The rights and interests of doctors and patients: does the new Victorian *Health Professions Registration Act 2005* strike a fair balance?

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ABSTRACT

- From July 2007, the *Health Professions Registration Act 2005* (Vic) will significantly alter the medical disciplinary process in Victoria.
- For practitioners:
  - Formal hearings for allegations of serious unprofessional conduct will be heard by the Victorian Civil and Administrative Tribunal (VCAT);
  - There will be no right of appeal from a VCAT decision other than on a point of law;
  - The maximum fine for serious unprofessional conduct will increase from $2000 to $50 000;
  - Performance standards panels (PSPs) will be established to conduct informal hearings, with a power to impose conditions on registration; and
  - Costs of the new system will cause an increase in annual registration fees.
- For complainants:
  - There are new avenues for conciliation;
  - There is a right to seek a review of certain Medical Practitioners Board of Victoria decisions; and
  - Reasons for a PSP decision will be provided.
- Despite government argument that these changes will make the health complaints handling system fairer, the new Act has the potential to diminish the rights and interests of doctors.

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Medical practitioners boards regulate and discipline doctors. The enforcement of acceptable standards of professional and ethical conduct, through disciplinary proceedings, is essential to protect the public and to uphold the reputation of the medical profession.[1] In Victoria, regulation is currently provided for by the *Medical Practice Act 1994* (Vic) (*MPA*). However, in July 2007, the *Health Professions Registration Act 2005* (Vic) (*HPRA*) will replace the *MPA*, bringing the Medical Practitioners Board of Victoria (MPBV) and 11 other health registration boards under its regulatory framework.[2]

Current disciplinary system

Under the *MPA*, the MPBV acts as the sole body responsible for disciplining medical practitioners. On receiving a complaint of unprofessional conduct, the MPBV determines whether it warrants preliminary investigation. An investigating subcommittee may recommend either that the matter not continue any further or that it be referred to a hearing. Alleged conduct of a "serious nature" is referred to a formal hearing. Alleged conduct of a non-serious nature is referred to an informal hearing. In the 2004–05 financial year, the MPBV received 690 complaints, of which 50% were lodged by patients and 20% by relatives. A total of 414 complaints were referred for preliminary investigation. Of these, almost half were related to clinical care and a quarter concerned conduct. After preliminary investigations on 367 of these complaints, 67 (18%) were referred to informal hearings, another 24 (7%) were referred to formal hearings, and the remaining 276 (75%) were not investigated further.[3] The findings and determinations of formal board hearings for 2004–05 are shown in Box 1.

A formal hearing differs from an informal hearing in that:

- it is open to the public;
- the doctor's name, the patient's complaint and the findings of the hearing are published;
- harsher sanctions apply, including suspension and cancellation of registration; and
- the practitioner has a right to legal representation.

A formal hearing is heard by a panel of at least three MPBV members and must include one registered medical practitioner and one lawyer. A practitioner dissatisfied with the outcome may appeal to the Victorian Civil and Administrative Tribunal (VCAT) for a rehearing or on a question of law.

Future disciplinary system

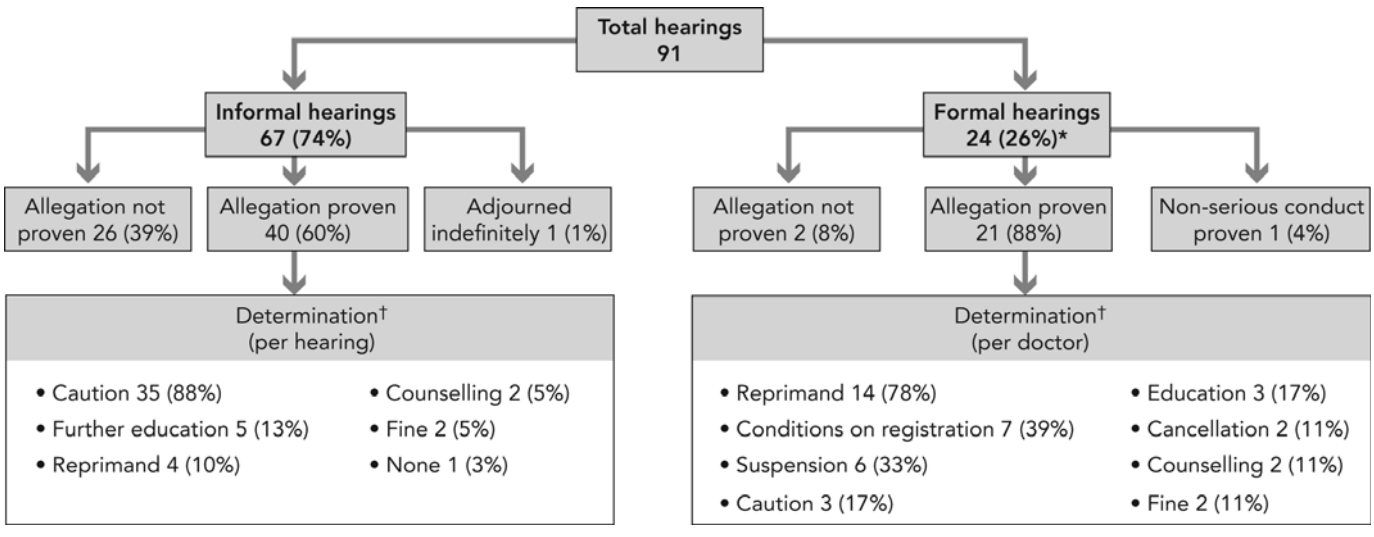
Under the *HPRA*, complainants (although the legislation now refers to "complaints" as "notifications" and "complainants" as "notifiers" [ss. 3 and 11, *HPRA*], we retain the use of the original terms for clarity) are entitled to seek a review of decisions made by the MPBV in the event that it: (i) does *not* investigate a complaint; (ii) closes a complaint following investigation; or (iii) forwards it to a performance standards panel (PSP) rather than VCAT. Where a complainant seeks a review, the MPBV must establish an investigation review panel (IRP) which may (among other things) affirm the decision, refer the matter back to the MPBV, or request transfer of the matter to VCAT. A complainant is also entitled, on request, to be given written reasons for a PSP determination.

There are increased options available to the MPBV after preliminary investigation, including arranging for the matter to be settled by agreement between the practitioner and the complainant.

Allegations of less serious unprofessional conduct will be referred to a PSP set up by the MPBV and will include at least one registered medical practitioner and one non-practitioner. Under the new legislation, the MPBV will have a new range of sanctions available, including imposing conditions on registration. This may result in more complaints being referred to informal hearings.

Formal hearings will be transferred to a VCAT panel comprising at least three people, two of whom must be registered medical practitioners. It is intended that the panel will be chaired by a legal member of VCAT,[4] although this is not a legislative requirement as it is in other Australian jurisdictions (Box 2). The panel will be empowered to hand down a variety of recommendations and sanctions beyond those currently available under the *MPA*. The

1 Outcomes of completed Medical Practitioners Board of Victoria hearings for the 2004–05 financial year



* Involving 18 doctors. † There can be more than one determination per hearing or doctor. ◆

most significant of these is an increase in the maximum fine payable from $2000 to $50 000.

Finally, the *HPRA* will give greater powers to the Minister for Health to approve MPBV-issued codes and guidelines; to set standards for registration; and to appoint non-practitioners to the MPBV, including to office-bearing positions.

Is reform needed?

The *HPRA* follows a government-commissioned study that showed many complainants were dissatisfied with the current system.[5] Yet the study has been described as a "deeply flawed and unrepresentative piece of research",[6] and itself concedes that the interviewees were "certainly not typical of the general population of health care users".[5] There is little other objective evidence to support the need for such major change. The Australian Medical Association (AMA) and other professional bodies have argued that the current system has "proven to be robust and effective in protecting the public by maintaining acceptable professional standards".[7] Indeed, the MPBV is often less forgiving on errant doctors than the independent appeals body, with the latter emphasising the protective (as opposed to punitive) nature of the jurisdiction.[1,8]

The AMA maintains that the MPBV has already recognised the inherent conflict within its multiple roles and understands the importance of maintaining procedural fairness.[7] This is reflected in the MPBV's current practice of using independent legal advisers and of precluding members who have been involved in the investigation process from appearing on the formal hearing panel.[9]

Justification for reform

Victoria is the last Australian jurisdiction to provide for an independent tribunal to hear serious allegations against practitioners.

While there is little evidence to suggest that the current system of self-regulation has failed to protect the Victorian community adequately, it is a fundamental principle of law that an adjudicator should not hear a case if the public might entertain a reasonable apprehension of bias.[10] Clearly, the investigation, prosecution and adjudication of medical practitioners by medical practitioners is a process that potentially "lacks sufficient independence", allowing doctors to close ranks and "protect their own".[11] Notably, adjudicator doctors also sustain strong collegial allegiances to their fellow practitioners. The perception of potential bias is strengthened by the fact that the MPBV's officers are appointed by the Minister for a 3-year term, and may be removed by the Governor in Council at any time.[12]

Accordingly, to the extent that the *HPRA* reforms are aimed at limiting the perceived potential for bias in the medical disciplinary process, they are defensible.[12] However, they go beyond what is necessary to achieve procedural fairness, placing the rights and interests of consumers ahead of those of practitioners. On this basis, the *HPRA* has provoked widespread criticism from health profession bodies.[7]

Enhanced rights for complainants

The introduction of greater powers for the MPBV to resolve less serious matters after the investigatory stage by conciliation is aimed at promoting flexibility and a timely resolution of negotiable complaints. However, this reform indicates "a substantial misunderstanding of the board's role, which is to maintain standards, not to resolve consumer complaints".[6] Dispute resolution is more properly the role of the Health Services Commissioner and, within this context, complaints about professional conduct are usually not deemed suitable for conciliation.[13] The AMA warns that the introduction of conciliation will cause long delays for doctors and consumers and distract the MPBV from the priorities of medical standards and patient safety.[13] Notably, the Northern Territory Medical Board is the only other Australian medical board statutorily authorised to undertake a mediation/conciliation role.

Criticism can also be directed at the complainant's right of review, matched only in New South Wales. Such a right challenges the well established view that a complainant is a witness only in disciplinary matters. Based on 2004–05 MPBV data, 94% of

2 The complaints management and disciplinary proceedings under the *Medical Practice Act 1994* (Vic) (*MPA*), the *Health Professions Registration Act 2005* (Vic) (*HPRA*) and other Australian legislation governing medical boards

	Victoria (*MPA*)	Victoria (*HPRA*)	Queensland	New South Wales	Australian Capital Territory	Northern Territory	Western Australia	Tasmania	South Australia
Hearings into serious unprofessional conduct									
Independent body	None	Victorian Civil and Administrative Tribunal	Health Practitioners Tribunal	Medical Tribunal	Health Professions Tribunal	Health Professional Review Tribunal	State Administrative Tribunal	Medical Complaints Tribunal	Medical Professional Conduct Tribunal
Legal member included	Legal practitioner	No statutory guarantee	District Court Judge	District Court Judge	Magistrate	Legal practitioner	Judge, magistrate or legal practitioner	Legal practitioner	District Court Judge
Maximum fine	$2000	$50 000	$99 975	$27 500	No fine	$10 000	$10 000	$5000	$20 000
Practitioner right of appeal on merits	Yes	No	No	Yes	Yes	No	No	Yes	Yes
Complainant right of appeal on merits	No	No	No	Yes	No	No	No	No	Yes
Hearings into non-serious unprofessional conduct									
Conditions on registration	No	Yes	Yes	Yes	Yes	Yes	Yes	No	Yes
Right to legal representation	No	No	No	No	Yes	No	Yes	Yes	Yes
Pre-investigatory and post-investigatory stage									
Legislated scope for board-facilitated conciliation*	No	Yes	No	No	No	Yes	No	No	No
Complainant right of review†	No	Yes	No	Yes	No	No	No	No	No

* This excludes possible conciliation or mediation functions undertaken by a separate health complaints commission or body. † This excludes possible judicial review rights under other legislation. ◆

complainants whose complaint was investigated would have been entitled to a review (ie, all those whose complaint was not referred to VCAT). Furthermore, 276 complainants whose complaints were not investigated could also have called for a review. This substantially undermines reforms introduced in 2003 enabling the MPBV to vet unmeritorious complaints.

While practitioners retain the right to appeal PSP decisions, or otherwise seek a transfer to VCAT, they will not have the same options as complainants for challenging pre-investigation and post-investigation decisions. In particular, practitioners have no right to seek a review of a decision to transfer a matter to VCAT.

Diminished rights for practitioners

While the new legislation complies with natural justice requirements insofar as it permits a practitioner to attend a PSP hearing and make submissions, it goes against a well established expectation that where registration is at risk (through the imposition of conditions on registration), a practitioner is entitled to legal representation. This expectation is given effect in the current *MPA* and also in the Australian Capital Territory, Tasmania, Western Australia and South Australia.

Under the *HPRA*, a finding of serious unprofessional conduct by VCAT and the associated penalty can be appealed in the Supreme Court only on a question of law. This alters the current regimen under which, after a formal hearing of the MPBV, a practitioner may request a rehearing by VCAT. The loss of the right to a rehearing is significant, and places Victorian doctors at a disadvantage compared with their counterparts in New South Wales, the Australian Capital Territory, Tasmania, and South Australia. It is also at odds with the practitioner's right to appeal against a PSP finding of unprofessional conduct, for which there are less severe penalties.

Of further concern is the increase in maximum fine from $2000 to $50 000. Such an increase is "punitive in nature and clearly excessive",[6] and does not sit well with the primary function of disciplinary hearings, which is to uphold the standards of the medical profession and thereby protect the public.[14] The quantum of the fine is surpassed only in Queensland. Across the five other states and territories that may impose a fine, the maximum ranges from $5000 to $27 500 (Box 2).

Financial cost to the profession

The medical profession pays for complaints management and disciplinary processes by way of registration to the MPBV and subscription to medical defence organisations. Under the *HPRA*, these costs are set to rise. While departmental estimates have

indicated just a small rise in registration fees, these estimates only consider costs associated with VCAT proceedings, and make no attempt to quantify other costs, including those associated with PSPs and IRPs. A predicted doubling in legal costs will also see indemnity premiums increase.[15] This doubling will be generated by practitioners seeking legal assistance for PSP hearings (even though they cannot be represented) and tribunal decisions being more fiercely and expensively defended. Given that the new system is not wholly based on self-regulation, there is a strong argument that the community should bear some of the increased cost.

Peer review

It is a clear line of reasoning that skilled medical practitioners are best equipped to assess acceptable standards of conduct in medical practice.[16] Consistent with this reasoning, the *HPRA* has maintained, and arguably even strengthened, the peer review process for serious matters. There is a requirement for at least two registered medical practitioners to sit on a VCAT panel, as opposed to the current requirement of at least one on a formal hearing. The role of community members in VCAT hearings is reduced.

However, in other ways the *HPRA* weakens the current peer review system. First, there is no guarantee that the two VCAT practitioners will have the same experience or understanding as board members who currently sit on formal hearings. Second, the transfer of formal hearings to VCAT will lead to a loss of experience for board members, whose participation in formal hearings is thought to improve their management of informal hearings and to help inform board policies. In turn, this loss of experience may result in decreased job satisfaction, leading to less competent individuals seeking appointment. Thus, health boards have argued that the removal of serious matters from health boards will "fragment their capacity to fulfil their overall obligation of protecting the public and guiding the professions".[7] Third, the practitioner membership of the board itself is diluted, with the Minister having power to appoint up to half the board from among non-practitioners. The AMA fears that this will "undermine the board's ability to set professional standards and guide doctors".[13]

National registration and accreditation scheme

The Council of Australian Governments has agreed to establish a single national registration and accreditation scheme for the medical profession and eight other health professions by July 2008.[17] The preferred model is a single cross-profession national registration board with a presence in each state, primarily to manage complaints and disciplinary matters by means of profession-specific panels.[18] The scheme will require a nationally consistent approach to medical disciplinary matters.

Given that such a scheme was already mooted in late 2005, the enactment of the *HPRA* seems both short-sighted and premature. Indeed, its secretive and rushed passage through Parliament more than 18 months before it was due to commence operation attracted criticism at the time.[6,7,14,19] An opposition amendment to stall the Bill to facilitate further consultation was defeated by the government. Yet, in all likelihood, the *HPRA* may only operate for a year before being superseded.

In the meantime, there are particular aspects of the *HPRA* that sit poorly with attempts to promote national consistency. These include the new ministerial powers to prescribe qualifications for registration. This goes against the Productivity Commission recommendation to establish uniform national qualifications requirements for medical and other health professions by means of an expert advisory mechanism similar to that already used through the Australian Medical Council.[20] Health boards argue that without any safeguards against ministerial abuse of power, professional standards and the quality of health care in Victoria could be compromised for the sake of "workforce flexibility".[7,21]

Conclusion

Transferring formal proceedings to VCAT can be justified based on the fundamental principle of administrative law that justice must both be done and be seen to be done. Such reform follows similar measures taken in other Australian jurisdictions. However, other aspects of the *HPRA* are open to criticism. Collectively, the reforms in the *HPRA* weaken the existing rights of practitioners in favour of consumer interests, while the costs of the system will be met solely by the medical profession. The reforms also have the potential to lead to a decrease in professional standards in health care in Victoria. Some of the changes are unprecedented in Australia, and detract from the move towards a nationally consistent approach. Despite these problems, the *HPRA* is unlikely to be repealed before its implementation. However, the planned introduction of a national registration and accreditation scheme by July 2008 presents a realistic opportunity to remedy the problems with the *HPRA*. In this context, the *HPRA* should be rejected as a template for national reform in favour of a more balanced approach to the rights and interests of consumers and doctors.

Competing interests

None identified.

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