



Review of the Health Services (Conciliation and Review) Act 1987

Submission from AMA Victoria

Introduction

A review of the Health Services Act (Conciliation and Review) Act 1987 ('the Act') is timely for a number of reasons which are well detailed in the Discussion Paper. AMA Victoria acknowledges the work of the Expert Panel in this regard as well as the options for reform it has presented.

The review should focus on strengthening the Victorian health services complaints system in order that it meets the needs of all who participate in, and stand to be affected by its processes including complainants, health service providers and health service users more broadly. However it is equally vital that the recommendations emanating from the review do not operate in a way that unnecessarily undermine or duplicate the powers and functions of existing agencies. In this context, our submission seeks to draw particular attention to the following:

- complaints against registered health practitioners
- dealing with unregistered providers of health services
- naming powers
- public interest matters and information disclosure
- inquiries and investigations.

Complaints against registered health practitioners

AMA Victoria recognises that the delivery of health services should be subject to a high level of scrutiny and always with a view to protecting the public.

Under the new National Registration and Accreditation Scheme, any member of the public may make a notification to AHPRA about the conduct, health or performance of a practitioner and all practitioners, employers and education providers must report notifiable conduct relating to a practitioner. These requirements are fortified by the fact that any complaint regarding a registered practitioner received by the Health Services Commissioner ('HSC') in Victoria must be brought to the attention of AHPRA and thereby the relevant national board, as soon as practicable.

The HSC is also required to notify AHPRA about any health, conduct or performance issues that arise with respect to a registered health practitioner during an investigation or conciliation.

This comprehensive system of regulation operates to ensure that the practice of all registered professionals is closely monitored – and rightly so; however, the impact of such strict oversight is also worth acknowledging here. Doctors take the practice of their profession seriously and any complaint or notification made about them, whether substantiated or not, is taken similarly.

Rather than imposing unnecessary emotional strain on them or any other registered professional, careful analysis of any proposal which may lead to an increase in the volume of complaints received must be undertaken.

Recommendation: AMA Victoria is of the view that in the context of AHPRA's wide-reaching regulatory powers, and the mandatory referral of complaints relating to registered practitioners by the HSC, there is no present justification for expanding the power of the HSC in dealing with the registered professions.



Dealing with unregistered providers of health services

There is a clear argument for managing people who engage in the delivery of unregulated health services. In contrast to the regulatory system for registered providers, current controlling mechanisms for unregistered providers of health services are lacking and reform could produce a means of effectively dealing with people who engage in exploitative or predatory behaviour.

AMA Victoria acknowledges the scope of Australian Consumer Law in addressing unconscionable and misleading and deceptive conduct as well as behaviour involving false or misleading representations; however, these provisions do not appear to sufficiently address the types of actions undertaken by some unregistered providers.

Accordingly, we would support reform to enhance the ability of the HSC to deal with unregistered practitioners who are incompetent, impaired or unethical. AMA Victoria supports the proposal to introduce a statutory code of conduct establishing standards applicable to unregistered practitioners as a mechanism for greater oversight and accountability than currently exists in relation to these practitioners.

A code of conduct could usefully empower consumers to register a complaint with the HSC if an unregistered health provider has failed to comply with the standards set by the code and if following adequate investigation of the complaint the practitioner is found to have seriously breached those standards, the HSC may make an order prohibiting or limiting the practitioner from continuing to provide health services.

It is vital however that further and extensive consultation takes place before introducing such a code. AMA Victoria would not support a scheme which purports to extend to registered practitioners who provide health services that are unrelated to their profession. As outlined above, the national law already provides sufficient mechanisms by which a complaint about a registered health practitioner must be brought to the attention of AHPRA which can then take appropriate action – protection of the public is a paramount consideration during its investigations and subsequent findings.¹

Further work would also need to be undertaken in relation to the categories of unregistered practitioners to which a code of conduct might apply. The AMA perceives a distinction between unregulated professional groups, who undertake accredited tertiary training, continuing professional development activities, codes of ethics, professional standards and evidence-based practice and people who engage in delivering 'health' services who fail to engage with an academic, scientific and professional framework (naturopaths and herbal medicine practitioners, for example).

An analysis of the effectiveness of the corresponding scheme in NSW may also be useful.

Naming powers

AMA Victoria considers that the stronger 'naming powers' suggested in the Discussion Paper would be unnecessary in the context of the code of conduct model supported above. In the absence of such a scheme, however, we would support relaxing the current limitations on the power of the HSC to name an unregistered practitioner on the grounds of a serious threat to the life, health, safety or welfare of any person or the public, as well as where an unregistered provider has unreasonably failed to take action to remedy a complaint after being given an official notice.

¹ Allen, Dr Robert Bruce [2005] VMPB 8 (3 May 2005), the Medical Board of Victoria considered among other things whether Dr Allen had engaged in unprofessional conduct by failing to adequately manage the patient's condition by failing to prescribe and/or recommend conventional medications; and failing to adequately advise the patient before commencing a particular treatment that the therapy was of unproven benefit to patients with his condition and was only experimental.



We acknowledge that current restrictions on these powers can cause regrettable and sometimes dangerous delay.

Recommendation: AMA Victoria would support provisions allowing the requirement that sufficient time be given to an unregistered practitioner to object to be waived in certain circumstances (similar to the provisions within South Australian legislation) and that the ability of the HSC to name an unregistered practitioner may be made by means other than in a report. This would allow the HSC to name such a provider more swiftly thereby enhancing its ability to protect the public from potential harm.

'Public interest' matters and information disclosure

AMA Victoria acknowledges the existing mechanisms by which health information may be obtained under the *Health Records Act 2001* as well as Freedom of Information legislation and in this regard we believe it is unnecessary for the powers of the HSC to be extended.

While the Discussion Paper mentions that there may be times when the HSC should be able to disclose information revealed during the course of conciliation, we would emphasise that the confidential nature of conciliation is a necessary element of this process and is as relevant to the resolution of health complaints as to the resolution of any other type of dispute. We do not support the proposal to afford the HSC discretion to disclose information if he or she considers that the public interest outweighs the protection of confidentiality on the basis that it would undermine the integrity of conciliation.

Where the HSC becomes aware of 'public interest' matters involving registered practitioners, including any potential or perceived risk to public health or safety, any such matters would come to the attention of AHPRA upon notification of a complaint. Public interest matters which may become apparent in relation to unregistered health providers could be addressed by the proposed code of conduct.

We would similarly not support that the powers of the HSC extend to its being able to compel participants to conciliation to produce material. The voluntary nature of conciliation is another essential element of this process and we note the existing power to request information and documents during conciliation under the Health Records Act and that conciliators are able to obtain information from parties to conciliation where it is voluntarily disclosed.

We question the rationale behind the proposal to legislate, that in cases referred to conciliation, before a complaint is conciliated, the HSC must inform the conciliator of any issue raised by the complaint that the HSC believes involves a matter of public interest and then advising the parties; the Discussion Paper suggests that this could similarly apply to conciliators who identify a public interest matter. In the context of the proposed code of conduct for unregistered providers and having regard to the requirement that AHPRA investigate complaints relating to registered practitioners, the need for this reform option is not clear.

Inquiries and investigations

The present powers of the HSC to conduct investigations are considerable and include the capacity to investigate a matter on referral from the Minister, either House of Parliament, a committee of a House or the Council; subject to ministerial approval, it can also initiate an inquiry into broader healthcare issues arising out of complaints received.



Recommendation: AMA Victoria would not support increasing the HSC's investigatory powers in the manners suggested by the Discussion Paper. In consideration of the powers exercisable by the HSC, and the requirement that notifications be made to AHPRA about registered health practitioners, a need to expand the HSC's powers in this regard is not evident.

The wide-reaching powers of the Victorian Ombudsman to investigate, whether on his own motion or as a consequence of complaint, any actions taken in any Government Department or Public Statutory Body, including any aspect of service delivery, practices or procedures in public hospitals, provide sufficient opportunities for examination of such bodies.

Categories of complaints

AMA Victoria is concerned that widening the categories of complaint in the ways suggested would open the way for frivolous or vexatious complaints without a strong case for doing so. By broadening the categories of complaint to include that any member of the public may do so by reason that it is within the public interest unnecessarily welcomes an extremely wide ambit of complaints. The role of the Ombudsman as above is also relevant here.

Next steps

While AMA Victoria supports a number of the proposals canvassed in the Discussion Paper, primarily in regard to regulating unregistered providers of health services, these recommendations must be subject to further stakeholder consultation before implementation.