Mental Health Coordinating Council

'Health Practitioner Regulation National Law 2009'
Exposure Draft

Australian Health Workforce Ministerial Council
Public Consultation

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Mental Health Coordinating Council
Rose Cottage
Callan Park
Rozelle
NSW
2039

For any further information please contact:
Jenna Bateman
Chief Executive Officer
E: jenna@mhcc.org.au
Tel: (02) 9555 8388 ext 102

Corinne Henderson
Senior Policy Officer
E: corinne@mhcc.org.au
Tel: (02) 9555 8388 ext 101

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Agency Management Committee
Australian Health Practitioner Agency

Email: NRAIP@dhs.vic.gov.au

The Mental Health Coordinating Council (MHCC) thanks the Committee for inviting us to provide input into the Exposure Draft. MHCC provided an earlier submission in November 2008 regarding the proposed arrangements for handling complaints, dealing with performance, health and conduct matters as part of the consultation regarding the National Registration and Accreditation Scheme for the Health Professions issued by the Practitioner Regulation Subcommittee, Health Workforce Principal Committee of the Australian Health Ministers' Advisory Council in October 2008. We have consulted the sector and members for their feedback and particularly thank ARAFMI NSW for their contribution to this submission.

MHCC are pleased to see that the complaints mechanism in NSW is to remain under the jurisdiction of the Health Care Complaints Commission (HCCC) who we believe have the capacity to exercise this duty, and the expertise and skills to gather the evidence necessary to investigate a complaint.

Throughout the Exposure Draft (ED) the language used does not clearly acknowledge the different health complaints model that operates in NSW, by requiring that the National Boards will need to cooperate with the HCCC. We are therefore concerned that the ED indicates an eventual move towards amending the NSW model, a suggestion that we are not satisfied is best practice. We are also concerned that in other states consumers will be subject to a far less rigorous system that will weaken the ability to effectively protect health care consumers, even given the role of the Public Interest Assessor.

- **Clause 6 – Definition**
  professional misconduct, of a registered health practitioner, includes:
  (a) unprofessional conduct by the practitioner that amounts to conduct that is substantially below the standard reasonably expected of a registered health practitioner of an equivalent level of training or experience, and
  (b) more than one instance of unprofessional conduct that, when considered together, amounts to conduct that is substantially below the standard reasonably expected of a registered health practitioner of an equivalent level of training or experience, and

MHCC agree with the HCCC that the definition of unprofessional conduct and professional misconduct are vague and unnecessarily broad. The existing NSW terminology seems appropriate and we support the proposal that these definitions be used instead:

> *unsatisfactory professional conduct which requires conduct significantly below acceptable standards,* and
> *which requires that professional misconduct is conduct that would warrant suspension or de-registration,*

- **Clause 10 Policy directions**
  (2) The Ministerial Council may give directions to a National Board about the policies to be applied by the National Board in exercising its functions under this Law.
  (3) Without limiting subsections (1) and (2), a direction under this section may relate to:
  (d) a particular accreditation standard for a health profession.

(4) However, the Ministerial Council may give a National Board a direction under subsection (3)(d) only if, in the Council's opinion, the accreditation standard will have a substantive and negative impact on the recruitment or supply of health practitioners to the workforce.

MHCC support the clause that enables the Ministerial Council to direct the National Board if its accreditation standards unreasonably restrict qualified professionals from undertaking certain clinical activities.

Whilst patient safety is the foremost consideration, it is important that certain professions do not unreasonably limit others with appropriate skills for undertaking activities, thus imposing unnecessary costs on the health system and preventing access to services by insisting that only certain professional classes can undertake them.

The decision signed by COAG in March 2008 to create a national registration scheme for health professionals under one national board was one that MHCC supported. The original agreement was to create a single registration body for nine categories of health professionals. This has now been amended to a national scheme with twelve separate national registration boards to be formed for each of 12 health professions. We are concerned as to how well this will operate.

Nevertheless, we support a national accreditation scheme since it seems appropriate for a national body to oversee clinical and registration accreditation standards of both local and overseas professionals, streamlining interstate movement of professionals. Hopefully this will benefit consumers in terms of uniform verification, flexibility and enhanced access to health professionals in rural, regional and remote areas of Australia.

- **Clause 17 Function of Advisory Council**
  (1) The function of the Advisory Council is to provide independent advice to the Ministerial Council about the following:
  (2) Advice under this section must not be about:
  (a) a particular person, or

  Clause 18 Publication of advice
  (2) However, the Ministerial Council may decide not to publish an advice or part of an advice if the Advisory Council recommends that the Council not publish it in the interests of protecting the privacy of any person.

Clause 18(2) gives grounds for the Ministerial Council to not publish advice or part of advice from the Advisory Council on the basis that this may infringe on the privacy of an individual, protected under the Privacy Act. Since Clause 17(2)(a) states that the Advisory Council may not give advice regarding individuals 18(2) appears to be a superfluous. Our sense is that that this Clause will result in a lack of transparency with regards to information that may be of public interest. We suggest that the Ministerial Council have limiting rights to secrecy.

- **Clause 23 Functions of National Agency**
  The functions of the National Agency are as follows:
  (i) to establish an efficient procedure for receiving and dealing with complaints against persons who are or were registered health practitioners and person who are students, including by establishing a single national process for receiving complaints about registered health practitioners in all professions.

The National Agency needs to be collaborating with relevant state bodies such as the HCCC in dealing with complaints handling matters. This clause is unclear, and seems to suggest that there will be different processes nationally.

- **Clause 37 Independence of Public Interest Assessor**
  The Public Interest Assessor is not subject to the control and direction of any entity in relation to dealing with a particular complaint under this Law.

  Clause 38 Vacancy in office
  (1) The office of the Public Interest Assessor becomes vacant if:
  (a) the Assessor resigns the Assessor's office by written instrument addressed to the Ministerial Council, or
  the appointment of the Assessor is terminated by the Ministerial Council under this section.
  (2) The Ministerial Council may, at any time and for any reason, terminate the appointment of the Public Interest Assessor by written notice given to the Assessor.

Clause 37 is undermined by Clause 38(2) giving the Ministerial Council the right to terminate at their discretion. We propose that termination other than for reasons of substandard performance is inappropriate.

- **Clause 43 Reporting by National Boards**
  (1) A National Board must, if asked by the National Agency, give the National Agency the information the National Agency requires to compile its annual report, including:
  (a) a report on the National Board's performance of its functions under this Law during the period to which the annual report relates, and

We propose that this clause should **require** a National Board give the National Agency a report on performance of all its functions for completion of its Annual Report.

- **Clause 49 Functions of National Boards**

The functions of a National Board established for a health profession are as follows:
(g) to oversee the receipt, assessment and investigation of complaints about persons who:
(i) are or were registered as health practitioners in the health profession under this Law or a corresponding prior Act, or
(ii) are students in the health profession,

Clause 49 must make clear that the NSW HCC operates under a different arrangement to other states or that the other States are adopting the NSW model. A sub-clause will need to describe that National Boards and relevant state complaint bodies will jointly assess and investigate complaints about persons who are practitioners or students.

- **Clause 124 Annual statement**
  Each applicant for renewal of registration must give to the National Board to which the application has been made, a statement that includes the following:
  (b) details of any change in the applicant's criminal history that occurred during the applicant's preceding period of registration,
  (c) if the applicant's clinical privileges were withdrawn or restricted
  (d) if the applicant's billing privileges were withdrawn or restricted under the *Medicare Australia Act 1973* of the Commonwealth or by a private health insurer during the applicant's preceding period of registration because of the applicant's conduct, professional performance or health, details of the withdrawal or restriction of the privileges,

The Medical Practice Act requires practitioners to advise the Board regarding any criminal convictions or charges within 7 days. Clause 124 should require immediate mandatory reporting to the National Board, not as required as part of the annual statement.

- **Clause 148 Directing or inciting unprofessional conduct or professional misconduct**
  (1) A person must not direct or incite a registered health practitioner to do anything, in the course of the practitioner's practice of the health profession, that amounts to unprofessional conduct or professional misconduct.
  Maximum penalty:
  (a) in the case of an individual—$30,000, or
  (b) in the case of a body corporate—$60,000.
  (2) Subsection (1) does not apply to a person who is the owner or operator of:
  (a) a public health facility, or
  (b) another health facility that is licensed under a law of the

MHCC suggest that Clause 148(2) makes little sense in the context of Clause 148(1).

- **Clause 153 How complaint is made**
  (1) A complaint may be made to the National Agency:
  (a) verbally, including by telephone, or
  (b) in writing, including by email or other electronic means.
  (2) A complaint must include particulars of the ground on which it is founded.

MHCC suggest that Clause 153 (1) (a) be amended to state that verbal complaints will only be accepted from people with a disability preventing them from submitting a written complaint or that cannot write in English, in which case a verbal statement may be made to an appointed employee at the relevant state complaints body who will sign off on a written record of the complaint. This then compliments Clause 154 National Agency to provide reasonable assistance to complainant.

- **Clause 155 Grounds for complaint**
  (1) A complaint about a registered health practitioner may be made to the National Agency on any of the following grounds:
  (a) that the practitioner's professional conduct is of a lesser standard then that which might reasonably be expected of the practitioner by the public or the practitioner's professional peers,
  (b) that the knowledge, skill or judgment possessed, or care exercised by, the practitioner in the practice of the practitioner's health profession is below the standard reasonably expected,
  (c) that the practitioner is not a suitable person to be registered in the health profession, including, for example, that the practitioner is not a fit and proper person to be registered in the profession,
  (d) that the practitioner has an impairment,
  (e) that the practitioner's registration was improperly obtained because the practitioner or someone else gave the National Board information or a document that was false or misleading in a material particular.

MHCC suggest that grounds for complaint are different from grounds on which the complaints body may act. People should be free to complain about any professional or service they choose. This clause is likely to lead to confusion as to where are complaint might sit within the categories defined, and could result in a valid complaint being rejected on that basis.

- **Clause 158 National Board may take action on own initiative**
  (1) This section applies if:
  (a) a National Board believes on reasonable grounds that a ground for complaint under section 155 exists in relation to a registered health practitioner or student, and
  (b) a complaint has not been made to the National Agency in relation to the practitioner or student.

As suggested by ARAFMI, MHCC agree that it would be more appropriate in Clause 158 to address the issue of *"anonymous tip offs"* by using the following sub-clause:

> *(b) a* **legally compliant** *complaint has not been made to the National Agency in relation to the practitioner or student.*

We suggest that Clause 164 Grounds for complaint, and Clause 165 Agreement with the independent assessor, which also concern the limitation of grounds for complaint be reviewed.

- **Clause 167 Rejection of complaint**

(1) A National Board may decide to reject a complaint it receives if:

It appears that there is nowhere in the EDB that provides for the right to have a decision that rejects a complaint reviewed by the Independent Assessor.

- **Division 6 Referring complaints to tribunals**

Tribunal hearing should be held in public unless it is not in the public interest, and this should be stated in the EDB.

- **Clause 170 Complaint to be referred to responsible tribunal**
  (1) A National Board must refer a complaint about a registered health practitioner to a responsible tribunal if:
  (a) the Board reasonably believes, based on a preliminary assessment or an investigation of the complaint, that the practitioner has behaved in a way that constitutes professional misconduct, or

Clause 170 only deals with the opinion of the Board in referring a complaint for investigation. To give force to Clause 165 it should refer to the Board or the Public Interest Assessor's opinion (in case the Public Interest Assessor wants to proceed but the National Board does not, as under Clause 165 the most serious cause of action will be followed if they cannot agree, as is the case in NSW under the HCCC. Therefore the sub-clause would read:

> *(a) the Board* ***or Public Interest Assessor*** *reasonably believes, based on a preliminary assessment or an investigation of the complaint, that the practitioner has behaved in a way that constitutes professional misconduct, or……* (The remainder of the section amended accordingly).

- **Clause 187 Hearing not open to the public**

As with Division 6, professional standards hearings should be public unless it is not in the public interest.

MHCC thank the Committee for their interest in these matters. For further comment on this submission please contact Corinne Henderson, Senior Policy Officer at corinne@mhcc.org.au or Tel: 02 9555 8388 ext 101.