that registered medical practitioners are generally exempted from restrictions that otherwise prevent persons who do not have relevant qualifications and experience from engaging in practices that are protected under other health registration Acts. The submission by the Chiropractors Association noted the risks to patient safety in allowing doctors who may have minimal training in potentially harmful spinal manipulation procedures from engaging in the performance of such procedures without further specialist training or clinical supervision.

The Review Working Paper at Annexure E drew the Working Party’s attention to core practice regulation as an alternative to the traditional approach to regulation based on the definition of scopes of practice. As its name suggests, core practice regulation[1] focuses on practices and procedures that have a high risk of causing harm to patients if they are performed by persons who do not possess appropriate knowledge and skill to do so safely and competently.

As an approach to regulation, core practice regulation more readily and transparently identifies the practices and procedures that should be reserved by statute to be performed exclusively by particular health professionals based on their training and the knowledge, skills and competencies they possess. This is a preferable response to the objective of protecting the public, not least because it enables the extent of the protection provided by health professional registration Acts to be more effectively communicated to the public.

The Working Party supports core practice regulation as the preferred approach to the regulation of health professions in Western Australia, including medicine. It notes that the broader and complementary review of health professional registration Acts (other than medicine) has reached the same conclusion. Accordingly, the final recommendation proposes that the current position (namely the practice of medicine (undefined) by non-registrants is prohibited) should be retained in the new Act for a period of 3 years pending completion of a review of core practices relevant to each regulated health profession.

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[1] Core practice regulation is also known as “the Ontario model” because of its systematic application to the regulation of health professions in that Canadian province.

Comparison of recommendations – Medical Act and health practitioner reviews

The final recommendation differs from the comparable recommendation made by the health practitioner legislation review ("the broader health practitioner review") in one material respect.

The broader health practitioner review has similarly recommended that core practice regulation should be applied to other regulated health professions within a period of 3 years, and that in the interim the current form of practice protection in each existing health practitioner registration Act should be retained.

However, the review has also recommended that retention of the existing form of practice protection should be the subject of a sunset provision, such that practice protection would cease after 3 years in the event that legislative amendment to implement core practice regulation is not achieved within that period. This sunset arrangement is intended to ensure that core practice regulation is progressed as a matter of priority by both the professions concerned and HDWA.

The majority view among the membership of the Working Party does not favour an equivalent sunset arrangement for the Medical Practitioners Registration Act. While supporting the adoption of core practice regulation, some members of the Working Party were concerned that the automatic cessation of practice protection under a sunset arrangement would leave patients exposed if preparations for the introduction of core practice regulation have not been completed before the proposed 3-year sunset.

For this reason, the final recommendation proposes that the new Act should require a review of the continuation of the existing form of practice protection after 3 years, as an alternative to a sunset arrangement, if core practice regulation has not been adopted at that time.

The Working Party acknowledges that the Minister and Government will need to consider whether different solutions to essentially the same issue should be adopted in the new Medical Practitioners Registration Act and other new health practitioner legislation or whether a consistent approach should be taken across all professions.

2.4 Application of the new Act to the Crown

The recommendation in the preliminary report was that the new Medical Act should expressly bind the Crown.

This recommendation was not the subject of extensive commentary in public submissions to the review.

The Ministry of the Premier and Cabinet noted that consideration should perhaps be given to the particular elements of the new Act that should bind the Crown.

The Working Party would note in this context that the issue of whether the Crown should be bound is principally linked to the regulation of corporate providers of medical services, and is therefore considered more fully in chapter 5 of this report.

CHAPTER 3 : MEDICAL BOARD OF WESTERN AUSTRALIA

Introduction

This chapter deals with the constitution, powers and proceedings of the Medical Board of Western Australia.

Key issues considered or raised by public submissions in the context of the review have included:

- The membership of the Medical Board, and particularly the balance in the composition of the Board as between medical practitioners and representatives of the community;
- Whether the new Act should include an express, but caveated, power of direction for the Minister for Health in relation to the Medical Board;
- How the public should be informed about meetings of the Medical Board and Board decisions;
- Whether the Medical Board should have the ability to issue codes of professional conduct to inform medical practitioners and others in relation to the new Act.

Summary of recommendations in Chapter 3

This chapter proposes that:

- The new Act should incorporate a statement of the functions of the Medical Board;
- The Medical Board should comprise 12 persons, being 8 medical practitioners (including nominees of the Commissioner of Health and of the Vice Chancellor of UWA), 1 legal practitioner, 2 representatives of consumers, and the Executive Director of the Ministry of Fair Trading or nominee;
- Provision should be made for the appointment of deputies to the appointed members of the Board;
- Remuneration of Medical Board and Board committee members should be determined by the Minister on the recommendation of the Minister for Public Sector Management;
- The Medical Board should be subject to an express, but caveated and accountable, power of direction by the Minister for Health;
- Medical Board members should be required to disclose interests in matters under consideration by the Board and not to make improper use of information to which they become privileged;
- The Medical Board should be required to publish a quarterly summary of matters dealt with at Medical Board meetings, including a summary of complaints received and action taken in response;
- A new power for the Medical Board to issue codes of professional conduct for the purpose of guiding medical practitioners, consumers and others in relation to the subject matter of the new Act should be included in the legislation.

3.1 Body corporate status

Final recommendation 4 : Body corporate status of the Medical Board

The Working Party recommends that the Medical Practitioners Registration Act should establish the Medical Board of Western Australia as a body corporate.

A provision modelled on section 5 of the Osteopaths Act 1997 would be appropriate, including specifying that the Medical Board is not an agent of the Crown.

Comment on final recommendation 4

The recommendation made by the preliminary report is unchanged. It was not the subject of any substantive comment in public submissions to the review.

3.2 Functions of the Medical Board of Western Australia

Final recommendation 5 : Functions of the Medical Board

The Working Party recommends that the Medical Practitioners Registration Act should define the functions of the Medical Board to be:

- To do all things that are necessary or convenient to be done in connection with the powers and functions bestowed on the Medical Board by the Act;
- To administer the scheme of registration created by the Act and to exercise the regulatory powers provided by the Act having regard at all times to the Act's public protection objective;
- To work collaboratively with bodies involved in the training and professional development of medical practitioners to promote the continuing competence of registered persons to practise medicine;
- To provide advice to the Minister as requested on matters to which the Act applies;
- To prepare guidance for the medical profession and the community on the rights and responsibilities bestowed by registration as a medical practitioner under the Act;
- To provide support to bodies responsible for the development of national policies for the promotion and maintenance of standards for the initial and continuing registration of medical practitioners, including the assessment of qualifications;
- To accredit pre-vocational training positions for the purposes of training interns;
- To prosecute persons who commit offences against the Act.

Comment on final recommendation 5

The statement of functions to be performed by the Medical Board that was proposed by the Working Party's preliminary report was broadly supported by public submissions.

3.3 Membership of the Medical Board of Western Australia

Final recommendation 6 : Membership of the Medical Board

The Working Party recommends that the Medical Practitioners Registration Act should define the membership of the Medical Board to be:

- 8 registered medical practitioners, of whom:
    - one is to be a nominee of the Commissioner of Health[1] (this is to be an ex officio appointment);
    - one is to be a senior member of the Faculty of Medicine and Dentistry at the University of Western Australia who is appointed by the Minister on the nomination of the Vice Chancellor of the University;
    - the remainder are to be appointed by the Minister;
- 1 legal practitioner appointed by the Minister;
- 2 persons appointed by the Minister who have knowledge of, and experience in, representing the interests of consumers of services provided by registered medical practitioners; and
- The Executive Director of the Ministry of Fair Trading[2] or a senior officer of the Ministry who is nominated by the Executive Director (this appointment is to be ex officio).

Comment on final recommendation 6

The above recommendation represents some change on the recommendation contained in the Working Party's preliminary report.

Different models for Medical Board membership were put forward in public submissions made to the review. These are shown in table 1. All public submissions supported the need for a majority of members of the Board to be drawn from the medical profession itself. However, different views were expressed (as reflected in table 1) on what should be the appropriate balance in the composition of the Board as between medical practitioners and others, particularly the representatives of consumers.

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[1] See footnote 1 on page 10 regarding the substitution of the title "Director-General" for "Commissioner of Health" in this report.

[2] See footnote 2 on page 10 regarding implications of the Machinery of Government Taskforce report.

TABLE 1 : MEMBERSHIP OF THE MEDICAL BOARD

	Medical practitioners	Lawyer	Community/ consumer	Other	TOTAL
Current membership (Medical Act 1894)	8 Includes Commissioner of Health (COH) or nominee	2[1]	1	1 Executive Director, Ministry of Fair Trading	**12**
Proposal in Working Party's preliminary report	6 Includes nominee of COH and a senior member of UWA's Medical School	1	Up to 3		**Up to 10**
Final recommendation	8 Includes nominee of COH and a senior member of Medical School nominated by Vice Chancellor	1	2	1 Executive Director, Ministry of Fair Trading or nominee	**12**
ALTERNATIVE PROPOSED MODELS					
Proposal by Australian Medical Association (WA)	8 Six appointed from a panel of 12 names submitted by the AMA 1 COH or nominee of COH 1 senior member of Medical School	1	Up to 2	1 Executive Director, Ministry of Fair Trading or deputy	**Up to 12**
Proposal by Health Consumers' Council	6 Includes nominee of COH and a senior member of Medical School	1	4 Two consumer; 2 community		**11**

[1] The number of legal practitioners appointed to the Board was increased to 2 by the Medical Amendment Act 2000 to accommodate an increase in disciplinary activity under the current Act. The (then) Government indicated during the passage of the Act that provision for the appointment of two legal practitioners was intended to be an interim measure. It noted that the proposal to establish a Medical Tribunal to hear serious complaints against doctors would obviate the need for the Medical Board to have two legal practitioners among its membership.

The AMA advocated that the ex officio appointment to the Board of the Executive Director of the Ministry of Fair Trading (or nominee) should be retained in preference to the new Act providing for the appointment of 3 consumer representatives. This was principally because the Association felt that the expertise in consumer and competition law that this appointment brings to the Board is highly valuable. The Ministry of Fair Trading also supports retention of the ex officio appointment of the Ministry's Executive Director or nominated senior officer among the Medical Board's membership.

Adoption of the final recommendation would see the membership of the Medical Board retained at 12 persons.

This makes for a relatively large Board when compared with other jurisdictions – the average size of Medical Boards in other States and Territories (excluding NSW[1]) being 9 persons.

Within this total number, the ratio of registered medical practitioners to non-registrants is proposed to be 2:1. This ratio compares favourably with the situation in other jurisdictions as regards the balance of the composition of Medical Boards as between medical practitioners and others.

3.4 Term of office of appointed members

Final recommendation 7 : Term of office of appointed members

The Working Party recommends that the Medical Practitioners Registration Act should provide:

- That members of the Medical Board (other than ex officio members) may be appointed for terms of office of up to 3 years duration as determined by the Minister and set out in each appointed member's instrument of appointment;
- That members may be appointed for a maximum of 3 consecutive terms in the first instance;
- That any member who has served 3 consecutive terms should be eligible for a further appointment of up to 3 years following a break from the Medical Board of not less than 3 years.

Comment on final recommendation 7

This recommendation is unchanged from the preliminary report.

The Working Party also advocates that appointments to the Medical Board should be staggered so as provide continuity in the availability of relevant expertise among the membership of the Board. However, it notes that, under its proposal as outlined above, this can be achieved by administrative action and need not be the subject of a statutory provision in the new Act.

[1] The Medical Board of NSW comprises 18 persons. Its composition is atypical of the Board composition arrangements in other States and Territories principally because the NSW Act prescribes a large number of organisations that are entitled to nominate persons to be appointed to the NSW Board.

3.5 Removal of appointed members from office

Final recommendation 8 : Removal of appointed members from office

The Working Party recommends that the Medical Practitioners Registration Act should vest the Minister with power to remove appointed members of the Medical Board from office during their term of appointment if one of the following grounds is established in any particular case.

Grounds for removal of appointed members from office

- For incompetence, neglect of duty, or misconduct that impairs the performance of a Board member's duty;
- For mental or physical disability of a nature or severity that effectively renders the person incapable of performing the functions required of a Board member;
- For insolvency under administration, as defined in the Corporations Law;
- If a member is absent without leave of the Medical Board from 3 consecutive meetings of the Board of which the member has had notice, or if a member is unavailable so as to adversely affect the effectiveness of the Board's operations;
- If a member ceases to hold the position or qualification by virtue of which he or she was appointed;
- If a member is convicted of an offence which, in the opinion of the Minister, renders the person unfit to be a member of the Medical Board;
- If there is any other act or omission on the part of a member that in the opinion of the Minister may cause prejudice or injury to the Board;
- For failure to disclose an interest when required to do so by the Act.

Comment on final recommendation 8

This recommendation is unchanged from the preliminary report. It was not the subject of substantive comment in public submissions made to the review.

The final recommendation proposes in essence that power to remove appointed members from office should be vested in the Minister for Health and grounds to be established before the power of removal may be exercised set out in the new Act. This differs from the current Act, which authorises the Governor to remove members and does not specify the particular circumstances in which removal may occur.

3.6 Appointment of deputies to members of the Medical Board

Final recommendation 9 : Appointment of deputies

The Working Party recommends that the Medical Practitioners Registration Act should incorporate a provision modelled on clause 3, Schedule 1 of the Osteopaths Act 1997 to enable deputies to members of the Medical Board to be appointed by the Minister, and for deputies to perform the functions of a member in the member's absence.

Provision should be made for the appointment of a "pool" of deputies rather than for the appointment of deputies for nominated members of the Medical Board. This should be subject to a requirement that person may perform the functions of a member as a deputy only if the person has the same qualifications for appointment as the member in respect of whom the person is deputising.

Comment on final recommendation 9

Final recommendation 9 is unchanged from the preliminary report.

3.7 Presiding member and deputy presiding member

Final recommendation 10 : Presiding member & deputy presiding member

The Working Party recommends that the Medical Practitioners Registration Act should provide:

- For the Medical Board's presiding member and deputy presiding member to be chosen by the membership of the Board itself by election;
- That eligibility to be either the presiding member or deputy presiding member of the Board should be limited to persons who are members of the Board (but is not to be limited to the members who are registered medical practitioners);
- That the function of the presiding member is to preside at meetings of the Board. The presiding member is also to have a casting vote for the purpose of determining decisions of the Board;
- That the function of the deputy presiding member is to perform the functions of the presiding member when the presiding member is unavailable. A provision modelled on clause 2, Schedule 1 of the Osteopaths Act 1997 would be suitable for this purpose;
- When the presiding member and deputy presiding members are absent from a valid meeting of the Board, for that meeting to be presided over by a chairperson chosen by the members present.

Comment on final recommendation 10

This recommendation is unchanged from the preliminary report.

3.8 Procedures at meetings of the Medical Board

Final recommendation 11 : Procedures at meetings of the Medical Board

General procedure

The procedures for convening meetings of the Medical Board and the conduct of business at Board meetings should, subject to the Act and any relevant subsidiary legislation that may be made, be determined by the Board itself.

Quorum

The quorum for valid meetings of the Medical Board should be 5 persons, of whom at least 3 must be registered medical practitioners.

Voting

Decisions of the Medical Board should be determined by majority voting by the members present at a valid meeting of the Board.

Each member should have an ordinary vote and the presiding member (or person acting in that capacity) should have an ordinary vote and a casting vote where ordinary votes are tied.[1]

Telephone and video meetings

A provision modelled on clause 7, Schedule 1, Osteopaths Act 1997 should be included in the new Act in respect of the validity of meetings of the Medical Board that are conducted by telephone or video conference.[2]

Procedure for passing resolution without a meeting being held

A provision modelled on clause 8, Schedule 1, Osteopaths Act 1997 should be included in the new Act in respect of the validity of resolutions passed other than at meetings of the Medical Board.[3]

Minutes

The Medical Board should be required to ensure that an accurate record is made and preserved of the proceedings of each Board meeting and of each resolution passed by the Board, and the proceedings of each committee established by the Board and of each resolution passed by each such committee.[4]

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[1] Cf. clause 6, Schedule 1, Osteopaths Act 1997.

[2] Clause 7, Schedule 1 of the Osteopaths Act 1997 provides that a meeting conducted by telephone or video is a valid meeting of the Board if all participating members are capable of communicating with one another instantaneously at all times during proceedings.

[3] Clause 8, Schedule 1 of the Osteopaths Act establishes the requirements to be satisfied where a resolution needs to be passed and it is not possible to convene a meeting of the Board to do so.

[4] Cf. clause 9, Schedule 1, Osteopaths Act 1997.

Comment on final recommendation 11

The proposed procedures applicable at meetings of the Medical Board attracted little comment in public submissions to the review.

The final recommendation:

- Generally incorporates provisions governing the procedure of the Osteopaths Registration Board as set out in the Osteopaths Act 1997; and
- Is substantially unchanged from the preliminary report.

3.9 Remuneration of Medical Board members

Final recommendation 12 : Remuneration of Medical Board members

The Working Party recommends that the Medical Practitioners Registration Act should establish that the remuneration and allowances paid to members of the Medical Board and of committees established by the Board should be determined by the Minister on the recommendation of the Minister for Public Sector Management.[1]

Comment on final recommendation 12

This recommendation is unchanged from the preliminary report, and reflects general Government policy applicable to determining remuneration payable to persons appointed to statutory boards.

[1] Cf. s.9, Osteopaths Act 1997.

3.10 Power of delegation

Final recommendation 13 : Power of delegation

The Working Party recommends that the Medical Practitioners Registration Act should enable the Medical Board to delegate the performance of its functions, by instrument, to a member of the Board, a committee of the Board, or to a member of a committee. However, the new Act should make clear that the following decisions are not to be delegated by the Board under its power of delegation:

- Whether to grant, or refuse to grant, initial registration. However, this should not prevent the Board delegating responsibility for granting provisional registration (final recommendation 38 refers);
- Whether to grant, or refuse to grant, renewal of registration;
- Whether to impose conditions on a person's registration, and if so what those conditions are to be;
- Decisions about the handling of complaints and other matters on advice from a Complaints Assessment Committee, including whether a complaint or matter should be the subject of further action (such as referral to an Impaired Registrants Panel, Professional Standards Committee, or to the Medical Tribunal);
- Whether to grant, refuse to grant, or grant subject to conditions, authorisation to enable a relevant legal entity to carry on a business involving the provision of medical services;
- Whether to initiate a review of the authorisation granted to a relevant legal entity.

(These last two dot points relate to the authorisation process described in chapter 5 of this report).

Comment on final recommendation 13

The final recommendation is largely unchanged from that which appeared in the preliminary report. It has, however, been amended to exclude from the matters that could be delegated by the Medical Board decisions concerning the authorisation of relevant legal entities to carry on a business involving the provision of medical services by registered medical practitioners.

This change accommodates the proposals presented in chapter 5 of this report that are intended to regulate the involvement of businesses in the provision of medical services by registered medical practitioners.

3.11 Directions by the Minister

Final recommendation 14 : Directions by the Minister

The Working Party recommends that the Medical Practitioners Registration Act should contain an express but caveated power for the Minister to direct the Medical Board in the exercise of its functions.

The Working Party considers that a provision modelled on section 12 of the Osteopaths Act 1997 would be appropriate for this purpose.

Comment on final recommendation 14

The recommendation in the preliminary report was that the new Act should not contain an express, but caveated, power of direction for the Minister in relation to the Medical Board.

This recommendation attracted support in submissions received from the AMA, the State branches of two Royal Colleges, and the General Practice Divisions of Western Australia.

However, the submission from the Ministry of the Premier and Cabinet noted several reasons why an express but caveated power of direction is important and necessary. These included:

- Providing a mechanism for upholding the Medical Board's accountability to Parliament via the Minister;
- The expanded policy role envisaged for the Board by the Working Party's preliminary report;
- The Board's status as a public sector body, and hence the fact that it is subject to broader government policy applying to the public sector as a whole;
- The Board's reliance on statutory fees;
- The legitimacy of the Government's interest in ensuring the effective and efficient administration and regulation of medical practice in Western Australia.

On further consideration of this matter in the light of the Ministry's submission, the Working Party agreed that a caveated power of direction should be recommended for inclusion in the new Act.

Having examined a number of models of caveated Ministerial control in relation to otherwise independent statutory officers and bodies (eg Director of Public Prosecutions Act 1991, Anti-Corruption Commission Act 1988), the Working Party concluded that the directions power in the Osteopaths Act 1997 would, on reflection, be suitable.

The following features of that section are particularly supported in the context of the Medical Board:

- The limitation placed on the scope of the directions power such that the Minister is not able to direct the Board with respect to the performance of its registration and disciplinary functions in relation to individuals, qualifications, complaints or proceedings;

- The requirement that the Board must first be consulted in relation to the text of any direction before the direction is issued;
- The requirement that the text of any direction must be laid before each House of Parliament and included in the Board's annual report.

The Working Party's recommendation had regard in particular to:

- The need to clearly delineate the scope of the power of direction to prevent Ministerial involvement in the conduct of the Medical Board's registration and disciplinary statutory functions; and
- The need to make the exercise of Ministerial direction an accountable process.

The final recommendation has been expanded to exclude from the scope of the power of Ministerial direction decision-making relating to the Medical Board's role in authorising relevant legal entities to carry on a business involving the provision of medical services by registered medical practitioners.

The Working Party's view is that decisions about applications for authorisation, the attachment of conditions to authorisation, and the review of authorisations granted to individual relevant legal entities should not be capable of being the subject of a Ministerial direction. This is similar to the limitation placed on the Minister's ability to direct the Medical Board in relation to the registration or disciplining of individual registrants.

3.12 Disclosure of interests

Final recommendation 15 : Disclosure of interests

The Working Party recommends that the Medical Practitioners Registration Act should include a requirement that members of the Medical Board and of committees established by the Board must declare an interest in any matter under consideration by the Board or committee as relevant.

Failure to comply with this requirement should be both an offence and, as proposed in final recommendation 8, a ground for the removal of a Board member from office.

Comment on final recommendation 15

This recommendation is unchanged from the preliminary report.

Section 13 of the Osteopaths Act 1997 provides an appropriate legislative model for giving effect to this recommendation.

A number of submissions to the review (eg AMA, Mental Health Law Centre) commented that either the legislation or administrative procedures should be able to provide further guidance on matters that should be disclosed under this requirement. The final recommendation relating to the Board's rule-making power in Chapter 9 accommodates this suggestion.

3.13 Duty not to make improper use of information

Final recommendation 16 : Duty not to make improper use of information

The Working Party recommends that the Medical Practitioners Registration Act should require the members and former members of the Medical Board and of committees established by the Board not to make improper use of information to which they become privileged as a consequence of their membership of the Board or committee.

Failure to comply with this requirement should be an offence.

Comment on final recommendation 16

This recommendation is unchanged from the preliminary report.

Section 14 of the Osteopaths Act 1997 provides an appropriate legislative model for giving effect to this recommendation.

3.14 Public access to meetings and the minutes of meetings

Final recommendation 17 : Public access to meetings and the minutes of meetings

The Working Party recommends that the Medical Practitioners Registration Act should provide as follows:

- There should be no presumption in the new Act that meetings of the Medical Board will be open to members of the public. However, the Board should be able to direct that a particular meeting, or part of a meeting, is to be open;
- The Medical Board should be required to publish a summary, on at least a quarterly basis throughout the year, of the business dealt with at meetings of the Board and at committees established by the Board. At a minimum, such summaries should:
  - Identify all major items of business discussed by the Board and committees at meetings held in the relevant quarter;
  - Identify all resolutions made by the Board and committees at meetings held in the relevant quarter;
  - Provide a summary of complaints received in the relevant quarter and action taken by the Board in response.

Comment on final recommendation 17

Final recommendation 17 is substantially unchanged from the recommendation on the same subject that appeared in the preliminary report.

The Working Party would acknowledge that the final recommendation is contrary to the precedent established by the Osteopaths Act 1997, which provides that:

- Meetings of the Osteopaths Registration Board are to be open to the public; and
- The minutes of Osteopaths Registration Board meetings are to be made available to members of the public on payment of a prescribed fee.

For the reasons set out in the Working Party's preliminary report, the majority view among the members of the Working Party does not support this degree of openness in relation to Medical Board meetings. These reasons relate principally to efficiency in the conduct of Board business.

The submission by the Health Consumers' Council advocated that the new legislation should provide that minutes of Medical Board and committee meetings should be available to the public as occurs under the Osteopaths Act 1997. The Nurses Board of Western Australia similarly favoured the template approach.

The Health Consumers' Council also indicated support for the alternative proposal recommended by the Working Party, namely that the Medical Board should be required to publish quarterly summaries of Medical Board business provided that these summaries included details of complaints received and action taken by the Board.

The AMA's support for the final recommendation is contingent on the summaries to be published by the Medical Board being produced on a de-identified basis.

3.15 Committees of the Medical Board

Final recommendation 18 : Committees of the Medical Board

The Working Party recommends that the Medical Practitioners Registration Act should provide the Medical Board with power to constitute and direct committees of the Board for specific purposes.

Comment on final recommendation 18

Final recommendation 18 is unchanged from the preliminary report.

Sections 17 and 18 of the Osteopaths Act 1997 provide an appropriate legislative model for giving effect to this recommendation.

3.16 Appointment of Registrar and other staff

Final recommendation 19 : Appointment of Registrar and other staff

The Working Party recommends that the Medical Practitioners Registration Act should provide for:

- The appointment of a Registrar and other staff by the Medical Board;
- The delegation of functions to the Registrar from the Board and from the Registrar to other staff of the Board.

The new Act should provide that these appointments may be made either under a contract for services or on a contract of employment.

In the latter case, staff of the Medical Board are not to be appointed as public service officers (ie not appointed under Part 3 of the Public Sector Management Act 1994).

The new Act should also provide, in the interests of flexibility, that the Medical Board may by agreement with the relevant Chief Executive Officer make use of the staff and facilities of a Department of State or other public sector agency.

Comment on final recommendation 19

The final recommendation differs from the recommendation contained in the preliminary report to accommodate comments made by the Ministry of the Premier and Cabinet that:

- The new Act should make clear that the Registrar and staff of the Medical Board are not to be appointed as public service officers. This is consistent with limiting the size and scope of the public service; and
- There would be merit in providing some flexibility in the new Act for the Medical Board to enter arrangements with Government departments and other public sector agencies in relation to the use of staff and facilities.

3.17 Codes of professional conduct

Final recommendation 20 : Codes of professional conduct

The Working Party recommends that the Medical Practitioners Registration Act should make provision for the Medical Board to prepare and issue codes of professional conduct.

Purpose of codes

The purpose of codes of professional conduct should be to guide medical practitioners, health consumers and others in relation to the subject matter of the Act, including (but not necessarily limited to) the rights and responsibilities that registration as a medical practitioner confers.

Legal status and effect of codes

Codes of professional conduct should have the same legal status and effect as do codes prepared by the Nurses Board of Western Australia under section 9 of the Nurses Act 1992, namely:

- A breach of a code should not itself constitute grounds for action by the Medical Board, but in any proceedings before the Board such a breach may be asserted and may be taken into account by the Board; and
- A person is not to be liable to any civil or criminal proceedings by reason only that the person has committed a breach of a code of professional conduct.

Preparation of codes

The new Act should require the Medical Board to:

- Consult broadly within the medical profession, with health consumers and with other relevant interests in developing any proposed code;
- Prepare an assessment of the code's impact in accordance with requirements determined by the Minister;
- Release any proposed code and impact assessment in draft form for a period of public consultation determined by the Minister, and to comply with any requirements determined by the Minister concerning public notification of the draft code's availability for comment;
- Have regard to public submissions in finalising any proposed code and impact assessment;
- Submit the finalised proposed code, impact assessment and report of public submissions concerning the proposed code to the Minister for approval.

Adoption of standards

The new Act should make provision for the adoption through a code of professional conduct of standards, rules and codes prepared by other bodies with or without modification or amendment.

Final recommendation 20 : Codes of professional conduct (continued)

Approval of codes

A code of professional conduct should not have effect unless it is approved by the Minister and published in the Government Gazette.

An approved code should come into operation on the date of its publication in the Gazette or on such other date as is determined by the Minister following consultation with the Medical Board.

The Minister should not be able to approve a code of professional conduct that is presented by the Medical Board unless he or she is satisfied that:

- The contents of the proposed code are necessary and appropriate having regard to the Act's public protection objective;
- There has been proper consultation within the medical profession, with health consumers and with other interested parties during the code's preparation;
- Proper account has been taken by the Medical Board of public submissions received in finalising any proposed code;
- The impact of the proposed code has been properly assessed in accordance with requirements determined by the Minister.

The Minister should be able to:

- Approve any proposed code;
- Refuse to approve any proposed code;
- Require the Medical Board to revisit the development of any proposed code to ensure that the matters identified in "preparation of codes" above are properly addressed; or
- Following consultation with the Medical Board, make approval conditional on changes being made to any proposed code that is presented by the Board.

In the case of the actions contemplated by the last 3 dots points, the Minister should be required to provide reasons for his/her decision. These reasons should be publicised as if they were directions by the Minister, ie they should be laid before each House of Parliament within 14 sitting days of being given, and should be included in the Medical Board's annual report.

Status of codes as subsidiary legislation

A code of professional conduct approved by the Minister should be regarded as a regulation for the purposes of section 42 of the Interpretation Act 1984 (ie should be subject to Parliamentary review).

Comment on final recommendation 20

The recommendation in the preliminary report that the new Medical Act should make provision for the preparation of codes of practice or professional conduct attracted strong support from health consumers, including in the submission by the Health Consumers' Council.

Consumers considered in particular that codes could be a useful means by which medical practitioners could be advised of the activities or behaviour that the Medical Board would regard as constituting grounds for action against medical practitioners. The sexual exploitation of patients by medical practitioners was highlighted in this regard.

Support for codes of professional conduct was also expressed by the Australian Competition and Consumer Commission, subject to the scope of issues that could be dealt with by codes being confined to clinical aspects of medical practice. The ACCC particularly supported the proposal that the Medical Board should be required to consult widely within the medical profession and among health consumers in developing codes.

The Commission noted that it would be concerned if codes were to be used to influence business practices in the medical services sector (eg advertising).

The Working Party does not share the view that the new Act should prescribe in detail the matters that may be the subject of a code, except to indicate that codes should only be capable of being made in relation to the subject matter of the Act.

It notes that the requirement for codes to be approved by the Minister will provide a safeguard against the proposed code-making provisions of the new Act being used for purposes that may be anti-competitive in effect. Specifically, the recommendation that the Minister should be able to detail the requirements that must be satisfied by the Medical Board when assessing the potential impact of any proposed code is intended to enable effective Ministerial scrutiny to be applied to all such proposals.

In addition, it is recommended that codes should be treated as regulations for the purposes of section 42 of the Interpretation Act 1984, making them subject to Parliamentary scrutiny and possible disallowance.

The essence of the recommendation made in the preliminary report has been retained, but extended to give a clearer indication of the process that the Medical Board should be required to follow in developing codes. Greater detail of the Minister's approval role is also provided in the final recommendation.

In finalising this recommendation, regard has been had to the code-making provisions of the Nurses Act 1992 (s.9), the Occupational Safety and Health Act 1984 (s.57), and the Medical Practice Act 1992 (NSW) (s.99A).

3.18 Medical Board's relationship with Australian Medical Council

Final recommendation 21 : Medical Board's relationship with Australian Medical Council

The Working Party recommends that the Medical Practitioners Registration Act should:

- Refer in the Medical Board's statement of functions to its role in liaising with national standards bodies concerning the initial and continuing registration of medical practitioners (final recommendation 5 refers);
- Continue to recognise the Australian Medical Council's role in determining qualifications for the purposes of registering medical practitioners and assessing overseas-trained doctors for general medical registration; and
- Clarify the Medical Board's authority to make financial contributions to the Council or similar national body that is approved by the Minister (final recommendation 63 refers).

Comment on final recommendation 21

This recommendation is substantially unchanged from the preliminary report.

The Australian Medical Council plays an important role in setting and monitoring standards for the initial education of medical practitioners through its accreditation program for Australian and New Zealand medical schools, and its assessment of overseas-trained doctors for general medical registration.

More recently, the Council's role has been expanded to include responsibility for evaluating proposals for the recognition new medical specialties to inform decision-making at Commonwealth and State levels regarding specialist registration.

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CHAPTER 4 : REGISTRATION OF MEDICAL PRACTITIONERS

Introduction

This chapter deals with a core functional responsibility of the Medical Board, namely the registration of suitably qualified persons to be medical practitioners in Western Australia.

The Working Party's preliminary report noted that the main provisions of the Medical Act 1894 relating to the Board's registration function were substantially amended by the Medical Amendment Act 1994 ("the 1994 Act"). The 1994 Act implemented a decision by Australian Health Ministers to introduce broad consistency in the entry requirements for medical practice across Australia.[1]

The Working Party strongly supports retention of this consistency in the State's scheme of medical registration.

Key issues relating to the Board's registration function that were considered or raised by public submissions to the review included:

- Whether the new Act should make provision for the granting of specialist registration;
- The scope of the Medical Board's ability to attach conditions to a person's registration to ensure the safe and competent practice of medicine;
- The powers available to the Medical Board to scrutinise the suitability of persons who seek registration as medical practitioners, including the Board's ability to conduct criminal record checks in relation to applicants;
- Role and power for the Medical Board to enforce standards through the registration system with respect to the professional indemnity insurance that must be held by, or on behalf of, a medical practitioner;
- What should be the consequences of registration, principally in terms of the protection of areas of clinical practice and reservation of titles for the exclusive use of medical practitioners, including use of the title "doctor";
- Information that should be held on the Medical Register to inform consumers about the qualifications and experience of registered medical practitioners, and the accessibility of the Register;
- Appeal rights in relation to registration decisions of the Medical Board.

[1] The decision to harmonise entry standards to medical practice was taken in the context of preparations for the introduction of mutual recognition for goods and occupations in Australia. The Mutual Recognition (Western Australia) Act 1995 provides for the implementation of the national scheme of mutual recognition in Western Australia. Under this legislation, medical practitioners who are registered in another State or Territory are entitled to the equivalent form of registration in Western Australia.

Summary of recommendations in Chapter 4

This chapter proposes that:

- The distinction between general and conditional forms of registration should be retained in the new Act with the criteria for registration remaining largely unchanged;
- Provision should be made for the commencement of registration by medical specialty;
- The Medical Board should have increased powers when assessing applications for initial, and renewal of, registration and to respond to concerns about the continuing competence of registered medical practitioners;
- Provision should be made for registration to be granted for a prescribed period of up to 3 years in most cases;
- The Medical Board should have a broader ability to attach conditions to registration in the interests of ensuring the safe and competent practice of medicine, subject to appropriate review and appeal procedures;
- As the principal effects of registration, the new Act should:
    - Retain the prohibition on non-registrants practising medicine pending completion of a core practice review;
    - Make it an offence for non-registrants to use the title “registered medical practitioner” or any other title calculated to induce a belief that the person is a registered medical practitioner;
    - Make it an offence for non-registrants otherwise to advertise or hold themselves out as being entitled or qualified to be a registered medical practitioner;
- Further consideration should be given to the question of the Medical Board having a role in setting standards for professional indemnity insurance under cover of which medicine is practised, and enforcing compliance with these standards through registration;
- A new form of registration – non-practising registration – should be available to persons who are otherwise entitled to registration as a medical practitioner but who choose not to practise medicine, either temporarily or permanently;
- Provision should be made to deem the registration of doctors who are registered in another State or Territory and who provide medical assistance in emergency situations or in connection with organ retrieval whilst in Western Australia;
- Medical practitioners should be required to notify the Medical Board in relation to certain matters;
- There should be a broad right of appeal to the proposed Medical Tribunal arising from registration decisions of the Medical Board.

4.1 General and conditional registration

Final recommendation 22 : General and conditional registration

The Working Party recommends that the Medical Practitioners Registration Act should maintain the distinction made in the Medical Act 1894 between the granting of general registration as a medical practitioner and the granting of conditional registration as a medical practitioner for specific purposes.

Comment on final recommendation 22

The Working Party's preliminary report noted that the registration provisions of the Medical Act 1894 were substantially amended by the Medical Amendment Act 1994 in order to make Western Australian registration requirements consistent with nationally agreed standards for the registration of medical practitioners.

The 1994 amendments to the Act distinguished between the granting of general registration (which is available to Australian and New Zealand medical graduates and to overseas-trained doctors who pass the Australian Medical Council's qualifying examination) and conditional registration for specific purposes.

These specific purposes are:

- To enable medical graduates to undertake periods of internship or supervised clinical practice – this is necessary in order for medical graduates to satisfy the requirements for general registration;[1]
- To enable graduates of institutions of medical education and training that are not accredited by the Australian Medical Council (ie overseas medical schools) to undertake postgraduate training;[2]
- To enable medical teaching and research positions to be filled; [3]
- To enable unmet areas of need to be filled; [4]
- To enable foreign-trained specialists to practise within their specialty or to undergo further specialist training or examination; [5]
- To enable persons to be registered temporarily in the public interest. [6]

[1] S.11AC and s.11AD, Medical Act 1894.

[2] S.11AF(1)A, Medical Act 1894.

[3] S.11AF(1)B and s.11AF(1)C, Medical Act 1894.

[4] S.11AF(1)D, Medical Act 1894.

[5] S.11AF(1)E and s.11AF(1)F, Medical Act 1894.

[6] S.11AF(1)G, Medical Act 1894.

Table 2 identifies the categories of registration available under the Act and the number of registrants in each category at 30 June 2000.[1]

TABLE 2 : REGISTRATION CATEGORIES AND NUMBERS OF REGISTRANTS

Category	Section of Medical Act 1894	No. of registrants (at 30 June 2000)	% of all registrants
General registration	s.11	5,849	90.0%
Purposes for which conditional registration may be granted:			
Internship	s.11AC	108	1.7%
Supervised clinical practice	s.11AD	9	0.1%
To enable graduates of non-accredited institutions to undertake postgraduate training	s.11AF(1)A	47	0.7%
Medical teaching	s.11AF(1)B	Nil	-
Medical research	s.11AF(1)C	2	0.03%
Unmet areas of need	s.11AF(1)D	391	6.0%
Foreign-trained specialists practising in specialty	s.11AF(1)E	69	1.1%
Foreign-trained doctors to undergo further training	s.11AF(1)F	15	0.2%
Temporary and in the public interest	s.11AF(1)G	12	0.2%
Total (all registrants)		**6,502**	**100.0%**

During the course of the Working Party's review, a further category of specific purpose conditional registration was added to the Act by the Medical Amendment Act 2000. This new category supports implementation of a scheme to attract qualified overseas-trained general practitioners to fill shortages in remote and rural parts of the State. This has become section 11AG of the Medical Act 1894.[2]

Specific purpose conditional registration may be characterised as providing the Medical Board with flexibility to register doctors who may not meet the requirements of general registration, but who are nonetheless qualified and possess relevant experience to practise medicine in the specific categories of conditional registration defined in the Act.

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[1] Source: Western Australian Government Gazette, No.243 dated 21 November 2000.

[2] Details of s.11AG registrants do not feature in Table 2 because that particular category of registration was not in operation at the time the Medical Register was gazetted.

As table 2 indicates, this flexibility is most frequently used to register overseas-trained doctors to provide medical services in designated unmet areas of need.

Apart from conditional registration for interns, the second most frequently used category of conditional registration is that which enables foreign-trained specialists to be registered to practise within their relevant specialty area of expertise.

In its submission to the review, the ACCC noted its disappointment that the Medical Board does not use the discretion it has to register more foreign-trained specialists in this category.

As noted previously, the categories of registration now available in Western Australia[1] are consistent with those in schemes of medical registration in other States and Territories, reflecting a decision taken by Australian Health Ministers to harmonise standards of entry to medical practice. The Working Party supports the retention of this consistency, not least because of the advent of mutual recognition legislation.

4.2 General registration – criteria and conditions

Final recommendation 23 : General registration – criteria and conditions

The Working Party recommends that the criteria to be satisfied by persons seeking general registration as medical practitioners should remain as set out in sections 11(1) and 11AA of the Medical Act 1894, except that the requirement to be "of good character" (s.11AA(c)) should be changed to:

> "the person is a fit and proper person to be registered as a medical practitioner and has not been convicted of an offence the nature of which renders the person unfit to practise medicine."

The Working Party further recommends that the Medical Practitioners Registration Act should allow the Medical Board to attach conditions to the granting of general registration in individual cases where the Board considers this necessary to ensure the competent and safe practice of medicine by a general registrant.

The Medical Board should have the ability to attach conditions:

- On the initial grant of registration; or
- On renewal of registration,

but not otherwise except as proposed in chapter 8 (regulation of medical practice) of this report.

[1] New s.11AG of the Medical Act 1894 (conditional registration for general practice in remote and rural parts of the State) is an exception. This section has been added to the Act to support a joint Western Australian – Commonwealth initiative to address specific problems of medical workforce shortage in rural and remote parts of Western Australia.

Comment on final recommendation 23

Criteria

Effectively, the recommendation proposes that the criteria to be satisfied by a person seeking general registration should be that:

- The person has recognised medical qualifications (ie the person is a graduate of a Medical School in Australia or New Zealand which is accredited by the Australian Medical Council or else has successfully completed the AMC's competency examination);
- The person has successfully completed a period of internship or supervised clinical practice as required by the Medical Board;
- The person has paid the prescribed application and annual practice fees;
- The Medical Board is satisfied that the person is competent to practise medicine (that is, the person has sufficient physical capacity, mental capacity and skill to practise medicine);
- The Medical Board is satisfied that the person has a sound knowledge of the English language and possesses sufficient skill in the expression of that language, both written and oral, for the practice of medicine; and
- The Medical Board is satisfied that the person is a fit and proper person to be registered as a medical practitioner and has not been convicted of an offence the nature of which renders the person unfit to practise medicine.

In relation to this last criterion, the submission by the ACCC noted that the retention of a "fit and proper" criterion to be satisfied by persons seeking registration could open the process to subjective decision-making. The Commission advocated that guidance should be included in the legislation in relation to the assessment of this criterion.

The Working Party's view is that some ability on the part of the Medical Board to refuse to register a person on character grounds should be retained in the new Act.

The Working Party does not favour attempting to prescribe in the legislation the matters that could result in a decision by the Board to refuse registration on character grounds. It notes that such a decision would in any event be appealable under the proposals presented in this report.

Conditions

The second part of the recommendation provides for the granting of general registration to be made subject to conditions where necessary to ensure the safe and competent practice of medicine by a general registrant.

This recommendation was contained in the Working Party's preliminary report.

It reflects:

- The situation in a number of other jurisdictions where the granting of general registration can be made subject to conditions; and

- The Working Party's recognition that the Medical Board occasionally confronts situations where an applicant for general registration may appear to satisfy all the relevant criteria, but the Board may have residual concerns that may not in themselves cause the Board to reject an application outright. This may occur, for example, where a person is returning to the practice of medicine following a period of absence. In this situation, it may be appropriate to enable the Board to grant registration subject to an applicant undergoing a period of supervised practice.

The recommendation that general registration may be granted subject to conditions was supported by the AMA, but opposed by the Western Australian Regional Committee of the Australasian Faculty of Public Health Medicine on grounds that it increased the scope of the Medical Board's regulatory intervention.

The ACCC noted that it would be appropriate for the Medical Board to develop guidelines on the circumstances when it would consider it necessary to apply conditions to general registration. The specification in the recommendation that the Medical Board must think it necessary for the conditions to be applied on safety or competence grounds is intended to provide an indication of the circumstances in which conditions may be appropriately applied.

The final recommendation has also been amended to make clearer the intention that the Medical Board should be able to condition registration under this recommendation only at times where it makes decisions concerning the granting or renewal of registration. At other times, conditions should only be applied as provided for in Chapter 8 of this report.

4.3 Specific purpose conditional registration – categories and criteria

Final recommendation 24 : Specific purpose conditional registration – categories and criteria

The Working Party recommends that the Medical Practitioners Registration Act should retain the categories of specific purpose conditional registration set out in the Medical Act 1894, including the new category of conditional registration for general practice in remote and rural areas created by the Medical Amendment Act 2000.

The matters to be satisfied by the Medical Board in deciding whether to grant specific purpose conditional forms registration should similarly remain as described in each of the existing categories of conditional registration.

The Working Party further recommends that:

- The amendment to the Act made by the Medical Amendment Act 2000 which had the effect of clarifying the Medical Board's responsibility to be satisfied in relation to each of the matters stated in section 11AA of the Act before it may grant conditional forms of registration should be retained;
- The Medical Practitioners Registration Act should make clear that one of the conditions the Medical Board may apply to a specific purpose conditional form of registration could be to limit the duration of the life of the registration.

Comment on final recommendation 24

The term “specific purpose conditional registration” is used in preference to “conditional registration” out of recognition of the intention that the new Act will allow the Medical Board to attach conditions to general registration in certain circumstances (final recommendation 23 refers).

The categories of specific purpose conditional registration that the recommendation proposes should be retained in the Medical Practitioners Registration Act are shown in table 2.

As was noted previously, these categories of conditional registration are consistent with conditional forms of registration found in the medical practitioner registration legislation of other States and Territories, reflecting the agreement by Australian Health Ministers to have consistent standards of entry to medical practice across Australia.

The recommendation proposes a number of changes compared with the recommendation contained in the Working Party’s preliminary report.

The first change is to recognise the existence of new section 11AG of the Medical Act (conditional registration for general practice in remote and rural areas) which has been inserted into the Act by the Medical Amendment Act 2000.

The second change is to recognise that the Medical Amendment Act 2000 clarified the relationship between the matters stated in section 11AA of the Act and decisions by the Medical Board concerning the granting of conditional forms of registration.[1]

The third change is to clarify the Medical Board’s ability to grant specific purpose conditional registration subject to a condition that has the effect of limiting the life of the registration.

A number of the existing categories of conditional registration envisage that the duration of the registration will be limited (eg the public interest conditional registration, and unmet area of need conditional registration). This proposed change is intended to enhance the Medical Board’s flexibility to deploy the available categories of specific purpose conditional registration to address a range of circumstances and situations.

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[1] S.11AA relevantly provides that the Medical Board must be satisfied, before it may grant registration, that an applicant for registration:

- Is competent to practise medicine (that is, the person has sufficient physical capacity, mental capacity and skill to practise medicine);
- Has a sound knowledge of the English language and possesses sufficient skill in the expression of that language, both written and oral, for the practice of medicine; and
- Is of good fame and character.

The Medical Amendment Act 2000 clarified that the Medical Board must be satisfied in relation to each of these matters when deciding whether to grant conditional as well as general forms of registration.

4.4 Specialist registration

Final recommendation 25 : Specialist registration

The Working Party recommends that the Medical Practitioners Registration Act should provide:

- For the prescription by subsidiary legislation made under the new Act of medical specialties;
- For the assessment and granting by the Medical Board of specialist registration to eligible persons in relation to each prescribed medical specialty;
- For the prescription by subsidiary legislation of specialist titles relevant to each medical specialty that may only be used by persons who have specialist registration in that specialty.

Declaration of medical specialties – role of Australian Medical Council

Before it may recommend the declaration of a medical specialty, the Medical Board should be required to seek and have regard to (but not necessarily be bound by) the advice of the AMC as to whether a particular area of medical practice should be prescribed as a medical specialty.

The views of the AMC should be accurately reflected in any recommendation put forward by the Medical Board concerning the prescription of medical specialties.

Final recommendation 26 : Eligibility for specialist registration

The Working Party recommends that the Medical Practitioners Registration Act should include the following eligibility criteria to be satisfied by a person seeking specialist registration:

- That the person has general registration, and has:
    - A qualification obtained in Australia or New Zealand that is a prescribed qualification in relation to the specialty in respect of which specialist registration is sought; or
    - A qualification in the specialty that the Medical Board considers to be substantially equivalent to, or based on similar competencies that are required for, a prescribed qualification relevant to the specialty in respect of which specialist registration is sought.

Alternatively, in the case of applicants who are not general registrants:

- That the person:
    - Is assessed by the Medical Board to be fit to practise in the specialty in respect of which specialist registration is sought; and
    - Has a qualification in, and has demonstrated experience in the practice of the specialty, that the Medical Board considers are sufficient to justify specialist registration being granted to the person.

In assessing whether a person who is not a general registrant is fit to practise in a particular specialty, the Medical Board should be required to be satisfied in relation to each of the following matters:

- That the person is competent to practise in the specialty (that is, the person has sufficient physical capacity, mental capacity and skill to practise medicine in the specialty);
- That the person has a sound knowledge of the English language and possesses sufficient skill in the expression of that language, both written and oral, for the practice of medicine; and
- That the person is a fit and proper person to be registered as a medical practitioner and has not been convicted of an offence the nature of which renders the person unfit to practise medicine.

In coming to a view concerning the suitability of an applicant's qualifications for specialist registration, or the fitness of an applicant to practise in a prescribed specialty as a specialist registrant, the Medical Board should be allowed to have regard to (but should not be required to act in accordance with) advice and recommendations provided by:

- The Australian Medical Council; or
- An Australian specialist medical college or institution which is recognised by the Board as being relevant to the specialty.

Final recommendation 26 : Eligibility for specialist registration (continued)

Transitional arrangements

The Medical Board should also be able to grant registration in a prescribed medical specialty to doctors who are able to satisfy the Board:

- That they were practising in the specialty at the point where the specialty was prescribed;
- That they are competent to practise in the specialty (that is, that they have sufficient skill, physical capacity, and mental capacity to practise in the specialty); and
- That they have knowledge and practical experience in the specialty sufficient to justify the Medical Board granting the form of specialist registration sought.

For the purpose of being satisfied on these last two points, the Medical Board should be able in individual cases to require a medical practitioner who seeks specialist registration under these transitional arrangements to submit to an assessment of his or knowledge, skill and competence in the specialty. This assessment should be undertaken by a medical practitioner who is registered in the specialty in respect of which registration is sought and who is appointed by the Medical Board.

Final recommendation 27 : Specialist registration – conditions

The Working Party recommends that the Medical Practitioners Registration Act should enable the Medical Board to impose such conditions on the grant of specialist registration as the Board considers necessary and appropriate to ensure the safe and competent practise of medicine in his or her specialty by a specialist registrant.

Comment on final recommendations 25 – 27

The Working Party's preliminary report recommended that no provision should be made in the Medical Practitioners Registration Act for the recognition of medical specialties or the granting of specialist registration.

However, general support for specialist registration was expressed in submissions made to the review by members of the medical profession and relevant representative bodies, including the AMA.

Health consumers also noted value in having a system of specialist registration that would enable consumers to more readily understand the extent of the specialist training and additional qualifications held by medical practitioners in particular areas of medical expertise.

In addition, the submission to the review from the Australian Medical Council noted that the Council had been commissioned by the Commonwealth Minister for Health and Aged Care, with the agreement of other Australian Health Ministers, to develop proposals for recognising new medical specialties.

These proposals are intended to inform decisions concerning the declaration of medical specialties and the registration of medical specialists at both Commonwealth and State levels.

The Working Party has reconsidered its original recommendation in the light of submissions made to the review.

As indicated in the relevant final recommendations, the Working Party accepts that it would be consistent with the public protection objective of the Medical Practitioners Registration Act to provide for the recognition of medical specialties and the granting of specialist registration in relation to prescribed specialties. The Working Party in particular accepts the argument advanced by health consumers that the identification in the State's scheme of medical registration of medical practitioners who hold appropriate qualifications in particular areas of medical expertise would be of considerable benefit.

The recommendations relevant to specialist registration are largely self-explanatory, and draw on comparable provisions made in Queensland's Medical Practitioners Registration Bill 2000.

In summary, they advocate that the new Act should include provision for the prescription of medical specialties by subsidiary legislation and for specialist registration to be available in relation to each prescribed specialty to medical practitioners who have appropriate specialist qualifications and experience. In addition, it is recommended that transitional arrangements should apply to medical practitioners who are practising in a particular specialty at the point the specialty is prescribed and who can demonstrate sufficient knowledge and practical experience in the specialty to warrant specialist registration being granted.

The Working Party's recommendation that specialist registration should be available both to general registrants and to persons who do not have general registration reflects the fact that, since 1994, conditional registration has been available to overseas-trained specialists. These are medical practitioners who may not be eligible for general registration but who are nonetheless assessed by the Medical Board as having appropriate qualifications and overseas experience that enables them to be granted registration for the purpose of practising within their particular specialty.

Role of Australian Medical Council

The recommendations relating to specialist registration also acknowledge developments at the national level, and particularly the expansion of the AMC's role to include the assessment of medical specialties and the provision of advice to the Commonwealth and State/Territory governments on the same.

In recognition of these developments, final recommendation 25 proposes that the Medical Board should be required to consult the Council before making a recommendation concerning the prescription of medical specialties. It would also require the Board to have regard to views expressed by the Council in relation to a proposed recommendation while also providing that the Board is not required to act in accordance with the Council's advice.

Similarly, final recommendation 26 acknowledges that the Medical Board may wish to take advice from the AMC and relevant specialist medical colleges when assessing eligibility for specialist registration. However, any decision as to the granting of specialist registration should, as a matter of law, be the Medical Board's.

4.5 Application for, duration and renewal of, general, specific purpose conditional, and specialist registration

Final recommendation 28 : Application for general, specific purpose conditional, and specialist registration

The Working Party recommends that the Medical Practitioners Registration Act should:

- Enable the Medical Board to determine the information that should be provided by persons who apply for general, specific purpose conditional, and specialist forms of registration, including the form any application should take.

  Such information should be confined to information that the Board may reasonably need to assess an application for registration having regard to the criteria relevant to the category of registration to which an application relates and the matters about which the Board is required to be satisfied.

- Require applicants for registration to pay a prescribed application fee and prescribed annual practice fee at the time they submit their applications, and for the Medical Board to refund the annual practice fee (but not the application fee) where applications are not successful.

- Enable the Medical Board to require a person who seeks registration:

  - To appear before it when requested to do so for the purpose of satisfying the Board in relation to any matter relevant to the Board's decision as to whether or not registration should be granted in the particular case;

  - To answer any question and provide any additional information or document that the Board may reasonably ask or require to be supplied in connection with determining the outcome of an application for registration;

  - To verify any answer given to it, or information or document provided to it, by a statutory declaration;

  - To participate in an assessment of the person's competence in the practice of medicine that the Board may reasonably require a person to undertake in order to satisfy itself in relation to the competence criterion for registration.

    Such assessment could take the form of a medical examination of the applicant by a medical practitioner nominated by the Board, or a requirement that the applicant complete an oral or written examination or perform a clinical examination of a patient under the direction of a person who is nominated by the Board.

- Authorise the Board to conduct appropriate investigations into an applicant's background and suitability for registration, including the conduct of criminal records checks.

Final recommendation 28 : Application for general, specific purpose conditional, and specialist registration (continued)

Medical Board obligations

The new Act should require the Medical Board to assess an application for registration as expeditiously as the circumstances of each application permit, and in the case of an application for registration that is not successful, to provide reasons in writing for its decision not to grant the registration sought.

Final recommendation 29 : Duration of general, specific purpose conditional, and specialist registration

The Working Party recommends that the Medical Practitioners Registration Act should provide that the grant of general, specific purpose conditional, or specialist registration should be for a period of up to 3 years, and subject to renewal thereafter, except where:

- The Medical Board grants specific purpose conditional registration subject to a condition that has the effect of limiting the life of the registration (final recommendation 24 refers); or
- The Medical Board decides in any individual case, having regard to the public protection purpose of the new Act, that it is appropriate to make the grant of initial registration, or to renew registration, for a lesser period than the prescribed period.

The grant of registration for a period of time that is longer than one year should be subject to the payment of a prescribed annual practice fee by the registrant in each of the years in that period.

Final recommendation 30 : Renewal of general, specific purpose conditional, and specialist registration

The Working Party recommends that the Medical Practitioners Registration Act should:

- Enable the Medical Board to determine the information that should be provided by persons who seek renewal of general, specific purpose conditional, and specialist forms of registration, including the form any application for renewal of registration should take.

- Require applicants for renewal of registration to pay a prescribed fee for renewal of registration and prescribed annual practice fee at the time they submit their applications for renewal, and for the Medical Board to refund the annual practice fee where applications for renewal are not successful.

- Enable the Medical Board to require a person who seeks renewal of registration:

  - To appear before it when requested to do so for the purpose of satisfying the Board in relation to any matter relevant to the Board's decision as to whether or not registration should be renewed in the particular case;

  - To answer any question and provide any additional information or document that the Board may reasonably ask or require to be supplied in connection with determining the outcome of an application for renewal of registration;

  - To verify any answer given to it, or information or document provided to it, by a statutory declaration.

Medical Board obligations

The new Act should require the Medical Board:

- To assess an application for renewal of registration as expeditiously as the circumstances of each application permit; and

- In the case of an application for renewal of registration that is not successful, to provide reasons in writing for its decision not to grant the renewal sought.

Final recommendation 30 : Renewal of general, specific purpose conditional, and specialist registration (continued)

Decisions the Medical Board may take

In the ordinary case, there should be a general presumption in the Medical Practitioners Registration Act that the Medical Board will renew the registration of a medical practitioner who applies to it.

However, the Board should be able to take action where the Board believes on reasonable grounds that an applicant for renewal of registration has:

- Not had sufficient practical experience; or
- Has not maintained adequate knowledge and skill,

in the practice of medicine relevant to his or her category of registration in the period since the granting of initial, or previous renewal of, registration as the case may be, such that the Board has significant concerns about the ability of the applicant to practise medicine competently and safely.

In this situation, the Medical Board should be able to:

- Refuse to renew registration; or
- Renew registration subject to conditions,

pending an assessment of the practitioner's competence in accordance with the procedures set out in chapter 8 of this report.

At the completion of a competence assessment, the Board should be able to renew registration with or without conditions or decline to refuse renewal.

Registration deemed to continue until outcome of renewal application known

The Medical Practitioners Registration Act should provide that the general, specific purpose conditional, or specialist registration of a medical practitioner shall be deemed to continue until:

- The outcome of a decision by the Medical Board as to the renewal of that registration is known; or
- Where an appeal against a decision to refuse to renew registration, or to renew registration subject to conditions, is made to the Medical Tribunal, the outcome of the appeal is known.

Comment on final recommendations 28 – 30

Final recommendations 28 to 30 deal with the processes and powers that the Working Party believes should be available to the Medical Board in relation to the granting and renewal of general, specific purpose conditional, and specialist forms of registration.

The Working Party's preliminary report had proposed that the Medical Board should be able to refuse to renew the registration of a person on recency of practice grounds. Some concern in relation to this proposal was evident in submissions made by the AMA and General Practice Divisions of WA Ltd.

The submission by the Health Consumers' Council advocated that the new Act should make stronger investigative powers available to the Medical Board, and for the Board to take a more proactive policing role in its assessment of applications for registration. Consumers in particular wanted the Medical Board to exercise greater diligence in its assessment of the background of applicants for registration, including obtaining information on any criminal convictions and periods of registration in other States and Territories and overseas.

In response to these submissions and concerns, some changes in the final recommendations have been made as compared to the recommendations set out in the Working Party's preliminary report. The main changes are as follows:

- A broader power is recommended for the Medical Board to require applicants for registration to provide relevant information in their applications, to appear before the Board to answer questions and provide supplementary information, to verify information by statutory declaration, and to participate in appropriate competence assessment;

- A specific power authorising the Medical Board to conduct criminal record checks in relation to applicants is proposed;

- It is recommended that the Medical Board should be required to process applications expeditiously and to provide written reasons for a decision to refuse initial (and renewal of) registration.

Duration, renewal of registration, and continuing competence

Under the present Act, registration is renewed annually, subject to payment of annual practice fees. The level of scrutiny applied by the Medical Board in relation to renewals of registration is understood to be minimal.

The Working Party would wish to encourage renewal of registration to be a more deliberative process on the part of the Medical Board involving a more thorough assessment of the continuing competence of registrants to practise medicine in the category, or categories, of registration for which renewal is sought.

The issue of continuing competence links to the recommendation in the Working Party's preliminary report that the new Act should create linkage between the registration decisions of the Medical Board and the participation of registered medical practitioners in programs of continuing education and professional development.

In submissions to the review, universal support was expressed for the principle that all doctors should participate in such programs. However, there was no consensus on how linkage of this kind would work in practice, perhaps reflecting the absence of working models that could provide the basis for the development of a detailed legislative scheme.

It is evident from most submissions that further policy development, involving representatives of the profession and consumers, will need to occur before participation in continuing professional development can be made a statutory requirement for registered medical practitioners as part of the registration process.

Other jurisdictions that have conducted extensive views of their medical practitioner legislation (eg NSW, Queensland) have come to a similar view.

The adoption of a universal requirement, linked to registration, that all doctors should participate in continuing medical education and professional development remains a desirable objective. However, it is appropriate to defer its progress in legislative terms until greater clarity is achieved about how the requirement would work in practice. The Working Party would express the hope that further work to achieve the necessary clarity will be progressed as a matter of priority.

In the meantime, the Working Party considers that the Medical Board's ability to monitor and respond to issues of competence at renewal of registration should be strengthened in the new Act. Final recommendations 29 and 30 are framed accordingly.

The Working Party would see considerable merit in recommending that the Medical Practitioners Registration Act should provide the Medical Board with the ability to grant registration for a period of up to 3 years in the majority of cases. This should be subject to the payment of annual practice fees in each year within that period.

The Working Party would further see merit in providing the Medical Board with discretion in individual cases to grant registration for shorter periods than the prescribed period to allow the Board to respond to situations where closer scrutiny of a person's registration is desirable in the public interest.

Implementation of this recommendation should allow the Medical Board to re-direct resources away from an annual re-registration process which is of limited regulatory value and towards more thorough scrutiny of applications for renewal of registration.

Final recommendation 30 also proposes that the Medical Board should have the ability to take action where it has reasonable grounds for believing that the competence to practise medicine of an applicant for renewal of registration may have been compromised by the applicant:

- Having had insufficient recent experience in medical practice; or

- Having paid insufficient attention to the maintenance of knowledge and skills.

In this situation, the Working Party believes that the Medical Board should be able to refuse to renew the registration of the applicant, or to make renewal subject to conditions, pending an assessment of the applicant in accordance with the competence process described in chapter 8 of this report.

This recommendation is intended to allow the Medical Board to take a proactive role in relation to issues of competence. It may perhaps be characterised as moving the legislative scheme of registration for medical practice in Western Australia in the direction of a mandatory link between registration and participation in continuing professional development.

4.6 Transfer of registration – general to specific purpose conditional registration

Final recommendation 31 : Transfer of registration – general to specific purpose conditional registration

The Working Party recommends that the Medical Practitioners Registration Act should enable the Medical Board to transfer the registration of a person ("the relevant person") who has general registration to an appropriate category of specific purpose conditional registration if the transfer is requested by the relevant person, and the Medical Board considers it reasonable in the circumstances for the transfer to occur.

Comment on final recommendation 31

This final recommendation proposes to authorise the Medical Board to transfer the registration of someone who has general registration to an appropriate category of specific purpose conditional registration (but not vice versa) on application by the person. The recommendation is intended to provide the Medical Board with flexibility in situations where (for example) a general registrant agrees that it would be appropriate to undergo a period of supervised practice as a specific purpose conditional registrant prior to re-applying for general registration. This voluntary approach may be preferable in some situations to the Board initiating proceedings against the registrant to alter his or her registration status on safety or competence grounds.

4.7 Imposition and review of conditions

Final recommendation 32 : Purpose and scope of conditions

The Working Party recommends the Medical Practitioners Registration Act should authorise the Medical Board to impose conditions on a person's registration for the following purposes:

Scope of conditions – grant of general or specialist registration

Conditions that may be imposed by the Medical Board should be limited to conditions that are necessarily applied for medicine to be practised competently and safely either generally or within a prescribed medical specialty by a general or specialist registrant.

Scope of conditions – grant of specific purpose conditional registration

Conditions that may be imposed by the Medical Board should be limited to conditions that are necessarily applied:

- For the purpose of the category of specific purpose conditional registration to which they relate; and
- For medicine to be practised competently and safely in the relevant category of specific purpose conditional registration.

Final recommendation 33 : Duration of conditions and review procedure

The Working Party recommends that the Medical Practitioners Registration Act should provide as follows:

Conditions attached to general and specialist forms of registration

- The Medical Board should be able to attach conditions to general or specialist forms of registration with or without specifying a period of time during which the conditions will remain in operation;

- Whether or not the Medical Board specifies a time period as proposed above, it should be required to specify a period of time ("the relevant period") during which a condition imposed on a general or specialist registrant is not to be reviewed at the request of the registrant to whose registration the condition is attached;

- Once the relevant period has elapsed, a general or specialist registrant should be able to request the Medical Board to review the conditions imposed on his or her registration. For the purpose of such a review, the Board should be able to require a registrant:

  - To appear before it when requested to do so for the purpose of satisfying the Board in relation to any matter relevant to the Board's review;

  - To answer any question and provide any additional information or document that the Board may reasonably ask or require to be supplied in connection with determining the outcome of the review;

  - To verify any answer given to it, or information or document provided to it, by a statutory declaration;

  - To participate in any assessment (in the form of an oral, written or practical examination or assessment of health status) that the Board may reasonably require the person to undertake in order to inform the review.

- The Medical Board should be required to complete a review of conditions within a period of not longer than 2 months. Upon completion of a review, the Medical Board must either confirm, revoke or vary any condition imposed on a registrant. The Board should be required to provide reasons in writing for its decision.

- Following an initial review, a person whose registration is subject to conditions should be able to apply at intervals of not less than 6 months for a further review of the conditions.

Conditions attached to specific purpose conditional registration

The new Act should enable the Medical Board, either on its own motion or at the request of a person having specific purpose conditional registration, to add to, vary or revoke conditions that are attached to the person's registration except for conditions which are necessarily applied consistent with the purpose of the category of specific purpose conditional registration that the person has.

Final recommendation 34 : Appeals against decisions relating to conditions

The Working Party recommends the Medical Practitioners Registration Act should provide the following rights of appeal against decisions taken by the Medical Board concerning the attachment of conditions to particular forms of registration.

Appeal rights in relation to conditions attached to the grant of general or specialist registration

It is recommended that a general or specialist registrant should have a right of appeal to the Medical Tribunal in relation to the following matters:

- A decision by the Medical Board to grant registration subject to conditions;
- The particular conditions attached by the Board to the registrant's registration; and
- A decision by the Medical Board about the relevant period during which the registrant is not to be able to request the Board to review a condition imposed on his or her registration.

Appeal rights in relation to conditions attached to the grant of specific purpose conditional registration

It is recommended that a person granted specific purpose conditional registration should have a right of appeal to the Medical Tribunal in relation to the following matters:

- In the case of conditions that the Medical Board considers are necessarily applied and consistent with the particular category of specific purpose conditional registration granted to a registrant – whether the particular conditions are in fact necessarily applied and consistent with the category of registration granted to that person;
- In the case of other conditions – the particular conditions attached by the Board to the person's registration.

Form of appeal and Medical Tribunal decisions

Appeals may be made either in relation to the merits of the Medical Board's decision or on points of law.

At the conclusion of an appeal, the Medical Tribunal should be able to confirm, vary or revoke a decision of the Medical Board.

The Tribunal should be required to provide reasons for its decision to the appellant medical practitioner and to the Registrar of the Medical Board. However, the Tribunal should not be required to publish these reasons.

Comment on final recommendations 32 – 34

As discussed in relation to final recommendation 23, the Working Party recommends that the new Act should enable the Medical Board to attach conditions to general registrations.

This is a significant departure from the current situation where conditions may be attached to the registration of a medical practitioner who has general registration only as a result of disciplinary proceedings under the Medical Act. This proposed change is necessarily made in the Working Party's view and is consistent with the new Act's public protection focus and objective.

It is also proposed that the Medical Board should be able to attach conditions to the grant of specialist registration.

This proposed extension of the Medical Board's discretionary ability to condition the practice of medical practitioners needs to be associated with appropriate guidance on the extent and nature of the conditions that may be applied and with appropriate review and appeal mechanisms in the legislation. Final recommendations 32 – 34 have been framed accordingly.

It is important in reviewing these recommendations to acknowledge the distinction made in the present Act, and which is recommended to be continued in the new Act, between general registration and conditional registration for specific purposes.

The present Act permits the Medical Board to attach to specific purpose forms of conditional registration conditions that are consistent with the purpose of each category of conditional registration. Thus, a registration under section 11AF(1)D of the Act is granted subject to the condition that the registrant may practise medicine only in an unmet area of need as determined by the Minister. Similarly, a registration under section 11AF(1)E is granted subject to the condition that the registrant must confine his or her practice of medicine to the particular specialty in which the registrant has been trained and holds relevant qualifications.

Accordingly, the review and appeal procedures in the Act need to distinguish between conditions:

- That are necessarily attached consistent with the category of specific purpose conditional registration that a medical practitioner has; and
- That are imposed by the Medical Board on general, specialist and specific purpose conditional registrants for public interest reasons.

Final recommendations 32 – 34 attempt to draw and maintain this distinction.

Specifically:

- Final recommendation 32 proposes to constrain the Medical Board by defining the scope of the conditions that the Board may attach to different forms of registration. In relation to general (and specialist) registration, it is proposed that the Board must be satisfied that any condition is necessarily applied to ensure the safe and competent practice of medicine by an individual medical practitioner;
- Final recommendation 33 proposes a procedure which medical practitioners may use to initiate a review by the Medical Board of conditions that have been attached to their registration.

This recommendation draws on the review provisions that have been incorporated into Queensland's Medical Practitioners Registration Bill 2000 for a similar purpose.[1] The Working Party would acknowledge in particular the need to strike a balance in the new legislation between the Medical Board's ability to impose conditions to ensure the safe and competent practice of medicine by registrants, and the ability of medical practitioners to seek a review of such conditions. The recommendation picks up on a proposal in the Queensland legislation that the Medical Board should be able to nominate a period of time following the imposition of a condition during which a registrant may not request that a review of the conditions be undertaken by the Board. The Board's decision in this regard should be open to appeal to the Medical Tribunal. The Working Party would also see merit in the new legislation stipulating a period of time (2 months) within which a review of conditions would need to be completed by the Board. It has also proposed that after an initial review, a medical practitioner should be able to initiate further reviews at intervals of not less than 6 months.

- Final recommendation 34 proposes appeal rights to the Medical Tribunal in relation to decisions taken by the Medical Board concerning the imposition of conditions on a medical practitioner's registration.

The Working Party believes that the proposals presented in final recommendations 32 to 34 strike a reasonable balance between:

- The need to empower the Medical Board to take action to ensure the safe and competent practice of medicine by medical practitioners; and

- The interests of medical practitioners whose registrations may be subject to conditions.

[1] Division 8, Part 3 (Registration) of the Medical Practitioners Registration Bill 2000 (Qld) refers.

4.8 Effects of registration

Final recommendation 35 : Effects of registration

The Working Party recommends that the Medical Practitioners Registration Act should make provision for the following effects of registration:

Practice protection

The prohibition on persons other than registered medical practitioners practising medicine set out in section 19(1) of the Medical Act 1894 should be retained, but subject to a further statutory review after 3 years, as proposed in final recommendation 3.

Title protection

The Working Party recommends that the new Act should:

- Prohibit persons who are not registered medical practitioners from using the title "registered medical practitioner" or any other title that is calculated to induce a belief that the person is a registered medical practitioner. (This is consistent with the approach to title protection taken in Victoria's Medical Practice Act 1994 – section 62(1)(a) of that Act refers);

- Prohibit persons who do not have specialist registration from using a relevant prescribed specialist title or any other title that is calculated to induce a belief that the person has registration in a prescribed medical specialty. (This relates to final recommendation 25).

Holding out offence

The Working Party recommends that the intent of section 19(3) of the Medical Act 1894 should be retained, namely that it should be an offence for a person who is not a registered medical practitioner to advertise or hold himself or herself out as being entitled or qualified to be a registered medical practitioner.

It should similarly be an offence for a person who does not have specialist registration to advertise or hold himself or herself out as being registered, or entitled or qualified to be registered, in the specialty.

Other effects of registration

It is also recommended that the intent of the following provisions of the Medical Act 1894 be retained:

- Section 21B – requirement for medical practitioners to arrange a consultation involving a second medical practitioner if requested to do so by a patient or patient's family or carers;

- Section 21C – prohibition on the administration of a general anaesthetic by persons other than registered medical practitioners, and on the administration of a general anaesthetic by a medical practitioner to a patient on whom the practitioner is operating.

Comment on final recommendation 35

Final recommendation 35 sets out the Working Party's final view on what should be the principal consequences of registration under the Medical Practitioners Registration Act.

Practice protection

The element of the recommendation relating to practice protection links to the discussion in final recommendation 3 and at Annexure E concerning the desirability of adopting core practice regulation for medical practice and other regulated health professions in Western Australia.

The Working Party would confirm its view that the most effective and readily communicated form of regulation for medical practice is one based on the identification of core harmful practices that only doctors and other appropriately trained and skilled health professionals should be able to perform.

Title protection – use of the title "doctor"

A number of submissions were made to the review concerning the use of the title "doctor".

The title "doctor" is one that may be used by registered medical practitioners by virtue of its inclusion in section 19(2) of the Medical Act 1894.[1] In practice, however, the title is used by a number of other health professionals, including dentists and chiropractors.

Submissions to the review generally requested that there be greater certainty in the Medical Practitioners Registration Act about the use of the title "doctor".

The AMA advocated that the title should be reserved for the exclusive use of registered medical practitioners and the holders of PhDs, while representatives of other professional groups (notably, dentists, optometrists, chiropractors, and podiatrists) advocated recognition for their use of the title in the new Act.

The majority view among the membership of the Working Party does not support the AMA's advocacy of a statutory prohibition on the use of the title "doctor" by other health professionals. The AMA's position is that such prohibition is necessary to protect the public.

The Working Party's view is that its title protection recommendation and the recommended retention of the holding out offence together sufficiently protect the public against the use of titles that may indicate or imply that an unregistered person either is, or is entitled to be, a registered medical practitioner.

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[1] S.19(2) of the Medical Act identifies the titles that, if used by a person who is not a registered medical practitioner, renders the person liable to an offence. It provides relevantly that:

> "… No person other than a medical practitioner shall be entitled to —
>
> (1) …
>
> (2) advertise or hold himself out as being, or in any manner to pretend to be, or to take or use the name or title, (alone or in conjunction with any other title, word, or letter) of a physician, doctor of medicine, licentiate in medicine or surgery, master in surgery, bachelor of medicine or surgery, <u>doctor</u>, surgeon, medical [sic] qualified or registered practitioner, apothecary, accoucheur, or any other medical or surgical name or title;"

This recommended approach should direct the Medical Board's attention – as the relevant regulatory body – to the circumstances and context in which a particular title is used. The Working Party would consider that use of term "doctor" by dentists or podiatrists (for example) would be unlikely to breach the title and holding out provisions of the new Act if the use is appropriately qualified to indicate a person's true profession (eg doctor of dentistry, doctor of podiatry).

The Working Party would note that its position in this regard is consistent with the situation in the majority of other States and Territories where no reservation of the use of the title "doctor" by medical practitioners is made under corresponding medical practitioner legislation.

Queensland's Medical Practitioners Registration Bill 2000 is a notable exception in this regard.

4.9 Registration and professional indemnity

Final recommendation 36 : Registration and professional indemnity

The Working Party:

- Supports in principle the Medical Board having a role in ensuring the adequacy of the professional indemnity under cover of which medicine is practised;
- Notes that legislative changes have been made, or are planned to be made, in Victoria and NSW which have the effect of empowering the respective Medical Boards to enforce compliance with appropriate standards of professional indemnity through the registration system; and
- Notes that the Australian Health Ministers Advisory Council (AHMAC) has commissioned work into medical indemnity arrangements in Australia.

The Working Party recommends:

- That further consideration should be given to the question of the Medical Board having a role in setting standards for professional indemnity insurance under cover of which medicine is practised and enforcing compliance with such standards through registration;
- That this further consideration should:
  - Take account of relevant legislative developments in Victoria and NSW;
  - Take account of the outcome of the work commissioned by AHMAC in relation to medical indemnity arrangements in Australia; and
  - Involve further consultation with interested parties in Western Australia, including the AMA, health consumers, Medical Defence Association (WA), and the Medical Board.

Comment on final recommendation 36

The preliminary report had proposed that the Medical Board should have a role in ensuring the adequacy of professional indemnity against civil liability in connection with the practice of medicine under cover of which doctors practise medicine.

This proposal attracted comment in a number of submissions to the review.

Submissions from within the medical profession generally did not support the proposal.

The AMA's submission linked the Association's consideration of this issue with its long-standing advocacy of legislation to cap civil liability in connection with the practice of medicine in response to the rising costs of insurance premiums.

The two specialist medical colleges that made submissions on this matter similarly did not support the Medical Board having a role in policing insurance or indemnity arrangements.[1]

However, the proposal was supported by the Australian Competition and Consumer Commission as being in the public interest subject to there being no intention:

- To mandate the insurers from which medical practitioners should be required to obtain insurance or indemnity cover; or
- To cap civil liability in connection with the practice of medicine.

A submission to the review was also made by the Medical Defence Association of Western Australia (MDA WA). The Association is the leading provider of indemnity to medical practitioners in the State. It supported the broad intent of the proposal contained in the preliminary report, but noted concern that the reference in that proposal to insurance (as opposed to indemnity arrangements) could result in the Association having to issue individual certificates of insurance to each of its members.

AHMAC Jurisdictional Working Party on Medical Indemnity

Ongoing concern about rising levels of premiums for medical indemnity has prompted the Australian Health Ministers Advisory Council (AHMAC) to establish a Jurisdictional Working Party on Medical Indemnity with the following terms of reference:

(a) Develop options to provide sustainable solutions to address long term care costs for those involved in health care litigation;

(b) Develop draft medical indemnity industry standards;

(c) Look at ways of reducing the administrative and legal costs associated with health care litigation; and

(d) Develop a model for the collection of national data on health care negligence cases.

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[1] Namely the WA branches of the Royal Australian College of Obstetricians and Gynaecologists and the Royal Australasian College of Radiologists.

The Jurisdictional Working Party has proposed the established of a broader Medical Indemnity Consultative Forum to assist in addressing these terms of reference. The Working Party is expected to report to AHMAC and the Australian Health Ministers' Conference (AHMC) by July 2001.

Legislative developments in other jurisdictions

Legislation amending the Medical Practice Act 1994 (Vic) was passed by the Victorian Parliament in 2000. Relevantly, the amendments made provision for the involvement of the Medical Practitioners Board of Victoria in setting and enforcing compliance with standards for professional indemnity insurance under cover of which medical practitioners practise medicine. In summary, these changes authorise the Victorian Board to:

- Set minimum standards for professional indemnity insurance;
- Require applicants for registration to provide evidence of the professional indemnity insurance under cover of which they propose to practise medicine;
- Refuse to grant registration to persons whose practice is not covered by professional indemnity insurance that meets the Victorian Board's standards;
- Impose as a condition of registration that a medical practitioner's practice of medicine must be covered by professional indemnity insurance that meets the standards set by the Victorian Board.

The term "professional indemnity insurance" is defined in the Victorian Act to include (as alternatives):

> "… insurance against civil liability in connection with the practice of medicine and an agreement or arrangement for discretionary indemnity in respect of that liability." [1]

Such a definition would appear to satisfy the concern expressed by MDA WA that any proposed comparable requirement in Western Australia should not necessitate doctors each holding insurance, but that appropriate forms of indemnity should be acceptable.

Victoria is, to date, the only State that has legislated to effect a linkage between registration and the enforcement of minimum standards with respect to the professional indemnity under which doctors practise medicine. However, as at March 2001, it is understood that NSW is intended to bring forward legislation to amend its Medical Practice Act to have the same effect.

Working Party's final position

The Working Party confirms its in principle support for the Medical Board having an involvement in ensuring that the practice of medicine in Western Australia occurs under cover of appropriate professional indemnity with respect to civil liability in connection with the practice of medicine.

However, it believes that it would be appropriate at this time, given AHMAC's recent decision to commission work on medical indemnity issues, to await developments nationally and to allow for an examination of how legislative developments proceed in NSW and Victoria. The Working Party also acknowledges that further in-depth consultation with Western Australian stakeholders, notably health consumer groups, MDW WA and the AMA, should occur before a final position on this issue is taken.

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[1] Section 3(1), Medical Practice Act 1994 (Vic).

4.10 Armed forces exemptions

Final recommendation 37 : Armed forces exemptions

The Working Party recommends that the Medical Practitioners Registration Act should retain the intention of section 11AB of the Medical Act 1894.

The Working Party believes that this intent should be achieved by the new legislation providing the Medical Board with the ability in the circumstances envisaged by section 11AB to grant – on an application received from or on behalf of a military doctor – an authorisation that has the effect of exempting the doctor from the ordinary requirement to obtain registration under the Act.

In the case of doctors who accompany foreign visiting forces, the Working Party recommends that it should be a condition of any authorisation granted by the Board that the authorisation is granted only in respect of the provision of medical services by doctors to the members of the armed forces to which they are attached.

In deciding whether to grant an authorisation to a military doctor, the Medical Board should be required to be satisfied in each case that the person in respect of whom an authorisation is sought:

- Has been appointed for the purpose of providing medical services to the members of an armed force in the State; and
- Is qualified to provide those medical services.

Comment on final recommendation 37

Section 11AB of the Medical Act 1894 enables the Medical Board to grant registration to doctors who are attached to the armed forces of the Commonwealth of Australia or of any other country which are in Western Australia with the approval of Australia's Minister of Defence. Although the provision is referred to in the Act as an exemption, it effectively operates as a separate category of specific purpose registration.

The provision is understood to be little used, but is of some value in instances where foreign doctors accompany the armed forces of other countries that come to Western Australia as part of joint military exercises with Australian forces. In this situation, unless exempted or registered, a foreign military doctor would be in breach of the prohibition on non-registrants practising medicine even if the doctor concerned were only to practise medicine on the members of the armed force to which he or she is attached.

Section 11AB provides for the granting of medical registration. The Working Party's preliminary report recommended continuation of this approach.

The Working Party's final view is that it would be more consistent with the intention of this provision to provide in the Medical Practitioners Registration Act that military doctors may be granted an exemption from the new Act's registration requirement by receiving an authorisation from the Medical Board.

An exemption from registration is consistent with the approach taken in the Health Professionals (Special Events Exemption) Act 2000 in respect of the involvement of overseas-trained health professionals in providing health care to the members of overseas teams attending major sporting or cultural events in Western Australia.

No comments were made concerning the proposal to retain the intent of section 11AB in the course of the public consultation on the Working Party's preliminary report.

4.11 Provisional registration

Final recommendation 38 : Provisional registration

The Working Party recommends that the Medical Practitioners Registration Act should enable provisional registration to be granted to applicants for general, specialist, and specific purpose conditional registration pending a decision by the Medical Board on the outcome of the application.

It further recommends that the new Act should define the circumstances in which provisional registration may be granted as follows:

- Where a person appears to be entitled to general, specialist, or specific purpose conditional registration and it is not practicable to wait until the Medical Board can consider the application for registration; or
- Where a person would be entitled to specific purpose conditional registration for the purposes of undertaking a period of internship except for the fact that a degree or award to which the applicant is entitled has not yet been conferred or granted by the awarding institution.

Comment on final recommendation 38

The purpose of provisional registration, broadly, is to enable applicants for registration to commence medical practice before their applications are considered and approved by the Medical Board.

The Working Party's final recommendation in relation to provisional registration is substantially unchanged from the preliminary report. It proposes the retention of the ability to grant provisional registration that is contained in section 12B of the Medical Act 1894.

The final recommendation incorporates a description of the circumstances in which provisional registration may be granted which is drawn from the medical practitioner legislation of the ACT, NSW, Queensland and Tasmania.

No submissions to the review offered substantive comment on this issue.

4.12 Non-practising registration

Final recommendation 39 : Non-practising registration

The Working Party recommends that the Medical Practitioners Registration Act should establish a new category of registration – non-practising registration – to enable a person to retain registration as a medical practitioner subject to the condition that the person does not practise medicine.

The new Act should further provide that:

- A non-practising registrant should be required to apply to the Medical Board if he or she wishes to recommence medical practice; and
- Such application should be treated as if it is an application de novo for general, specialist, or specific purpose conditional registration as the case may be. On assessment of the application, the Medical Board should be able to:
  - Transfer the registration of the person to a practising form of registration, thereby authorising the person to recommence medical practice. Such transfer may be made subject to conditions;
  - Refer the applicant for an assessment of his or her competence to practise medicine under the provisions set out in chapter 8.
- Failure by a non-practising registrant to obtain the Medical Board's approval to re-commence medical practice may be dealt with as unsatisfactory professional conduct on the practitioner's part and subject to the process described in section 8.6.3 of chapter 8 of this report.

Comment on final recommendation 39

The concept of non-practising registration is intended to enable persons who may qualify for registration but who are not intending to practise as medical practitioners (either temporarily or permanently) to retain a link with the medical profession through the registration process. The Medical Board has established a separate register of non-practising medical practitioners, who pay a lower annual practising fee than do their "practising" colleagues. Provision for the granting of non-practising registration is made in the medical practitioner legislation of a number of other jurisdictions, notably NSW and Tasmania.

The final recommendation is intended to make it clear that a non-practising registrant must seek approval from the Medical Board to recommence medical practice, and may be subject to disciplinary action on grounds of unsatisfactory professional conduct if he or she does so except as approved by the Board. In this situation, the Medical Board should be able to assess the person's current knowledge and skill in the practice of medicine and may approve recommencement of medical practice (by transferring the person's registration to a "practising" category of registration).

The Board should be able to refer an applicant for assessment under the competence process set out in chapter 8.

4.13 Registration based on mutual recognition

Final recommendation 40 : Registration based on mutual recognition

The Working Party recommends that the Medical Practitioners Registration Act should retain the intent of section 11AE of the Medical Act 1894, thereby providing an entitlement to an equivalent form of registration in Western Australia for persons who are registered under the medical practitioner legislation of another State or Territory.

This proposed entitlement would be independent of the national scheme of mutual recognition that has been adopted in Western Australia pursuant to the Mutual Recognition (Western Australia) Act 2001.[1]

It is further recommended that the new Act should provide that the entitlement in the Act itself to registration on the basis of registration in another jurisdiction should not have effect while Western Australia is a participating jurisdiction in the national mutual recognition scheme.

Comment on final recommendation 40

Section 11AE of the Medical Act 1894 was added as part of the package of amendments to the Act's registration provisions by the Medical Amendment Act 1994.

In effect, section 11AE enshrines the mutual recognition principle within the Medical Act itself.

The section's purpose, broadly, is to establish an entitlement to general or conditional registration in Western Australia for persons who have the equivalent form of registration under the medical practitioner registration legislation of another State or Territory.

Subsequent to the 1994 amendments to the Medical Act, Western Australia became a participating jurisdiction in the national mutual recognition scheme by passing the Mutual Recognition (Western Australia) Act 1995 and subsequently the Mutual Recognition (Western Australia) Act 2001.

The intention of the final recommendation is twofold:

- First, to continue to enshrine the principle of mutual recognition in the Medical Practitioners Registration Act itself.

  This will establish an entitlement to medical registration in Western Australia for medical practitioners in other States and Territories that is independent of the national mutual recognition scheme (as adopted in Western Australia by the Mutual Recognition (Western Australia) Act 2001); and

[1] Passed in June 2001 in succession to the Mutual Recognition (Western Australia) Act 1995, which had ceased to have effect from 28 February 2001 (the "termination date" of that Act).

- Second, to recognise the primacy of the legislation establishing the national mutual recognition scheme by making clear that the provision for mutual recognition incorporated into the new Act itself does not have effect while Western Australia is a participating jurisdiction in the national mutual recognition scheme. This approach is the same as taken in the Osteopaths Act 1997.[1]

4.14 Deemed registration in medical emergencies

Final recommendation 41 : Deemed registration in medical emergencies

The Working Party recommends that the Medical Practitioners Registration Act should incorporate a provision modelled on section 112 of the Medical Practice Act 1992 (NSW) to provide deemed registration for persons who:

- Are registered as medical practitioners in another State or Territory; and
- Provide medical assistance in emergency situations and in connection with organ retrieval while in Western Australia.

Comment on final recommendation 41

This recommendation is unchanged from the preliminary report. It was supported by the AMA and in submissions received from the WA branch of the Royal Australasian College of Surgeons and the Royal College of Pathologists of Australasia.[2]

Section 112 of the NSW Act provides as follows:

> **"Medical service rendered by persons registered elsewhere**
>
> 112. (1) The giving or performance of any medical or surgical advice, service, attendance or operation by a recognised foreign practitioner in an emergency or for the purpose of organ harvesting or transplantation in accordance with the Human Tissue Act 1983[3] has the same legal effect as if the person had been registered under this Act at that time.
>
> (2) A "recognised foreign practitioner" is a person who is duly registered as a medical practitioner under the law in force in another State or a Territory or in New Zealand."

[1] Cf. s.22(4), Osteopaths Act 1997.

[2] The Royal College of Pathologists of Australasia queried whether the deeming provision should also apply to medical practitioners who are registered in the UK, Europe, the USA and Canada.

[3] The equivalent Western Australian legislation being the Human Tissue and Transplant Act 1982.

4.15 The Register

Final recommendation 42 : The Register

The Working Party recommends that the Medical Practitioners Registration Act should:

- Require the Medical Board to maintain a Register of persons who are registered under the new Act. The Register should allow for the identification of persons who have general, specialist and specific purpose conditional forms of registration;

- Require the Register to be maintained in electronic and paper formats and for other characteristics of the Register's form to be prescribed by subsidiary legislation;

- Require the Medical Board to:

  - Provide access to the Register for inspection (without charge) at its place of business during ordinary office hours;

  - Arrange for the Register to be accessed by electronic means (ie via the Internet);

  - Provide a hard copy extract of the Register or a copy of the whole Register to any person who requests it on payment of a prescribed fee.

- Prescribe the information to be included in the Register in relation to each registrant to be:

  - The registrant's full name and contact address (business or practice address or home address);

  - A unique numerical identifier assigned by the Medical Board;

  - The date of the registrant's initial registration;

  - Details of the registrant's medical qualifications (including fellowships and specialist qualifications held by the registrant that are recognised by the Medical Board);

  - Details of conditions that have been applied to the registrant's registration and the period of time during which each condition has, or had, effect;

  - Details of any action ordered against the registrant by the Medical Tribunal on grounds of unsatisfactory professional conduct;

  - Any other information that may be prescribed by subsidiary legislation.

Comment on final recommendation 42

Final recommendation 42 sets out proposed requirements relating to the Register, including arrangements for access and the information to be maintained in the Register in relation to individual registrants.

As compared to comparable provisions currently in the Medical Act 1894, the recommendation proposes the following main changes:

- The current requirement placed on the Medical Board to arrange for the Register's publication annually in the Government Gazette is discontinued.[1] Gazetting the Register is not thought to be an efficient way of informing the public as to who is registered under the Act. In its place it is proposed to require the Board to arrange for the Register to be maintained and made accessible by electronic means (eg via the Internet);

- The information that, as a minimum, should be recorded in the Register in relation to individual registrants is proposed to be stated in the new Act (with the ability to extend the minimum information requirements by subsidiary legislation in the interests of administrative flexibility). This mirrors the situation in section 28 of the Osteopaths Act 1997.

4.16 Certificates of registration

Final recommendation 43 : Certificates of registration

The Working Party recommends that the Medical Practitioners Registration Act should require the Medical Board to issue a certification of registration to each person who is registered.

Purpose

Certificates should be used and taken as evidence (in the absence of evidence to the contrary) that the person to whom the certificate is issued is a registered medical practitioner.[2]

Form of certificate

The certificate should contain:

- The registrant's full name;

- A unique numerical identifier assigned by the Medical Board;

- The date of the registrant's initial registration;

- The relevant category of registration (ie general, specialist, or specific purpose conditional);

[1] Discontinuation of this requirement was supported in the Ministry of the Premier and Cabinet's submission to the review.

[2] Cf. s.30(2), Osteopaths Act 1997.

Final recommendation 43 : Certificates of registration (continued)

Form of certificate (continued)

- Details of the registrant's medical qualifications (including fellowships and specialist qualifications held by the registrant that are recognised by the Medical Board),

but should otherwise be in a form determined by the Board.

Replacement of certificates

The new Act should enable a registrant to apply to the Medical Board for a replacement of a certificate that has been lost, stolen, damaged or destroyed.

If the Board is satisfied that a certificate has been lost, stolen, damaged or destroyed it should be required to issue a replacement certificate to the registrant on payment of a prescribed fee. In addition, if there is a change in the information held in respect of a registrant in the Register that affects the contents of a certificate of registration, the Medical Board should be required to issue a new certificate to the registrant.

Certified copy of certificate

The new Act should enable a registrant to obtain a certified copy of his or her certificate of registration from the Medical Board on payment of a prescribed fee.

Surrender of certificates

The new Act should require registrants whose registrations are ended at their request or that are suspended or cancelled to return their certificates of registration to the Medical Board within 14 days. Failure to do so should be an offence.

Comment on final recommendation 43

The preliminary report had recommended that provision should be made in the Medical Practitioners Registration Act for the Medical Board to continue to be subject to a requirement to issue certificates of registration to registered medical practitioners.[1]

The recommendation attracted only one direct comment in submissions made to the review, namely from the AMA. The Association noted its support for the recommendation.

The final recommendation has been modified to provide further details of the purpose and content of certificates and of requirements relating to their replacement and surrender. The modified recommendation draws on comparable provisions that have been included in Queensland's Medical Practitioners Registration Bill 2000.

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[1] This requirement is stated in s.16 of the Medical Act 1894.

The modifications have been made out of recognition of the evidentiary purpose that certificates are intended to serve (hence the need for their updating and replacement) and to accommodate general comments made by consumers about the need to have ready access to information concerning a medical practitioner's qualifications.

4.17 Removal of names from the Register

Final recommendation 44 : Removal of names from the Register

The Working Party recommends that the Medical Practitioners Registration Act should authorise the Medical Board to remove the names of persons from the Register in the following situations:

- If the Board is satisfied that a decision to grant registration (either general, specialist, or specific purpose conditional registration) was made on the basis of fraudulent or materially incorrect claims made by an applicant;
- If a registrant fails to pay the prescribed annual practice fee by the due date;
- If the Medical Tribunal orders that a person's registration should be suspended or cancelled on grounds of impairment, competence or professional conduct;
- If the registration of a person as a medical practitioner under a corresponding law of another State or Territory is suspended or cancelled pursuant to action taken under that corresponding law;
- If a medical practitioner requests the Medical Board in writing to remove his or her name from the Register (the Board having the discretion to remove the person's name but may refuse to do so if the person is the subject of proceedings, or possible proceedings, under the Act);
- On the death of a medical practitioner.

Comment on final recommendation 44

This recommendation is unchanged from the preliminary report in all but one material respect.

The preliminary report had proposed that the Medical Board should be able to remove from the Register the name of a medical practitioner who the Board considered had not had sufficient experience in the practice of medicine in the five year period preceding an application for renewal of registration.

This specific proposal is not reflected in the final recommendation. This omission recognises that any decision to order the cancellation of a person's registration of grounds that the person has not had sufficient recent experience in the practice of medicine would be taken by the Medical Tribunal under the revised proposals presented in chapter 8 of this report.

4.18 Restoration of names to the Register

Final recommendation 45 : Restoration of names to the Register

Restoration following removal for non-payment of annual practice fee

The Working Party recommends that the new Act should enable the Medical Board to restore to the Register the name of any person whose name is removed for failure to pay the annual practice fee by the due date. This restoration should be subject to the person paying all outstanding fees to the Board and an additional prescribed financial penalty for late payment of the fee.

Restoration following removal at individual's request

The new Act should enable a person whose name has been removed from the Register at his or her request to make application to the Medical Board to have his or her name restored.

In this situation, the Board should have the discretion to restore the person's name if the Board is satisfied in relation to all of the matters it would be required to be satisfied about when granting initial registration in the particular category of registration to which restoration is sought.[1]

Restoration following removal by order of the Medical Tribunal

If a person's name has been removed from the Register following a decision by the Medical Tribunal to suspend the person's registration, it is recommended that the new Act should require the Medical Board, at the end of that period of suspension, to restore the person's name to the Register.

If a person's name has been removed from the Register following a decision by the Medical Tribunal to cancel the person's registration, it is recommended that the following should apply:

- The person should be able to apply to the Tribunal, after a period of not less than 2 years, for a review of the decision to cancel the person's registration;
- The Tribunal should be able to dismiss the application or review the decision to cancel the person's registration. For the purpose of such review the Tribunal should be able to:
  - Call for, and take account of, submissions from parties the Tribunal considers have an interest in the review;
  - Require the person who has requested the review to appear before it, answer questions under oath, and produce documentation; and
  - Require the person who has requested the review to participate in any assessment (including medical examination, assessment of competence) the Tribunal considers necessary to inform its decision in relation to the review.

[1] Cf. s.36(1) & (2), Osteopaths Act 1997.

Final recommendation 45 : Restoration of names to the Register (continued)

Restoration following removal by order of the Medical Tribunal (continued)

- At the conclusion of its review, the Tribunal may decide to dismiss the application or order that the person's name be restored to the register with or without conditions.

Restoration following removal for because of action in another jurisdiction

The Working Party recommends that the new Act should authorise the Medical Board to restore to the Register the name of a person whose name is removed as a result of action taken against the person under a corresponding law of another State or Territory.

The Board should be able to do so on being notified by the Medical Board of the other relevant State or Territory that the person's name has been restored to the Medical Register of that other State or Territory.

Comment on final recommendation 45

Final recommendation 45 identifies the circumstances in which, and procedures by which, a person's name may be restored to the Register following removal pursuant to final recommendation 44.

No submissions relevant to this recommendation were made to the review.

4.19 Amending the Register

Final recommendation 46 : Amending the Register

The Working Party recommends that the Medical Practitioners Registration Act should enable the Medical Board to amend any entries made in the Register in respect of a medical practitioner:

- On an application received from the practitioner concerned; and
- If satisfied that the amendment is properly made.[1]

The Medical Board should also be able to amend the Register to maintain its accuracy (eg by including additional conditions that may have been applied to a person's registration).

Comment on final recommendation 46

This recommendation is unchanged from the preliminary report.

[1] Cf. s.32, Osteopaths Act 1997.

4.20 Notifications to the Medical Board

Final recommendation 47 : Notifications to the Medical Board

Notifications that could trigger action by the Medical Board

A medical practitioner should be required by the Medical Practitioners Registration Act to notify the Medical Board:

- In the event that a writ of summons relating to a claim for civil liability in connection with his or her practice of medicine is served on the practitioner or the practitioner's employer (eg a health service);
- If the practitioner is found guilty of an offence against the Health Insurance Act 1973 (Cth) or of any criminal offence in connection with his or her practice of medicine.
- If the practitioner becomes an insolvent under administration, as defined by the Corporations Law.

Failure to provide notification of any of these matters should be an offence.

Notifications for information

A medical practitioner should also be required by the Medical Practitioners Registration Act to notify the Medical Board if there is a change in any of particulars recorded in the Register in relation to the practitioner.

Comment on final recommendation 47

The recommendation that medical practitioners should be required to notify certain matters to the Medical Board was the subject of a number of submissions made to the review.

In relation to the involvement of medical practitioners in civil litigation relating to their practice of medicine, the recommendation in the preliminary report had been that a practitioner should be required to notify the Medical Board when:

> "… an order or award of damages is made against the practitioner in civil proceedings arising out of the medical practitioner's practice of medicine; " [1]

The Medical Defence Association of Western Australia and the AMA noted that it would be of concern if this element of the recommendation were to be interpreted in a way that would require medical practitioners to disclose details of settlements reached in civil proceedings in notifications to the Board.[2]

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[1] Medical Act Review Working Party (2000) Report of a review of the Medical Act 1894 prepared by a Working Party established by the Minister for Health. Published by the Health Department of Western Australia, pp 98-9.

[2] However, one submission to the review from a consumer (Ms Karen Carey-Hazell) suggested that the new Act should prohibit the use of confidentiality clauses in pre-trial settlements that are agreed between medical practitioners and plaintiffs. This suggestion was not generally supported by the Working Party.

This was not the intention of the recommendation in the preliminary report.

The purpose of the proposed notification requirements may broadly be described as to enable the Medical Board to be informed of matters that may cause it to initiate a review in accordance with the procedures recommended in chapter 8 of this report. This is consistent with the Board's general oversight responsibility for medical practice in the State. The Working Party does not consider that this necessarily requires information about the settlement of claims to be provided to the Board.

The final recommendation has been modified to identify a different "trigger" event for the notification requirement, namely the receipt of a writ of summons claiming civil liability in connection with a practitioner's practice of medicine. In the conduct of civil litigation, the issue of a writ may be regarded as an indication that a complainant has an intention to pursue a grievance through the court system if necessary.

In reviewing the proposed notification requirements it is important to understand that the new Act will contain no implied or actual requirement for the Medical Board to take any particular action on receipt of a notification. Notifications are, as indicated above, intended to inform a "watching brief" by the Board. In any particular case, receipt of a notification that a practitioner has been convicted of an offence against the Health Insurance Act 1973 (Cth) (for example) could trigger a Board decision to initiate an inquiry into the practitioner's professional conduct. In other cases, the Board may decide that the notification in itself does not give rise to sufficient cause for concern for any action on its part to be contemplated.

The final recommendation has also been modified to distinguish between notifiable matters that could trigger action by the Medical Board (in the form of a review of a person's registration) and the notification of changes concerning the information held about medical practitioners on the Register (eg change of address).

4.21 Rights of appeal arising from registration decisions

Final recommendation 48 : Rights of appeal arising from registration decisions

The Working Party recommends that the Medical Practitioners Registration Act should establish broad rights of appeal to the proposed Medical Tribunal arising from registration decisions by the Medical Board.

It is recommended that the following decisions should be appealable to the Tribunal:

- A decision to refuse to grant general, specialist or specific purpose conditional registration in any particular case, or to refuse to renew the registration of an existing applicant in each registration category;
- A decision to grant, or renew, registration for a period of time that is less than the prescribed period (final recommendation 29 refers);
- A decision to refuse to renew registration, or to renew registration subject to conditions, on the grounds that the Medical Board considers that an applicant for renewal of registration has not had sufficient experience, or has not maintained adequate knowledge or skill, in the practice of medicine (final recommendation 30 refers);
- A decision concerning the application of conditions to a person's registration (appeal rights are detailed in final recommendation 34);
- A decision to refuse the grant of registration on the basis that a person is registered as a medical practitioner in another State or Territory (final recommendation 40 refers);
- A decision to remove the name of a person from the Register where the decision is taken without the consent of the individual concerned (final recommendation 44).

It is recommended that appeals should take the form of a rehearing of the matter before the Medical Tribunal, with the Tribunal having power to:

- Dismiss an appeal;
- Affirm, vary or quash a decision or order of the Medical Board; and
- Make any incidental or ancillary order.

A right of appeal against decisions of the Medical Tribunal following its hearing of appeals in relation to Medical Board registration decisions should lie to the Supreme Court, but should be limited to points of law only.

Comment on final recommendation 48

The recommendation in the preliminary report that there should be broad rights of appeal against registration decisions of the Medical Board to the proposed Medical Tribunal was supported in submissions to the review made by the AMA and the Australian Competition and Consumer Commission.

Final recommendation 48 indicates the specific decisions by the Medical Board that should be subject to appeal to the Medical Tribunal.

It also confirms the Working Party's view that, once a matter has been the subject of a fresh hearing on appeal to the Tribunal, appeals to the Supreme Court against Tribunal decisions should be limited to matters of law only.

This aspect of the proposed appeal system was not commented on in submissions to the review.

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CHAPTER 5 : REGULATION OF CORPORATE PROVIDERS OF MEDICAL SERVICES

Introduction

This chapter considers whether, and if so what, measures should be taken in the Medical Practitioners Registration Act to regulate the involvement in providing medical services of corporate owners and providers of management services.

The issue of corporate involvement in the provision of medical services, particularly general practitioner services, emerged as a significant area of interest in the course of the review. This interest is related to the rapid corporatisation of general practitioner services occurring in Western Australia at this time.

Summary of recommendations in Chapter 5

This chapter proposes that:

- The Medical Practitioners Registration Act should include a requirement that corporations and other legal entities wishing to carry on a business involving the provision of medical services by registered medical practitioners must first obtain authorisation from the Medical Board;
- Appropriate transitional arrangements should apply to legal entities that are involved in the provision of medical services in Western Australia at the point where the new legislation comes into operation;
- The Medical Board should be able to refuse to grant authorisation to a corporate body if it has reason to believe that the clinical autonomy of registered medical practitioners is likely in any particular case to be compromised to the detriment of patient care;
- The Medical Board should have the ability to grant authorisation subject to conditions;
- There should be a right of appeal to the Medical Tribunal against a decision by the Medical Board to refuse authorisation or to grant authorisation subject to conditions;
- New offences should be created:
  - Where a legal entity or a person in a position of authority in a legal entity that is a corporation directs or incites a registered medical practitioner to engage in conduct that would be grounds for the Medical Board taking action against the practitioner for unsatisfactory professional conduct (eg over-servicing);
  - Where a person, legal entity or person in a position of authority in a legal entity offers or accepts a benefit as an inducement or reward for patients being referred to particular registered medical practitioners or recommended to use particular health services.
- The Medical Tribunal should have the ability to review and revoke the authorisation granted to a legal entity in certain circumstances.

Background

The Working Party's review was conducted against a background of rapid corporatisation of general practices in Western Australia, such that more than a third of general practices in the State are estimated to have been taken into the corporate sector through practice buy-outs or the institution of practice management arrangements.

These developments, and the attitudes of key stakeholders to them, were examined by a major review undertaken by KPMG Consulting on behalf of the Commonwealth Department of Health & Aged Care, the report of which was released in May 2000.[1]

At Annexure F is a Review Working Paper on corporate regulation which was considered by the Working Party.

In summary this paper:

- Outlines broad options for the regulatory response that could be made to the corporatisation of general practitioner services in Western Australia;
- Contains an extract from the Working Party's preliminary review concerning body corporate regulation;
- Summarises the public submissions made regarding body corporate regulation in response to the release of the Working Party's preliminary report;
- Identifies key issues that were raised about the corporatisation of general practice by stakeholders in the KPMG report; and
- Summarises recent legislative developments in New South Wales and Queensland that are relevant to regulation of the corporate medical sector.

The Working Party would begin by acknowledging that corporatisation of medical services presents a complex policy environment in which to be contemplating legislative change.

As the stakeholder consultation conducted by KPMG illustrates, there are benefits as well as potential risks associated with the corporatisation of medical services.

The pace of general practice corporatisation in Western Australia would suggest that the benefits of corporatisation from a general practitioner perspective (eg lifestyle and career choices, improved efficiency, and earlier realisation of equity) are attractive for many.

Similarly, health consumers have indicated support for developments that improve service access, facilities and integration, leading to service enhancements.

Realisation of these benefits for general practitioners and consumers is to a considerable extent dependant on the injection of capital and management expertise that is associated with corporatisation.

[1] KPMG Consulting (2000) Corporatisation of General Practice – Scoping Paper prepared for the Commonwealth Department of Health & Aged Care.

It has long been recognised, not least by Commonwealth initiatives aimed at encouraging the amalgamation of smaller general practices, that much of general practice has remained undercapitalised. This reflects the origins of general practice as small “cottage industry” style businesses. Undercapitalisation has consequences for business efficiency in the general practice sector, and for the pace of service enhancements and developments in response to contemporary consumer requirements and expectations.

The injection of both capital and business management skills to a sector that has traditionally lacked both are important benefits of corporatisation. The majority view among the Working Party’s membership is that access to both types of benefit should be preserved in any legislative response that may be made to corporatisation in new medical practitioner legislation for Western Australia.

Indeed, the Working Party would note that, since the 1993 review of the Medical Act was completed, the State itself has commenced arrangements with private and publicly listed corporations for the provision of hospital facilities and treatment services for public patients. Thus corporate involvement in the provision of medical services is not confined to the general practice and private hospital sectors.

In relation to the potential risks associated with corporatisation in the general practice sector that are referred to in the KPMG report, the Working Party would note that not all are amenable to action under medical practitioner registration legislation.

For example, the exposure of general practitioners who are employed in, or engaged by, a corporate entity when the entity suffers financial failure is not a matter for consideration in the context of the new Act. The Working Party would note that, under the traditional equity-based model of general practice ownership, the associated small business risk of financial failure was carried by general practitioners themselves. Similarly:

- The Working Party would note that consumer concerns about the possible impact of corporatisation on the geographical accessibility of general practitioner services (as a result of the amalgamation of smaller practices, for example) is outside the scope of its review; and

- The possible impact of corporatisation on Commonwealth expenditure on the Medicare Benefits Schedule (MBS) and on shared State – Commonwealth financial responsibilities for health care is also outside the scope of the Working Party’s review.

In relation to other possible consequences of corporatisation, the Working Party believes that there are firmer grounds for measures to be included in the new legislation. Specifically, the Working Party considers there is a need for new medical practitioner legislation for Western Australia to protect the independence of medical practitioners in relation to clinical decision-making. The Working Party’s view is that legislative intervention in relation to this issue is warranted in the public interest.

Relevant issues are well-canvassed in the KPMG report.

The vertical integration of medical services involving the bringing together of primary medical, diagnostic, and possibly secondary and tertiary medical services within the same corporate structure creates incentives for:

- Patient flows to be retained within the one structure; and

- Inappropriate servicing of patients to occur in the context of the Medicare system.

The Working Party acknowledges that the vertical integration of medical services could be in the interests of patients if such integration promotes continuity and timeliness of care. But there are also attendant risks that the clinical autonomy of medical practitioners may be compromised by overtly commercial pressures and considerations within corporations.

Submissions to Medical Act Review

Responses to the Working Party's preliminary report on the question of body corporate regulation were mixed (refer to Appendix B, Annexure F).

The AMA advocates the view that the new legislation should establish that medical practices may only be owned by natural persons who are themselves registered medical practitioners or by corporate bodies that are comprised entirely of registered medical practitioners, citing the precedent in the pharmacy sector.

In contrast, the submission by the ACCC noted its opposition to ownership restrictions and its view that such restrictions are difficult to justify on public interest grounds.

Health consumers, to the extent that they commented on this issue in the course of the review, indicated support for regulation to be applied to the activities of corporate providers of medical services in order to safeguard consumer interests.

Only one public submission to the review was received from a corporate provider of medical services, namely Westpoint Healthcare. Westpoint's submission highlighted the benefits of corporate involvement and noted that its contracts incorporate standard clauses aimed at preserving the clinical independence of the general practitioners with whom it enters agreements to provide management services.

Working Party's final position

The Working Party's final position on this issue was reached having regard to the material contained in the Review Working Paper at Annexure F.

In relation to the ownership of medical practices, the majority view among the Working Party's membership does not support the AMA's position that the new Act should restrict the ownership of medical practices to registered medical practitioners.

As has been noted, a significant (and growing) minority of general practitioners in Western Australia have already sold their practices into corporate ownership, making this option impractical even assuming that it were desirable. This option would also compromise access to capital and management expertise that corporate ownership brings to the general practice sector and that the Working Party acknowledges to be important benefits of the corporatisation process.

The Working Party reviewed legislative developments[1] in NSW and Queensland which in both cases have involved the creation of offences that link actions by a corporate owner/manager with grounds for disciplinary action relating to professional misconduct and over-servicing by registered medical practitioners.

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[1] Relevant legislative developments in NSW and Queensland are summarised in Attachment II of Annexure F to this report.

The legislation in both NSW and Queensland also provides that persons who are found guilty of these offences may be precluded by administrative (NSW) or judicial (Queensland) order from having further involvement in the ownership or management of medical services for a defined period, or possibly indefinitely.

The approaches adopted in NSW and Queensland are consistent with a negative licensing regime, ie there is no positive requirement for corporations or individuals wishing to become involved in providing medical services to seek registration or some other form of authorisation involving a positive approval process. However, regulatory action can be taken where clinical autonomy within a corporation is compromised, as evidenced by a conviction for the relevant NSW or Queensland offences.

The Working Party's majority view is that the regulatory approaches adopted in NSW and Queensland, based on negative licensing, do not go far enough having regard to the public protection objective of the proposed new medical practitioner legislation for Western Australia.

The Working Party is concerned in particular that commercial and shareholder considerations within corporations are likely to be such that stronger legislative measures need to be applied as a disincentive to pressure being brought to bear on the independence of medical practitioners in their clinical decision-making.

The Working Party therefore favours and recommends the institution of a positive system of approval and regulation of corporate providers of medical services. The Working Party's recommendations as to how this approval system should operate are detailed below with appropriate supplementary commentary.

5.1 Purpose of regulation of corporate providers of medical services

Final recommendation 49 : Purpose of regulation of corporate providers of medical services

The Working Party recommends that the Medical Practitioners Registration Act should incorporate, as a general statement of the purpose of provisions relevant to the regulation of corporate providers of medical services, that these provisions are intended:

- To protect the professional independence and autonomy in clinical decision-making of medical practitioners who are employed by, or who enter arrangements with, the legal entities to which the recommendations in this chapter apply; and
- To ensure that provision of effective, high quality patient care remains the first concern of medical practitioners who provide medical services in, or in association with, the legal entities to which the recommendations in this chapter apply.

Clinical decision-making refers to decisions taken by a registered medical practitioner concerning the clinical care of his or her patients, and includes decisions concerning:

- The frequency and duration of consultations;
- Referrals to providers of diagnostic services (ie pathology, radiology); and
- Referrals to other medical practitioners, including for specialist treatment.

Comment on final recommendation 49

The Working Party would see advantage in all provisions relevant to the regulation of corporate providers of medical services appearing in a separate part of the Medical Practitioners Registration Act, as occurs in the NSW Medical Practice Act 1992 (Part 8A of that Act[1] refers).

Final recommendation 49 is intended to provide guidance in the legislation as to the purpose of the provisions relevant to corporate providers of medical services, and would thus provide a statement of the purpose of the stand-alone part of the Act dealing with corporate regulation.

[1] Inserted by the Medical Practice Amendment Act 2000 (NSW).

5.2 Application of corporate regulation provisions

Final recommendation 50 : Application of corporate regulation provisions

The Working Party recommends that the recommendations set out in this chapter of the report that are relevant to corporate providers of medical services should apply to any "person"[1] who carries on a business involving the provision of medical services by registered medical practitioners.

The term "carry on business" should be defined to cover the following situations:

- The ownership, management, control, conduct or operation by a "person" of a business in which medical practitioners are employed for the purpose of providing medical services; and
- The provision of management services by a "person" for the purpose of facilitating the provision of medical services by a registered medical practitioner in return for which the "person" is entitled to receive a share or interest in the profits or income arising from the practice of medicine by the practitioner.

The Working Party further recommends that the recommendations set out in this chapter of the report should not apply to:

- The Crown in right of the State of Western Australia;
- Any "person" with whom the Crown enters arrangements for the provision of hospital and other health services to public patients, but only in respect of the "person's" involvement in the provision of those services;
- Any "person" who is the licensee of a facility licensed pursuant to Part 3A of the Hospitals and Health Services Act 1927, but only in respect of the activities for which a licence is required under that part.

The Working Party further recommends that the new Act should provide for the prescription, by subsidiary legislation, of other exemptions.

Comment on final recommendation 50

Final recommendation 50 defines the scope of the application of provisions that are recommended to be contained in the new Act relevant to corporate providers of medical services and other legal entities involved in the provision of medical services by registered medical practitioners. It also contains recommended exemptions.

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[1] The term "person" as used in this recommendation is intended to have the same meaning as that term has in the Interpretation Act 1984:

> "person" or any word or expression descriptive of a person includes a public body, company, or association or body of persons, corporate or unincorporate;" (s.5, Interpretation Act 1984).

Use of the term "person" – as that term is defined in the Interpretation Act 1984 – is intended to convey that any legal entity (and not just corporate bodies) that carries on a business in the ways described in the recommendation should be subject to the regulatory controls set out in this chapter.

In the majority of cases, the legal entities to which the recommendation applies will be incorporated bodies. The Working Party would note, however, that restricting the scope of the proposed regulation to bodies corporate could have the unintended effect of creating an incentive for alternative legal arrangements to be instituted in order to avoid the regulatory controls described in this chapter.

"Relevant legal entities"

The term "relevant legal entities" is used in the remainder of this chapter to refer to natural persons, bodies corporate and unincorporate, and other forms of association to which the regulations proposed in this chapter will apply.

The Working Party acknowledges that one consequence of the reliance on the Interpretation Act's definition of "person" is that the proposed regulatory regime will apply to natural persons, including registered medical practitioners, who carry on business in the ways described in final recommendation 50. The Working Party considers this to be appropriate. It acknowledges that this may mean that a natural person may be eligible for the grant of medical registration under the new Act, but may not necessarily become authorised by the Medical Board to carry on a business involved in the provision of medical services by other registered medical practitioners.

The recommendation draws on the extended concept of "carrying on a business" which is included in section 116C of the Medical Practice Act 1992 (NSW) for a similar purpose.

The recommendation is intended to capture situations where a relevant legal entity either provides medical services through the employment of registered medical practitioners or else facilitates the provision of medical services by registered medical practitioners (by providing management services, for example). In the latter case, the scope of the proposed legislation is intended to be limited to situations in which income sharing from the practice of medicine between a registered medical practitioner and a relevant legal entity occurs.

The Working Party proposes that an exemption should apply to the Crown and in respect of the provision of hospital services whether for public and private patients.

The proposed exemption for providers of hospital services – whether to public patients under contract with the Crown or providers of private hospital services – reflects the following considerations:

- The concerns that have lead the Working Party to frame the recommendations included in this chapter of the report relate primarily to the impact of corporatisation on medical practitioners operating in the general practice sector; and

- Regulation of corporate providers of private hospital services is more appropriately a matter for the Hospitals and Health Services Act 1927. The Commissioner of Health already has responsibility under Part 3A of that Act to approve (by way of licensing) bodies corporate that wish to operate private hospitals.

The Working Party would acknowledge the incentives that exist for corporations to vertically integrate their operations such that general practitioner and hospital services are brought together under a single corporate structure. As noted previously, the potential risks to quality of care and independent clinical decision-making attendant upon developments of this kind are a primary reason for the proposed regulation in this area.

The Working Party would confirm its intention that the exemption proposed in final recommendation 50 in relation to the involvement of relevant legal entities in the provision of hospital services should not exempt the same relevant legal entities from seeking authorisation to carry on a business in the ways defined in the recommendation.

The proposed exemption is intended to be limited in scope to the activities for which a licence is required under Part 3A of the Hospitals and Health Services Act 1927. The fact that a corporate body is approved by the Commissioner of Health under Part 3A of that Act to operate a private hospital or has entered an agreement with the State of Western Australia to provide hospital services for public patients is not intended to exempt the same corporate body from seeking authorisation to carry on a business involving the provision of general practitioner medical services under the Medical Practitioners Registration Act.

5.3 Requirement to obtain authorisation

Final recommendation 51 : Requirement to obtain authorisation

The Working Party recommends that the Medical Practitioners Registration Act should require relevant legal entities to be authorised by the Medical Board in order to carry on a business involving the provision of medical services by registered medical practitioners.

Failure on the part of a relevant legal entity to which this requirement applies to obtain authorisation should be an offence.

The new Act should contain transitional provisions that exempt relevant legal entities that are carrying on a business involving the provision of medical services at the point where the new legislation comes into operation from committing this offence for a period of 6 months pending an application and decision concerning authorisation, or until a decision concerning authorisation is made.

Comment on final recommendation 51

Final recommendation 51 confirms the Working Party's view that relevant legal entities should be required to obtain authorisation from the Medical Board in relation to their carrying on a business involving the provision of medical services. It proposes a transitional period of 6 months for relevant legal entities that are engaged in providing medical services at the point where the authorisation requirement comes into operation.

The new Act should provide for this period of exemption to continue until a decision on the outcome of an application for authorisation, or of an appeal against a decision to refuse authorisation, is known.

5.4 Information to be provided by relevant legal entities seeking authorisation

Final recommendation 52 : Information to be provided by relevant legal entities seeking authorisation

The Working Party recommends that, in an application submitted to it seeking authorisation to carry on a business involving the provision of medical services, the Medical Board should be able to require the following information to be provided to it:

- The names of all persons who have a significant financial interest in, or otherwise have a significant involvement in the direction and management of, the relevant legal entity that is applying for authorisation.

  This should be defined to include:

  - The directors, persons who have a significant shareholding (eg above a prescribed percentage), and persons having responsibility for the direction and management of a relevant legal entity that is a corporation (including the corporation's executive officer); and

  - All partners in a partnership.

- All business names under which the relevant legal entity operates, or proposes to operate;

- The relevant legal entity's principal place of business;

- Details of the agreements that the relevant legal entity has, or proposes to have, with registered medical practitioners regarding the relationship, or proposed relationship, between the relevant legal entity and registered medical practitioners in relation to the provision of medical services, including clinical decision-making, by registered medical practitioners;

- In the case of corporate bodies, a copy of the memorandum and articles of association of the corporation;

- The names and dates of initial registration of the registered medical practitioners (other than temporarily employed medical practitioners, eg locums) with whom the relevant legal entity carries, or proposes to carry, on a business involving the provision of medical services;

- Any other information the Medical Board reasonably requires to inform a decision by it as to whether the relevant legal entity should be authorised to carry on a business involving the provision of medical services by registered medical practitioners.

The form of an application for authorisation should be determined by the Medical Board.

Provision should be made in the new Act for applicants for authorisation to pay a prescribed fee.

Comment on final recommendation 52

Final recommendation 52 details the information that the Medical Board should be able to require relevant legal entities seeking authorisation to supply to it as part of an application for authorisation.

The Working Party considers that it will be important for the Medical Board to be able to be aware of the details of agreements that the relevant legal entity proposes to enter into with registered medical practitioners in relation to clinical matters. The purpose of this scrutiny is to enable the Board to come to a view as to whether the autonomy of registered medical practitioners in clinical decision-making is likely to be compromised under an arrangement entered into between themselves and the relevant legal entity. It is not intended that this should necessarily involve the Medical Board in examining the content of actual contractual agreements entered into by relevant legal entities.

5.5 Authorisation by the Medical Board

Final recommendation 53 : Authorisation by the Medical Board

The Working Party recommends as follows:

Decision concerning authorisation

The new Act should require the Medical Board to grant authorisation to a relevant legal entity to carry on a business involving the provision of medical services unless the Board believes on reasonable grounds that the relevant legal entity would be likely, if authorised to carry on that business, to act in a way that would be intended to compromise the professional autonomy and independence in clinical decision-making of the registered medical practitioners with whom it carried on the business.

The Medical Board should be entitled to presume that a relevant legal entity would be likely, if authorised, to act in the way described if it is a relevant legal entity:

- That has been convicted of one of the offences described in final recommendation 57; or
- Being a body corporate, has, in a position of authority, a person who has been convicted of one of the offences described in final recommendation 57; or
- Whose authorisation to carry on a business providing medical services has previously been revoked pursuant to a review conducted by the Medical Tribunal in accordance with final recommendation 59; or
- Which is substantially similar (in terms of the directors, persons having a significant shareholding, or persons having responsibility for the direction and control of the entity) to a relevant legal entity:
    - That has been convicted of one of the offences described in final recommendation 57; or
    - Whose authorisation has been revoked pursuant to a review conducted by the Medical Tribunal in accordance with final recommendation 59.

Final recommendation 54 : Authorisation may be granted subject to conditions

The Working Party recommends that the Medical Practitioners Registration Act should enable the Medical Board to grant authorisation to a relevant legal entity subject to such conditions as the Board thinks appropriate consistent with the purpose stated in final recommendation 49.

Such conditions may include the following:

- That the relevant legal entity incorporate a statement that is acceptable to the Medical Board in its agreements with registered medical practitioners acknowledging that such practitioners have professional autonomy and independence in clinical decision-making in their relationship with the relevant legal entity;

- That the relevant legal entity:

    - Establish a Medical Advisory Committee composed of an agreed number of medical practitioners with whom the relevant legal entity carries on a business of providing medical services;

    - Appoint as chairperson of such Medical Advisory Committee a medical practitioner who has no financial interest in the relevant legal entity and who is acceptable to the Medical Board;

    - Consult with, and have regard to the views expressed by, the Medical Advisory Committee in relation to clinical matters in carrying on the business of providing medical services.

- That the relevant legal entity comply with a code of practice issued by the Medical Board (subject to the approval of the Minister) dealing with the permitted uses and confidentiality of patient records that come into the ownership or control of the relevant legal entity.

  For the purpose of preparing any such code, the elements of final recommendation 20 dealing with the preparation of codes of professional conduct, adoption of standards through codes, process of approval, and status of codes as subsidiary legislation are to apply.

Comment on final recommendations 53 & 54

Final recommendations 53 and 54 identify the decisions that the Medical Board may take following its assessment of an application by a relevant legal entity for authorisation to carry on a business involving the provision of medical services.

The Board's ability to refuse to grant authorisation is purposely confined to situations where it has reason to believe that a relevant legal entity may act in a way that would be likely, or intended, to compromise the professional autonomy of registered medical practitioners with whom it intended to carry on a business involving the provision of medical services.

This limited discretion is consistent with the overall purpose of corporate regulation, namely to protect the professional autonomy and independence in clinical decision-making of medical practitioners.

It is also recommended that the Medical Board should be able to grant authorisation subject to conditions.

One such condition may be to direct the relevant legal entity to establish a Medical Advisory Committee with an independent medical practitioner chairperson with which the relevant legal entity would be required to consult in relation to clinical matters.

Another such condition may relate to complying with a code of practice dealing with the permitted uses of patient records that come into the ownership or control of a relevant legal entity as a result of the corporatisation of medical practices. Health consumers, in particular, were concerned that the regulation of corporate providers should enable principles and rules to be established relating to the use of patient records, including access and confidentiality issues.

It is proposed that the process for developing and approving any such code should be essentially the same as that proposed for codes of professional conduct (final recommendation 20 refers).

5.6 Duration of authorisation

Final recommendation 55 : Duration of authorisation

The Working Party recommends that an authorisation granted by the Medical Board under final recommendation 53 should, subject to the review process described in final recommendations 58 and 59, have effect for a period of 3 years, and should be renewable on application to the Board.

The Board should be able to make the same decisions on renewal of authorisation as it can when it grants initial authorisation, namely:

- The Board may refuse to renew authorisation if it believes on reasonable grounds that the relevant legal entity would be likely, if authorised to carry on that business, to act in a way that would be intended to compromise the professional autonomy and independence in clinical decision-making of the registered medical practitioners with whom it carried on the business; and
- The Board may attach conditions to renewal of authorisation

Comment on final recommendation 55

The Working Party recommends that, except where the situations envisaged in final recommendations 58 and 59 arise, an authorisation granted by the Medical Board should have effect for a period of 3 years, and may be renewed for further periods of 3 years on application to the Board.

5.7 Notifications by authorised relevant legal entities

Final recommendation 56 : Notifications by authorised relevant legal entities

The Working Party recommends that the Medical Practitioners Registration Act should make it a requirement for an authorised relevant legal entity to notify the Medical Board when:

- There is a change in persons who have a significant financial interest in, or significant involvement in the direction and management of, the relevant legal entity (in which case, the notification should detail the names of the persons involved);
- There is a material change in any agreements that the relevant legal entity has with registered medical practitioners which detail the relationship between the relevant legal entity and registered medical practitioners in relation to the provision of medical services (including clinical decision-making) by registered medical practitioners (in which case the notification should include details of the change);
- In the case of authorised relevant legal entities that are incorporated bodies, there is a change in the memorandum and articles of association of the corporation, and if so the change.

In relation to the above three notification requirements, notification of a change could result in the Medical Board deciding to initiate a review of the authorisation granted to the relevant legal entity.

Other recommended notifiable matters are:

- If there is a change in the business name or names under which the relevant legal entity operates, and if so details of the new name;
- If there is a change in the relevant legal entity's principal place of business, and if so, the details of the new principal place of business;
- If the relevant legal entity, or a person in a position of authority in a relevant legal entity that is a body corporate, is charged with the offence described in final recommendation 57.

An authorised relevant legal entity should also be required to notify the Medical Board of changes in the registered medical practitioners (other than medical practitioners who are temporarily employed or engaged, eg locums) with whom it carries on a business involving the provision of medical services. Such notifications should detail the names and registration dates of the medical practitioners concerned.

It should be an offence for an authorised relevant legal entity to fail to notify the Medical Board when required to do so as recommended above.

Comment on final recommendation 56

The notification requirements proposed in final recommendation 56 are intended to ensure that the Medical Board is made aware of changes in the composition and operation of an authorised relevant legal entity and the business it carries on with registered medical practitioners.

They relate to the information the Board may require an applicant for authorisation to give it under final recommendation 52.

The Working Party recommends that any significant change in:

- Personnel in management roles, and in persons holding a significant financial interest in, an authorised relevant legal entity;
- The content of agreements between an authorised relevant legal entity and registered medical practitioners relating to clinical matters; and
- The memorandum and articles of association of a relevant legal entity that is a corporation,

should enable the Medical Board to initiate a review of the authorisation granted to a particular relevant legal entity as proposed in final recommendation 58.

The Medical Board has requested that notifications of the names of medical practitioners who are engaged or employed by authorised relevant legal entities should be confined to medical practitioners who have a reasonably continuing association with the entities concerned. Notifications of medical practitioners who are engaged for short periods of service (eg locums) should not be required.

5.8 Offences

Final recommendation 57 : Offences

Offence to cause a medical practitioner to engage in unsatisfactory professional conduct

The Working Party recommends that the Medical Practitioner Registration Act should make it an offence for:

- An authorised relevant legal entity (which can be an individual person, partnership or body corporate etc); and
- Any person who is in a position of authority in an authorised relevant legal entity that is a body corporate,

to direct, incite or induce (including by threats or promises) a registered medical practitioner with whom the relevant legal entity carries on a business involving the provision of medical services to engage in conduct that the relevant legal entity, or person, knows, or could reasonably be expected to know, could result in the Medical Board taking action against the practitioner on grounds of unsatisfactory professional conduct.

Offence to offer or accept a benefit to influence referral decisions of medical practitioners

The Working Party recommends that the Medical Practitioner Registration Act should make it an offence for a person (other than a registered medical practitioner) to:

- Offer or give a registered medical practitioner, an authorised relevant legal entity, or a person who is in a position of authority in an authorised relevant legal entity that is a body corporate, a benefit as an inducement, consideration or reward for the registered medical practitioner or any registered medical practitioner with whom an authorised relevant legal entity carries on a business:
  - Referring a patient to a particular registered medical practitioner or particular health service;
  - Recommending that a patient use or attend a particular registered medical practitioner or particular health service.
- Accept from a registered medical practitioner, an authorised relevant legal entity, or a person who is in a position of authority in an authorised relevant legal entity that is a body corporate, a benefit as an inducement, consideration or reward for a registered medical practitioner:
  - Referring a patient to a particular registered medical practitioner or particular health service;
  - Recommending that a patient use or attend a particular registered medical practitioner or a particular health service.

Final recommendation 57 : Offences (continued)

Defined terms

For the purpose of the above offences:

- "A person who is in a position of authority" should be defined to include any person who owns, manages, operates or controls the conduct of, an authorised relevant legal entity which is a body corporate, such as a person who is the director or executive officer of the corporation or who otherwise carries substantial management responsibility within the corporation;
- The actions of an agent or employee of an authorised relevant entity should be taken to be the actions of that authorised relevant legal entity unless the relevant legal entity can demonstrate that he, she or it, as the case may be, had no knowledge of those actions and could not, by the exercise of due diligence, have prevented those actions; and
- The meaning of "unsatisfactory professional conduct" is as defined in the grounds for regulatory action by the Medical Board that are set out in final recommendations 69 and 70 and includes, relevantly:
  - Providing a person with medical services that are excessive, unnecessary, or not reasonably required for the person's well-being;
  - Accepting or offering a benefit as an inducement to refer a patient to a particular medical practitioner or particular health service or to recommend that a patient use a particular medical practitioner or particular health service.
- The term "benefit" refers to money, property or anything else of value.

Comment on final recommendation 57

Final recommendation 57 proposes two offences relevant to the involvement of authorised relevant legal entities in the provision of medical services. They are intended to deter the following behaviour:

- Directing, inciting or influencing a registered medical practitioner to engage in conduct that may result in the Medical Board taking action against the practitioner on grounds of unsatisfactory professional conduct as that term is defined by final recommendations 69 and 70;
- The offering or acceptance by a registered medical practitioner or relevant legal entity of an inducement to influence the referral decisions of a registered medical practitioner.

The penalties for the proposed offences are shown in chapter 10.

The recommended offence provisions draw on legislative developments in NSW and Queensland where similar offences have been created to provide a comparable deterrent.[1]

[1] See, for comparison, s.112A, s.112B, and s.116A of the Medical Practice Act 1992 (NSW).

The recommendation draws particularly on the extended concept of “employment” in section 116B of the Medical Practice Act 1992 (NSW) in the proposed definition of a person who is in a position of authority in an authorised relevant legal entity that is a body corporate.

5.9 Grounds for review of authorisation

Final recommendation 58 : Grounds for review of authorisation

The Working Party recommends that the Medical Practitioners Registration Act should provide that a review of the authorisation granted to a relevant legal entity may be initiated:

- Where the Medical Board:
  - Becomes aware, or believes on reasonable grounds, that there was not full disclosure of the information that it required to be made available to it in an application for authorisation submitted by a relevant legal entity; and
  - Is satisfied that had full disclosure occurred, its decision concerning the granting of authorisation, or the granting of authorisation subject to conditions, may have been different.
- When the Medical Board:
  - Receives notification from a relevant legal entity of the matters identified in the first three dot points of final recommendation 56, or otherwise becomes aware of the changes referred to in those dot points; and
  - Is satisfied that the changes are such as to warrant review of the relevant legal entity’s authorisation.
- If the Medical Board is satisfied that there has been a material failure on the part of an authorised relevant legal entity to comply with a condition attached to the entity’s authorisation.
- If:
  - An authorised relevant legal entity, or person who in a position of authority in an authorised relevant legal entity that is a body corporate, is convicted of one of the offences described in final recommendation 57; and
  - The Medical Board is satisfied that the circumstances of the conviction warrant review of the relevant legal entity’s authorisation.
- When the Commissioner of Health is otherwise satisfied that a review of a relevant legal entity’s authorisation is in the public interest having regard to the purpose stated in final recommendation 49.

Comment on final recommendation 58

Final recommendation 58 identifies the circumstances in which a review of the authorisation granted to a relevant legal entity may be initiated, and by whom.

It is intended that the grounds for initiating a review of an authorisation should be limited. This is consistent with the intention that relevant legal entities that respect the clinical independence of the medical practitioners with whom they carry on a business should be able to conduct their affairs with minimal regulatory interference.

The grounds distinguish between specific matters that may cause the Medical Board to initiate a review of an authorisation, with a more general power to be able to do so conferred on the Commissioner of Health in the public interest.

5.10 Form of review of authorisation

Final recommendation 59 : Form of review of authorisation

The Working Party recommends that a review of an authorisation granted to a relevant legal entity should take the form of an inquiry before the Medical Tribunal. For the purpose of an inquiry of this kind, the procedures that are recommended to be generally applicable in relation to the Tribunal, as set out in chapter 8, are to apply.

Proceedings may be brought before the Tribunal in the name of the Medical Board or Commissioner of Health.

Medical Tribunal may decide that no grounds for review exist

On initial consideration of an application by the Medical Board or the Commissioner of Health for a review to be conducted of an authorisation, the Medical Tribunal may decide that grounds for conducting a review have not been established to its satisfaction. If so satisfied, the Tribunal may decline the application by the Board or Commissioner.

Action that the Tribunal may order at the conclusion of an inquiry

It is recommended that, after an inquiry, the options available to the Tribunal should be to:

- Decline to take any action in relation to a relevant legal entity's authorisation;
- Issue a caution or reprimand to the relevant legal entity;
- Order that the authorisation granted to a relevant legal entity should be subject to conditions specified by the Tribunal (these conditions may be in addition to, or in substitution for, conditions that may have been imposed by the Medical Board in the original authorisation);
- Order that the authorisation granted to a relevant legal entity be suspended for a period of up to 2 years as determined by the Tribunal or revoked, if the Tribunal is satisfied that such suspension or revocation is necessary and appropriate having regard to the purpose stated in final recommendation 49.

Comment on final recommendation 59

Final recommendation 59 proposes that reviews of authorisations granted to relevant legal entities should take the form of an inquiry before the Medical Tribunal. It also identifies the options for decision-making that are recommended to be available to the Tribunal at the conclusion of an inquiry.

5.11 Offence to carry on business if authorisation is suspended or revoked

Final recommendation 60 : Offence to carry on business if authorisation is suspended or revoked

The Working Party recommends that it should be an offence for a relevant legal entity whose authorisation is suspended or revoked by the Medical Tribunal to continue operating a business involving the provision of medical services during the period of suspension or following revocation.

Comment on final recommendation 60

Final recommendation 60 proposes that it should be an offence for a relevant legal entity to continue conducting a business involving the provision of medical services during a period of suspension of authorisation ordered by the Medical Tribunal or following revocation of an authorisation.

5.12 Investigative powers

Final recommendation 61 : Investigative powers

The Working Party recommends that the Medical Board should be able to appoint investigators for the purpose of ensuring that relevant legal entities are operating in accordance with the terms of their authorisation.

Investigators appointed by the Board for this purpose should generally have the same investigative powers as it is recommended that investigators should have under the proposed process for unsatisfactory professional conduct (section 8.6.3 of this report refers). However, the circumstances in which an application to enter premises under the authority of a warrant may be made should be extended. It is recommended that an investigator may, with the approval of the Medical Board, apply for a warrant where it is reasonably necessary to gain entry to premises for the purpose of conducting an investigation into whether either of the offences described in final recommendation 57 may have been committed.

Comment on final recommendation 61

Final recommendation 61 proposes that the Medical Board should have power to appoint investigators for the purposes of ensuring that the provisions of the new Act relating to relevant legal entities are being complied with.

Such investigators should be appointed in accordance with the recommendations made concerning the appointment of investigators to look into matters of unsatisfactory professional conduct, and should have the equivalent investigative powers, namely:

- Power to enter premises (other than residential premises) at which a relevant legal entity conducts a business involving the provision of legal services by registered medical practitioners, or at which records relating to that business are held. This power may be exercised at any reasonable time with the consent of the relevant legal entity and the occupier of the premises, or otherwise subject to providing 5 days written notice of the intention to enter the premises;

- Power to inspect premises, examine equipment, take photographs, require the production of records etc.

In addition, it is proposed that the ability of investigators to put and require answers to questions will be subject to further consideration involving the Attorney General.

Power of entry subject to a warrant

Section 8.6.3 of this report proposes that an investigator may apply for a warrant to enter premises (other than with the consent of the occupier) if the matter under investigation involves a significant threat to the life or the physical or mental health of any person or involves a matter that is to be referred to the Medical Tribunal because of its seriousness.

It is proposed that the equivalent circumstances in which the Medical Board may authorise an investigator to apply for a warrant to enter premises in connection with an investigation involving a relevant legal entity should be:

- Where a matter under investigation involves a significant threat to the life or physical or mental health of a person; or

- If the investigation is being undertaken for the purpose of establishing whether one of the offences described in final recommendation 57 has been committed.

5.13 Cancellation of authorisation

Final recommendation 62 : Cancellation of authorisation

The Working Party recommends that the Medical Practitioners Registration Act should provide that an authorisation granted to a relevant legal entity may be cancelled by the Medical Board if:

- The relevant legal entity notifies the Board that it has ceased carrying on a business involving the provision of medical services by registered medical practitioners; and

- The Medical Board is satisfied that the relevant legal entity has so ceased to carry on a business for which authorisation is required.

Comment on final recommendation 62

Final recommendation 62 clarifies that an authorisation granted to a relevant legal entity may by cancelled by the Medical Board at the request of the relevant legal entity (eg if the relevant legal entity ceases to carry on a business involving the provision of medical services).

5.14 Appeals against decisions in relation to authorisation

Final recommendation 63 : Appeals against decisions in relation to authorisation

Appeals against authorisation decisions by Medical Board

The Working Party recommends that the Medical Practitioners Registration Act should provide a right of appeal for relevant legal entities against decisions by the Medical Board to:

- Refuse to grant authorisation to carry on a business providing medical services, or to renew such authorisation; or
- Grant or renew such authorisation subject to conditions, and if so the particular conditions applied.

It further recommends that:

- Such appeals should lie to the Medical Tribunal;
- The Tribunal should be able to consider an application for authorisation afresh and to confirm, vary, or quash a decision by the Medical Board.
- Appeals on points of law only should lie from the Medical Tribunal to the Supreme Court of Western Australia.

Appeals against decisions by Medical Tribunal following review of authorisation

The Working Party recommends that there should be a right of appeal on points of law only in relation to a decision taken by the Medical Tribunal following a review by it of the authorisation granted to a relevant legal entity.

Such appeals are recommended to lie to the Supreme Court of Western Australia.

Comment on final recommendation 63

Final recommendation 63 defines the proposed rights of appeal against authorisation decisions by the Medical Board and Medical Tribunal.

CHAPTER 6 : MEDICAL STUDENTS

Introduction

This chapter deals with the Medical Board's jurisdiction to deal with matters of impairment affecting students who are enrolled to study medicine at the University of Western Australia.

This issue attracted significant interest in public submissions to the review, in particular from members and students of the University's Faculty of Medicine and Dentistry, and a number of specialist medical colleges.

6.1 Medical Board's jurisdiction in relation to medical students

Final recommendation 64 : Medical Board's jurisdiction in relation to medical students

The Working Party recommends that the Medical Practitioners Registration Act should adopt the revised proposal set out in the Review Working Paper at Annexure G as the basis for providing the Medical Board with a limited jurisdiction to deal with medical students who may be suffering from an impairment that may affect their involvement in clinical activities.

Background and comment on final recommendation 64

The Working Paper at Annexure G describes the background to this issue and provides greater detail of the recommended legislative approach.

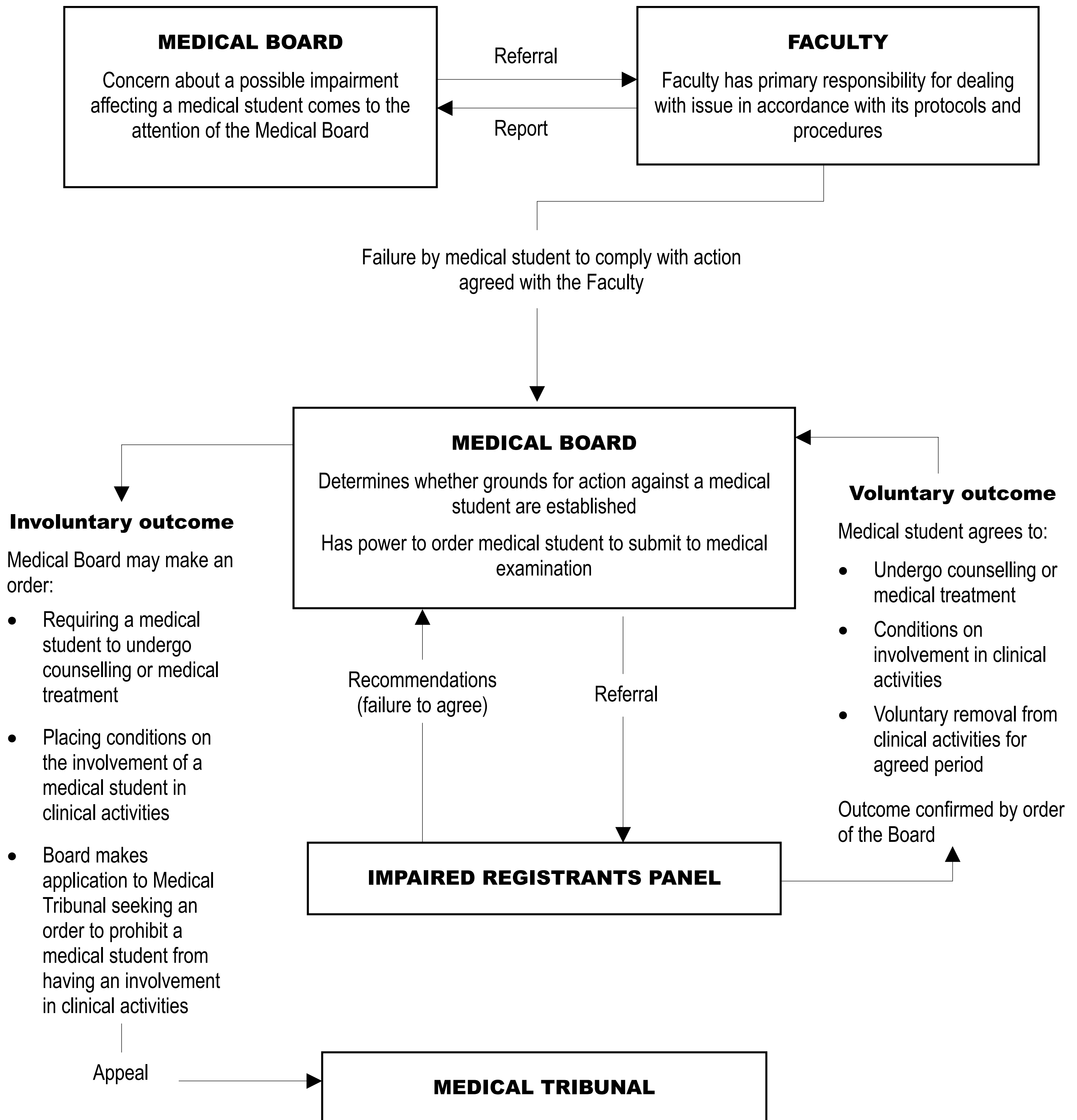
Broadly this approach involves:

- There being no general requirement for all medical students to be registered by the Medical Board (as occurs in NSW, and has recently been introduced in Victoria[1]);
- No payment of registration or enrolment fees by students to the Medical Board;
- Acknowledging that the University's Faculty of Medicine and Dentistry has primary responsibility for responding to concerns about the impact of a medical student's physical or mental health on his or her involvement in the provision of clinical care to patients;
- The Medical Board having a limited jurisdiction to deal with impaired medical students under the proposed impairment provisions of the Medical Practitioners Registration Act, this jurisdiction being confined to impaired medical students who are referred to the Board by the Dean of the University's Faculty of Medicine and Dentistry.

Chart 1 replicates the chart shown at Appendix A of Annexure G and provides a summary of the relationships envisaged.

[1] Section 9A, Medical Practice Act 1994 (Vic), inserted by the Health Practitioner Acts (Amendment) Act 2000.

CHART 1 : RECOMMENDED APPROACH TO IMPAIRMENT AFFECTING MEDICAL STUDENTS



Issues raised during the review

The Working Party's preliminary report contained a recommendation that the Medical Practitioners Registration Act should provide for the commencement of medical student registration in Western Australia.

This recommendation was aimed at enabling the Medical Board to respond to concerns about the possible impact on the delivery of clinical services of an impairment that affects a medical student. It was included in the Working Party's report primarily at the request of Medical Board members of the Working Party, and reflected developments in NSW where a universal requirement for all medical students to be registered by the Medical Board of NSW was instituted in 1992. The NSW registration requirement founds the NSW Medical Board's jurisdiction to take action where a medical student in NSW becomes affected by impairment.[1]

This particular recommendation attracted more responses in the public submissions made to the review than did any other single issue.

Submissions indicated divided opinion on the issue – the University and medical students being opposed to universal medical student registration, while some support was evident in submissions received from the Medical Board and a number of Royal Colleges.

Further discussion on the question of the Medical Board's jurisdiction in relation to medical students has taken place with the Dean and senior staff of the Faculty and with representatives of medical students. The revised proposal described in the paper at Annexure G is the result.

The revised proposal reflects a clearer delineation of roles as between the Medical Board and the Faculty in relation to concerns about impaired students than did the recommendation in the preliminary report.

Specifically, the revised proposal acknowledges the primacy of the Faculty's role in managing impaired students, with the Medical Board having a residual role where the Faculty is unable to secure the co-operation of a student in addressing the fact or consequences of an impairment.

In this situation, the Faculty believes there would be merit in providing in the Medical Practitioners Registration Act for the referral of such students for the Board to deal with under the proposed impairment procedures recommended for the new Act.[2]

Attitude of Faculty and medical students to the revised proposal

The Dean of UWA's Faculty of Medicine and Dentistry (Professor Louis Landau) and the Acting President of the WA Medical Student's Society (Mr Glynn Hughes) have both confirmed in writing their support for the revised legislative proposal presented in Annexure G.

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[1] It is relevant to acknowledge that the provisions of the NSW Medical Practice Act that apply to medical students are purposely limited to authorising the NSW Medical Board to respond to issues of impairment only. The NSW Board is not authorised to investigate or respond to issues of discipline or conduct, such matters remaining the exclusive responsibility of medical schools in NSW.

[2] Chapter 8 provides fuller details of the recommended role, composition and powers of the proposed Impaired Registrants Panel.

Comments by Dr Warwick Ruse

One member of the Working Party, Dr Warwick Ruse, requested that the following points be made in the Final Report and drawn to the attention of Ministers:

- It should be acknowledged that any prescribed involvement for the Medical Board in relation to medical students should be expressly for the protection of consumers; and

- If the Medical Board is given jurisdiction over medical students, then as a matter of principle other regulatory bodies should be given jurisdiction over students who are enrolled in courses of study leading to entry to any regulated health profession (eg nursing, dentistry).

In relation to the first of these points, the Working Party believes that providing the Medical Board with a limited jurisdiction in relation to medical students as proposed is directed at protecting the interests of patients, and as such is in the public interest.

The point made in the second dot point is outside the scope of the Working Party's review which is limited to preparing recommendations for new medical practitioner legislation.

CHAPTER 7 : FINANCIAL MANAGEMENT

Introduction

This chapter deals with the financial administration of the Medical Board, including:

- The sources of Medical Board funds, and the purposes to which these funds may be put;
- Accountability requirements, including requirements relating to the maintenance of financial accounts, audit requirements, and the production of an annual report;
- Access by the Minister to information in the Medical Board's possession.

Key issues considered or raised by public submissions in the context of the review included:

- Whether the costs of the proposals presented in chapter 8 (particularly the establishment of the Medical Tribunal) should be funded entirely by the Medical Board or whether a financial contribution from Government should be made;
- Whether the Auditor General should be nominated in the new Act as the Medical Board's auditor.

Summary of recommendations in Chapter 7

This chapter proposes that:

- The new Act should identify the sources of funds available to the Medical Board and the purposes for which these funds may be used;
- The Medical Board should continue to be required to maintain its financial accounts in accordance with Australian Accounting Standards;
- The Auditor General should be nominated in the new Act as the Medical Board's auditor, with annual audits of the Board's finances being undertaken at the Board's expense either by the Office of Auditor General or by auditors engaged by the Auditor General;
- The Medical Board should continue to be required to prepare and submit to the Minister an annual report of its activities;
- The Medical Board should include in its annual report information about the number of complaints it has received and the action it has taken in response to these complaints;
- The new Act should authorise the Minister to be able to access information that is in the possession of the Medical Board, other than information that would enable the identity of a person who is involved in a complaint to be ascertained.

7.1 Funds of the Medical Board

Final recommendation 65 : Funds of the Medical Board

The Working Party recommends that the Medical Practitioners Registration Act should provide as follows:

Sources of funds

The funds of the Medical Board should be identified as comprising:

- Fees received by the Board;
- Grants and loans (if any) received from the State;
- Gifts and donations made to the Board, subject to any trusts declared in relation to grants, gifts or donations;
- Penalties and costs received in connection with the exercise of disciplinary powers in relation to unsatisfactory professional conduct, as recommended in chapter 8; and
- Any other money or property that is lawfully received by the Board in connection with the performance of its functions.[1]

Purposes for which Medical Board funds may be applied

The new Act should identify the following as purposes for which the funds of the Medical Board may be applied:

- For purposes connected with the administration and enforcement of the Act, including the remuneration of Medical Board members, the Registrar and other persons engaged by the Board, and members of the Medical Tribunal, Professional Standards Committees and Impaired Registrants Panels;
- For the advancement of scientific and educational purposes relating to the practice of medicine and surgery;
- To make a financial contribution to the Australian Medical Council or other national body approved by the Minister for purposes connected with the setting of standards in relation to the registration of medical practitioners and the regulation of medical practice;
- For any other purpose the Minister may approve on the recommendation of the Medical Board.

[1] Cf. s.41(1), Osteopaths Act 1997.

Comment on final recommendation 65

Final recommendation 65 is substantially unchanged from the preliminary report.

A number of submissions to the review noted that consideration should be given to the Government making a financial contribution towards the costs of the Working Party's recommended disciplinary structure, which is expected to be more expensive that the existing arrangement.

This point was made by the AMA and the WA branch of the Royal Australian College of Obstetricians and Gynaecologists.

The Working Party believes that the question of financial responsibility should be reviewed in the light of a business plan for the new structure for regulating medical practice that should be developed between the Medical Board and Health Department of Western Australia.

The AMA also queried the appropriateness of the Medical Board making a financial contribution to the operating costs of the Australian Medical Council.

The Working Party believes that continuation of this financial support is appropriate in view of the significant role played by the Council in accrediting Australian medical schools and assessing the competence of overseas-trained practitioners for registration in Australia.

7.2 Accounts, auditing and annual reports

Final recommendation 66 : Accounts, auditing and annual reports

The Working Party recommends that the Medical Practitioners Registration Act should provide as follows:

Accounts

The new Act should retain the requirement stated in section 21E of the Medical Act 1894 that the Medical Board must keep accounts and prepare financial statements in accordance with Australian Accounting Standards. The requirement that financial statements should be prepared on an accrual basis unless the Medical Board determines otherwise should similarly be retained.

Audit

The new Act should retain the requirement stated in section 21F of the Medical Act 1894 that the Medical Board's accounts must be audited annually at the Board's expense.

In preference to the Medical Board being able to select its own auditor (subject to the Minister's approval) it is proposed that the Auditor General should be nominated in the new Act as the Medical Board's auditor. The new Act should enable audits to be undertaken either by staff of the Office of Auditor General or by auditors appointed by the Auditor General.

Annual report

The new Act should retain the intent of section 21G of the Medical Act 1894 that has the effect of requiring:

- The Medical Board to prepare and submit to the Minister an annual report of its proceedings, together with a copy of the financial statement and auditor's report, by 31 December each year;
- The Minister to table a copy of the Medical Board's annual report, financial statements, and auditor's report in each House of Parliament within 14 sitting days.

In addition the new Act should also:

- Require the Medical Board's annual report, financial statements and auditor's report to be available for inspection free of charge at the Board's place of business during ordinary office hours;[1]
- Require the Medical Board to include in its annual report information about complaints received by the Board and action taken in response to such complaints in the year to which the report relates. This requirement should not involve the disclosure of the identity of a complainant, any person about whom a complaint is made, or any other person in the annual report.

[1] Cf. s.44(3), Osteopaths Act 1997.

Comment on final recommendation 66

The matters dealt with in final recommendation 66 relate principally to accountability requirements for financial management by the Medical Board.

The preliminary report in essence recommended retention of the equivalent provisions of the Medical Act 1894, subject to including a requirement to include information concerning complaints received and action taken by the Medical Board in the Board's annual report.

These matters attracted little comment in submissions to the review, except with regard to the auditing provision.

The requirement currently stated in section 21F of the Medical Act 1894 is that the Medical Board's accounts must be audited annually at the Board's expense by an auditor who is appointed by the Board with the approval of the Minister. The submission to the review received from the Ministry of the Premier and Cabinet queried whether, as a matter of principle, statutory authorities should be permitted to select their own auditors. The Ministry suggested that the Auditor General could be designated the Medical Board's auditor with audits conducted either by the Office of the Auditor General or by an auditor who is appointed by the Auditor General.

The Auditor General has indicated support for the suggestion, noting that this approach is:

> "… consistent with the principles espoused by the 1989 Burt Commission on Accountability, reiterated by the 1992 Royal Commission Part II Report and complemented by the Commission on Government." [1]

It is noted that, while the Medical Board is not generally reliant on funding from the Government's Consolidated Fund, it is nevertheless a public sector agency whose funding is obtained largely from fees levied under statute. The Working Party would therefore concur with the view that the audit of Medical Board finances should be conducted by, or under the direction of, the Auditor General, and notes that this is likely to have consequences for other health registration boards that are accountable to the Minister for Health.

In relation to the annual report, the basic requirement for an annual report to be prepared is retained, but extended to require the Medical Board to make its annual report (and financial statements and audit report) available for inspection at its offices, once these documents have been tabled in Parliament.

The final recommendation also proposes to make it a requirement that information about complaints management should be included in the Board's annual report. The Working Party considers that this requirement should relate to the complaints handling decisions the Medical Board may make as outlined in chapter 8.

The information should as a minimum include:

- The number of complaints received by the Medical Board in the year to which the annual report relates;
- A general indication of the subject matter of these complaints;

[1] Correspondence from the Auditor General to the Chief Medical Officer.

- The number of these complaints that are:
  - Dismissed as vexatious or lacking substance;
  - Referred to an Impaired Registrants Panel;
  - Referred to a Professional Standards Committee for either competence or professional conduct reasons;
  - Referred to the Medical Tribunal;
  - Referred to the Office of Health Review for conciliation to be attempted;
  - Otherwise dealt with by the Medical Board.
- An indication of the progress and outcome of complaints, including the work of the Impaired Registrants Panel, Professional Standards Committee and Medical Tribunal.

The Working Party would confirm its intention that the information about complaints to be included in the Medical Board's annual report should not enable the identity of complainants, persons about whom complaints are made, or other relevant persons to be ascertained.

7.3 Minister to have access to information

Final recommendation 67 : Minister to have access to information

The Working Party recommends that the Medical Practitioners Registration Act should provide the Minister with a general entitlement to information that is in the possession of the Medical Board except for information that is in a form that:

- Discloses the identity of a person who is involved in a complaint; or
- Might enable the identity of such a person to be ascertained,

unless the person concerned has consented to the disclosure.

The Minister should be able to:

- Request the Medical Board to furnish or otherwise give access to information to which the Minister is entitled;
- Make use of the staff of the Board to obtain information to which the Minister is entitled,

and the Medical Board should be obliged to comply with any such request.[1]

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[1] Cf. s.45, Osteopaths Act 1997.

Comment on final recommendation 67

Final recommendation 67 is unchanged from the equivalent recommendation that appeared in the Working Party's preliminary report.

The recommendation is drawn from an equivalent provision in the Osteopaths Act 1997. Its purpose is to support the Minister for Health in discharging the responsibility vested in the office of Minister for ensuring the accountability of the Medical Board for its administration of the State's scheme of medical registration. It recognises that, on occasion, this may require the Minister to request access to information that is in the possession of the Board.

The recommendation is not supported by the AMA, which cites concerns about the possible impact on the Medical Board's independence.

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CHAPTER 8 : REGULATION OF MEDICAL PRACTICE

Introduction

This chapter presents the Working Party's final proposals for the structures and powers to be included in the new Act to ensure the effective regulation of medical practice in Western Australia.

Summary of recommendations in Chapter 8

This chapter proposes that:

- The Medical Practitioners Registration Act should distinguish between the processes, investigative powers, and options for action that should be available to the Medical Board when addressing concerns about:
  - The impact of a medical practitioner's physical or mental health on his or her practice of medicine;
  - The continuing competence of a medical practitioner to practise medicine; or
  - The professional conduct of a medical practitioner.
- The Medical Board should retain primary responsibility for deciding on the action that should be taken in response to complaints about medical practitioners following assessment and investigation under the Act. The Board will be supported in discharging this responsibility by:
  - A Complaints Assessment Committee to conduct preliminary inquiries into complaints and to advise the Board accordingly;
  - An Impaired Registrants Panel to inquire into concerns about the possible impact of his or her health on a medical practitioner's practice of medicine; and
  - A Professional Standards Committee to inquire into issues of competence and professional conduct.
- A Medical Tribunal should be established for Western Australia to have:
  - Primary jurisdiction to hear serious complaints or matters of concern where the option of suspension or cancellation of registration may be warranted;
  - Appellate jurisdiction arising from key decisions of the Medical Board in relation to its principal responsibilities for registering medical practitioners and regulating medical practice.
- Sexual exploitation of patients by medical practitioners should be identified as unsatisfactory professional conduct.

Summary of recommendations in Chapter 8 (continued)

This chapter proposes that:

- The Medical Board should have power to:
  - Issue an interim order imposing restrictions on a medical practitioner before the outcome of an inquiry by the Medical Tribunal is known if the Board has reason to believe that the activities of the medical practitioner pose a significant threat to the life or physical or mental health of a person;
  - Require a medical practitioner or medical student to undergo a medical examination under the proposed impairment process;
  - Require a medical practitioner to undergo a competence assessment under the proposed competence process;
  - Appoint an investigator to investigate complaints relating to the professional conduct of a medical practitioner;
- Options for action that may be ordered by the Medical Board or the Medical Tribunal at the conclusion of the impairment, competence and unsatisfactory professional conduct processes should be appropriately tailored;
- Where the Medical Tribunal makes an adverse finding against a medical practitioner on grounds of unsatisfactory professional conduct, the Tribunal (but not the Medical Board itself) should be required to publish:
  - The practitioner’s name;
  - The Tribunal’s findings;
  - The Tribunal’s decision and the reasons for its decision; and
  - The sanction imposed;
- The Minister for Health should seek the Attorney General’s advice on the question of whether information and reports etc that are generated for the purposes of the impairment and competence processes should be inadmissible in civil proceedings, as they are in NSW;
- Appeals from the Medical Tribunal should lie to the Supreme Court and should be limited to points of law only.

Background

The Working Party's preliminary report noted two main concerns about the "disciplinary" provisions in the Medical Act 1894:

- First, a potential conflict of interest in the Medical Board combining the roles of investigating, hearing, and determining the outcome of serious complaints against doctors;

- Second, the absence of a graduated response to disciplinary matters in the Act itself. The Act effectively requires the Medical Board to either decide to take no action in response to a complaint or else to proceed to an inquiry of the Board. An intermediary response (to deal with less serious complaints by less formal means, for example) is not possible under the present Act.

Partly as a consequence of these essentially structural issues, health consumers perceive there to be a lack of responsiveness on the part of the Medical Board to complaints that are made against doctors. This perception tends to be supported by Medical Board statistics on the number of complaints made to it and the relatively small number of these complaints that proceed to an inquiry before the Board.[1]

For its part, the Medical Board considers itself to be at a significant disadvantage in performing its regulatory role because of the inflexibility of the current Act's disciplinary machinery.

In response to these concerns, the Working Party's preliminary report proposed a number of structural and other reforms of the Act's disciplinary processes. In summary, these proposed reforms were:

- That the new Act should distinguish in its regulatory provisions and powers between procedures to address concerns about an "impairment" affecting medical practitioners as compared to the approach to be taken in relation to "disciplinary" matters.

  The focus of this proposal was recommended to be the establishment of an Impaired Registrants Panel by the Medical Board to deal with concerns about the impact of a medical practitioner's physical or mental health on his or her practice of medicine. It was envisaged that the Panel's approach would emphasise securing the voluntary co-operation, wherever possible, of medical practitioners to acknowledge the fact and consequences of an impairment.

- That the new Act should provide for the creation of "informal" and "formal" mechanisms for dealing with disciplinary matters, involving:

  - A Professional Standards Committee appointed by the Medical Board to hear and determine less serious matters; and

  - An independent Medical Tribunal chaired by a Judge to hear and determine serious matters.[2]

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[1] The preliminary report noted that in the 3-year period 1995-96 to 1997-98 the Medical Board reported receiving 264 complaints, of which 14 (5.3%) were the subject of a Board inquiry (preliminary report, page 115).

[2] The proposal in the preliminary report was that, whether a matter is heard by a Professional Standards Committee or the Medical Tribunal would be determined by the Medical Board on the basis of whether a particular matter was likely to necessitate suspension or cancellation of registration (in which case the Medical Tribunal would deal with it).

- That the Medical Board should be able to initiate action under the new Act either on receipt of a complaint or a referral from the Office of Health Review or on its own motion;

- That the new Medical Act should incorporate:

  - Stronger powers of investigation;

  - Power for the Medical Board to issue interim orders in certain circumstances; and

  - Broader options for disciplinary action.

These proposals – including the creation of a structural distinction in the new Act between impairment and disciplinary processes and options for action – attracted broad support from health consumers, the medical profession, and others in submissions made to the Medical Act review.

Working Party's final position

The Working Party confirms its support for the main elements of the structural changes to the Act's disciplinary provisions outlined above, subject to some amendment to accommodate comments made in public submissions to the review.

The Working Party would propose to go further in one important respect.

As indicated above, a key change proposed for the new Act is that a clear distinction should be made in the processes and procedures to be employed by the Medical Board when responding to concerns about an "impairment" affecting a medical practitioner as opposed to "disciplinary" matters. One of the main reasons for this distinction is acknowledgment of the inappropriateness of dealing with concerns about the impact of a doctor's health status on his or her practice of medicine as a "disciplinary" issue. This acknowledgment received widespread support in submissions made to the review.

Similarly, the Working Party considers that there would be merit in the new Act distinguishing in the processes that should apply when the Medical Board is dealing with concerns about a doctor's continuing competence to practise medicine.

The Working Party has come to this view having regard to the legislative developments in NSW and New Zealand, which are summarised in the Review Working Paper at Annexure H.

Broadly, in both jurisdictions, the medical practitioner registration legislation has been amended[1] to empower the respective medical regulatory authorities to take a more proactive approach to the issue of competence review and assessment than is generally possible under the medical practitioner legislation in other States and Territories, including Western Australia.

This more proactive approach involves:

- Providing the NSW Medical Board/NZ Medical Council with jurisdiction to review the performance or competence of medical practitioners; and

- Detailing the procedures to be followed, the options for action, and the rights of medical practitioners who may become involved in such reviews.

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[1] In 1995 in the case of New Zealand and 2000 in the case of NSW.

The Working Party would wish the Medical Board of Western Australia similarly to be able to take a proactive approach to concerns about the competence of medical practitioners other than through initiating "disciplinary" action. A separate (but inter-linked) approach to competence assessment should have important benefits. It should enable:

- A proper focus to be placed on the issue of continuing competence in the structure of the new Act, thus helping to raise the profile of an issue which responses to the Medical Act review generally agreed to be of critical importance to the future regulation of medical practice;
- The procedures to be followed by the Medical Board when responding to issues of concern about a doctor's competence (as opposed to unsatisfactory professional conduct) to be tailored appropriately;
- The options for a response to concerns about competence similarly to be appropriately tailored and distinguished from the responses that the Medical Board will be able to make when responding to unsatisfactory professional conduct. For example, the option of imposing a financial penalty on a doctor should be excluded in relation to concerns about competence.

Final recommendation 68 : Overview of recommended new structure for the regulation of medical practice

The Working Party recommends that, structurally, the Medical Practitioners Registration Act should distinguish in the processes and response options available in relation to the following categories of grounds for action involving medical practitioners:

- Impairment;
- Competence;
- Unsatisfactory professional conduct,

as illustrated in chart 2.

Comment on final recommendation 68

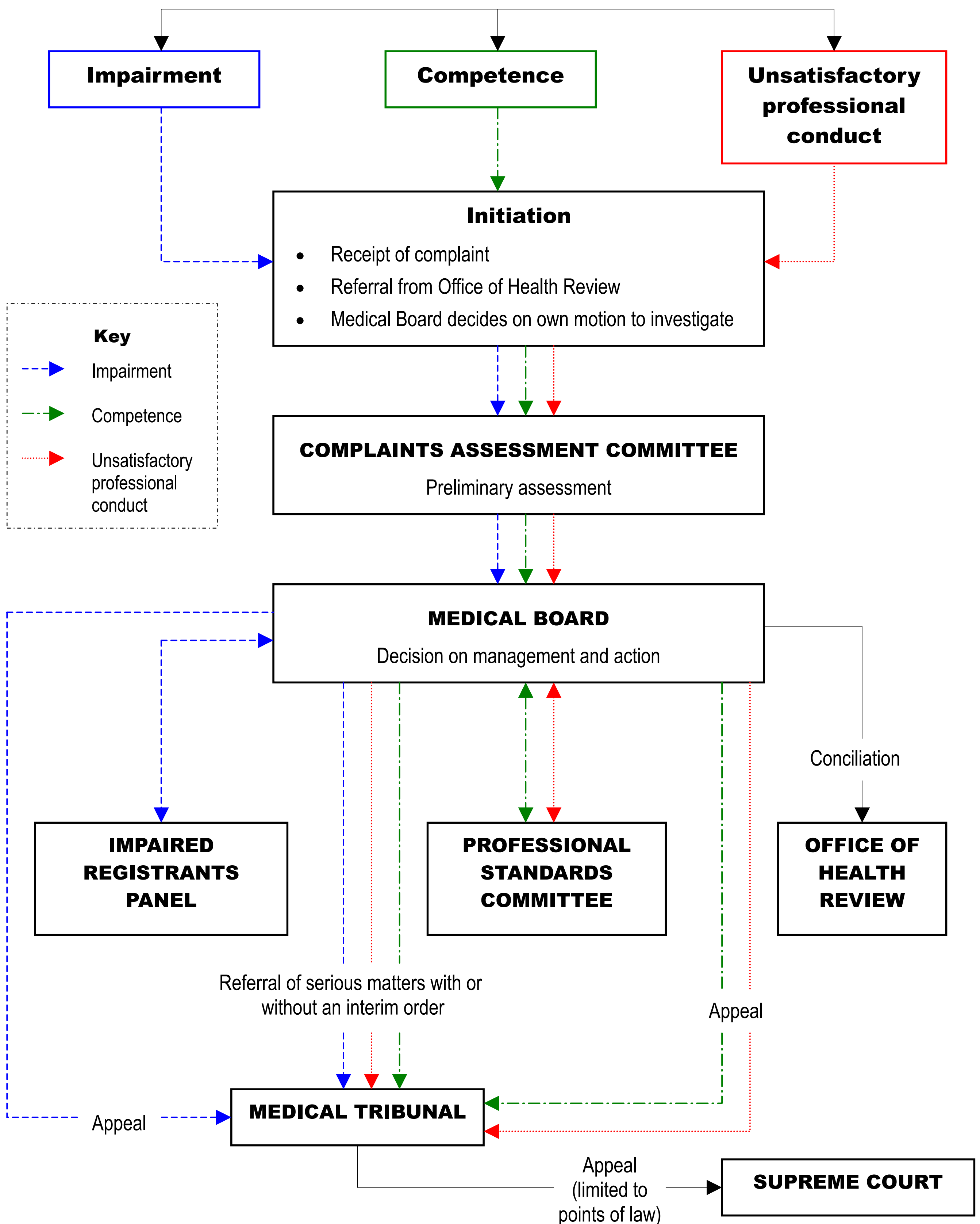
Conceptually, then, the Working Party would see the Medical Board's involvement in regulating medical practice taking three distinct forms depending on whether the grounds for action by the Board involve:

- Impairment – ie concerns about the impact of a doctor's physical or mental health on his or her practice of medicine;
- Competence – ie concerns about a doctor's knowledge and skill to practise medicine either generally or in a particular area of specialty; or
- Unsatisfactory professional conduct – ie concerns that a doctor may have behaved in a way that is careless, improper, incompetent, or involves misconduct.

An overview of the structure and relationships envisaged is provided in chart 2.

CHART 2 : OVERVIEW OF RECOMMENDED NEW STRUCTURE

Grounds for action by the Medical Board



It is acknowledged that while for illustrative purposes the categories of grounds for action are presented as distinct “streams”, in reality there will be overlap and the need for discretionary decision-making on the part of the Medical Board as to which is the more appropriate stream in any given situation. Some ability on the part of the Board to re-direct particular issues between streams will also be necessary.

The identification in the new Act of separate processes for responding to concerns about a doctor’s health status or continuing competence should encourage the Medical Board to address such concerns at an early stage.

One desirable consequence of earlier intervention would be the earlier adoption of strategies to address health or competence issues (as the case may be) which would hopefully have the effect of lessening the chances of a doctor becoming involved in action by the Medical Board for unsatisfactory professional conduct.

Organisation of Chapter 8

The remainder of this chapter will provide further details on how the proposed new structure for regulating medical practice in Western Australia is recommended to work, including detailing the role, composition, functions and powers of the related elements of the proposed structure.

8.1 Specific grounds for action by the Medical Board

Final recommendation 69 : Specific grounds for action by the Medical Board

The Working Party recommends that the Medical Practitioners Registration Act should specify the grounds for action by the Medical Board to be as follows:

Impairment

It is recommended that new Act should enable action involving a registered medical practitioner to be taken on impairment grounds if it is established to the satisfaction of the Medical Board or Medical Tribunal, as the case may be, that the practitioner is:

- Affected by dependence on alcohol or addiction to any deleterious substance to the extent that the practitioner's practice of medicine is, or is likely to be, adversely affected; or
- Suffering from a physical or mental illness to such extent that the practitioner's ability to practise medicine safely and competently is, or is likely to be, adversely affected.

Competence

It is recommended that the new Act should enable action involving a registered medical practitioner to be taken on competence grounds if it is established to the satisfaction of the Medical Board or Medical Tribunal, as the case may be, that the practitioner:

- Has not maintained adequate knowledge and skill in the practice of medicine such that the practitioner's ability to practise medicine safely and competently either generally or in a particular area of medical expertise in which the practitioner is practising is, or is likely to be, adversely affected; or
- Is practising in a branch of medicine without having or exercising sufficient knowledge or skill to be able to do so safely and competently.

Unsatisfactory professional conduct

It is recommended that new Act should enable action involving a registered medical practitioner to be taken on grounds of unsatisfactory professional conduct if it is established to the satisfaction of the Medical Board or Medical Tribunal, as the case may be, that the practitioner:

- Has, in relation to his or her practice of medicine, acted carelessly, incompetently, improperly or is otherwise guilty of professional misconduct;
- Has failed to comply with a condition imposed on the practitioner's practice of medicine by or under the Medical Practitioners Registration Act or regulations made under the Act;
- Has been convicted of an offence against the Medical Practitioners Registration Act or regulations or against any other statute and the nature of the offence indicates that the person may no longer be a fit and proper person to be a registered medical practitioner.

Final recommendation 70 : Meaning of "unsatisfactory professional conduct"

Without limiting the interpretation of the first dot point under "unsatisfactory professional conduct" in final recommendation 69, the Working Party further recommends that the following matters should be cited in the Act as conduct that should be characterised as unsatisfactory professional conduct on the part of a registered medical practitioner:

- Providing a person with medical services that are excessive, unnecessary or not reasonably required for the person's well-being;
- Offering or accepting a benefit[1] as an inducement, consideration or reward for:
  - Referring a patient to a particular registered medical practitioner or particular health service;
  - Recommending that a patient use or attend a particular registered medical practitioner or particular health service.
- Engaging in professional conduct that is of a lesser standard than:
  - The public might reasonably expect of a registered medical practitioner; or
  - That which might reasonably be expected of a medical practitioner by his or her peers;
- Engaging in the sexual exploitation of patients.

Comment on final recommendations 69 & 70

Final recommendation 69 sets out the specific grounds for action involving registered medical practitioners that the Working Party considers should be stated in the Medical Practitioners Registration Act. As discussed above, the recommendation distinguishes between:

- "Impairment" grounds;
- "Competence" grounds; and
- "Unsatisfactory professional conduct" grounds.

Final recommendation 70 identifies certain conduct that should be cited in new Act as behaviour that should be regarded as unsatisfactory professional conduct, without otherwise limiting the interpretation of that term. For ease of comparison, table 3 compares the grounds for action in the Medical Act 1894 with those recommended for inclusion in the new Act.

[1] The term "benefit" should be defined for this purpose as proposed in final recommendation 57, namely to mean money, property or anything else of value.

TABLE 3 : COMPARISON OF GROUNDS FOR ACTION

Medical Act 1894 (current)	Medical Practitioners Registration Act (recommended)
Medical practitioner appears to the Medical Board to be: • Guilty of infamous or improper conduct in a professional respect; • Affected by a dependence on alcohol or addiction to any deleterious drug; • Guilty of gross carelessness or incompetency; • Guilty of not complying with or contravening a condition or restriction imposed by the Board with respect to the practice of medicine by that medical practitioner; • Suffering from a physical or mental illness to such extent that his or her ability to practise as a registered medical practitioner is or is likely to be affected.	**Impairment** It is established that a medical practitioner is: • Affected by dependence on alcohol or addiction to any deleterious substance to the extent that the practitioner's practice of medicine is, or is likely to be, adversely affected; or • Suffering from a physical or mental illness to such extent that the practitioner's ability to practise medicine safely and competently is, or is likely to be, adversely affected. **Competence** It is established that a medical practitioner: • Has not maintained adequate knowledge and skill in the practice of medicine such that the practitioner's ability to practise medicine safely and competently either generally or in a particular area of medical expertise in which the practitioner is practising is, or is likely to be, adversely affected; or • Is practising in a branch of medicine without having or exercising sufficient knowledge or skill to be able to do so safely and competently. **Unsatisfactory professional conduct** It is established that a medical practitioner: • Has, in relation to his or her practice of medicine, acted carelessly, incompetently, improperly or is otherwise guilty of professional misconduct (with citation of certain behaviours to be regarded as unsatisfactory professional conduct); • Has failed to comply with a condition imposed on the practitioner's practice of medicine by or under the Medical Practitioners Registration Act or regulations made under the Act; • Has been convicted of an offence against the Medical Practitioners Registration Act and regulations or against any other statute and the nature of the offence indicates that the person may no longer be a fit and proper person to be a registered medical practitioner.

Sexual exploitation as a specific ground for action

In response to the preliminary report, health consumers indicated a preference for a more expansive definition of what constitutes “unsatisfactory professional conduct” appearing in the new Act, as occurs in NSW and Victoria. More specifically, a number of submissions from consumers and consumer groups advocated that sexual exploitation of patients by medical practitioners should be cited in the new Act as a specific ground for action by the Medical Board.

It is evident from the submissions received and the further exploration of this issue with consumers that the responsiveness of the Medical Board to the issue of sexual misconduct by doctors involving patients is perceived to be poor. There is a view – reflected in submissions to the review – that this responsiveness would improve if the new Act specifically identified sexual exploitation as a ground for regulatory action by the Medical Board.

The contrary view is that the Medical Act 1894 already provides the Medical Board with the legal authority to discipline doctors who engage in sexual abuse of their patients because such abuse would ordinarily constitute “infamous or improper conduct in a professional respect”.[1] This is the Medical Board’s view. The Board’s difficulty is that complaints alleging sexual misconduct can be difficult to substantiate because objective evidence of misconduct may not be available and the facts in individual cases may be difficult to establish. The Medical Board would contend that any impression of lack of responsiveness on its part to complaints alleging sexual misconduct stems from the need, quite properly, to obtain such objective evidence before proceeding, and not from any deficiency in the grounds for action against doctors that are set out in the Act.

On this second view, continuing to include a broadly defined ground in the new Act relating to unsatisfactory professional conduct, as proposed in final recommendation 69, would continue to authorise the Medical Board to take action in response to sexual misconduct by doctors involving their patients. As a matter of law, there is no real doubt that a medical practitioner who uses his or her position of trust to exploit a patient for reasons of sexual gratification could be dealt with by the Medical Board on grounds that the practitioner had acted improperly or was guilty of professional misconduct.

The identification of sexual exploitation as a specific ground for action in the new Act would not alter this basic legal position. It would also not have the effect – nor should it – of lowering the standard of proof that the Medical Board should accept in relation to allegations of sexual exploitation. The challenge of properly substantiating allegations of sexual abuse will remain.

It is also worth noting that no other Australian State or Territory’s medical practitioner legislation specifically identifies sexual exploitation as a ground for action against doctors. All rely instead on more general descriptions of unprofessional conduct. New Zealand’s Medical Practitioners Act 1995 similarly does not identify sexual exploitation as a specific ground for action.[2]

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[1] This being a ground for action under the Medical Act 1894 – s.13(1) of that Act refers.

[2] However, the NZ Act acknowledges that action can be taken against doctors for professional misconduct resulting from sexual abuse of patients. S.107 of the NZ Act provides a right for complainants to have their evidence before the NZ Medical Practitioners Disciplinary Tribunal heard in closed session if the subject matter of the complaint is of a sexual nature. The NZ Medical Council has also developed a policy on victim support where sexual abuse in a doctor-patient relationship is alleged. It would be open to the Medical Board of Western Australia to develop a similar policy for use in Western Australia pursuant to the Working Party’s recommendation concerning codes of professional conduct (final recommendation 20 refers).

One submission to the review[1] drew attention to legislation regulating the activities of health professionals (including medical practitioners) in the Canadian Province of Ontario. This legislation:

- Defines the term “sexual abuse” to include sexual intercourse or other forms of sexual relations between a health professional and patient, touching of a sexual nature of a patient, and behaviour or remarks of a sexual nature;
- Identifies sexual abuse as a ground for disciplinary action;
- Provides for:
    - The identity of witnesses in proceedings involving allegations of sexual abuse to be protected;
    - Mandatory cancellation of a health professional’s registration if the sexual abuse involved the performance of certain sexual acts (eg sexual intercourse);
    - The establishment of Patient Relations Programs by each regulatory authority and for such programs to include measures for preventing or dealing with sexual abuse of patients;
    - The mandatory report of sexual abuse by health professionals and health care institutions (eg hospitals);
    - The establishment of funds by each regulatory authority to fund the provision of therapy and counselling to persons who have been subject to sexual abuse by health professionals.[2]

Sexual abuse as specific ground for action – Working Party’s final position

The Working Party considered again the question of whether the new Act should specify sexual exploitation as a ground for action, taking account of submissions received on this issue.

The Working Party would consider sexual exploitation to be sexual behaviour and contact that a medical practitioner engages in with a person with whom he or she has a professional clinical relationship in which the practitioner exploits the position of trust that he or she holds as a health professional for the purposes of personal sexual gratification.

Having regard to the concerns expressed by, and on behalf of, health consumers, the Working Party agreed that sexual exploitation should be mentioned alongside the other conduct that it recommends should be identified in the Act as behaviour that ordinarily constitutes unsatisfactory professional conduct. Final recommendation 70 refers.

The specification of these matters is intended to be illustrative and is not intended to limit the interpretation of what is meant by unsatisfactory professional conduct.

[1] Submission by Ms Patricia Young.

[2] Provisions found in Ontario’s Regulated Health Professions Act 1991.

8.2 Elements of proposed structure for regulating medical practice

8.2.1 Role of the Medical Board

Final recommendation 71 : Role of Medical Board in proposed new structure for regulating medical practice

The Working Party recommends that the Medical Practitioners Registration Act should identify the following roles for the Medical Board in the proposed new structure for regulating medical practice.

The Medical Board's principal roles should be:

- Decide on the management of complaints and other matters warranting possible action on advice from a Complaints Assessment Committee;
- Authorise the use of investigative powers under the Act;
- Convene and provide administrative support for Impaired Registrants Panels and Professional Standards Committees, and decide on action at the conclusion of panel and committee proceedings;
- Initiate and conduct proceedings before the Medical Tribunal in relation to serious matters.

Comment on final recommendation 71

As noted earlier, a key concern with the present Act is that all disciplinary functions and powers are exercised by a single body, namely the Medical Board.

The Board receives complaints, decides whether the subject matter of a particular complaint warrants an inquiry, and if so:

- Convenes the inquiry;
- Takes submissions from parties before the inquiry (one of which may be the Medical Board itself acting on behalf of a complainant); and
- Determines the outcome of the inquiry, including whether (and if so what) disciplinary sanctions should be applied.

This current system has been criticised for failing to distinguish separate roles and accountability for decisions involving the investigation, prosecution and determination of complaints.

It is also criticised for failing to recognise that a graduated response should be available to deal with complaints about doctors. In this context, the Medical Board inquiry process (a formal process that can involve legal representation of parties) is no longer considered to be an appropriate mechanism to deal with less serious complaints that are made to the Board.

As indicated in final recommendation 71, it is proposed that the regulatory role of the Medical Board should be more limited in some respects than it is under the Medical Act 1894. In particular, under the Working Party's proposals, the Board would no longer itself be involved in proceedings to hear complaints. The Board would however retain considerable responsibility for decisions about the handling of complaints, the circumstances in which the investigative powers may be deployed, and for making decisions on the outcome of complaints.

Retention of Medical Board's decision-making responsibility

Retaining decision-making responsibility at the level of the Medical Board is a key change from the proposal that was put in the preliminary report in so far as Professional Standards Committees are concerned. The preliminary report had proposed that such committees should themselves have decision-making powers and the ability to impose disciplinary sanctions at the completion of committee inquiries, subject to there being an appeal right against such decisions to the Medical Tribunal.

This aspect of the Working Party's proposal was the subject of comment in responses to the review. While acknowledging the desirability of allowing for the use of structures below the level of the Medical Board to deal with complaints with relative informality and expedition, some responses considered that decision-making should reside with the Medical Board as the appropriate regulatory authority.

On further consideration, this view is supported. A decision-making role for the Medical Board on advice from Professional Standards Committees and Impaired Registrants Panels should help to ensure consistency of decision-making in the proposed new regulatory processes for impairment, competence and professional conduct.

The original Working Party recommendation that Professional Standards Committees be decision-making bodies reflected the position in NSW.

However, it should be noted that the relatively larger size of the medical workforce in NSW[1] and the correspondingly larger number of complaints made to the NSW Medical Board would tend to favour the devolution of decision-making for determining responses to complaints by Professional Standards Committees under the Medical Practice Act 1992 (NSW).

The smaller size of the medical profession in Western Australia means that it is more feasible to retain decision-making responsibility at the level of the Medical Board (except in relation to matters that are referred to the Medical Tribunal) with delegation of responsibility for the production of recommended action by the Board to Professional Standards Committees and Impaired Registrants Panels.

[1] There are approximately 3 times the number of registered doctors in NSW as there are in Western Australia.

8.2.2 Complaints Assessment Committee – role and composition

Final recommendation 72 : Complaints Assessment Committee – role and composition

The Working Party recommends that the Medical Practitioners Registration Act should make provision for the establishment of a Complaints Assessment Committee or Committees as a sub-committee/sub-committees of the Medical Board.

Role

The role of a Complaints Assessment Committee should be to:

- Undertake a preliminary assessment of complaints, matters referred from the Office of Health Review, and matters warranting possible action that are identified by the Medical Board; and
- Recommend action that the Medical Board should take in response to the complaint or matter.

Composition

It is recommended that a Complaints Assessment Committee should comprise:

- Up to 4 persons appointed by the Medical Board, of whom:
  - A clear majority of members should be medical practitioners;
  - One person is to be a lay person who is representative of the community;
  - The Chairperson is to be appointed by the Medical Board.

The general powers of the Medical Board in relation to committees (final recommendation 18 refers) should apply in relation to a Complaints Assessment Committee.

Comment on final recommendation 72

Final recommendation 72 describes the proposed role and composition of a Complaints Assessment Committee, which is recommended to be established under the new Act as a committee of the Medical Board. Such a committee already exists, but is not specifically recognised in the Medical Act. The recommendation to make provision for the establishment, role and composition of a Complaints Assessment Committee is consistent with the Osteopaths Act 1997, section 16 of which requires the Osteopaths Registration Board to establish a Complaints Assessment Committee.

Like Professional Standards Committees and Impaired Registrants Panels, it will be desirable to make provision in the new Act for the established of multiple CACs as required to meet the Medical Board's complaints workload.

8.2.3 Medical Tribunal – role and composition

Final recommendation 73 : Medical Tribunal – role and composition

The Working Party recommends that the Medical Practitioners Registration Act should make provision for the establishment of a Medical Tribunal.

Role

The role of the Medical Tribunal is recommended to be:

- Hear and determine the outcome of serious complaints and other serious matters referred to the Tribunal by the Medical Board;
- Have appellate jurisdiction in relation to Medical Board registration decisions as proposed in chapter 3 and Medical Board decisions relating to the exercise of powers set out in this chapter;
- Discharge the review and appeals functions proposed in relation to authorised relevant legal entities in chapter 5.

Composition

It is recommended that the composition of the Medical Tribunal should be as follows:

- The Chairperson of the Tribunal should be a legal practitioner who is appointed by the Governor on the recommendation of the Minister for Health following consultation with the Attorney General. Eligibility for appointment as chairperson (or deputy chairperson) of the Tribunal should be confined to persons who are:
  - Serving or retired Judges of the Supreme Court or of the District Court; or
  - Eligible to be appointed as a Judge of the Supreme Court or of the District Court (ie persons who are legal practitioners of eight years standing and practice[1]).

  Provision should be made for Deputy Chairperson(s) to be appointed on the same basis.
- It is recommended that other members of the Tribunal as convened for the purposes of a hearing into a specific matter should in addition to the Chairperson/Deputy Chairperson be:
  - Two medical practitioners; and
  - A person who is not a medical practitioner,

  who are appointed by the Medical Board from panels of medical practitioners and lay persons established by the Minister for Health.

[1] S.8(1), Supreme Court Act 1935; s.10(2), District Court of Western Australia Act 1969.

Comment on final recommendations 73

As noted earlier, the proposal to establish a Medical Tribunal was included in the preliminary report to address concerns about the Medical Board performing potentially conflicting roles in investigating, "prosecuting" and determining the outcome of more serious complaints.

The proposal to establish an independent Tribunal drew on legislative developments in NSW, Queensland, and South Australia where, in each case, Tribunals presided over by senior judicial appointees and comprising medical and lay representatives hear and determine serious complaints against doctors.

As in these other jurisdictions, the independence of the Medical Tribunal of Western Australia would be established by providing for the Chairperson of the Tribunal to be appointed independently of the Medical Board. Indeed, the final recommendation confirms the Working Party's view that this appointment should be held by a senior legal practitioner – preferably a Judge or recently retired Judge of the Supreme or District Court – who is appointed by the Governor.

However, it should be noted that the Medical Board strongly favours specifying the new Act that the Chairperson of the Tribunal should be a serving Judge of the Supreme Court, as had been proposed in the Working Party's preliminary report, or alternatively a Queen's Counsel.

The Working Party's recommendations in its preliminary report relating to the proposed Medical Tribunal for Western Australia drew heavily on the precedent in NSW, and the majority of these recommendations are confirmed. For example, it is intended, as occurs in NSW, that the new Act should allow for concurrent hearings of the Medical Tribunal. This is supported by the recommendation that provision should be made for the appointment of a deputy or deputies to the Chairperson of the Tribunal and that the membership of the Tribunal for specific inquiries could be drawn from panels appointed by the Minister.

Provisions relating to the formulation of such panels are discussed in final recommendation 74.

What is envisaged, essentially, is that on receipt of a referral from the Medical Board or appeal from an aggrieved party, the Chairperson would constitute a Tribunal to deal with the matter. The Chairperson would allocate either himself or herself to preside over the Tribunal. In addition, the Medical Board would appoint 2 medical practitioners and a lay member from among panels appointed by the Minister for Health for this purpose, as occurs in NSW. [1]

The final recommendation as to the composition of the Tribunal differs from the recommendation in the preliminary report in one material respect.

The recommendation in the preliminary report had been that the Tribunal should comprise a Chairperson/Deputy Chairperson, 3 medical practitioners, and a lay member. This is the same as the composition of the NZ Medical Practitioners Disciplinary Tribunal.[2]

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[1] S.147, Medical Practice Act 1992 (NSW) refers. It should be noted that an alternative approach has been adopted in relation to the establishment of a comparable higher level disciplinary body in New Zealand. S.98 of the Medical Practitioners Act 1995 (NZ) provides that the appointment of the non-judicial members of the Medical Practitioners Disciplinary Tribunal in NZ is determined by the Tribunal's Chairperson who is a senior legal practitioner.

[2] S.98, Medical Practitioners Act 1995 (NZ) refers.

This composition was supported by the AMA, but a number of other submissions noted concern that requiring 3 out of 5 members of the Tribunal to be medical practitioners may not be appropriate. The final recommendation is that there should be 2 medical practitioners appointed to each Tribunal. This is consistent with the approach taken in NSW.[1]

It is also relevant that the recommendation relating to decision-making by the Medical Tribunal is that the Chairperson should have a casting vote where votes are tied, thus obviating the need to have an odd number of persons on the Tribunal for decision-making purposes (final recommendation 83 refers).[2]

Jurisdiction of Medical Tribunal

The proposal in the preliminary report was that the Medical Board should be required to refer to the Medical Tribunal any matter that on initial consideration appeared sufficiently serious to warrant consideration being given to suspension or cancellation of registration.

This proposal was taken from the NSW precedent. Section 52 of the Medical Practice Act 1992 (NSW) provides as follows:

> **"52. Serious complaints must be referred to Tribunal**
>
> (1) Both the [NSW Medical] Board and the [NSW Health Care Complaints] Commission are under a duty to refer a complaint to the [NSW Medical] Tribunal if at any time either forms the opinion that it may, if substantiated, provide grounds for the suspension or deregistration of a registered medical practitioner."

The assessment of "seriousness" attracted comment in a number of submissions to the review:

- The submission by Liscia and Tavelli (Solicitors) noted that a decision to refer a matter to the Tribunal might appear to involve a predetermined decision on the part of the Medical Board that particular conduct warrants removal of a person's name from the Register.

  It is important to understand that whether such a sanction is imposed will, under the Working Party's proposals, be determined by the Medical Tribunal, not by the Medical Board. This is a key distinction from the current regulatory system under the Medical Act 1894. If the Medical Board forms the view in any particular case that suspension of cancellation of registration is warranted, it will be able to submit to the Tribunal that such an outcome is appropriate. However, the Board would be just one party to proceedings before the Tribunal and it would be open to the Tribunal to come to quite a different view on the sanction, if any, that should be imposed in any individual case.

- The submission by the Mental Health Law Centre suggested that more detailed guidance should be provided in the legislation as to how complaints would be categorised as "less serious" or "more serious".

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[1] S.147, Medical Practice Act 1992 (NSW) refers.

[2] Which had been advanced as a reason for having 3 registered medical practitioners on the Tribunal – to form a 5 member Tribunal for decision-making purposes.

The Working Party does not favour attempting to prescribe the matters that should be regarded as more serious (ie warranting review by the Medical Tribunal) or less serious. It prefers the retention of the NSW approach in this regard.

It should be noted that a decision to refer a matter to the Tribunal does not pre-suppose that a particular outcome will result, nor would referral to a Professional Standards Committee (for example) necessarily close off the option of suspension or cancellation of registration. This is because:

- The response options that are recommended to be available to the Tribunal and Medical Board (on advice from a Professional Standards Committee) will be the same, with the exception of the power to suspend or cancel registration being available only to the Medical Tribunal. Thus less punitive responses (eg requirement to participate in counselling or specified educational programs) will be available to both the Tribunal and the Medical Board;

- If a matter is referred to a Professional Standards Committee and the committee decides on examination that the matter warrants consideration being given to suspension or cancellation of registration, the Committee will be able to refer back to the Medical Board with a recommendation that the matter be referred to the Medical Tribunal.

Eligibility for appointment as Chairperson or Deputy Chairperson of Medical Tribunal

The proposal in the preliminary report was that the Chairperson of the Medical Tribunal should be a Judge of the Supreme Court of Western Australia.

The final recommendation is that eligibility for appointment should be confined to persons who are serving or retired Judges of the Supreme or District Court or who are eligible to be appointed as a Judge of either Court.[1]

This change is made following consultation with the Chief Justice and Ministry of Justice, the outcome of which favoured a less prescriptive approach to the appointment of the Tribunal's Chairperson.

However, as noted above, the Medical Board remains strongly of the view that the Chairperson of the Tribunal should be a serving Judge of the Supreme Court or a Queen's Counsel.

[1] The recommended eligibility criteria for appointment of the Chairperson of the Medical Tribunal are not dissimilar to those set out in the Legal Practitioners Act 1893 in respect of the appointment of the Chairperson of the Legal Practitioners' Disciplinary Tribunal.

8.2.4 Appointment of panels by the Minister

Final recommendation 74 : Power of Minister to appoint panels

The Working Party recommends that the Medical Practitioners Registration Act should enable the Minister for Health to appoint panels of medical practitioners and lay persons from which appointments to the Medical Tribunal, Professional Standards Committees, and Impaired Registrants Panels for the purposes of particular inquiries or proceedings may be made.

It further recommends that there should be no prescribed limit on the number of persons appointed to such panels. There should however be a general duty on the Minister to ensure that the panels contain a sufficient number of persons for the purpose of constituting the Medical Tribunal, Professional Standards Committees, and Impaired Registrants Panels to meet anticipated workload requirements.

It should be open to the Minister to seek nominations for panel membership from bodies the Minister considers appropriate, including the Medical Board, AMA, Health Consumers' Council and others.

Desired characteristics of panel members

In appointing panel members, the Minister should be required to be satisfied that each person has personal attributes, knowledge and experience relevant to performing the role of a panel member, either as a medical practitioner or as a lay member.

Term of appointment to panel

Provision should be made for the term of appointment of a person appointed to a panel to be determined by the person's instrument of appointment. The maximum allowable term should be 3 years. Persons appointed to panels should be eligible for re-appointment.

Removal of person from panel

Provision should be made for a member of a panel to resign from the panel by notice in writing to the Minister.

The Minister should be able to remove a person from a panel during the person's term of appointment if the Minister is satisfied that one or more of the following grounds are established:

- For incompetence, neglect of duty, or misconduct;
- For mental or physical disability of a nature or severity that effectively renders the person incapable of performing the functions required of a panel member;
- For insolvency under administration, as defined in the Corporations Law;
- If a person ceases to hold the position or qualification by virtue of which he or she was appointed;
- If a person is convicted of an offence which, in the opinion of the Minister, renders the person unfit to be a member of the panel.

Final recommendation 74 : Power of Minister to appoint panels (continued)

Temporary additional appointments at request of Chairperson or Board

The Working Party recommends that the Medical Practitioners Registration Act should authorise the Minister to make additional temporary appointments to the medical practitioners' panel at the request of the Chairperson of the Medical Tribunal or of the Medical Board if:

- The subject of a matter referred to the Tribunal is such that the Chairperson considers that it is important that the deliberations of the Tribunal should be informed by a medical practitioner having expertise in a particular area of medical practice; or

- The Medical Board considers that the deliberations of a Professional Standards Committee or Impaired Registrants Panel should be informed by a medical practitioner having expertise in a particular area of medical practice,

and it does not appear to the Chairperson or Medical Board that any of the medical practitioners on the panel at the time have the relevant expertise.

Comment on final recommendation 74

Final recommendation 74 deals with the appointment of panels for the purpose of constituting Medical Tribunals, Professional Standards Committees, and Impaired Registrants Panels.

The preliminary report noted that such panels are used in other jurisdictions (eg NSW, Queensland, also NZ) where independent Tribunals have been established to hear serious complaints against doctors. This is perceived to be an efficient and accountable way of ensuring that adequate expertise is available to serve regulatory needs.

The final recommendation provides further details of how appointments to the panel will be made, including recommended terms of appointment and grounds for removal of a person from a panel.

In its submission to the review, the AMA queried the need for panels appointed by the Minister, advocating instead a role for the Medical Board in determining the composition of the relevant bodies. As noted above, it is more consistent with the intention that the Tribunal should be independent of the Medical Board for the Tribunal to comprise persons who are selected from panels that are formed independently of the Board. It should also be noted that the approach to constituting the Medical Tribunal is analogous to that used in convening the Mental Health Review Board (MHRB) for the purposes of reviewing the involuntary detention of persons having a mental illness. The membership of the MHRB is appointed by the Governor on the recommendation of the Minister for Health. For the purpose of conducting individual reviews of involuntary detention, the President of the MHRB selects 3 persons from among the membership of that Board to constitute "the Board" for the purpose of conducting a specific review. [1]

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[1] S.126 – 129, Mental Health Act 1996. The Act specifies that the 3 persons must be a legal practitioner, a psychiatrist, and a person who is neither a legal practitioner nor a medical practitioner (ie lay member).

8.2.5 Professional Standards Committees – role and composition

Final recommendation 75 : Professional Standards Committees – role and composition

The Working Party recommends that the Medical Practitioners Registration Act should enable the Medical Board to convene Professional Standards Committees for specific matters.

Role

The role of Professional Standards Committees is to inquire into complaints or matters of concern referred by the Medical Board in relation to the:

- Competence; or
- Professional conduct,

of registered medical practitioners.

Composition

It is recommended that a Professional Standards Committee for any given matter should comprise two medical practitioners and one lay person, of whom:

- At least one person (medical practitioner or lay) should be a member of the Medical Board;
- The other members should be selected by the Medical Board from the panels referred to in final recommendation 74; and
- One person is to be nominated by the Medical Board as Chairperson of the Committee.

Comment on final recommendation 75

The proposal in the preliminary report that the new Act should provide for the constitution of Professional Standards Committees by the Medical Board was directed at establishing a less formal, expeditious but nonetheless accountable and transparent process to deal with "less serious"[1] complaints and matters brought to the Board's attention.

The preliminary report noted that this "two-tiered" approach has been adopted in all other Australian States in various forms. The particular approach to constituting Professional Standards Committees in the preliminary report adopted essentially the comparable provisions of the Medical Practice Act 1992 (NSW).

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[1] Meaning complaints or matters which, if substantiated, would be unlikely to warrant consideration being given to suspension or cancellation of a medical practitioner's registration.

Final recommendation 75 confirms the Working Party's view that the Medical Practitioners Registration Act should provide for the establishment of Professional Standards Committees to inquire into competence and professional conduct matters that are referred by the Medical Board and make recommendations for action by the Medical Board.

It is important to note that powers of investigation and options for action at the conclusion of an inquiry by a Professional Standards Committee will be different depending on whether a particular committee has been convened to examine a competence or professional conduct matter.

The recommended composition of a Professional Standards Committee for a given matter is primarily as proposed in the preliminary report and is consistent with the NSW precedent. It differs from the recommendation in the preliminary report in stipulating that at least one of the members of a Professional Standards Committee should be a member of the Medical Board itself. This is intended to facilitate communication between the Board and committees.

The AMA's submission to the review advocated that the membership of Professional Standards Committees should be composed entirely of medical practitioners who are appointed by the Medical Board. While acknowledging that matters of professional competence and conduct will require a majority of members of a Professional Standards Committee to be drawn from the profession, the Working Party's final view is that it is also important that the deliberations of these committees are informed by lay opinion. Hence the retention of its proposal that one member of each committee should be a lay person. This is consistent with the approach taken in other jurisdictions, including NSW and Queensland.

8.2.6 Impaired Registrants Panel – role and composition

Final recommendation 76 : Impaired Registrants Panel – role and composition

The Working Party recommends that the Medical Practitioners Registration Act should enable the Medical Board to convene Impaired Registrants Panels for specific matters.

Role

The role of Impaired Registrants Panels is to look into complaints or matters of concern referred by the Medical Board in relation to impact of a registered medical practitioner's health status on his or her practice of medicine and to advise the Board as appropriate.

Composition

An Impaired Registrants Panel is recommended to comprise two persons – a medical practitioner and one other person, both of whom are to be appointed to the Panel by the Medical Board.

An Impaired Registrants Panel may comprise:

- Members of the Medical Board itself; or
- One person who is a member of the Medical Board, and one other person who is appointed from one of the panels referred to in final recommendation 74.

Comment on final recommendation 76

There was broad support in the public consultation for the idea that a separate process should be instituted under the Medical Practitioners Registration Act to deal with concerns about the impact of a medical practitioner's physical or mental health on his or her practice of medicine.

The ability to convene Impaired Registrants Panels to deal with such issues is the focus of the structural change proposed to the current Act's disciplinary system. Incorporation of this ability in the new Act was strongly supported by the AMA.

A key principle underpinning the work of Impaired Registrants Panels is that their emphasis should be on securing the voluntary co-operation of medical practitioners whose health may be affecting their medical practice in taking appropriate remedial action. Consistent with this emphasis, the intention is that Impaired Registrants Panels will be informal with the Panel itself having no power to order or compel action on the part of a medical practitioner. Each panel's authority would be derived from the role it is given by the Act to achieve a response and outcome that is negotiated with and agreed by the medical practitioner who is the subject of a referral from the Medical Board. If co-operation is not obtained, the matter would be referred back to the Medical Board for more formal proceedings.

Final recommendation 76 proposes that the composition of Impaired Registrants Panels under the new Act should be the same as in the NSW precedent, namely two persons appointed by the Medical Board of whom one should be a registered medical practitioner. This limited membership is consistent with the low-key, co-operative emphasis.

8.3 Procedural and other matters relating to elements of proposed structure for regulating medical practice

8.3.1 Hearings

Final recommendation 77 : Hearings

Medical Tribunal

It is recommended that there should be a presumption in the Medical Practitioners Registration Act that proceedings of the Medical Tribunal will be open to the public. However, the Act should allow the Tribunal to hold particular proceedings in closed session if it is satisfied that it is in the public interest to do so, having regard to the subject matter of those proceedings.

Professional Standards Committee

It is recommended that there should be a presumption in the Act that proceedings of a Professional Standards Committee will be closed to the public.

However, a committee established to look into an allegation of unsatisfactory professional conduct should be able to hold particular proceedings in open session if it is satisfied that it is in the public interest to do so, having regard to the subject matter of the proceedings.

An equivalent discretion should not be available to committees established to examine the competence of a medical practitioner – all such proceedings must be conducted in closed session.

Final recommendation 77 : Hearings (continued)

Impaired Registrants Panel

Proceedings of an Impaired Registrants Panel must be conducted in closed session.

Power for Medical Tribunal, Professional Standards Committee and Impaired Registrants Panel to prohibit publication of information

Whether or not proceedings are open or closed, it is recommended that the Medical Tribunal, Professional Standards Committees and Impaired Registrants Panels should have the power, where satisfied that it is desirable in any particular case to do so, to order that:

- Any information disclosing the identity of parties to the proceedings;
- Evidence presented to the Tribunal, committee, or panel;
- Information produced to the Tribunal, committee, or panel (eg the content of reports); or
- The identity of any person who appeared in proceedings before the Tribunal, committee, or panel,

is not to be published.

Failure to observe this prohibition should be an offence.

Procedures where proceedings relate to allegation of sexual exploitation

Where the subject matter of proceedings before the Medical Tribunal or a Professional Standards Committee concerns an allegation that a medical practitioner has engaged in the sexual exploitation of a patient, either or both of the following must occur if either or both is requested by the complainant in proceedings before the Tribunal:

- Proceedings of the Tribunal or committee must be conducted in closed session;
- The Tribunal or committee must make an order prohibiting the publication of any information relating to the proceedings that would allow the identity of the complainant or medical practitioner to be ascertained.[1]

Failure to observe this prohibition should constitute an offence.

[1] This prohibition would not apply if an adverse finding is made against the medical practitioner. In this situation, the requirement for decisions to be published should apply – final recommendation 121 refers.

Comment on final recommendation 77

The recommendation in the preliminary report had been that there should be a presumption in the Medical Practitioners Registration Act that proceedings of the Medical Tribunal and Professional Standards Committee should be, respectively, open and closed. This was to have been subject to there being a discretion given to the Tribunal and committee to reverse this presumption if satisfied that it is in the public interest to do so.

This approach is consistent with the NSW precedent. It was generally supported in submissions to the Medical Act review, notably by the AMA, Health Consumers' Council, and the WA branch of the Royal Australasian College of Surgeons.

Final recommendation 77 retains the basic approach set out in the preliminary report, but goes further in three respects:

- First, it proposes that the Medical Tribunal, Professional Standards Committees and Impaired Registrants Panels should have power to make an order preventing publication of certain information relating to the proceedings. The ability for the equivalent bodies in NSW to make such orders is also found in the NSW legislation.[1] The AMA's submission to the review advocated that provision for orders to be made suppressing the identity of doctors who become involved in proceedings should be included in the new Act.
- Second, it proposes that there should be no discretion to decide that proceedings of the Medical Tribunal or Professional Standards Committee should be open or closed if the proceedings relate to an allegation of sexual exploitation. In this situation, it is proposed that proceedings must be closed if this is requested by a complainant involved in the proceedings. A complainant should also be able to request that a prohibition be placed on the publication of any information relating to proceedings that would enable the identity of either party to be ascertained. This would not apply to disclosure of the identity of a doctor against whom an adverse finding is made by the Medical Tribunal.
- Third, it proposes that there should be no discretion given to a Professional Standards Committee that is established to inquire into a competence issue to decide that proceedings should be conducted in open session. All such proceedings should be conducted in closed session.

[1] Clause 6, Schedule 2, Medical Practice Act 1992 (NSW) refers.

8.3.2 Procedures and proceedings

Final recommendation 78 : Procedures and proceedings

The Working Party recommends as follows:

Medical Tribunal and Professional Standards Committees

The Medical Practitioners Registration Act should provide in relation to the Medical Tribunal and Professional Standards Committee that:

- Neither should be bound by the rules of evidence, but both should be required to conduct proceedings in accordance with the rules and principles of natural justice;
- Both should have power to summons and swear witnesses, take evidence and obtain documents;
- Both should be able to admit evidence from judicial proceedings where the evidence is relevant to the matter before the Tribunal or committee, as the case may be;
- Both should be under a duty to proceed expeditiously and with as little formality and technicality as the requirements of a proper hearing of the matter before the Tribunal or committee permit;
- Both should have power to adjourn proceedings.

Otherwise procedural matters should be determined by the Tribunal or committee or by the making of procedural rules in accordance with final recommendation 79.

Final recommendation 79 : Procedural rules

The Working Party recommends that the Medical Practitioners Registration Act should provide as follows:

Procedural rules – Medical Board

- The Medical Board should be able to make rules that are consistent with the principles of natural justice, subject to the approval of the Governor, in respect of the procedure of:
  - Professional Standards Committees;
  - Impaired Registrants Panels; and
  - Complaints Assessment Committee.

Procedural rules – Medical Tribunal

- The Chairperson and Deputy Chairperson(s) of the Medical Tribunal should have power to make rules that are consistent with the Act in respect of the practice and procedure of the Tribunal. Such rules should be regarded as a regulation for the purposes of Part 6 of the Interpretation Act 1984, ie:
  - Should be published in the Government Gazette and should ordinarily come into operation on the date of publication;
  - Are to be subject to Parliamentary scrutiny and disallowance under section 42 of that Act.[1]

Final recommendation 80 : Legal assistance for Professional Standards Committees

The Working Party recommends that the Medical Practitioners Registration Act should enable the Medical Board, at the request of a Professional Standards Committee, to appoint a legal practitioner to assist the committee, and in particular to:

- Advise the committee on the conduct of proceedings before the committee; and
- Prepare recommendations and reasons for the committee's recommendations.[2]

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[1] Cf. s.87– 88, District Court of Western Australia Act 1969; s.158, Medical Practice Act 1992 (NSW).

[2] Cf. s.176(3), Medical Practice Act 1992 (NSW).

Comment on final recommendations 78 – 80

Final recommendations 78 – 80 set out the proposals that the Working Party would wish to see reflected in the Medical Practitioners Registration Act in respect of the proceedings and procedures of the Medical Tribunal and Professionals Standards Committees.

The issue of procedures attracted limited comment in submissions to the review, and hence these recommendations are, in their essence, unchanged from the preliminary report.

Final recommendation 78 establishes procedural ground rules in relation to hearings of both the Medical Tribunal and Professional Standards Committees. These ground rules are consistent with:

- The quasi-judicial role to be performed by these bodies; and
- Comparable provisions which govern the procedure of the Medical Tribunal and Professional Standards Committees in NSW.[1]

Final recommendation 79 deals with the making of procedural rules in relation to proceedings under the new Act. It distinguishes between:

- The Medical Board's role in preparing subsidiary legislation dealing with procedure, if any, before committees established by the Board (ie Professional Standards Committee, Impaired Registrants Panel, and Complaints Assessment Committee – in the case of the last two, minimal guidance on procedure is likely to be necessary); and
- The ability to make rules governing the procedure of the Medical Tribunal. In this case, it is proposed that power to make procedural rules should be conferred on the Chairperson and Deputy Chairperson of the Tribunal. This is analogous to the role of Judges of the Supreme and District Court making procedural rules for their respective courts. It is also analogous to the rule-making power conferred on the Chairperson and Deputy Chairperson of the NSW Medical Tribunal.

Any procedural rules made by the Medical Board or in respect of the Medical Tribunal would be subject to Parliamentary scrutiny and disallowance in accordance with Part 6 of the Interpretation Act 1984.

Final recommendation 80 confirms a proposal contained in the preliminary report in respect of the provision of legal support for Professional Standards Committees.

The membership of these committees will not include a lawyer. While the intention is that Professional Standards Committees will conduct proceedings with as little formality as possible, they will nevertheless be required to adhere to principles of natural justice.

It will also be the case that recommendations by Professional Standards Committees that may be adopted by the Medical Board may be the subject of an appeal to the Medical Tribunal. It is important for these reasons to ensure that Professional Standards Committees have access to legal support and expertise, as the comparable committees in NSW do.

[1] Schedule 2, Medical Practice Act 1992 (NSW) refers.

8.3.3 Representation and support in proceedings

Final recommendation 81 : Representation in proceedings

The Working Party recommends as follows:

Medical Tribunal

Parties in proceedings before the Medical Tribunal should be able to elect to be represented by a legal practitioner or other adviser.[1]

Professional Standards Committees

Parties in proceedings before a Professional Standards Committee should be able to elect to be accompanied (but not represented) by a legal practitioner or other adviser.

However, a Professional Standards Committee should be able to grant leave for an adviser (other than a legal practitioner) who accompanies a medical practitioner to address the Committee on behalf the practitioner.[2]

Impaired Registrants Panel

No provision should be made for medical practitioners who are requested to attend an Impaired Registrants Panel to be able to be represented by a legal practitioner or to be accompanied by a legal practitioner. They should however be able to elect to be accompanied by another medical practitioner.

Final recommendation 82 : Complainant may be accompanied by support person

The Working Party recommends that the Medical Practitioners Registration Act should authorise the Medical Tribunal or Professional Standards Committee to allow a complainant to be accompanied in proceedings by a person of the complainant's own choosing for the purposes of providing support.

Comment on final recommendations 81 & 82

The preliminary report recommended that a distinction should be drawn in the new Act in the rights to legal representation available to parties in proceedings before the Medical Tribunal and Professional Standards Committees. Essentially, the Working Party had proposed that there should be rights to legal representation before the Medical Tribunal but not a Professional Standards Committee.

This distinction mirrors the position in NSW.

[1] Cf. s.162, Medical Practice Act 1992 (NSW).

[2] Cf. s.177, Medical Practice Act 1992 (NSW).

As noted previously, Professional Standards Committees are expected to proceed with as little formality as possible and their membership is not to include a legal practitioner. It is consistent with this intention to exclude the involvement of legal representatives. It is important to note in this context that there is proposed to be a broad right of appeal on matters of fact and law to the Medical Tribunal in relation to findings and recommendations produced by a Professional Standards Committee that are acted upon by the Medical Board. Legal representation would be available at any such appeal.

No substantive comments on the matter of legal representation in proceedings before a Professional Standards Committee were made to the review.

Final recommendation 82 responds to comments by health consumers concerning the desirability of providing for the involvement of a support person for complainants where proceedings are likely to prove distressing. This point was made particularly with regard to proceedings into allegations of sexual exploitation. One submission to the review drew attention to section 107 of New Zealand's Medical Practitioners Act 1995 which expressly acknowledges a role for support persons in proceedings which are likely to cause distress to a complainant.[1]

8.3.4 Decision-making

Final recommendation 83 : Decision-making – Medical Tribunal

The Working Party recommends as follows:

Medical Tribunal

The Medical Practitioners Registration Act should provide that:

- Decisions of the Medical Tribunal, other than decisions relating to procedure and the interpretation of law, should be reached by majority voting among the members of the Tribunal as constituted for a particular matter. Where the ordinary votes of the members of the Tribunal are tied, the Chairperson of the Tribunal for the particular matter should have a casting vote in addition to an ordinary vote;
- Decisions on procedure and the interpretation of law in proceedings before the Tribunal should be determined by the Chairperson.[2]

[1] Submission by Ms Janet Lowe and Ms Jean Goodwill.

[2] Cf. s.154, Medical Practice Act 1992 (NSW).

Final recommendation 84 : Decision-making – Professional Standards Committees and Impaired Registrants Panel

The Working Party recommends as follows:

Professional Standards Committee

The Medical Practitioners Registration Act should provide that decisions of a Professional Standards Committee should be reached by majority voting among the members of the committee as constituted for a particular matter.[1]

Impaired Registrants Panel

A decision supported by both members of an Impaired Registrants Panel should be the decision of the Panel.

If the members of an Impaired Registrants Panel cannot come to a decision that they both share, they should be required to notify the Medical Board providing a report detailing the reasons for their failure to reach agreement.[2]

Comment on final recommendations 83 & 84

Final recommendations 83 and 84 propose that decisions of the Medical Tribunal and a Professional Standards Committee may be determined by majority voting (involving the Chairperson of the Tribunal having a casting in addition to an ordinary vote for this purpose).

Decision-making by the Impaired Registrants Panel should be by consensus and failing that by referral to the Medical Board.

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[1] Cf. s.171, Medical Practice Act 1992 (NSW).

[2] Cf. s.184, Medical Practice Act 1992 (NSW).

8.3.5 Determining remuneration and allowances

Final recommendation 85 : Remuneration and allowances

The Working Party recommends that the Medical Practitioners Registration Act should provide that the remuneration and allowances payable to:

- The Chairperson and Deputy Chairperson of the Medical Tribunal; and
- Medical and lay members of the Medical Tribunal, Professional Standards Committees, and Impaired Registrants Panels,

should be determined by the Minister for Health on advice from the Minister for Public Sector Management.

The Minister for Health should be required to consult the Attorney General before making a determination in relation to the remuneration and allowances payable to the Chairperson and Deputy Chairperson of the Medical Tribunal.

Remuneration and allowances should be paid by the Medical Board.

Comment on final recommendation 85

The final recommendation in respect of determining the remuneration to be paid to members of the Medical Tribunal, Professional Standards Committees, and Impaired Registrants Panels is essentially unchanged from that which appeared in the preliminary report. The approach involving the Minister responsible for the Act (ie the Minister for Health) making a determination on advice from the Minister for Public Sector Management is consistent with:

- The recommended approach to determining the remuneration payable to members of the Medical Board (final recommendation 12 refers); and
- The approach taken in the Legal Practitioners Act 1893 to determining the remuneration payable to the Chairperson and members of the Disciplinary Tribunal and Complaints Committee established under that Act.[1]

The recommendation also is that consultation should occur between the Minister for Health and the Attorney General in relation to the remuneration payable to the Chairperson and Deputy Chairperson of the Medical Tribunal. This element of the recommendation acknowledges the Attorney General's role in the appointment of the Chairperson and Deputy Chairperson of the Tribunal (final recommendation 73 refers) and the quasi-judicial nature of the role of the Chairperson and Deputy Chairperson.

A number of submissions to the review commented on the question of remuneration and allowances, notably those from the AMA and other medical groups, including the State branch of the Royal Australian College of Obstetricians and Gynaecologists.

[1] Part C, Schedule 2, Legal Practitioners Act 1893 refers.

These submissions noted concern that:

- The new regulatory structure will be more costly to administer;
- These costs should not necessarily be carried by the medical profession (through the imposition of higher registration fees, for example) because of the quasi-judicial nature of the proceedings envisaged, particularly the Medical Tribunal.

The AMA advocated that consideration should be giving to Government making a financial contribution towards the cost of the new structure.

The general policy that applies in this area is that professions that are self-regulating under an Act of Parliament, such as the medical profession, are required to raise sufficient revenue through fees and other charges to meet the costs of that regulation. Whether this general principle is departed from in relation to the regulation of medical practice under the new Act will require careful consideration within Government.

As indicated in the discussion concerning final recommendation 65 (funds of the Medical Board), it is intended that a business case should be prepared jointly by the Medical Board and the Health Department of Western Australia to determine the estimated cost of establishing and operating the new regulatory structure. Decisions on funding can be taken in light of that assessment.

Beyond that, questions of funding of the new structure do not need to be addressed within the new Act itself. As proposed in final recommendation 65, it will be possible for the State to provide financial assistance to the Medical Board in the form of grants or loans. There will therefore be an avenue for the Government to provide financial support towards the costs of administering the regulatory structure if it is decided at any point that this should happen.

8.4 Initiating action

Final recommendation 86 : Initiating action

The Working Party recommends that the Medical Practitioners Registration Act should provide that action involving a medical practitioner may be initiated under the Act:

- On receipt of a complaint by the Medical Board by any person concerning the actions and activities of a medical practitioner;
- On referral of a matter to the Medical Board by the Director of the Office of Health Review under the Health Services (Conciliation and Review) Act 1995;
- If the Medical Board decides on its own motion to initiate action under the Act in any particular case.

Final recommendation 87 : Form of complaints

The Working Party recommends that the Medical Practitioners Registration Act should provide in relation to complaints made to the Medical Board:

- That complaints ordinarily should be made in writing and should contain particulars of any allegation made against a medical practitioner. However, the Medical Board should have a discretion to proceed with a complaint that is made orally to it if it believes that it is in the public interest for it to do so, subject to:
    - The complainant's identity being satisfactorily established by the Medical Board; and
    - Sufficient details of the allegation made against a medical practitioner being provided by the complainant.
- Complaints cannot be dealt with under the Act if the complainant's identity is not established. [1]

Comment on final recommendations 86 & 87

The Working Party's preliminary report proposed that the new Act should be clearer than is the Medical Act 1894 on the circumstances in which action involving medical practitioners may be initiated. The test to be satisfied under the present Act is that it must "… appear to the Board …" that a medical practitioner has breached one of the grounds for action set out in section 13(1) of the Act, in which case the Board is required to hold an inquiry into the matter.

Interestingly, the word "complaint" does not appear anywhere in the current Act's disciplinary scheme, nor does the Act acknowledge that regulatory action by the Medical Board may be triggered by the receipt of a complaint. However, in practice whether "it appears" to the Board that action under the Act may be warranted is determined principally by the complaints made to it.

Final recommendation 86 proposes to categorise the circumstances in which action under the new Act may be initiated. The three proposed categories (receipt of complaint, referral of complaint from Office of Health Review, and decision by the Medical Board on its own motion) were suggested in the preliminary report.

This particular issue did not attract significant comment in responses to the review. The State branch of the Royal Australian College of Obstetricians and Gynaecologists noted that it was not in favour of giving the Medical Board the ability to initiate action "… on its own motion …" because the College felt that this may involve a conflict of interest for the Board. The Working Party disagrees. It regards the ability for the Medical Board to act independently of receiving a complaint as consistent with the more proactive regulatory role envisaged for the Board in the new Act.

Other submissions to the review supported this more interventionist approach.

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[1] For which purpose, the Medical Board should have the same ability has the Director of the Office of Health Review has under s.27(3) of the Health Services (Conciliation & Review) Act 1995 to require a complainant to provide his or her name and such other information relating to the person's identity as the Director requires.

Referrals from Office of Health Review

The reference to referral of matters from the Office of Health Review (OHR) acknowledges the provision made in the Health Services (Conciliation and Review) Act 1995:

- For the Director of the OHR to refer certain complaints to health practitioner registration boards, including the Medical Board; and
- Requiring boards to initiate action under their own Acts when such referrals are made.[1]

Who may complain

Final recommendation 86 does not propose to limit who may make a complaint to the Medical Board, in the way that (for example) the Health Services (Conciliation and Review) Act 1995 restricts the persons from whom the Director of the Office of Health Review may receive a complaint.[2]

This unrestricted approach is consistent with the medical practitioner legislation of most other States and Territories. Indeed, some jurisdictions go further and specify particular "persons" from whom a complaint may be received who have no direct connection with the medical service provided in relation to which the complaint is made.

For instance:

- In NSW, the Director-General of the NSW Department of Health may make a complaint to the NSW Medical Board;[3]
- In NZ, the Minister for Health and public servants acting in an official capacity may make a complaint to the NZ Medical Council.[4]

Requirement for complaints ordinarily to be in writing

The acceptable form of a complaint was not the subject of consideration in the preliminary report.

Final recommendation 87 proposes that for any complaint to be acted upon by the Medical Board it should be made in writing and the identity of the complainant must be known to the Board. However, it is recommended that discretion should be given to the Medical Board to proceed with complaints that are made orally to it if there are strong public interest reasons for it doing so.

This discretion is intended to deal with situations where people are unwilling or unable for practical or other reasons to make a complaint in writing, but where the Board considers that there are strong reasons for it to pursue the matter in the public interest.

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[1] S.43 and s.54 of the Health Services (Conciliation and Review) Act 1995 refers.

[2] S.19 of the Health Services (Conciliation and Review) Act 1995 provides that complaints under that Act may be made by the user of a service, a user's representative, or by a service provider. The Minister for Health may also direct the Director of the Office of Health Review to investigate matters under the Act on certain public interest grounds (s.45, Health Services (Conciliation and Review) Act 1995).

[3] S.41, Medical Practice Act 1992 (NSW).

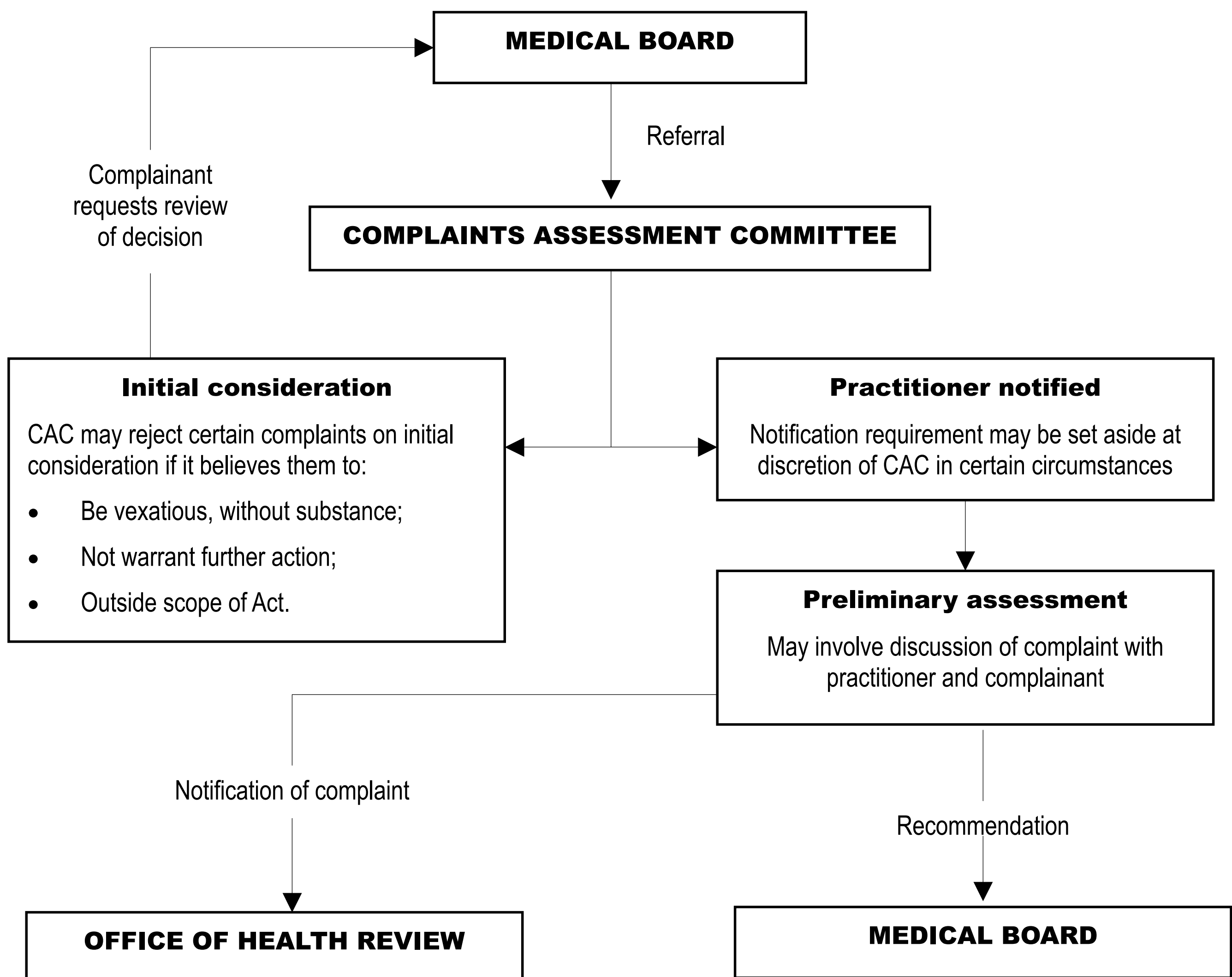
[4] S.83, Medical Practitioners Act 1995 (NZ).

In all cases, it should be necessary for sufficient details of the particular allegation(s) made in relation to a medical practitioner to be provided.

This links to recommendations that medical practitioners should be informed of the fact and content of complaints that are made about them to the Medical Board.

8.5 Complaints assessment

CHART 3 : OVERVIEW OF COMPLAINTS ASSESSMENT PROCESS



Final recommendation 88 : Complaints assessment – initial steps

Requirement to refer matters to Complaints Assessment Committee

The Medical Practitioners Registration Act should require the Medical Board to refer to a Complaints Assessment Committee for preliminary assessment:

- All complaints it receives;
- All matters referred to it by the Director of the Office of Health Review; and
- Any matter the Medical Board has decided on its own motion may warrant action under the Act.

Certain complaints may be rejected on initial consideration

On receipt and the completion of initial inquiries into a complaint, a Complaints Assessment Committee should be able to reject the complaint if it appears to the committee that the complaint:

- Is vexatious, trivial or without substance;
- Does not warrant further action; or
- Is not a complaint that can be dealt with under the Act because it does not appear to relate to one of the grounds for action identified in final recommendation 69.

Otherwise the complaint should be subject to a preliminary assessment as outlined in final recommendation 89.

Review of committee's decision to reject complaint

Where a complaint is rejected, a Complaints Assessment Committee should be required to:

- Notify the complainant and the Registrar of the Medical Board of its decision and to provide an adequate explanation of the reasons for it;
- Advise the complainant that he or she may request the Medical Board to review the decision.

If so requested, the Medical Board should be required to appoint a committee of two of its members (not being persons who had any involvement in the original Complaints Assessment Committee decision to reject the complaint) to review the decision and report to the Board. On receipt of this report, the Board should be able to do one of the following:

- Uphold the CAC's decision to reject the complaint;
- Direct the CAC to undertake a preliminary assessment of the complaint and to make a recommendation of a kind indicated in final recommendation 91; or
- Proceed with one of the options for action indicated in final recommendation 91.

Final recommendation 89 : Conduct of preliminary assessment by Complaints Assessment Committee

The Working Party recommends that the Medical Practitioners Registration Act should authorise a Complaints Assessment Committee to do the following in relation to complaints and matters referred to it (other than complaints that the CAC rejects on initial consideration as proposed in final recommendation 88):

- Notify the relevant medical practitioner of the complaint or matter; and
- Conduct a preliminary assessment of the complaint or matter.

Requirement to notify medical practitioner

The Medical Practitioners Registration Act should require a Complaints Assessment Committee on receipt of a complaint or referral to:

- Notify the medical practitioner(s) in respect of whom a complaint or referral has been made to the CAC of the fact that a complaint or referral has been made, the person by whom a complaint has been made, and the subject matter of the complaint or referral. However, notification should not occur at this stage if the Complaints Assessment Committee believes on reasonable grounds that such a notification would be likely to:
  - Prejudice the investigation of the complaint;
  - Place the health or safety of a patient at risk;
  - Place the complainant or any other person at risk of intimidation or harassment.[1]
- Provide the medical practitioner(s) with details of the Complaints Assessment Committee's role and the options for action by the Medical Board that the CAC can recommend; and
- Provide the medical practitioner(s) concerned with an opportunity to make a written submission to the CAC in relation to the complaint or referral within 14 days.

Conduct of preliminary assessment

In conducting a preliminary assessment, a Complaints Assessment Committee should be able to conduct such inquiries as it considers appropriate.[2]

Such inquiries may include approaching a complainant and the medical practitioner in respect of whom a complaint or referral is made to discuss the subject matter of the complaint or referral, but should not extend to authorising or exercising the investigative powers referred to in section 8.6 of this report.

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[1] Cf. s.47(3), Medical Practice Act 1992 (NSW); s.35(2), Health Services (Conciliation and Review) Act 1995.

[2] Cf. s.49(2), Osteopaths Act 1997; s.34(2), Health Services (Conciliation and Review) Act 1995.

Final recommendation 89 : Conduct of preliminary assessment by Complaints Assessment Committee (continued)

Conduct of preliminary assessment (continued)

The Act should require preliminary assessments to be undertaken within 28 days of referral of a complaint or matter to a Complaints Assessment Committee. However, this period may be extended for a further period of 28 days at the discretion of the CAC if it appears to the CAC that it would be of benefit to a complainant for it to do so.[1]

Final recommendation 90 : Notification of complaints to Office of Health Review

The Working Party recommends that the Medical Practitioners Registration Act should require a Complaints Assessment Committee, following its preliminary assessment of a complaint, to determine whether the subject matter of the complaint meets the criteria for complaints that may be acted upon by the Director of the Office of Health Review.[2]

If the Complaints Assessment Committee decides that a complaint meets the relevant criteria, it should be required to:

- Provide a copy of the complaint to the Director of the Office of Health Review – this action would discharge the Medical Board's obligation to notify the Director of the OHR of relevant complaints pursuant to section 53(1) of the Health Services (Conciliation and Review) Act 1995; and
- Advise the Registrar of the Medical Board, the complainant, and the medical practitioner[3] to whom the complaint relates, that a copy of the complaint has been provided to the Director of the OHR.

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[1] Cf. section 34(1), Health Services (Conciliation and Review) Act 1995.

[2] S.25(1) of the Health Services (Conciliation and Review) Act 1995 defines the scope of matters that may be the subject of a complaint that the Director of the Office of Health Review may act upon. Obviously, a determination by the Complaints Assessment Committee as proposed under final recommendation 88 would not need to be made in relation to a complaint that had been referred to the Medical Board by the Office of Health Review itself. The decision here is whether the Office of Health Review should be informed of the complaint under review by the Medical Board for the purpose of deciding whether the Board's obligation under the Health Services (Conciliation and Review) Act 1995 to notify the Office of Health Review about the complaint needs to be discharged.

[3] Subject to the CAC having a similar discretion not to advise the medical practitioner at this stage for the same reasons as identified in final recommendation 89.

Final recommendation 91 : Action the Complaints Assessment Committee may recommend on completion of preliminary assessment

The Working Party recommends that, on completion of a preliminary assessment, a Complaints Assessment Committee should be required to:

- Make a recommendation to the Medical Board as to what further action, if any, the Board should take in relation to the complaint or referred matter; and
- Provide the Medical Board with reasons for the CAC's recommendation.

The options that a Complaints Assessment Committee may recommend to the Medical Board should be as follows:

- To decline to taken any further action on grounds that the complaint or matter, on preliminary assessment:
  - Is vexatious, trivial or without substance;
  - Does not warrant further action; or
  - Is not a complaint or matter that can be dealt with under the Act because one of the grounds for action identified in final recommendation 69 does not appear to exist.
- Where it appears to the CAC that the complaint or matter relates to a concern about an impairment affecting a medical practitioner, to deal with the complaint or matter in accordance with the impairment process described in section 8.6.1;
- Where it appears to the CAC that the complaint or matter relates to a concern about the competence of a medical practitioner, to deal with the complaint or matter in accordance with the competence process described in section 8.6.2;
- Where it appears to the CAC that the complaint or matter alleges unsatisfactory professional conduct on the part of a medical practitioner, to deal with the complaint or matter in accordance with the process described in section 8.6.3;
- To initiate proceedings in relation to the complaint or matter before the Medical Tribunal with or without first issuing an interim order;
- To refer a complaint to the Director of the Office of Health Review to be dealt with under the Health Services (Conciliation and Review) Act 1995, with or without a recommendation that conciliation under that Act be attempted;
- To itself appoint a conciliator to attempt to conciliate between a complainant and the medical practitioner to whom a complaint relates under the Medical Practitioners Registration Act.

Final recommendation 92 : Decision-making by the Medical Board on advice from a Complaints Assessment Committee

The Working Party recommends that, on receipt of the CAC's recommendation referred to in final recommendation 91, the Medical Board should be required to:

- Make a decision concerning the future management of the complaint or matter. The Medical Board should be able to accept the recommendation of the CAC or decide to pursue any of the other options that are described in final recommendation 91;
- Inform the complainant and the medical practitioner[1] to whom a complaint relates of the Board's decision on the future management of the complaint or matter; and
- Where the Medical Board's decision is that no further action should be taken in relation to a complaint, to provide reasons in writing for this decision to the complainant.

Comment on final recommendations 88 – 92

Final recommendations 88 – 92 deal with the assessment of complaints by a Complaints Assessment Committee. The stages and processes involved are summarised in chart 3.

The purpose of complaints assessment is to inform decisions on the response that the Medical Board should make to complaints and other referred matters. Decision-making responsibility is proposed to reside with the Medical Board – the CAC will, in effect, be advisory with only limited scope to take action independently of the Board. This is consistent with the approach taken in the Osteopaths Act 1997. A requirement for preliminary assessment before decisions are taken about the handling of complaints is also found in the Health Services (Conciliation and Review) Act 1995.

There are three main issues to consider when reviewing the final recommendations relating to complaints assessment:

- The stage at which, and grounds on which, complaints may be rejected;
- The stage at which medical practitioners should be informed that a complaint has been made against them, and by whom;
- The scope of a "preliminary assessment".

Rejection of certain complaints

A particular issue for consideration is the stage at which complaints may be rejected and whether the new Act should allow this to occur before a medical practitioner becomes aware that a complaint against him or her has been made.

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[1] Subject to the Medical Board having a similar discretion not to advise the medical practitioner at this stage for the same reasons as identified in final recommendation 89.

During the course of the review the Health Consumers' Council acknowledged that some ability to decline to deal with complaints at an early stage would be appropriate. For example, if the subject matter of a complaint cannot be properly substantiated by a complainant.

The Office of Health Review has also advised that it is not unusual for matters of concern that may be raised as a "complaint" to be dealt with by way of providing further information or reassurance to the complainant.

Such complaints may stem from a lack of understanding on the part of a patient about the constraints operating on health professionals by virtue of their registration or other statutory requirements. Concerns of this kind are often dealt with expeditiously and without necessarily involving the health professional who is the nominal subject of the complaint.

Consistent with this understanding, it is recommended that a Complaints Assessment Committee should itself be able to reject certain complaints on initial consideration, which in most cases would involve some follow-up contact with a complainant.

The Health Consumers' Council's view was that, where this occurs, provision should be made in the Act for a complainant to be able to request a review by the Medical Board of the CAC's decision to reject a complaint. This suggestion helps to re-inforce the accountability of a Complaints Assessment Committee and has accordingly been incorporated into final recommendation 88.

Notification of complaints to medical practitioners

The ordinary requirements of procedural fairness would dictate that a medical practitioner who is the subject of a complaint should be informed of the complaint that has been made and the person who has made the complaint at an early stage in the complaint handing process.

Final recommendation 89 therefore proposes that, except where a complaint is rejected on initial consideration by a Complaints Assessment Committee, a medical practitioner should ordinarily be advised early in the process of preliminary assessment that he or she is the subject of:

- A complaint;
- Referral from the Office of Health Review; or
- A decision by the Medical Board that action in relation to the practitioner may be warranted.

The medical practitioner should also, ordinarily, be advised of the nature of the complaint or referral and the identity of the person who has made the complaint or referral. Final recommendation 89 also proposes that medical practitioners who are in this situation should be able to make a written submission to the CAC concerning a complaint to inform the CAC's preliminary assessment of the complaint or matter.

The presumption in the new Act should be that the majority of complaints and matters referred to the CAC for preliminary assessment will be notified and dealt with in this way.

However, final recommendation 89 acknowledges that there may be some situations when it would not be appropriate to notify medical practitioners of either the fact of a complaint or the identity of a complainant at this early stage.

The NSW Medical Practice Act allows the NSW Medical Board to set aside the requirement stated in that Act that medical practitioners should be notified concerning a complaint if the NSW Board is satisfied that the likely consequences would be that an investigation into the complaint would be prejudiced, the health or safety of a patient may be put at risk, or there is a possibility of intimidation or harassment of a complainant.[1]

In Western Australia, the Director of the Office of Health Review is able to set aside a statutory requirement to provide details of the identity of a complainant (but cannot set aside the requirement to notify a health practitioner about a complaint) for similar reasons.[2] In practice, however, notifying complaints on a de-identified basis is problematic, and protection of the identity of a complainant is difficult.

Final recommendation 89 proposes that the ability under the NSW Medical Practice Act to set aside the notification requirement at the stage of preliminary assessment of a complaint by the CAC should be included in the Medical Practitioners Registration Act. It is expected that such discretion would be exercised infrequently, but it would be relevant in more serious cases where the deployment of intrusive investigative powers (for example) may be contemplated. Deferral of notification may be necessary in such cases to prevent the loss or destruction of evidence that may indicate that a medical practitioner has engaged in serious unsatisfactory professional conduct.

It should also be acknowledged that, at a stage in the process of complaint handling, a medical practitioner who is not notified of a complaint at the stage of preliminary assessment will be made aware that a complaint has been made against him or her, and will be able to answer any allegations that have been made. In the more serious cases, this will occur in proceedings before the Medical Tribunal. In this context, it is important to acknowledge that the preliminary assessment of complaints is simply intended to provide a filter for decision-making by the Medical Board.

Form of preliminary assessment

It is not proposed that a preliminary assessment should require the deployment of extensive or intrusive investigative powers on the part of a Complaints Assessment Committee.

Rather, the CAC should be authorised to conduct appropriate inquiries, which may involve making contact with both a complainant and the medical practitioner who is the subject of a complaint to clarify certain matters. If more extensive investigation is required, this should be authorised by the Medical Board under one of the response streams detailed in section 8.6. This is consistent with the approach taken in the Osteopaths Act 1997 and the Health Services (Conciliation and Review) Act 1995.

Decision-making by the Medical Board

Final recommendation 92 confirms the intention that decisions about the handling of complaints beyond the stage of preliminary assessment should be taken by the Medical Board. The Board should be able to act on the specific recommendation of a Complaints Assessment Committee or to pursue any one of the other response options noted in final recommendation 91.

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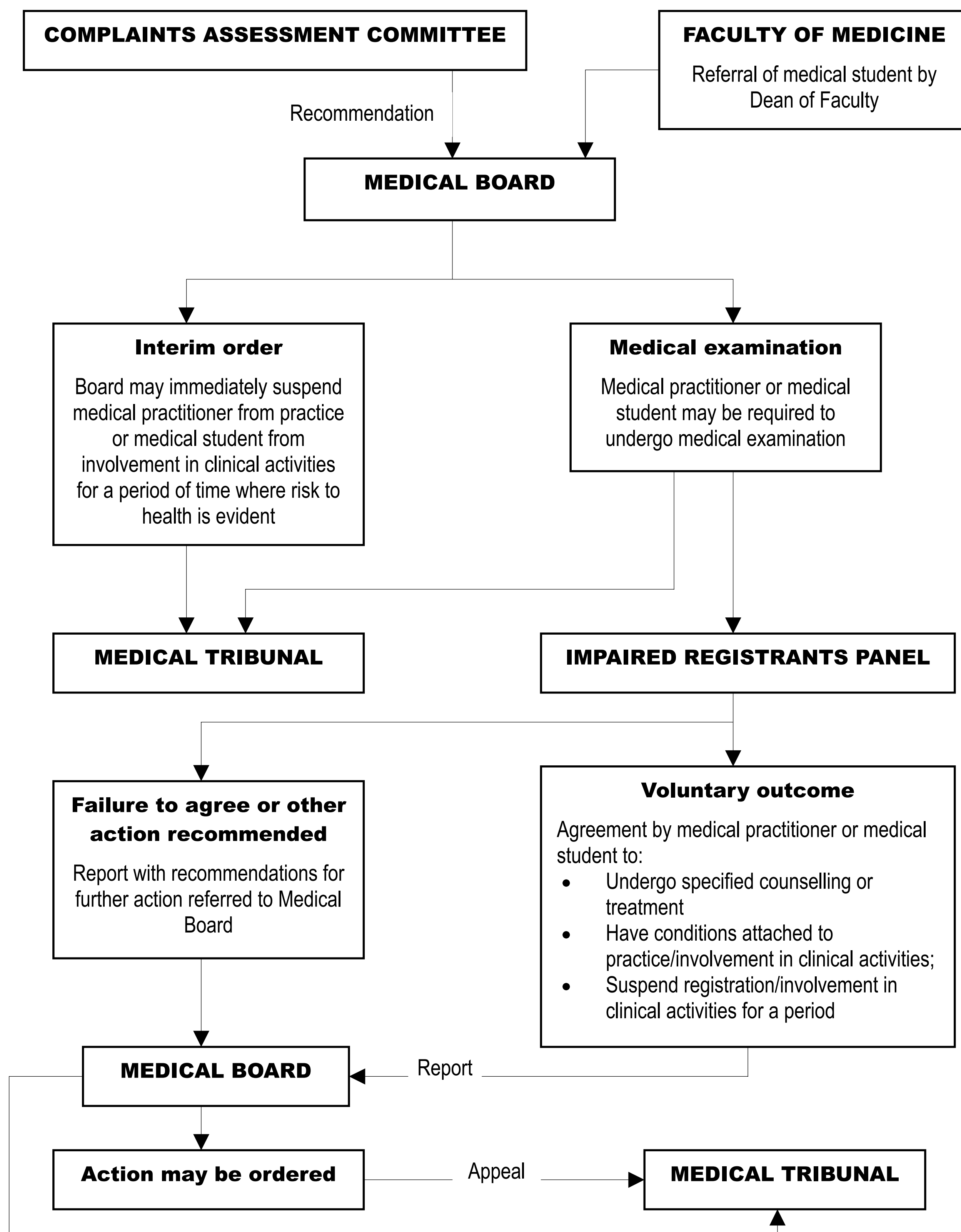
[1] S.47(3), Medical Practice Act 1992 (NSW) refers.

[2] S.35(2), Health Services (Conciliation and Review) Act 1995 refers.

8.6 Description of regulatory processes

8.6.1 Impairment process

CHART 4 : OVERVIEW OF IMPAIRMENT PROCESS



Comment on impairment process

Final recommendations 93 – 100 detail how the proposed impairment process is recommended to operate. Chart 4 summarises the main stages involved. In developing these recommendations and putting essential detail on the proposed system for dealing with impairment, close attention has been paid to comparable impairment processes in NSW[1] and New Zealand.[2]

As discussed in chapter 6, an important feature of the proposed impairment system for the Medical Practitioners Registration Act is that its recommended application to medical students who are referred to the Medical Board by the Dean of UWA's Faculty of Medicine, as well as to registered medical practitioners. This is in contrast to the competence and professional conduct processes described in sections 8.6.2 and 8.6.3 below, which would apply only to medical practitioners.

Another key feature of the impairment process is the opportunity it will afford medical practitioners and medical students who are referred to an Impaired Registrants Panel to discuss and agree action that may be taken in response to a health issue that may be impacting on their involvement in providing medical services.

Final recommendation 93 : Impairment process – initial steps

The Working Party recommends that where the Medical Board decides to deal with a complaint or referred matter as an impairment matter, it should inform the medical practitioner of this fact and, where the practitioner has not previously been advised, of the subject matter of the complaint or referral. The Board may at this stage order the medical practitioner or medical student who is the subject of the complaint or referred matter to undergo a medical examination.

Ordinarily the Board should convene an Impaired Registrants Panel and refer the complaint or matter to the Panel. An exception to this general process would occur where:

- The Medical Board decides to issue an interim order imposing restrictions on a medical practitioner or medical student; or
- The Medical Board decides on initial consideration that the subject matter of the complaint or matter appears to be sufficiently serious to warrant consideration being given to:
  - Suspension or cancellation of a medical practitioner's registration; or
  - Placement of a prohibition on the involvement of a medical student in clinical activities either for a period or indefinitely,

in which case, the Medical Board should be required to refer the matter to the Medical Tribunal. Where an interim order is made, the Board should be required to refer the matter to the Tribunal within 5 working days, and the order should cease to have effect if the Board fails to do this.

[1] Part 5 (Impairment), Medical Practice Act 1992 (NSW) refers.

[2] Part 7 (Conditions affecting fitness to practise medicine), Medical Practitioners Act 1995 (NZ) refers.

Comment on final recommendation 93

Final recommendation 93 confirms the intention stated in the preliminary report that serious impairment matters should be referred to and dealt with by the Medical Tribunal. This is because it is intended under these proposals that only the Medical Tribunal should be able to order suspension or cancellation of a medical practitioner's registration.

Final recommendation 94 : Impairment process – power to make interim order

The Working Party recommends that the Medical Board should be able to make an interim order if it believes on reasonable grounds that the activities of a medical practitioner or medical student who is the subject of action under the proposed impairment process pose a significant threat to the life or to the physical or mental health of any person.

An interim order should be able to do any of the following:

- Suspend the registration of a medical practitioner or prohibit the involvement of a medical student in clinical activities for a period of up to 30 days;
- Impose conditions on the practice of medicine or the involvement of a medical student in clinical activities for the purpose of mitigating the threat posed by the medical practitioner or student to the life or the physical or mental health of any person;
- Prohibit the carrying on of any activity specified in the order by the medical practitioner or medical student for the purpose of mitigating the threat posed by the medical practitioner or student to the life or the physical or mental health of any person.

An interim order should be made in writing and should state the reasons for the order being made.

The Medical Board should be required to provide copies of the order to:

- The medical practitioner or medical student who is the subject of the order; and
- Any other person the Board considers should be informed that an order has been made and the effect of the order.

In the case of an interim order that is made in relation to a medical student, the Board should be required to provide a copy of the interim order to the Dean of UWA's Faculty of Medicine and Dentistry who should be required to take appropriate action to give effect to the order.

Medical Tribunal may vary or quash interim order

On initial hearing of the matter that gave rise to the issuing of an interim order, the Tribunal should be able to vary or quash an order if considers it appropriate to do so.

Comment on final recommendation 94

The preliminary report proposed that the new Act should incorporate a power for the Medical Board to issue interim orders where the Board considers that the activities of a medical practitioner pose a threat to the physical or mental health of a person. Comparable interim order powers are found in other jurisdictions' medical practitioner legislation – see, for example, section 66, Medical Practice Act 1992 (NSW).

The ability for the Board to issue interim orders was generally supported in submissions to the review. The AMA noted that the use of an interim order should be regarded as an option of last resort. The Working Party agrees. The "test" to be satisfied before an interim order may be issued is that a significant risk to the life or physical or mental health of a person is evident.

Final recommendation 93 proposes that, where an interim order is made, the Medical Board must refer the matter that gave rise to the order to the Medical Tribunal within 5 working days. The Tribunal should have power on initial hearing to vary or quash the order if it is not satisfied that the required "test" has been properly met. This ability, plus the fact that matters that are the subject of a interim order will in any event be heard and determined by the Tribunal, should operate as important caveats on the use of the interim order power by the Medical Board.

Final recommendation 95 : Impairment process – power to order medical examination

The Medical Practitioners Registration Act should provide that the Medical Board may order a medical practitioner or medical student who is the subject of proceedings under the Act's impairment process to undergo a medical examination.

Form of medical examination

The form of medical examination should be determined by the Medical Board, but the investigations to be performed must be reasonable having regard to the subject matter of the complaint or matter that has given rise to the order.

Content of order

An order for a medical examination must be made in writing and delivered to the medical practitioner or medical student who is the subject of the order. It must state:

- The name of the medical practitioner who has been nominated by the Medical Board to conduct the examination;
- The time and place at which the medical examination will be conducted; and
- The consequences of failure on the part of the medical practitioner or medical student without reasonable excuse to comply with the order.

Final recommendation 95 : Impairment process – power to order medical examination (continued)

Cost of examination must be met by Medical Board

The cost of the medical examination should be met by the Medical Board.

Report of examination to be provided

The medical practitioner who conducts the medical examination should be required to prepare a report of the examination and to provide a copy of this report to:

- The Registrar of the Medical Board, who in turn must provide copies to:
    - The members of the Impaired Registants' Panel established by the Board for the particular matter; or
    - The Chairperson and members of the Medical Tribunal convened for the particular matter;
- The medical practitioner or medical student who is the subject of the examination,

but must not otherwise disclose the contents of the report.

Decisions the Medical Board may take on receipt of report of medical examination

On receipt of the medical examination, the Medical Board should be able to decide that a matter that has been referred to an Impaired Registrants Panel is more appropriately dealt with by the Medical Tribunal. If so, it may require the Panel to cease looking into the matter and refer the matter to the Tribunal.

Final recommendation 96 : Impairment process – consequences of failure by medical practitioner or medical student to submit to medical examination

If a medical practitioner or medical student who is ordered by the Medical Board to submit to a medical examination fails, without reasonable excuse, to do so, the Board should be able to take the failure as evidence that one of the impairment grounds for action identified in final recommendation 69 may exist in relation to the practitioner or student and to deal with the practitioner or student accordingly.

Specifically, the failure by a medical practitioner or student to undergo a medical examination ordered by the Medical Board should not prevent the Board from making an order of the kind it can make on advice from an Impaired Registrants Panel (as described in final recommendation 98) or else to refer the matter to the Medical Tribunal if it otherwise has reasonable grounds for doing so.

Comment on final recommendations 95 & 96

The ability to require a medical practitioner or medical student who may be suffering from a health-related condition that may impact on their clinical work to undergo an examination by a registered medical practitioner is an essential investigative tool in an impairment process. Final recommendations 95 and 96 propose procedures to be followed and the consequences of non-compliance by a medical practitioner or medical student who is the subject of an order.

A key issue is the extent of the investigations that may be ordered. Final recommendation 95 proposes that these should be limited by reference to the particular form of the impairment that is under investigation.

The consequences of failure on the part of a medical practitioner or medical student to undergo a medical examination ordered by the Medical Board (final recommendation 96) are mirrored on the NSW legislation.

Specifically, section 78(3) of the Medical Practice Act 1992 (NSW) provides as follows:

Section 78(3), Medical Practice Act 1992 (NSW)

> "(3). If a registered medical practitioner refuses, without reasonable excuse, to comply with a direction to undergo a medical examination, that refusal is, for the purposes of this Act and any inquiry or appeal under this Act, evidence that the practitioner does not have sufficient physical and mental capacity to practise medicine."

Alternative consequences might be to make failure to undergo a medical examination an offence that may be punishable by a fine, or else to enable the Medical Board to suspend registration until such times as the practitioner, or student, complies with the order. These alternatives are not preferred.

At the same time, it must be acknowledged that failure to comply with an order to undergo a medical examination should not be able to prevent regulatory action by the Medical Board where the Board has reason to believe that the health of a medical practitioner, or medical student, may call into question the practitioner's, or student's, involvement in providing medical services, but where the Board is denied the opportunity to have its concerns validated or set aside by the results of a medical examination.

The preferred position is therefore that failure on the part of a medical practitioner or student to comply with an order by the Medical Board that the practitioner or student undergo a medical examination should not be able to prevent the Medical Board from taking regulatory action on impairment grounds if the Board otherwise has reason to believe that such action is appropriate.

Indeed, it is recommended that, as in NSW, such failure may be accepted by the Medical Board as evidence that regulatory action is necessary.

Final recommendation 97 : Impairment process – inquiry by Impaired Registrants Panel

It is recommended that an Impaired Registrants Panel should be authorised to conduct an inquiry into any matter referred to it by the Medical Board.

In conducting an inquiry, a Panel must:

- Have regard to the report of any medical examination provided to it by the Medical Board;
- Afford the medical practitioner or medical student who is the subject of an inquiry the opportunity to attend before, and make representations to, the panel; and
- Have regard to representations made by the medical practitioner or medical student.

Agreement to action by medical practitioner or medical student

If during the course of an inquiry before an Impaired Registrants Panel, a medical practitioner or medical student acknowledges the fact that one of the impairment grounds set out in final recommendation 69 applies, the Panel should be authorised to consider with the practitioner or student what action could be taken in response. Such action could take the form of an agreement by the medical practitioner or medical student to do one or more of the following:

- Undergo specified counselling or specified medical treatment;
- Have conditions placed on the practitioner’s practice of medicine or student’s involvement in clinical activities for an agreed period;
- Suspension of registration (practitioner) or of involvement in clinical activities (student) for an agreed period.

Final recommendation 98 : Impairment process – action at conclusion of inquiry by Impaired Registrants Panel

At the conclusion of an inquiry, an Impaired Registrants Panel should be required to provide a report in writing to the Medical Board:

- Detailing its findings and conclusions in relation to the matter referred to it;
- Making a recommendation for the Board’s consideration; and
- Giving reasons for its recommendation.

Final recommendation 98 : Impairment process – action at conclusion of inquiry by Impaired Registrants Panel (continued)

Action that can be recommended

Alternatives for action that an Impaired Registrants Panel may recommend should be:

- That the Medical Board take no further action in relation to the matter because neither of the impairment grounds specified in final recommendation 69 has satisfactorily been established;
- Where the Panel has reached an agreement with a medical practitioner or medical student on action to be taken as proposed in final recommendation 97 – that the Medical Board make an order reflecting the agreement reached;
- That the matter would be more appropriately dealt with under the Act's competence or professional conduct processes and should be referred accordingly;
- That the Medical Board make an order that:
  - The medical practitioner or medical student undergo specified counselling; or
  - That specified conditions be attached to the medical practitioner's practice of medicine or medical student's involvement in clinical activities;
- That the Medical Board refer the matter to the Medical Tribunal so that consideration may be given by the Tribunal to:
  - Suspending for an agreed period or cancelling the registration of a medical practitioner on impairment grounds; or
  - Prohibiting the involvement of a medical student in clinical activities for an agreed period or permanently.

Decisions the Medical Board may make

The Medical Board should be able to accept a recommendation made by an Impaired Registrants Panel or take any other action specified above having regard to the outcome of the Panel's inquiry and the report of the medical examination of the medical practitioner or student.

However, where the Medical Board proposes to make a decision that is materially different or that has more restrictive consequences for a medical practitioner or medical student as compared to the action recommended by an Impaired Registrants Panel, it should first be required to afford the medical practitioner or student concerned an opportunity to appear before the Board or to make a submission in writing, and the Board should be required to have regard to any further representations made by the practitioner or student before making a final decision in the matter.

Final recommendation 98 : Impairment process – action at conclusion of inquiry by Impaired Registrants Panel (continued)

Reasons for decisions to be prepared and provided to medical practitioner

On making a decision the Medical Board should be required to:

- Prepare reasons for its decision; and
- Provide a copy of its reasons to the medical practitioner or medical student who was the subject of the inquiry by the Impaired Registrants Panel.

Comment on final recommendations 97 & 98

Final recommendation 97 deals with a key feature of the impairment process, namely the ability for a medical practitioner or medical student to acknowledge the impact of a health-related condition on their involvement in providing medical services and to negotiate remedial action. Two important distinctions are proposed in the action that may be agreed voluntarily by a medical practitioner or medical student under final recommendation 95 as compared to action that may be ordered by the Medical Board under final recommendation 98:

- First, a medical practitioner or student may agree voluntarily that the action that needs to be taken in an individual case would involve undergoing specified medical treatment. By contrast it is not intended that the Medical Board should have the ability to order specified medical treatment against the wishes of a medical practitioner or medical student;
- Second, a medical practitioner or student may agree voluntarily to the suspension of registration or involvement in clinical activities for an agreed period. By contrast, compelling suspension as an outcome of the impairment process is not to be an option for the Medical Board because, under the Working Party's proposed schema, suspensions or cancellations of registration may only be ordered by the Medical Tribunal.

Decisions on the outcome of an Impaired Registrants Panel inquiry would be for determination by the Medical Board. The Board would not be bound to act in accordance with a recommendation presented to it by an Impaired Registrants Panel. However, where it proposed to act in a way that is materially different from the action recommended by an Impaired Registrants Panel or that has more restrictive consequences for the medical practitioner or medical student concerned, it is proposed that the practitioner or student should have the ability to make further representations to the Board before a final decision is taken.

It is also proposed that the Medical Board should be required to provide reasons for its decision to the medical practitioner or medical student who was the subject of the Panel's inquiry.

Final recommendation 99 : Impairment process – referral of matter to Medical Tribunal

Where a matter is referred to the Medical Tribunal for determination as proposed under final recommendation 98, the Tribunal should be required to deal with the matter in accordance with its own procedures. In so doing it should be required to have regard to:

- The report of any medical examination referred to in final recommendation 95;
- The report of the outcome of its inquiry by an Impaired Registrants Panel; and
- Any further submissions made to it by or on behalf of the Medical Board and the medical practitioner or medical student who is the subject of the referral.

Decisions the Medical Tribunal may take

It is recommended that the Tribunal should be able to take any decision that the Medical Board may take as set out in final recommendation 98 (other than decision to refer matter to the Tribunal) or it may make an order:

- Suspending for an agreed period (subject to a 2 year maximum) or cancelling the registration of a medical practitioner on impairment grounds; or
- Prohibiting the involvement of a medical student in clinical activities for an agreed period or permanently.

Reasons for decision

On making a decision, the Medical Tribunal should be required to prepare reasons for its decision setting out:

- The Tribunal's decision;
- The findings of the Tribunal on material questions of fact, and the reasons for its decision;
- Summary of evidence and other information on which its findings and decision were based.

The Tribunal should be required to provide copies of its reasons to the Medical Board and the medical practitioner or medical student who was the subject of the inquiry before the Tribunal.

Comment on final recommendations 99

Final recommendation 99 proposes that the Medical Tribunal may, following an inquiry by it into a referral by the Medical Board, make any relevant decision that the Board itself may make in response to the report of an inquiry into an issue of impairment.

The Tribunal would also be able to order the suspension or cancellation of a medical practitioner's registration or prohibit the involvement of a medical student in clinical activities.

Final recommendation 100 : Impairment process – appeal and review procedures

Appeal rights

It is recommended that the Medical Practitioners Registration Act should provide that appeals in relation to the following decisions by the Medical Board may be made to the Medical Tribunal:

- A decision by the Medical Board to initiate action in relation to the practitioner under the Act's impairment process;
- The action ordered by the Medical Board at the conclusion of an inquiry by an Impaired Registrants Panel.

It should be possible to make appeals on points of law and on the merits of a decision by the Medical Board.

At the conclusion of an inquiry, the Medical Tribunal should be able to confirm, vary or quash the decision that was the subject of the appeal.

Review of voluntary restrictions

If an order is made by the Medical Board giving effect to an agreement reached between an Impaired Registrants Panel and a medical practitioner or medical student as proposed in final recommendation 95, the person who is the subject of the order should be able after a reasonable period to request the Medical Board to review the terms of the order.

Where such a request is made, the Medical Board should be required to convene an Impaired Registrants Panel to conduct the review and report to the Board. On receipt of this report, the Medical Board should be able to amend the terms of the order or decline to do so.

Review of voluntary restrictions – appeal rights

A medical practitioner or medical student whose voluntary agreement to action is the subject of review as proposed above should have a right of appeal to the Medical Tribunal against the decision of the Medical Board at the conclusion of the review.

At the conclusion of an inquiry, the Medical Tribunal should be able to confirm, vary or quash the decision that was the subject of the appeal.

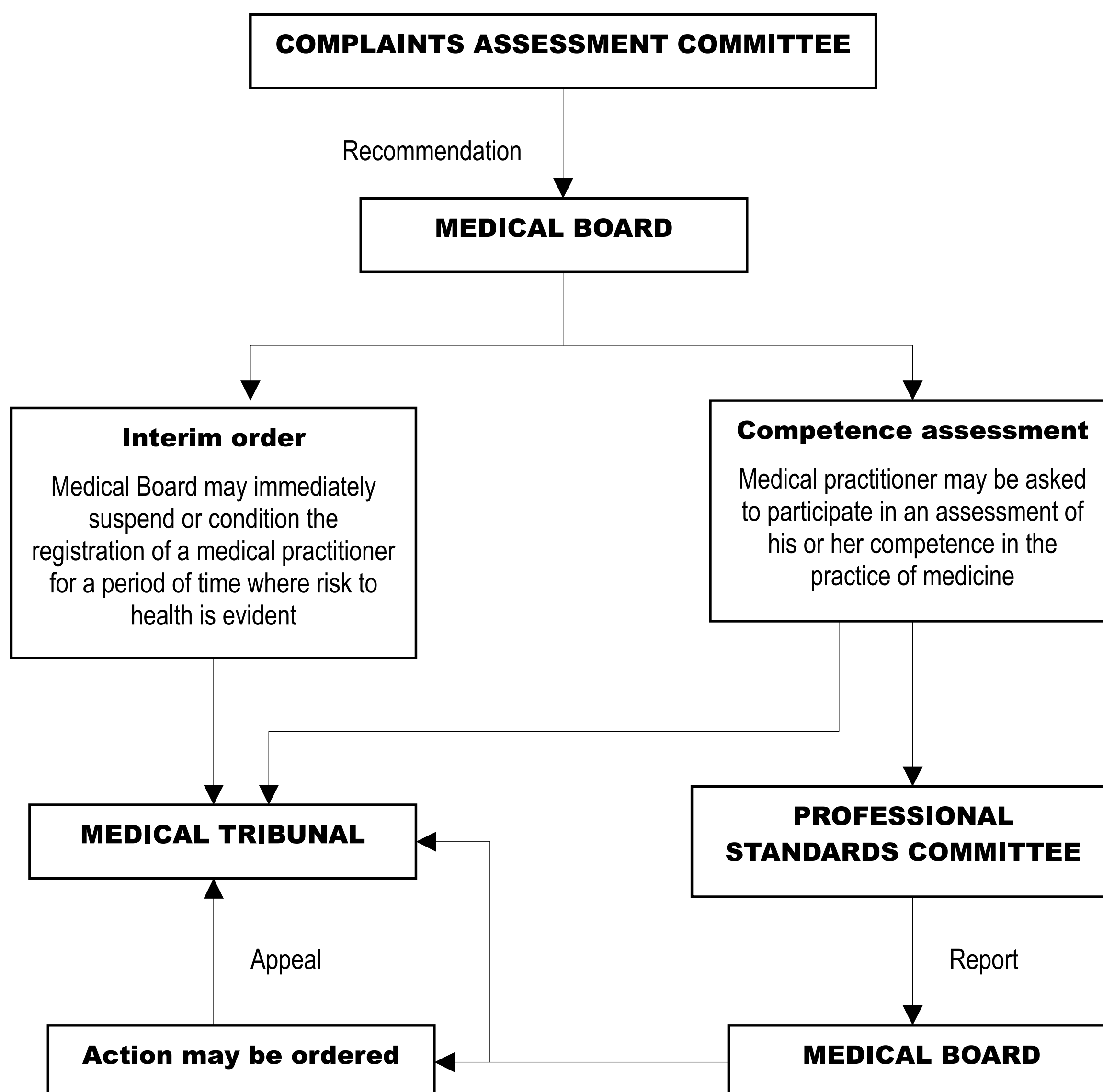
Comment on final recommendations 100

Final recommendation 100 proposes that the Medical Tribunal should have appellate jurisdiction to review certain decisions by the Medical Board during the impairment process.

There should also be some ability for medical practitioners and medical students who are the subject of an order giving effect to certain voluntary action to seek a review of the order at reasonable intervals.

8.6.2 Competence process

CHART 5 : OVERVIEW OF COMPETENCE PROCESS



Comment on competence process

The recommended competence process is a new part of the regulatory structure for medicine. It reflects acknowledgment on the part of the Working Party that concerns about a medical practitioner's competence should preferably not be dealt with as a "disciplinary" matter.

This conclusion was reached having regard to legislative developments in NSW and New Zealand that are highlighted in the Review Working Paper at Annexure H.

Key differences between the proposed competence process and that recommended to apply in the case of unsatisfactory professional conduct are as follows:

- The investigative processes under either "stream" should be tailored. In the case of the competence process, the principal investigative action is proposed to involve the conduct of an assessment of a medical practitioner's competence by a medical practitioner(s) who is (are) appointed by the Medical Board. By contrast the unsatisfactory professional conduct process may involve the appointment of an investigator and the sanctioning of intrusive investigations (eg search of premises under warrant);
- The options for action at the end of the competence and unsatisfactory professional conduct processes are also proposed to be appropriately tailored, such that the option of imposing a financial penalty (for example) would not be available in the case of a competence matter, but would be where unsatisfactory professional conduct is established.

Final recommendation 101 : Competence process – initial steps

The Working Party recommends that where the Medical Board decides to deal with a complaint or referred matter as an competence matter, it should inform the medical practitioner who is to be the subject of the process of this fact and, where the practitioner has not previously been advised, of the subject matter of the complaint or referral.

At this stage it may order the medical practitioner who is the subject of the complaint or referred matter to participate in a competence assessment.

Ordinarily the Board would convene a Professional Standards Committee and refer the complaint or matter to the Committee. An exception would occur where:

- The Medical Board decides to issue an interim order imposing restrictions on a medical practitioner; or
- The Medical Board decides on initial consideration that the subject matter of the complaint or matter is sufficiently serious to warrant consideration being given to suspension or cancellation of a medical practitioner's registration,

in which case, the Medical Board should be required to refer the matter to the Medical Tribunal.

Where an interim order is made, the Board should be required to refer the matter to the Tribunal within 5 working days, and the order should cease to have effect if the Board fails to do this.

Comment on final recommendations 101

The first steps in the competence process are similar to those proposed in relation to the impairment process (final recommendation 93 refers).

As under the recommended impairment process, any matter that may warrant cancellation or suspension of registration should be referred to the Medical Tribunal for determination, with or without an interim order first being made by the Medical Board.

Final recommendation 102 : Competence process – power to make interim order

The Working Party recommends that the Medical Board should be able to make an interim order if it believes on reasonable grounds that the activities of a medical practitioner who is the subject of action under the proposed competence process poses a significant threat to the life or to the physical or mental health of any person.

An interim order should be able to do any of the following:

- Suspend the registration of the medical practitioner for a period of up to 30 days;
- Impose conditions on the practice of medicine of the medical practitioner for the purpose of mitigating the threat posed by the practitioner to the life or the physical or mental health of any person;
- Prohibit the carrying on of any activity specified in the order by the medical practitioner for the purpose of mitigating the threat posed by the medical practitioner to the life or the physical or mental health of any person.

An interim order should be made in writing and should state the reasons for the order being made.

The Medical Board should be required to provide copies of the order to:

- The medical practitioner who is the subject of the order; and
- Any other person the Board considers should be informed that an order has been made and the effect of the order.

Medical Tribunal may vary or quash interim order

On initial hearing of the matter that gave rise to the issuing of an interim order, the Tribunal should be able to vary or quash an order if considers it appropriate to do so.

Comment on final recommendations 102

Final recommendation 102 deals with the issuing of interim orders under the competence process.

It is similar in effect to final recommendation 94, which deals with the power to make interim orders under the impairment process.

Final recommendation 103 : Competence process – power to order competence assessment

The Medical Practitioners Registration Act should provide that the Medical Board may order a medical practitioner who is the subject of proceedings under the Act's competence process to participate in an assessment of the person's competence in the practice of medicine.

For the purpose of the competence process, competence refers to the knowledge and skill applied by a medical practitioner in his or her practice of medicine.

Form of competence assessment

It is recommended that a competence assessment should be undertaken by one or more appropriately qualified medical practitioners ("assessors") who are appointed to conduct the assessment by the Medical Board.

Assessors should be subject to direction by the Board.

The form of assessment should be determined by the Medical Board but must be reasonable having regard to the complaint or matter that triggered action under the competence process. It may, if practicable, involve requiring the medical practitioner to participate in a simulated clinical situation during which the practitioner's clinical skills are observed and knowledge assessed by an assessor(s).[1]

Content of order

An order requiring a medical practitioner to participate in a competence assessment must be made in writing and delivered by the Board to the medical practitioner who is the subject of the order.

It must state:

- The name(s) of the medical practitioner(s) who has (have) been nominated by the Medical Board to be an assessor(s);
- Details of particular aspects of competence in the practice of medicine that the assessor(s) has (have) been asked to assess;
- Details of the time and place at which the competence assessment will be conducted; and
- The consequences of failure on the part of the medical practitioner without reasonable excuse to comply with the order.

Cost of competence assessment to be met by medical practitioner

The cost of the competence assessment (eg fees paid to assessors etc) should be met by the medical practitioner whose competence is under review.

[1] Cf. Schedule 3A, Medical Practice Act 1992 (NSW); s.61(1), Medical Practitioners Act 1995 (NZ).

Comment on final recommendations 103

Final recommendation 103 deals with the conduct of competence assessments.

It is envisaged that competence assessments will be conducted by appropriately qualified medical practitioners who are appointed by the Medical Board. This approach corresponds to the approach taken under Part 5A of the Medical Practice Act 1992 (NSW).

A key issue for consideration is the form that a competence assessment should take, and what limits should be placed on what a medical practitioner who is ordered to undergo a competence assessment may be required to do.

Different approaches have been taken to this issue in the two other jurisdictions examined. In New Zealand, the form of a competence assessment is determined by the NZ Medical Council, and no guidance is provided in the legislation on the content of such assessment.[1]

NSW has taken a more prescriptive approach, as indicated by the relevant provisions of its Act:

Clause 3(2) – (5), Schedule 3A, Medical Practice Act 1992 (NSW)[2]

"(2). An assessment exercise is an exercise during which the assessor observes and assesses the professional performance of the registered medical practitioner.

(3). If practicable, an assessment exercise is to be based on a simulated clinical situation (for example, a mock consultation).

(4). However, an assessment exercise may be based on an actual clinical situation (that is, an actual consultation or examination or the giving or performance of any other medical treatment, by a registered medical practitioner) if a simulated exercise is not practicable in the circumstances.

(5). The time and the place for, and the length of, the assessment exercise must be reasonable."

The final recommendation proposes that the form of a competence assessment that a medical practitioner may be ordered by the Medical Board to participate in must be reasonable having regard to the issue that triggered the order. The Board would determine what is reasonable in a given situation.

[1] S.61(1) of the Medical Practitioners Act 1995 (NZ) refers.

[2] The relevant schedule was inserted by amendment made to the NSW Act in 2000 by the Medical Practice Amendment Act 2000 (NSW).

Final recommendation 104 : Competence process – powers of assessors

It is recommended that the Medical Practitioners Registration Act should provide assessors with the following powers,[1] subject to the Medical Board having the ability to limit the extent of the powers available to an assessor in individual cases. Such limitations should be specified in the instrument of appointment that the Medical Board gives to each assessor.

Ability to enter premises (other than residential premises)

An assessor should be able to enter premises at which a medical practitioner who is the subject of a competence assessment practises medicine or stores records relating to his or her practice. Such entry may be made:

- At any reasonable time, with the consent of the medical practitioner who is subject of the assessment and the occupier of the premises; or
- Having given the occupier and medical practitioner 5 days notice in writing of the assessor's intention to enter the premises.

Entry to residential premises

Residential premises may only be entered with the consent of the occupier.

Powers in relation to premises entered by assessor

On premises entered as above, an assessor should have power to:

- Examine equipment used in connection with the medical practitioner's practice of medicine;
- Require the production of medical supplies (eg therapeutic substances) held at such premises;
- Take photographs of the equipment, medical supplies or premises;
- Require the production of records relating to the practitioner's practice of medicine, to take copies of such records, or to make notes from such records;
- Ask questions of any person at such premises relating to the assessment of a medical practitioner's competence (but any such person is not to be required to answer any question asked and failure to answer a question is not to constitute a contravention of the offence of hindering an assessor);
- Require the occupier of the premises to provide such assistance and facilities as the assessor reasonably requires to enable his or her functions to be carried out.

[1] Cf. cl.2, Schedule 3A, Medical Practice Act 1992 (NSW).

Comment on final recommendations 104

Final recommendation 104 proposes certain powers of entry to premises and inspection for assessors. The recommendation is modelled on powers that have been made available to assessors in NSW.

Final recommendation 105 : Competence process – failure to comply with certain requirements and offences

It is recommended that the Medical Practitioners Registration Act should provide as follows:

Failure by medical practitioner to comply with competence assessment order

If a medical practitioner who is ordered by the Medical Board to participate in a competence assessment fails, without reasonable excuse, to do so, the Board should be able to take the failure as evidence that one of the competence grounds for action identified in final recommendation 69 may exist in relation to the practitioner and to deal with the practitioner accordingly.

Specifically, failure by a medical practitioner to participate in a competence assessment ordered by the Medical Board should not prevent the Board from making an order of the kind it can make on advice from a Professional Standards Committee (as described in final recommendation 108) or else to refer the matter to the Medical Tribunal if it otherwise has reasonable grounds for doing so.

Offences relating to assessors

It is recommended that the following offences should apply in relation to assessors and the exercise of the powers available to assessors:

- It should be an offence for a person to impersonate an assessor;
- It should be an offence for a person to prevent entry by an assessor to premises to which the assessor is entitled to gain entry or otherwise to hinder or obstruct the assessor in exercising the powers available to the assessor on entered premises;
- It should be an offence for a person to provide information to an assessor that the person knows to be false or misleading.

Comment on final recommendations 105

Final recommendation 105 details the recommended consequences of:

- A medical practitioner failing to comply or co-operate with an order of the Medical Board requiring the practitioner to undergo competence assessment; and
- Any person impersonating or obstructing an assessor in exercising the powers set out in final recommendation 104 in relation to the entry and inspection of premises.

As under the impairment process, it is intended that failure on the part of a medical practitioner to comply with an order requiring his or her participation in a competence assessment may not prevent action being taken against the practitioner on grounds of competence.

This, again, mirrors the position in NSW:

Clause 3(6) – (7), Schedule 3A, Medical Practice Act 1992 (NSW)

"(6). A failure or refusal by a registered medical practitioner to take part in, or continue with an assessment exercise does not constitute an offence against clause 5;[1]

(7). However, a failure or refusal by a registered medical practitioner, without reasonable excuse, to take part in or continue with an assessment exercise is evidence that the professional performance of the registered medical practitioner is unsatisfactory."

Final recommendation 106 : Competence process – action at conclusion of competence assessment

Report of assessment to be provided

The assessor(s) who conduct(s) the competence assessment should be required to prepare a report of the assessment and to provide a copy of this report to:

- The Registrar of the Medical Board, who in turn must provide copies to:
  - The members of the Professional Standards Committee convened by the Board for the particular matter; or
  - The Chairperson and members of the Medical Tribunal convened for the particular matter;
- The medical practitioner who is the subject of the assessment,

but must not otherwise disclose the contents of the report.

Decisions the Medical Board may take on receipt of report of competence assessment

On receipt of the report of a competence assessment, the Medical Board should be able to decide that a matter that has been referred to a Professional Standards Committee is more appropriately dealt with by the Medical Tribunal and may require the Committee to cease looking into the matter and refer the matter to the Tribunal accordingly.

Comment on final recommendations 106

The options for action at the conclusion of a competence assessment are similar to those recommended in relation the impairment process (final recommendation 95 refers).

[1] Clause 5, Schedule 3A, Medical Practice Act 1992 (NSW) makes it an offence, relevantly, to hinder or prevent an assessor from exercising his or her statutory functions.

Final recommendation 107 : Competence process – inquiry by Professional Standards Committee

It is recommended that a Professional Standards Committee should be authorised to conduct an inquiry into any matter referred to it by the Medical Board under the proposed competence process.

In conducting an inquiry, a Committee must:

- Have regard to the report of any competence assessment provided to it by the Medical Board;
- Afford the medical practitioner who is the subject of the inquiry the opportunity to attend before, and make representations to, the Committee; and
- Have regard to representations made by the medical practitioner.

Otherwise the Committee must proceed in accordance with the procedures that are recommended ordinarily to govern the proceedings of Professional Standards Committees (section 8.3 of this report refers).

Comment on final recommendations 107

It is proposed that an inquiry into competence by a Professional Standards Committee would generally proceed in accordance with the procedures laid down for such committees, as described in section 8.3 of this report.

However, in conducting the inquiry the committee would also be expected to have regard to:

- The report of the competence assessment ordered by the Medical Board; and
- Any representations made by, or on behalf of, the medical practitioner who was the subject of the inquiry.

Final recommendation 108 : Competence process – action at conclusion of inquiry by Professional Standards Committee

At the conclusion of an inquiry, a Professional Standards Committee should be required to provide a report in writing to the Medical Board detailing its findings and conclusions in relation to the matter referred to it, and making a recommendation for the Board's consideration.

Action that can be recommended

Alternatives for action that a Professional Standards Committee may recommend should be as follows:

- That the Medical Board take no further action in relation to the matter because neither of the competence grounds specified in final recommendation 69 has satisfactorily been established;
- That the matter would be more appropriately dealt with under the Act's impairment or professional conduct processes and should be referred accordingly;
- That the Medical Board should make an order requiring one or more of the following to be done:
  - That specified conditions be attached to the practitioner's practice of medicine to address a concern about the practitioner's professional competence;
  - That the practitioner complete specified educational courses;
  - That the practitioner report at specified intervals on his/her medical practice to a medical practitioner or medical practitioners who is (are) nominated by the Board;
  - That the practitioner seek and take advice in relation to the management of his/her medical practice from a specified person or persons;
  - That the practitioner's practice of medicine be further assessed at a specified future date.
- That the Medical Board should refer the matter to the Medical Tribunal so that consideration may be given by the Tribunal to suspending for an agreed period or cancelling the registration of a medical practitioner on competence grounds.

Decisions the Medical Board may make

The Medical Board should be able to act on a recommendation made by a Professional Standards Committee or take any other action identified above having regard to the outcome of the Committee's inquiry and the report of the assessment of the medical practitioner's competence.

However, where the Medical Board proposes to make a decision that is materially different or that has more restrictive consequences for a medical practitioner as compared to the action recommended by a Professional Standards Committee, it should first be required to afford the medical practitioner concerned an opportunity to appear before the Board or to make a submission in writing, and the Board should be required to have regard to any further representations made by the practitioner before making a final decision in the matter.

Final recommendation 108 : Competence process – action at conclusion of inquiry by Professional Standards Committee (continued)

Reasons for decisions to be prepared and provided to medical practitioner

On making a decision the Medical Board should be required to:

- Prepare reasons for its decision; and
- Provide a copy of its reasons to the medical practitioner who was the subject of the inquiry by the Professional Standards Committee.

Comment on final recommendations 108

Final recommendation 108 details the recommendations that a Professional Standards Committee may make to the Medical Board at the conclusion of an inquiry into a competence issue.

Relevantly, it proposes that the Medical Board should have a range of options available to it to make orders to address concerns about the competence of a medical practitioner. These options are tailored to the sort of response that the Board would be likely to want to make where the issue of concern relates to competence as opposed to unsatisfactory professional conduct.

Provision is also made for a referral to be made to the Medical Tribunal where suspension or cancellation of registration appears to be warranted on competence grounds.

As under the impairment process, it is proposed that the Medical Board should be able to act on the recommendation of a Professional Standards Committee or to pursue an alternative course of action.

However, where an alternative action is proposed that is materially different from that recommended by the Professional Standards Committee, or which is more restrictive in its effect, the Board should be required to provide the medical practitioner concerned with a further opportunity to make submissions before a final decision is taken.

Final recommendation 109 : Competence process – referral of matter to Medical Tribunal

Where a matter is referred to the Medical Tribunal for determination as proposed under final recommendation 108, the Tribunal should be required to deal with the matter in accordance with its own procedures.

In so doing it should be required to have regard to:

- The report of any competence assessment undertaken in relation to the medical practitioner;
- The report of the outcome of its inquiry by a Professional Standards Committee; and
- Any further submissions made to it by or on behalf of the Medical Board and the medical practitioner who is the subject of the referral.

Decisions the Medical Tribunal may take

It is recommended that the Tribunal should be able to take any decision that the Medical Board may take under final recommendation 108 (other than decision to refer matter to the Tribunal) or it may make an order suspending for an agreed period (subject to a 2 year maximum) or cancelling the registration of a medical practitioner on competence grounds.

Reasons for decision

On making a decision, the Medical Tribunal should be required to prepare reasons for its decision setting out:

- The Tribunal's decision.
- The findings of the Tribunal on material questions of fact, and the reasons for its decision;
- Summary of evidence and other information on which its findings and decision were based.

The Tribunal should be required to provide copies of its reasons to the Medical Board and the medical practitioner who was the subject of the inquiry before the Tribunal.

Comment on final recommendations 109

Final recommendation 109 confirms the intention that the Medical Tribunal should be able to order suspension or cancellation of a medical practitioner's registration on competence grounds.

Final recommendation 110 : Competence process – appeal rights

It is recommended that the Medical Practitioners Registration Act should provide that appeals in relation to the following decisions by the Medical Board may be made to the Medical Tribunal:

- A decision by the Medical Board to initiate action in relation to the practitioner under the Act's competence process;
- Action ordered by the Medical Board at the conclusion of an inquiry by a Professional Standards Committee.

It should be possible for appeals to be made on points of law and on the merits of a decision by the Medical Board.

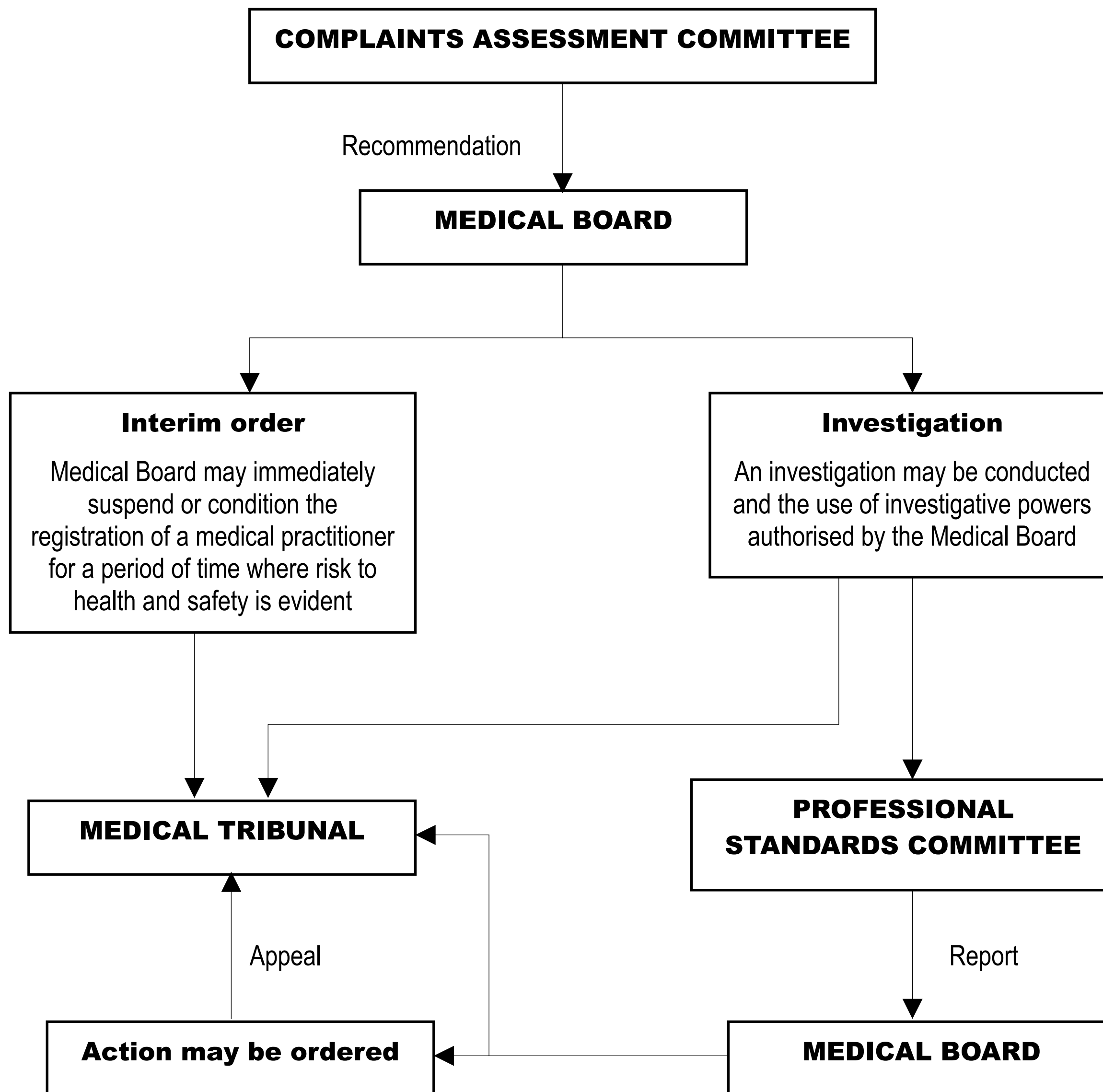
At the conclusion of an inquiry into an appeal, the Medical Tribunal should be able to confirm, vary or quash the decision that was the subject of the appeal.

Comment on final recommendations 110

Final recommendation 110 confirms the decisions that the Medical Board may take during the competence process that may be the subject of an appeal to the Medical Tribunal by a medical practitioner who is subject to them.

8.6.3 Unsatisfactory professional conduct process

CHART 6 : OVERVIEW OF UNSATISFACTORY PROFESSIONAL CONDUCT PROCESS



Comment on unsatisfactory professional conduct process

The recommended process for dealing with complaints or concerns about unsatisfactory professional conduct is similar in structure to the proposed competence process. However, key differences between the processes will be:

- The extent and type of investigative powers that are provided in the new Act; and
- The options for action at the conclusion on an inquiry by either a Professional Standards Committee or the Medical Tribunal.

Final recommendation 111 : Unsatisfactory conduct process – initial steps

The Working Party recommends that where the Medical Board decides to deal with a complaint or referred matter under the unsatisfactory professional conduct process it should inform the medical practitioner who is to be the subject of the process of this fact and, where the practitioner has not previously been advised, of the subject matter of the complaint or referral.

However, the Board should be able to defer informing the medical practitioner until further investigations have been completed if satisfied that informing the practitioner at this stage would be likely to:

- Prejudice the investigation of the complaint;
- Place the health or safety of a patient at risk; or
- Place the complainant or any other person at risk of intimidation or harassment.[1]

Ordinarily the Board would convene a Professional Standards Committee and refer the complaint or matter to the Committee. An exception would occur where:

- The Medical Board decides to issue an interim order imposing restrictions on a medical practitioner; or
- The Medical Board decides on initial consideration that the subject matter of the complaint or matter is sufficiently serious to warrant consideration being given to suspension or cancellation of a medical practitioner's registration,

in which case, the Medical Board should be required to refer the matter to the Medical Tribunal.

Where an interim order is made, the Board should be required to refer the matter to the Tribunal within 5 working days, and the order should cease to have effect if the Board fails to do this.

Comment on final recommendation 111

The initial steps in the unsatisfactory professional conduct process are proposed to be the same as those involved in the impairment and competence process except that some continuing ability to defer notifying a medical practitioner until further investigations into the complaint or matter have been completed is recommended.

It would not be expected that discretion to do this would be exercised with any great frequency, but such capacity would be relevant if notification of a medical practitioner at this stage may result in the destruction of evidence that may otherwise be gathered during an investigation. The protection of complainants and witnesses would be another reason to defer notification.

[1] These being the same grounds on which a Complaints Assessment Committee may defer notifying a medical practitioner of the fact of a complaint at the stage of preliminary assessment (final recommendation 87 refers).

Final recommendation 112 : Unsatisfactory conduct process – power to make interim order

The Working Party recommends that the Medical Board should be able to make an interim order if it believes on reasonable grounds that the activities of a medical practitioner who is the subject of action under the proposed unsatisfactory conduct process poses a significant threat to the life or to the physical or mental health of any person.

An interim order should be able to do any of the following:

- Suspend the registration of the medical practitioner for a period of up to 30 days;
- Impose conditions on the practice of medicine of the medical practitioner for the purpose of mitigating the threat posed by the practitioner to the life or the physical or mental health of any person;
- Prohibit the carrying on of any activity specified in the order by the medical practitioner for the purpose of mitigating the threat posed by the medical practitioner to the life or the physical or mental health of any person.

An interim order should be made in writing and should state the reasons for the order being made.

The Medical Board should be required to provide copies of the order to:

- The medical practitioner who is the subject of the order; and
- Any other person the Board considers should be informed that an order has been made and the effect of the order.

Medical Tribunal may vary or quash interim order

On initial hearing of the matter that gave rise to the issuing of an interim order, the Tribunal should be able to vary or quash an order if considers it appropriate to do so.

Comment on final recommendation 112

The circumstances in which and scope of the interim order making power under the unsatisfactory professional conduct process are similar to the equivalent power included in the impairment and competence process.

Final recommendation 113 : Unsatisfactory conduct process – appointment and powers of investigators

Appointment of investigators

The Working Party recommends that the Medical Practitioners Registration Act should enable the Medical Board to appoint investigators to investigate particular complaints or matters that are dealt with under the unsatisfactory professional conduct process.

Investigators:

- May be (but do not have to be) medical practitioners;
- Should, on appointment, be issued with an instrument of appointment by the Medical Board. This instrument should state:
    - The particular issue that the investigator has been appointed to investigate; and
    - The investigative powers that the investigator has.

An investigator's instrument of appointment is to be used to inform others, particular medical practitioners who are the subject of an investigation of:

- The fact of the investigator's appointment;
- The matter that the investigator is investigating; and
- The powers that the investigator has.

The instrument of appointment should be returned by the investigator to the Medical Board at the conclusion of the particular investigation that an investigator has been appointed to undertake.

Powers of investigators

It is recommended that the new Act should distinguish between:

- Powers that all investigators should have; and
- Additional power with respect to entry to premises under a warrant that may be conferred by the Medical Board in individual cases.

Final recommendation 114 : Unsatisfactory conduct process – powers that investigators should have

Entry and inspection of premises without a warrant

An investigator should have the same ability to enter premises without a warrant as assessors have under the competence process (final recommendation 104 refers).

On premises entered without a warrant, an investigator should have power to:

- Examine equipment used in connection with the medical practitioner's practice of medicine;
- Require the production of medical supplies (eg therapeutic substances) held at such premises;
- Take photographs of the equipment, medical supplies or premises;
- Require the production of records, to take copies of such records, or to make notes from such records;
- Require the occupier to provide such assistance as the investigator reasonably requires.

Power to require production of documents

An investigator should have power to require a medical practitioner who is under investigation for unsatisfactory professional conduct to produce a document concerning the investigation that the investigator reasonably believes is in the possession, or under the control of, the practitioner. Such a requirement must be stated in writing.

The investigator should be able to retain a document for a reasonable period and to make a copy of it.[1]

Power to put question and require answer

It is recommended that the question of an investigator's power to require a medical practitioner who is under an investigation for unsatisfactory professional conduct to answer a question relevant to the investigation should be given further consideration and determined by the Minister for Health in consultation with the Attorney General.

[1] Cf. s.59, Osteopaths Act 1997.

Final recommendation 115 : Unsatisfactory conduct process – entry to premises subject to obtaining a warrant

Circumstances in which authorisation to apply for warrant may be given

It is recommended that the Medical Board should be able to decide, either on its own motion or at the request of an investigator, that an application may be made for premises to be entered and searched under the authority of a warrant if the matter under investigation:

- Involves a significant threat to the life or the physical or mental health of a person; or
- Has been, or is intended to be, referred to the Medical Tribunal because the matter appears to the Medical Board to be sufficiently serious that consideration should be given to cancellation or suspension of a medical practitioner's registration on grounds of unsatisfactory professional conduct.

If the Medical Board so decides, it may authorise an investigator to apply either to a magistrate or Justice of the Peace for a warrant to be issued. An application must:

- Be in writing;
- Confirm the Medical Board's approval to the application being made;
- Set out the grounds for seeking a warrant; and
- Describe the premises to which entry is sought.[1]

Decision by magistrate or Justice of Peace

A magistrate or Justice of the Peace:

- Should be required to refuse the application if the above requirements are not fully complied with or if the investigator applying for a warrant fails to provide further information requested by the magistrate, or Justice, concerning the application;[2]
- May grant a warrant if the magistrate, or Justice, is satisfied that there are reasonable grounds for issuing a warrant, having regard to the particular matter under investigation.

Content of warrant

A warrant must state the purpose for which it is issued, the name of the investigator who is authorised by the warrant to enter premises, and the premises to which entry is authorised by the warrant.[3]

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[1] Cf. s.60(2), Osteopaths Act 1997.

[2] Cf. s.60(3), Osteopaths Act 1997.

[3] Cf. s.61(3), Osteopaths Act 1997.

Final recommendation 115 : Unsatisfactory conduct process – entry to premises subject to obtaining a warrant (continued)

What a warrant authorises

A warrant should authorise an investigator to enter premises named in the warrant and, at such premises, to exercise any of the powers that an investigator may exercise at premises which are entered other than under the authority of a warrant (final recommendation 114 refers).

Comment on final recommendations 113 – 115

These final recommendations deal with the conduct of investigations into allegations of unsatisfactory professional conduct. In summary they provide:

- For the appointment by the Medical Board of investigators to investigate particular matters;
- For investigators to have essentially the same ability to enter and inspect premises as assessors are recommended to have under the proposed competence process;
- For investigators, in addition, to have power to require medical practitioners who are the subject of an investigation into unsatisfactory professional conduct to produce documents relevant to the investigation; and
- For the Medical Board to be able to authorise applications being made for the issue of a warrant to enter and inspect premises in certain circumstances.

Of particular interest will be the extent of the investigative powers that it is proposed the Act should make available to investigators who are appointed to investigate concerns about professional conduct.

The powers recommended in final recommendations 114 and 115 are essentially the same powers as were recommended in the Working Party's preliminary report, except that it is proposed that the question of the power of investigators to put questions and require answers should be the subject of specific consideration by the Minister for Health and the Attorney General.

These proposed powers attracted a number of comments in submissions to the review, specifically:

- The AMA queried the circumstances in which a warrant may be issued;
- A number of submissions queried the appropriateness of requiring a medical practitioner to answer any question that may be put by an investigator. The AMA and Medical Defence Association of WA queried whether such a requirement infringed a right to remain silence where self-incrimination may occur.

Power to enter premises under authority of a warrant

On the first of these points, it is intended that the circumstances in which an application may be made for a warrant to enter premises against the wishes of an occupier should be limited.

Final recommendation 115 proposes that, before it may authorise the making of such an application, the Medical Board should be required to be satisfied that an investigation involves a threat to the life or physical or mental health of a person, or that a matter of sufficient seriousness to warrant referral to the Medical Tribunal.[1]

Such circumstances will be relatively rare, and the reliance on the proposed warrant power correspondingly limited.

Power to require answers to questions

The Working Party's preliminary report incorporated a recommendation that the template legislation's ability for investigators to require answers to be provided to questions should be included in the new Medical Act.

The relevant provision is found at section 59 of the Osteopaths Act 1997:

Section 59(1), Osteopaths Act 1997

"(1) An investigator may for the purposes of an investigation –

(a) – (c) [omitted]

(d) Require a person –

i. To give the investigator such information as the investigator requires; and

ii. To answer any question put to that person,

in relation to the matter the subject of the investigation."

Section 85 of the Osteopaths Act 1997 provides that a person may not refuse to comply with this or any other requirement stated in the Act in relation to the provision of information. It specifically provides that the requirement cannot be refused on the grounds that an answer given in response to a question put by an investigator may be incriminating. However, it further provides that an answer or other information that is compelled to be given is not admissible in proceedings except in proceedings for the offence of under section 80 of the Osteopaths Act 1997 of providing false information. The effect is that information that is compelled to be given under the Act cannot itself be admitted as evidence in proceedings conducted by the Osteopaths Registration Board (eg proceedings to establish whether grounds for disciplinary action by the Board exist). This is a strong protection for an individual who is compelled under the Act to provide information or answer a question, and places a corresponding limitation on the usefulness of the information that is gathered under compulsion.

By contrast, in NSW, a person is similarly not excused from answering a question put by an "authorised person" (ie investigator) under the supervision and enforcement provisions of the NSW Medical Practice Act 1992 on grounds that an answer may be incriminating.[2]

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[1] Cf. s.125(1), Medical Practice Act 1992 (NSW).

[2] S.122(1), Medical Practice Act 1992 (NSW) refers.

However, information gathered under this power of compulsion may be used in proceedings under the NSW Act but not in criminal proceedings.[1] Moreover, information is only inadmissible if:

- The person who was compelled to provide the information objected at the time to providing the information on the basis of not wanting to incriminate himself or herself; or

- The person was not advised at the time that he or she could object to providing the information on the grounds that it might be incriminating.[2]

The protection provided by the NSW Act to a medical practitioner who is the subject of an investigation is therefore more limited. Specifically, the NSW Act allows answers that are compelled to be given to questions put by investigators to be used in proceedings under the Act, eg to establish whether a medical practitioner is guilty of unsatisfactory professional conduct.

The question of the ability to compel an individual to provide information that may be both incriminating and used against the person concerned involves matters of important legal principle. It is acknowledged that a balance needs to be struck between the need to facilitate investigations under the new Act into allegations of unsatisfactory professional conduct and the rights of the individuals who are the subject of such investigations. Of the two precedents examined, the Osteopaths Act 1997 would appear to strike this balance more in favour of the person who is the subject of an investigation than does the NSW Medical Practice Act 1992.

There are of course significant public interest reasons for ensuring the effective and efficient conduct of investigations into allegations of unsatisfactory professional conduct by medical practitioners. These relate directly to the need to protect the public from harm. The question is whether, and if so to what extent, the public interest in ensuring the effective regulation of standards of conduct and professional behaviour in the provision of medical services should displace the ordinary ability of individuals not to divulge information that may result in a disciplinary sanction being imposed against them. As indicated in final recommendation 114, it is suggested that this matter specifically should be referred for consideration and determination by the Minister for Health and the Attorney General. The main options for consideration would appear to be:

- No compulsion – ie allow medical practitioners who are the subject of an investigation under the unsatisfactory professional conduct process of the new Act to decline to answer questions if the answer is likely to be incriminating;

- Adopt the template position – ie allow medical practitioners to be compelled to answer questions put by investigators under the unsatisfactory professional conduct process, but provide that answers provided under compulsion may not be used in proceedings under the Act or otherwise (except in proceedings for the offence of providing false information);

- Adopt the NSW position – ie allow medical practitioners to be compelled to answer questions put by investigators and allow answers provided under compulsion to be used in proceedings under the Act, but not otherwise in criminal (or civil) proceedings if an objection is made to providing information on grounds of possible self-incrimination.

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[1] Except for proceedings for the offence of hindering an authorised person in the exercise of functions under the NSW Act or providing false information under the NSW Act.

[2] S.122(2), Medical Practice Act 1992 (NSW) refers.

Power to require sample of bodily tissue

The preliminary report raised for public discussion whether an ability should be included in the new Act for the Medical Board to apply to a relevant judicial authority (eg District Court) for an order requiring a medical practitioner to provide a sample of blood, hair or other bodily tissue for use in disciplinary investigations.

Such an ability might be relevant in the conduct of investigations into allegations of sexual abuse, for example.

The preliminary report noted that the Criminal Code had been amended in 1998 to provide for the taking of samples of bodily tissues in criminal investigations. The report acknowledged there to be a significant difference between compelling a person to provide such samples in criminal investigations as compared to disciplinary investigations under a professional registration Act.

Incorporating a comparable ability into the Medical Practitioners Registration Act was opposed in most submissions to the review that commented on this issue, nor did the Medical Board indicate or confirm the need for such an intrusive investigative power.

The matter has not therefore been pursued in defining the investigative powers to be included in the new Act relevant to investigations into unsatisfactory professional conduct.

Final recommendation 116 : Unsatisfactory conduct process – offences relating to investigators and investigations

It should be an offence for a medical practitioner or other person, as the case may be, to:

- Impersonate an investigator;
- Provide false or misleading information to an investigator;
- Prevent entry by an investigator to premises to which the investigator is entitled to gain entry, whether under the authority of a warrant or otherwise, or to hinder or obstruct the investigator in exercising the powers available to the assessor on entered premises;
- Fail without reasonable excuse to produce a document requested by an investigator.

Comment on final recommendations 116

This final recommendation confirms the offences that should be included in the new Act in relation to the conduct of investigations into unsatisfactory professional conduct.

Penalties for each offence are recommended in chapter 10.

Final recommendation 117 : Unsatisfactory conduct process – action at conclusion of investigation

Report of investigation to be provided

The investigator(s) who conduct(s) an investigation into a concern about unsatisfactory professional conduct should be required to prepare a report of the investigation and to provide a copy of this report to the Registrar of the Medical Board, who in turn must provide copies to:

- The members of the Professional Standards Committee convened by the Board for the particular matter; or
- The Chairperson and members of the Medical Tribunal convened for the particular matter,

but must not otherwise disclose the contents of the report.

Decisions the Medical Board may take on receipt of report of investigation

On receipt of the report of an investigator, the Medical Board should be able to decide that a matter that has been referred to a Professional Standards Committee is more appropriately dealt with by the Medical Tribunal and may require the Committee to cease looking into the matter and refer the matter to the Tribunal accordingly.

Comment on final recommendations 117

Final recommendation 117 confirms that the investigator appointed by the Medical Board for a particular matter should be required to provide a report of the investigation to the Board (but not, in this instance, to the medical practitioner who was the subject of the investigation).

Final recommendation 118 : Unsatisfactory conduct process – inquiry by Professional Standards Committee

A Professional Standards Committee should be authorised to conduct an inquiry into any matter referred to it by the Medical Board under the proposed unsatisfactory professional conduct process. In conducting an inquiry, a Committee must:

- Have regard to the report of any investigation provided to it by the Medical Board;
- Afford the medical practitioner who is the subject of the inquiry the opportunity to attend before, and make representations to, the Committee, and have regard to representations made by the medical practitioner.

Otherwise the Committee must proceed in accordance with the procedures that are recommended ordinarily to govern the proceedings of Professional Standards Committees (section 8.3 refers).

Final recommendation 119 : Unsatisfactory conduct process – action at conclusion of inquiry by Professional Standards Committee

At the conclusion of an inquiry, a Professional Standards Committee should be required to provide a report in writing to the Medical Board detailing its findings and conclusions in relation to the matter referred to it and making a recommendation for the Board's consideration.

Action that can be recommended

Alternatives for action that a Professional Standards Committee may recommend should be as follows:

- That the Medical Board take no further action in relation to the matter because none of the unsatisfactory professional conduct grounds specified in final recommendation 69 has satisfactorily been established;
- That the matter would be more appropriately dealt with under the Act's impairment or competence processes and should be dealt with accordingly;
- That the Medical Board issue a caution or a reprimand to the medical practitioner;
- That the Medical Board make an order requiring one or more of the following to be done:
  - That specified conditions be attached to the practitioner's practice of medicine to address a concern about the practitioner's professional conduct;
  - That the medical practitioner undergo specified counselling;
  - That, in relation to a complaint about a service performed by the medical practitioner, if the patient agrees:

    The medical practitioner provide further services at no cost or at a cost determined by the Medical Board; or

    The medical practitioner pay for further services to be provided by a medical practitioner specified by the Medical Board who is acceptable to the patient; or

    The medical practitioner refund any fees paid by a patient to the extent determined by the Medical Board;
  - That the medical practitioner report at specified intervals on his/her medical practice to a medical practitioner or medical practitioners who is (are) nominated by the Medical Board;
  - That the medical practitioner seek and take advice in relation to the management of his/her medical practice from a specified person or persons;
  - That the medical practitioner pay a financial penalty of up to $5,000 determined by the Board.

Final recommendation 119 : Unsatisfactory conduct process – action at conclusion of inquiry by Professional Standards Committee (continued)

Action that can be recommended (continued)

- That the Medical Board refer the matter to the Medical Tribunal so that consideration may be given by the Tribunal to suspending for an agreed period or cancelling the registration of a medical practitioner on grounds of unsatisfactory professional conduct.

Decisions the Medical Board may make

The Medical Board should be able to act on a recommendation made by a Professional Standards Committee or take any other action identified above having regard to the outcome of the Committee's inquiry and the report of the investigation into the matter referred to the Committee.

However, where the Medical Board proposes to make a decision that is materially different or that has more restrictive consequences for a medical practitioner as compared to the action recommended by a Professional Standards Committee, it should first be required to afford the medical practitioner concerned an opportunity to appear before the Board or to make a submission in writing, and the Board should be required to have regard to any further representations made by the practitioner before making a final decision in the matter.

Reasons for decisions to be prepared and provided to parties

On making a decision the Medical Board should be required to:

- Prepare reasons for its decision;
- Provide a copy of its reasons to:
  - The medical practitioner who was the subject of the inquiry by the Professional Standards Committee; and
  - If the inquiry originated in a complaint, the complainant.

Comment on final recommendations 118 and 119

These recommendations deal with the conduct of inquiries into unsatisfactory professional conduct and the action that may be taken by the Medical Board where an inquiry results in an adverse finding against a medical practitioner.

In comparison with the competence process, the following features should be noted:

- Options for action where an adverse finding is made are proposed to be different. Re-funding or re-provision of service at the medical practitioner's expense are recommended as options, as would be the option of imposing a financial penalty of up to $5,000;

- As under the impairment and competence processes, it is recommended that it should be a requirement for the Medical Board to prepare reasons for its decision and to provide a copy of these reasons to the medical practitioner who was the subject of the inquiry.

  Specifically in relation to matters of unsatisfactory professional conduct, it is also proposed that it should be a requirement for the Board also to provide these reasons to a complainant.

Final recommendation 120 : Unsatisfactory conduct process – referral of matter to Medical Tribunal

Where a matter is referred to the Medical Tribunal for determination as proposed under final recommendation 119, the Tribunal should be required to deal with the matter in accordance with its own procedures. In so doing it should be required to have regard to:

- The report of any investigation undertaken in relation to the medical practitioner;
- The report of the outcome of its inquiry by a Professional Standards Committee; and
- Any further submissions made to it by or on behalf of the Medical Board and the medical practitioner who is the subject of the referral.

Decisions the Medical Tribunal may take

It is recommended that the Tribunal should be able to take any decision that the Medical Board may take under final recommendation 119 (other than decision to refer matter to the Tribunal) or it may make an order suspending for an agreed period (subject to a 2 year maximum) or cancelling the registration of a medical practitioner on grounds of unsatisfactory professional conduct.

In addition, the maximum financial penalty that a Medical Tribunal should be able to impose should be $25,000.

Reasons for decision

On making a decision, the Medical Tribunal should be required to prepare reasons for its decision setting out:

- The findings of the Tribunal on material questions of fact;
- Summary of evidence and other information on which its findings were based; and
- The Tribunal's decision and its reasons for the decision.

The Tribunal should be required to provide copies of its reasons to the Medical Board, the medical practitioner who was the subject of the inquiry before the Tribunal, and if the matter before the Tribunal originated in a complaint, to the complainant.

Comment on final recommendations 120

Final recommendation 120 confirms the intention that the Medical Tribunal should be able to order suspension or cancellation of a medical practitioner's registration on grounds of unsatisfactory professional conduct. In addition, the Tribunal should be able to order payment of a financial penalty of up to $25,000 reflecting the more serious nature of the matters that will be referred to the Tribunal.

Final recommendation 121 : Unsatisfactory conduct process – requirement to publish decisions of the Medical Tribunal

It is recommended that, where an adverse finding is made against a medical practitioner by the Medical Tribunal on grounds of unsatisfactory professional conduct (but not impairment or competence), the new Act should require the Tribunal to publish:

- The name of the practitioner;
- The nature of the findings against the practitioner;
- The sanction, if any, imposed on the practitioner; and
- A summary of the Tribunal's findings, its decision, and the reasons for its decision.

When complying with this requirement, the Tribunal should be able to withhold details, including the identity of the complainant, if it considers it to be in the interests of the complainant for it to do so.[1]

Comment on final recommendations 121

The question of publishing decisions of the Medical Tribunal was not considered in any detail in the Working Party's preliminary report, and was not the subject of a detailed recommendation.

Final recommendation 121 proposes that an obligation should be placed on the Medical Tribunal (but not a Professional Standards Committee) to publish findings, reasons and decisions where the Tribunal makes an adverse finding against a medical practitioner. It is intended that this reporting obligation should arise only in relation to adverse findings where the grounds for action were that the practitioner was guilty of unsatisfactory professional conduct. The intention would be that no publication of details would occur if, on inquiry into a matter, the Tribunal does not find that grounds for taking action against a medical practitioner are established.

This reporting obligation is modelled on a comparable requirement that was included in the Legal Practitioners Act 1893 by amendment made in 1992 which had the effect of requiring the Legal Practitioners' Disciplinary Tribunal to publish details of adverse findings against lawyers.

[1] Cf. s.31C(5), Legal Practitioners Act 1893.

Final recommendation 122 : Unsatisfactory conduct process – appeal rights

It is recommended that the Medical Practitioners Registration Act should provide that appeals to the Medical Tribunal may be made in relation to any order that the Medical Board makes against a medical practitioner at the conclusion of an inquiry by a Professional Standards Committee.

It should be possible for appeals to be made on points of law and on the merits of a decision by the Medical Board.

At the conclusion of an inquiry into an appeal, the Medical Tribunal should be able to confirm, vary or quash the decision that was the subject of the appeal.

Comment on final recommendations 122

Final recommendation 122 confirms the intention that there should be a right of appeal to the Medical Tribunal on matters of fact and law in relation to action that the Medical Board orders at the conclusion of an inquiry into unsatisfactory professional conduct.

8.6.4 Summary of regulatory processes

Table 4 provides an overview of the key features of the impairment, competence and unsatisfactory professional conduct processes detailed in sections 8.6.1 – 8.6.3. This summary has been prepared to allow comparison of key features and proposed differences in the processes.

TABLE 4 : COMPARISON OF PROPOSED REGULATORY PROCESSES

	Impairment	Competence	Unsatisfactory Professional Conduct
Relevant inquiry body	Impaired Registrants Panel Medical Tribunal (more serious matters)	Professional Standards Committee Medical Tribunal (more serious matters)	Professional Standards Committee Medical Tribunal (more serious matters)
Applies to	Medical practitioners Medical students	Medical practitioners	Medical practitioners
Interim order	Yes – where risk to life or physical or mental health is evident	Yes – where risk to life or physical or mental health is evident	Yes – where risk to life or physical or mental health is evident

TABLE 4 : COMPARISON OF PROPOSED REGULATORY PROCESSES (continued)

	Impairment	Competence	Unsatisfactory Professional Conduct
Investigations	Medical examination conducted by medical practitioner nominated by Medical Board	Competence assessment conducted by medical practitioner nominated by Medical Board Assessor will have power to enter premises (with consent or by notice) and carry out inspections, including accessing records	Investigation conducted by investigator appointed by Medical Board. Investigator to have power: • To enter premises (with consent or by notice) and carry out inspections; • To require production of documents. Also, Medical Board will be able to authorise the making of applications for warrants to enter and search premises in certain circumstances Ability to require answers to questions to be considered
Action at conclusion of inquiry	Agreed outcome may be negotiated between medical practitioner / medical student and Panel and given effect to by order of the Medical Board Alternatively, the Medical Board may order: • Counselling • Attachment of conditions to practice Medical Tribunal may order suspension (up to 2 years) or cancellation of registration or involvement in clinical activities	Medical Board may order: • Attachment of conditions to practice • Practitioner to undertake educational courses • Monitoring of medical practice by specified persons • Practitioner to take advice on medical practice • Further assessment at future point Medical Tribunal may order suspension (up to 2 years) or cancellation of registration	Medical Board may caution or reprimand practitioner Medical Board may order: • Attachment of conditions to practice • Counselling • Re-provision or re-funding of services • Monitoring of medical practice • Practitioner to take advice on medical practice • Payment of financial penalty of up to $5,000 Medical Tribunal may order: • Suspension (up to 2 years) or cancellation of registration • Payment of financial penalty of $25,000

8.7 Legal professional privilege

Final recommendation 123 : Legal professional privilege

The Working Party recommends that any requirement stated in the Medical Practitioners Registration Act that involves a person providing a document or other information or answering a question should not apply to information in respect of which the person claims legal professional privilege.[1]

Any dispute as to whether particular information or documents are subject to legal professional privilege may be referred to the Chairman of the Medical Tribunal for determination.

Comment on final recommendation 123

Under the investigative and procedural recommendations set out earlier in this chapter, it is envisaged that a medical practitioner who is the subject of an investigation or any person who is involved in proceedings before the Medical Tribunal or Professional Standards Committee may be required to provide information, answer questions etc.

Final recommendation 123 clarifies that this requirement is not to extend to documents or information which is subject to legal professional privilege (eg advice provided by a medical practitioner's lawyer). The Osteopaths Act 1997 incorporates a similar protection.

The final recommendation goes further than the equivalent template provision in acknowledging that determinations may need to be made from time to time as to the scope of the material that is protected under legal professional privilege. The final recommendation proposes a role for the Chairman of the Medical Tribunal in making such determinations.

[1] Cf. s.86, Osteopaths Act 1997.

8.8 Admissibility of information

Final recommendation 124 : Admissibility of certain information in civil proceedings

The Working Party recommends that the Minister for Health seeks the Attorney General's advice on the question of making certain documents and information gathered during the regulatory processes set out in section 8.6 of this report inadmissible in civil proceedings relating to a medical practitioner's practice of medicine.

The Working Party recommends that consideration should be given in particular to the following documents and information being made inadmissible in civil proceedings by the Medical Practitioners Registration Act:

- Impairment process:
  - Information provided by a medical practitioner to a person who is appointed to conduct a medical examination of the practitioner, and the report of the medical examination;
  - The report of an Impaired Registrants Panel into a matter referred to it by the Medical Board;
  - The reasons for decision prepared by the Medical Board or the Medical Tribunal at the conclusion of an inquiry into a matter dealt with under the impairment process.
- Competence process:
  - Information provided by a medical practitioner to a person who is appointed to conduct an assessment of the person's competence, and the report of the competence assessment;
  - The report of a Professional Standards Committee into a competence matter referred to it by the Medical Board;
  - The reasons for decision prepared by the Medical Board or the Medical Tribunal at the conclusion of an inquiry into a matter dealt with under the competence process.

Comment on final recommendation 124

The question of incorporating legal protection and privilege into the new Act in respect of information gathered during investigations and inquiries into medical practitioners under the Act was raised by the AMA in the course of the review. It raises important issues of legal principle that need to be considered in a broader policy context, hence the recommendation that this specific matter should be taken up with the Attorney General by the Minister for Health.

The question of the application of Freedom of Information legislation also needs to be considered in relation to certain information that may be gathered or generated under the Act's regulatory processes.

It is acknowledged that denying the use in civil proceedings of information that is gathered for official purposes, such as investigations that are conducted under an Act of Parliament, requires careful consideration and justification. However, such denial is authorised in certain situations.

For example, the Health Services (Quality Improvement) Act 1994 grants privilege to information that is generated for use in approved quality improvement activities in hospitals. Section 10 of that Act provides that such information cannot be required to be produced in court, nor are the members of approved quality improvement committees able to be compelled to divulge information in civil proceedings that they have acquired through their membership of such committees.

The policy objective underpinning the granting of such protection in this situation is acknowledgment of the need to engage the co-operation of clinical staff – medical practitioners in particular – in activities that involve reviewing the quality of care provided to patients with the aim of improving quality. In the absence of such legal protection, the effectiveness of such activities would be compromised by the unwillingness of clinical staff to participate.

In relation to the regulatory processes proposed for the Medical Practitioners Registration Act, the impairment and competence processes are intended, to a varying degree, to encourage medical practitioners to co-operate in the process so that earlier intervention to address the fact and possible consequences of an impairment or concern about competence may be practised by the Medical Board. This difference in emphasis from the proposed process for unsatisfactory professional conduct is reflected in the more limited powers of investigation and compulsion that are set out in the impairment and competence processes.

It would be consistent with the policy underpinning these separate processes for serious consideration to be given to making inadmissible in relevant civil proceedings information that is generated for the purposes of each. Such an approach has been taken in other jurisdictions where comparable processes have been included in the regulatory scheme for medical practice.

For example, in NSW:

- The report of an Impaired Registrants Panel is not admissible in civil proceedings, nor may a person be compelled to produce the report or give evidence in relation to the report in civil proceedings.[1]

- Similarly, medical reports are not admissible in civil proceedings except with the consent of the person who produced the report and the person who was the subject of the report, nor may a person be compelled to provide evidence in civil proceedings in relation to such report.[2]

- The report of an assessor appointed to assess the performance of a medical practitioner in NSW is not admissible in civil proceedings except with the consent of the person who conducted the assessment and the medical practitioner concerned, nor is it possible to compel a person to produce the report of give evidence in relation to it in civil proceedings.[3]

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[1] S.85, Medical Practice Act 1992 (NSW).

[2] S.190A, Medical Practice Act 1992 (NSW).

[3] Clause 8, Schedule 3A, Medical Practice Act 1992 (NSW).

- Medical reports, performance assessment reports and reports of Impaired Registrants Panels are "protected reports" for the purposes of the NSW Act. The Act makes it an offence for a person to disclose the contents of a protected report except as authorised by the Act. [1]

In New Zealand, information provided by a medical practitioner in the course of participating in a competence program is not admissible in civil proceedings. [2]

The Working Party would advocate that a broad approach be considered in relation to the making inadmissible in civil proceedings of information gathered in the proposed impairment and competence processes, as occurs in NSW. The policy objective of so doing would be to encourage medical practitioners to co-operate with such processes to the maximum extent possible.

A similar limitation on the admissibility of information gathered during the unsatisfactory professional conduct process is not contemplated.

8.9 Conciliation

Final recommendation 125 : Conciliation

The Working Party recommends that the Medical Practitioners Registration Act should provide as follows:

Referral of matter warranting conciliation to Office of Health Review

The Medical Board should be able to refer a complaint to the Office of Health Review for conciliation to be attempted in accordance with the Health Services (Conciliation and Review) Act 1995 if:

- The Board decides on the receipt of advice from a Complaints Assessment Committee that an attempt at conciliation would be the appropriate response to a complaint; or

- The Director of the Office of Health Review advises the Board, pursuant to section 53 of the Health Services (Conciliation and Review) Act 1995, that a complaint that the Board has received is suitable for conciliation under that Act.

Such referral should only occur with the consent of the person who made the complaint.

Conciliation by Medical Board

The Medical Board should itself be able to attempt conciliation in any individual case by appointing a conciliator, if this approach is acceptable to a complainant.

A provision in the new Act modelled on sections 63 – 64 of the Osteopaths Act 1997 would be suitable for this purpose.

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[1] Clause 8, Schedule 3A, Medical Practice Act 1992 (NSW).

[2] S.65, Medical Practitioners Act 1995 (NZ).

Comment on final recommendation 125

The Working Party's preliminary report had proposed that a complaint warranting an attempt at conciliation may be referred to the Office of Health Review or else an attempt at conciliation may be made by the Medical Board itself. Final recommendation 125 confirms this intent if the option of conciliation is acceptable to the person whose complaint is to be the subject of an attempt at conciliation.

In its submission to the Medical Act review, the OHR commented extensively on the conciliation of complaints.

The OHR suggested that, with the advent of the Health Services (Conciliation and Review) Act 1995 and the establishment of the OHR, it was no longer necessary to retain the ability for health registration boards to attempt conciliation themselves under their individual professional registration Acts.

Points made by the OHR in support of this position were as follows:

- The OHR is established for the specific purpose of conducting conciliation of complaints about health services. It has particular expertise in the specialist area of conciliation;
- Any involvement by the Medical Board in conciliating complaints would require resources, which would duplicate those already available through the OHR;
- The Health Services (Conciliation and Review) Act 1995 precludes the OHR from considering an issue once a registration board has made a determination in relation to it. Thus a decision by the Medical Board to retain a complaint for conciliation under the Medical Practitioners Registration Act (or indeed to take any other type of action) would prevent the OHR from taking action in relation to the complaint. The OHR's view is that there should be no prohibition on the OHR dealing with an issue (eg attempting conciliation in order to secure a financial settlement for a complainant where an adverse finding has been made against a medical practitioner). It is also concerned about conciliation being attempted under a health professional registration Act if the remedies available at the conclusion of the conciliation process are not specified in the Act.

The Working Party has re-considered the recommendation in its preliminary report that the Medical Board should itself be able to attempt conciliation in light of the OHR's submission. It has concluded the option of conciliation by the Medical Board itself should be included in the new Act in order to maximise the flexibility available to the Board when dealing with complaints, particularly those where a resolution may be expeditiously achieved by bringing the parties together for "low level" conciliation.

It therefore proposes that provisions modelled on sections 63 and 64 of the Osteopaths Act 1997 should be included in the new Act, except that the new Act should provide that conciliation may be attempted by a conciliator appointed by the Medical Board rather than by a Complaints Assessment Committee (as provided for in the Osteopaths Act 1997).

The Working Party accepts that, other than "low-level" conciliation (eg bringing the parties to a complaint together for the purposes of an apology being provided) it would ordinarily be appropriate for matters warranting conciliation to be referred to the Office of Health Review. It would anticipate that, at an administrative level, discussions will occur between the Medical Board and the OHR as to the most appropriate approach to conciliation once the Board has come to a view that conciliation is the appropriate response to a particular complaint.

The OHR's advocacy in favour of removing the restriction on its involvement in the same complaint once a health professional registration Board has made a determination in relation to it is noted. This restriction is found at section 26(2) of the Health Services (Conciliation and Review) Act 1995, which provides as follows:

> **"26. Complaints that must be rejected**
>
> (1) [omitted]
>
> (2) If an issue raised in a complaint has already been determined by a court or an industrial tribunal or a registration board, the Director [of the OHR] must reject the complaint to the extent to which it relates to that issue unless in the Director's opinion it relates to matters that were not determined by the court, industrial tribunal or board."

It is probable that section 26(2) of the Health Services (Conciliation and Review) Act 1995 reflects an express intention the conciliation under that Act should be seen as an alternative to, and not additional to, the disciplinary powers that may be exercised by a health professional registration board, such as the Medical Board.

If this view is correct, the OHR's advocacy of the removal of the prohibition on its dealing with an issue that has already been determined by the Medical Board would represent a significant policy shift requiring amendment to the Health Services (Conciliation and Review) Act 1995.

Without commenting on the merits of such a proposed shift, it is noted that a statutory review of the Health Services (Conciliation and Review) Act 1995 is scheduled to be conducted sometime after September 2001.[1] This review would appear to be the most appropriate vehicle for giving detailed consideration to the policy change advocated by the OHR.

8.10 Medical Tribunal – power to award costs

Final recommendation 126 : Medical Tribunal – power to award costs

The Working Party recommends that the Medical Practitioners Registration Act should provide that the Medical Tribunal should have power to award costs against any party in proceedings before the Tribunal.

Comment on final recommendation 126

Final recommendation 126 confirms the preliminary report's recommendation that the Medical Tribunal (but not other elements of the proposed regulatory structure) should have power to award costs against parties in proceedings before the Tribunal.

[1] S.79 of the Health Services (Conciliation and Review) Act 1995 requires the Minister for Health to conduct a review of the Act 5 years after its commencement (which occurred in September 1996).

This recommendation was supported by the AMA, but opposed by the Nurses Board, which felt that a broader ability to award costs under the new Act should be available, particularly with regard to proceedings before the Professional Standards Committee.

The distinction drawn in the recommendation between the ability to award costs in proceedings before the Tribunal but not otherwise in other proceedings under the Act is consistent with the intention that legal representation may be permitted in proceedings before the Tribunal but not otherwise.

8.11 Reciprocal action

Final recommendation 127 : Reciprocal action

The Working Party recommends as follows:

Notification of orders

Where an order is made as a result of the regulatory processes described in this chapter against a medical practitioner who the Medical Board believes is also registered in another State and Territory, the Board should be authorised to notify other relevant medical regulatory authorities of the fact that an order has been made against the medical practitioner and the terms of the order.

Further consideration should be given in preparing the new Act to other categories of persons and organisations (eg employers, professional colleges) who should be informed of the fact that an order has been made against a medical practitioner and the effect of the order.

Reciprocal action

A provision modelled on section 74 of the Osteopaths Act 1997 should be included in the Medical Practitioners Registration Act to enable the reciprocal enforcement in Western Australia of an order that is made against a medical practitioner under medical practitioner legislation in another jurisdiction.[1]

Comment on final recommendation 127

Final recommendation 127 confirms the preliminary report's recommendation that the Medical Board should be authorised to notify other medical regulatory authorities of regulatory action that is taken against medical practitioners in Western Australia. Such notifications would only be made in respect of medical practitioners who have medical registration in more than one jurisdiction.

It is proposed that further consultation should occur in preparing the Medical Practitioners Registration Act on whether the Medical Board should be able to notify other relevant groups of action taken against a medical practitioner. The submission to the review by the Royal College of Pathologists of Australia requested that consideration be given to authorising the Medical Board to notify Royal Colleges and other professional associations if regulatory action is taken against one of their members.

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[1] As under s.74 of the Osteopaths Act 1997, it is intended that reciprocal enforcement of regulatory action would be governed by the Mutual Recognition (Western Australia) Act 1995 while Western Australia is a participating jurisdiction in the national mutual recognition scheme.

It should be noted that reciprocity of regulatory action involving professionals who are registered in more than one jurisdiction is governed by mutual recognition legislation, relevantly section 33 of the Mutual Recognition Act 1992 (Cth) as adopted in Western Australia by the Mutual Recognition (Western Australia) Act 2001.

Section 74 of the Osteopaths Act 1997 makes provision for reciprocal action to be taken in Western Australia against osteopaths who are subject to disciplinary action in another State or Territory. However, the provision does not have effect while Western Australia is a participating jurisdiction in the national mutual recognition scheme. It is recommended that the same approach be taken in the Medical Practitioners Registration Act.

8.12 Appeal rights to Supreme Court

Final recommendation 128 : Appeal rights to Supreme Court

The Working Party recommends that the Medical Practitioners Registration Act should provide that appeals against decisions by the Medical Tribunal, in its primary jurisdiction and appellate roles, should lie to the Supreme Court of Western Australia and should be limited to points of law only.

Comment on final recommendation 128

Final recommendation 128 confirms the Working Party's view that appeals from the Medical Tribunal should lie to the Supreme Court and should be limited to appeals on points of law only.

The proposed limitation on appeal rights beyond the Medical Tribunal was supported by the AMA's submission to the review. However, it was opposed by the State branch of the Royal Australian College of Obstetricians and Gynaecologists on the grounds that an unlimited right of appeal would act as an important deterrent to the arbitrary exercise of powers.

It should be noted that the proposals contained in this report provide for a more transparent and accountable discharge of the registration and regulatory roles of the Medical Board, with rights of appeal on the merits of decisions and on points of law to the Medical Tribunal at appropriate points. This allows, in the Working Party's view, appeal rights beyond the Tribunal to be limited to points of law without unduly compromising the entitlement to procedural fairness and review of decisions that medical practitioners should have.

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CHAPTER 9 : MISCELLANEOUS MATTERS

Introduction

This chapter deals with a number of miscellaneous matters, most notably:

- Regulation of medical call services;
- Controls over the advertising of services provided by registered medical practitioners;
- Medical Board's role in accrediting arrangements for the pre-vocational training of interns;
- Legal protection for members and officers of the Medical Board;
- Scope of the power to make subsidiary legislation under the Medical Practitioners Registration Act.

Of these matters, the proposed retention in the new Act of profession-specific controls in relation to advertising is perhaps the key issue.

Summary of recommendations in Chapter 9

This chapter proposes that the Medical Practitioners Registration Act should:

- Prohibit certain advertising of services provided by registered medical practitioners, but otherwise discontinue the prescriptive restrictions on advertising contained in the Medical Rules 1987;
- Recognise the Medical Board's role in accrediting positions for the pre-vocational training of interns in hospitals and other health care settings;
- Continue to provide protection from liability for members and staff of the Medical Board who administer the Act, discharge functions and exercise powers under the Act in good faith;
- Provide that proceedings for offences may be initiated and taken in the name of the Medical Board by the Board's Registrar or other authorised persons;
- Continue to provide that fines, penalties etc paid or recovered under the new Act shall be credited to the Medical Board;
- Make provision for the Medical Board to have and use a common seal;
- Incorporate provision to make appropriate subsidiary legislation under the new Act; and
- Retain the requirement that the new Act be subject to a 5-yearly statutory reviews.

9.1 Medical call services

Final recommendation 129 : Medical Call Services

The Working Party recommends that no provision should be made in the Medical Practitioners Registration Act to continue the approval role that the Medical Board exercises in relation to medical call services.

This recommendation has regard to the fact that such services will be subject to the proposed regulation of corporate providers of medical services set out in chapter 5 of this report.

Comment on final recommendation 129

The Medical Board has had an involvement in regulating medical call services since 1985 when the Medical Act 1894 was amended to confer an approval role on the Board in relation to such services.

Medical call services are deputising services that provide after hours coverage for general practitioners.

The Medical Board's current role in relation to medical call services involves:

- Approving such services by reference to criteria (eg relating to fitness/propriety, management ability, and involvement of medical practitioners in directing the service) that are stated in the Act;
- Maintaining a register of medical call services;
- Receiving notifications of certain matters from approved medical call services.

It is an offence for a medical call service to be established or conducted without the approval of the Medical Board. The Board also has discretion to suspend or cancel its approval, which is subject to appeal to the District Court.[1]

Medical call services would come within the scope of the regulation proposed in chapter 5 in relation to the involvement of relevant legal entities in the provision of medical services involving registered medical practitioners. As a consequence, if the provisions relating to medical call services in the Medical Act 1894 were to be retained in the Medical Practitioners Registration Act, medical call services would be subject to two separate authorisation processes under the same Act.

Final recommendation 129 therefore proposes that the provisions relevant to medical call services in the Medical Act 1894 should not be continued into the new Act. However, medical call services will be subject to the regulation applying to relevant legal entities that seek to become involved in carrying on a business involving the provision of medical services by registered medical practitioners.

[1] Statutory provisions relevant to medical call services are found at s.21CA – 21CD of the Medical Act 1894 and in rules 19 – 32 of the Medical Rules 1987.

9.2 Regulation of advertising

Final recommendation 130 : Regulation of advertising of medical services

General offence applicable to advertising medical services

The Working Party recommends that it should be an offence for a person to advertise, or cause to be advertised, services that are provided by registered medical practitioners in a manner that:

- Is false, misleading, or deceptive or is likely to mislead or deceive;
- Creates, or is likely to create, an unjustified expectation of beneficial treatment;
- Promotes the unnecessary or inappropriate use of medical services;
- Refers to, uses, or cites actual or purported testimonials;
- Offers a discount, gift or other inducement to attract patients unless the advertisement also sets out the terms and conditions of the offer;
- Compares the services provided by another medical practitioner with the services being advertised other than on the basis of objective fact.

Offence to publish prohibited advertisement

The Working Party further recommends that it should be an offence for a person to exhibit, or cause or permit to be exhibited, an advertisement contrary to the general offence proposed above or otherwise whereby:

- A person who is not a registered medical practitioner:
  - Uses the title “registered medical practitioner” or any other title that is calculated to induce a belief that the person is a registered medical practitioner; or
  - Advertises or holds himself or herself out as being able, entitled, or qualified to practise medicine as a registered medical practitioner;
- A person who does not have specialist registration:
  - Uses a title that is prescribed in relation to the particular specialty; or
  - Advertises or holds himself or herself out as being registered, or entitled or qualified to be registered, in the specialty.

The offence should apply to a newspaper proprietor, or to a printer publishing such an advertisement, only after the person has received a written notification from the Medical Board that an advertisement to which the offence may apply has appeared in a publication for which the newspaper proprietor or printer is responsible and is likely, in the opinion of the Board, to have breached the proposed offence.

Final recommendation 131 : Repeal of advertising restrictions in the Medical Rules 1987

The Working Party recommends that, on commencement of the controls on advertising proposed in final recommendation 130, the following provisions of the Medical Rules 1987 should be repealed:

- Rules 33, 33A and 34 (restrictions on advertising by registered medical practitioners); and
- Schedule 2, which details the manner in which registered medical practitioners may advertise their services.

The Working Party further recommends that no provision should be made in the new Act to enable the controls on advertising proposed in final recommendation 130 to be augmented by subsidiary legislation.

Comment on final recommendations 130 & 131

Final recommendations 130 and 131 set out the Working Party's final position on controls that should be included in the Medical Practitioners Registration Act in relation to the advertising of services provided by registered medical practitioners.

In essence the final recommendations propose that:

- The new Act should continue to prohibit certain kinds of advertising in relation to services provided by registered medical practitioners;
- The intent of section 20 of the Medical Act 1894 should be retained; [1]
- The prescriptive approach to the content of advertising set out in the Medical Rules 1987 should be repealed;
- No provision should be made in the new Act to create additional controls on advertising by subsidiary legislation made under the Act.

Submissions to Medical Act Review

Perhaps the key issue for consideration when reviewing final recommendation 130 is whether the new Act should incorporate profession-specific restrictions on the advertising of services by registered medical practitioners at all.

Opinion on this point, as expressed in submissions made to the review, was divided.

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[1] S.20 of the Medical Act 1894 makes it an offence for a person to exhibit or cause to be exhibited an advertisement whereby a person advertises of holds themselves out contrary to the prohibitions contained in s.19 of the Act.

The proposal that the new Act should retain controls in relation to advertising was supported in submissions received from:

- AMA;
- Chiropractors Association;
- Medical Board;
- Nurses Board;
- WA branch of the Royal Australasian College of Surgeons; and
- Royal College of Pathologists of Australasia.

However, concern about the retention of such controls was expressed in the submission from the Australian Competition and Consumer Commission.

Proponents of the retention of advertising controls in the new Act, such as the AMA, noted the need for the new legislation to distinguish between:

- The provision of information that enables the public to make informed choices when accessing medical services; and
- Advertising that seeks to promote the increased consumption of medical services.

The AMA noted that it has major concerns about certain advertising (eg in the area of cosmetic surgery) which could exploit people's vulnerability.

The ACCC's submission questioned the need to retain advertising restrictions in the Medical Practitioners Registration Act and particularly noted its concerns about restrictions on advertising that extend beyond those contained in the Trade Practices Act 1974 (Cth) and the Fair Trading Act 1987 (WA) being included in the new Act.

The Commission is concerned that such restrictions can be subjective and may operate to limit or restrict entry to the medical services sector.

It noted that any such restrictions would need to be justified in accordance with National Competition Policy legislation review requirements. If the public benefit of the proposed restrictions cannot be established in accordance with these requirements, the Commission's view is that the proposed restrictions should not be retained in the new Act.

The Commission also noted that it had been proactive in taking legal action to protect consumers in the health sector using the powers available to it under the Trade Practices Act 1974 (Cth).

The Commission has also prepared guidelines to assist health professionals, including doctors, and consumers to understand the Trade Practices Act requirements in relation to advertising.[1]

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[1] Fair treatment? Guide to the Trade Practices Act for the advertising or promotion of medical and health services. Published July 2000 by the Australian Competition and Consumer Commission and the NSW Health Care Complaints Commission.

Working Party's final position

Having reviewed the submissions on this issue, the Working Party remains of the view that provision should be made in the new Act for the Medical Board to have a role in scrutinising advertising that is put into the market place in relation to services provided by registered medical practitioners.

The Working Party would see this role as being consistent with the Medical Board's charter to regulate medical practice in Western Australia in a way that protects the public. Indeed, the Working Party would see the manner in which medical practitioners advertise, or allow to be advertised, their services as an integral part of each practitioner's professional conduct and as such should be subject to Medical Board scrutiny.

The Working Party would note in this regard that the Medical Board incorporates, or has ready access to, the medical expertise necessary to come to a view as to whether a particular form of advertising is:

- Likely to cause patients to undergo treatment that is unnecessary or inappropriate; or
- Likely to create an unrealistic expectation of benefit.

Furthermore, the Working Party would characterise the controls proposed in final recommendation 130 as complementing the generic controls on advertising in the Trade Practices Act 1974 (Cth) and Western Australia's Fair Trading Act 1987.

The Working Party notes that its final recommendation will need to be justified in accordance with National Competition Policy legislative review requirements. However, it also notes that a number of other jurisdictions' medical practitioner legislation has retained controls over advertising that are not dissimilar from those recommended by the Working Party following NCP reviews in a number of other States. Table 5 provides an illustration by reference to medical practitioner legislation in NSW, Queensland and Victoria.

The final form of the general advertising offence proposed in final recommendation 130 differs from the recommendation that appeared in the preliminary report in the following respects:

- The proposal that it should be part of the offence to advertise medical services in a manner which offers a discount, gift or inducement to attract patients has been retained but modified to permit such advertising where the terms and conditions of the offer are included in the advertisement. This is consistent with the approach taken to this form of advertising in Queensland and Victoria;
- The recommendation in the preliminary report had been that the new Act should make it an offence to advertise medical services:

> "… in a manner which unfavourably compares another medical practice or medical services with the medical practice or medical services being advertised." [1]

[1] Recommendation 75, Report of a review of the Medical Act by a Working Party established by the Minister for Health, page 195.

TABLE 5 : ADVERTISING CONTROLS IN OTHER JURISDICTIONS' MEDICAL PRACTITIONER LEGISLATION

JURISDICTION	FORM OF CONTROL
NSW	Section 114 of the Medical Practice Act 1992 (NSW) prohibits advertising of medical services except in accordance with the Medical Practice Regulation 1998 (NSW), regulation 9 of which permits advertising other than advertising that: • Is false, misleading or deceptive; • Creates an unjustified expectation of beneficial treatment; • Promotes the unnecessary or inappropriate use of medical services.
Queensland	Clause 168 of the Medical Practitioners Registration Bill 2000 (Qld) proposes to prohibit advertising of medical services in a way that: • Is false, misleading or deceptive or is likely to mislead or deceive; • Offers a discount, gift or inducement to attract a person to use the service unless the advertisement also states the terms of the offer; • Refers to, uses or cites actual or purported endorsements or testimonials; • Is disparaging of a medical service provided by another person, another business providing medical services, or another registered medical practitioner. A person is also prohibited from advertising: • A medical service that the person knows, or ought reasonably to know, will or is likely to harm a person; • A registrant's expertise in a field of practice unless the registrant has the skills, knowledge, training or qualifications to practise in the field.
Victoria	Section 64 of the Medical Practice Act 1994 (Vic)[1] makes it an offence to advertise a medical practice or medical services in a manner that: • Is or is intended to be false, misleading or deceptive; • Offers a discount, gift or other inducement to attract patients (unless the advertisement also sets out the terms and conditions of the offer); • Refers to, uses, or quotes from testimonials or purported testimonials; • Creates an unreasonable expectation of beneficial treatment. The Health Practitioner Acts (Amendment) Act 2000 (Vic) also amends the Medical Practice Act 1994 (Vic) to allow the Governor of Victoria, on the recommendation of the Victorian Medical Board, to issue guidelines about the minimum standards that are acceptable to the Board for the advertising of medical services.[2]

[1] As amended following NCP review of the Victorian Act by the Health Practitioner Acts (Amendment) Act 2000.

[2] S.29 of the Health Practitioner Acts (Amendment) Act 2000 (Vic). Not commenced at March 2001.

Specifically in relation to this element of the recommendation, the Medical Board and the AMA indicated that it would be preferable if the new Act did not prevent comparative information being made available to the public provided that comparisons are made on the basis of scientific or statistically valid information. For this reason, the AMA suggested that the term “unfavourable” should be replaced with “unscientific” in the final recommendation.

Consistent with this view, the final recommendation proposes to make it unlawful for advertisements to include comparisons of medical services other than by reference to objective facts. This would be intended to allow comparisons based on scientific evidence or published statistics to be made.

9.3 Accreditation of pre-vocational intern training

Final recommendation 132 : Accreditation of pre-vocational intern training

The Working Party recommends that the Medical Practitioners Registration Act should recognise the Medical Board’s role in accrediting arrangements for the pre-vocational training of interns. This recognition should take the following forms:

- The new Act should include, as one of the defined functions of the Medical Board, the accreditation of pre-vocational training positions for interns (final recommendation 5 refers);
- The new Act should provide for:
  - The establishment of a committee of the Medical Board to be known as the Pre-vocational Training and Accreditation Committee (“the committee”);
  - The committee’s membership, terms of reference, procedures and other constitutional matters to be determined by the Board;
  - The committee to be subject to direction by the Board;
  - The Board, on the recommendation of the committee, to publish guidelines about the process of accrediting intern training positions, including the requirements to be satisfied by hospitals and other health care providers wishing to have a training position accredited.
- The new Act should include power for the Medical Board, on the recommendation of the committee, to:
  - Accredit positions in a hospital or other health care settings for the purpose of training interns for a period of up to 3 years, subject to renewal;
  - Attach conditions to such accreditation;
  - Vary or revoke such accreditation (except that the Medical Board should not be able to revoke an accreditation while a person is undertaking intern training in the accredited position).

Comment on final recommendation 132

Final recommendation 132 deals with the Medical Board's role in accrediting pre-vocational training positions for interns.

It confirms the recommendation in the Working Party's preliminary report that this role should be recognised in the new Act. This recommendation attracted no substantive comment in public submissions to the review.

The final recommendation has been modified to provide specifically for:

- The statutory recognition of the Pre-vocational Training and Accreditation Committee (PTAC) as a committee of the Medical Board;
- The preparation and publication of guidelines relating to its accreditation role by the Board.

9.4 Protection from liability

Final recommendation 133 : Protection from liability

The Working Party recommends that the Medical Practitioners Registration Act should continue to provide protection from civil liability for members and staff of the Medical Board who administer the Act, discharge their statutory functions, and exercise their statutory powers in good faith.

A similar protection should be extended to:

- The members of the Medical Tribunal, Professional Standards Committees, and Impaired Registrants Panels;
- Medical practitioners who are appointed by the Medical Board to perform a medical examination of another medical practitioner or to undertake a competence assessment of a medical practitioner under the new Act's impairment and competence processes; and
- A person who is appointed as an investigator for the purposes of proposed unsatisfactory professional conduct process.

Comment on final recommendation 133

This recommendation proposes that broad immunity from civil or criminal liability should be granted to all persons who perform functions under the Medical Practitioners Registration Act, provided that such functions are performed in good faith.

9.5 Legal proceedings

Final recommendation 134 : Legal proceedings

The Working Party recommends that the Medical Practitioners Registration Act should provide that proceedings for offences against the Act:

- May be initiated and taken in the name of the Medical Board by the Registrar or other person authorised by the Board; and
- Are to be heard in a court of summary jurisdiction constituted by a magistrate.[1]

The new Act should also adapt sections 91(3) and 91(4) of the Osteopaths Act 1997 dealing with proof of appointment of members of the Board not being required in proceedings, and with the evidentiary status of certain documents (certificates, extracts of Register) issued by the Board.

The Working Party also recommends that the provision made in section 22 of the Medical Act 1894 for all fines, fees and penalties paid under the Act to be credited to the Medical Board should be retained in the new Act.

Comment on final recommendation 134

Final recommendation 134 is unchanged from the preliminary report.

This issue attracted one comment in the AMA's submission to the review. The Association queried the appropriateness of providing in the new Act that fines and penalties imposed under the Act should continue to be charged to the Medical Board. The Association's concern is that this arrangement may act as an incentive for the Board to initiate more prosecutions.

This provision has been retained for the following reasons.

Firstly, the designation of the Medical Board as a prosecuting authority for offences under the new Act assumes that the Board will exercise its prosecutorial function having regard to ordinary principles that govern decisions about initiating prosecutions. Adherence to these principles would not allow the Board to make such decisions on the basis of financial considerations.

Secondly, it is generally the exception for the proceeds of fines and costs awarded in relation to offences of the kind to be included in the new Act to cover the costs incurred by a prosecuting authority in investigating alleged offences and bringing proceedings before the courts.

[1] Cf. s.91(1) and s.91(2), Osteopaths Act 1997.

9.6 Common seal and execution of documents

Final recommendation 135 : Common seal and execution of documents

The Working Party recommends that the Medical Practitioners Registration Act should provide for the Medical Board to have a common seal and for the application of the common seal in executing documents of the Board.

A provision modelled on section 93 of the Osteopaths Act 1997 would be suitable for this purpose.

Comment on final recommendation 135

This issue was not the subject of a recommendation in the preliminary report and is included here for completeness.

Section 93 of the Osteopaths Act 1997 provides that:

- Documents are executed by the Board if the common seal is affixed or signed by a member who is authorised by the Board;
- The common seal may only be affixed by resolution of the Board, and must be affixed to any document in the presence of at least two Board members;
- The Board ‘s common seal is to be in a form determined by the Board, must be kept in a place of safe keeping, and must only be used as authorised by the Board;
- Judicial notice is to be taken of the Board’s common seal.

9.7 Subsidiary legislation

Final recommendation 136 : Power for Medical Board to make rules

The Working Party recommends that the Medical Practitioners Registration Act should make provision for the Medical Board to make rules, subject to the approval of the Governor in Executive Council:

- Generally to prescribe all things that are required or permitted by the new Act to be prescribed or that are necessary or convenient to be prescribed for the purpose of carrying out the Act; and
- Specifically for the following purposes:
  - To regulate meetings of, and the conduct of business by, the Medical Board and committees of the Board;
  - To provide guidance on the matters in relation to which members of the Medical Board and committees established by the Board must declare an interest in discussions involving the Board or committee;
  - To regulate the process of registration, including the making of applications for initial and renewal of general, specialist, and specific purpose conditional forms of registration;
  - To prescribe medical specialties in respect of which specialist registration may be granted by the Medical Board and the titles that may be used by persons having specialist registration;
  - To prescribe qualifications that are acceptable for the purposes of granting specialist registration in relation to prescribed medical specialties;
  - To prescribe the form of the Register, additional information that must be included in the Register in relation to individual registrants, and generally to maintain the accuracy of the Register;
  - To regulate the issuing, display, use, and replacement of certificates of registration;
  - To regulate the granting of authorisations to relevant legal entities to carry on a business involving the provision of medical services by registered medical practitioners, including the making of exemptions to this requirement;
  - To regulate the manner of making complaints to the Medical Board concerning any person who is, or was, a registered medical practitioner;
  - To regulate the conduct of investigations into complaints;
  - To regulate the proceedings and procedures of Complaints Assessment Committees, Impaired Registrants Panels, and Professional Standards Committees;

Final recommendation 136 : Power for Medical Board to make rules (continued)

Scope of Medical Board's rule-making power (continued):

- To prescribe standards in relation to the keeping, confidentiality, and disposal of patient records with which medical practitioners, or particular classes of medical practitioner, must comply;

- To prescribe standards in relation to the keeping, sterilisation, and disposal of instruments and equipment that are used in the practice of medicine with which medical practitioners, or particular classes of medical practitioner, must comply;

- To prescribe standards in relation to infection control in the practice of medicine with which medical practitioners, or particular classes of medical practitioner, must comply;

- To prescribe the fees payable under the Act;

- To prescribe forms, returns, and notices to be used in connection with the Act.

The Working Party further recommends that provision should be made in the new Act for contravention of any specified rule to be subject to a fine of up to $5,000.[1]

Final recommendation 137 : Power to make regulations

The Working Party recommends that the Medical Practitioners Registration Act should provide for:

- The Governor in Executive Council to make regulations with respect to any matter on which the Medical Board may make rules; and

- A regulation to take precedence over a rule where there is any inconsistency between the two.[2]

Comment on final recommendations 136 & 137

Final recommendations 136 and 137 identify the scope of the power to make subsidiary legislation that the Working Party considers should be included in the new Act.

[1] Cf. s.94(3), Osteopaths Act 1997.

[2] Cf. s.95, Osteopaths Act 1997.

The recommendations maintain the distinction in the Medical Act 1894 and the Osteopaths Act 1997 between the making of statutory rules by the relevant Board and the making of regulations by the Governor, with the latter taking precedence over the former in the event of any inconsistency.

The proposed power to make statutory rules has been expanded in comparison to the recommendation in the Working Party's preliminary report to provide for rules to be made prescribing standards in relation to certain professional aspects of medical practice, namely:

- The keeping, confidentiality, and disposal of patient records;
- The keeping, sterilisation, and disposal of instruments and equipment used in the practice of medicine; and
- Infection control measures to be employed in the practice of medicine.

9.8 Quinquennial review of Act

Final recommendation 138 : Quinquennial review of Act

The Working Party recommends that the Medical Practitioners Registration Act should retain the intent of section 24 of the Medical Act 1894 requiring that the new Act be subject to statutory reviews on a 5-yearly cycle.

Comment on final recommendation 138

Final recommendation 138 proposes that a requirement to conduct quinquennial statutory reviews should be retained in the Medical Practitioners Registration Act.

This requirement was first included in the Medical Act 1894 by the Medical Amendment Act 1985. It requires the Minister to conduct a statutory review of the Act once every five years and to prepare and table in Parliament a report on the outcome. Such reviews must consider:

- The attainment of the objectives of the Act;
- The administration of the Act;
- The effectiveness of the operations of the Medical Board;
- The need for a continuation of the Medical Board;
- Such other matters as appear to the Minister to be relevant.

The Working Party notes that a similar requirement is included at section 98 of the Osteopaths Act 1997, and generally is incorporated into all new Acts of Parliament.

CHAPTER 10 : OFFENCES AND RECOMMENDED PENALTIES

Introduction

In broad terms the recommendation in the Working Party's preliminary report was that:

- The majority of offences in the Medical Act 1894 should be retained, subject to modification (eg increase in penalty levels);
- The new Act should adopt a number of the offence provisions in the template legislation; and
- The new Act should incorporate a new offence relating to the provision of false information or testimony to the Medical Board or in proceedings under the Act.

Public submissions to the review generally did not comment on offences, except that the AMA noted its opposition to the proposal in the preliminary report that the prohibition on the practising of medicine by unregistered persons should be removed. [1]

This section of the report details the offences that the Working Party recommends should be incorporated into the Medical Practitioners Registration Act.

In the majority of cases, the recommendations repeat proposals regarding offences contained in recommendations made earlier in this report.

These recommendations are brought together in this final chapter in order to:

- Provide an overview of all proposed offences; and to
- Recommend and allow comparison of all proposed penalties.

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[1] As indicated in final recommendations 3 and 35, it is recommended that this prohibition should be replaced by practice protection based on identified core practices.

10.1 Offence for unregistered persons to practise medicine or use certain titles

<table>
<tr><th>RECOMMENDED OFFENCE</th><th>APPLIES TO</th><th>RECOMMENDED MAXIMUM PENALTY</th></tr>
<tr><td>Unauthorised practising medicine, use of prohibited titles etc

It should be an offence for a person who is not a registered medical practitioner to:

• Practise medicine or surgery.

An exemption should apply to medical students who provide medical services under the supervision of a registered medical practitioner (cf. s.76, Osteopaths Act 1997).

As indicated in final recommendations 3 and 35, it is intended that this offence will be replaced in due course with an offence that would apply to unregistered persons who perform core practices relevant to the practice of medicine.

• Use the title “registered medical practitioner” or any other title that is calculated to induce a belief that the person is a medical practitioner.

• Advertise or hold himself or herself out as being, or entitled or qualified to be, a registered medical practitioner.</td><td>Any natural person who is not a registered medical practitioner.</td><td>First offence: $5,000 (plus daily penalty of $200)

Second and subsequent offence: $10,000 (plus daily penalty of $400)</td></tr>
</table>

Comment

The above recommended offence gives effect to final recommendation 35. As discussed in the relevant final recommendation, it is not proposed that a definition of the practice of medicine or surgery should be included in the new Act as a guide to the activities that are covered by the prohibition on non-registrants practising medicine. The intention is that this form of practice protection should be replaced within 3 years by core practice regulation.

10.2 Offence relating to use of prescribed specialist titles

RECOMMENDED OFFENCE	APPLIES TO	RECOMMENDED MAXIMUM PENALTY
Use of specialist titles, holding out as to specialist registration It should be an offence for a person who does not have specialist registration in a prescribed medical specialty to: • Use a title that is prescribed in relation to the particular specialty; or • Advertise or hold himself or herself out as being registered, or entitled or qualified to be registered, in the specialty.	Natural persons who do not have registration in a prescribed specialty. This includes medical practitioners who may have general or specific purpose conditional registration but not registration in a prescribed specialty.	First offence: $5,000 (plus daily penalty of $200) Second and subsequent offence: $10,000 (plus daily penalty of $400)

Comment

The above recommended offence gives effect to final recommendation 25 which proposes that the Medical Practitioners Registration Act should provide for the granting of specialist registration in relation to prescribed medical specialties.

It proposes to enforce the scheme of specialist registration by prohibiting the use of specialist titles by persons who do not have the appropriate specialist registration, or the holding out by such persons that they are qualified or entitled to such registration.

10.3 Offences relating to obligations placed on registered medical practitioners

RECOMMENDED OFFENCE	APPLIES TO	RECOMMENDED MAXIMUM PENALTY
Arranging consultation when requested It should be an offence for a registered medical practitioner to fail, without reasonable excuse, to arrange a professional consultation between himself/herself and another medical practitioner to discuss a patient's condition when requested to do so by the patient or patient's relatives/carers (cf. s.21B, Medical Act 1894).	Any person having general, specialist or specific purpose conditional registration under the Medical Practitioners Registration Act.	First offence: $2,500 Second and subsequent offence: $5,000
Administration of general anaesthetic It should be an offence for a registered medical practitioner, other than in an emergency situation, to: • Administer a general anaesthetic to a patient on whom the practitioner is operating; or • Cause or permit a person who is not a registered medical practitioner to administer a general anaesthetic (cf. s.21C, Medical Act 1894).	Any person having general, specialist or specific purpose conditional registration under the Medical Practitioners Registration Act.	First offence: $2,500 Second and subsequent offence: $5,000

Comment

The above recommended offence gives effect to the recommendation that the obligations placed on registered medical practitioners by sections 21B and 21C of the Medical Act 1894 should be retained in the new Act (final recommendation 35 refers).

RECOMMENDED OFFENCE	APPLIES TO	RECOMMENDED MAXIMUM PENALTY
Failure to surrender certificate of registration It should be an offence for a medical practitioner whose registration is ended at his or her request or that is cancelled or suspended by the Medical Tribunal to fail to return his or her certificate of registration to the Medical Board.	Any person having general, specialist or specific purpose conditional registration under the Medical Practitioners Registration Act.	$1,000
Failure to notify Medical Board when required It should be an offence for a registered medical practitioner to fail to notify the Medical Board: • In the event that a writ of summons relating to a claim for civil liability in connection with his or her practice of medicine is served on the practitioner or the practitioner's employer (eg a health service); • If the practitioner is found guilty of an offence against the Health Insurance Act 1973 (Cth) or of any criminal offence in connection with his or her practice of medicine; • If the practitioner becomes an insolvent under administration, as defined by the Corporations Law.	Any person having general, specialist or specific purpose conditional registration under the Medical Practitioners Registration Act.	$5,000

Comment

The above recommended offences give effect to final recommendations 43 and 47.

10.4 Offences relating to obligations placed on members of the Medical Board and Board committees

RECOMMENDED OFFENCE	APPLIES TO	RECOMMENDED MAXIMUM PENALTY
Failure to declare interest It should be an offence for a member of the Medical Board or of a committee established by the Board to fail to declare an interest in any matter under consideration by the Board or committee as the case may be.	Any member of the Medical Board or of a committee established by the Board.	$5,000
Duty not to make improper use of information It should be an offence for a member, or former member, of the Medical Board or of a committee established by the Board to make improper use of information to which he or she becomes privileged as a consequence of his or her membership of the Board or committee.	Any serving or former member of the Medical Board or of a committee established by the Board.	$5,000

Comment

The above offences give effect to the recommended consequences of the failure on the part of a member of the Medical Board or committee of the Board to comply with the obligations stated in final recommendations 15 and 16.

10.5 Offences relating to the provision of false information or testimony

<table>
<tr><th>RECOMMENDED OFFENCE</th><th>APPLIES TO</th><th>RECOMMENDED MAXIMUM PENALTY</th></tr>
<tr><td>Offence to obtain registration by fraudulent means

It should be an offence for a person:

• To obtain registration as a medical practitioner for himself or herself fraudulently or by false representation; or

• To procure the registration as a medical practitioner of another person fraudulently or by false representation.</td><td>The first limb of the offence should apply only to natural persons (since only natural persons may become registered medical practitioners).

The second limb should apply to any “person” as defined in the Interpretation Act 1984.</td><td>Imprisonment for 2 years and/or fine of $10,000</td></tr>
<tr><td>Offence to provide false information or testimony

It should be an offence for a person to give information orally or in writing that the person knows to be false or misleading in a material respect or likely to deceive in a material way in an application for registration as a medical practitioner or otherwise:

• To a person who is appointed by the Medical Board to be an assessor or investigator for the purposes of the competence and unsatisfactory professional conduct processes described in sections 8.6.2 and 8.6.3 respectively; or

• In proceedings before the Medical Board, Professional Standards Committee, or Medical Tribunal.</td><td>Any “person” as that term is defined in the Interpretation Act 1984.</td><td>$10,000</td></tr>
</table>

Comment

The Working Party confirms the view expressed in its preliminary report that the option of a custodial sentence should be available under the new Act if a person is found to have obtained registration for himself or herself or for another person by fraudulent means.

The option of imprisonment recognises the seriousness of the consequences that are attendant upon a person gaining entry to medical practice when the person does not have the necessary knowledge, qualifications or skill to practise medicine safely and competently.

The recommended penalty in relation to this offence is aligned with the penalties for comparable offences that are found in NSW and Victorian medical practice legislation.

10.6 Offences relating to proceedings and investigations under Medical Practitioners Registration Act

RECOMMENDED OFFENCE	APPLIES TO	RECOMMENDED MAXIMUM PENALTY
Obstruction of, or impersonating, assessor or investigator It should be an offence for a person to: • Obstruct or hinder an assessor who is appointed by the Medical Board for the purposes of the competence process referred to in section 8.6.2; • Obstruct or hinder an investigator who is appointed by the Medical Board for the purposes of the unsatisfactory professional conduct processes referred to section 8.6.3 or to conduct investigations in relation to relevant legal entities as proposed in chapter 5 of this report; • Impersonate an assessor or investigator.	Any "person" as that term is defined in the Interpretation Act 1984.	$5,000 (natural person) $10,000 (body corporate)
Failure to answer question, give information etc It should be an offence for a person, without reasonable excuse, to refuse to give information, produce a document or other thing, or answer a question put to the person when required to do so by the Medical Practitioners Registration Act.	Any "person" as that term is defined in the Interpretation Act 1984.	$5,000 (natural person) $10,000 (body corporate)

RECOMMENDED OFFENCE	APPLIES TO	RECOMMENDED MAXIMUM PENALTY
Failure to attend proceedings, take oath etc It should be an offence for a person to fail, without reasonable excuse, when required to do so by the Medical Practitioners Registration Act to: • Appear before the Medical Board, Professional Standards Committee or Medical Tribunal when summonsed or otherwise required; or • Be sworn or make an affirmation (cf. s.81, Osteopaths Act 1997).	Any "person" as that term is defined in the Interpretation Act 1984.	$5,000 (natural person) $10,000 (body corporate)
Misbehaviour in proceedings It should be an offence for a person to misbehave in proceedings (including to wilfully interrupt proceedings) before the Medical Board, Professional Standards Committee or Medical Tribunal (cf. s.83, Osteopaths Act 1997).	Any "person" as that term is defined in the Interpretation Act 1984.	$5,000 (natural person) $10,000 (body corporate)
Failure to observe order prohibiting disclosure of information It should be an offence for a person to publish evidence or information relating to proceedings of the Medical Tribunal, Professional Standards Committee, or Impaired Registrants Panel if the Tribunal, committee, or panel has ordered that the evidence or information is not to be published.	Any "person" as that term is defined in the Interpretation Act 1984.	$5,000 (natural person) $10,000 (body corporate)

RECOMMENDED OFFENCE	APPLIES TO	RECOMMENDED MAXIMUM PENALTY
Failure to observe order prohibiting publication of information identifying persons involved in a complaint alleging sexual exploitation It should be an offence for a person to fail to observe an order prohibiting the publication of information relating to proceedings of the Medical Tribunal or Professional Standards Committee involving allegations of sexual exploitation that would allow the identity of the complainant or medical practitioner to be ascertained.	Any "person" as that term is defined in the Interpretation Act 1984.	$5,000 (natural person) $10,000 (body corporate)

Comment

The offences recommended in this section are drawn mainly from the Osteopaths Act 1997 (as relevant template legislation). They are directed principally at giving effect to the investigative powers included in chapter 8, and at ensuring the smooth running of proceedings under the new Act.

The proposed offences relating to:

- Publication of information in contravention of an order by the Medical Tribunal, Professional Standards Committee or Impaired Registrants Panel; and
- Failure to observe prohibition on publication of information enabling the identity of a complainant or medical practitioner involved in allegations of sexual exploitation to be ascertained,

relate to final recommendation 77.

10.7 Offences relating to the authorisation of relevant legal entities to carry on a business involving the provision of medical services

RECOMMENDED OFFENCE	APPLIES TO	RECOMMENDED MAXIMUM PENALTY
Carrying on business involving the provision of medical services by registered medical practitioners without authorisation It should be an offence for a relevant legal entity to carry on a business involving the provision of medical services by registered medical practitioners without being authorised to do so by the Medical Board or otherwise exempted.	Any "person" as defined in final recommendation 50.	$10,000 plus daily penalty of $400 (natural person) $40,000 plus daily penalty of $1,600 (body corporate)
Failure to notify when required to do so It should be an offence for an authorised relevant legal entity to fail to notify the Medical Board in relation to the matters detailed in final recommendation 56, namely: 1. Changes in persons having an interest in the relevant legal entity; 2. Material changes in the content of agreements relating to clinical matters between the relevant legal entity and medical practitioners; 3. In the case of bodies corporate – significant changes in the memorandum and articles of association of the relevant legal entity; 4. Change in business names or principal place of business; 5. If persons associated with the relevant legal entity are charged with causing a medical practitioner to engage in unsatisfactory professional conduct	Any authorised relevant legal entity, as that term is defined for the purposes of chapter 5.	**Notification requirements at 1 – 3:** $5,000 (natural person) $10,000 (body corporate) **Notification requirements at 4 – 5:** $1,000 (natural person) $2,500 (body corporate)

RECOMMENDED OFFENCE	APPLIES TO	RECOMMENDED MAXIMUM PENALTY
Causing a registered medical practitioner to engage in unsatisfactory professional conduct It should be an offence for: • An authorised relevant legal entity; or • Any person who is in a position of authority in an authorised relevant legal entity that is a body corporate, to direct, incite or induce (including by threats or promises) a registered medical practitioner with whom the relevant legal entity carries on a business involving the provision of medical services to engage in conduct that the relevant legal entity, or person, knows, or could reasonably be expected to know, could result in the Medical Board taking action against the practitioner on grounds of unsatisfactory professional conduct.	Any authorised relevant legal entity, as that term is defined in chapter 5. Any "person who is in a position of authority" in an authorised relevant legal entity as that term is defined in final recommendation 57.	$50,000 (natural person) $250,000 (body corporate)

RECOMMENDED OFFENCE	APPLIES TO	RECOMMENDED MAXIMUM PENALTY
Offence to offer or accept a benefit to influence referral decisions of medical practitioners It should be an offence for a person to offer or give a registered medical practitioner, an authorised relevant legal entity, or a person who is in a position of authority in an authorised relevant legal entity that is a body corporate, a benefit as an inducement, consideration or reward for the registered medical practitioner or any registered medical practitioner with whom an authorised relevant legal entity carries on a business: • Referring a patient to a particular registered medical practitioner or particular health service; • Recommending that a patient use or attend a particular registered medical practitioner or particular health service. It should be an offence for a person to accept from a registered medical practitioner, an authorised relevant legal entity, or a person who is in a position of authority in an authorised relevant legal entity that is a body corporate, a benefit as an inducement, consideration or reward for a registered medical practitioner: • Referring a patient to a particular registered medical practitioner or particular health service; • Recommending that a patient use or attend a particular registered medical practitioner or a particular health service.	Any "person" (except medical practitioners) as that term is defined in the Interpretation Act 1984. Medical practitioners are exempted because the equivalent behaviour would be dealt with as unsatisfactory professional conduct (final recommendation 70 refers).	$50,000 (natural person) $250,000 (body corporate)

RECOMMENDED OFFENCE	APPLIES TO	RECOMMENDED MAXIMUM PENALTY
Offence for relevant legal entity to carry on business involving provision of medical services if authorisation is suspended or revoked It should be an offence for a relevant legal entity whose authorisation is suspended or revoked by the Medical Tribunal to continue operating a business involving the provision of medical services during the period of suspension or following revocation	Relevant legal entity whose authorisation is suspended or revoked by Medical Tribunal	$10,000 plus daily penalty of $400 (natural person) $40,000 plus daily penalty of $1,600 (body corporate)

Comment

The proposed offences shown above confirm the recommendations in chapter 5 of this report regarding offences that should be included in the Medical Practitioners Registration Act in relation to the Medical Board's proposed role in authorising relevant legal entities to carry on business involving the provision of medical services.

10.8 Offence relating to advertising

<table>
<tr><th>RECOMMENDED OFFENCE</th><th>APPLIES TO</th><th>RECOMMENDED MAXIMUM PENALTY</th></tr>
<tr><td>Offence to publish prohibited advertisement

It should be an offence for a person to exhibit, or cause or permit to be exhibited, an advertisement contrary to the general offence proposed on the next page or otherwise whereby:

• A person who is not a registered medical practitioner:

- Uses the title “registered medical practitioner” or any other title that is calculated to induce a belief that the person is a registered medical practitioner; or

- Advertises or holds himself or herself out as being, or qualified or entitled to be, a registered medical practitioner.

• A person who does not have specialist registration:

- Uses a title that is prescribed in relation to the particular specialty; or

- Advertises or holds himself or herself out as being registered, or entitled or qualified to be registered, in the specialty.</td><td>Any “person” as that term is defined in the Interpretation Act 1984.

The offence should apply to a:

• Newspaper proprietor; or

• Printer publishing such an advertisement,

only after the person has received a written notification from the Medical Board that an advertisement to which the offence may apply has appeared in a publication for which the newspaper proprietor or printer is responsible and is likely, in the opinion of the Board, to have breached the proposed offence (cf. s.20, Medical Act 1894).</td><td>Natural person:

First offence: $2,500 (plus daily penalty of $100)

Second and subsequent offence: $5,000 (plus daily penalty of $200)

Body corporate:

First offence: $5,000 (plus daily penalty of $200)

Second and subsequent offence: $10,000 (plus daily penalty of $400)</td></tr>
</table>

RECOMMENDED OFFENCE	APPLIES TO	RECOMMENDED MAXIMUM PENALTY
General offence applicable to advertising medical services It should be an offence for a person to advertise, or cause to be advertised, services that are provided by registered medical practitioners in a manner that: • Is false, misleading or deceptive or is likely to mislead or deceive; • Creates, or is likely to create, an unjustified expectation of beneficial treatment; • Promotes the unnecessary or inappropriate use of those services; • Refers to or cites actual or purported testimonials; • Offers a discount, gift or other inducement to attract patients unless the advertisement also sets out the terms and conditions of the offer; • Unscientifically compares the services provided by another medical practitioner with the services being advertised.	Any "person" as that term is defined in the Interpretation Act 1984.	**Natural person:** First offence: $5,000 (plus daily penalty of $200) Second and subsequent offence: $10,000 (plus daily penalty of $400) **Body corporate:** First offence: $20,000 (plus daily penalty of $800) Second and subsequent offence: $40,000 (plus daily penalty of $1,600)

Comment

This section confirms the recommendation in chapter 9 that there should be two advertising offences in the Medical Practitioners Registration Act.

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