

[Act 2000 No 64]



New South Wales

## Medical Practice Amendment Bill 2000

### Explanatory note

This explanatory note relates to this Bill as introduced into Parliament.

#### Overview of Bill

The object of this Bill is to amend the *Medical Practice Act 1992* (*the principal Act*) as follows:

- (a) to establish a procedure for the assessment and review of the professional performance of registered medical practitioners,
  - (b) to regulate the giving or acceptance of benefits for recommendations or referrals,
  - (c) to prohibit any person who employs a registered medical practitioner from directing or encouraging the practitioner to engage in overservicing or to engage in conduct that would constitute unsatisfactory professional conduct or professional misconduct,
  - (d) to allow the New South Wales Medical Board (*the Medical Board*) to establish a code of conduct for registered medical practitioners,
  - (e) to require practitioners to submit an annual return to the Board and to notify convictions for offences and certain criminal proceedings,
-

- (f) to remove certain restrictions on unregistered persons,
- (g) to make further provision with respect to the registration and deregistration of practitioners,
- (h) to make further provision in respect of practitioners who suffer from an impairment,
- (i) to make other miscellaneous changes to the principal Act.

The Bill also amends the *Public Health Act 1991* in order to create an offence of advertising or otherwise promoting a health service in a manner that:

- (a) is false, misleading or deceptive, or
- (b) creates an unjustified expectation of beneficial treatment.

## Outline of provisions

**Clause 1** sets out the name (also called the short title) of the proposed Act.

**Clause 2** provides for the commencement of the proposed Act on a day or days to be appointed by proclamation.

**Clause 3** is a formal provision giving effect to the amendments to the *Medical Practice Act 1992* set out in Schedule 1.

**Clause 4** is a formal provision giving effect to the amendment to the Acts specified in Schedule 2.

## Schedule 1 Amendment of Medical Practice Act 1992

### Performance assessment

The amendments introduce a procedure for the assessment and review of professional performance of registered medical practitioners.

The Medical Board may have the professional performance of a practitioner assessed if any matter comes to its attention that indicates the professional performance of the practitioner is unsatisfactory. Professional performance is unsatisfactory if it is below the standard reasonably expected of a practitioner of an equivalent level of training or experience. Serious matters concerning a practitioner must not be dealt with under the performance assessment provisions.

The procedure for a performance assessment is as follows:

**Step 1: Assessment**

The Board appoints one or more assessors to conduct an assessment of the professional performance of the practitioner concerned. The assessment may be limited to particular aspects of the professional performance of the practitioner.

An assessor has various powers for the purpose of conducting an assessment, including power to enter premises used by the practitioner for his or her professional practice, power to question the practitioner, power to inspect records and power to require the practitioner to take part in an assessment exercise. Any information provided by the practitioner for the purpose of the assessment cannot be used in civil proceedings against the practitioner.

**Step 2: Action by Board**

The assessor is required to report and make recommendations to the Board concerning the assessment. The Medical Board then has several options as to how it proceeds with the matter. These include taking no further action, making a complaint against the practitioner, or requiring a Performance Review Panel to conduct a performance review in relation to the practitioner's professional performance.

**Step 3: Performance review by Panel**

If the Medical Board decides to have the professional performance of the practitioner reviewed, the Board must establish a Performance Review Panel to conduct the performance review. The Panel has power to summon witnesses and obtain documents for the purpose of the review. The practitioner is entitled to be present.

At the end of the review, the Panel may make such recommendations to the Board as the Panel considers appropriate. If the Panel finds the professional performance of the practitioner is unsatisfactory, the Panel may exercise certain powers. These include power to impose conditions on the practitioner's registration and to order that the practitioner attend educational courses or take advice in respect of the management of his or her practice. The Panel may also require the practitioner's professional performance to be re-assessed at a future date.

The performance assessment provisions are set out in proposed Parts 5A and 13A of and Schedule 3A to the principal Act. Amendments to Part 6 of the principal Act provide for appeals and reviews in relation to actions of a Performance Review Panel. Savings and transitional provisions will require the Medical Board to conduct a review of the performance assessment program at the end of 3 years.

### **Benefits for referrals and recommendations**

The amendments (see new section 36) will make it unsatisfactory professional conduct for a registered medical practitioner to do any of the following:

- (a) accept a benefit from a health service provider as inducement, consideration or reward for a referral to or recommendation of that provider,
- (b) accept a benefit from a health product supplier as inducement, consideration or reward for a recommendation of a health product,
- (c) offer a benefit to any person as inducement, consideration or reward for a referral to or recommendation of the registered medical practitioner.

Similar amendments are made to Part 7. Those amendments will make it an offence for any person to offer a benefit to or accept a benefit from a registered medical practitioner, or the employer of a registered medical practitioner, as inducement, consideration or reward for a referral or recommendation.

Other provisions set out in new section 36 will make it unsatisfactory professional conduct for a practitioner to refer or recommend a person to a health service, health provider or health product without disclosing any pecuniary interest the practitioner has in making the referral or recommendation.

There are exceptions for recommendations made in public advertisements and for referrals and recommendations made in other prescribed circumstances.

### **Overservicing**

New section 36 of the principal Act will also make it unsatisfactory professional conduct for a registered medical practitioner to engage in overservicing.

New Part 8A will make it an offence for a person who employs a registered medical practitioner to direct or incite the practitioner to do either of the following in the course of professional practice:

- (a) engage in overservicing,
- (b) engage in conduct that would constitute unsatisfactory professional conduct or professional misconduct.

A practitioner engages in overservicing if the practitioner:

- (a) provides a service in circumstances in which the provision of the service is unnecessary, not reasonably required or excessive, or
- (b) engages in conduct prescribed by the regulations as constituting overservicing.

The Director-General of the Department of Health will be able to prohibit persons who have been convicted of the overservicing offence from operating a business that provides medical services. Such a prohibition has an extended operation. For instance, it will prohibit the person from having a management role or substantial interest in a corporation that operates such a business or from having a substantial interest in a trust under which such a business is operated.

### **Code of conduct**

New section 99A will allow the Board to establish a code of professional conduct for registered medical practitioners. The code will be relevant for the purpose of determining what constitutes proper and ethical conduct by a practitioner. (Any improper or unethical conduct by a practitioner in relation to the practice of medicine constitutes unsatisfactory professional conduct.) The Minister will be able to direct the Medical Board to establish a code of professional conduct in relation to any particular area that the Minister considers should be the subject of such a code.

### **Annual returns**

New section 127A will require registered medical practitioners to submit an annual return to the Medical Board in relation to their activities over the previous 12 months. The return is to include details of criminal convictions and certain other criminal proceedings relating to the practitioner, details of any significant illness, and educational activities.

### **Criminal findings**

Various amendments are made for the purpose of extending provisions of the principal Act relating to criminal convictions to criminal findings (that is, where a court finds an offence proved without proceeding to conviction).

At present a court that convicts a practitioner of an offence is required to notify the Registrar of the Board of the conviction. The amendments to section 71 will extend that requirement to criminal findings for sex or violence offences.

Amendments to section 39 will make it grounds for complaint against a registered medical practitioner that the practitioner has been made the subject of a criminal finding.

The power of the Tribunal under section 64 of the principal Act to suspend or deregister a practitioner who has been convicted of an offence is extended to cases where the practitioner has been made the subject of a criminal finding.

New section 127B will require practitioners to notify the Board if they are convicted of an offence or are the subject of certain other criminal proceedings.

### **Registration**

The Bill makes further provision with respect to the registration of medical practitioners.

In particular, the provisions allow the Medical Board to require an applicant for registration to disclose convictions for offences, and details of any criminal proceedings pending against the applicant for a sex or violence offence (see new clause 3A of Schedule 1).

At present, an application for registration can be refused if an applicant has been convicted of an offence. Amendments to section 15 will extend this to criminal findings.

The principal Act already allows an application for registration to be refused if an applicant has been deregistered in another jurisdiction. The amendments to section 16 will allow the Board to refuse registration if the applicant has been suspended in another jurisdiction for reasons relating to misconduct or the person's physical or mental capacity to practise medicine, but only if the applicant is not entitled to registration under mutual recognition principles. Similar amendments are made to section 32 to allow the Board to deregister a person in such a case.

Clause 9 of Schedule 1 is replaced to clarify the situations in which the Board can hold an inquiry into the eligibility of an applicant for registration.

New clause 13A of Schedule 1 allows the Health Care Complaints Commission to appear at such an inquiry.

Clause 15 of Schedule 1 is replaced to allow the Board to be constituted, for the purposes of such an inquiry, by 3 persons appointed to conduct the inquiry. The 3 persons need not be members of the Board.

New clause 19A of Schedule 1 will require the Board to give a statement of reasons for its decision to reject an application for registration, even when it does not hold an inquiry. The amendment will also require the Board to inform a rejected applicant about his or her appeal rights.

Clauses 21 and 22 of Schedule 1 are replaced for the purpose of giving the Board more flexibility as to the form in which it keeps the Register of Medical Practitioners and to allow regulations to be made as to the matter that is to be included in the Register.

### **Powers of Medical Board to protect public**

Under the Division 5 of Part 4 of the principal Act the Medical Board has power to impose conditions on a person's registration, or suspend registration, if the Board is of the opinion that such action is necessary for the purpose of protecting the life or the physical or mental health of a person. A suspension may be imposed initially for a period not exceeding 30 days, but may subsequently be extended for periods of up to 30 days.

The amendments allow the Board to impose an initial suspension of up to 8 weeks, which may be subsequently extended for a period of up to 8 weeks.

The period in which an appeal can be made under section 95 against such a suspension (or other actions by the Board) is increased from 7 days to 28 days.

Other amendments to Division 5 of Part 4 make it clear that the Board may at any time alter or remove the conditions imposed pursuant to its powers to protect the public. A practitioner will be able to appeal against any alteration of the conditions by the Board under section 95 of the principal Act.

At present, the Medical Board is required to make a complaint in respect of a practitioner if the Board decides to impose conditions or suspend registration using its powers under section 66 of the principal Act.

The amendments require the Board to refer the matter to the Health Care Complaints Commission, which is to deal with it as a complaint made to the Commission.

### **Conditions imposed in impairment cases**

If the Medical Board imposes conditions on a practitioner because of an impairment suffered by the practitioner, the Board is to consult the Commission, with a view to determining whether the matter should be referred to an Impaired Registrants Panel, instead of being dealt with as a complaint.

If the matter is referred to an Impaired Registrants Panel, and the practitioner agrees to conditions being imposed on the practitioner's registration, the Board will not be required to alter or remove the conditions imposed on the practitioner under section 66. However, the practitioner may require the Board to review those conditions, and may appeal against a refusal by the Board to alter or remove them.

### **Medical examination of practitioner affected by impairment**

A new provision (section 78A) will allow the Board to require a registered medical practitioner to undergo a medical examination in connection with a matter referred or proposed to be referred to the Impaired Registrants Panel. This power already exists in relation to medical students.

A report made in connection with a medical examination of a registered medical practitioner under the principal Act will not be admissible in civil proceedings.

### **Removal of conditions agreed to by practitioner**

At present, a practitioner who agrees to conditions being imposed on his or her registration, or to a suspension, as a result of recommendations by an Impaired Registrants Panel, may at any time require the conditions to be altered or removed or the suspension to be terminated or shortened.

New section 81A will remove the practitioner's right to make that requirement. Instead, the practitioner will be able to make a request to the Medical Board that the conditions be removed or the suspension terminated or shortened. The Board must then require an Impaired Registrants Panel to review the matter. If the Panel recommends that the Board refuse to alter or remove the conditions, or refuse to terminate or shorten the suspension, the Board may do so. Amendments to section 95 provide for a right of appeal against that refusal.

### **Confidentiality of reports**

Various changes are made for the purpose of ensuring that certain reports and other information obtained under the Act are kept confidential. In particular, the following reports will not be admissible in civil proceedings:

- (a) a report made in connection with a medical examination of a practitioner or person applying for registration under the Act (see new section 190A),
- (b) a report made by an assessor in connection with a performance assessment of a practitioner (see new Schedule 3A, clause 8).

New section 190B provides for an offence of disclosing the contents of a protected report.

### **Definition of "medical student"**

Amendments to the definition of medical student extend the definition to a person who is undertaking a clinical placement in a public hospital under the auspices of an educational institution accredited by the Australian Medical Council. Such students will be required to be registered under the principal Act.

### **Restrictions on unregistered persons**

The following restrictions on unregistered persons are removed:

- (a) section 104, which provides that an unregistered person is not entitled to recover any charge for any medical or surgical advice, service, attendance or operation,
- (b) section 108, which prohibits an unregistered person from holding himself or herself out as being entitled, qualified or able or willing to cure certain diseases,
- (c) section 109, which prohibits a person from selling, supplying or giving an article represented as being helpful in the treatment of cancer, except as authorised by a registered medical practitioner.

However, note the new offence to be inserted in the *Public Health Act 1991*, as described above.

### **Recovery of fees by medical practitioner**

At present, a registered medical practitioner cannot sue for the recovery of fees for professional services until 3 months has passed since the patient has been served with a bill for the amount owing (section 102). This restriction is removed.

### **Use of qualifications by practitioner**

The amendments will remove a provision (currently in section 36 of the principal Act) that makes it unsatisfactory professional conduct for a registered medical practitioner to use any qualifications other than those that are recorded in the Register.

### **Information to be provided by Board**

The amendments to section 135 will require the Board to include information concerning the performance assessment program in its annual report.

New section 135A will require the Board to make available to the public, on request, information concerning any conditions imposed on the registration of a practitioner or other orders made in respect of a practitioner.

New section 191B requires the Board to give notice of any order made in respect of a practitioner, or the placing of conditions on a practitioner's registration, to the practitioner's employer and others.

### **Consultation with third parties**

A body (such as the Medical Board or the Medical Tribunal) that proposes to make an order or exercise any other function under the principal Act will be required to consult with any third party who will be appreciably affected by the order or other action. An example of how this requirement will work is when the Tribunal proposes to make an order requiring the practice of a practitioner to be supervised by a particular person. The Tribunal will be required to consult with that third person before making the order and notify the person of the order. The relevant provisions are set out in new section 191A, new clause 3A of Schedule 2 and new Schedule 3A (clause 16).

### **Liability of officers of corporations**

At present, if a corporation contravenes a provision of the principal Act any person who is a director of the corporation or who is concerned in the management of the corporation is taken to have contravened the same provision if the person knowingly authorised or permitted the contravention. Amendments to section 187 will make a director or other person concerned in the management of a corporation liable for a contravention by the corporation unless the person proves that:

- (a) the offence was committed without his or her knowledge, and
- (b) he or she exercised due diligence to prevent the commission of the offence.

### **Self-incrimination**

Section 122 of the principal Act, which relates to the privilege against self-incrimination, is replaced so as to make it clear that the privilege:

- (a) does not extend to corporations,
- (b) applies only in respect of criminal proceedings,
- (c) does not apply to records,
- (d) does not apply to certain offences against the Act, in particular, the offence of providing false and misleading information to an authorised person under the Act.

### **Penalties for offences**

The penalties for the following offences are increased:

- (a) obstructing or otherwise failing to comply with a requirement made by an authorised person (section 121),
- (b) impersonating an authorised person (section 123).

The maximum penalty that may be imposed for offences under the regulations is also increased (section 194).

### **Object of Act**

New section 2A will insert an objects provision in the principal Act.

### **Appeal provisions**

The amendments to section 88 remove the need to make regulations relating to the time in which appeals can be made against a decision of a Committee.

The amendments to sections 89 and 90 will allow an appeal to be made to the Supreme Court against a decision of the Tribunal on an appeal against the exercise by the Chairperson or a Deputy Chairperson of the Tribunal of his or her power to order that a practitioner be suspended or deregistered.

Section 95 is replaced so as to provide for additional rights of appeal in respect of powers exercised by the Medical Board under the Act, and to extend the period in which appeals can be made to the Tribunal from 7 days to 28 days.

### **Reviews under Act to be limited in scope**

At present, the principal Act allows a practitioner to obtain a review of certain orders made under the Act. A review is conducted by the Tribunal or the Board.

New section 94A makes it clear that the review is to function as a review of the appropriateness of the order at the time of the review. The review body is not to revisit the findings made by the original decision maker, unless significant fresh evidence is produced.

### **Membership of Board**

The membership of the Medical Board is increased from 18 to 20 (see amendments to section 130). The 2 new members will be persons who, in the opinion of the Minister, are conversant with the interests of patients as consumers of medical services.

The requirement that the member of the Board nominated by the Ethnic Affairs Commission of NSW be a registered medical practitioner is removed.

### **Payment of Tribunal members and others**

At present, non-judicial Tribunal members are paid at the same rate as a witness who gives expert evidence in the Supreme Court. Section 150 is replaced so as to allow the Board to determine the rate of pay, having regard to the rate paid to witnesses who give expert evidence in the Supreme Court.

Similar amendments are made to sections 169 and 183, in respect of members of a Professional Standards Committee or an Impaired Registrants Panel.

### **Powers of chairperson of Tribunal or Committee**

Section 174 of the principal Act is replaced so as to allow the chairperson of a Professional Standards Committee to exercise certain powers of the Committee.

Amendments to clause 12 of Schedule 2 will allow a Committee or the Tribunal to terminate an inquiry or appeal, or decide not to hold it, if a complaint is withdrawn. This power may be exercised by the chairperson of the Committee or Tribunal.

### **Information to be provided by practitioner**

A new provision (section 127C) will allow the Board to require a registered medical practitioner to provide further information in connection with a complaint or other matter.

### **Entitlement of practitioner to be present at proceedings**

Amendments to sections 78, 162 and 177 and clause 13 of Schedule 1 make it clear that, although a person is entitled to be present at proceedings under the Act relating to the person, the proceedings can go ahead in the person's absence, as long as the person has been given notice of the proceedings.

### **Complaint handling procedure**

Amendments to sections 50 and 51 make it clear that any complaint that is dealt with by the Medical Board as an impairment issue (that is, is referred to an Impaired Registrants Panel for assessment under the Act) or as a professional performance issue (that is, is referred for performance assessment under new Part 5A of the Act) ceases to be a complaint.

### **Powers of Committee**

Amendments to section 63 make it clear that a Professional Standards Committee can make a recommendation in respect of a practitioner even if the practitioner has ceased to be registered under the principal Act.

### **Certificate evidence**

New section 192A makes further provision for the matters in respect of which the Registrar of the Board may give certificate evidence. This replaces clause 11 of Schedule 2 to the Act.

### **Other amendments**

Other minor and consequential amendments are made to the principal Act.

Amendments are also made for savings and transitional purposes.

## **Schedule 2 Amendment of other Acts**

Schedule 2 makes the amendments to the *Public Health Act 1991* introducing the offence described above. It also makes it clear that proceedings for the offence may be taken by any person.

Schedule 2 also makes a consequential amendment to the *Defamation Act 1974* in order to extend the defence of absolute privilege to publications made to or by a Performance Review Panel or an assessor under the *Medical Practice Act 1992*.