Review of processes undertaken by the Medical Council of New South Wales pursuant to Part 8 of the *Health Practitioner Regulation National Law* (NSW) with respect to Dr Emil Gayed

Gail B Furness SC

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Contents

1. Terms of reference

1. On 29 June 2018 I was appointed by Doctor A, President, Medical Council of New South Wales (**Medical Council**) to undertake an independent review of processes undertaken pursuant to Part 8 of the *Health Practitioner Regulation National Law* (NSW) (**National Law**) with respect to Dr Emil Gayed from the date of his registration as a medical practitioner in New South Wales until 7 March 2018, being the date Dr Gayed surrendered his registration as a medical practitioner in Australia.

2. Under the terms of reference, the review is required to consider the management of Dr Gayed, including:

> (1) Actions taken in response to any complaints received with respect to Dr Gayed, including:
> (a) Any immediate action taken for the protection of the public under s150 of the *Health Practitioner National Law* (NSW), and
> (b) Referral of matters to other bodies, including the Health Care Complaints Commission.
> (2) Exchange of information and consultation with other regulatory bodies including AHPRA and the HCCC.
> (3) Actions taken with respect to performance assessment of Dr Gayed, including any review by a Performance Review Panel.
> (4) Actions taken with respect to the management of any impairment of Dr Gayed.
> (5) The notification of outcomes following imposition of conditions on Dr Gayed by Professional Standards Committee, Performance Review Panel and s150 hearings.
> (6) The monitoring of Dr Gayed by the Council.
> (7) And any other matters that the reviewer deems fit.

3. The terms of reference state that I may provide any comments or observations arising from the review of the above matters that I wish to make with respect to improvements or changes in current legislation or practice. They also stated that I may obtain any clinical or other advice considered appropriate in order to undertake the review.

4. The Secretary of NSW Health appointed Doctor B MBBS FRANZCOG, Clinical Associate Professor O&G, UNDA, to assist the inquiry. Doctor B is an obstetrician and gynaecologist. Junior Counsel\Barrister of counsel also assisted me in the inquiry.

2. The Inquiry

5. The Medical Council's files relating to Dr Gayed were made available to me in conducting this inquiry.

6. On 21 June 2018, the Secretary of NSW Health, appointed me to conduct that independent inquiry under section 122 of the *Health Services Act 1997* (NSW) (***Health Services Act***). The terms of reference for that inquiry require me, in summary, to review the actions of the five local health districts at which Dr Gayed held an appointment in New South Wales between 1990 and 2016, management of complaints about Dr Gayed, and compliance with conditions imposed on Dr Gayed by relevant regulatory bodies including the NSW Medical Council.

7. For the purpose of both inquiries, I was provided with the records, where available, of the local health districts at which Dr Gayed held appointments. I have had regard to those records, as well as the Medical Council's files, in conducting the present inquiry.

8. I have determined that, because the scope of each inquiry and the issues to be addressed differ, although the subject matter is necessarily related and overlaps, it would be necessary to issue a separate report for each inquiry. Whereas the focus of the inquiry under s 122 of the *Health Services Act* is the management of Dr Gayed by the local health districts and their response to complaints, adverse events or performance issues which arose, the inquiry the subject of this report is focussed upon the regulatory response of the Medical Council.

9. On 30 October 2018, at my request the Secretary of NSW Health extended my reporting deadline for the inquiry under s 122 of the *Health Services Act* to 31 January 2018. The reason for that extension is that several audits or reviews are presently being conducted by the Hunter New England Local Health District of clinical outcomes involving patients treated by Dr Gayed in that local health district. The outcome of those audits or reviews may be relevant to my terms of reference for that inquiry. I do not anticipate that those additional matters will have any impact upon my report in the Inquiry regarding the Medical Council. As such I did not request from the Medical Council a similar extension for providing my report. I discussed this issue with the Medical Council.

10. In the course of the inquiry, I met with the Executive Officer and the Medical Director of the Medical Council as well as the Health Care Complaints Commissioner to discuss Dr Gayed and the issues raised by the terms of reference.

11. On 21 September 2018 I provided the Medical Council with my draft report in order to provide it with an opportunity to make submissions and other comments including as to recommendations. I also sought the Medical Council's view as to whether any individuals should be provided with a copy of the report for procedural fairness reasons. Doctor A name was suggested and he was invited to make a submissions.

12. On 19 October 2018 I received written submissions on behalf of the Medical Council from Associate Professor A, who became President of the Medical Council after the inquiry's inception. I have taken those submissions into account in finalising my report. I did not receive any other submissions regarding the draft report.

3. Summary of key events

13. This executive summary sets out in very short compass the key dates and events. For a complete outline and an explanation of the concepts referred to, it is necessary to refer to the report.

14. Dr Gayed applied for registration as a medical practitioner with the New South Wales Medical Board (**Medical Board**) on 10 May 1994. He had been offered an appointment as a Visiting Medical Officer at Grafton Base Hospital and sought urgent registration as an overseas-trained specialist. He had obtained his tertiary qualifications in Egypt and trained in both Cairo and the United Kingdom.

15. On 17 May 1994 the Medical Board registered him in the speciality of obstetrics and gynaecology.

16. Dr Gayed's registration was subject to a condition that he practise only in positions approved by the Medical Board. Although the Medical Board sent him letters annually from 1994 to 1999 seeking details of positions held, there is no evidence that Dr Gayed sought the Medical Board's approval, or that the Board ever expressly granted approval, for the appointments he came to hold. In those years, he worked in public and private hospitals in Grafton, Canberra, Cooma, Taree and Kempsey. It

seems that the Medical Board interpreted the condition as requiring that he advise of positions rather than that he obtain approval before accepting an appointment.

17. There is no evidence that the Medical Board received any complaints about Dr Gayed in connection with his practice of medicine in Grafton, Canberra or Kempsey.

18. On 15 March 2001 the Health Care Complaints Commission (**HCCC**) commenced disciplinary proceedings against Dr Gayed arising out of his treatment of nine patients at Cooma Hospital between July 1996 and July 1998. The proceedings before a Professional Standards Committee comprised 11 complaints, including one that Dr Gayed suffered from an impairment, namely, high myopia. The hearing took place in August 2001. Of the 11 complaints heard by the Professional Standards Committee, 10 related to gynaecological surgery or incidents within the operating theatre and one related to visual impairment as manifested during gynaecological surgery.

19. On 31 October 2001 the Professional Standards Committee found that Dr Gayed was guilty of unsatisfactory professional conduct in relation to five of the complaints and that he suffered from an impairment which detrimentally affected his physical capacity to practise medicine. It found that, over 15 months in 1997 and 1998, incidents and complications occurred involving Dr Gayed's gynaecological practice leading to a loss of confidence in him by general practitioner (**GP**) and nursing colleagues. The Professional Standards Committee:

    - reprimanded Dr Gayed;
    - ordered that his registration be subject to a condition that he not undertake microsurgery;
    - ordered that he be assessed by an ophthalmologist approved by the Medical Board at intervals determined by the ophthalmologist, with reports to be forwarded to the Medical Board;
    - recommended to the Medical Board that a performance assessment be undertaken in respect of his practice at Manning Base Hospital at a time deemed appropriate by the Medical Board; and

- ordered that a full copy of the decision be provided to the Medical Board, the HCCC, Dr Gayed and his advisor, the peer reviewers and the chief executive officer (**CEO**) of Southern Area Health Service, and a de-identified copy be provided to the Royal Australian and New Zealand College of Obstetricians and Gynaecologists for educational training purposes.

20. The Medical Board notified Dr Gayed's employers of the condition imposed that he not undertake microsurgery. He held appointments at private facilities and the Mid North Coast Area Health Service. However, the notices did not refer to the Professional Standards Committee's finding of unsatisfactory professional conduct, the reprimand or orders or recommendations made. The Medical Board should have provided those employers with the full Committee decision.

21. The Medical Board's Performance Committee did not adopt the Professional Standards Committee's recommendation that a performance assessment be conducted. It resolved on 18 December 2001 to consider him for inclusion in the Performance Assessment Program only in the event further concerns were raised about his professional performance. No reasons were given for that decision. As outlined in this report, that decision is difficult to justify.

22. Dr Gayed was assessed by an ophthalmologist in accordance with the Professional Standards Committee's orders. The Medical Board appointed ophthalmologist recommended on a number of occasions that Dr Gayed's perceptual or practical facility in performing laparoscopic surgery be judged by the supervision of his peers in a real surgical situation. This did not occur.

23. Dr Gayed was appointed to Mona Vale Hospital as a Visiting Medical Officer obstetrician gynaecologist in April 2002. There is no record of Dr Gayed informing the Medical Board of that appointment. During the appointment process, Dr Gayed did not inform Mona Vale Hospital (or the controlling area health service, Northern Sydney Health) of the conditions on his registration or his disciplinary history. Those matters were not known to Northern Sydney Health when it appointed him.

24. On 22 September 2003, after complaints were made about Dr Gayed's treatment of a number of patients, the Director of Medical Services at

Mona Vale Hospital sought from the Medical Board a list of the conditions on Dr Gayed's medical registration and information about his compliance with the conditions. The Medical Board staff took the view that the Medical Board was not permitted to release information as to Dr Gayed's compliance without his consent.

25. No legislation prohibited the Medical Board from giving an employer information about a doctor's compliance. In my view, and that of Doctor B, any privacy considerations should have yielded to considerations of public safety. The current law does not expressly allow the Medical Council to provide information to employers or accreditors about a doctor's compliance with conditions on registration. I am of the view that it should. Such information is relevant to enable proper supervision of a medical practitioner whose registration is conditional.

26. On 30 September 2003 the CEO of Northern Sydney Health notified the Medical Board that Dr Gayed had been the subject of a review in relation to seven patients whose treatment by him had given rise to clinical concerns. All cases related to gynaecological surgery. The CEO informed the Medical Board that Dr Gayed's appointment at Mona Vale Hospital had been suspended pending the review of concerns. Following that review, the suspension was lifted subject to a condition that any "replication of concerns" would lead to another review of his appointment. The Medical Board and the HCCC consulted each other and agreed to refer Dr Gayed to the Performance Assessment Program. No reasons were given for that decision.

27. On 28 October 2003 the Medical Board's Performance Committee resolved that a performance assessment be undertaken as a matter of urgency. A performance assessment was undertaken on 13 September 2004 at Mona Vale Hospital—almost one year after the resolution that it occur urgently. The performance assessment was not tailored in any way to the areas of concern about Dr Gayed's performance as an obstetrician and gynaecologist. The assessors were briefed with the Performance Standards Committee report of 2001, Northern Sydney Health's notification of 30 September 2003 and a decision of its Credentials Advisory Committee of 22 September 2003. Those documents indicated that the most serious concerns about Dr Gayed's performance related to his surgical performance. Yet the assessment team did not observe any

major gynaecological surgery and did not assess his visual impairment. The assessors found that his professional performance was at the standard reasonably expected of a practitioner of an equivalent level of training or experience. They expressed the view that the conditions on his registration served no continuing useful purpose.

28. It is my conclusion, and that of Doctor B, that, given the nature of the complaints and the Medical Board nominated ophthalmologist's recommendations, a more thorough review of Dr Gayed's surgical performance, and an assessment of his visual impairment, were necessary in the context of the performance assessment in 2004. We also conclude that that assessment should have occurred earlier than it did.

29. A follow-up counselling session recommended by the assessors did not occur until November 2005.

30. On 30 March 2006, on Dr Gayed's application, which was unopposed by the Medical Board and the HCCC, the Medical Tribunal of New South Wales (**Medical Tribunal**) ordered the removal of the conditions on registration imposed by the Professional Standards Committee. Accordingly, Dr Gayed's registration was amended with effect from 30 March 2006. The only remaining condition on his registration was the original condition dating from 1994 limiting his registration to practise as a specialist in obstetrics and gynaecology. There had been, and was still, some confusion within the Medical Board as to the distinction between conditions, orders and recommendations. Also, there was confusion over the fact that the condition that he work as a specialist in positions to be approved by the Medical Board was part of his initial registration and not one imposed by the Professional Standards Committee.

31. In 2007 the CEO of Northern Sydney Central Coast Area Health Service, Doctor C, notified the Medical Board of further investigations being carried out in relation to Dr Gayed's treatment of patients at Mona Vale Hospital. He had been suspended pending the outcome. The CEO informed the Medical Board that Dr Gayed had resigned his appointment upon being informed of the suspension. This was the second occasion on which Doctor C had brought to the attention of the Medical Board the area health service's serious concerns about Dr Gayed's clinical practice.

32. On 24 March 2007 the chair of the Medical Advisory Committee at Delmar Private Hospital, Dee Why, advised the Medical Board of three incidents at that hospital that concerned Dr Gayed. She advised of the hospital's decision to temporarily suspend his clinical privileges pending a review. The three cases were not dissimilar to cases that had been before the Professional Standards Committee.

33. On 17 April 2007 the Medical Board's Health Committee resolved to refer Dr Gayed to the Performance Committee and that an inquiry under s 66 of the *Medical Practice Act 1992* (NSW) be considered after receiving the investigation report from Northern Sydney Central Coast Area Health Service. The matters were not referred to the Conduct Committee despite the fact that the clinical issues were of serious concern.

34. The Medical Board's decision to await the outcome of the investigation by Northern Sydney Central Coast Area Health Service was, on the face of it, justifiable given that Dr Gayed had resigned from Mona Vale Hospital and been suspended from Delmar Private Hospital. However, Dr Gayed was still working in other locations, including Manning Base Hospital in Taree. The Medical Board apparently did not inform Manning Base Hospital (or Hunter New England Area Health Service, of which it forms part) of the suspensions, or concerns raised, by the other hospitals.

35. On 24 April 2007 the Performance Committee considered the issues and was satisfied that the matters indicated that Dr Gayed's professional performance was unsatisfactory in the areas of procedural skills and clinical judgment. It resolved that a performance assessment be undertaken but that the assessment should not be limited to any particular aspect of his practice.

36. On 26 June 2007 the Northern Sydney Central Coast Area Health Service provided to the Medical Council its investigation report relating to two external reviews. Both were highly critical of Dr Gayed's treatment. The criticisms included Dr Gayed's taking of history and note keeping, his case selection, his preparation for surgery, errors in the operating theatre and his surgical management, and inadequate follow-up. One of the cases involved his obstetric practice.

37. The Medical Board considered whether the issues warranted urgent action being taken under s 66 of the Medical Practice Act or whether Dr

Gayed was best dealt with in the performance pathway. A referral was made to the Performance Assessment Program. This inquiry has considered the adequacy of that decision in light of the material available at the time. My conclusion is that the imposition of conditions would have been justified, and a better protective measure to take, in July 2007. Dr Gayed continued to practise unrestricted for the following 12 months.

38. A further performance assessment took place on 25 October 2007 at Manning Base Hospital and in Dr Gayed's rooms at 54 Commerce Street, Taree. Dr Gayed opposed the assessors being given the full history of complaints against him.

39. The assessors concluded that his professional performance was unsatisfactory in that it was below the standard reasonably expected of a practitioner of an equivalent level of training or experience in the areas of basic clinical skills, patient management skills and practical and technical skills. They recommended that a Performance Review Panel be convened to review his professional practice. They stated that he would benefit from working in the company of other specialists and registrars in training for a period of time. They found that he did not fully understand his professional responsibilities.

40. The Medical Board apparently did not notify the Hunter New England Area Health Service of the results of that performance assessment. I consider that it should have.

41. The Medical Board's Performance Committee considered the performance assessment report, and submissions made by Dr Gayed, and resolved that a Performance Review Panel be convened.

42. On 23 April 2008 the Performance Review Panel hearing took place. Dr Gayed was accompanied by a solicitor (legal representation as such was not permitted). Dr Gayed provided a report by a specialist in obstetrics and gynaecology, who he had asked to evaluate his competence. That report was favourable to Dr Gayed. Dr Gayed opposed conditions being imposed that would limit the types of operations he could perform but accepted that a condition imposing a mentoring requirement was appropriate.

43. In its report of 25 June 2008 the Performance Review Panel found that Dr Gayed's professional performance was unsatisfactory in the areas

identified by the assessors. The Performance Review Panel had power to impose conditions on his practice but no power to suspend him. The Panel considered that the complaints made at Mona Vale Hospital raised serious questions. However, it noted that neither it nor the assessors were in a position to make a considered judgment about those incidents, which in its view could be the subject of disciplinary proceedings as 'the proper forum to evaluate the truth and significance of the allegations'.

44. The Performance Review Panel imposed a mentoring requirement and a condition that he not perform certain types of surgery, including complicated laparoscopy including hysterectomy; laparoscopic treatment of moderate or severe endometriosis; advanced urogynaecology; and oncology procedures. It directed that his performance be reassessed no sooner than six months after its decision. It made ancillary orders.

45. The Medical Board notified the chief executive of Hunter New England Area Health Service, Manning Base Hospital and relevant private hospitals of the conditions imposed, but it did not provide them with a copy of the Performance Review Panel report. Again, I consider that employers (broadly defined) should be provided with such reports.

46. The Medical Board was required to monitor compliance with orders made by a Performance Review Panel and from time to time evaluate their effectiveness in improving the professional performance of the medical practitioner concerned. The Medical Board sought to do this by monitoring Medicare data and seeking from Dr Gayed a surgical log and his confirmation that he was compliant with the conditions. The Medical Board also received reports from his mentor over a 12-month period following the Performance Review Panel. My report outlines the monitoring undertaken and makes observations about it and the mentoring process. After 12 months, Dr Gayed's mentor recommended that the mentoring requirement cease.

47. On 25 August 2009 the Performance Committee resolved that the mentoring condition had been fulfilled. It declined to remove the condition on Dr Gayed's practice that limited the types of surgery he could perform.

48. On 10 February 2010 Dr Gayed was charged with indecent assault of a female staff member. The charge was ultimately dismissed, but the

records reviewed by this inquiry raise an issue as to the adequacy of the Medical Board's monitoring of that issue.

49. This report outlines complaints that patients lodged with the HCCC at various times and how they were resolved in consultation with the Medical Board / Medical Council.

50. Following some complaints made by patients, on 28 August 2012 the Performance Committee resolved to require a performance assessment in accordance with the Performance Review Panel's direction and that it be a full reassessment not limited to the areas found to be unsatisfactory.

51. On 20 October 2013 a performance assessment took place at Manning Base Hospital and in Dr Gayed's private rooms in Taree. The assessors concluded that his practice was unsatisfactory in the areas of surgical technique, communication with patients, patient examination, ultrasound examination, criticism of colleagues and clinical judgment. They recommended that a Performance Review Panel be convened to review his professional performance and that he undergo ophthalmological assessment on a regular basis. As outlined in paragraph [28], the removal of the requirement for ongoing ophthalmological assessment in 2006 had followed insufficient investigation.

52. A Performance Review Panel was convened on 16 October 2014. Dr Gayed put forward references from other medical practitioners and patients as well as reports prepared by practitioners who he had asked to observe his practice, including operating sessions.

53. In its report dated 15 December 2014, the Performance Review Panel said that it placed significant weight upon those assessments. It saw little utility in ordering a future performance assessment but said that it could not ignore the report of the performance assessors or the history of complaints. The Performance Review Panel found that Dr Gayed's professional performance 'is at present satisfactory and ... in accordance with section 153 and 153A of the National Law the knowledge, skill or judgment possessed and applied by Dr Gayed in the practice of medicine is of the standard reasonably expected of a practitioner of an equivalent level of training or experience'. Nevertheless, it continued the conditions upon Dr Gayed's practice and noted that these conditions could be varied or removed altogether at a later date. The Performance Review Panel

recommended that the Medical Council alter the wording of condition 2 to better explain the definition of 'complicated laparoscopy' (as 'Skill Level 4, 5 and 6 laparoscopic surgery (RANZCOG Guidelines for performing Advanced Operative Laparoscopy C-Trg 2)').

54. On 27 January 2015 the Medical Council's Performance Committee resolved that condition 2 be varied in the manner recommended by the Performance Review Panel.

55. In November 2015 the HCCC received complaints from patients treated by Dr Gayed at Manning Base Hospital. Both involved gynaecological surgery. On 9 February 2016 the Medical Council considered whether an urgent hearing under s 150 of the National Law should be convened to consider suspending or imposing conditions on Dr Gayed or whether it was sufficient that the complaints be investigated by the HCCC and on the basis that the current conditions were sufficient protection to the public. The members determined that the cases did not involve a breach by Dr Gayed of his existing conditions and that it was reasonable to await the outcome of the HCCC's investigation.

56. Then, on 24 February 2016, the Hunter New England Local Health District notified the Medical Council and the HCCC that it was investigating concerns relating to Dr Gayed's treatment of six patients and had suspended him from Manning Base Hospital. It recommended that the Medical Council impose restrictions on him to minimise risks to patient safety.

57. On 7 March 2016 an urgent hearing was held under s 150 of the National Law to consider whether Dr Gayed should be suspended from practice or have additional conditions imposed on his practice, as was recommended by delegates of the Medical Council. On 1 April 2016 the Medical Council held s 150 proceedings and the delegates considered complaints by or regarding patients Patient Q, Patient M, Patient S, Patient T, Patient U, Patient V, Patient W, Patient HH and Patient R. They concluded that Dr Gayed's performance in some matters indicated very poor insight and judgment both preoperatively and postoperatively. The case of Patient S was 'deeply disturbing'.

58. The Medical Council imposed a range of conditions substantially restricting his surgical work (including a ban on performing laparotomies for any reason) and compelling him to obtain approval from a supervisor

before undertaking any surgery. I have concluded that there was no, or inadequate, monitoring by the Medical Council of the supervision requirement.

59. This inquiry has considered whether those conditions should have been imposed earlier, particularly in 2007 and 2008, when serious concerns about his practice of medicine arose again. In my and Doctor B' view, condition 8, imposed in 2016, addressed the issues identified by 2008. That is, his registration should have been restricted in 2008 with the effect that he was not to perform any procedures in an operating theatre without prior written approval of a Medical Board approved supervisor who had reviewed the patient record and the practitioner's treatment plan. Further, there would have been a reasonable basis for requiring him to maintain and submit a log of all procedures to the Medical Board on a monthly basis.

60. Following the HCCC's investigation, between December 2016 and April 2017 the Conduct Committee reviewed the outcomes. In consultation with the HCCC it decided to refer the matters to the Director of Proceedings for the commencement of disciplinary proceedings against Dr Gayed. On 1 September 2017 the Director of Proceedings determined to prosecute the complaints together before the New South Wales Civil and Administrative Tribunal.

61. On 25 October 2017 Dr Gayed, through his medical defence solicitor, sought a review of the conditions imposed on his surgical practice. In determining that application, the Medical Council decided to suspend Dr Gayed' s registration from 29 November 2017, as it was satisfied that suspension was appropriate for the protection of the health or safety of the public or that it was otherwise in the public interest to do so.

62. On 17 January 2018, through his solicitor, Dr Gayed asked the Medical Council to lift the suspension of his registration on the basis that he had surrendered his registration as a medical practitioner.

63. On 6 March 2018 the Medical Council lifted the suspension and imposed a condition that, with the effect from 13 February 2018, he not practise medicine until the disciplinary matter was disposed of or the condition was removed by the Medical Council.

64. On 6 June 2018 the New South Wales Civil and Administrative Tribunal found Dr Gayed guilty of professional misconduct. It made an order that it would have cancelled his registration if he had still been registered. It disqualified him from being registered for three years.

65. My conclusions and recommendations are set out at the end of this report (chapters 37 to 43).

4. Role of the Medical Council

66. Until 2010 the registration body for medical practitioners in New South Wales was the New South Wales Medical Board (the **Medical Board**). It was the Medical Board that initially registered Dr Gayed as a medical practitioner in New South Wales in 1994. The primary responsibility of the Medical Board was to protect the public of New South Wales by ensuring that all doctors were properly trained and maintained high standards of professional conduct and competence.

67. The Medical Council was established on 1 July 2010 with the commencement of the National Registration and Accreditation Scheme for health professionals. It replaced the Medical Board. At that time, responsibility for registering medical practitioners transferred from the Medical Board to the Medical Board of Australia. The Medical Board of Australia is supported by the Australian Health Practitioner Regulation Agency in its functions as the registration body for doctors.

68. The introduction of a national scheme in 2010 meant that health professionals no longer need to hold multiple registrations in the same profession, and that uniform registration standards apply across all jurisdictions. In 2010 Dr Gayed's registration as a medical practitioner carried over to the Australian Health Practitioner Regulation Agency.

69. New South Wales did not adopt the regulatory part of the National Registration and Accreditation Scheme, which handles complaints and notifications about practitioners. Instead, New South Wales retained its own independent complaints processes involving the HCCC, the Medical Council and New South Wales Civil and Administrative Tribunal (a 'co-regulatory' environment). Like the Medical Board and HCCC prior to 2010, the Medical Council and the HCCC continue to be responsible for receiving and managing complaints about the professional performance, conduct

and health of medical practitioners who practise in New South Wales (and medical students). Part 8 of the National Law sets out complaints-handling processes in New South Wales.

70. It is understood that the complaints processes of the Medical Council remain largely the same as those of the former Medical Board in that complaints are dealt with in three streams or pathways (called the conduct, performance and health programs).[1]

71. In 2002 the Medical Board described its processes as being divided as follows:[2]

    (a) Disciplinary

    - Medical Tribunal (professional misconduct)
    - Professional Standards Committee (unsatisfactory professional conduct)

    (b) Non-Disciplinary

    - Impaired Registrants Panel (Health)
    - Performance Review Panel (Performance).

72. That is, the Medical Board managed complaints about medical practitioners in three streams: health, performance and conduct.

73. During his registration as a medical practitioner in New South Wales, Dr Gayed was managed by the Medical Board, and by the Medical Council after 2010, within all three streams.

74. It is therefore necessary to briefly outline the processes involved in, and the purposes of, each stream.

75. In short, the health program is for doctors suffering ill health (an 'impairment') which may compromise their capacity to practise medicine safely. The performance program is for doctors whose professional performance may not meet safe standards. The conduct program is for doctors whose professional conduct may not meet acceptable standards.

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[1] Medical Council web page, 'How we assess your complaint', states: 'Complaints that are referred to us are managed through our heath, performance or conduct pathway, depending on the issue.' (Accessed 28 August 2018).

[2] Performance Assessment Program, Participants Handbook, December 2002.

76. The Medical Board had committees to consider and make decisions about medical practitioners referred to each program: a Health Committee, a Performance Committee and a Conduct Committee. The inquiry understands that the Medical Council still manages its processes through the same committee structure.

4.1 Disciplinary/conduct stream

77. As stated, one of the functions of the Medical Council, and formerly of the Medical Board, is to work with the HCCC in receiving and managing complaints about registered doctors and medical students in New South Wales.

78. Complaints about doctors in New South Wales can be lodged with either the Medical Council or the HCCC.[3] All complaints are required to be jointly considered by the two bodies.[4]

79. The Medical Council is required to notify the HCCC and the Medical Board of Australia of any complaint made to or by the Medical Council about a registered medical practitioner.[5]

80. The *Health Care Complaints Act 1993* (NSW) provides that a complaint must be investigated if the Medical Council is of the opinion that it should be.[6] A complaint must also be investigated if, following assessment of the complaint, it appears to the HCCC that the complaint:[7]

    (i) raises a significant issue of public health or safety, or

    (ii) raises a significant question as to the appropriate care or treatment of a client by a health service provider, or

    (iii) if substantiated, would provide grounds for disciplinary action against a health practitioner, or

    (iv) if substantiated, would involve gross negligence on the part of a health practitioner, or

[3] *Health Practitioner Regulation National Law* (NSW) s 144C.
[4] *Health Practitioner Regulation National Law* (NSW) s 145A.
[5] *Health Practitioner Regulation National Law* (NSW) s 144G.
[6] *Health Care Complaints Act 1993* (NSW) s 23.
[7] *Health Care Complaints Act 1993* (NSW) s 23.

(v) if substantiated, would result in the health practitioner being found guilty of an offence under Division 1 or 3 of Part 7 of the *Public Health Act 2010*.

81. The Medical Council informed the inquiry that, in practice, complaints are jointly assessed by the Medical Council and the HCCC. The Council's view is provided to the HCCC by a delegated medical officer, which is usually the Medical Director. An assessment committee within the HCCC determines whether to investigate. If the HCCC determines that the complaint does not reach the threshold for investigation and instead refers the practitioner to the Medical Council, the Medical Council's Conduct Committee usually reviews the matter. If the Conduct Committee is of the view that a complaint should be investigated with a view to prosecution before a disciplinary body, the Conduct Committee may direct the HCCC to investigate.

82. As the facts relating to Dr Gayed show, other avenues for dealing with complaints include conciliation, declining to deal with the complaint, referring the medical practitioner for a performance or health assessment or the HCCC referring a complaint to the Medical Board for consideration of inclusion in the health or performance program or the area health service for investigation.[8]

83. At times relevant to this inquiry, the Medical Council, and formerly the Medical Board, considered complaints against a medical practitioner through its Conduct Committee. The Conduct Committee consulted with the HCCC on the outcome of investigations to determine the most appropriate avenue for dealing with the complaints.

84. Of interest to this inquiry is that, according to the Medical Board's 2001 annual report, in that year the Medical Board's Assessment Committee began considering all complaints received by the Medical Board and the HCCC to determine whether the matter was to be treated as a complaint against a practitioner or as a notification of concerns to the Medical Board about the practitioner's health or performance.[9] As a result, some matters were assessed for referral to the Medical Board's Performance and Health Committees instead of to the Conduct Committee (with a view to possible

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[8] *Health Practitioner Regulation National Law* (NSW) s 145B.

[9] New South Wales Medical Board, *Annual report 2000–01*, p 16.

disciplinary action). The Medical Board's 2004 annual report clarifies that matters that were referred to the Medical Board rather than being investigated by the HCCC were previously all dealt with by the Conduct Committee. In 2004 the Medical Board transferred responsibility for referrals involving low-level performance issues to the Performance section of the Board (rather than the Conduct section) under the direction of the Performance Committee.[10]

85. For matters where the HCCC and/or Medical Council decide to investigate, under the Health Care Complaints Act the HCCC must consult with the Medical Council (and was so required previously with the Medical Board) before deciding what action to take at the end of an investigation.

86. Following consultation, the HCCC may decide:

- to terminate an investigation and that no action be taken against the practitioner;
- that the HCCC make adverse comments in a letter to the practitioner;
- that the practitioner be counselled by the Medical Council; or
- that a complaint be referred to a disciplinary hearing.

4.1.1 Disciplinary hearings

87. A complaint referred to a disciplinary hearing may be referred to a Professional Standards Committee or, since 1 January 2014, the New South Wales Civil and Administrative Tribunal. Prior to 1 January 2014 the relevant tribunal was the Medical Tribunal.

88. The legislation places both the Medical Council and the HCCC under a duty to refer a complaint to the Medical Tribunal if, at any time, either body forms the opinion that the complaint may, if substantiated, provide

[10] New South Wales Medical Board, *Annual report 2003–04*, p 33.

grounds for the suspension or cancellation of a registered health practitioner's registration.[11] The Medical Board had the same duty.[12]

89. The Medical Council has the power to refer a complaint to the Tribunal or a Professional Standards Committee (as does the HCCC after consultation with the Council).[13] The Medical Council informed the inquiry that it 'does not ever' refer complaints because it does not have powers of investigation. The Medical Council considers that other than in performance matters, it has no power to gather evidence necessary to prosecute a matter before the Tribunal or a Professional Standards Committee.[14] The functions of the HCCC's Director of Proceedings include determining whether a complaint should be prosecuted before a disciplinary body.[15]

90. It seems that matters of clinical competence or concerning treatment warranting disciplinary action are generally referred to a Professional Standards Committee where questions of clinical standards can be examined by the doctor's peers. Complaints involving misconduct (such as sexual misconduct or inappropriate prescribing) are referred to the Medical Tribunal.[16]

91. A Professional Standards Committee has the power to impose conditions on a medical practitioner's registration.[17] It can caution or reprimand the practitioner, order that the practitioner seek and undergo medical or psychiatric treatment or counselling, order that the practitioner complete an educational course specified by the Committee and order that the practitioner report on the practitioner's practice at the times, in the way and to the persons specified by the Committee.

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[11] *Health Practitioner Regulation National Law* (NSW) s 145D. Unless of the opinion that the allegations on which the complaint is founded relate solely or principally to the physical or mental capacity of the practitioner to practise medicine: *Health Practitioner Regulation National Law* (NSW) s 145D.

[12] *Medical Practice Act 1992* (NSW) s 52.

[13] *Health Practitioner Regulation National Law* (NSW) ss 145B and 145C.

[14] Submission from Medical Council dated 19 October 2018.

[15] *Health Care Complaints Act 1993* (NSW), s 90B; *Health Practitioner Regulation National Law* (NSW), s 145B.

[16] The Medical Board made this observation in its 2001 annual report.

[17] *Health Practitioner Regulation National Law* (NSW) s 146B; *Medical Practice Act 1992* (NSW) s 61.

92. A Professional Standards Committee does not have the power to order suspension or deregistration of a registered medical practitioner (although it can recommend either course).[18]

93. The Medical Tribunal has the power to cancel or suspend registration, order conditions on registration, order the practitioner to complete an educational course and take other action set out in the legislation.[19]

94. The circumstances in which cancellation or suspension is available include findings of incompetence, professional misconduct, conviction rendering the practitioner unfit in the public interest and not being a suitable person.[20]

95. Since 1987 the legislation has contained the concepts of 'professional misconduct' and 'unsatisfactory professional conduct'.[21] The historical trend in the regulation of the medical profession, resulting in these concepts being adopted, was traced by Basten JA in *Chen v Health Care Complaints Commission* [2017] NSWCA 186 at [5]ff. His Honour explained that that trend involved an expansion of the primary focus of regulation from (in the 19th century) the control of conduct involving moral turpitude to the regulation (in the last 30 years) of conduct demonstrating a degree of incompetence.

96. The term 'professional misconduct' does not have a specific meaning; it is a category of 'unsatisfactory professional conduct' which is sufficiently serious to justify suspension or cancellation.[22]

97. The phrase 'unsatisfactory professional conduct' is now broadly defined by reference to 12 separate categories of conduct relating to professional practice.[23] They include demonstrating competence or care significantly

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[18] *Medical Practice Act 1992* (NSW) s 179; *Health Practitioner Regulation National Law* (NSW) s 171D. Since 2009 the doctor concerned and any complainant may be legally represented in a Professional Standards Committee: *Health Practitioner Regulation National Law* (NSW) s 177, amended by the *Health Legislation Amendment Act 2009* (NSW) sch 1.5 [1], [2].

[19] *Health Practitioner Regulation National Law* (NSW) s 165L; *Health Practitioner Regulation National Law* (NSW) ss 149A, 149C.

[20] *Health Practitioner Regulation National Law* (NSW) s 149C(1).

[21] The historical trend in the regulation of the medical profession to be seen in the scope of regulation of each. That trend has involved an expansion of the primary focus of regulation from (in the 19th century) the control of conduct involving moral turpitude to the regulation (in the last 30 years) of conduct demonstrating a degree of incompetence.

[22] *Health Practitioner Regulation National Law* (NSW) s 139E.

[23] *Health Practitioner Regulation National Law* (NSW) s 139B(1).

below the standard reasonably expected of a practitioner of an equivalent level of training or experience, making a referral in circumstances where the practitioner has a financial interest in giving that referral without disclosing the interest, over servicing and any other improper or unethical conduct relating to the practice of the practitioner's profession.

98. Prior to the introduction of the National Law in 2010, unsatisfactory professional conduct included 14 defined categories (similar to the current categories). The 'lack of competence' category was expressed as being 'any conduct that demonstrates a lack of adequate knowledge, skill, judgment or care, by the practitioner in the practice of medicine'.[24]

99. As stated by Basten JA in *Chen v Health Care Complaints Commission*:[25]

> incompetent professional care is not necessarily an indicator of a defect in character, although it may be. In many cases incompetence will be capable of rectification by undertaking further training and possibly obtaining further experience in a supervised role. That possibility allows that unsatisfactory professional conduct may be dealt with by the imposition of conditions, or by a period of suspension. However, whether such orders will be sufficient is a matter for the disciplinary tribunal to determine in each case. ...
>
> There may well be cases in which, in the proper exercise of its discretion, based upon the findings it has made, the Tribunal would err in failing to cancel a practitioner's registration in other cases, cancellation may be seen as an unreasonable or disproportionate exercise of the power conferred on the Tribunal.

Basten JA also stated:[26]

> Incompetence or inadequate care may in some circumstances be remediable by specific steps; in other circumstances the Tribunal may be concerned that the carelessness, for example, is such as to cast doubt on the suitability of the person to practise medicine. Each of the criteria for cancellation or suspension may be analysed in this way. Each case will depend upon an evaluative judgment to be made by the Tribunal as to the nature and seriousness of the conduct.

100. Any orders made at the conclusion of disciplinary proceedings against a medical practitioner are for the protection of the public and not for the

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[24] *Medical Practice Act 1992* (NSW) s 36.
[25] *Chen v Health Care Complaints Commission* [2017] NSWCA 186, [13]–[14] (Basten JA).
[26] *Chen v Health Care Complaints Commission* [2017] NSWCA 186, [20] (Basten JA).

purpose of punishing the practitioner (see *Clyne v New South Wales Bar Association* [1960] HCA 40; (1960) 104 CLR 186).

4.2 Performance assessment

101. The Medical Council has mechanisms other than disciplinary action by which to fulfil its responsibilities. Since 2000, one of these has been the Performance Assessment Program.

102. Performance assessment is one of the approaches that the Medical Board could take (and the Medical Council now can take) in response to a concern about a practitioner's performance. The purpose of the Performance Assessment Program is to provide a means of dealing with medical practitioners who are not impaired and have not engaged in professional misconduct but the Medical Board has concerns about their standard of clinical performance.

103. Performance assessment is intended to have a non-disciplinary, remediation focus in that it seeks to achieve improvement in the doctor's performance.

104. Dr Gayed was the subject of performance assessments in 2004, 2007 and 2013; and Performance Review Panels in 2008 and 2014.

105. In 2010 the legislation governing performance assessments and Performance Review Panels contained in Part 5A and Part 13A of the *Medical Practice Act 1992* was repealed and replaced by new provisions contained in Part 8, Divisions 5 and 14, of the National Law. The provisions remain largely the same.

106. Because Dr Gayed's performance was the subject of performance assessment for the first time under the previous provisions, those provisions are set out here.

107. Section 86A of the Medical Practice Act defined 'professional performance' as meaning 'a reference to the knowledge, skill or care possessed and applied by the practitioner in the practice of medicine'.

108. The National Law now refers to 'judgment' instead of 'care'.[27]

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[27] *Health Practitioner Regulation National Law* (NSW) s 153.

109. Section 86C of the Medical Practice Act provided the Medical Board with power to have a practitioner's performance assessed:

> The Board may have the professional performance of a registered medical practitioner assessed under this Part if any matter comes to its attention that indicates that the professional performance of the registered medical practitioner, or any aspect of the practitioner's professional performance, is unsatisfactory. This is not limited to matters that are the subject of a complaint or notification to the Board.

110. Section 86B defined 'unsatisfactory' in relation to professional performance:

> For the purposes of this Part, the professional performance of a registered medical practitioner is unsatisfactory if it is below the standard reasonably expected of a practitioner of an equivalent level of training or experience.

111. The current provision is identical (for present purposes).[28]

112. Performance assessment is the means by which the Medical Board establishes whether or not the indication of unsatisfactory professional performance is well founded. Under the Medical Practice Act, the Medical Board was not to have the professional performance of a doctor assessed if the matter giving rise to the proposed assessment raises a significant issue of public health or safety or raises a prima facie case of professional misconduct or unsatisfactory professional conduct. Subsection 86D(2) provided that any such matter was to be dealt with by a complaint (that is, by the Medical Board to the HCCC). This remains the position under current law.[29]

113. Once poor performance is identified, it is open to the Medical Board to implement a range of means to support improvement, including education and mentoring and public protection measures, such as supervision and limits on practice.

114. The Medical Board's Performance Assessment Program Participants Handbook (December 2002) described the process.

115. A notification or complaint by a third party (a member of the public, a statutory authority such as an area health service, a registration board or a Medical Board committee) is referred to the Medical Board's

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[28] *Health Practitioner Regulation National Law* (NSW) s 153A.
[29] *Health Practitioner Regulation National Law* (NSW) s 154A.

Performance Committee if it is felt that the notification raises issues pertaining to the practitioner's professional performance. This is known as the triggering notification.

116. The handbook outlined that, although a single notification may trigger a referral to the Performance Committee, that notification will be viewed in the context of any previous dealings that the doctor may have had with the Medical Board, including prior complaints or Health notifications. It stated:

> in dealing with the matter through the Performance Assessment Program, the Board is concerned with the overall performance of a practitioner, not an individual complaint. Consequently, the matters raised in the triggering notification will not be specifically investigated.

117. Following referral, the matter is considered by the Performance Committee and a resolution is passed as to whether a performance assessment is the most appropriate course of action. Alternatively, the Performance Committee may refer the matter to the conduct or health streams.

118. Performance assessments are conducted in the practitioner's environment by two or three practitioners (the 'assessment team') who are familiar with the area of practice.

119. The assessment is broad-based and not limited to the particulars of the matter that triggered the assessment. Multiple assessment tools are used, including the observation of consultations and procedures, a review of records and a clinical practice interview.

120. Following the assessment, the assessment team prepares a report to present to the Performance Committee for its consideration.

121. The handbook outlined that the Performance Committee may decide to take a number of courses of action (as set out in the legislation[30]):

- no further action;
- convene a Performance Review Panel;
- make a complaint against a practitioner;

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[30] *Medical Practice Act 1992* (NSW) s 86J; *Health Practitioner Regulation National Law* (NSW) s 155C.

- refer the matter to an Impaired Registrants Panel; and
- direct counselling.

122. An amendment to s 155C of the *Health Practitioner Regulation National Law* (NSW) in 2016 now also allows the Medical Council to impose conditions, with the consent of a practitioner, following the receipt of a performance assessor's report.[31] Previously, the Medical Council could not impose conditions following a performance assessor's report but instead had to refer the matter to a Performance Review Panel or make a complaint.

123. The Medical Board's 2003 annual report described each option as follows. When the assessors do not identify performance deficiencies, no further action is taken in relation to the practitioner. In cases where minor concerns are raised, the assessors may counsel and advise the practitioner during the assessment. More formal counselling can occur when there are more significant performance issues that do not require the Medical Board to order remediation but that need to be drawn to the practitioner's attention. If remediation is required, or if there are issues of public protection, a Performance Review Panel is convened.

124. A complaint involves the Medical Board (and since 2010, the Medical Council) making a complaint to the HCCC, at which point the matter becomes an issue of professional conduct rather than professional performance.

4.2.1 Performance Review Panel

125. A Performance Review Panel examines evidence placed before it to establish whether the practitioner's practice of medicine meets the standard 'reasonably expected of a medical practitioner of an equivalent level of training or experience'.

126. The Performance Review Panel consists of two medical practitioners and one lay member.

127. The Performance Review Panel is conducted in the absence of the public and with as little formality and technicality as possible.[32] Witnesses may

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[31] *Health Practitioner Regulation National Law (NSW) Amendment (Review) Act 2016.*

[32] *Medical Practice Act 1992* (NSW) sch 3A; *Health Practitioner Regulation National Law* (NSW) sch 5B.

be summoned to appear or produce or review documents. Reports may be obtained from experts. The names and addresses of witnesses and the medical practitioner, any specified evidence and the subject of the review may be withheld from publication by direction of the chair of the Panel.

128. The doctor can be legally represented in a Performance Review Panel and can make oral and written submissions.

129. The Performance Review Panel is required to hand down a decision regarding action, if any, to be taken to rectify deficiencies in the performance of a medical practitioner and to protect the public.

130. A Performance Review Panel is not to take place if the Panel is aware that the practitioner is subject to a complaint that is being investigated by the HCCC, unless the HCCC agrees to its continuation.[33] A Performance Review Panel must terminate the review if, either before or during the performance review, the Panel forms the view that there is a significant issue of public health or safety or a prima facie case of professional conduct or unsatisfactory professional conduct by the medical practitioner.[34] Such matters must be referred back to the Medical Board with a recommendation that a complaint be made against the doctor.

131. One significant difference between a performance assessment and a Performance Review Panel is that a Performance Review Panel can direct that conditions relating to the practice of medicine be imposed on the doctor's registration.[35]

132. The legislation makes clear that, following a performance review by a Performance Review Panel, the Medical Council is required to monitor compliance with any orders made by the Panel and from time to time evaluate the effectiveness of those orders in improving the professional performance of the registered medical practitioner concerned to a standard that is commensurate with other practitioners of an equivalent level of training or experience.[36]

4.3 Health stream

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[33] *Medical Practice Act 1992* (NSW) s 86L; *Health Practitioner Regulation National Law* (NSW) s 156A.
[34] *Medical Practice Act 1992* (NSW) s 86M; *Health Practitioner Regulation National Law* (NSW) s 156B.
[35] *Medical Practice Act 1992* (NSW) s 86N(2); *Health Practitioner Regulation National Law* (NSW) s 156C.
[36] *Medical Practice Act 1992* (NSW) s 86R; *Health Practitioner Regulation National Law* (NSW) s 157.

133. According to the Medical Board's 2001 annual report (p 29), the Impaired Registrants Program commenced in 1993.

134. The Impaired Registrants Program is aimed at allowing doctors with health problems to remain in active medical practice while protecting the public. It is non-disciplinary. The common outcome for an impaired doctor is conditional registration, with conditions tailored to address their particular circumstances and type of impairment.[37]

135. Dr Gayed was not in the Impaired Registrants Program, although he suffered an impairment based on eyesight problems (high myopia of the eyes) which was recognised by the Professional Standards Committee in 2001 (see below). Because of his impairment, the Professional Standards Committee made an order requiring Dr Gayed to attend a Medical Board nominated ophthalmologist for monitoring and prohibited him from practising microsurgery. The legislation required the Medical Board to notify the practitioner's employers of the conditions on their registration (s 191B of the Medical Practice Act commenced on 1 October 2000).

136. Whether the Medical Board managed Dr Gayed's impairment adequately is an issue identified and explored in this inquiry.

4.4 Urgent action: Medical Practice Act, s 66 / National Law, s 150

137. The legislation provides the Medical Council with powers to take immediate action for the protection of the public, either to suspend the doctor or impose conditions on his or her registration. The Medical Council's predecessor (the Medical Board) also had such powers.

138. The power is currently found in s 150 of the *Health Practitioner Regulation National Law* (NSW). The Medical Board's power was under s 66 of the former Medical Practice Act.

139. Between 1 July 1993 and 1 October 2000, if at any time the Medical Board was satisfied that such action was necessary for the purpose of protecting the life or physical or mental health of any person, it had a power under s 66 to suspend a registered medical practitioner from practising medicine

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[37] As stated in New South Wales Medical Board, *Annual report 2000–01*.

for a period not exceeding 30 days or to impose conditions on registration as it considered appropriate. The Medical Board could take such action whether or not a complaint had been made to the Board about the practitioner.

140. A s 66 inquiry was intended to be held urgently to determine whether urgent conditions or suspension of a practitioner was required under s 66.

141. After an amendment to the legislation commencing on 1 October 2000, the Medical Board's power in s 66 was expressed as a duty or requirement ('must') for the Board to take action (rather than a discretion) 'if at any time it is satisfied that such action is necessary for the purpose of protecting the life or physical or mental health of any person'. At that time, the period of any suspension was extended to eight weeks. A provision allowing the Medical Board to remove or alter conditions imposed pursuant to s 66 at any time was also introduced (s 66A).

142. In 2008 the circumstances in which the Medical Board was required to take action under s 66 were broadened. It can now take action when satisfied that it is 'appropriate' for the protection of the health or safety of any person or persons (whether or not a particular person or persons) or if satisfied that the action is otherwise in the public interest. The Medical Board could take such action whether or not a complaint had been made or proceedings were on foot.

143. Since the abolition of the Medical Board on 1 July 2010, the Medical Council has had a similar duty. Under current law (s 150 of the *Health Practitioner Regulation National Law* (NSW)), if at any time the Medical Council is satisfied it is appropriate to do so for the protection of the health or safety of any person or persons (whether or not a particular person or persons) or if it is satisfied the action is otherwise in the public interest, it must:

    (a) by order suspend a registered health practitioner's or student's registration; or

    (b) by order impose on a registered health practitioner's registration the conditions relating to the practitioner's practising the health profession the Medical Council considers appropriate; or

(c) by order impose on a student's registration the conditions the Medical Council considers appropriate.

144. A suspension has effect until:

(a) the complaint about the practitioner or student is disposed of; or

(b) the suspension is ended by the Medical Council, whichever occurs first.

5. Exchange of information by the Medical Council and former Medical Board

145. In this review I am required to consider the exchange of information and consultation by the Medical Council / Medical Board with other regulatory bodies as well as the notification of outcomes regarding the imposition of conditions on Dr Gayed.

146. This section of the report outlines the main aspects of the legislation governing the sharing of information by the Medical Board / Medical Council relating to the management of a registered medical practitioner such as Dr Gayed.

147. As noted above, the objective of the legislation is to protect the health and safety of the public.[38] The object of the legislation is sought to be achieved by providing mechanisms designed to ensure that medical practitioners are fit to practise medicine. The current provision refers to the objective of the national registration and accreditation scheme, which is to provide for the protection of the public by ensuring that only health practitioners who are 'suitably trained and qualified' to practise in a competent and ethical manner are registered.

148. Since 1 October 2000 the legislation in New South Wales has made clear that, in the exercise of functions under the legislation, the protection of the health and safety of the public is to be the paramount consideration.[39]

149. Regulatory authorities exchanging information about doctors with third parties, such as hospitals or other employers, other clinicians or the public, as to their registration status and conduct or performance issues,

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[38] *Medical Practice Act 1992* (NSW) s 2A.

[39] *Medical Practice Act 1992* (NSW) s 2A; *Health Practitioner Regulation National Law* (NSW) s 3A.

may raise questions of privacy. While there may be an exercise required in weighing privacy considerations, significant weight must be given to protecting the public. Protection of the public is the paramount consideration, as the legislation makes clear.

150. Equally, this information would allow an employer to assess any patterns in a doctor's clinical practice. Without knowing where performance is deficient, there is a risk that supervising the doctor and devising and taking protective measures to address his or her performance becomes somewhat arbitrary.

151. The provisions governing the exchange of information by the Medical Council, and formerly the Medical Board, are, and were at material times, as follows.

152. *Medical Tribunal and Professional Standards Committee decisions:* Until 1 October 2008, Professional Standards Committee hearings were heard in the absence of the public unless the Committee directed that the proceedings were to be open to the public.[40] Decisions were not published. Tribunal hearings were open to the public except when the Tribunal otherwise directed.[41]

153. A Professional Standards Committee was required to provide its decision in writing to the complainant, the practitioner concerned and the Medical Board, and the Board was entitled to provide it to such other persons as the Professional Standards Committee thought fit.[42]

154. From 1 October 2000, s 191B of the Medical Practice Act required the Medical Board to give notice within seven days of any order made in respect of a registered medical practitioner under the Act, or the imposition of conditions on registration, to the employer (if any) of the practitioner, the CEO of any public health organisation in respect of which the practitioner concerned is a visiting practitioner or is otherwise accredited or of any private hospital or day procedure centre in which respect of which s/he is accredited.

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[40] *Medical Practice Act 1992* (NSW) s 176.
[41] *Medical Practice Act 1992* (NSW) s 161.
[42] *Medical Practice Act 1992* (NSW) s 180(4).

155. That notification requirement therefore included orders made or conditions imposed by a Professional Standards Committee.

156. While the notification requirement in s 191B related to the doctor's current employers or health services where the practitioner is accredited, the Medical Board arguably had a discretion to notify subsequent employers or accrediting entities where the Board considered it appropriate to do so.

157. The legislation was amended in 2008 to require Professional Standards Committee hearings to be open to the public unless the Committee directs otherwise.[43] That remains the position.[44] Medical Tribunal hearings are also open to the public unless the Tribunal is satisfied it is in the public interest for them to be held in private.[45]

158. Also, in 2008, s 191B was amended to allow the Medical Board to give notice of any action taken under Division 5 of Part 4 (being decisions of the Medical Tribunal or a Professional Standards Committee) to any person or body the Board reasonably considers it appropriate to notify.

159. Since 1 October 2008 there has been an obligation on the Medical Board (when it existed), and now the Medical Council, to make the Professional Standards Committee's statement of decision publicly available when it relates to a complaint that has been proved or admitted, unless the Committee orders otherwise.[46] The Medical Council may disseminate any other statement as it thinks fit. Similar provisions apply to Medical Tribunal decisions.[47]

160. *Conditions on registration:* Conditions on the registration of a practitioner are utilised to protect the public.

161. The Medical Board did not publish the registration status of medical practitioners on the Internet in 2002. However, the Medical Board was required to make conditions on registration, and information as to orders made under the Medical Practice Act, apart from impairment conditions,

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[43] *Medical Practice Amendment Act 2008* (NSW) sch 1, [28].
[44] *Health Practitioner Regulation National Law* (NSW) s 171A.
[45] *Health Practitioner Regulation National Law* (NSW) s 165K.
[46] *Medical Practice Act 1992* (NSW) s 180; *Health Practitioner Regulation National Law* (NSW) s 171E.
[47] *Health Practitioner Regulation National Law* (NSW) s 165M.

available to the public on request.[48] The inquiry has been informed that the Medical Board published the Register of Medical Practitioners for New South Wales online at least by September 2006.

162. The Register of Medical Practitioners for New South Wales was required to be available for inspection by any person at the office of the Medical Board and by such other means, including by Internet access, as the Board determined.[49]

163. I have referred above to s 191B of the Medical Practice Act, which required the Medical Board to give notice to employers of any order made under the Act or the imposition of conditions on registration.

164. From 1 March 2005 the section was amended to provide a definition of 'employer', being a reference to the employer at the time of the relevant conduct that gave rise to the order made or conditions imposed and any subsequent employer of the practitioner that the Medical Board considers appropriate. From 1 August 2008 an amendment allowed the Medical Board to give notice to any person or body reasonably considered appropriate, in addition to the mandatory notifications required by the section.[50]

165. Under the *Health Practitioner Regulation National Law* (NSW) (since 2010), s 176B requires a National Board to give written notice to an employer of a registered health practitioner as soon as practicable if it decides to take health, conduct or performance action against the practitioner or receives notice from an adjudication body (defined to include a Professional Standards Committee) or co-regulatory body that an adjudication body has decided to take such action.[51] This section reflects the previous approach whereby the entity that kept the register (previously the Medical Board) had the obligation to give notice.

166. On 1 November 2015, a new s 176BA was introduced. It requires the Medical Council (of New South Wales) to give written notice to an

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[48] *Medical Practice Act 1992* (NSW) s 135A, sch 1.

[49] Schedule 1 to Medical Practice Act, cl 21.

[50] *Medical Practice Amendment Act 2008* (NSW) sch 1, [30]–[32], amended s 191B.

[51] The legislation does not use the term 'employer' but refers to an entity that has engaged the practitioner under a contract of employment, contract for services or any other arrangement or agreement or for or on behalf of whom the practitioner is providing services, whether in an honorary capacity, as a volunteer or otherwise, and whether or not the practitioner receives payment from the entity for the services: *Health Practitioner Regulation National Law* (NSW) s 132(4)(c), (d).

employer or accreditor of a registered health practitioner as soon as practicable if it decides to impose, alter or remove conditions relating to the health, performance or conduct of the practitioner. The section also allows the Medical Council, if it considers it appropriate, to give notice to an entity that becomes an employer or accreditor after the decision is made. The section does not require the Medical Council to notify employers or accreditors of a decision by the Council to suspend the doctor. In my view, the legislation should be amended to require notice to be given to employers and accreditors in such circumstances.

167. *Compliance with conditions on registration:* The legislation has at all times placed the responsibility on the individual practitioner to ensure that he or she complies with the conditions on registration. A breach of conditions is a form of 'unsatisfactory professional conduct'.[52]

168. Whether the Medical Board had the right to disclose such information arose in the inquiry. For example, Mona Vale Hospital sought information from the Medical Board in 2003 about Dr Gayed's registration status and his compliance with conditions on his registration. The Medical Board considered that Dr Gayed's consent was required to allow disclosure to occur.

169. The Medical Board had no express power under the Medical Practice Act to provide information to a hospital at which a doctor was a visiting practitioner or employed about that doctor's compliance with conditions on registration. The legislation required the Medical Board to give to public health organisations notice of any order made against a practitioner and of any conditions imposed.[53] It had the power to provide copies of Professional Standards Committee and Medical Tribunal decisions to such persons as it thought fit.[54] It might be thought that those discretions also allowed the Medical Board to inform relevant hospitals as to a doctor's compliance with orders and conditions imposed.

170. However, the Medical Practice Act also contained a general prohibition on the disclosure of information obtained in connection with the administration or execution of the Act subject to certain exceptions

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[52] *Medical Practice Act 1992* (NSW) s 36 from 1 August 2005; *Health Practitioner Regulation National Law* (NSW) s 139B.
[53] *Medical Practice Act*, s 191B.
[54] *Medical Practice Act*, ss 165(4), 180(4).

(which included the circumstance in which the disclosure would be made in connection with the administration or execution of the Act).[55] It appears that, in the absence of express statutory permission, doubts about the right to share information about Dr Gayed's compliance arose.

171. The current law does not expressly allow the Medical Council to provide information to employers or accreditors (as those terms are defined) about a doctor's compliance with conditions on registration.[56] Section 176BA of the *Health Practitioner Regulation National Law* (NSW) is noted above. **I recommend** that the law be amended to expressly allow the Medical Council to do so. That information is clearly relevant to the proper supervision necessary for a Visiting Medical Officer whose registration is conditional.

172. Monitoring of compliance with conditions necessarily reflects the information gathered by, and available to, the Medical Council at a given point in time and a lack of evidence of non-compliance does not necessarily mean that a doctor is complying with his or her conditions. However, the Medical Council should not be or feel restricted in providing information on compliance insofar as relevant information is available to it. Where the Medical Council is satisfied that it can conclusively advise an employer or accreditor about compliance with one or more condition, it should not be prohibited from doing so.

173. *Decisions taken by local health districts:* As the facts relating to Dr Gayed show, the Medical Council is not the only entity with the ability to take action in response to complaints about medical practitioners. The hospitals and local health districts for whom medical practitioners work also impose restrictions (on clinical privileges), suspend, and conduct investigations. Local health districts have obligations under legislation and NSW Health policy to report to the Medical Council any conduct of a visiting practitioner that is suspected on reasonable grounds to constitute professional misconduct or unsatisfactory professional conduct (s 99A of the *Health Services Act 1997* (NSW)) and, under policy, to report when it takes action to suspend or apply restrictions on a medical practitioner's practice.

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[55] *Medical Practice Act*, s 190.
[56] *Health Practitioner Regulation National Law* (NSW) s 176BA.

174. A question has arisen whether, upon being notified by a local health district of such action, the Medical Council should then inform other employers (where known to it), such as private hospitals, of the decision by the local health district to suspend or impose conditions or restrictions on the doctor.

175. The Medical Council has informed the inquiry that it does not share information with private health facilities where a local health district has suspended a doctor. The Medical Council has treated those matters as employment matters unless they meet the threshold for taking action under s 150 of the *Health Practitioner Regulation National Law* (NSW).

176. The Medical Council considers that it has limited power to share information with employers (such as local health districts and, particularly, private health facilities) because of the offence provisions in s 216(1) of the National Law. Section 216(1) prohibits disclosure of 'protected information' by a person exercising functions under the National Law. 'Protected information' is information that comes to a person's knowledge in the course of, or because of, the person's exercise of those functions. That duty of confidentiality does not apply in certain circumstances provided for in s 216(2); however, none of those exceptions expressly allow the provision of performance-related information to an employer or accreditor. An exception applies where disclosure is otherwise required or permitted by law.[57]

177. In that regard, s 219(1)(e) allows a person exercising functions under the *Health Practitioner Regulation National Law* (NSW) (which includes persons at the Medical Council) to disclose protected information to, among other entities, State entities 'having functions relating to professional services provided by health practitioners or the regulation of health practitioners'. In my opinion, this provision would allow the Medical Council to disclose information to public health organisations that have functions relating to professional services provided by health practitioners. Local health districts meet that description in that they

[57] *Health Practitioner Regulation National Law* (NSW), s 216(2)(c)

facilitate the provision of health services[58] and have functions relating to health services so provided.[59] The words 'relating to' are of wide import.

178. In my view, s 219(1)(e) allows persons in the Medical Council exercising functions under the *Health Practitioner Regulation National Law* (NSW) to disclose information that comes to their knowledge about a doctor in the course of exercising those functions to relevant local health districts. However, the limitation in s 219(2) must also be considered. The person disclosing the information must, by those provisions, be satisfied that:

    (a) the protected information will be collected, stored and used by the entity to which it is disclosed in a way that ensures the privacy of the persons to whom it relates is protected; and

    (b) the provision of the protected information to the entity is necessary to enable the entity to exercise its functions.

    Whether it is 'necessary' for employers or accreditors to have information about action taken against a doctor by another employer or accreditor following complaints or performance issues relating to the doctor might depend on the circumstances and be the subject of debate. It seems to me that the legislation may create doubt in some cases as to whether the Medical Council would be permitted to provide such notice.

179. It is desirable that information of this type is available to public and private health organisations at which the practitioner is working. I understand there may be competing policy, contractual and legislative matters that bear upon this; however, there are real benefits from each organisation knowing of sanctions for poor performance imposed by others.

180. I note that the existing legislation permits a public health organisation to notify a private facility of action taken by the public health organisation in circumstances where the public health organisation is aware the doctor also works at the private facility. Section 133C of the Health Services Act and s 58A of the *Private Health Facilities Act 2007* (NSW) allow exchange of information relating to 'variation, suspension or termination by the licensee of clinical privileges' of a health practitioner where the disclosing

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[58] *Health Services Act 1997*, ss 8 and 9.
[59] *Health Services Act 1997*, s 10.

facility 'reasonably considers' that the disclosure of the information is 'necessary because it raises serious concerns about the safety of patients'. The provisions in effect allow an exchange of information between public and private facilities and between two private facilities. Exchange of information between public facilities is not expressly covered, although s 133C(4) states that the section is not intended to limit exchange of information that may occur between public facilities. So, rather than imposing a duty, the legislation facilitates the sharing of information where it is appropriate to safeguard patient safety.

181. *Performance assessment reports and reports of a Performance Review Panel:* The inquiry considered whether the law allows a report prepared by assessors relating to a performance assessment and the report of a Performance Review Panel to be provided to the relevant doctor's employer (broadly defined). A number of reports were prepared about Dr Gayed's performance in the context of the performance assessment program. As outlined in this report, the Medical Board/Council did not generally provide those reports to the hospitals at which Dr Gayed held appointments.

182. The legislation distinguishes between performance assessment reports and reports of a Performance Review Panel.

183. A performance assessment report is a "protected report", meaning that a person may not disclose information contained in a performance assessment report or the report itself except to the HCCC or for the purposes of exercising functions under the legislation.[60] The law was to similar effect prior to 2010.[61]

184. The legislation therefore creates some doubt as to whether the Medical Council is permitted to provide a performance assessment report to a current employer or hospital at which a doctor is appointed as a Visiting Medical Officer, because such provision may not be for the purpose of

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[60] *Health Practitioner Regulation National Law (NSW)*, ss 138, 176F; The legislation protects performance assessment reports from admission or use in civil proceedings before a court other than with the consent of both the person giving the report and the person the subject of the report: ss 138, 176F(3). The legislation was to the same effect under the former Medical Practice Act: *Medical Practice Act 1992* (NSW), s 190B and Sch 3A, cl 8.

[61] *Medical Practice Act 1992* (NSW), s 190B and Sch 3A, cl 8.

exercising functions under the Health Practitioner Regulation National Law (NSW).

185. Whether the Medical Board had, or whether the Medical Council now has, a discretion to provide a report on a performance assessment to any person it thinks fit in the absence of the consent of the medical practitioner, and in the absence of express statutory permission to do so, is a moot point. In my view, patient safety should allow a performance assessment report to be provided in full to hospitals where a doctor whose performance has been assessed is working.

186. **I make a recommendation** at the end of this report that the Medical Council should have a discretion to inform employers, broadly described, of the outcome of a performance assessment if, as a result of the assessment, a Performance Review Panel is to be held, the practitioner is counselled or directed to attend counselling or conditions are imposed.

187. The decision and report of a Performance Review Panel is not a 'protected report' under the legislation. A Performance Review Panel is required to provide, within one month of its decision being made, a written statement of its decision to the Medical Board / Medical Council, the doctor and is permitted to provide it to any other persons it thinks fit.[62] The position was the same prior to 2010, in that the Medical Board was empowered to provide a copy of the decision of a Performance Review Panel to such persons as it 'thinks fit'.[63]

188. The Performance Assessment Program Participants Handbook in 2002 stated that a Performance Review Panel report could be provided to others in its entirety or as a de-identified or summary version. Confidential information (such as patient information) is not required to be included.

6. Registration of Dr Gayed

189. Dr Gayed applied for registration with the Medical Board on 10 May 1994. His covering letter, sent by facsimile and express post, sought urgent

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[62] *Health Practitioner Regulation National Law* (NSW) s 156E(3).
[63] *Medical Practice Act 1992* (NSW), s 86P.

registration as an overseas-trained specialist on the basis that Grafton, where he had just arrived, had had no gynaecologist for several months.

190. In support of his application he provided proof of his eligibility to apply, in the form of letters from the Royal Australian College of Obstetrics and Gynaecologists and the Australian Medical Council. He also provided a letter of employment from Grafton Base Hospital, his curriculum vitae, copies of his qualifications, identification documents and two references from a consultant obstetrician and gynaecologist at Farnborough Hospital in the United Kingdom and the Director of Medical Services at Al Hasa Health Centre in Saudi Arabia, being hospitals where he had previously worked.

191. The letter from the Australian Medical Council dated 10 May 1994 to the Medical Board confirmed that Dr Gayed 'is eligible to apply for registration with conditions an Overseas Trained Specialist' on the basis of having:

    1) Permanent resident status;

    2) A primary medical degree from a medical school listed in the WHO Directory of Medical Schools and

    3) Passed the Occupational English Test conducted by the National Languages and Literacy Institute of Australia, or been granted an exemption by the AMC.

192. The Australian Medical Council enclosed a letter dated 7 November 1993 from the Royal Australian College of Obstetrics and Gynaecologists confirming that Dr Gayed had been recognised as a specialist medical practitioner in obstetrics and gynaecology.

193. The letter from the Royal Australian College of Obstetrics and Gynaecologists stated that its council had endorsed a recommendation made by the Postgraduate Education Committee that Dr Gayed be advised that, following assessment of his qualifications and experience as a specialist in obstetrics and gynaecology, he be admitted as a member of the College and elevated to fellowship subject to certified evidence of Australian residency status and 'the usual conditions'.

194. Dr Gayed provided a certificate of fellowship of the Royal Australian College of Obstetrics and Gynaecologists dated 30 October 1993. The letter from Grafton Base Hospital and Health Service to the Department

of Immigration dated 8 December 1993 stated that he had been appointed as a specialist obstetrician and gynaecologist and was expected to commence duty on 31 January 1994.

195. Dr Gayed's curriculum vitae referred to his 'full registration' with the General Medical Council (United Kingdom) and various overseas qualifications, including a Bachelor of Medicine and Bachelor of Surgery from Ain-Shams University in Egypt and membership of the Royal College of Obstetricians and Gynaecologists (UK), as well as a summary of medical posts held overseas, as set out in Appendix 1.

196. On 11 May 1994 Dr Gayed's application was sent to the chair of the Medical Board's registration committee (Doctor D) for approval of conditional registration to work as an obstetrician and gynaecologist in positions approved by the Medical Board and approval to work at Grafton Base Hospital and Health Service.

197. On 16 May 1994 Dr Gayed provided further material in the form of an application for registration form and a statutory declaration to the effect that he was 'currently in good standing with the General Medical Council of UK' and would provide certification to this effect as soon as possible. He provided a copy of his annual registration certificate with the General Medical Council for a 12-month period from 22 December 1993. There is no evidence that he provided certification of his good standing with the General Medical Council as stated in his statutory declaration.

198. On 18 May 1994 Dr Gayed sent a facsimile to the Medical Board to 'confirm' that he would be mainly working at a private practice at 146 Fitzroy Street, Grafton, with duties at Grafton Base Hospital.[64] He said the Health Insurance Commission would not issue him with a provider number until it had confirmed his practice address with the Medical Board.

199. On 19 May 1994 the Medical Board informed Dr Gayed that his application had been approved, and it enclosed a certificate of registration.[65] On 17 May 1994 the Medical Board had proceeded to register Dr Gayed as a medical practitioner under s 7(1)E of the Medical Practice Act in the speciality of obstetrics and gynaecology only and

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[64] Facsimile from the Registrar to Doctor D dated 11 May 1994 (Medical Council NSW files, tab 4).
[65] Letter from the Registrar to Dr E S Gayed dated 19 May 1994 (Medical Council NSW files, tab 5).

subject to a condition that he practise in positions approved by the Medical Board.

200. On 21 March 1996 the Australian Medical Council sent the Medical Board a letter saying that, on checking Dr Gayed's file, it had noted that the Australian Medical Council had not despatched the original letter confirming his recognition by the Royal Australian College of Obstetrics and Gynaecologists. It is not clear from the file, but it seems that the Australian Medical Council may have provided the original letter from the College on that occasion.

201. The Medical Council files show that, prior to his registration, on 15 November 1993 Doctor E, Area Medical Superintendent at Grafton Base Hospital, sought confirmation from the Medical Board of Dr Gayed's eligibility for registration in New South Wales. On 18 November 1993 the Royal Australian College of Obstetrics and Gynaecologists wrote to Doctor E to advise that the College council had endorsed a recommendation that Dr Gayed be admitted as a fellow of the College following assessment of his overseas-obtained specialist qualifications and experience and that Dr Gayed would receive his fellowship certificate with effect from 30 October 1993. On 22 November 1993 the Medical Board provided telephone advice to Doctor E that Dr Gayed would be eligible for specialist registration if he was a permanent resident and had passed an occupational English test, but if these conditions were not satisfied he would be eligible for temporary registration to work in approved Area of Need posts.[66]

6.1 Observations on registration in New South Wales

202. The Australian Medical Council is a national standards and assessment body for medical education and training. Its functions include assessing the knowledge, clinical skills and professional attributes of overseas-qualified medical practitioners seeking registration in medicine. The Royal Australian College of Obstetrics and Gynaecologists (now known as Royal Australian and New Zealand College of Obstetricians and Gynaecologists)

[66] Letter from Doctor E, Area Medical Superintended to Registrar NSW Medical Board dated 15 November 1993 (Medical Council NSW files, tab 3).

provides postgraduate vocational training and accreditation for doctors seeking to specialise in the practice of obstetrics and gynaecology.

203. Dr Gayed did not seek 'general registration' as a medical practitioner as he did not have 'recognised medical qualifications', being a degree from a medical school (whether within or outside Australia) accredited by the Australian Medical Council or successful completion of Australian Medical Council examinations for the purposes of registration.[67] At the time Dr Gayed sought registration, the Medical Board had a discretion to register a person as a medical practitioner and impose conditions it thought appropriate if it was 'satisfied that the person has specialist qualifications and experience in medicine recognised by the relevant Australian specialist college or institution and registration is for the purpose of enabling him or her to practise within that speciality'.[68] According to the Medical Board's 2001 annual report, conditional registration was possible for overseas-trained specialists whose training and experience was the equivalent of local specialists as assessed by the relevant college. It stated that the relevant college could require top-up experience up to a maximum of two years.

204. In the course of the Professional Standards Committee proceedings in 2001, Doctor F provided a report reviewing Dr Gayed's curriculum vitae. His conclusion was that his training experience in Britain had amounted to a total of 27 months. Doctor F said, 'This may, under the rules as they apply in Australia at present, be deemed inadequate as perhaps may the pre-MRCOG training. The RANZCOG should be consulted to clarify this issue'.[69]

205. There is no evidence on the Medical Council files that the Medical Board consulted with the Royal Australian and New Zealand College of Obstetricians and Gynaecologists to clarify the issue. My inquiry has made an enquiry of the College and has been informed that the College does not have any of the records relating to Dr Gayed's assessment by the Australian Medical Council in 1993.

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[67] *Medical Practice Act 1992* (NSW) s 4(2)
[68] *Medical Practice Act 1992* (NSW) s 7(1)E.
[69] Professional Standards Committee, vol 6, tab 29.

206. Doctor B considers that, based on the information included in his curriculum vitae and the letters of reference provided, the College was justified in granting him fellowship of the Royal Australian College of Obstetricians and Gynaecologists.

6.2 Monitoring of Dr Gayed's positions

207. Dr Gayed's registration was subject to a condition that he practise only in positions approved by the Medical Board.

208. There is no evidence that Dr Gayed ever sought the Medical Board's approval, or that the Medical Board ever expressly granted approval, for the appointments he came to hold.

209. The Medical Board sent letters annually from 1994 to 1999, as outlined below, seeking details of all positions Dr Gayed held each year. Although, to its credit, the Medical Board was monitoring his positions by these letters, the letters did not request that Dr Gayed seek its approval of positions he held or proposed to hold in accordance with the condition on his registration. Approval arguably required more than mere notification. It seems the Medical Board had interpreted this condition as advising of positions rather than gaining approval before accepting an appointment.

210. Following his registration, on 2 November 1994 the Medical Board wrote to Dr Gayed to seek confirmation of all positions he currently held, whether as a Visiting Medical Officer or a staff specialist, and his field of practice and practice locations.[70] It said he had paid the annual registration fee but had not returned the form that requested these details. On 14 November 1994 Dr Gayed responded that he was a Visiting Medical Officer in obstetrics and gynaecology at both Grafton Base Hospital and the private practice at 146 Fitzroy Street, Grafton.

211. The Medical Board address history for Dr Gayed shows that as at 26 September 1995 his address had changed from Grafton, New South Wales, to Canberra, Australian Capital Territory (ACT). This indicates that the Medical Board was aware of this change of position, although a monitoring letter is not contained on the file.

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[70] Letter from Medical Board dated 2 November 1994 to Dr Emil Gayed (tab 6, Medical Council NSW files).

212. There is no evidence that the Medical Board monitored Dr Gayed's positions in 1996.

213. On 21 October 1997 the Medical Board wrote to Dr Gayed to confirm his payment of the annual registration fee and request details concerning positions currently held, saying it had requested these details in August/September that year. Dr Gayed replied to the effect that he held Visiting Medical Officer appointments at Cooma in New South Wales and both John James Memorial Hospital and Calvary Private Hospital in the ACT.[71]

214. In 1998 the Medical Board sent a similar letter monitoring Dr Gayed's appointment (and hence compliance with the condition on his specialist registration). Dr Gayed responded that he held Visiting Medical Officer appointments at John James Memorial Hospital in Canberra and at Cooma Hospital in New South Wales.[72]

215. On 30 July 1999 Dr Gayed wrote to the Medical Board to notify it that he had been appointed as a Visiting Medical Officer obstetrician gynaecologist at the Manning Base Hospital, Taree, and was due to commence duties on 2 August 1999. Later that year the Medical Board sent him a letter asking him to confirm all positions currently held. Dr Gayed responded that he held Visiting Medical Officer appointments at Taree and in Canberra (one day per week).

216. The next change of address recorded by the Medical Board, dated 30 December 2002, is to Suite 401, 20 Bungan Street, Mona Vale, New South Wales. There is no record of Dr Gayed informing the Medical Board of an appointment as a Visiting Medical Officer he sought and obtained at Mona Vale Hospital in May 2002.

7. Complaints arising from appointment to Cooma Hospital

217. The terms of reference require me to review the actions taken in response to complaints made against Dr Gayed, including referral of

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[71] Letter from Head of Registration Medical Board to Dr E Gayed dated 21 October 1997 (Medical Council NSW files, tab 10).

[72] Letter from the Registrar to Dr Emil Gayed, undated (Medical Council NSW files, tab 13).

matters to the HCCC and consultation by the Medical Board and Medical Council with other regulatory bodies, including the HCCC.

218. In 2001 the HCCC commenced disciplinary proceedings against Dr Gayed that arose from his treatment of patients at Cooma Hospital. This section of the report outlines the Medical Board's response to the complaints made leading up to the disciplinary proceedings, including referral to and consultation with the HCCC.

219. In February 1996 Dr Gayed was appointed a Visiting Medical Officer Obstetrics and Gynaecology at Cooma Hospital. At the time of his appointment to Cooma Hospital, Dr Gayed also had appointments at John James Memorial Hospital, Deakin, ACT; and the Calvary Private Hospital, Bruce, ACT.

220. During the appointment to Cooma Hospital, a number of complaints were made about Dr Gayed to Cooma Hospital and to the HCCC.

221. A complaint was made to Cooma Hospital by a patient, Patient A, on 27 June 1997 about her treatment by Dr Gayed between 20 May and 3 June 1996. On 9 July 1997 the Medical Board and the HCCC agreed that the complaint dated 27 June 1997 should be conciliated.[73]

222. On 10 July 1997 another patient, Patient B, complained to the HCCC about Dr Gayed in relation to the result of a pap smear taken on 26 March 1996. A peer reviewer engaged by the HCCC, Doctor F, was not critical of Dr Gayed's treatment. On 16 July 1997 the Medical Board agreed that no further action should be taken—that is, the complaint was discontinued.[74]

223. On 23 October 1997, Patient C complained to the HCCC about surgery performed by Dr Gayed at Cooma Hospital on 16 July 1996. On 3 December 1997 the HCCC and the Medical Board agreed that the complaint should be investigated.[75]

224. In October 1998 the Southern Area Health Service referred a complaint, which concerned 13 incidents recorded in incident reports made by staff, to the HCCC about Dr Gayed's clinical treatment of patients at Cooma Hospital.

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[73] Professional Standards Committee, vol 6, tab 32.
[74] Assessment Committee record (Medical Council NSW files, tab 9).
[75] Complaints assessment sheet (Medical Council NSW files, tab 11).

225. On 14 October 1998, the Medical Board agreed that the complaint referred by the Southern Area Health Service on 8 October 1998 be investigated.[76]

226. On 7 October 1998 Patient A provided further information to the HCCC—namely, statements from family members supporting her allegation that Dr Gayed did not provide information about the risks of the procedure before she signed the consent form.[77]

227. On 14 October 1998 the HCCC prepared a complaint assessment and review brief for the Assessment Committee and recommended that DP's complaint be investigated, as she had provided additional information received after the unsuccessful conciliation. The Medical Board agreed with that decision.[78]

228. On 15 December 1998 the HCCC received a complaint by Southern Area Health Service in relation to Patient D. The complaint concerned her treatment by Dr Gayed at Cooma Hospital on 24 November 1998. On 16 December 1998 the Medical Board agreed that the complaint should be investigated.[79]

229. On 6 January 1999 the Medical Board agreed that a complaint by Patient E, dated 23 December 1998, about Dr Gayed's surgery at Cooma Hospital on 12 August 1998 should be investigated.[80]

230. On 9 February 1999 Dr Gayed resigned from Cooma Hospital.

231. On 10 February 1999 the Medical Board agreed that a complaint dated February 1999 by Patient F about Dr Gayed's surgery at Cooma Hospital on 1 December 1998 should be investigated.[81]

232. On 5 October 1999 the HCCC wrote to the Medical Board requesting that action under s 66 of the Medical Practice Act be taken against Dr Gayed.

233. It provided the Medical Board with:

(a) a brief dated 27 September 1999 setting out the complaints;

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[76] Complaints assessment sheet (Medical Council NSW files, tab 14).
[77] Professional Standards Committee, vol 6, tab 3.
[78] Complaints assessment sheet (Medical Council NSW files, tab 15).
[79] HCCC documents.
[80] Complaints assessment sheet (Medical Council NSW files, tab 17).
[81] Complaints assessment sheet (Medical Council NSW files, tab 18).

(b) various documents related to the complaints by Patient A, Patient C, Patient E, the Southern Area Health Service complaint, Patient F and Patient D; and

(c) the report of Doctor F in relation to Dr Gayed's previous clinical experience.

234. The HCCC expressed concern that Dr Gayed may be lacking in technical surgical expertise, slow to recognise complications of surgery and slow to refer patients with complications or appropriate specialist review and or treatment:[82]

> If this is correct it jeopardises the safety of his patients. While all the current complaints relate to service provision at Cooma Hospital, the extent to which Dr Gayed is currently performing procedures in New South Wales is unknown.

235. The Medical Board responded on 17 November 1999, noting that:

(a) Dr Gayed had ceased working at Cooma Hospital in February 1999;

(b) Dr Gayed had commenced as a Visiting Medical Officer Obstetrician and Gynaecologist at Manning Hospital, Taree, in August 1999; and

(c) there had been no complaints about Dr Gayed arising out of any incidents since December 1998.

236. It noted that the brief raised concerns about Dr Gayed's performance during 1997 and 1998. It concluded:[83]

> The Board does not consider it appropriate to conduct a Section 66 Inquiry when there is no evidence of an immediate and continuing risk to the public. We look forward to the completion of your investigation report.

237. In the circumstances, the decision not to hold a s 66 inquiry was justifiable.

238. On 11 April 2000 the HCCC received a complaint from Patient G concerning her treatment by Dr Gayed at Cooma Hospital on 2 April 1996. On 19 April 2000 the Medical Board agreed that the complaint should be investigated.

239. On 12 May 2000 the HCCC received a complaint from Patient H about her treatment by Dr Gayed at Cooma Hospital on 17 July 1996. On 17 May

[82] Professional Standards Committee, vol 6, tab 32.

[83] Professional Standards Committee, vol 6, tab 32; Letter from Deputy Registrar to HCCC dated 17 November 1999 (Medical Council NSW files, tab 22).

2000 the Medical Board agreed that the complaint should be investigated.[84]

240. On 15 June 2000 the HCCC consulted with the Medical Board on its view that the complaints by Patient C, Patient A and Patient E be prosecuted before a Medical Tribunal.[85]

241. The Medical Board resolved that the matter be deferred until the HCCC furthered its investigations of the other complaints against Dr Gayed.[86]

242. In September 2000 the Medical Board agreed that the complaint by Patient F and the complaint by Patient D be finalised on the basis that the peer reviewer was not critical of Dr Gayed's treatment in either case.[87]

243. On 13 December 2000 the HCCC sought the agreement of the Medical Board to prosecute a complaint before a disciplinary body arising out of the complaint by the Southern Area Health Service.[88]

244. On 6 February 2001 the HCCC sought the agreement of the Medical Board to prosecute a complaint before a Professional Standards Committee concerning the complaints by the Southern Area Health Service, Patient C, Patient E and Patient A.[89]

245. On 13 February 2001 the Medical Board resolved that a complaint be referred to a Professional Standards Committee in relation to the complaints referred to above and that the Medical Board would arrange an independent assessment of Dr Gayed's possible visual impairment before the Professional Standards Committee was convened.[90]

246. In March 2001 the HCCC sought the Medical Board's agreement to the inclusion of the complaint by Patient H in the complaint being prosecuted. The Medical Board agreed on 6 April 2001.[91]

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[84] HCCC brief regarding complaint (Medical Council NSW files, tab 30).
[85] Letter from HCCC to the Registrar, Medical Board dated 15 June 2000 (Medical Council NSW files, tab 23).
[86] Minutes of Conduct Committee dated 22 June 2000 (Medical Council NSW files, tab 24).
[87] Letter to HCCC from Medical Board dated 22 September 2000 (Medical Council NSW files, tab 25).
[88] Brief by HCCC dated 13 December 2000 (Medical Council NSW files, tab 27).
[89] Letter from HCCC to the Registrar Medical Board dated 6 February 2001 (Medical Council NSW files, tab 28).
[90] Minutes of Conduct Committee meeting dated 13 February 2001 (Medical Council NSW files, tab 29).
[91] Letter from HCCC to the Registrar, Medical Board dated 15 March 2001 (Medical Council NSW files, tab 30); Minutes of Conduct Committee dated 10 April 2001 (Medical Council NSW files, tab 32).

8. Professional Standards Committee decision

247. On 15 March 2001 the HCCC made 10 complaints, concerning nine patients, to a Professional Standards Committee about Dr Gayed's clinical work as an obstetrician and gynaecologist between July 1996 and July 1998 at Cooma Hospital. It made one complaint that Dr Gayed suffered from an impairment—namely, high myopia.

248. A Professional Standards Committee heard the 11 complaints against Dr Gayed in August 2001. Dr Gayed was advised by United Medical Protection.

249. Doctor F provided evidence as a peer reviewer.

250. The first complaint concerned LD's treatment. Patient C was a patient who had complained directly to the HCCC that Dr Gayed had perforated her uterus and caused tears to her bowel. Dr Gayed admitted the particulars of the complaint. The Professional Standards Committee found the complaint was proven and that Dr Gayed was guilty of unsatisfactory professional conduct.

251. The second complaint concerned DP's treatment. Patient A claimed that Dr Gayed had performed an unnecessary laparotomy, among other matters. Dr Gayed admitted most of the particulars of the complaint. The Professional Standards Committee noted that, in his original submission, Dr Gayed had described one aspect of his treatment as an error of judgment; however, in his final submission he admitted that he had inappropriately performed a laparotomy.

252. The Professional Standards Committee found three particulars of the complaint proved and one not proved. They noted that, in relation to the latter, there was conflicting evidence. It found that Dr Gayed was guilty of unsatisfactory professional conduct.

253. The third complaint concerned Patient E—another patient who had complained directly to the HCCC. The complaint was in relation to an examination under anaesthetic. Doctor F was only mildly critical of Dr Gayed's treatment. Dr Gayed did not accept the criticism. The Professional Standards Committee found the complaint proven in part and that Dr Gayed was not guilty of unsatisfactory professional conduct. It considered

Dr Gayed's techniques were not best practice but did not amount to unsatisfactory professional conduct.

254. The fourth complaint concerned Patient I. Dr Gayed denied the breach of protocol in relation to not using gloves, and he admitted that he had altered the consent form. The Professional Standards Committee found the complaint proven and that Dr Gayed was guilty of unsatisfactory professional conduct.

255. The fifth complaint concerned Patient J. Dr Gayed admitted the particulars of the complaint that he had handed over the care of a high-risk patient to a GP. The Professional Standards Committee found the complaint proven and that Dr Gayed was guilty of unsatisfactory professional conduct.

256. The sixth complaint concerned Patient D and the performance of a hysterectomy. Doctor F was severely critical of the failure to inform the anaesthetist of relevant information and moderately critical of Dr Gayed leaving the hospital. Dr Gayed did not admit the complaint.

257. The Professional Standards Committee found two of the three particulars of the complaint proven and that Dr Gayed was guilty of unsatisfactory professional conduct. The third particular was in relation to communication with the anaesthetist.

258. The seventh complaint concerned five incidents, including needlestick injuries, a scalpel injury to a nurse and failure to follow appropriate safe practice. The incidents occurred in 1997. Doctor F criticism was mild to moderate. Dr Gayed admitted the factual allegations and denied any inappropriate behaviour.

259. The Professional Standards Committee found four of the five particulars proven and that Dr Gayed was not guilty of unsatisfactory professional conduct. The Professional Standards Committee considered the fifth particular to be a systems failure.

260. The eighth complaint concerned Patient K. Dr Gayed admitted the complaint that he had acted contrary to protocol when admitting a patient. The Professional Standards Committee found that a system failure was a contributing factor. It found Dr Gayed was not guilty of unsatisfactory professional conduct.

261. The ninth complaint concerned Patient H—another patient who had complained directly to the HCCC. The complaint concerned preoperative consultation and Dr Gayed's knowledge in performing a procedure. Doctor F's criticism was moderate to severe and was shared by another expert. Dr Gayed admitted part of the complaint.

262. The Professional Standards Committee found two of the four particulars were proven and that Dr Gayed was not guilty of unsatisfactory professional conduct.

263. The 10th complaint related to a patient experiencing postoperative bleeding and Dr Gayed placing his ungloved hand in the patient's vagina. Dr Gayed did not recall the incident. Doctor F was moderately critical. The Professional Standards Committee did not accept that Dr Gayed had conducted himself as alleged. It found the complaint not proven and that Dr Gayed was not guilty of unsatisfactory professional conduct.

264. The final complaint—that of impairment—was that Dr Gayed had high myopia which impacted on his ability to perform certain procedures. Dr Gayed admitted he had high myopia and denied it impacted on his ability to adequately perform surgical procedures.

265. The Professional Standards Committee found the complaint proven and that Dr Gayed suffered from an impairment which detrimentally affected or was likely to detrimentally affect his physical capacity to practise medicine.

266. In its summary, the Professional Standards Committee stated that, over a period of 15 months in 1997 and 1998, a number of incidents and complications had occurred involving Dr Gayed's gynaecological practice. These led to a gradual loss of confidence in Dr Gayed by his GP colleagues and his nursing colleagues.

267. Dr Gayed provided the Professional Standards Committee with a number of documents, including positive references from Doctor U at Manning Base Hospital; Doctor H, the CEO of the Mayo Private Hospital, Taree; and the Quality Development Unit of John James Memorial Hospital.

268. These references are detailed in chapter 2.

269. The Professional Standard Committee found Dr Gayed guilty of unsatisfactory professional conduct. It:

- reprimanded Dr Gayed;
- ordered that his registration be subject to the condition that he not undertake microsurgery;
- ordered that he be assessed by an ophthalmologist approved by the Medical Board at intervals determined by the ophthalmologist and reports forwarded to the Medical Board, with the first assessment to take place before the end of December 2001;
- recommended to the Medical Board that a performance assessment in accordance with Part 5 of the Medical Practice Act be undertaken in respect of his practice at Manning Base Hospital at a time deemed appropriate by the Board;
- ordered that a full copy of the decision be provided to:
  - the Medical Board;
  - HCCC;
  - Dr Gayed and his adviser;
  - the peer reviewers Doctor F and Doctor I; and
  - the Chief Executive Office, Southern Area Health Service
- ordered that a de-identified copy of the decision be forwarded to Royal Australian and New Zealand College of Obstetricians and Gynaecologists for the purposes of educational training.

270. Notification of outcome of the Professional Standards Committee decision

270. I am required to consider the notification of outcomes following imposition of conditions by a Professional Standards Committee.

271. There is an issue as to whether the Medical Board should have provided the full Professional Standards Committee decision to the hospitals at which Dr Gayed held appointments at the time of the Committee outcome.

272. The applicable legislation is summarised in chapter 5. In short, within seven days of the Medical Board's receipt of the Professional Standards Committee decision the Medical Board was required to give notice of the orders made and conditions imposed on Dr Gayed to his employer and to the CEO of any area health service or private hospital at which he worked.[92] The Medical Board was empowered to provide it to other persons.[93]

273. A copy of the Professional Standards Committee decision was apparently given to the HCCC, Dr Gayed and his adviser, the peer reviewers and the Chief Executive Office, Southern Area Health Service, as directed by the Professional Standards Committee. It was not given to other hospitals or the Mid North Coast Area Health Service, where Dr Gayed worked.

274. On 31 October 2001 Dr Gayed's medical defence solicitor enquired of the Medical Board why the Professional Standards Committee had not made non-publication orders.[94] The Medical Board's legal officer informed the solicitor that no submissions had been made regarding publication of the Professional Standards Committee orders, that Professional Standards Committees did not make such orders routinely, that the decision was subject to production under compulsion in any event and that the local population would be aware of the proceedings.

275. On 8 November 2001 the Medical Board's legal officer wrote to Dr Gayed to formally inform him of the Professional Standards Committee decision and the amendment of the Register of Medical Practitioners with effect from 31 October 2001 to reflect the conditions on his registration.[95] She advised him that a full copy of the decision had been provided to the Medical Board, the HCCC, Dr Gayed and his advisor, the peer reviewers Doctor F and Doctor I, and the CEO of the Southern Area Health Service. The legal officer advised Dr Gayed that the Medical Board had sent appropriate letters to the four patients concerned and a de-identified copy of the decision to the Royal Australian and New Zealand College of Obstetrics and Gynaecologists for educational training purposes.

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[92] *Medical Practice Act 1992* (NSW) s 191B.
[93] *Medical Practice Act 1992* (NSW) s 180(4).
[94] File note dated 31 October 2001 under the hand of the legal officer (Medical Council NSW files, tab 35).
[95] Letter from Medical Board to Dr Gayed (Medical Council NSW files, tab 37).

276. On the same day, the Medical Board notified the CEO of the Southern Area Health Service on the basis that the complaints arose out of the provision of services to patients at the Cooma Hospital, of the finding of unsatisfactory professional conduct by the Professional Standards Committee, the order that he be reprimanded and the fact that conditions were placed on his registration under s 191B of the Medical Practice Act. In a separate letter to the CEO on 15 November 2001 the Medical Board enclosed a full copy of the Professional Standards Committee decision.

277. The Medical Board also notified four patients of the outcome of their respective complaints heard by the Professional Standards Committee (but did not enclose the decision).[96] The letters to the four patients warned them that disclosure to any third party of any information arising out of the Professional Standards Committee was an offence punishable by 20 penalty units or six months imprisonment. This information was incorrect, as it turned out.

278. On 14 November 2001 the Medical Board informed Dr Gayed that it had notified the CEO of Southern Area Health Service of the decision.[97] It reminded him of his duty under s 99(2) of the *Health Services Act 1997* to report the finding of unsatisfactory professional conduct, and provide a copy of the finding, to the CEO of a public health organisation to which he is appointed. Section 99(2) provided that a visiting practitioner appointed by a public health organisation who has a finding of unsatisfactory professional conduct or professional misconduct made against him or her under the Medical Practice Act must, within seven days of receiving notice of the finding:

    (a) report that fact to the chief executive officer of the organisation; and

    (b) provide the chief executive officer with a copy of that finding.

    The same provision applies today, but the reference to the Medical Practice Act has been replaced by a reference to the *Health Practitioner Regulation National Law* (NSW).

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[96] Letter from Medical Board to Person B (Medical Council NSW files, tab 37). [97] Letter from Medical Board to Dr Gayed (Medical Council NSW files, tab 38).

279. On 23 November 2001, pursuant to s 191B of the Medical Practice Act, the Medical Board notified each of the CEOs of the Mayo Private Hospital (Taree), the Cape Hawke Community Private Hospital (Forster) and the Mid North Coast Area Health Service of the condition imposed on Dr Gayed's registration that he not undertake microsurgery. The letters stated that Dr Gayed had informed the Medical Board that he held positions at those hospitals.[98]

280. The notices only referred to the condition not to undertake microsurgery. The notices did not advise that the Professional Standards Committee had found Dr Gayed guilty of unsatisfactory professional conduct, ordered that he be reprimanded and recommended that the Medical Board undertake a performance assessment or that Dr Gayed was to be assessed by an ophthalmologist at intervals determined by the ophthalmologist and reports forwarded to the Medical Board.

281. In my view, the Professional Standards Committee's order that Dr Gayed be assessed by a Medical Board approved ophthalmologist was a matter about which the Medical Board was required to notify Dr Gayed's employers under s 191B of the Medical Practice Act. It appears that the Medical Board may have misinterpreted the legislation. The Medical Board's letters stated that the Board 'is required to give such notice it considers appropriate of any order made under the Act'. Subsection 191B(3) provided that the notice was to include such information as the Board considers appropriate. However, that subsection did not detract from the obligation in subsection (1) to give notice of 'any' order made or condition imposed. Subsection (3) was intended to empower the Medical Board to provide additional information.

282. The Medical Board had the power to provide the full decision, even putting aside the notice requirement in s 191B.[99] It would have been relevant for the hospitals at which Dr Gayed worked to have the full decision. On their face, the letters might have suggested that the microsurgery condition had nothing to do with adverse performance issues. The full decision would have placed the microsurgery condition in

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[98] Letters from Medical Board to CEO of Mayo Private Hospital, to Cape Hawke Community Private Hospital and to Mid North Coast AHS (Medical Council NSW files, tabs 41 and 42).

[99] *Medical Practice Act 1992* (NSW) s 180(4).

context and apprised the hospitals of the background of complaints and the findings of unsatisfactory professional conduct, the reprimand and the recommendation that Dr Gayed be performance assessed.

283. It is also noted that the Medical Board's notice to the relevant hospitals on 23 November was somewhat tardy, being outside the seven-day period for notice required by s 191B of the Medical Practice Act.

284. On 10 December 2001 the patient the subject of complaint 1 before the Professional Standards Committee (Patient C) acknowledged the Medical Board's letter of 8 November 2001 and asked what reprimand or punishment had been imposed on Dr Gayed in relation to her complaint, because it had not been stated in the letter.[100] She expressed frustration that she had not known about the hearing despite being told by the HCCC that her presence would be needed. Patient C also took issue with the 'threat' contained in the Medical Board's letter of a possible penalty in the event of disclosure of information pertaining to the Professional Standards Committee to a third party. She raised the right of women, including those she may know who seek treatment from Dr Gayed, to know whether a doctor deserves their trust.

285. On 18 December 2001 the Medical Board's legal officer informed Patient C that her concerns would be placed before the Medical Board's next Conduct Committee on 22 January 2002 and referred to the HCCC.[101] The legal officer forwarded the patient's letter to the HCCC.[102]

286. In January 2002 the Conduct Committee considered LD's concerns and resolved that a detailed letter in response be provided to her.[103] It would seem that, as Dr Gayed was not part of the Medical Board's 'performance pathway' at this time, it fell to the Conduct Committee, which dealt with disciplinary matters, to make decisions with regard to the Professional Standards Committee.

287. The Conduct Committee resolved that a copy of the Professional Standards Committee decision be provided to the ACT Medical Board.[104] The Conduct Committee noted that s 180 empowered the New South

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[100] Letter to legal officer, Medical Board (Medical Council NSW files, tab 44).
[101] Letter from legal officer (Medical Council NSW files, tab 44).
[102] Letter from legal officer (Medical Council NSW files, tab 45).
[103] Minutes of meeting of Conduct Committee (Medical Council NSW files, tab 48).
[104] Minutes of meeting of Conduct Committee (Medical Council NSW files, tab 48).

Wales Medical Board, through the Conduct Committee, to send a copy of the Professional Standards Committee decision to any persons that it thought fit.

288. On 5 February 2002 the Medical Board's legal officer wrote to Patient C to notify her that she was not prevented from discussing Dr Gayed's case and that advice to that effect in the Medical Board's previous letter was incorrect.[105] The letter informed Patient C that the Professional Standards Committee's function was to protect the health and safety of the public and was not punitive. The letter also responded to LD's concern about not being heard before the Professional Standards Committee by stating that it was a matter for the HCCC as to which witnesses to call and that her letter had been forwarded to the HCCC for its response.

289. LD's husband contacted the Medical Board to seek further information about the conditions on Dr Gayed's registration. On 7 February 2002 the Medical Board sent a letter to Patient C informing her of the three conditions imposed on Dr Gayed's registration.[106]

290. On 11 February 2002 the Medical Board's legal officer advised two other patients the subject of complaints before the Professional Standards Committee that the Board had incorrectly informed them in its previous correspondence that they were prevented from discussing Dr Gayed's case.[107]

9.1 Confusion about conditions imposed by the Professional Standards Committee

291. On 30 November 2001 the Medical Board's legal officer wrote to Dr Gayed again to confirm his registration status. Her letter said that his registration was now subject to three conditions, namely:[108]

    1. to work as a specialist obstetrician and gynaecologist in positions to be notified to the Board.

    2. may not undertake microsurgery.

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[105] Letter from legal officer dated 5 February 200 (Medical Council NSW files, tab 49).
[106] Letter from legal officer (Medical Council NSW files, tab 49).
[107] Letters from legal officer (Medical Council NSW files, tabs 50 and 51).
[108] Letter from Medical Board (Medical Council NSW files, tab 43).

3. to be assessed by an ophthalmologist approved by the New South Wales Medical Board at intervals determined by the ophthalmologist and reports forwarded to the Board. The first assessment is to take place before the end of December 2001.

290. Her letter confirmed that his initial registration in New South Wales on 17 May 1994 had been granted at the Medical Board's discretion pursuant to s 7(1)E of the Medical Practice Act based on his recognised specialist qualifications.

291. It is clear that there was some confusion as to the distinction between conditions, orders and recommendations. There was only one condition imposed by the Professional Standards Committee, one order for assessment and one recommendation for performance assessment. In addition, there was a condition imposed on his initial registration: to work in positions approved by the Medical Board (not, as was frequently stated, notified to the Medical Board).

10. Decision not to undertake performance assessment following the Professional Standards Committee

292. As noted above, in addition to imposing a condition on Dr Gayed's registration, the Professional Standards Committee recommended to the Medical Board that a performance assessment be undertaken in respect of his practice at the Manning Base Hospital at a time that the Medical Board deemed appropriate.

293. On 18 December 2001 the Performance Committee of the Medical Board met to consider the Professional Standards Committee report. It resolved that Dr Gayed be considered for inclusion in the Performance Assessment Program 'should further concerns be received about his professional performance' and that the ACT Medical Board be notified about his health problems and the recent Professional Standards Committee decision.[109]

294. The minutes of the Performance Committee meeting do not outline the reason for the decision not to include Dr Gayed in the Performance

[109] Minutes of meeting (tab 103); Minutes of meeting of Performance Committee (Medical Council NSW files, tab 46).

Assessment Program in accordance with the Professional Standards Committee's recommendation.

295. It is desirable that reasons be recorded for a decision not to carry out a performance assessment in circumstances where a disciplinary body makes a recommendation that a performance assessment be undertaken following a finding of unsatisfactory professional conduct. Giving reasons promotes proper decision-making. Reasons are also of benefit to those who may need to consider the history of a matter at a later time.

296. The decision not to carry out a performance assessment in accordance with the Professional Standards Committee's recommendations is difficult to understand and justify. Doctor B considers it is puzzling. I agree. The performance assessment which the Professional Standards Committee recommended was in respect of Dr Gayed's practice at Manning Base Hospital at a time that the Medical Board deemed appropriate. He continued to work at that hospital. The Professional Standards Committee did not express reasons for its recommendation. However, it is reasonable to assume that it made the recommendation due to ongoing concerns about Dr Gayed's management of patients arising from the matters considered by the Professional Standards Committee. A performance assessment would allow further monitoring of Dr Gayed by the Medical Board and allow it to assess whether Dr Gayed's practices had improved or required attention. While, on one view, a lack of complaints or concerns concerning conduct in 1999 and 2000 may provide some justification for the decision not to adopt the Professional Standards Committee's recommendation, that reason alone was not sufficient to ground the decision not to adopt the Committee's recommendation.

297. The Medical Board had the power to have Dr Gayed's professional performance assessed under s 86C of the Medical Practice Act. There is a prohibition in 86D(1) of the Medical Practice Act on the Medical Board referring a doctor for performance assessment if the matter giving rise to the proposed assessment raises a significant issue of public health or safety or a prima facie case of professional misconduct or unsatisfactory professional conduct. This prohibition did not apply here because the matters giving rise to the recommendation had already been dealt with in a complaint before the Professional Standards Committee. Further, upon completion of the Professional Standards Committee, the unsatisfactory

professional conduct was not merely a 'prima facie case' required to be dealt with as a complaint. It was proven unsatisfactory professional conduct which 'came to the Board's attention' for the purpose of s 86C. Without adequate reasons, it is not clear to me why the Medical Board decided not to undertake a performance assessment.

11. Assessment by a Medical Board nominated ophthalmologist

298. Dr Gayed was assessed by an ophthalmologist in accordance with the Professional Standards Committee orders.

299. An appointment was made for assessment by Doctor J, ophthalmologist, on 20 December 2001. On 19 December 2001 the Manager, Professional Conduct, at the Medical Board sent to Doctor J an extract from the Professional Standards Committee decision relating to the complaint based on Dr Gayed's myopia and its effect on his operative capability. It also sent the reports that had been before the Professional Standards Committee: the report of Doctor K dated 9 July 2001, the report of Doctor L dated 8 August 2001 and the report of Doctor M dated 1 August 2001.[110]

300. The Medical Board's letter asked Doctor J to address in his report:

    1. Dr Gayed's current vision;
    2. the impact of Dr Gayed's visual impairment on his practice;
    3. whether Dr Gayed's visual impairment is likely to change over time;
    4. when he proposed that Dr Gayed should be reassessed by him for the Board; and
    5. any other matters of note.

301. On 25 March 2002 the Medical Board followed up with Doctor J, saying it had not received his report in relation to the appointment on 20 December 2001.[111] An internal file note states that the Medical Board did

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[110] Letter from Medical Council Officer A (Medical Council NSW files, tab 47).
[111] Letter from Medica Council Officer F to Doctor J (Medical Council NSW files, tab 51).

not receive Doctor J's report until 11 April 2002, although Doctor J saw Dr Gayed on 20 December 2001.[112]

302. Doctor J's report was dated 1 February 2002. It stated that Dr Gayed 'is a lifelong high myope with chronic myopic retinal deterioration and secondarily reduced vision'.[113] Dr Gayed's vision was better in contact lenses than glasses and his myopic maculopathy was likely to deteriorate over time. He had reduced vision but sufficient vision and adaptation to maintain a private vehicle drivers licence and to provide distance judgment on the basis of monocular clues. His vision was sufficient for macro surgery and for the use of monocular instruments which require two-dimensional rather than three-dimensional visualisation. Doctor J also stated:

> An external video monitor attached to a laparoscopic camera generates a 2D image, the depth clues being provided from spatial relationships and relative contrast and luminosity. I believe that Dr Gayed maintains the visual capacity to see these images. I cannot comment on his perceptual or practical facility in performing such surgery. This would better be judged by the supervision of his expert peers.
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> By contrast, binocular surgery through the operating microscope does require substantial stereopsis, which I doubt Dr Gayed's visual incapacities would permit.

303. Doctor J recommended a re-examination in six months' time to review the visual acuity and the progression, if any, of his cataract formation and myopic macular degeneration.

304. At a meeting of the Conduct Committee on 21 May 2002 it was resolved that Dr Gayed be reviewed by Doctor J again in December 2002.[114]

305. The Medical Board's legal officer spoke to Doctor J on 25 June 2002.[115] Doctor J said that Dr Gayed's vision would 'go downhill' over the following decade. He commented that, based on the information provided to him by the Medical Board, it seemed the concerns about Dr Gayed's clinical judgment had been 'simplified into ophthalmology issues'. Doctor J reiterated that he could not test whether Dr Gayed's vision was

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[112] File note of legal officer dated 25 June 2002 (Medical Council NSW files, tab 54).
[113] Report of Doctor J dated 1/2/2002 (Medical Council NSW files, tab 51). [114]
Minutes of Conduct Committee meeting (Medical Council NSW files, tab 52). [115]
File note of legal officer, Medical Board (Medical Council NSW files, tab 54).

suitable for telescopic work. He understood that there should not be a problem for Dr Gayed to operate a monocular telescope because it requires only a good eye to be applied and the use of a monitor, but he was not in a position to assess Dr Gayed's visual acuity using a telescope. There was no test for this. The only way to assess Dr Gayed's vision for telescopic work was to have his function with the instrument observed by a gynaecologist who could comment on his abilities with the instrument.

306. On 25 June 2002 the legal officer followed up with a letter to Doctor J in which she confirmed their discussion and asked him to advise the Medical Board whether it was possible 'to further assess the impact of Dr Gayed's visual problem on his perceptual or practical facility'.[116] She said in her letter that the Medical Board would be asking Dr Gayed to make an appointment to see Doctor J again in July 2002.

307. On 10 July 2002 the Medical Board wrote to Dr Gayed to require him to attend Doctor J for a further review in July 2002.[117] The Medical Board asked Dr Gayed to confirm in writing his compliance with the first two conditions on his registration—namely, to work in positions notified to the Medical Board and to not undertake microsurgery. Again, this correspondence misstated the condition, which was to work in positions approved by the Medical Board.

308. On 26 July 2002 Dr Gayed informed the Medical Board in writing that he was 'fully compliant' with the conditions of registration.[118] He said he had seen Doctor J in July 2002 and that Doctor J found no changes from the previous examination and recommended a one-year follow-up.

309. On 30 August 2002 the Medical Board received a query from the Health Insurance Commission as to whether Dr Gayed could be issued a new provider number to work at a new location: Vale Medical Centre in Brookvale.[119] The Medical Board informed the Health Insurance Commission that Dr Gayed was required to notify the Medical Board where he is working but was not required to seek approval from the Medical Board. There are no records to indicate that Dr Gayed informed

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[116] Letter from legal officer to Doctor J (Medical Council NSW files, tab 54).
[117] Letter from Medical Council Officer F of LCH Monitoring to Dr Gayed (Medical Council NSW files, tab 55). [118] Letter to Medical Council Officer F of LCH Monitoring from Dr Gayed (Medical Council NSW files, tab 56). [119] File note of legal officer; File Note of Medical Council Officer F (Medical Council NSW files, tab 57).

the Medical Board that he was working at Vale Medical Centre or that the Medical Board followed up with him about that position.

310. This is not consistent with the condition initially imposed on Dr Gayed's registration.

311. On 1 October 2002 the Medical Board requested from Doctor J his second report relating to the assessment in July 2002.[120]

312. On 18 October 2002 Doctor J provided his report. He said there was no evidence at the examination of July 2002 of any deterioration in Dr Gayed's visual function. He said there was no ophthalmological reason to consider that there had been any diminution in Dr Gayed's visual ability to use monocular instruments or to view two-dimensional video monitors. However, he reiterated that it was not possible for an ophthalmologist to comment on his perceptual or practical facility in performing surgery with these instruments. He emphasised that assessment of this question required an experienced and objective obstetrics and gynaecology peer to assess Dr Gayed in a real surgical situation ('in much the same way that check pilots perform in the commercial cockpit'). He anticipated reviewing Dr Gayed in January 2003.

313. On 19 November 2002 the Conduct Committee noted Doctor J's report of 18 October 2002. Again, there does not appear to have been any follow-up by the Medical Board of Doctor J's recommendation for a 'real-life' assessment of Dr Gayed's vision during surgery. In my view, Doctor J's recommendations have relevance to what unfolded when a performance assessment was finally carried out in September 2004, as outlined later in my report.

314. On 15 January 2003 the Medical Board sent Dr Gayed a letter to inform him of the requirement to attend upon Doctor J for a further eyesight review in January 2003. The Medical Board confirmed this request in writing to Doctor J.

315. On 3 February 2003 Doctor J provided a report to the Medical Board in which he stated that Dr Gayed's 'visual situation is essentially stable'. He suggested a review in another six months.

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[120] Letter from Medical Board to Doctor J dated 1 October 2002 (Medical Council NSW files, tab 58).

316. On 20 October 2003 Doctor J informed the Medical Board that he had examined Dr Gayed again on 3 October 2003.[121] His vision remained essentially the same. He suggested a further review in 12 months unless his vision deteriorated in the meantime.

317. On 3 November 2003 the Medical Board informed Dr Gayed that he was required to arrange a further appointment with Doctor J on around 3 October 2004 or on an earlier date if his vision noticeably deteriorated before then. A corresponding letter was sent to Doctor J.

318. This did not occur. Dr Gayed was not reviewed by a Medical Board nominated ophthalmologist again until January 2006. That review was prompted following the outcome of a performance assessment, which recommended the removal of the conditions imposed on his registration by the Professional Standards Committee (as outlined below).

12. Dr Gayed's change in practice location in 2002

319. Dr Gayed was first appointed as a Visiting Medical Officer at Mona Vale Hospital in May 2002.

320. There is no record in the Medical Board files of Dr Gayed informing the Medical Board of his appointment as Visiting Medical Officer to Mona Vale Hospital or seeking its approval.

321. On 2 December 2002 a doctor in Mona Vale contacted the Medical Board to enquire about Dr Gayed's registration.[122] The doctor wanted to share rooms with Dr Gayed on a commercial basis and said they would probably share patients, but he had heard on the grapevine that Dr Gayed had 'real strife in Cooma'. He informed the Medical Board that Dr Gayed had been appointed at Mona Vale Hospital. The person who took the call informed that doctor of Dr Gayed's two employment-related conditions of registration and recommended that he seek information from Dr Gayed about the conditions. It is not clear what conditions that person informed that doctor about given the confusion in the Medical Board that I referred to earlier (namely, as to which conditions were imposed by the Professional Standards Committee in 2001).

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[121] Letter from Doctor J to Medical Board (Medical Council NSW files, tab 71). [122] File note dated 2 December 2002 (Medical Council NSW files, tab 60).

322. In December 2002 the Register of Medical Practitioners was not publicly available on the Internet. As noted earlier, decisions of Professional Standards Committee were not published. There was no legal impediment to the Medical Board providing the doctor who made the enquiry with a copy of the Professional Standards Committee decision; however, it appears likely that the Medical Board took the view that Professional Standards Committee decisions were confidential.

323. On 30 December 2002 Dr Gayed wrote to the Registrar of the Medical Board to advise of his change of address from 7 Bundan Street, Mona Vale, to 20 Bungan Street, Mona Vale. His letter did not refer to his appointment to Mona Vale Hospital.

324. On 28 May 2003 the Manager, Registration, of the Medical Board advised Dr Gayed of 'an amendment made to the requirements for Permanent Specialist Registration'. The letter stated:[123]

> To date, in addition to the condition that you must work in your field of speciality, you were also required to advise the Board of your location of practice. The policy has been amended to remove the requirement to advise the Board of your position location.

325. On 30 July 2003 the Monitoring Coordinator at the Medical Board wrote to Dr Gayed about the above letter. The letter said that the removal of the requirement to notify the Medical Board of his place of work was 'overruled' by the condition imposed on his registration by the Professional Standards Committee. The letter confirmed that Dr Gayed 'must continue to inform the Board whenever you change employment'.

326. Putting aside the question whether the Medical Board could have removed a condition on registration by a change in policy (which is questionable), contrary to what is stated in the Medical Board's letter, the condition referred to—that he work only as a specialist obstetrics and gynaecology in positions to be notified to the Medical Board—was not in fact imposed by the Professional Standards Committee. It pre-existed the Professional Standards Committee and was part of Dr Gayed's original registration, although, to add to the confusion, the condition on his registration originally had referred to positions being 'approved by' as

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[123] Letter from Manager, Registration Medical Board to Dr Emil Gayed dated 28 May 2003 (Medical Council NSW files, tab 64).

opposed to merely 'notified to' the Medical Board. In practice, the Medical Board treated the condition as being satisfied by Dr Gayed responding to monitoring letters from the Medical Board asking him to disclose where he worked (as set out at 6.2).

327. On 17 September 2003 the Medical Board sought confirmation from Dr Gayed in writing that he was not undertaking microsurgery and confirmed three conditions of registration (namely, (1) only to work as an obstetrics and gynaecology specialist in positions to be notified to the Medical Board; (2) not to undertake microsurgery; and (3) assessment by an ophthalmologist) and the dates on which he had attended a Medical Board approved ophthalmologist for assessment. The letter did not confirm or seek information about Dr Gayed's employment or places of work. As noted earlier, the assessment was a recommendation rather than a condition on registration.

328. In a letter dated 18 September 2003 Dr Gayed confirmed his compliance with the three conditions of registration.[124] He said that his next appointment at the ophthalmologist was 3 October 2003. He said, 'I regularly inform the Board of positions of employment'. His letterhead was Suite 401, 20 Bungan Street, Mona Vale, 2103, but it did not refer to his practice at Mona Vale Hospital.

13. Concerns raised by Mona Vale Hospital

329. Dr Gayed was first appointed as a Visiting Medical Officer at Mona Vale Hospital in April 2002.

330. On 22 September 2003 Doctor N , Director of Medical Services at Manly and Mona Vale Hospitals, sought from the Medical Board a list of Dr Gayed's conditions of registration for a credentialing meeting scheduled for that evening. Doctor N was particularly interested in whether Dr Gayed had complied with the requirement to undergo regular ophthalmological examinations.[125]

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[124] Emails dated 22 September 2003 between Monitoring Assistant and legal officer; facsimile from Manly Hospital and Community Health Services to Medical Board dated 22 September 2003 (Medical Council NSW files, tab 67).

[125] Emails dated 22 September 2003 between Monitoring Assistant and legal officer; facsimile from Manly Hospital and Community Health Services to Medical Board dated 22 September 2003 (Medical Council NSW files, tab 67).

331. The Northern Sydney Local Health District records suggest that Mona Vale Hospital first became aware of the conditions on Dr Gayed's registration on or about 30 June 2003. In August 2003 the Medical Board sent a facsimile attaching the conditions on Dr Gayed's registration 'as requested'.[126]

332. The Medical Board's Manager of Professional Conduct and a monitoring assistant enquired internally of the Medical Board's legal officer whether the information about Dr Gayed's compliance with conditions could be disclosed to Doctor N. The legal officer said that it was not permitted without Dr Gayed's authority and that the hospital should be told to seek Dr Gayed's written authority for the Medical Board to disclose such information to them.[127]

333. No legislation expressly prohibited the Medical Board from informing an employer or hospital at which a medical practitioner had visiting rights of the doctor's compliance with conditions on registration, and no legislation compelled such disclosure. But I note at [170] above the confidentiality provisions of the Medical Practice Act which may have created doubt about the right to disclose such information. In the circumstances, it seems to me that any privacy considerations should have yielded to considerations of public safety. In Doctor B' opinion, after undergoing a disciplinary process that results in conditions on registration, a medical practitioner should expect that the Medical Board will communicate with employers about compliance with conditions given that public safety is the foremost consideration.

334. As it happened, Doctor N was able to and did provide Dr Gayed's written consent to the Medical Board that had been contained in his letter to the CEO of Northern Sydney Health on 17 September 2003.

335. On 22 September 2003 the Medical Board's monitoring assistant confirmed that Dr Gayed's registration is subject to three conditions.[128]

336. The conditions were stated in the attached document to be as follows:

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[126] Facsimile from Medical Board to Person C dated 28 August 2003 (NSLHD documents, tab 1.4).

[127] Emails dated 22 September 2003 between Monitoring Assistant and legal officer; facsimile from Manly Hospital and Community Health Services to Medical Board dated 22 September 2003 (Medical Council NSW files, tab 67).

[128] Facsimile from Medical Board to Person C dated 28 August 2003 (NSLHD documents, tab 1.4).

1. To work as a specialist obstetrician and gynaecologist in positions to be notified to the Board.

2. may not undertake microsurgery.

3. to be assessed by an ophthalmologist approved by the New South Wales Medical Board at intervals determined by the ophthalmologist and reports forwarded to the Board.

337. The Medical Board's letter stated as to his compliance with his conditions:

1. Dr Gayed has notified the Board that he is working at Mona Vale Hospital;

2. Dr Gayed has informed the Board by letter dated 18 September 2003 that he continues to comply with this condition [being as to microsurgery];

3. Doctor J is the Board-appointed ophthalmologist. He has provided reports to the Board as requested. Dr Gayed has his next appointment to see Doctor J on 3 October 2003. This complies with the Board's requirements.

338. The letter did not refer to the recommendation for performance assessment made by the Professional Standards Committee. The documents provided to this inquiry do not include a notification by Dr Gayed that he was working at Mona Vale Hospital.

13.1 Notification to Medical Board by Northern Sydney Health

339. On 30 September 2003 the Registrar of the Medical Board, received a letter from the CEO of Northern Sydney Health (Doctor C) outlining recent events involving a decision to suspend Dr Gayed from his appointment at Mona Vale Hospital pending a review and a subsequent decision to lift the suspension subject to a condition that any "replication of similar concerns" would lead to another review of his appointment. The letter said that Northern Sydney Health had become aware during the review of Dr Gayed's conditional registration that the Medical Board had previously considered concerns about Dr Gayed. Doctor C's letter attached documentation (around 90 pages) relating to seven cases/ patients whose treatment by Dr Gayed gave rise to clinical concerns.

340. On 2 October 2003 the Medical Board informed Doctor C that the Board and HCCC would assess the notification as required under s 46(1) of the Medical Practice Act.

341. On 8 October 2003 the HCCC and the Medical Board consulted and agreed to refer Dr Gayed to the Performance Assessment Program.[129] No reasons are recorded in the Medical Board's records. The HCCC referred the matter to the Medical Board on 9 October 2003.[130]

14. Decision to undertake a performance assessment

342. On 28 October 2003 the Performance Committee of the Medical Board met to discuss the notification by Doctor C of Northern Sydney Health regarding Dr Gayed. The Performance Committee noted the referral to the Medical Board dated 9 October 2003 and the assessment decision dated 8 October 2003.

343. The Performance Committee resolved that a performance assessment be undertaken as a matter of urgency and that a letter be sent to Doctor F, Chief Health Officer, regarding the need for a doctor's registration status to be confirmed during an appointment process.

344. Following the meeting, on 11 November 2003 Doctor P Medical Director at the Medical Board, wrote to the Chief Health Officer to notify him of the 'general issue' that Dr Gayed had apparently been appointed to Northern Sydney Health without an adequate check being made as to his registration status.

345. On 7 November 2003 the coordinator of the Performance Assessment Program at the Medical Board informed Dr Gayed in writing of the referral to the Medical Board of Doctor C's notification and of the decision to undertake a performance assessment 'to determine whether you need to enter into the Performance Assessment program'.[131]

346. The coordinator's letter informed Dr Gayed that the Performance Assessment Program was designed to be educative rather than disciplinary and that there would be no investigation or determination in

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[129] HCCC Referral to NSW Medical Board form dated 9 October 2003 (Medical Council NSW files, tab 71).
[130] HCCC Referral to NSW Medical Board form dated 9 October 2003 (Medical Council NSW files, tab 71).
[131] Letter from Coordinator – Performance Assessment Program to Dr Emil Gayed dated 7 November 2003 (Medical Council NSW files, tab 74).

relation to any individual complaint. She requested that Dr Gayed fill out a pre-visit questionnaire and provide a copy of his current professional indemnity insurance policy.

347. Dr Gayed and the coordinator spoke on the telephone that day. He said that the motivation for the suspension at Mona Vale was racial, adding that other doctors who had had incidents had not been notified to the Medical Board. He said that he was the only doctor at the hospital with a foreign name or who had been foreign trained. He asked what the performance assessment would entail, and the coordinator then explained it to him. He said he had a practice at Taree and Mona Vale. The coordinator indicated that the assessment would probably take place at Mona Vale, as this was more convenient.

348. On 7 November 2003 the coordinator notified Doctor C of the proposed performance assessment.

349. On 12 November 2003 Dr Gayed's medical defence solicitor (from United Medical Protection) telephoned the Medical Board to ask why there were two performance assessments running. She said that it had been a recommendation of the Professional Standards Committee in 2001 that a performance assessment be undertaken and the Medical Board had said that it would take place. United Medical Protection had agreed to assist him, but 'he had never heard anything further'. The coordinator explained to Senior Solicitor that, following the Professional Standards Committee decision, the Performance Committee had decided that a performance assessment would not take place, although she did not know the reason for this, and that the recent notification from Mona Vale Hospital had resulted in a resolution that it now be undertaken.

350. On 26 November 2003 Doctor C of Northern Sydney Local Health District sent to the Medical Board a copy of the minutes of the Northern Sydney Health Credentials Committee meeting of 22 September 2003 outlining the review undertaken and recommendations made in respect of Dr Gayed which had been endorsed by the Northern Sydney Local Health District Board. The recommendations were:[132]

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[132] Letter from Doctor C, Chief Executive Officer, Northern Sydney Health to Coordinator – Performance Assessment Program at Medical Board dated 26 November 2003 (Medical Council NSW files, tab 76).

1. That Dr Gayed be recommended to the (Northern Sydney Health) Board to recommence full privileges;
2. That should there be replication of similar concerns, Dr Gayed's appointment would again be reviewed and this should be a condition of continued appointment;
3. That in fairness to both the interests of Gayed and the community, it was determined to raise the review and issues with the Medical Board.

351. On 27 November 2003 Dr Gayed sent to the Medical Board a copy of his professional indemnity insurance policy endorsement.

352. On 2 December 2003 Dr Gayed's solicitor asked the Medical Board to reconsider the decision to undertake a performance assessment. She argued that, of the seven cases reviewed by the Credentials Committee of Northern Sydney Health, concerns had been expressed about three cases and the remaining four had been found to have been managed within acceptable standards. The letter defended his management of the three cases. It said, in summary, that one case involved a well-recognised complication of surgery, of which Dr Gayed had warned the patient pre-operatively. The second case involved a surgeon being called in to assist, but he expressed no criticism of Dr Gayed's surgical technique. The third case involved a hysterectomy being performed after a patient bled postoperatively. However, the consent to a hysterectomy had been obtained following the laparoscopy surgery and prior to the patient starting to bleed postoperatively.

353. Dr Gayed's solicitor also noted the absence of concerns, complaints or incidents raised at Manning Base Hospital, where he had been a Visiting Medical Officer since August 1999. She said that it appeared that the only reason for the referral to the Medical Board by Northern Sydney Health was that it became aware of the conditions on his registration and, further, Dr Gayed had instructed United Medical Protection that the Northern Sydney Health investigation was only instigated once it became aware of the conditions on his registration. She asked that United Medical Protection's letter be considered by the Performance Committee at its meeting of 9 December 2003.

354. Those assertions by Dr Gayed through his solicitor were not correct. The Northern Sydney Health documents indicate that, prior to Northern Sydney Health becoming aware of the conditions on his registration, it

had decided to review the cases of concern and inform the Medical Board. Northern Sydney Health should have known, but failed to enquire, about the conditions of registration at the time it appointed Dr Gayed, but it is not correct to state that it only decided to investigate or review and refer him to the Medical Board as a consequence of discovering the registration conditions.

355. On 5 December 2003 Dr Gayed followed up with the Medical Board to ensure that United Medical Protection's letter would be considered. He said that he taught students and it was embarrassing at the age of 50 to have a performance assessment undertaken.[133]

356. At a meeting on 9 December 2003 the Performance Committee noted Dr Gayed's solicitor's letter of 2 December 2003 and the notification from Doctor C. The Performance Committee resolved that the performance assessment should proceed.

357. On 10 December 2003 Dr Gayed telephoned the coordinator of the Performance Assessment Program to find out the outcome. She informed him that the performance assessment would go ahead. He said that he would complete the forms sent to him.

358. On 19 December 2003 the Medical Board informed United Medical Protection of the Performance Committee's resolution of 9 December 2003 that a performance assessment be undertaken. It said this was based on the totality of Dr Gayed's history with the Medical Board, not only the triggering notification from Northern Sydney Health. The Medical Board sent a similar letter directly to Dr Gayed.

15. Performance assessment—September 2004

359. On 23 February 2004 Dr Gayed provided to the Medical Board the completed pre-visit questionnaire listing his places of practice, his operating and consultation hours, his qualifications and experience, the nature of his continuing medical education and his own views as to 'deficiencies' in his knowledge or performance (which he put in terms of his growing ability to cope under pressure and deal efficiently with staff).

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[133] File Note – Dr Emil Gayed, by Coordinator – Performance Assessment Program, 5 December 2003 (Medical Council NSW files, tab 79).

He provided documentation setting out the number of surgical procedures of various types performed during the period 1 January 2000 to 31 December 2003.

360. He said he practised in two locations:

- in Sydney in rooms at 401/20 Bungan Street, Mona Vale; 509 Pittwater Road, Brookvale; Level 5, 187 Macquarie Street, Sydney; and 100 Waldon Street, Chester Hill; and at Mona Vale Public Hospital and Delmar Private Hospital in Dee Why; and
- in Taree in rooms at 54 Commerce Street, Taree; and at Manning Base (Public) Hospital and Mayo Private Hospital.

361. In the lead-up to the performance assessment, a complaint was made by a patient from Manning Base Hospital. I outline that matter separately below.

362. On 3 August 2004 the Medical Board informed Dr Gayed of the names of the two assessors who would conduct the performance assessment and the date of the assessment, which was 13 September 2004. There was obvious delay in the Medical Board's attention to the resolution of the Performance Committee of 28 October 2003 that a performance assessment be undertaken 'as a matter of urgency'.

363. The Medical Board confirmed the arrangements in letters to Dr Gayed and to Mona Vale Hospital on the same day.[134]

364. One of the assessors initially appointed was replaced because he was a member of the Professional Standards Committee for Dr Gayed in 2001. On 24 August 2004 the Medical Board informed Dr Gayed of the replacement assessor for his performance assessment.

365. On 3 September 2004 Dr Gayed provided to the Medical Board his surgical patient list for 13 September, including the nature of the procedures, for the purpose of the performance assessment.[135]

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[134] File noted dated 3 August 2004; letter to Dr Emil Gayed dated 3 August 2004 (Medical Council NSW files, tab 84).
[135] File noted dated 3 August 2004; letter to Dr Emil Gayed dated 3 August 2004 (Medical Council NSW files, tab 84).

366. On 7 September 2004 Dr Gayed's solicitor wrote to the Medical Board to convey concerns which Dr Gayed had about a briefing paper provided by the Medical Board to the assessors, which he felt prevented a fair and independent performance assessment.[136] The briefing paper referred to and addressed the Patient L complaint, the Patient H and Patient E cases and the complaint by the NSAHS regarding seven cases.

367. On 9 September 2004 Dr Gayed told the coordinator of the Performance Assessment Program in a telephone call that he was upset about the briefing paper, saying it contained a lot of 'untrue facts'. He asked that his solicitor's facsimile to the Medical Board be provided to the assessors prior to the performance assessment.

368. On 9 September 2004 one of the assessors raised with the Medical Board that she was on the Medical Advisory Committee of United Medical Protection, whose function was to decide whether to defend or settle cases. In her view there was no conflict of interest and she confirmed that she had never dealt with Dr Gayed before. She had discussed the upcoming performance assessment with solicitors at United Medical Protection, who had no concerns. The Medical Board staff (Doctor P and Medical Board Officer A) were advised but felt that there was no conflict of interest.

369. On 13 September 2004 the assessors attended Mona Vale Hospital and Dr Gayed's rooms to undertake the performance assessment.

15.1 Observations on decision to undertake the performance assessment

370. I am satisfied that the Medical Board was too slow in attending to the Performance Committee's resolution of 28 October 2003 that a performance assessment be conducted 'as a matter of urgency'. Holding the performance assessment almost one year after the resolution that it must occur urgently was tardy, to say the least.

371. I will return the adequacy of the performance assessment undertaken later in this report.

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[136] File noted dated 3 August 2004; letter to Dr Emil Gayed dated 3 August 2004 (Medical Council NSW files, tab 84).

15.2 Patient complaint

372. On 26 March 2004 the HCCC received a complaint regarding an obstetric patient (Patient L) of Dr Gayed at Manning Base Hospital.[137] The complainant had been 22 and a half weeks pregnant with a history of pain in the abdomen for one and a half weeks. On 4 February 2004 Dr Gayed advised her to go to hospital. On admission to hospital, she was of the opinion that she was in labour. Dr Gayed advised her that she was not in labour and gave medication to stop labour pains. On 9 February 2004 she went into labour and the twin babies did not survive. In essence, the complainant wanted to know why Dr Gayed had not transferred her to a larger hospital for care and treatment.

373. On 18 August 2004 the acting Commissioner of the HCCC, wrote to the Registrar of the Medical Board to notify it of the matter, which, in its view, indicated that the professional performance of Dr Gayed may be unsatisfactory (pursuant to s 86F(1) of the Medical Practice Act).[138] The HCCC had assessed the matter as requiring investigation. The HCCC recommended that the available documents (which it enclosed) be provided to the Performance Committee of the Medical Board with a view to the Committee determining whether the complaint could be included in the scheduled performance assessment commencing on 13 September. The acting Commissioner's letter stated that the HCCC was of the view that the complaint raised a significant question as to the appropriate care and/or treatment of her by Dr Gayed and that it would continue to investigate.

374. On 24 August 2004 the Board's Performance Committee resolved that the HCCC be advised that s 86D of the Medical Practice Act prevented the matter from being dealt with in the Performance Assessment Program, that the investigation should be finalised in the usual way and be the subject of consultation with the Medical Board, and that the performance assessment is broad-based and does not deal with particular complaints. The committee also expressed concern that Dr Gayed's response to the HCCC appeared to have been provided to the complainant.

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[137] Assessment decision sheet (Medical Council NSW files, tab 83).
[138] HCCC facsimile (Medical Council NSW files, tab 85).

375. On 27 September 2004 the coordinator of the Performance Assessment Program informed the HCCC acting Commissioner of the resolution of the Performance Committee declining to include the Patient L complaint in the performance assessment.

376. On 7 October 2004 the HCCC informed the Medical Board that it was continuing to investigate the Patient L matter and had received an independent peer review report on 30 September 2004.

377. Then, on 26 October 2004, the HCCC advised the Medical Board that the investigation of the Patient L complaint had been completed and the file would be closed subject to consultation with the Medical Board. The Medical Board agreed.

378. On 17 November 2004 the Medical Board informed Dr Gayed of the resolutions of the Conduct Sub-committee.

15.3 Outcome of the performance assessment

379. Dr Gayed was given an opportunity to comment on the performance assessment report before the final report was issued. On 26 November 2004 the Medical Board sent a draft report to Dr Gayed and asked for his input as to any errors of fact in the draft. Dr Gayed suggested some corrections.

380. On 14 January 2005 the assessors issued their report on Dr Gayed's professional performance.[139]

381. The assessors noted that his private practice was mainly gynaecological. He did only about 50 deliveries of private patients each year. His public hospital work included both obstetrics and gynaecology. He did 10 surgical lists a month, amounting to about 500 cases per year. He reported very low complication rates and high patient satisfaction. He told the assessors he felt like the most scrutinised practitioner in the State. He considered that the complaints originating in Cooma that resulted in the Professional Standards Committee were orchestrated by patients known to each other. He acknowledged that there were things to learn from those cases and he had changed his practice accordingly. The assessors noted that there had been a complaint about his practice in

[139] Performance Assessment report dated 14 January 2005 (Medical Council NSW files, tab 95).

Taree but, since the performance assessment began, the HCCC's investigation of the complaint had been terminated with no further action.

382. Dr Gayed believed that the notification from Northern Sydney Health had been an overreaction on the part of Doctor N, who had since left the hospital. He told the assessors that he believed that when the hospital became aware of his conditional registration they conducted a retrospective review of his performance. As I noted earlier, his view of the matter was erroneous. He said that four of the seven cases of concern identified in the notification by Northern Sydney Health turned out to be acceptable, and there was no pattern of poor outcomes, in his view. The bowel obstruction case and bowel perforation case were the only such cases in 25 years of practice.

383. Dr Gayed's representation to the assessors that he had no history of perforating a bowel was not correct, in that the first complaint before the Professional Standards Committee had involved tears to two sections of bowel. The assessors apparently did not test what he said to them by comparing his claims with the Professional Standards Committee reasons. Indeed, they took into account his submissions in a manner that was favourable to him.

384. As recorded in their report, the assessors sought to speak to two of Dr Gayed's colleagues about his practice. Doctor Q informed the assessors that Dr Gayed was not popular in the operating theatre and cited a recent case where Dr Gayed had undertaken a laparotomy to explore an abdominal mass which turned out to be a lymphoma. Doctor Q felt that the preoperative work and planning were substandard. The other colleague approached at Dr Gayed's suggestion was unwilling to contribute comments.

385. In their report, the assessors did not indicate what inferences, if any, they drew from, or what weight they gave to, Doctor Q's negative comments or the other colleague's unwillingness to comment.

386. The assessors observed Dr Gayed during the performance of his morning surgical list. The assessors made some criticisms of his technique and the indication for surgery in respect of the cases observed. For example, he did not appear to have a very methodical approach in performing

laparoscopy, and the assessors would have had some concerns if he were performing more complex laparoscopic procedures. In other cases he failed to consider the use of colposcopy. He handled the needle on several occasions directly with his fingers instead of forceps. He did not fully explore alternatives to surgery in one case. They had no concerns with his consultation skills or in their review of 10 patient records (which they said was the number to review according to the Medical Board's protocol).

387. The assessors found that his professional performance was at the standard reasonably expected of a practitioner of an equivalent level of training or experience. They believed that he would benefit from some constructive feedback and recommended that one of the assessors informally counsel him about aspects of his practice that could be further improved. In the recommendations section of their report, they stated their belief that the existing conditions on his registration, other than the condition required because of his status as a conditional specialist, served no continuing useful purpose.

16. Adequacy of the performance assessment

388. The assessors were provided with a number of documents prior to the assessment. The documents included:

    a. the letter from Doctor C (CEO of Northern Sydney Health) to the Medical Board dated 30 September 2003 with attachments:
        i. Letter to Dr Gayed from Doctor C dated 11/8/2003[140]
        ii. Letter to Doctor C from Dr Gayed dated 14/8/2003;
    b. minutes of Northern Sydney Health Credentials Advisory Committee Meeting held on Monday 22 September 2003; and
    c. the Professional Standards Committee Inquiry Report dated 30 October 2001.

389. Doctor B is of the view that it was clear from those documents that the most serious concerns about Dr Gayed's performance related to his surgical performance. Of the seven cases of concern at Mona Vale Hospital, all related to gynaecological surgery. Of the 11 complaints heard

[140] Although the report refers to it as being dated 8 August 2003, this appears to have been an error, as the letter was dated 11 August 2003.

by the Professional Standards Committee, nine related to gynaecological surgery or incidents within the operating theatre and one related to visual impairment as manifested during gynaecological surgery.

390. The assessment team observed Dr Gayed perform the following procedures:

    a. caesarean section: an elective caesarean section on a primiparous woman;
    b. dilatation and curettage (D&C), hysteroscopy, diathermy of cervix;
    c. D&C, laparoscopy, tubal ligation: although the procedure was considered satisfactory, there were some concerns noted by the assessors regarding his competence to perform more complex procedures; and
    d. D&C, diathermy of cervix.

391. In the summary it is recorded that 'Dr Gayed makes reasonable decisions regarding surgical intervention. He is competent with the procedures that were observed, but he could "tighten up" some of his techniques'.

392. Doctor B observes that there was no observation of Dr Gayed performing major gynaecological surgery. The procedures that were observed are some of the least technically challenging and most basic procedures that a specialist would perform and yet there were concerns raised about his techniques during those procedures. Doctor B does not believe that the assessment team had sufficient opportunity to make an assessment of Dr Gayed's surgical expertise. He considers that it is questionable whether the performance assessment addressed the concerns about Dr Gayed's performance raised by Doctor C and the Professional Standards Committee. Given the nature of the complaints, a more thorough review of Dr Gayed's surgical performance was necessary.

393. I agree with Doctor B's views about the performance assessment.

394. Further, while an assessment of a practitioner's professional performance is inherently a matter of judgment, the evidence obtained from the assessors' observations of surgery and the comments made by Dr Gayed's colleague as to his technical skill, coupled with the other colleague's refusal to comment, might have given pause for thought as to the adequacy of Dr Gayed's clinical knowledge and skill. What is notable is that the assessors expressed no reservations apart from the comment

that some areas 'could be tightened up'. This appears to have been the consequence of the assessors observing only basic gynaecological surgery, as Doctor B notes.

16.1 Management of impairment

395. I have an additional concern about the performance assessment. The terms of reference require me specifically to review actions taken with respect to the management of any impairment of Dr Gayed.

396. In my view, the assessors did not adequately assess Dr Gayed's performance of procedures in light of his impairment. The legislation allowed the Medical Board to have the professional performance of a doctor assessed generally or as to 'any particular aspect of aspects of the practitioner's professional performance'.[141] Accordingly, it would have been open to the Medical Board to brief the assessors to assess particular aspects of Dr Gayed's technical skills in light of his eyesight issues.

397. The Medical Board was equipped with precise recommendations by the Board-nominated ophthalmologist, Doctor J, made in February 2002, June 2002 and again in October 2002. Doctor J had emphasised on three occasions that he could not assess Dr Gayed's perceptual or practical facility in performing laparoscopy, using monocular instruments or viewing two-dimensional video monitors, doing telescopic work or binocular surgery and the 'only way to assess Dr Gayed's vision for telescopic work was to have his function with the instrument observed by a gynaecologist who could comment on his abilities with the instrument'. Doctor J's letters were not included in the material briefed to the performance assessors.[142]

398. It would have been appropriate for the tasks nominated by Doctor J to be observed in the performance assessment. Doctor B agrees that, in the circumstances, the visual impairment should have been at the forefront of the assessors' task. The Medical Board did not tailor the performance assessment to the areas of concern about Dr Gayed's

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[141] *Medical Practice Act 1992* (NSW), s 86G.
[142] Briefing material (Medical Council NSW files, tab 87).

performance as an obstetrician and gynaecologist based on his disciplinary history and the issues raised by Northern Sydney Health.

399. As a result, the performance assessment did not engage with the particular problems that Dr Gayed's eyesight potentially posed for gynaecological surgery, and the assessors appear to have accepted Dr Gayed's assertions that the relevant conditions on his registration were of no continuing use or concern. This may have resulted in issues bearing on Dr Gayed's technical skills being missed in the performance assessment.

400. In my view, this was a deficiency in the Medical Board's management and monitoring of Dr Gayed's impairment. After Northern Sydney Health's triggering notification gave rise to a performance assessment, the Medical Board should have considered the information deriving from Doctor J's assessment of Dr Gayed's impairment and emphasised to the assessors that it was a matter to be assessed and reported on in the performance assessment.

401. The legislation allowed the assessors to make such recommendations as they considered appropriate.[143] The assessors did not give reasons for the finding that the conditions relating to microsurgery and ophthalmic assessment served no useful purpose. The relevant matters referred to in their report were that Dr Gayed said he would like to have the conditions removed, as he believed they served no purpose and had prejudiced him in his dealings with the area health service. The assessors noted in their draft report, which they provided to Dr Gayed, that with correction his eyesight was 6/9 and his difficulty was in relation to stereopsis, which potentially made microsurgery more difficult. In their final report they noted that Dr Gayed had submitted in response to the draft report that he had passed the stereopsis test with another doctor. He also said he was not practising microsurgery for professional reasons and 'not because it is difficult'. There is nothing to suggest that the assessors sought proof from Dr Gayed with regard to the stereopsis test. They may have given considerable weight to his statement that he would voluntarily not be doing microsurgery, but it is not clear from their report what reasoning they adopted in, in effect, recommending the removal of his conditions of registration.

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[143] *Medical Practice Act 1992* (NSW), s 86I(2).

402. I note that Dr Gayed had surgery in 2005 and his eyesight condition appeared to have been rectified. However, the fact that Dr Gayed had had surgery was not known to the assessors. In a letter dated 20 May 2005 United Medical Protection sent to the Medical Board a report from Doctor R to the effect that he had removed cataracts on 20 and 27 January 2005 and implanted myopic intraocular lenses which 'have corrected Dr Gayed's myopia'. Doctor R said his vision was now 6/9 in the right eye and 6/7.5 in the left eye and his stereopsis was excellent. He said his 'vision is now superior to that which it was for the past decade'. Dr Gayed's solicitor said that the assessors' recommendations were made without the knowledge of Dr Gayed's further eye surgery, and she requested that the conditions be lifted from his registration.[144]

403. The Performance Assessment Program Participants Handbook (September 2010) notes that the procedures observed should be 'representative of the practitioner's usual practice'.[145] It is noted that the *Health Practitioner Regulation National Law* (NSW) does not prescribe the manner in which performance assessments should be conducted.

404. If this is interpreted as meaning that little regard needs to be given to the circumstances which gave rise to the need for a performance assessment then I do not agree with that approach. Consideration should be given to revising this section to make clear the importance of those circumstances in determining the procedures to be observed in a performance assessment.

16.2 Follow-up counselling

405. On 25 January 2005 the Medical Board's Performance Committee considered the performance assessment report and resolved that Dr Gayed be counselled informally by one of the assessors.

406. On 15 March 2005 the coordinator sent Dr Gayed a copy of the report and thanked him for his cooperation in the assessment. The coordinator discussed the outcome with Dr Gayed and told him that, although the assessors had recommended that the conditions on his registration

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[144] Letter to Medical Board from United Medical Protection dated 25 May 2005 (Medical Council NSW files, tab 111).

[145] Medical Council NSW, *Performance Assessment Program Participants Handbook* (September 2010), p 11.

imposed by the Professional Standards Committee be removed, the legality of the issue needed to be considered.

407. On 22 March 2005 the Performance Committee noted a 'pending date for counselling' with respect to Dr Gayed.[146]

408. On 20 May 2005, a solicitor for Dr Gayed wrote to the Medical Board requesting that the conditions be lifted from his registration.[147]

409. On 21 June 2005 the Medical Board's Conduct Committee met to discuss the request from Dr Gayed's solicitor to lift conditions 2 and 3 imposed by the Professional Standards Committee in October 2001 relating to microsurgery and the need for assessment by an ophthalmologist. The Conduct Committee took the view that the appropriate review body for lifting the conditions was the Medical Tribunal (and that the Medical Board had no power to do so). The Conduct Committee resolved that the Medical Board write to United Medical Protection to advise that the appropriate review body was the Medical Tribunal and that the Medical Board would not oppose any application for review of the conditions.

410. On 19 August 2005 Medical Council Officer F, Monitoring Coordinator at the Medical Board, sent a letter to United Medical Protection to advise of the resolution.

411. On or about 22 September 2005 one of the assessors agreed to conduct a counselling session with Dr Gayed in accordance with the Performance Committee's resolution. The coordinator wrote to him and Dr Gayed to make arrangements for it to occur on 1 November 2005.

412. This was another tardy response by the Medical Board to a committee resolution, as 11 months had passed since the performance assessment report and Performance Committee's resolution that Dr Gayed be counselled in accordance with the assessors' recommendation.

413. At its meeting on 25 October 2005 the Performance Committee noted that the counselling session was to take place with one of the assessors on 1 November 2005.

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[146] Performance Committee minutes dated 22 March 2005 (Medical Council NSW files, tab 98).
[147] Unsworn affidavit of Solicitor A (NHLHD documents, Tab 5.6, p 1121).

414. The assessor issued a performance counselling report dated 16 November 2005 which recommended that the enquiry 'be declared closed and that Dr Gayed be allowed to continue his work in a routine capacity'.[148]

415. The report records that during the counselling session he and Dr Gayed discussed the performance assessment process. Dr Gayed said that he had found it daunting and stressful at the time. He considered the counselling session to be 'the final piece of this drawn out jigsaw puzzle'. He told the assessor that he was in the process of removing the conditional status of his registration which he viewed as a bureaucratic cloud. He did not intend to change his activities. He informed the assessor that the original restriction derived from a problem with his vision and that his vision was now all but perfect following cataract surgery in 2005. The assessor providing the counselling concluded that the performance assessment had brought positive and constructive change to his practice and personal life and that 'he is practising reasonable and competent medicine and has complied with all the requirements of the Board'.

416. The counselling appears to have been more about Dr Gayed's response to the performance assessment process than the deficiencies exposed by the Professional Standards Committee and the performance assessment. There does not appear to have been any counselling about the areas of criticism identified in the assessment report in relation to Dr Gayed's technique and assessment of indications for surgery. Again, the concerns of the Medical Board nominated ophthalmologist appear to have been overlooked.

417. I note that the counselling report repeats the erroneous information, which, on the inquiry's view of the records, has its genesis in an assertion made by Dr Gayed that Northern Sydney Health made its notification to the Medical Board *because* it became aware of Dr Gayed's conditional registration. As I have stated earlier, this is not an accurate reflection of the events. The Northern Sydney Health records show that Northern Sydney Health intended to, and did, inform the Medical Board of the clinical concerns before it discovered that Dr Gayed had conditions (other than the standard condition related to his specialty) on his registration.

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[148] Performance Counselling Report dated November 2005 (Medical Council NSW files, tab 99).

418. On 22 November 2005 the Performance Committee met and noted the performance counselling report.

419. On 21 December 2005 the coordinator of the Performance Assessment Program informed Dr Gayed in writing that his involvement in the Performance Assessment Program arising from the notification by Doctor C was now completed.[149]

420. On 1 February 2006 the Medical Board also informed Doctor C, CEO of Northern Sydney Central Coast Area Health Service (formerly known as Northern Sydney Health) that the performance assessment had been finalised. It did not inform Doctor C of the outcome or forward the report.

421. The legislation did not and still does not have any provisions about the sharing of information about a performance assessment. It may be important for employers to know the results of a performance assessment and to have the full report, subject to patient confidentiality being observed. As I noted earlier, while there may be an exercise in weighing privacy considerations, significant weight should be given to protecting the public. The information would allow an employer to assess any patterns in a doctor's clinical practice. Without knowing where performance is deficient, there is a risk that supervising the doctor and devising and taking protective measures to address his or her performance becomes somewhat arbitrary.

422. On 1 February 2006 the Medical Board formally advised Dr Gayed that no further action would be taken with respect to the Professional Standards Committee's recommendation in 2001 that a performance assessment be undertaken with respect to his practice at Manning Base Hospital.

17. Removal of conditions on registration

423. On 8 December 2005 Dr Gayed, through his solicitors, filed an application in the Medical Tribunal under s 92 of the Medical Practice Act to remove the conditions placed on his registration by the Professional Standards Committee in 2001.

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[149] Letter to Dr Gayed from Medical Board dated 21 December 2005 (Medical Council NSW files, tab 99).

424. The HCCC sought from the Medical Board the reports of the Board-approved ophthalmologist and the results of the performance assessment.

425. This prompted the Medical Board to arrange for an updated assessment to be carried out by an ophthalmologist.[150] The Medical Board nominated Dr HH for this purpose. Because of an objection by Dr Gayed's solicitor on the basis that Dr HH had been involved with the Professional Standards Committee, Dr HH was replaced by Dr G.

426. Dr G assessed Dr Gayed on 13 February 2006. Dr G informed the Medical Board in a letter dated 22 February 2006 that in his opinion there was no need for the Medical Board to place any visual-related restrictions on Dr Gayed's obstetric and gynaecological practice.[151] He said he could detect no visual impediment for performing surgery. He did not offer any reservations or qualifications on his capacity to comment on Dr Gayed's visual ability for particular gynaecological surgery similar to those offered by Dr J.

427. On 3 February 2006 the Director of Medical Services at Mona Vale Hospital sought from the Medical Board a copy of the performance assessment report and notification of any restrictions on this registration. Dr ZZ informed the Medical Board that Dr Gayed had informed him as part of his health service performance review that his conditions had been lifted.

428. The Medical Board consulted with Dr Gayed's solicitor about the request. Dr Gayed's solicitor objected to the full assessment report being provided to Mona Vale Hospital. The Medical Board's legal officer asked his solicitor to prepare a version that could be disclosed. The United Medical Protection solicitor suggested that limited information from the performance assessment report be provided relating to Dr Gayed's 'approachable manner' as a practitioner and the outcome summary and conclusions.

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[150] Letter of legal officer (Medical Council NSW files, tab 100, p 1434).
[151] Report of Dr G dated 22 February 2006 (Medical Council NSW files, tab 102).

429. The Medical Board adopted that approach and in a letter dated 21 February 2006 to the Director of Medical Services at Mona Vale Hospital set out only those parts of the report to which Dr Gayed consented.

430. In my view, the Medical Board's approach to the provision of information to the area health service about the outcome of the performance assessment was inadequate. That the Medical Board permitted the practitioner to select those favourable passages and send those excerpts, with the clear inference that the Medical Board accepted them as representative of the findings, shows poor judgment. The Medical Council drew the inquiry's attention to the fact performance assessment reports were (and still are) "protected reports", which are thus prohibited from being disclosed except to the HCCC and for the purpose of exercising functions under the Act.[152] However, those provisions did not allow for disclosure of information contained in a performance assessment report with Dr Gayed's consent. It therefore appears that the Medical Board did not have the prohibition on disclosing a protected report in mind when it decided to provide only those parts of the report to which Dr Gayed consented. This rather suggests that the legislation is confusing as to the circumstances in which the Medical Board/Council is entitled to disclose a performance assessment report or its content to an employer.

431. On 28 March 2006 the Conduct Committee noted its view that there was no objection to the removal of the conditions on registration. The Conduct Committee took into account that in January 2005 Dr Gayed had cataract surgery and myopic intraocular lenses had been implanted. As to this, the Committee had before it a report of Dr Gayed's treating ophthalmologist dated 7 March 2005 (Dr R)).

432. I have some reservations about the Medical Board's lack of opposition to the removal of the conditions. Dr J's recommendations had not been acted upon—that is, that it was necessary to conduct specific testing of his visual acuity in surgery of the kind he would be required routinely to carry out. As such, there was an inadequate investigation of the effect of Dr Gayed's vision on his clinical practice.

433. On 30 March 2006 the Medical Tribunal made orders that the conditions placed on Dr Gayed's registration by the Professional Standards

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[152] *Medical Practice Act*, s 190B; *Health Practitioner Regulation National Law* (NSW), ss 138 and 176F.

Committee on 31 October 2001 be removed and that each party bear its own costs. The Medical Tribunal's reasons for determination record that the conditions imposed on Dr Gayed's registration by the Professional Standards Committee were:

(1) that he not undertake microsurgery; and

(2) that he be assessed by an ophthalmologist approved by the Medical Board at intervals determined by the Board.

However, as stated earlier in this report, the assessment ordered by the Professional Standards Committee was expressed to be an order rather than a condition on registration.[153]

434. The Medical Tribunal found that Dr Gayed 'does not suffer from an impairment within the meaning of Clause 3 of the Dictionary of the *Medical Practice Act 1992*'. The Medical Tribunal's reasons record that Dr Gayed had cataract surgery on 20 and 27 January 2005 and that his treating ophthalmologist had provided a report stating that in his opinion Dr Gayed's vision 'is now superior to that which it was for the past decade'. The Medical Tribunal took into account that the HCCC, which was represented in the Medical Tribunal by a solicitor, did not oppose the removal of the two conditions on the registration of Dr Gayed. It also took into account information that the Medical Board's Conduct Committee concurred with the performance assessors' view that the two conditions imposed by the Professional Standards Committee served no continuing useful purpose.

435. The Medical Tribunal ordered that there be no publication of the name of Dr Gayed or any material capable of identifying him.

436. The Medical Board notified Dr Gayed's solicitor of the findings and orders.

437. On 12 April 2006 the Medical Board informed Dr Gayed's solicitor that it had amended Dr Gayed's registration on the Register of Medical Practitioners with effect from 30 March 2006 and that the 'only remaining condition on Dr Gayed's registration is pursuant to s 7(1)E of the *Medical*

[153] Reasons for Determination of Medical Tribunal of New South Wales (Medical Council NSW files, tab 105).

Practice Act which limits this registration to practise as a specialist in obstetrics and gynaecology'.[154]

438. There is no mention in the letter of the condition that he notify the Medical Board or seek its approval of his positions as specialist. In my view, there was probably a misunderstanding within the Medical Board that the notification requirement had been imposed by the Professional Standards Committee. The Medical Board's correspondence in the years following the Professional Standards Committee referred to it as a condition imposed by the Professional Standards Committee, while in fact the Committee had not imposed a condition that he hold only positions 'to be notified to the Board'. As outlined at [325]–[326] of my report, that condition predated the Professional Standards Committee. It was imposed as the time of his initial registration as an overseas specialist (although the condition on his initial registration referred to positions being 'approved' by the Medical Board rather than 'notified' to it).

439. On 26 April 2006 the Conduct Committee noted the decision of the Medical Tribunal.

440. In May 2006 queries were raised about how the Department of Health had learned of the Medical Tribunal's decision given the Medical Tribunal's non-publication orders.[155] Also in May, a staff member at John Hunter Hospital contacted the Medical Board to find out the outcome of the Conduct Committee meeting. The Medical Board informed him that it was unable to disclose information because the Medical Tribunal had made a non-publication order, except to confirm that all conditions on Dr Gayed's registration were removed except for his registration category as a specialist in obstetrics and gynaecology.

441. There is no evidence that the Medical Board informed Manning Base Hospital or other places where Dr Gayed worked of the change to Dr Gayed's registration status as a result of the Medical Tribunal decision.

442. The legislation did not require publication of Medical Tribunal decisions until December 2006.[156]

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[154] Letter from legal officer to Senior Solicitor dated 12 April 2006 (Medical Council NSW files tab 105, p 1477). [155] Email from legal officer to The Registrar dated 12 May 2006 (Medical Council NSW files, tab 105, p 1479).

[156] *Health Legislation Amendment (Unregistered Health Practitioners) Act 2006* (NSW) sch 3.4, [4].

18. Notifications by Northern Sydney Central Coast Area Health Service and Delmar Private Hospital

443. On 8 March 2007 the Director of Medical Services at Mona Vale Hospital contacted the Medical Board to say that concerns had been raised about Dr Gayed and that a level 2 investigation was being carried out by an external reviewer. He informed the Medical Board that Dr Gayed had resigned. Under the applicable NSW Health policy, a level 2 complaint or concern related to a 'significant complaint or concern, where there may be one or more events involving unexpected mortality or increasingly serious morbidity (SAC 1 or 2), and there may be a pattern of suboptimal performance or variation in clinical outcomes over a period of time'.[157] The policy (which is still current) requires (within the local health district) that the Director of Clinical Governance be notified, that a decision be made as to whether the doctor's clinical privileges be varied and that an investigation be conducted.[158]

444. On 16 March 2007 the Medical Board received a letter from Dr C, Chief Executive of Northern Sydney Central Coast Area Health Service, to inform the Board of matters that had arisen in relation to the management of four patients, of the decision to suspend Dr Gayed pending the outcome of investigations, and Dr Gayed's subsequent decision to resign.[159] The cases of concern were those of a patient who suffered a small bowel and bladder perforation, a stillbirth and two patients admitted from Delmar Private Hospital who also suffered bowel perforations requiring surgery.

445. This was the second occasion on which Dr C had brought to the attention of the Medical Board his serious concerns about Dr Gayed's clinical practice.

446. The Medical Board informed Dr C that it would consult with the HCCC regarding his notification as required under the legislation.

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[157] File note by Coordinator Performance Program dated 8 March 2007 (Medical Council NSW files, tab 106).
[158] NSW Health, *Complaint or concern about a clinician—Management Guidelines* (GL2006_020) (published 30 January 2006 and still current); *Complaint or concern about a clinician—Principles for Action* (PD2006_007).
[159] Letter from Northern Sydney Central Coast Area Health Service to Medical Board dated 15 March 2007; and letter to HCCC dated 16 March 2007 (Medical Council NSW files, tab 107).

447. Then, on 24 March 2007, Dr Il, the chair of the Medical Advisory Committee at Delmar Private Hospital in Dee Why and an orthopaedic surgeon, wrote to the Medical Board to advise of a number of incidents at that hospital that had come to the Medical Advisory Committee's attention in relation to Dr Gayed. She advised that his clinical privileges had been temporarily suspended pending a review.

448. Two of the incidents concerned patients on whom Dr Gayed performed laparoscopic surgery on 2 March 2007 at Delmar Private Hospital, both of whom then underwent bowel resection at Mona Vale Hospital for bowel perforation. The other incident involved Dr Gayed obtaining consent for an urgent hysterectomy for uncontrolled bleeding by ceasing a patient's anaesthetic, having the patient sign a consent form and then re-anaesthetising the patient. Hospital administration intervened and the hysterectomy was not performed. The patient was discharged after eight hours of observation.

449. It is noted that all three complaints are not dissimilar to complaints before the Professional Standards Committee.

450. In that letter, the Delmar Private Hospital sought the Medical Board's assistance in relation to Dr Gayed's 'possible impairment' and provided a copy of a letter to the hospital from Dr Gayed. In that letter he had attributed his performance to the stress caused by the 'complete breakdown' of his relationship with Mona Vale Hospital administration, from which there had been 'total relief' since his resignation.

451. On 29 March 2007 the Medical Board and the HCCC consulted regarding Dr C's letter and both determined to treat the matter as a notification regarding Dr Gayed and to await the outcome of the area health service's investigation.[160]

452. On 17 April 2007 the Health Committee of the Medical Board considered the letter from Delmar Private Hospital and noted that it did not raise issues of impairment, but the clinical issues were of serious concern. It said that a s 66 inquiry may be required, but it was necessary to see the result of the area health service's investigation before making that decision. The Health Committee resolved to refer Dr Gayed to the

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[160] Assessment sheet dated 29 March 2007 (Medical Council NSW files, tab 107, p 1489).

Performance Committee and that a s 66 inquiry be considered when the Northern Sydney Central Coast Area Health Service report was received. I note that it did not refer Dr Gayed to the Conduct Committee despite accepting that the clinical issues were of serious concern.

18.1 Complaints to the HCCC

453. According to information that the HCCC provided to the inquiry, the Northern Sydney Central Coast Area Health Service notified four complaints to the HCCC on 13 June 2007 concerning patients CC, DD, EE and FF. Each was dealt with, with the consent of the Medical Board, by referring it to the Medical Board to be dealt with in the Performance Assessment Program.[161]

19. Advising Manning Base Hospital in March 2007

454. Given that Dr Gayed had been suspended from both Mona Vale Hospital (from which he had also resigned) and Delmar Private Hospital, the decision taken by the Medical Board, in consultation with the HCCC, to await the outcome of the Northern Sydney Central Coast Area Health Service investigation was, on the face of it, justifiable.

455. However, Dr Gayed was working in other locations, including Manning Base Hospital.

456. The files suggest that the Medical Board did not inform Manning Base Hospital or Hunter New England Area Health Service about the issues of concern. The legislation required the Medical Board to give notice to employers or the CEO of any public health organisation or private hospital of any order made under the Medical Practice Act or the imposition of conditions on a doctor's registration.[162]

457. As no order had been made, the Medical Board was not required to or prohibited from informing other employers of the new concerns.[163]

458. It is desirable that information of this type is available to public and private health organisations at which the practitioner is working. I

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[162] *Medical Practice Act 1992* (NSW) s 191B.

[163] Subject to *Medical Practice Act 1992* (NSW) s 190.

understand there may be competing policy, contractual and legislative matters that bear upon this; however, there are real benefits from each organisation knowing of sanctions for poor performance imposed by others.

20. Decision to undertake a further performance assessment

459. On 24 April 2007 the Performance Committee considered the letter from Dr II (Delmar Private Hospital), the notification from Dr C (Northern Sydney Central Coast Area Health Service), the performance assessment of 13 September 2004 and related counselling report of 1 November 2005, a complaint history summary dated 18 April 2007 and a hearing summary report dated 18 April 2007, being a document listing the dates of the Professional Standards Committee hearing, the resolution that he undergo counselling (arising from the performance assessment) and the Medical Tribunal order.

460. The Performance Committee was satisfied, under s 86C of the Medical Practice Act, that matters indicated that Dr Gayed's professional performance was unsatisfactory in the areas of procedural skills and clinical judgment. It resolved that a performance assessment be undertaken but not limited to any particular aspect. It made a direction that it was not practicable that the assessment exercise be based on a simulated clinical situation, but it said that this did not preclude the assessors conducting a simulated clinical assessment if circumstances required.[164]

461. The coordinator of the Performance Assessment Program informed the Delmar Private Hospital that the concerns had been brought to the attention of the Medical Board, which would advise when the matter was finalised.

462. On 25 May 2007 one of the patients the subject of both the Delmar Private Hospital's notification and the Northern Sydney Central Coast

[164] Performance Committee minutes dated 17 April 2007 (Medical Council NSW files, tab 110).

Area Health Service notification, Patient FF, made her own complaint to the Medical Board.[165]

463. On 29 May 2007 the Medical Board informed Patient FF that it would consult with the HCCC as required under the legislation. On 30 May 2007 the patient withdrew her complaint. The Medical Board and the HCCC consulted about the complaint on 7 June 2007 and decided that the HCCC would contact the patient. After contact was made, the patient wished to proceed. The HCCC obtained medical records which were reviewed by the HCCC's Internal Medical Advisor. The Internal Medical Advisor concluded that the complaint raised a significant issue of public health or safety. A response was sought from Dr Gayed, and the Internal Medical Advisor reviewed that response. The Internal Medical Advisor sought peer advice from Dr JJ, who advised that Dr Gayed's management was reasonable but that two other cases raised a question about his technique of laparoscopy.

464. The HCCC recommended that the matter concerning Patient FF be referred to the Medical Board for consideration of performance assessment. On 26 July 2007 the HCCC and the Medical Board consulted. The Medical Board agreed that it be dealt with in the performance pathway.[166] A Performance Panel (comprising A/Professor B and A/ Professor A) formally made a decision to this effect on 24 August 2007.[167]

465. On 29 May 2007 the Medical Board informed Dr Gayed of the decision to undertake a performance assessment. It sought from him a pre-visit questionnaire, evidence of his current professional indemnity insurance and recent Medicare provider statistics.

466. On 30 May 2007 the Medical Board sought from Dr C of Northern Sydney Central Coast Area Health Service the outcome of the investigation conducted by the area health service, noting that the matters could warrant an exercise of the powers under s 66 of the Medical Practice Act.

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[165] Letter to Medical Board from patient dated 25 May 2007 (Medical Council NSW files, tab 112).
[166] HCCC Complaint assessment sheet dated 20 July 2007 (Medical Council NSW files, tab 122, p 1624).
[167] Letter to Dr Gayed from Coordinator - Performance Program dated 26 September 2007 (Medical Council NSW files, tab 122 p 1641); Performance Panel record dated 24 August 2007 (Medical Council NSW files, tab 122 p 1677).

467. On 26 June 2007 Dr C forwarded to the Medical Board a copy of reports relating to two external reviews carried out by the Northern Sydney Central Coast Area Health Service, being the reports of Dr KK and Professor A.

468. The Northern Sydney Central Coast Area Health Service had asked Dr KK to conduct an external review of a surgical case of 25 September 2006 in which Dr Gayed performed a laparotomy. During the surgery, both the small bowel and bladder were perforated and required surgical repair. In his report of 10 May 2007, Dr KK recommended referral of Dr Gayed to the Medical Board and that Dr Gayed's practice should continue to be restricted at Mona Vale Hospital.[168] He had multiple criticisms, including Dr Gayed's taking of history; his case selection (saying that Dr Gayed should have strongly recommended against surgery); his preparation for surgery and performance of it at Mona Vale, which were not appropriate; errors in the operating theatre; surgical management (including not knowing if he was repairing bowel or bladder); and inadequate follow-up. He said possible common errors in other cases should be reviewed. There were matters 'of great concern'.

469. The Northern Sydney Central Coast Area Health Service had asked Professor A to conduct an external review of a case involving a stillbirth on 4 December 2006 involving a private patient of Dr Gayed. In his report Professor A was highly critical of Dr Gayed's note keeping in terms of both its accuracy and its completeness, Dr Gayed's interpretation of a fetal heart rate trace, communication in the labour ward, and the nursing staff. Professor A stated that '[t]his baby was in pretty serious trouble for very nearly three hours before he died and there is to my mind no evidence that either the nursing staff or Dr Gayed had any appreciation of the seriousness of the situation'.[169]

470. A file note of 4 July 2007 indicates that the Medical Board considered whether the two reviews conducted by the Northern Sydney Central Coast Area Health Service raised any significant issues that warranted action under s 66 of the Medical Practice Act or whether Dr Gayed was best dealt with in the Performance Assessment Program. Dr P

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[168] Letter from Dr KK to Dr ZZ dated 10 May 2006 [with 2006 apparently a typographical error] (Medical Council NSW files, tab 3.8, p 838).

[169] Report of Professor A, (Medical Council NSW files, p 1090).

was of the view that he would be best dealt with in the performance pathway. On 4 July 2007 another person within the Medical Board agreed that a performance assessment was indicated, saying there was 'insufficient evidence to recommend a s 66'.[170]

471. On 24 July 2007 the Performance Committee considered the reports provided by the Northern Sydney Central Coast Area Health Service and noted the decision of the delegates that the matter was best dealt with in the performance pathway rather than by holding a s 66 inquiry.[171]

472. The matters were not considered by the Medical Board's Conduct Committee.

20.1 Observations on decision to hold a further performance assessment

20.1.1 A s 66 inquiry should have been held

473. It was appropriate to respond to the complaints in 2004 by way of performance assessment. However, that was not the case in 2007. In 2007, the information to hand indicated that the clinical judgment could (and in the view of Dr B, should) have been made that action under s 66 was necessary for the physical health of patients.

474. It is clear that the purpose of the power in s 66 was to allow the Medical Board to take urgent measures, by way of suspension or the imposition of conditions, to protect the public pending a fuller consideration of the matter by way of investigation, if necessary, and disciplinary proceedings. As such, s 66 action was an interim measure, with suspension being limited to eight weeks (subject to extensions being allowed in certain circumstances). However, it permitted conditions to be imposed and empowered the Medical Board to remove or alter those conditions.

475. By contrast, a performance assessment and then a Performance Review Panel could take months. In the case of Dr Gayed, it took one year until conditions could be imposed and without any prospect of suspension.

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[170] Handwritten notes (Medical Council NSW files, tab 119).
[171] Performance Committee minutes (Medical Council NSW files, tab 121).

476. In my view, the imposition of conditions was probably a better protective measure to take in July 2007 by way of a s 66 hearing. As set out below, my view, and that of Dr B, is that the available evidence at this time would have justified the imposition of one of the conditions ultimately imposed in 2016 following s 150 proceedings. That is, his registration should have been restricted following the concerns raised in 2007 with the effect that he was not to perform any procedures in an operating theatre without prior written approval of a Medical Board approved supervisor who had reviewed the patient record and the practitioner's treatment plan. Further, he was to maintain and submit a log of all procedures to the Medical Board on a monthly basis.

20.1.2 Adequacy of reasons

477. No adequate reasons were given for the decision to have Dr Gayed's performance assessed rather than hold a s 66 inquiry. Dr Gayed's history with the Medical Board was lengthy. His performance had been criticised in a number of forums, he had been found guilty of unsatisfactory professional conduct, he had been suspended from and he had effectively had his appointment terminated at two hospitals. This decision by the Medical Board was at a critical time in its management of him. Proper reasons should have been recorded.

21. Performance assessment in 2007

478. For the purpose of the performance assessment, Dr Gayed provided the Medical Board with a completed questionnaire and various material in support of his practice, including references from Dr V (Manager Clinical Services and Director of the Emergency Department at Manning Base Hospital) dated 5 April 2007, Dr Y (anaesthetist at Mayo Private Hospital), Dr LL (obstetrics and gynaecology specialist at Manning Base Hospital), Dr Z (obstetrics and gynaecology specialist at Manning Valley Rural Referral Centre), Dr MM
(surgeon at Manning Base Hospital) and Dr NN (surgeon). Dr V's letter refers to Dr Gayed having not demonstrated 'untoward

infection rates, rates of return to theatre, complication or mortality rates. These matters are peer reviewed every three months'.[172]

479. On 15 June 2007 Dr Gayed asked the Medical Board not to brief the assessors with his history of complaints and Professional Standards Committee proceedings. He complained that this had occurred in September 2004, although he agreed that the two assessors in 2004 were not biased against him. He was advised that the form of the briefing to assessors had changed since 2004, but the brief would include reference to complaints made in the last seven years and those older than seven years where they led to a hearing with an adverse finding.[173]

480. The effect of this was to prevent a complete picture of the clinical competence of this doctor and, in particular, the identification of any patterns in his performance. This issue goes to the heart of the problems with the management of Dr Gayed and the complaints and concerns which arose. Unless Dr Gayed's whole history is examined on each occasion another concern is raised, he will continue to be managed in a silo manner and critical patterns will be missed. By this stage it was evident that his competence in performing complicated gynaecological procedures was in issue. The performance assessors should not have been deprived of his complete history since 1997.

481. The performance assessment took place on 25 October 2007 at Manning Base Hospital, Taree, and at Dr Gayed's rooms at 54 Commerce Street, Taree.

482. In their report, the assessors concluded that Dr Gayed's professional performance was unsatisfactory in that it was below the standard reasonably expected of a practitioner of an equivalent level of training or experience in the areas of basis clinical skills (interviewing/examination), clinical judgment, patient management skills (treatment/advice) and practical/technical skills.[174]

483. They recommended that a Performance Review Panel be convened to review the professional performance of Dr Gayed. They stated that he

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[172] Letter from Dr V entitled "Reference for Dr Emil Gayed" dated 5 April 2007 (Medical Council NSW files, tab 116).

[173] File note by Coordinator – Performance Program dated 15 June 2007 (Medical Council NSW files, tab 116, p 1582).

[174] Performance Assessment Report (Medical Council NSW files, vol 5, tab 128).

would benefit from working in the company of other specialists and registrars in training for a period of time.

484. In particular:

- he demonstrated no competence in performing even basic obstetric ultrasounds;
- there seemed to be a pattern of multiple operations on patients;
- he gave two examples of how he protected a colleague which involved giving misleading information to a patient;
- he demonstrated borderline surgical skills for a senior gynaecologist, with lack of systematic assessment, poor tissue handling, inappropriate knot-tying technique, the use of continuous suturing in anterior repair and suboptimal infection control with contamination of sterile equipment and inadequate handwashing; and
- patients were under-informed with respect to operative complications and management options.

485. They found that he does not fully understand his professional responsibilities.

486. The Medical Board provided Dr Gayed with an opportunity to make submissions on the performance assessment report, which he did in a lengthy written submission. His solicitor also made a submission about the choice of assessors on the basis of an alleged lack of impartiality and the alleged irrelevance of an assessor's subspecialisation. Also, Dr Gayed wanted a colleague of his choice, Professor B, to observe and support him instead of a Performance Review Panel being convened.

487. On 22 January 2008 the Performance Committee considered the report and submissions made by Dr Gayed and his solicitor. The Performance Committee considered that the assessors were an appropriate choice and resolved that a Performance Review Panel be convened under s 86K of the Medical Practice Act to review the professional performance of Dr Gayed. A Performance Review Panel's task is to review the evidence in a hearing, at which the doctor can be legally represented, and determine

whether the doctor meets the standard 'reasonably expected of a medical practitioner of an equivalent level of training or experience'.

488. The Performance Committee considered that it would be useful for Dr Gayed to be supported by his colleague, Professor B, but that a Performance Review Panel was nevertheless required to be convened. It requested that Dr Gayed's submission be provided to the assessors for comment.

489. The Performance Committee did not give explicit consideration to the assessors' recommendation that Dr Gayed would benefit from working in the company of other specialists and registrars in training for a period of time. It is not clear what the intent behind the recommendation was and how they would ensure in practice it would occur. They may have considered that this would be dealt with in the Performance Review Panel. In the event, the Performance Review Panel recommended a condition be imposed requiring mentoring.

490. The Medical Board provided a copy of Dr Gayed's submissions to the assessors and they did not see fit to amend their report on the performance assessment.

491. On 7 February 2008 the Medical Board informed Dr Gayed of the resolutions and advised him that a Performance Review Panel was planned for a half day in four to six weeks' time.

21.1 Provision of the performance assessment report

492. There are no documents indicating any information was provided to the Hunter New England Area Health Service from the Medical Board about the results of the performance assessment. As stated in chapter 3, I consider that current employers should be given a copy of a performance assessment report.

22. Performance Review Panel

493. The Performance Review Panel members, appointed by the Registrar of the Medical Board as delegates under s 184B of the Medical Practice Act, were an Associate Professor, a physician and obstetrician and gynaecologist.

494. Dr Gayed raised an objection to the obstetrician and gynaecologist's inclusion on the basis of his involvement with Royal North Shore Hospital on the ground that patients are transferred there from Mona Vale Hospital. As he had no prior involvement with Dr Gayed and had not managed any of Dr Gayed's patients, the Medical Board decided that he would remain on the Performance Review Panel.

495. The Performance Review Panel hearing took place on 23 April 2008 by way of a hearing at Gladesville Hospital campus. Dr Gayed was accompanied by his medical defence solicitor, a Senior Solicitor of Avant.

496. Dr Gayed provided a report by Professor B, an obstetrics and gynaecology specialist, who Dr Gayed had asked to evaluate his competence. Professor B gave evidence that he had observed Dr Gayed over four operating sessions at Manning Base Hospital, totalling about 17 hours of operating time, covering a range of operative procedures. He also observed Dr Gayed in his private consulting practice. Professor B spoke to his lengthy report at the hearing. He disagreed with many of the comments that the assessors made in their report. He did have some criticism of Dr Gayed's practice, including as to Dr Gayed's use of transabdominal ultrasound, and considered that it was appropriate that Dr Gayed not do complex work. He gave evidence that Dr Gayed wanted to learn.

497. In Dr Gayed's submissions to the Performance Review Panel following the hearing, he accepted that a condition imposing a mentoring requirement was an appropriate condition. He objected to a condition limiting the type of operations that he could perform, saying that he had already limited his surgical practice and there was no risk of him performing those types of surgery (including laparoscopic hysterectomy). He submitted that, if the Performance Review Panel did seek to limit the types of operations in his practice, this could be achieved by way of endorsement on his insurance, which would effectively prevent hospitals from contracting him to do that work. His solicitor submitted that:[175]

> [t]his will serve exactly the same purpose as a condition on the registration ... [and] This will avoid the reaction which occurred in Mona Vale Hospital

[175] Letter to Medical Board from Avant dated 2 May 2008 (Medical Council NSW files, vol 6, tab 135).

> where professional relationships deteriorated once the Hospital became fully aware of Dr Gayed's conditional registration.

498. The Performance Review Panel issued a report dated 25 June 2008.[176] They said:

> the issue before the Panel is whether Dr Gayed's professional performance is unsatisfactory. If the Panel is of that view then it must consider whether it should make orders to assist Dr Gayed to improve his professional performance; orders which may include placing conditions on this registration for the protection of the public.

499. The Performance Review Panel referred to the complaints the subject of the reviews by Dr KK (relating to Patient CC) and Professor A (relating to Patient DD) and the complaints by Patients FF and EE, which the Panel considered raised serious questions concerning Dr Gayed's handling of the cases. They noted that the assessors were not in a position to make a considered judgment about those incidents and they were not on the Performance Review Panel (whose focus was the performance assessment), and that the issues raised could be the subject of disciplinary proceedings. Further, they said that would be 'the proper forum to evaluate the truth and the significance of these allegations'.

500. The Performance Review Panel found that:

> the professional performance of Dr Gayed is unsatisfactory in that the knowledge, care and skill possessed and applied by Dr Gayed in the practice of medicine is below the standard reasonably expected of a practitioner of an equivalent level of training or experience.

501. The Performance Review Panel agreed with the assessors that the matters the subject of the performance assessment in relation to ultrasound, multiple operations and surgical techniques supported the assessors' finding of unsatisfactory professional performance and their recommendation that he was below the standard reasonably expected of a practitioner of his training and experience in their four identified areas of basic clinical skills, clinical judgment, patient management skills and practical/technical skills. The Performance Review Panel did not consider that the additional material put forward by Professor B displaced the significant observations made by the assessors. They noted that Dr

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[176] Written reasons for Performance Review Panel decision dated 25 June 2008 (Medical Council NSW files, tab 136).

Gayed's significant continuing professional education in the past had not resulted in much change in his practice over some years.

502. The Performance Review Panel did not accept Dr Gayed's solicitor's submission that any restrictions on his surgery practice could be achieved by endorsements on his insurance. Rather, conditions on his registration were required in the interests of the protection of the health and safety of the public.

503. The Performance Review Panel said they were of the view that Dr Gayed could continue to undertake hysteroscopy (diagnostic and operative), laparoscopy (diagnostic, adnexal surgery, mild endometriosis, sterilisation), open surgery (hysterectomy, myomectomy—adnexal surgery, adhesiolysis), vaginal surgery—hysterectomy, anterior and posterior repair, sacrospinous colpopexy, Bartholin's cyst and similar, colposcopy, diathermy loop biopsy of the cervix and cone biopsy of cervix. However, it emphasised that the issue as to which procedures Dr Gayed can perform satisfactorily in the future should not be determined conclusively by its decision. The question should be reviewed again after a further performance assessment or on Dr Gayed's application; and be informed by the mentoring arrangement it directed.

504. The Performance Review Panel, in summary:

- directed that conditions be imposed on Dr Gayed's registration with effect from 25 June 2008 as set out below;
- directed that, within 21 days, Dr Gayed was to provide for approval by the Medical Board the name of a registered medical practitioner in a senior position who has agreed to act as his professional mentor. The mentor would be required to comply with the Medical Board's Guidelines for Mentors, which include the holding of fortnightly meetings with Dr Gayed to discuss professional and clinical issues and reporting to the Medical Board every three months on progress;
- imposed a condition that Dr Gayed not perform certain types of surgery specified in the Performance Review Panel's report, being complicated laparoscopy, including hysterectomy (laparoscopically assisted vaginal hysterectomy and total laparoscopic hysterectomy); laparoscopic treatment of moderate or severe

endometriosis; advanced urogynaecology, including mesh procedures; and oncology procedures (for cervical or uterine or ovarian malignancy);

- required that Dr Gayed consent to any exchange of information between the Medical Board and Medicare Australia as necessary to facilitate monitoring of compliance with the conditions;
- stated that the Medical Board may notify Dr Gayed's employer/s of any issues arising in relation to compliance with these conditions;
- stated that the conditions may be varied, amended or removed at the discretion of the Medical Board; and
- directed Dr Gayed to have his professional performance reassessed no sooner than six months after the Performance Review Panel's decision.

505. The Performance Review Panel directed that a copy of the decision be provide to Dr Gayed and his legal advisor and recommended to the Medical Board that a copy be provided to the performance assessors, Dr OO, Dr PP and Dr QQ.

22.1 Observations about performance assessment

506. I made observations earlier in this report about the need to tailor a performance assessment to the issues identified.

507. For the 2008 Performance Review Panel, Dr Gayed tendered a report from a specialist obstetrician and gynaecologist who had observed Dr Gayed over 17 hours of operating. For the 2014 performance review panel, Dr Gayed provided two reports from obstetricians and gynaecologists, one of whom observed him for three days and another during two operating sessions.

508. It appears that the performance assessment undertaken by the Medical Board, then Medical Council, took place, and generally take place, over a standard period of one day, with a half day observing the practitioner performing procedures and the other half observing the practitioner's interviews with patients.

509. It may be that the number and type of performance interventions and the period of time over which some practitioners are assessed need to be reconsidered.

510. I observe that the process may be more likely to determine the extent of the poor performance earlier, and take protective action sooner, if the performance assessment is tailored to the individual practitioner.

22.2 Observations about the Performance Review Panel

511. The concerns identified by the assessors covered each key area of practice —that is, his surgical skills, his poor judgment as to patient selection and treatment options, his communication with patients and his understanding of ethical matters. He had demonstrated most of these deficiencies in Cooma Hospital and in the earlier complaints from Mona Vale Hospital. The conclusion was available that he had learned no lessons from the criticisms of his conduct between 1998 and 2007.

512. However, the conditions imposed concerned his surgical skills in performing only complicated procedures, primarily laparoscopic.

513. In my view his performance as demonstrated in the findings of the Professional Standards Committee in 2001, and the complaints leading to the suspension from Mona Vale Hospital in 2003 and in 2006, warranted the imposition of conditions which addressed his deficiencies.

514. I agree with Dr B that condition 8, imposed in 2016, addressed the issues identified by 2008. That is, his registration should have been restricted in 2008 with the effect that he was not to perform any procedures in an operating theatre without prior written approval of the Medical Board approved supervisor who had reviewed the patient record and the practitioner's treatment plan. Further, there would have been a reasonable basis for requiring him to maintain and submit a log of all procedures to the Medical Board on a monthly basis.

22.3 Notification of outcome of Performance Review Panel

515. On 26 June 2008 the Medical Board informed Dr Gayed of the conditions imposed by the Performance Review Panel.

516. On 1 July 2008, under s 191B of the Medical Practice Act, the Medical Board notified the chief executive of the Hunter New England Area Health Service, Dr V of Manning Base Hospital and the CEOs of Mayo Private Hospital, Adori Day Surgery and Warringah Mall Day Surgery of the conditions imposed.[177] It did not provide the Performance Review Panel's report.

517. The internal Medical Council file notes show that the coordinator made enquiries of Dr Gayed's solicitor to find out the names of his employers.[178]

518. A query was raised within the Medical Board whether it was required to notify the (then) Department of Health to cover the possibility of possible locum work being undertaken by Dr Gayed in another area health service.[179] The Medical Board took the view that only relevant (employer) area health services had to be notified, as the Department of Health and other area health services employing Dr Gayed could check the Medical Board's online register. The inquiry has been informed that there is no necessity, currently, for the Ministry of Health to be informed when conditions are imposed.

519. Nevertheless, the Medical Board sent to the Director-General of the Department of Health a copy of the correspondence to the chief executive of Hunter New England Area Health Service advising of the conditions imposed on Dr Gayed's registration.

520. The legislation permitted the Medical Board to provide a copy of the decision of the Performance Review Panel to such persons as the Medical Board thought fit.[180] Similarly, under the current law, a Performance Review Panel must give a copy of its decision to the relevant doctor and the Medical Council, and the Medical Council may provide it to any person it thinks fit.[181]

521. In my view, the Medical Board should have provided the report of the Performance Review Panel to Hunter New England Area Health Service. It would have been relevant for Manning Base Hospital to have information about the reason for the imposition of conditions as set out in the report

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[177] Letters from Medical Board dated 1 July 2008 (Medical Council NSW files, tabs 139–142, 144).
[178] Medical Board File note dated 1 July 2008 (Medical Council NSW files, tab 143).
[179] Medical Board File note dated 3 July 2008 Medical Council NSW files, tab 145.
[180] *Medical Practice Act 1992* (NSW), s 86P.
[181] *Health Practitioner Regulation National Law* (NSW), s 156E.

of the Performance Review Panel. Without knowing the reasons, it would be difficult to understand the extent of the measures it needed to put in place and to know whether there was a clear indication that Dr Gayed had acted in contravention of the conditions imposed by the Medical Board.

23. Monitoring of Dr Gayed by the Medical Council

522. The correspondence to Dr Gayed's employers by the Medical Board following the Performance Review Panel indicated that a monitoring officer within the Medical Board was to monitor Dr Gayed's compliance with the conditions on his registration imposed by the Performance Review Panel.

523. The Medical Board was required to monitor compliance with any orders made by a Performance Review Panel and from time to time evaluate the effectiveness of those orders in improving the professional performance of the registered medical practitioner concerned to a standard that is commensurate with other practitioners of an equivalent level of training or experience.[182]

524. The Medical Board sought to monitor compliance with the orders made by the Performance Review Panel primarily by monitoring Medicare data relating to Dr Gayed and seeking from Dr Gayed his surgical log and confirmation from him that he was compliant with the conditions on his registration. The Medical Board also received from Dr Gayed's mentor, Professor B, reports every three months over a 12-month period following the Performance Review Panel.

23.1 Monitoring through Medicare data

525. On 4 July 2008 Dr Gayed telephoned the Medical Board to raise an issue—namely, that some procedures he was allowed to do were covered in Medicare under the same item number as procedures he was not permitted to undertake. Dr Gayed said that he would be able to provide the Medical Board with his own clinical notes about procedures to allow his compliance to be monitored.[183] He said that he was in the process of

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[182] *Medical Practice Act 1992* (NSW) s 86R; same provision now in *Health Practitioner Regulation National Law* (NSW) s 157.
[183] Medical Council NSW files, tab 151.

seeking a suitable mentor.[184] The Medical Board provided to Dr Gayed the Guidelines for Mentors policy.[185]

526. On 8 July 2008 the CEO of Mayo Private Hospital, to whom the Medical Board had notified the new conditions, sought clarification of the condition limiting the type of surgery and asked for confirmation that the Medical Board would monitor compliance and inform the hospital in the event of problems. He also expressed concern to the Medical Board that he had had a 40-minute conversation with Dr Gayed since the Performance Review Panel's decision but Dr Gayed had not mentioned the hearing or the fact that conditions had been imposed on his registration.[186]

527. The CEO's concerns were valid. However, Dr Gayed's obligation under s 99(2) of the *Health Services Act 1997* to report any finding of unsatisfactory professional conduct, within seven days of receiving notice of the finding, applied with respect to any public health organisations at which he was a visiting practitioner. It did not require him to inform private hospitals of such findings. The law is unchanged in this regard.

528. In my view, it should be changed. The protection of the public cannot be dependent on whether patients attend a public or private facility, particularly in circumstances where the practitioner concerned has restrictions on his practice based on his professional performance.

529. Mayo Private Hospital may have had its own policies requiring Dr Gayed to disclose the finding of the Performance Review Panel to it, but my inquiry does not encompass this issue.

530. Dr V of Manning Base Hospital also sought clarification on the scope of the condition regarding surgical procedures—in particular, the scope of complicated laparoscopy, moderate/severe endometriosis and advanced urogynaecology.

531. The issue having been raised, the monitoring officer (Medical Council Officer B) sought guidance from the Medical Director at the Medical Board, Dr P, about how to monitor Dr Gayed's types of surgery, noting

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[184] Letter from Dr Gayed to Medical Board dated 4 July 2008 (Medical Council NSW files, tab 148).
[185] Email to Dr Gayed dated 4 July 2008 with attached guidelines (Medical Council NSW files, tab 149).
[186] Medical Board filed note dated 8 July 2008; Email from Mayo Private Hospital dated 8 July 2008 (Medical Council NSW files, tabs 152 and 153).

that Dr Gayed could provide records on any procedures about which clarification was needed.

532. The Medical Board replied to the employers that Dr Gayed was aware of the procedures he could and could not perform and that there was no requirement for his employer to have patients assessed by another specialist to ascertain whether or not he was acting in compliance with the condition. It said the Medical Board could provide advice if there was a need for clarification with respect to any specific procedure.

533. On 23 July 2008 and again on 28 August 2008, the Medical Board wrote to the chief executive of the Hunter New England Area Health Service to state that assessing the level of complexity is Dr Gayed's responsibility. Each letter stated that:[187]

> Please note that Dr Gayed is aware of the procedures he may / may not perform. It was with Dr Gayed's agreement that this Practice Condition was composed, with the aim of restricting him from carrying out more complicated surgical procedures. Assessing the level of complexity in any particular case is a matter for Dr Gayed's professional judgement and solely his responsibility. There is no requirement for his employer to have patients assessed by another specialist to ascertain whether or not Dr Gayed is acting in compliance with the condition.
>
> Notwithstanding the above, the Board would appreciate your advice if there is clear indication that Dr Gayed has acted in contravention of this condition.

534. On 23 July 2008 the Medical Board confirmed with Dr Gayed in writing that he should maintain a written record of all procedures that he performed so as to allow the Board to compare Medicare data with his surgical log. It reminded him that it was his responsibility as a doctor to ensure proper compliance with the conditions of registration and that a failure to comply may lead to a complaint to the HCCC and a hearing before the Medical Tribunal.

535. On 11 August 2008 the Medical Board wrote to Medicare Australia to seek a list of all services provided by Dr Gayed from 25 June 2008 to 31

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[187] Letter from Medical Council Officer B, Monitoring Officer, New South Wales Medical Board, to Chief Executive, Hunter/New England Area Health Service, 23 July 2008 (HNELHD documents, tab 5.1); Letter from Medical Council Officer B, Monitoring Officer, New South Wales Medical Board to Chief Executive, Hunter/ New England Area Health Service, 28 August 2008 (HNELHD documents, tab 4.b.18)

July 2008. On 17 September 2008 the Medical Board sought from Dr Gayed a copy of his surgical log to 31 August 2008.[188]

536. The Medical Board made requests to Medicare in three-monthly intervals and requests to Dr Gayed for his surgical log.[189] The records indicate that the Medical Board received data provided by Medicare.[190] For most three-monthly intervals a Medical Board employee made a file note confirming that the Medicare data had been reviewed and there were no anomalies. For some periods, there is no file note to indicate that Dr Gayed's compliance was checked, but the Medicare data was nevertheless received.[191]

537. In 2008, an assistant at the Medical Board raised with the Medical Director (Dr P) 19 services listed in that Medicare report which she suspected he was prohibited from performing. Dr P reviewed the data and considered them to be permitted procedures. Similar queries were raised and resolved (internally in the Medical Board) from time to time in 2010 and 2011.[192]

538. On other occasions the Medical Board wrote to Dr Gayed about procedures. On 10 March 2009 a Medical Board staff member raised an issue whether Dr Gayed was prohibited from conducting some of the surgeries disclosed in the Medicare records as having been undertaken by him. On 9 April 2009 the Medical Board wrote to Dr Gayed to inform him that, according to Medicare data, on 17 October 2008 he had performed a complicated operative laparoscopy which was prohibited by condition 2 on his registration.

539. Dr Gayed replied to the Medical Board's letter to the effect that the item number also covered surgery for removal of the tube for ectopic pregnancy, which he was entitled to do and was required for that patient.

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[188] Letter to Medicare dated 13 October 2008 (Medical Council NSW files, tab 180).
[189] Letters to Medicare from NSW Medical Board (Medical Council NSW files, tabs 187, 196, 219, 224, 235, 241, 250, 252, 256, 262, 267, 270, 275, 278, 287, 300, 301, 315 and 328).
[190] NSW Medical Board/Council file notes (Medical Council NSW files, tabs 198, 211, 226, 237, 243, 248, 249, 254, 255, 259, 264, 269, 272, 277, 303 and 304).
[191] There is no file note indicating it reviewed in 2010 the data at tab 250 or in 2012 the data at tab 279, or tab 315 and 402. In late 2017 data was reviewed for the period 1 February 2015 to 31 January 2017 and there were no anomalies. There was monitoring of the surgeries done after the log conditions were imposed on 7 April 2016.
[192] Letter to Medicare dated 13 October 2008 (Medical Council NSW files, tab 180); Medical Council file notes and internal emails (Medical Council NSW files tabs 237, 238, 249, 254, 258 and 289).

The Medical Board accepted his response. The same issue arose in March 2012. The Medical Board sought and accepted Dr Gayed's assurance that the Medicare item number covered the treatment he provided, which fell within his surgical condition.[193]

23.2 Observations on monitoring of Medicare data

540. Medical practitioners performing surgery in public hospitals do not bill Medicare for procedures they perform with respect to public patients in that setting; therefore, review of Medicare data will only disclose surgical procedures performed in private hospitals or on private patients.

541. To monitor Dr Gayed's compliance with the conditions restricting his surgical practice, the Medical Board would have had to obtain information from the public hospitals where he worked. Following his resignation from Mona Vale Hospital and following the Performance Review Panel, the only public health organisation to appoint or employ Dr Gayed was the Hunter New England Area Health Service at Manning Base Hospital.

542. Dr Gayed's mentor, Professor B, informed the Medical Board that he was receiving detailed information as to Dr Gayed's surgical work and that this complied with the conditions on his registration. The 'detailed information' was not provided to the Medical Board, and the Medical Board did not request it.

543. There is no evidence that the Medical Board sought or obtained from the Hunter New England Area Health Service information as to Dr Gayed's compliance with the conditions on his registration insofar as the conditions limited the type of surgery he could perform on public patients.

23.3 Mentoring

544. Following the Performance Review Panel, Professor B agreed to act as Dr Gayed's mentor. In case of emergency, Dr RR would take over.

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[193] Letter to Dr Gayed dated 22 March 2012; emails from and to Dr Gayed dated 27 and 28 March 2012 (Medical Council NSW files, tabs 273 and 274).

545. On 24 July 2008 the Medical Board wrote to Professor B and Dr RR about their agreement to mentor Dr Gayed (Dr RR in the event of emergency). Both doctors signed an agreement to act as mentors.[194]

546. On 8 August 2008 a delegate of the Performance Committee approved the nominations.

547. On 2 September 2008 Professor B provided an initial letter setting out the plan for his meetings and correspondence with Dr Gayed.

548. On 4 December 2008 Professor B reported on his mentor meetings with Dr Gayed.[195] He had not identified any issues. He said he had received a detailed list of all confinements and operative procedures carried out by Dr Gayed over the previous three months (from where he did not say) and that 'the data confirms that Dr Gayed has observed the restrictions on his operative work as directed by the board'. Professor B said that he had also spoken to the senior midwife at Manning Base Hospital, who was satisfied with Dr Gayed's performance and clinical outcomes over the previous three months. Professor Bsaid that Dr Gayed had been fully cooperative with the mentoring process and very meticulous in keeping records and regular contact with him.

549. On 5 March 2009 Professor B informed the Medical Board that Dr Gayed had been 'meticulous' in carrying out the requirements of the Board over the previous six months. Professor B said that he had received a detailed dossier of his operative work over that period and also had discussions with Dr Gayed every two weeks. Professor B said he had also confirmed with Dr V (Manager Clinical Services) and the Senior Midwife at Manning Base Hospital that there had been no problems over the previous three months.[196] He said Dr RR would be replaced by Professor C as back-up mentor due to Dr RR's change of employment.

550. The Medical Board sought Professor C's agreement to this course and curriculum vitae, which he provided.[197] He was approved as mentor.

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[194] Facsimile from Professor B dated 29 July 2008 and facsimile from Dr RR dated 5 August 2008 (Medical Council NSW files, tabs 168 and 169).

[195] Letter from Professor B dated 4 December 2008 (Medical Council NSW files , tab 186). [196] Letter from Professor B dated 5 March 2009 (Medical Council NSW files, tab 192).

[197] Facsimile from Professor C dated 14 June 2009 (Medical Council NSW files, tab 202).

551. On 31 May 2009 Professor B reported to the Medical Board that there had been no problems between March and May.[198] He said that he had kept in touch with Dr V at Manning Base Hospital, 'who provides me with feedback at the local level and who as you know has recently provided Dr Gayed with a glowing reference—which is entirely consistent with the feedback he has given to me'. He said that he would be overseas in August and September and would review the logbook of Dr Gayed's work on his return. He said that he could report in July before he left for overseas.

552. On 17 July 2009 Professor B advised the Medical Board that the mentoring relationship had been of benefit to Dr Gayed and had achieved its objectives of providing education support and retraining to the doctor and protecting the public. He recommended ceasing the mentoring relationship and the removal of condition 2 relating to restrictions on his surgical practice.[199] Professor B said:

> It is relevant that the limitations on his operative work were not directly related to the laparoscopic entry complications which initially caused concern, but arose from concerns which the assessors had following an onsite review. The Board has extensive documentation regarding that assessment, which unfortunately was of very short duration – and my comments on it to the Board. Having spent many hours with Dr Gayed as a consultant as his hospital I have reconfirmed the view that the concerns raised at that assessment were not justified – and this has been further confirmed by continuing observation and surveillance through the mentoring programme.

553. Professor B said the restriction on laparoscopy for moderate or severe endometriosis was difficult to document and interpret and that it was 'anomalous' and should be removed. He said that Dr Gayed had spent a great deal of time upgrading his ultrasound skills as well as investing in a very sophisticated ultrasound machine. Professor B addressed each of the other restrictions on Dr Gayed's practice. He said he believed that Dr Gayed had done everything required of him by the Medical Board.

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[198] Letter from Professor B dated 31 May 2009 (Medical Council NSW files, tab 199). [199] Letter from Professor B dated 7 July 0209 (Medical Council NSW files, tab 214).

554. This was considered by the Medical Board in August 2009 (outlined below). I make observations about the mentoring below.

23.4 Complaint by patient M

555. On 6 July 2009 a patient, M, contacted the Medical Board by email concerning Dr Gayed. He had performed a laparoscopy, hysteroscopy and D&C for endometriosis on her at Manning Base Hospital and she had since obtained information that suggested the conditions of his registration prevented him from performing a laparoscopy for moderate to severe endometriosis.[200]

556. On 7 July 2009 the Medical Board wrote to Patient M to indicate that it was required to consult with the HCCC on the appropriate course of action for all complaints received. This occurred on 16 July 2009. The result of the consultation was that the complaint was referred to the Medical Board for further consideration.[201]

557. The Medical Board sought Patient M's consent to obtaining information relating to her medical history and treatment, which she provided. It sought a response from Dr Gayed. On 4 August 2009 Dr Gayed wrote to the Medical Board and attached relevant correspondence and clinical records relating to the patient.

558. On 25 August 2009 the Performance Committee considered the complaint and Dr Gayed's response. It considered that Dr Gayed was not in breach of his conditions (as to the type of surgery), as the patient was treated laparoscopically for mild endometriosis. It resolved that there be no further action.

559. On 3 September 2009 the Medical Board wrote to the patient and advised her that it had considered her complaint and Dr Gayed's response and decided that the matter did not raise issues requiring action by the Medical Board. The file was closed.

24. Removal of mentoring condition on registration

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[200] Email from patient dated 6 July 2009 (Medical Council NSW files, tab 204).
[201] HCCC Complaint Assessment sheet dated 16 July 2009 (Medical Council NSW files, tab 206).

560. At the meeting of 25 August 2009 the Performance Committee considered the question whether the mentoring and surgery conditions on Dr Gayed's registration should be removed. It considered Professor Hewson's submission in this regard and a letter from Dr Gayed seeking removal of conditions 1 and 2. Dr Gayed provided a reference from Dr V, Manager Clinical Services at Manning Base Hospital, dated 18 May 2009. That reference was in substantially similar terms to his reference in 2007.

561. The Performance Committee resolved that the requirements in relation to the mentoring condition were satisfied. In relation to the condition limiting the types of surgery Dr Gayed could perform, it resolved:

> Request for removal of Practice Condition 2 is denied. Dr Gayed is asked to consult with his medical defence organisation about an alternate, more acceptable form of words.
>
> Re-assessment will be considered after the Board receives this advice.

562. It considered (as noted in the minutes) that, if condition 2 was removed, Dr Gayed could recommence the relevant procedures without the Medical Board's knowledge. But it considered that it may be possible to state condition 2 as the procedures that he could do rather than as the ones he could not do.

563. On 9 September 2009 the Medical Board informed Dr Gayed of the committee's resolutions and confirmed that condition 1, relating to mentoring, was now 'completed/removed/expired'.

24.1 Observations on mentoring

564. In his evidence before the Performance Review Panel, Professor B did not agree with criticisms made by the performance assessors about Dr Gayed's surgical technique, including as to his use of the running suture, being too slow, his handling the needle during repair, his knot tying technique and his touching of the Filshie clip or their criticisms that Dr Gayed does too many procedures. He had expressed some criticism of Dr Gayed's practice, but his overall assessment was that his operative technique was within the normal range.[202]

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[202] Performance Review Panel report (Medical Council NSW files, tab 136, p 10).

565. Professor B's reports to the Medical Board on the mentoring undertaken varied as to the detail provided. Dr B has reviewed the reports and considers as follows:

> In his assessment Professor B observed Dr Gayed during 4 operating sessions covering approximately 17 hours of operating time and encompassing a wide range of surgical procedures. In his report Professor B provided a thorough assessment and critique of each procedure. At the conclusion of this period of observation Professor B was reassured in terms of Dr Gayed's surgical practice and found his operative technique to be within the normal range. On this basis it was reasonable that Professor B did not undertake further direct observation of Dr Gayed's operating during the mentorship.
>
> The mentor reports completed 3 monthly by Professor B are thoroughly completed and suggest that Professor B was diligent in his role as mentor. The format of the report is however generic and in terms of a possible process improvement, consideration could be given to generating a report template which specifically addresses the areas of performance concern which have been identified by the Medical Council.

566. I agree with Dr B and add that mentoring is likely to be more effective where it is tailored to the issues identified in the practitioner's clinical performance.

25. Further aspects of monitoring and further complaints

25.1 Criminal charge

567. On 10 February 2010 Dr Gayed was charged with indecent assault of a female staff member.[203] His medical defence solicitor informed the Medical Board of the charge.

568. on 26 February 2010 the Medical Board exercised its power under s 127C of the Medical Practice Act to require further information from Dr Gayed about the matter—namely, details of all charges against him arising out of his practice of medicine, including all court attendance notices and

[203] Facsimile from Avant dated 12 February 2010 (Medical Council NSW files, tab 227).

statements made to the police and details of any bail conditions, court dates and police contact details.

569. It was not until 30 September 2013 that the Medical Board followed up this request by telephoning Dr Gayed's solicitor. His solicitor said the matter had come before Taree Local Court on Monday, 2 May 2011, for trial and had been dismissed on the same day. The former employee's employment was terminated. She said that a response had been sent to the Medical Board at the time. In 2013 this was not on the Medical Board's file, so the Board requested a copy of it. Dr Gayed's solicitor forwarded to the Medical Board a copy of the completed Medical Board form (containing details of the charge and police contact et cetera) signed by Dr Gayed in 2010. The Medical Board asked for the solicitor's covering letter to the completed form from 2010. Avant indicated that, while it had the form, it did not have the covering letter, as Dr Gayed had sent the material directly to the Medical Council in 2010. In 2013, the Medical Council was not able to ascertain from its files whether it received the form and information in 2010.

570. It is still not possible to ascertain from the Medical Council files whether either Dr Gayed or his solicitor sent the form back to the Medical Board in 2010 as required. There is no record of it, or of any follow-up by the Medical Board to obtain the completed form. There is also no record of the Medical Board ascertaining whether he was convicted of the offence, which is concerning. A conviction for sexual misconduct in connection with Dr Gayed's practice of medicine would have been reportable conduct[204] or notifiable conduct if entered after 1 July 2010.[205] Further, his failure to response to the s 127C notice without reasonable excuse would have been an offence and unsatisfactory professional conduct.[206]

571. Dr Gayed was not convicted, but the Medical Council's records raise an issue regarding the adequacy of monitoring of the issue by the Medical Board. My inquiry cannot resolve this issue on the available records.

25.2 Complaint by patient N

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[204] *Medical Practice Act 1992* (NSW), s 71A.
[205] *Health Practitioner Regulation National Law* (NSW), s 140.
[206] *Medical Practice Act 1992* (NSW), s 36(1)(b).

572. On 24 May 2010 a patient, N, lodged a complaint online with the HCCC relating to treatment she received from Dr Gayed at Warringah Day Surgery.

573. Dr Gayed provided a written response to the complaint and supporting documentation to the HCCC.

574. The HCCC assessed the complaint, obtained an opinion from an Internal Medical Advisor[207] and recommended that it be discontinued, subject to the Medical Council's satisfaction with the response and treatment provided.[208] The Medical Council agreed on 29 July 2010.[209]

25.3 Ongoing monitoring by the Medical Board

575. On 11 August 2010, as part of a review of files, the Medical Council sought confirmation from Dr Gayed that he was compliant with all practice conditions on his registration.[210] On 17 August 2010 Dr Gayed advised by email that he was fully complying with the conditions.

576. On 26 August 2011 the Medical Council sought confirmation from Dr Gayed that he was compliant with all practice conditions on his registration.[211] On 5 September 2011 Dr Gayed advised by email that he was fully complying with the conditions. It sent the same letter and received a similar response in 2012.[212]

25.4 Complaint by patient N

577. On 8 July 2011 the HCCC received another complaint from a patient who had been treated by Dr Gayed in his private rooms at Brookvale Medical Centre. The HCCC assessed the complaint and consulted with the Medical Council. The HCCC obtained a response from Dr Gayed and recommended that the matter be discontinued. In September 2011 the HCCC and Medical Council resolved to discontinue the complaint, there being 'no concerns from IMA or Council delegate'.[213]

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[207] HCCC documents, tab 19.
[208] HCCC Assessment Brief dated 22 July 2010 (Medical Council NSW files, tab 240, p 2446).
[209] HCCC documents, tab 19.
[210] Letter from Medical Council to Dr Gayed dated 11 August 2010 (Medical Council NSW files, tab 244).
[211] Letter from Medical Council to Dr Gayed dated 26 August 2011 (Medical Council NSW files, tab 265).
[212] Letters from Medical Council to Dr Gayed (Medical Council NSW files, tabs 283 and 284).
[213] HCCC Complaints Assessment sheet dated 8 September 2011 (Medical Council NSW files, tab 261).

25.5 Mayo Private Hospital query

578. On 16 August 2012 the executive director of Mayo Private Hospital, contacted the Medical Council to seek advice as to whether a laparoscopy case listed for the following day was complicated. Dr Gayed had provided details to the hospital administration that it was not.[214] The Executive Director informed the Medical Board that the surgery was for a 13-year-old girl for removal of left ovarian cyst.

579. The hospital sent by fax to the Medical Council a letter from Dr Gayed in response to queries it had raised with Dr Gayed about the surgery. Dr Gayed's letter said, 'the surgery scheduled for tomorrow falls under the privileges I currently have and the voluntary restrictions I agreed to place on my surgical practice for the current time'.[215]

580. Dr Gayed's representations to Mayo Private Hospital were disingenuous as, needless to say, the restrictions on his surgical practice were not voluntary. The conditions on his registration imposed by the Performance Review Panel were stringent as to the types of surgery he could perform. In the Performance Review Panel hearing, Dr Gayed had opposed the imposition of conditions limiting the type of surgery he could undertake.

581. Dr A, who was at that time Deputy President of the Medical Council and Royal Australian and New Zealand College of Obstetrics and Gynaecologists nominee to the Council, confirmed that the surgery was not outside the scope of his conditions but raised concerns that based on the available information the cyst was likely to be physiological and the surgery did not appear to be indicated. The Medical Council suggested to the hospital that it put the Council's concerns regarding the indications for surgery to Dr Gayed. The Executive Director telephoned the Medical Council back some hours later to inform the Council that he had met with Dr Gayed and conveyed the concerns, but Dr Gayed was firm in his view that, because of persistent pain, the surgery was indicated. The hospital indicated its intention to allow Dr Gayed to proceed with the surgery.

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[214] Medical Council file note dated 18 September 2012 (Medical Council NSW files, tab 280).
[215] Facsimile from Dr Gayed to Mayo Private Hospital dated 16 August 2012 (Medical Council NSW files, tab 282).

582. There can be no criticism of the Medical Council in the way it handled this matter. The Medical Council offered its view that the conditions on Dr Gayed's registration allowed the surgery. But, having identified an issue as to whether the surgery was clinically indicated, this was a difficult position for the Medical Council. Whether the surgery was clinically justified was a different question from whether it fell within the scope of Dr Gayed's restrictions. It was Dr Gayed's responsibility to determine whether particular surgery was indicated and whether it fell within his conditions of registration. It was reasonable for Mayo Private Hospital to seek clarification from the Medical Council as to whether performance of the surgery would comply with the conditions and it was incumbent on the hospital, if it had concerns, to ask Dr Gayed to justify his compliance with the conditions on his registration.

26. Decision to undertake performance reassessment

583. On 28 August 2012 the Performance Committee resolved that an assessment was required in accordance with the direction of the Performance Review Panel's direction that Dr Gayed have his performance reassessed no sooner than six months after the Panel's decision. The Performance Committee resolved that it be a full reassessment, not limited to the areas found to be unsatisfactory by the Performance Review Panel.

584. It noted that Dr Gayed had been fully compliant with his conditions since they were imposed in 2008. He had successfully completed the mentoring condition, and yearly compliance letters had been written to him and Medicare data had been sought every three months to check compliance with his conditions.[216]

585. The Performance Review Panel made its direction on 25 June 2008. Fully four years passed before the Medical Council acted on the direction. There is no explanation in the documents provided as to the reason for such passage of such time. The Performance Committee was sufficiently concerned to direct a full reassessment and yet left unremarked in the documents that four years had passed. There had been three complaints

[216] Performance Committee minute dated 28 August 2012 (Medical Council NSW files, tab 285).

by patients since the Performance Review Panel; however, it is noted that all were discontinued.

586. On 17 September 2012 the Mayo Private Hospital (Executive Director) enquired as to whether Dr Gayed's conditions of registration had been removed, as they were no longer displayed on the online register. The Medical Board indicated that he still had conditions and that it would contact the Australian Health Practitioner Regulation Agency to see why they were not displayed. The Executive Director said that Dr Gayed had informed him that the conditions were voluntary and could be removed at any time. This, of course, was not correct.

27. Performance reassessment in 2013

587. The assessment was scheduled for 10 October 2013 at Manning Base Hospital and in Dr Gayed's rooms at 54 Commerce Street, Taree.

588. The Medical Board provided Dr Gayed with an unsigned copy of the assessor's report and provided an opportunity for him to comment on it.[217] It recommended that a Performance Review Panel be held.

589. Dr Gayed provided a lengthy submission on the report and submitted through his medical defence solicitor that, instead of proceeding to a Performance Review Panel, he be mentored on an ongoing basis.

590. On 25 February 2014 the assessors signed their report.[218]

591. The assessors considered that Dr Gayed's practice was unsatisfactory in the areas of surgical technique, communication with patients, patient examination, ultrasound examination, criticism of colleagues and clinical judgment. The performance reassessment concluded that 'Dr Gayed's surgical and clinical skills remain unsatisfactory' and that 'Dr Gayed's practice of ultrasound is inappropriate and unsatisfactory'.[219]

592. They recommended that a Performance Review Panel be convened to review the professional performance of Dr Gayed and that he undergo ophthalmological assessment on a regular basis. In my view, as outlined

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[217] Letter to Dr Gayed dated 18 February 203 (Medical Council NSW files, tab 292).
[218] Signed Performance Assessment report dated 25 February 2013 (Medical Council NSW files, tab 294).
[219] Medical Council of New South Wales, Performance Re-Assessment, Dr Emil Shawky Gayed, 10 October 2013 (HNELHD documents, tab 4.a.17, p 15).

earlier in my report, the fact that the requirement for ongoing ophthalmological assessment was removed following the initial performance assessment followed insufficient investigation.

593. The assessors also suggested that consideration be given to Dr Gayed:

- transferring all of his practice to Taree;
- investigating the possibility of sharing his operating list with another specialist obstetrician/gynaecologist or a more senior registrar; and
- restricting his practice of ultrasound to basic studies such as diagnosis of pregnancy, determination of foetal viability and determination of foetal position.

594. There is no evidence that consideration was given to any of these matters. None of them were put in place.

595. On 25 March 2014 the Performance Committee noted the assessors' report and the submission made on behalf of Dr Gayed. It resolved that a Performance Review Panel was required to conduct a performance review in relation to Dr Gayed.

27.1 Further complaint from patient O

596. On 12 November 2013 the HCCC received a complaint from patient O, who had been treated by Dr Gayed at Manning Base Hospital. The complaint involved a caesarean section two years before. Patient O had been advised by a doctor in Sydney that Dr Gayed had used undissolvable stitches, which now had to be surgically removed (and were causing her extreme pain).[220]

597. The HCCC consulted with the Medical Council about the complaint on 10 January 2014. The HCCC recommended that the matter be referred to the Medical Council, as it appeared that Dr Gayed had breached the conditions placed on his registration (by carrying out a hysterectomy on the patient's sister).

[220] HCCC material, tab 21.

598. The Medical Council was of the view that the complaint should be discontinued. It was satisfied that his conduct did not breach his conditions and his conduct was 'satisfactory under Performance assessment'. The HCCC accepted the Medical Council's view and on 30 January 2014 it informed the patient that it had discontinued the complaint.[221]

28. Second Performance Review Panel—2014

599. A Performance Review Panel was convened on 16 October 2014 at the Gladesville Hospital campus. Dr Gayed was accompanied by a lawyer.

600. Dr Gayed put forward a number of reports and other documents in support of his position. These included references from Dr V and other medical practitioners as well as references from patients.[222]

601. The Performance Review Panel heard evidence from Dr V, Dr SS and Dr TT, who gave evidence on behalf of Dr Gayed. Following the earlier performance reassessment, Dr Gayed's solicitor requested an assessment from a number of practitioners who were asked to observe Dr Gayed in practice and provide reports.

602. Dr V gave evidence that he had frequent contact with Dr Gayed at Manning Base Hospital and he spoke highly of Dr Gayed in his report and oral evidence before the Performance Review Panel. He referred to the Incident Management System at Manning Base Hospital. He said that he saw all such incident reports and that Dr Gayed did not have a high rate of complications compared with his peers. When asked if Dr Gayed had many unplanned returns to theatre, Dr V said that nothing stood out and that there were no discussions at morbidity & mortality meetings about Dr Gayed's patients. He said that there was one IIMS (incident report) involving a patient bleeding, but the matter was handled appropriately. There was also a complaint by nursing staff that he could not see well. However, according to Dr V, Dr Gayed has now addressed this issue.

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[221] HCCC material, tab 21.

[222] Letter from Avant dated 2 October 2014 (Medical Council NSW files, tab 309).

603. Dr SS spent three days observing Dr Gayed in May 2014 and he reported that in his opinion Dr Gayed's consultation and surgical skills were 'exemplary'. He gave oral evidence by telephone.

604. Dr TT had been asked to observe two operating sessions and to sit in Dr Gayed's consulting rooms with him for an afternoon. He considered that Dr Gayed's operative technique was very safe and his knowledge of pelvic anatomy was good. He 'would say that he is a safe surgeon in all that I saw him do'. His only criticism related to consultations: he said that Dr Gayed's accent made it difficult for some patients to understand him. He had a criticism about a hysterectomy during which Dr Gayed made an indentation in the top of the uterus but said he had picked it up. He said that he 'would be quite happy for his wife to consult Dr Gayed'.

605. Dr Gayed submitted that the performance reassessment was flawed because he had been stressed and the assessors were overburdened with too much information from his past assessments which prejudiced them.

606. In its report dated 15 December 2014, the Performance Review Panel said that it placed significant weight upon the assessments conducted by Dr SS and Dr TT and the evidence of Dr V (at [74]).[223] Dr V had worked with Dr Gayed for 10 years and the other two doctors had spent more time with Dr Gayed than the performance assessors. The Performance Review Panel noted the positive references from other medical practitioners and from patients.

607. The Performance Review Panel received and accepted a report from Dr Gayed's ophthalmologist, Dr UU, dated 4 August 2014 stating that he should have 'no problems driving or in any aspect of his professional career'.

608. The Performance Review Panel saw little utility in ordering a future performance assessment in light of the very positive reports of Dr SS and Dr TT. It said that it could not ignore the report of the performance assessors or the history of complaints. It noted that a number of complaints had been discontinued.

609. The Performance Review Panel found that Dr Gayed's professional performance 'is at present satisfactory and that in accordance with

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[223] Performance Review Panel report dated 15 December 2014 (Medical Council NSW files, tab 311, p 3742).

section 153 and 153A of the *Health Practitioner Regulation National Law* (NSW) the knowledge, skill or judgment possessed and applied by Dr Gayed in the practice of medicine is of the standard reasonably expected of a practitioner of an equivalent level of training or experience'.

610. However, in view of the report of the performance assessors, the Performance Review Panel considered that it was prudent to continue the conditions upon Dr Gayed's practice and noted that these conditions could be varied or removed altogether at a later date.

611. The Performance Review Panel recommended that the Medical Council alter the wording of condition 2 to better explain the definition of complicated laparoscopy (as 'Skill Level 4, 5 and 6 laparoscopic surgery (RANZCOG Guidelines for performing Advanced Operative Laparoscopy C-Trg 2)').

612. The Performance Review Panel directed that a copy of the decision be provided to Dr Gayed and the Medical Council (in accordance with s 156E(1)(a) and (b) of the *Health Practitioner Regulation National Law* (NSW)) and to his solicitor and that the Medical Council inform the assessors of the outcome.

613. On 16 December 2014, the Medical Council informed Dr Gayed of the Performance Review Panel's decision and that it would advise the Australian Health Practitioner Regulation Agency to remove the paragraph in his conditions relating to a performance reassessment on the basis that it was completed on 25 March 2014 when the Performance Committee considered the reassessment report.

614. The Medical Council provided a notice of information to be recorded on the National Register of practitioners which reflected the removal of the condition that his performance be reassessed.[224] (This complied with the obligation on the Performance Review Panel to give notice under s 176 of the *Health Practitioner Regulation National Law* (NSW)).

615. On 27 January 2015 the Medical Council's Performance Committee resolved that condition 2 be varied in the manner recommended by the Performance Review Panel in its decision and that the assessors be

[224] Email to AHPRA with attached notice of information (Medical Council NSW files, tab 313).

provided with the outcome of the Panel's decision as recommended by the Panel.

616. The Medical Council sent to the Australian Health Practitioner Regulation Agency a notice of information reflecting the amendment to condition 2 to be recorded in the National Register.[225]

28.1 Notification to employers of variations to conditions

617. The Medical Council was permitted under the legislation to provide a copy of the Performance Review Panel's decision to any persons the Council or Panel thinks fit.[226]

618. The Performance Review Panel itself did not impose conditions. However, based on its recommendations, the Medical Council varied the conditions that had been imposed by the previous Performance Review Panel (in 2008) in two ways, as outlined above. It did this on the basis of its power to vary, amend or remove conditions on Dr Gayed's registration under condition 5 (which had been imposed by the Performance Review Panel in 2008).

619. Under the law in December 2014, a Performance Review Panel was required to give notice of any decision imposing or agreeing to impose conditions on a practitioner's registration to the National Board, being the Medical Board of Australia.[227] The Performance Review Panel did not refer to these provisions in its decision. However, as noted above, the Medical Council sent a notice to the National Board regarding the removal of the condition that his performance be reassessed.

620. The question is whether the Medical Council had an obligation to inform employers of the removal or variation of conditions.

621. It was the Medical Board of Australia that was required under the legislation to give notice to employers of action if it decided 'to take health, conduct or performance action against the registered health practitioner' or if it received notice from an adjudication body that it had decided 'to take health, conduct or performance action',[228] which

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[225] Email to AHPRA dated 11 August 2015 (Medical Council NSW files, tab 319).
[226] *Health Practitioner Regulation National Law* (NSW), s 156E.
[227] *Health Practitioner Regulation National Law* (NSW), s 176.
[228] *Health Practitioner Regulation National Law* (NSW), s 176B.

included action taken at the end of a Performance Review Panel (see definition of 'health, conduct or performance action' in s 5 of the *Health Practitioner Regulation National Law* (NSW)). An adjudication body included the Medical Council and a Performance Review Panel.[229] The Medical Council does not appear to have informed the National Board that it varied the conditions at the end of the Performance Review Panel proceedings. It told the Australian Health Practitioner Regulation Agency in order to have the National Register amended.

622. But also note the term 'employer' was not defined in s 5 or Schedule 7 of the National Law. Ordinarily, it would not include a hospital that had appointed him under contract as a visiting medical practitioner.

623. From 1 November 2015 the legislation was amended to require the Medical Council itself to give written notice to an employer (defined to include a hospital at which a doctor is appointed under contract) of the imposition of conditions.[230]

624. Therefore, there appears to have been a gap in the legislation in the period between repeal of the Medical Practices Act and the relevant amendment of the National Law (which came into force on 1 November 2015),which meant that the Medical Council was not under an obligation to inform Dr Gayed's employer or hospitals at which he held appointments of the variation of the conditions made as a consequence of the Performance Review Panel proceedings. There can be no doubt, however, that the Medical Council should have notified relevant employers and public health organisations in any event.

29. Complaints to HCCC in 2015

625. On 5 March 2015 the HCCC received a complaint from a patient, GG, alleging poor care by Dr Gayed following a laparotomy at Manning Base Hospital.

626. The HCCC assessed the complaint and sought advice from its medical advisor (Internal Medical Advisor) which was not critical of Dr Gayed.[231] It

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[229] *Health Practitioner Regulation (Adoption of National Law) Act 2009* (NSW) s 6A.
[230] *Health Practitioner Regulation National Law* (NSW), s 176BA.
[231] HCCC Complaint Assessment sheet dated 29 May 2015 attaching internal medical advice dated 19 May 2015 (Medical Council NSW files, tab 318, p 3917).

recommended that the complaint be discontinued on 22 May 2015 and the Medical Council agreed on 28 May 2015.[232]

29.1 Further complaint by Patient M

627. On 17 November 2015 a patient, M, lodged a complaint with the HCCC relating to surgery for endometriosis that resulted in the severing of her ureter at Manning Base Hospital and emergency surgery being undertaken at John Hunter Hospital.[233]

628. On 23 November 2015 the HCCC advised the Medical Council of the complaint. The HCCC sought advice from its Internal Medical Advisor and Dr Gayed's response to the complaint.

629. On 4 February 2016 the Medical Council and the HCCC consulted and referred the matter for investigation. They noted that the Medical Council would consider action under s 150 of the National Law (to suspend).[234]

630. The HCCC investigated the complaint and on 30 November 2016 proposed to the Medical Council that the matters be referred to the Director of Proceedings under s 39(1)(a) of the *Health Care Complaints Act 1993* (for determination of whether to prosecute a complaint before a disciplinary body). It sought the Medical Council's advice.[235] As set out below, the Medical Board's Conduct Committee considered the matter, and the matter of Patient Q (see below), at a meeting on 13 December 2016, and it agreed with the HCCC's proposal to refer the matters for prosecution. The complaint was ultimately prosecuted before the New South Wales Civil and Administrative Tribunal in 2017.

29.2 Further complaint by Patient Q

631. On 2 November 2015 the HCCC received a complaint from a patient, Q, who underwent surgery by Dr Gayed at Manning Base Hospital. It was alleged that Dr Gayed sewed part of the patient's cervix and it was later

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[232] Email from HCCC dated 18 March 2015 attaching HCCC file notes, complaint by patient dated 3 March 2015 and medical records (Medical Council NSW files, tab 317); Assessment sheet (Medical Council NSW files, tab 318); HCCC material, tab 22.
[233] HCCC Complaint Assessment Sheet (Medical Council NSW files, tab 324).
[234] HCCC Complaint Assessment Sheet (Medical Council NSW files , tab 324).
[235] Letter from HCCC to Medical Council dated 30 November 2016 (Medical Council NSW files , tab 325).

discovered that he had completely sewn up her cervix. She had to undergo further surgery due to excessive bleeding.

632. On 6 November 2015 the HCCC advised the Medical Council of the complaint. The HCCC sought advice from its Internal Medical Advisor and Dr Gayed's response to the complaint.

633. On 4 February 2016 the Medical Council and the HCCC consulted regarding the complaint and referred it for investigation.[236] It was noted that the conduct involved was a significant departure, as the procedures undertaken by Dr Gayed (loop excision and cone biopsy) do not arrest cervical bleeding; rather, they are used as diagnostic procedures.

29.3 Consideration of s 150 action

634. On 9 February 2016 the Medical Council requested a consultation in relation to the course of action to be taken in relation to the two complaints made in November 2015 (regarding patients M and Q). The Medical Council asked Dr VV and Dr A to consider the appropriate action to be taken by the Medical Council, of which the following were available:

Option A: Convening proceedings to consider taking action pursuant to s 150 (to suspend registration or impose conditions considered appropriate);

Option B: No need to convene s 150 proceedings on the basis either that the triggering issue does not warrant consideration of urgent interim action or it is sufficient that both complaints are already under investigation by the HCCC and the current conditions provide sufficient protection;

Option C: Consideration of course of action to be referred to full Conduct Committee.

635. On 10 February 2016 Dr VV and Dr A conferred and agreed that option B was appropriate.[237] Dr VV expressed the view that neither case

[236] HCCC Complaint Assessment Sheet (Medical Council NSW files, tab 327).
[237] Email from Dr A dated 10 February 2016 (Medical Council NSW files, tab 330).

appeared to be in breach of existing conditions or warranted urgent interim action through s 150 proceedings.[238]

29.3.1 Observations about decision

636. In Dr B's view this was a justifiable decision in that it was reasonable to await the outcome of the HCCC review before determining what further action would be appropriate.

637. These two cases were clearly serious with poor outcomes for the patients. However, each was under investigation, there were conditions on Dr Gayed's registration and the two complaints did not involve a breach of any of those conditions. The question was whether 'urgent' action was warranted.

638. In my view, this was a difficult decision, about which reasonable minds might differ. I am conscious to avoid 'hindsight' bias and therefore judge Dr Gayed's conduct on these two occasions by the information now available. For these reasons, and on balance, I am not critical of the decision not to hold a hearing pursuant to s.150.

29.4 Complaint by Patient R

639. On 26 February 2016 the HCCC received a complaint from a patient, R, relating to treatment she received from Dr Gayed at Manning Base Hospital. She wished to know whether Dr Gayed had breached the conditions on his registration in performing a laparotomy on her for endometriosis in November 2014.

640. The HCCC assessed the complaint. It sought Dr Gayed's response, records from Manning Base Hospital and Dr Gayed. The advice provided to the HCCC was that Dr Gayed did not contravene his conditions in performing the procedure.[239]

641. Patient R had previously made a complaint to the HCCC about Dr Gayed following a stillbirth at 20 weeks, three days. On 4 May 2016 Patient R lodged an amended complaint regarding that matter. The HCCC sought a response

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[238] Complaint from Patient R dated 26 February 2016 (Medical Council NSW files, tab 333). [239] HCCC file note (Medical Council NSW files , tab 334, p 420).

from Dr Gayed and its Internal Medical Advisor on the case.[240] The peer who reviewed the case was not critical of Dr Gayed's management of Patient R during the miscarriage, as no treatment could have halted the delivery.[241] On that basis, on 1 August 2016 the HCCC recommended that the complaint be discontinued. The HCCC and the Medical Council consulted on 11 August 2016 and, as a result, the matter was discontinued.[242]

642. Dr B reviewed this complaint for the purposes of this inquiry. He agrees that there was no departure from acceptable standard of care with respect to the care provided to Patient R by Dr Gayed during her 2016 stillbirth.

30. Notification by Hunter New England Local Health District

643. On 24 February 2016 the Chief Executive of Hunter New England Local Health District notified the Medical Council and the HCCC that it was investigating a concern relating to Dr Gayed based on his treatment of six patients (S, T, U, V, W and HH) and had suspended him from Manning Base Hospital.[243] The letter recommended that the Medical Council impose restrictions on Dr Gayed to minimise risks to patient safety pending the completion of the investigation.[244] As outlined above, restrictions were imposed with effect from 7 April 2016 following s 150 proceedings on 1 April 2016.

644. The letter outlined the allegations that the skill, judgment and care he exercised in the practice of obstetrics and gynaecology were significantly below the standard reasonably expected of a practitioner of an equivalent level of training and experience.

645. On 4 March 2016 the Medical Council advised Hunter New England Local Health District that it would meet with the HCCC to decide on the outcome of the notification.

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[240] Internal Medical Advice (Medical Council NSW files, tab 334, p 4789).

[241] Internal Medical Advice (Medical Council NSW files , tab 334, p 4783).

[242] HCCC Complaint assessment sheet with attachments (Medical Council NSW files, tab 334).

[243] Letter from Hunter New England Local Health District dated 24 February 2016 (Medical Council NSW files, tab 335).

[244] Letter from the Chief Executive, Hunter New England Local Health District, to the Medical Council of NSW, 24 February 2016 (HNELHD documents, tab 4.a.38).

646. In the following days, the Medical Council contacted Hunter New England Local Health District to seek further documentation.[245] The Director Clinical Governance at the Hunter New England Local Health District advised the Medical Council that Dr Gayed had resigned from the local health district and had said that he would retire. The Hunter New England Local Health District provided to the Medical Council medical records relating to the six patients and indicated that it would provide its investigation report as soon as possible.

647. On 7 March 2016 the Medical Council referred the matter to Medical Council members Dr A and Dr VV for consideration as to the appropriate action to be taken in relation to the Hunter New England Local Health District's notification (a 'consultation').[246]

648. Dr A and Dr VV were provided with the letter from the Chief Executive of Hunter New England Local Health District, to the Medical Council dated 24 February 2016, which provided a very brief summary of the six cases under investigation. They were also provided with the same information which was provided for their review of Dr Gayed conducted on 10 February 2016.

649. Both recommended option A—namely, an urgent hearing under s 150 of the National Law to consider whether Dr Gayed should be suspended from practice or have additional conditions imposed on his practice.

650. On 9 March 2016 Dr Gayed notified the Medical Board of his resignation from Hunter New England Local Health District and suspension.

651. On 17 March 2016 the Medical Council consulted with the HCCC. They determined to refer the notification by Hunter New England Local Health District to the HCCC for investigation.[247] At the end of the investigation, on 28 March 2017, the HCCC proposed to the Medical Council that the matter be referred to the Director of Proceedings under s 39(1)(a) of the Health Care Complaints Act.

652. On 29 March 2016 the Medical Council issued a notice to Dr Gayed to require him to provide the names of all his employers / places of work.

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[245] File note dated 8 March 2016 (Medical Council NSW files, tab 336).
[246] Email to Medical Council members dated 7 March 2016 (Medical Council NSW files, tab 343).
[247] HCCC Complaint Assessment Sheet (Medical Council NSW files, tab 340).

This he did on 1 April 2016. He had resigned from Manning Base Hospital and was working at Mayo Private Hospital, Taree, and Warringah Day Surgery in Sydney.

653. The records indicate that the Medical Council did not notify those private health facilities of Dr Gayed's suspension from the Hunter New England Local Health District. The legislation did not require it. Section 176BA of the National Law requires the Medical Council to notify each employer or accreditor of the practitioner of a decision to impose or alter or remove conditions on registration. However, a suspension from a public health organisation does not give rise to any legal duty on the part of the Medical Council to notify other employers. **I make a recommendation** about this at the end of this report.

654. On 29 March 2016 the Hunter New England Local Health District sent to the Medical Council a draft report relating to its review of the matters of concern. The review team consisted of the Acting Director of Clinical Services, the Acting General Manager of Manning Base Hospital, the Director Obstetrics and Gynaecology, the Human Resources Manager and Area Director of Obstetrics and Gynaecology. The report was finalised and provided to the Medical Council on 7 April 2016.

655. The Hunter New England Local Health District's review team found that in a significant number of incidents (in respect of the six patients the subject of its notification to the HCCC and others) Dr Gayed's performance was below the standard reasonably expected of a fellow of the Royal Australian and New Zealand College of Obstetricians and Gynaecologists. It determined that he exhibited unsatisfactory professional conduct in the care of the patients with regard to clinical performance below the standard reasonably expected of a fellow of Australian and New Zealand College of Obstetricians and Gynaecologists, behaviour in breach of the NSW Health Code of Conduct and behaviour in contravention of accepted guidelines for the care of patients.[248]

30.1.1 Observations about the s 150 decision

[248] Email from Hunter New England Local Health District dated 29 March 2016 attaching unsigned review report (Medical Council NSW files, vol 13, tab 338).

656. The further review by Dr A and Dr VV on 7 March 2016 was triggered by the suspension of Dr Gayed from Manning Rural Referral Hospital while the care he provided to six patients was investigated.

657. Dr A reasoned that on the basis of the new information provided there was 'broad clinical performance dysfunction that poses risk to patient safety, despite the conditions on his registration'.[249]

658. Dr VV reasoned that the new notification 'raises significant new issues for which, if substantiated, Dr Gayed's current conditions do not protect the public'.

659. Dr B considers that the six additional cases reported from Manning Base Hospital indicate a serious escalation of concerns by the executive at the hospital and, as such, it was appropriate for an urgent s 150 hearing to be arranged. I agree.

30.2 Complaint from patient X

660. On 18 March 2016 the HCCC received a complaint from a patient, X, who alleged that Dr Gayed did not wear gloves during a pap smear test (the location of the consultation is not stated).[250] The HCCC sought Dr Gayed's response. He denied not wearing gloves. The patient did not consent to the release of her medical records. On 2 June 2016 the HCCC and the Medical Council consulted and decided to discontinue the matter.[251]

30.3 Complaint from patients T and S

661. On 30 March 2016 the HCCC received a complaint from a patient, T, about her treatment by Dr Gayed at Manning Base Hospital. T consented to a hysterectomy but later decided to only have a fibroid removed, as she wished to keep her ovaries. Her requests to change written consent prior to surgery were not attended to and there were complications during and after surgery. The HCCC assessed the complaint and sought and received a response from Dr Gayed and relevant medical records. On

[249] Email from Dr A dated 7 March 2016 (Medical Council NSW files, tab 345). [250] HCCC Assessment brief (Medical Council NSW files, tab 348).
[251] HCCC Assessment brief (Medical Council NSW files, tab 348).

9 June 2016 the Medical Council and the HCCC consulted about the complaint and the matter was referred for investigation.[252]

662. On the same date the HCCC received a complaint from a patient, S (whose case had been notified by the Hunter New England Local Health District on 24 February 2016) about her treatment by Dr Gayed at Manning Base Hospital. The HCCC assessed the complaint and recommended that it be referred for investigation. On 7 July 2016 the Medical Council and the HCCC consulted with each other and the matter was referred for investigation.[253]

31. Suspension, s 150 proceedings and imposition of additional conditions

663. Following the notification from the Hunter New England Local Health District dated 24 February 2016, on 1 April 2016 the Medical Council held proceedings pursuant to s 150 of the National Law to determine whether action should be taken either to suspend or impose further conditions on Dr Gayed's registration.

664. This inquiry queried with the Medical Council the time taken to convene hearings under s 150 following a decision to do so. The Medical Council informed the inquiry that it has no formal policy regarding time frames for s 150 hearings. Since 7 October 2014, however, an internal business key performance indicator seeks to have hearings scheduled within 13 days of a decision to take urgent action. A practitioner would usually be given seven days' notice of a hearing to allow time to prepare. The Medical Council notes that the time frame depends on the immediacy of the potential risk to the public and/or the public interest. For example, it notes that s 150 hearings have been held, and action taken, 'on the papers' (that is, without proceeding to an oral hearing) where a practitioner has been arrested and charged with aggravated sexual assaults on patients.

665. The hearing in relation to Dr Gayed took place on 1 April 2016. Dr Gayed attended the hearing. He also provided a written statement in which he

[252] HCCC Complaint Assessment Sheet (Medical Council NSW files, tab 349).
[253] HCCC Complaint Assessment Sheet (Medical Council NSW files, tab 350).

addressed each of the six cases of concern and provided supporting material.

666. The central issue for the delegates was whether Dr Gayed posed a risk to the safety or health of the public that warranted action to be taken by the Medical Council and whether conditions could be imposed to adequately minimise that risk; and, if not, whether his registration should be suspended.[254]

667. In a report dated 11 May 2016, the delegates considered the complaints by Patients Q and M and the cases concerning patients referred to in the Hunter New England Local Health District notification—namely, S, T, U, V, W, HH, and the additional case of Patient R.

668. The delegates considered that Dr Gayed's performance in some matters indicated very poor insight and judgment, both pre and postoperatively. They said they were 'deeply disturbed' by his treatment of patient S. The incidents showed a tendency to operate without considering options for conservative treatment and to opt for surgery without proper assessment of the patient, the surgical resources available and Dr Gayed's own level of surgical ability. The delegates stated:

> A theme that emerged in these events was Dr Gayed's response to the demands of patients who did not wish to be moved to another hospital or who wished him to treat them surgically rather than conservatively. Dr Gayed described himself at times as 'emotionally trapped' and 'pressured'. He appeared unable to say 'no' after exercising his judgment. At times he appeared not to have exercised judgment at all.
>
> Another theme that emerged was what appears to be a breakdown in communication with the Director of Obstetrics and Gynaecology. Dr Gayed made much of this and we considered it unusual that the incidents concerning patients U, V, W and HH had reached the points they had, being the kinds of matters that are usually resolved by discussion between colleagues. This breakdown of communication cannot support the provision of safe and effective medical care.
>
> These incidents take place against a background of an unusually high number of complaints over many years and a number of performance interventions by this Council. Dr Gayed had also had his VMO rights suspended or he has relinquished them on a total of four occasions, all connected with adverse

[254] Report of delegates on proceedings under s 150 (Medical Council NSW files, tab 357).

events. This is a disturbing pattern. We are conscious that Dr Gayed intends to practise until he is 70.

We consider that Dr Gayed poses a threat to the health and safety of the public, particularly in respect of his poor judgment as to the need for surgery and his failure to seek and heed the advice of others.

669. The Medical Council (through the delegates) considered that a range of conditions substantially restricting his surgical work and compelling him to consult with a supervisor before undertaking surgery would serve to adequately minimise the risks it identified.

670. Thus, the Medical Council imposed conditions on Dr Gayed's registration with effect from 7 April 2016, additional to those already in effect. The delegates specified that the additional conditions would have effect until the complaints are disposed of or the conditions are removed by the Medical Council. The conditions were, in summary:[255]

- not to perform a laparotomy for any reason;
- to practise under category B supervision in accordance with the Medical Council's Compliance Policy-Supervision, except when consulting in his consulting rooms;
- not to perform any procedures in an operating theatre without prior written approval of his Medical Council-approved supervisor. The practitioner is to maintain and submit to the Medical Council on a monthly basis (within seven days of each calendar month) a log of all procedures undertaken or proposed to be undertaken in an operating theatre;
- to authorise and consent to any exchange of information between the Medical Council and Medicare Australia for monitoring compliance with these conditions;
- to authorise Medical Council to notify current and future places in Australia where he works as a medical practitioner of any issue arising in relation to compliance with the conditions;
- by no later than 14 days of receipt of the written reasons for this decision, to provide proof that he has given a copy of the conditions

[255] Report of delegates on proceedings under s 150 (Medical Council NSW files, tab 357).

to all employers, accreditors and the director of any hospital at which he has VMO rights; and

- to advise the Medical Council in writing at least seven days before changing the nature or place of his practice.

671. The Medical Council communicated the new conditions to the Australian Health Practitioner Regulation Agency so that the changes could be recorded on the public National Register of Medical Practitioners maintained by the Agency.

672. The Medical Council also forwarded to Dr Gayed and his solicitor, the Medical Council of New Zealand, the HCCC and Dr Gayed's employers—Mayo Private Hospital and Warringah Day Surgery—a notice of decision listing the new conditions imposed.[256]

673. From 1 November 2015 the legislation required that notice be given by the Medical Council to employers, including hospitals that accredit the practitioner to provide services, of any imposition or alteration or removal of conditions.[257]

674. On 8 April 2016, the Medical Council referred the matter to the HCCC for investigation as a complaint, as required under s 150D of the National Law.[258] On 28 April 2016 the Medical Council and the HCCC consulted and the matter was referred for investigation.[259]

31.1 Observations on the decision to impose new conditions

675. The question arises whether Dr Gayed's registration should have been suspended at this time.

676. I am most troubled by the case of Patient S, which involved clinical performance and a gross breach of ethical standards.

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[256] Letters from Medical Council to Dr Gayed and HCCC dated 13 May 2016 (Medical Council NSW files ,tabs 358 and 359); Letters from Medical Council to CEO of Mayo Private Hospital and to Warringah Day Surgery dated 21 April 2016 (Medical Council NSW files , tabs 366 and 367); and Letter to Dr Gayed dated 26 April 2016 (Medical Council NSW files, tab 368).

[257] *Health Practitioner Regulation National Law* (NSW), s 176BA

[258] Letter to HCCC dated 8 April 2016 (Medical Council NSW files, tab 362); HCCC Complaint Assessment Sheet (Medical Council NSW files , tab 369).

[259] HCCC Complaint Assessment Sheet (Medical Council NSW files , tab 369).

677. In respect of patient S, Dr Gayed paid for a termination, at 18 weeks, for a patient whose foetus he may have damaged when carrying out an endometrial ablation at 10 weeks. He carried out the procedure without formally establishing prior to the procedure whether the patient was pregnant or recognising the pregnancy at the time of the ablation. Further, he did not undertake clinical investigations to determine if the foetus was harmed during surgery. He failed to refer Patient S for specialist investigations, to explore alternatives such as adoption, or to refer Patient S for counselling at any stage. His conduct was in breach of the NSW Health Code of Conduct and raised serious boundary issues. In my view, this alone justified suspension. In combination with the other complaints and concerns, Dr Gayed should have been suspended.

32. Supervision requirement

678. The condition that Dr Gayed practice under category B supervision in accordance with the Medical Council's Compliance Policy—Supervision, except when consulting in his consulting rooms, required as follows:[260]

- that the supervisor monitor and provide indirect supervision (as opposed to 'direct supervision') and be readily available to provide advice, assistance or direct supervision as required;
- that the supervisor practise at the same location, although they may in exceptional circumstances be offsite while remaining contactable by phone to provide advice or assistance as required;
- fortnightly review meetings between the supervisor and the practitioner, with the nature and duration of review meetings being determined by the approved supervisor; and
- that the proposed supervisor be nominated within 21 days of imposition of conditions.

679. Of note, the supervision was not limited to supervising Dr Gayed's performing of surgery.

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[260] Medical Council, *Compliance Policy—Supervision* (Medical Council NSW files , tab 368).

680. Dr Gayed initially indicated to the Medical Council that he had difficulties finding a supervisor.[261] But on 20 May 2016 the Medical Council received a supervisor consent form signed by Dr WW, obstetrician gynaecologist, who had agreed to act as Dr Gayed's supervisor. Dr WW provided his curriculum vitae and a covering letter on 20 May 2016.[262] The Medical Council approved him in that role on 2 June 2016.[263] Dr WW sought clarification in relation to his role as supervisor.[264]

681. On 8 June 2016 the Medical Council wrote to Dr WW to outline the requirements of supervision. They sent him a template 'Supervision Report' to complete each quarter containing questions, including as to dates of review meetings, instances of non-compliance with the conditions, details of Dr Gayed's clinical performance and progress during the reporting period, and difficulties encountered.[265] The Medical Council informed Dr WW that Dr Gayed was not permitted to perform any procedures in an operating theatre without Dr WW's prior written approval. It asked Dr WW to discuss with Dr Gayed his clinical performance, patient follow-up and clinical outcomes at each review meeting.

682. On 9 April 2016 Dr Gayed's solicitor requested that the condition prohibiting Dr Gayed from carrying out laparotomies be amended to allow laparotomies in emergencies.[266] She raised a scenario where laparoscopy surgery turned into an emergency requiring a laparotomy.

683. The Medical Council delegates considered the request. They resolved not to amend the condition in the manner sought. They had considerable concern about Dr Gayed's ability to assess risk balanced against the risk to a patient if an emergency laparotomy was required. However, they noted that the condition did not prevent him from treating patients in rare life-threatening circumstances.[267] They said that he could discharge his responsibility to render urgent attention by making arrangements for

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[261] Email from Dr Gayed dated 2 May 2016 (Medical Council NSW files , tab 372).

[262] Letter from Dr WW (Medical Council NSW files , tab 374).

[263] Email from Person D to Medical Council Officer C dated 2 June 2016 (Medical Council NSW files , tab 376). [264] Email from Dr WW to Medical Council Officer C dated 15 June 2016 (Medical Council NSW files , tab 379).

[265] Letter to Dr WW from Medical Council (Medical Council NSW files , tab 378).

[266] Email from Council Legal Officer to Solicitor B dated 14 April 2016 (Medical Council NSW files , tab 364).

[267] Memorandum to Conduct Committee from Council Legal Officer dated 2 August 2016 (Medical Council NSW files, tab 382).

another practitioner to attend the patient within a reasonable time and recommended that he do so if possible.

684. Dr Gayed renewed his request for the condition to be amended. He forwarded to the Medical Council a letter he had received from the chief executive of Mayo Private Hospital dated 29 July 2016 in relation to the application from Dr WW for appointment as surgical assistant. The hospital noted the prohibition on laparotomies and, in effect, queried how the condition would work. It sought from Dr Gayed a management plan for circumstances where an escalation to laparotomy may be indicated for procedures Dr Gayed undertook.[268] Dr Gayed said that he intended to operate at Mayo Private Hospital from 9 September 2016 and every four weeks thereafter 'if agreed to'.

685. On 9 August 2016 the Conduct Committee of the Medical Council considered the request for the condition to be amended and resolved that:

    1. it be declined on the basis that:

        (a) the request had already been considered by s. 150 delegates; and

        (b) there were no new circumstances which would warrant amending the condition (such as being unable to comply with it);

    2. Dr Gayed be informed that he is to obtain his own advice as to how he can satisfy the issues raised in Dr H's letter of 29 July 2016; and

    3. that it be brought to Dr Gayed's and Dr WW's attention that Dr WW's appointment at Mayo Private Hospital must allow him to fulfil his role as a Category B Supervisor—that is, that he is able to take over from Dr Gayed as primary surgeon if and when required.

686. The Conduct Committee noted that the delegates expressly did not intend practice condition 6 to prevent Dr Gayed from treating patients in rare life-threatening circumstances or, by refraining from treatment, to engage in unsatisfactory professional conduct.[269]

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[268] Email from Dr Gayed to Medical Council Officer C dated 1 August 2016 (Medical Council NSW files , tab 381). [269] Medical Council Conduct Committee minutes (Medical Council NSW files, tab 383).

605. On 25 August 2016 and 2 September 2016 the Medical Council wrote to Dr Gayed and Dr WW respectively to raise an issue that Dr WW's accreditation at Mayo Private Hospital appeared to be limited to surgical assistant and did not appear to allow him to fulfil his role as a supervisor who could step in as surgeon if and when required.[270] The Medical Council asked Dr Gayed to attend to the issue and inform it by 6 September 2016 of the arrangement made to ensure Dr WW could fulfil his role as a Category B Supervisor.[271]

606. There is no indication in the material that Mayo Private Hospital ever approved the application for appointment of Dr WW as a surgical assistant or surgeon to enable him to supervise Dr Gayed or that such approval was ever communicated to the Medical Council.

607. The Medical Council's monitoring of the supervision arrangement was not adequate. I return to this below.

33. Referral to the Director of Proceedings

608. Following the HCCC's investigation of the three complaints (namely, from patients M and Q and the Hunter New England Local Health District), all matters were referred to the Director of Proceedings for the consideration of disciplinary action.

609. On 13 December 2016 the Conduct Committee noted that the complaints from patients M and Q had been investigated by the HCCC. It noted an expert's opinion that Dr Gayed's decisions and conduct were significantly below the standard reasonably expected of a practitioner of an equivalent level of training or experience and invited strong criticism in both cases.[272]

610. The Conduct Commission agreed with a proposal by the HCCC to refer the matters to the Director of Proceedings under s 39(1)(a) of the Health Care Complaints Act. It recommended a Professional Standards Committee as a suitable forum for prosecuting the complaint. On 20 December 2016 the Medical Council informed the HCCC of the Conduct Committee's resolution.

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[270] Letter from Medical Council to Dr WW (Medical Council NSW files, tab 385).

[271] Letter from Medical Council to Dr Gayed dated 25 August 2016 and to Dr WW dated 2 September 2016 (Medical Council NSW files, tabs 384 and 385).

[272] Medical Council Conduct Committee minutes of meeting (Medical Council NSW files, tab 386).

611. The HCCC formally informed the Medical Council that its investigation of the two patients' complaints had concluded by referring the matters to the Director of Proceedings for determination of whether a complaint should be prosecuted before a disciplinary body.

612. On 11 April 2017 the Conduct Committee noted the complaints from patients T and S, the Hunter New England Local Health District and the Medical Council concerning Dr Gayed's treatment of patients during their admissions at Manning Base Hospital. The Conduct Committee considered an expert's opinion that Dr Gayed's conduct in respect of each patient—namely, T, S and other patients referred to in the Hunter New England Local Health District's complaint, being V, W, HH and U—was significantly below the standard reasonably expected of a practitioner of an equivalent level of training or experience and invited strong criticism.

613. The Conduct Committee agreed with a proposal by the HCCC to refer those matters to the Director of Proceedings under s 39(1)(a) of the Health Care Complaints Act. It formed the view that the conduct of Dr Gayed had some elements of recklessness that might warrant prosecution in the New South Wales Civil and Administrative Tribunal. It expressly did not recommend a forum for prosecuting the complaint.[273]

614. The HCCC formally informed the Medical Council that its investigation of the two patients' and the Hunter New England Local Health District's complaints had concluded by referring the matters to the Director of Proceedings for determination of whether a complaint should be prosecuted before a disciplinary body.

33.1 Decision to refer for prosecution of a complaint

615. At this point in time, against the background of findings of unsatisfactory professional conduct, several suspensions from Visiting Medical Officer appointments over several years, suspension of his registration, and the new complaints, the probable outcome of any disciplinary proceedings was that Dr Gayed would be suspended or deregistered. The appropriate forum in which to prosecute a complaint against Dr Gayed was therefore the Medical Tribunal. A Professional Standards Committee has no power to order a suspension or direct a deregistration of a medical practitioner.

[273] Medical Council Conduct Committee minutes of meeting (Medical Council NSW files, tab 390).

Even if the Medical Tribunal were to determine not to suspend or deregister Dr Gayed, it would still have power to impose conditions. It should have been clear to the Medical Council that the complaint against Dr Gayed had to be prosecuted in the Medical Tribunal.

33.2 Complaint from patient BB

616. On 31 May 2017 the HCCC received a complaint from a patient, BB, alleging that Dr Gayed did not explain the complications that had occurred during caesarean section surgery. The HCCC assessed the complaint. It sought Dr Gayed's response and relevant medical records as well as a review from an Internal Medical Advisor, who was not critical of Dr Gayed's provision of treatment.[274] The HCCC recommended that the matter be discontinued.[275]

617. On 10 August 2017 the HCCC and the Medical Council consulted and agreed that the matter be discontinued.[276]

33.3 Complaint from patient Y

618. The HCCC continued to receive complaints from patients.

619. On 20 July 2017 the HCCC received a complaint from a patient, Y, who had received a total abdominal hysterectomy performed by Dr Gayed at Mayo Private Hospital. She complained that she now had severe nerve damage, a large hernia and prolapsed bowel and bladder.[277]

620. The HCCC assessed the complaint. It sought a response from Dr Gayed and a medical advice from a peer gynaecologist. On 1 December 2017 the HCCC recommended that the matter be referred to the Medical Council.[278]

621. On 25 January 2018 the Medical Council and the HCCC consulted about the matter and decided to take no further action, as Dr Gayed had since surrendered his registration and was no longer practising as a surgeon.[279]

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[274] HCCC Complaint Assessment Sheet (Medical Council NSW files, tab 393 p 6103).
[275] HCCC Complaint Assessment Sheet (Medical Council NSW files, tab 393).
[276] HCCC Complaint Assessment Sheet (Medical Council NSW files, tab 393).
[277] HCCC Assessment Brief (Medical Council NSW files, tab 396).
[278] HCCC Assessment Brief (Medical Council NSW files, tab 396).
[279] HCCC Complaint Assessment Sheet (Medical Council NSW files, tab 397); Letter from HCCC to Dr Gayed (Medical Council NSW files, tab 398)

I anticipate that if Dr Gayed should ever apply for re-registration as a medical practitioner in the future, this complaint would be reconsidered.

33.4 Determination for HCCC to prosecute

622. In a letter to the Medical Council on 1 September 2017, the Director of Proceedings proposed that the complaints be prosecuted together before the New South Wales Civil and Administrative Tribunal.[280]

623. On 12 September 2017 the Conduct Committee of the Medical Council agreed with the Director of Proceedings' proposal to refer the complaints together to the New South Wales Civil and Administrative Tribunal.[281]

624. The Director of Proceedings then made that determination. A complaint dated 11 November 2017 was lodged in the New South Wales Civil and Administrative Tribunal alleging that Dr Gayed was guilty of unsatisfactory professional conduct and/or professional misconduct, particularised by 13 complaints.[282]

34. Monitoring by the Medical Council of conditions imposed in April 2016

625. On 20 September 2017 the Medical Council reviewed data obtained from Medicare in relation to the period 1 February 2015 to 31 January 2017 to determine Dr Gayed's compliance with the conditions imposed in January 2015 and on 7 April 2016. It identified no anomalies.[283]

626. As at 28 September 2017, following the query about Dr WW's accreditation as merely 'surgical assistant' at that hospital, the Medical Council had not received from Dr Gayed any nomination of a supervisor at Warringah Day Surgery, and the identity of his supervisor at Mayo Private Hospital and Manning Base Hospital was unclear.

627. Further, Dr Gayed had not provided any monthly logs of his surgery to the Medical Council since the conditions were imposed in April 2016, and the Medical Council considered that his procedures were not being reviewed

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[280] Letter to Medical Council from HCCC dated 1 September 2017 (Medical Council NSW files, tab 399).
[281] Medical Council Conduct Committee minutes of meeting (Medical Council NSW files, tab 400).
[282] Complaint (Medical Council NSW files, tab 401).
[283] File note by Medical Council Officer D (Medical Council NSW files, tab 402).

by a supervisor as required. The Medical Council did not know if he was still performing any procedures in an operating theatre.

628. His employers at Warringah Day Surgery and Mayo Private Hospital had not returned to the Medical Council a signed copy of his registration conditions.[284]

629. These omissions were noted by a monitoring program officer at the Medical Council in a file note dated 28 September 2017.

630. The review of Medicare data for the period 1 February 2015 to 31 January 2017 carried out on 20 September 2017 indicated that any surgeries Dr Gayed had billed to Medicare were performed prior to the log conditions being imposed—that is, prior to 7 April 2016.[285]

631. It appears that no monitoring of Dr Gayed's compliance with the conditions imposed in April 2016 by the Medical Council took place prior to 28 September 2017.

632. There is no record of Dr WW returning to the Medical Council completed supervision reports, or review meeting reports, of the kind requested of him in the Medical Council's letter of 8 June 2016.

633. In short, the supervision does not appear to have been carried out and there was no monitoring by the Medical Council of the supervision condition to ascertain whether it was being complied with.

634. On 18 October 2017 the monitoring program officer wrote to Dr Gayed to seek his response by 1 November 2017 to a number of matters, including information as to whether Dr WW's accreditation at the Mayo Private Hospital had changed so as to allow him to properly supervise and whether he was in fact supervising Dr Gayed at Mayo Private Hospital and Manning Base Hospital; a nomination of supervisor for the Warringah Day Surgery and details of the supervision; a log of all procedures carried out by Dr Gayed from April 2016 until October 2017; and information as to whether his procedures had been reviewed by a supervisor.[286]

635. In a letter dated 29 October 2017 Dr Gayed informed the Medical Council that he had not performed any obstetric or gynaecological surgery since 8

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[284] File note by Medical Council Officer D (Medical Council NSW files, tab 403).
[285] File note dated 20 September 2017 (Medical Council NSW files, tab 402).
[286] Letter from Medical Council to Dr Gayed dated 18 October 2017 (Medical Council NSW files, tab 404).

February 2016. He said that his privileges had not been renewed at the Mayo Private Hospital, 'even when Dr WW was approved as a surgeon and not just as an assistant'. He said he had elected not to operate at Warringah Day Surgery. He had no intention to perform surgery any time in the future.[287] Dr Gayed did not provide logbooks for the period April 2016 to October 2017 as requested by the Medical Council.

636. The absence of any follow-up documentation suggests that the Medical Council accepted Dr Gayed's assurances at face value. The Medical Council may have taken the view that the fact Dr Gayed had not performed any surgery obviated the need for the supervisor to meet with him on a fortnightly basis and report to the Medical Council. However, the supervision was not limited to his surgery and therefore the Medical Council should have sought reports from Dr WW. Further, it was unsatisfactory in the circumstances for the Medical Council not to have known until 29 October 2017 whether Dr Gayed was performing procedures in an operating theatre.

34.1 Observations on monitoring by the Medical Council

637. Section 157 of the National Law requires that, following a performance review by a Performance Review Panel, the Medical Board is required to monitor compliance with any orders made by the Performance Review Panel *and* from time to time evaluate the effectiveness of those orders in improving the professional performance of the registered medical practitioner concerned to a standard that is commensurate with other practitioners of an equivalent level of training or experience.[288]

638. There is no evidence that this occurred with respect to Dr Gayed.

639. However, in order for there to be any real value in the Performance Review Panel process, compliance needs to be monitored and the effectiveness of the orders evaluated.

640. It appears that no monitoring of his compliance with the conditions imposed in April 2016 by the Medical Council took place prior to 28 September 2017.

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[287] Letter from Dr Gayed dated 29 October 2017 (Medical Council NSW files, tab 405).
[288] *Medical Practice Act 1992* (NSW) s 86R; *Health Practitioner Regulation National Law* (NSW) s 157.

35. Review of conditions / decision to suspend

641. On 25 October 2017 Dr Gayed's medical defence solicitor requested a review by the Medical Council of the conditions restricting his surgical practice. The solicitor submitted that the conditions should be removed and replaced by a single condition limiting him to performing minor surgical procedures in his rooms. The letter stated that he was not operating other than to perform minor procedures in his rooms and that a single condition would adequately minimise the risk identified in the s 150 decision.

642. That request was treated as an application for review under s 150A of the National Law of the decision of the Medical Council under s 150.[289]

643. A 150A review took place on 29 November 2017 before Dr XX and Dr YY. Dr Gayed attended the hearing by telephone and was assisted by his solicitor.

644. For the purposes of the review, Dr Gayed informed the Medical Council that he performed only two procedures under local anaesthetic in his rooms, being neonatal circumcisions and cervical diathermy for pre-cancer.[290]

645. On 30 November 2017 the Medical Council suspended Dr Gayed's registration with effect from 3 pm on 29 November 2017 under s 150(1)(a), as it was satisfied that suspension was appropriate for the protection of the health or safety of any person or because it was otherwise in the public interest.[291]

646. It is apparent that the decision to suspend Dr Gayed was made in the context of considering his application to review the conditions imposed. This raises a question whether he would have been suspended if he had not sought the review.

647. In their reasons delivered on 15 December 2017, the delegates noted that s 150A(4) of the National Law provides that the Medical Council may vary or set aside a decision only if satisfied there has been a change in the

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[289] Email from Senior Solicitor to Medical Council (Medical Council NSW files, tab 407).

[290] Email from Senior Solicitor to Medical Council dated 27 November 2017 (Medical Council NSW files, tab 408).

[291] Notice of suspension dated 30 November 2017 (Medical Council NSW files, tab 411).

practitioner's circumstances that justifies the variation or setting aside of the decision.[292]

648. They noted that, following the s 150 hearing in April 2016, further information concerning patient S and patient T was received by the Medical Council, and this raised serious issues in considering Dr Gayed's review.

649. Dr Gayed had failed to obtain consent for a hysterectomy and removal of patient T's ovaries. While the complaint raised a 'he said / she said' element, the complaint raised serious concerns about the robustness of Dr Gayed's consenting process.

650. The delegates considered the case of Patient S to be exploitative and that a payment Dr Gayed made to Patient S's partner appeared to be compensatory.

651. They also took into account that, since the imposition of conditions in April 2016, the Director of Proceedings had made a determination that the HCCC would prosecute Dr Gayed at a medical tribunal at the New South Wales Civil and Administrative Tribunal.

652. The delegates said that Dr Gayed's proposal to do minor procedures in his rooms did not allay their fears regarding his consenting procedures, and they took into account that circumcisions are carried out on vulnerable patients who require the utmost protection.

653. The delegates said that they would provide a copy of their decision to Dr Gayed, the HCCC, Dr Gayed's lawyers and the National Board under s 176 of the National Law.[293]

654. The Medical Council informed Dr Gayed of the decision and provided him and the HCCC with the reasons for decision. The Medical Council also provided a notice of suspension to the Royal Australian and New Zealand College of Obstetrics and Gynaecologists, the Medical Council of New Zealand, Pharmaceutical Services and Medicare Australia. There had been a change to s 176B of the National Law which affected the obligation of the National Board to give notice to employers and entities who engaged Dr Gayed, but this did not affect the Medical Council. The Medical Council

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[292] Written reasons for decision in s 150A proceedings (Medical Council NSW files, tab 412).
[293] Written reasons for decision (Medical Council NSW files, tab 412, p 6239).

appears to have been using its discretion in notifying the College and other entities.

655. On 11 December 2017 the Medical Council issued a notice to Dr Gayed requiring him to inform the Council of the names of all his employers or places of work. He provided information to the effect that he had ceased all forms of medical practice, that his last working day had been 24 November 2017 and that, in a letter dated 8 December 2017, he had informed the Australian Health Practitioner Regulation Agency of his decision to stop medical practice.

656. Having been informed of the suspension, on 8 January 2018 the HCCC assessed the matter as a notification relating to performance. On 16 January 2018 the Medical Council and the HCCC consulted about the matter and the decision to suspend Dr Gayed under s 150 was added to the other matters being prosecuted by the HCCC.[294]

35.1 Further complaint by patient Z

657. On 29 November 2017 the HCCC received a complaint from a patient, Z. She alleged that in 2013 she was left with permanent health issues as a result of a hysterectomy at Manning Base Hospital that resulted in a hernia which required surgery, leading to a full stomach reconstruction at Royal Prince Alfred Hospital two years later.[295]

658. On 9 February 2018 the patient raised concerns with the Medical Council that Dr Gayed was still working and advertising his availability to do procedures in Dee Why in Sydney.

659. The HCCC sought medical advice from a peer who was critical that Dr Gayed performed surgery (urgent repair of hernia with mesh) and advised that it was probably outside of his scope of practice.

660. The HCCC obtained a response from Dr Gayed through his solicitor.

661. The HCCC recommended that the complaint by Patient Z be referred to the Medical Council for its management. On 19 April 2018 the Medical Council was of the view the complaint should be discontinued, as Dr

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[294] HCCC Complaint Assessment Sheet (Medical Council NSW files, tab 420); File note Medical Council dated 23 January 2018 (Medical Council NSW files, tab 421).
[295] Complaint Form received by HCCC 29 November 2017 (Medical Council NSW files, tab 422).

Gayed was suspended and had surrendered his registration (see below).[296]

662. On 17 November 2017 a legal officer at the HCCC contacted the Principal Monitoring Officer of the Medical Council in relation to an email received from one of the patients the subject of the complaint to the New South Wales Civil and Administrative Tribunal (ES), who had learned that Dr Gayed was advertising.[297] The email has not been provided and there is no other evidence of which I am aware that he was advertising.

35.2 Further complaint from patient AA

663. On 23 November 2017 the HCCC received a complaint from a patient, AA, alleging that in 2010 Dr Gayed performed surgery to remove a cyst and she continued to suffer severe pain.

664. The HCCC's Internal Medical Advisor contacted a peer, who considered the treatment provided by Dr Gayed was logical, thoughtful and consistent with acceptable standards. The HCCC and the Medical Council reviewed the complaint, the response and the medical notes provided and they determined there was insufficient evidence to demonstrate that his knowledge, skill, judgment or care represented a significant departure from what would be reasonably expected of a medical practitioner of an equivalent level of training or experience.[298]

665. On 26 April 2018 the Medical Council and the HCCC consulted and agreed to take no further action.

666. On 2 May 2018 the HCCC wrote to Dr Gayed to advise that, after consultation with the Medical Council, it was decided to take no further action in relation to the complaint.

36. Dr Gayed surrenders registration

667. On 8 January 2018 Dr Gayed made a statutory declaration to the effect that on 8 December 2017 he had sent a letter to the Australian Health Practitioner Regulation Agency dated 30 November 2017 requesting that

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[296] HCCC material, tabs 34 and 35.
[297] Email from Medical Council Officer E dated 21 November 2017 (Medical Council NSW files, tab 410). [298] HCCC material, tab 33.

his name be removed from the National Register of Medical Practitioners. He declared that he had no intention of ever reapplying for registration. He said that he had made the decision to remove his name from the register for personal reasons.

668. On 17 January 2018 Dr Gayed's medical defence solicitor sent the statutory declaration to the Medical Council.[299] His solicitor requested that the Medical Council lift the suspension for the purpose of giving effect to Dr Gayed's surrender of his registration as a medical practitioner.

669. On 13 February 2018 the Conduct Committee considered the application for review made on behalf of Dr Gayed. It resolved to set aside the suspension under s 150A(3)(b) and made an order to impose a condition that he not practise medicine, pursuant to s 150(1)(b), because it considered it appropriate for the protection of the health and safety of the public and because it was satisfied that the action was otherwise in the public interest.

670. Accordingly, on 6 March 2018 the Medical Council lifted Dr Gayed's suspension under s 150A(3)(b) and imposed a condition on his registration that, with effect from 13 February 2018, he must not practise medicine until the matter was disposed of or the condition was removed by the Medical Council.[300]

671. On the same day, the Medical Council informed Dr Gayed of the decision of the Conduct Committee to impose the condition that he not practise medicine and of his right to seek review of the decision.

672. The Medical Council informed the Royal Australian and New Zealand College of Obstetrics and Gynaecologists, the Medical Council of New Zealand and Pharmaceutical Services of the imposition of the condition that he not practise medicine.

37. Health Care Complaints Commission proceedings

673. Dr Gayed's surrender of his medical registration did not preclude the HCCC from prosecuting the complaints.

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[299] Letter from Avant dated 17 January 2018 (Medical Council NSW files, tab 436).
[300] Notice of Imposition of Conditions dated 6 March 2018 (Medical Council NSW files, tab 437).

674. On 6 June 2018 the New South Wales Civil and Administrative Tribunal found Dr Gayed guilty of professional misconduct and made orders as follows:

1. The Respondent is guilty of professional misconduct;
2. If the Respondent were registered as a medical practitioner the Tribunal would have cancelled his registration;
3. The Respondent is disqualified from being registered as a medical practitioner for 3 years from today;
4. The National Medical Board is required to record the fact that the Tribunal would have cancelled the Respondent's registration in the National Register kept by the Board;
5. Publication or broadcast without the leave of the Tribunal of the name or other identifying information of any patient referred to in these proceedings is prohibited; and
6. The issue of costs is reserved.

38. Other matters

38.1 The Public Register

675. The Council of Australian Governments (COAG) Health Council (comprising health ministers from every State and Territory and the Commonwealth) issued a consultation paper seeking views on a number of potential reforms to the National Law. Among other matters, it raises questions about the information which should be on the public register. Relevant to this inquiry, the consultation paper notes:

> Under current arrangements, access to register information is constrained. For instance, details of the disciplinary conditions placed on a practitioner's registration are removed from the register either:
>
> - when the condition expires (when evidence of compliance or successful completion has been accepted by the relevant board), or
> - when the practitioner withdraws or fails to renew their registration.
>
> This means that to find historical information about a practitioner's disciplinary history requires a Google search or to search and read through previous tribunal decisions, with a separate search required for each state and territory. This can be complex and onerous, particularly if a practitioner has practised in multiple jurisdictions. The AHPRA website does, however, provide a link to the Australasian Legal Information Institute website (known

as AustLII), which publishes decisions of courts and tribunals about registered health practitioners (AHPRA 2017c).

Other issues include the following:

- The public national registers may be searched only by entering a practitioner's name. This means there is no public access to a single list of all practitioners who are subject to disciplinary conditions or those whose registration has been suspended. It may be argued that there is no clear public benefit in this given that if a patient is considering seeing a particular practitioner they can already search the register for that practitioner by name to see if they have any conditions on their registration.
- The register of practitioners, the list of cancelled practitioners and the list of practitioners who have given an undertaking not to practise are all separate registers that need to be searched separately.

This consultation provides an opportunity to canvass views about whether the current National Law provisions governing the public national registers and, specifically, the publication of information about registered and formerly registered practitioners whose registration has been cancelled are fit for purpose and strike a reasonable balance between the consumer's right to know and the practitioner's right to privacy. Issues include:

- whether a practitioner's disciplinary history should be publicly accessible against their name on the public register
- if so, then what information should be included in a published disciplinary record—for example, the findings and decisions of tribunal and panel hearings, conditions imposed on registration, reprimands and undertakings (other than details of impairment/health-related conditions)
- whether there should be a time period after which some information (such as expired conditions and reprimands) should be removed from the register if there have been no further related notifications

676. This inquiry is concerned with the management of a doctor whose performance fluctuating over two decades in circumstances where many patient complaints were made concerning their treatment at the hands of Dr Gayed from 1997 to 2017.

677. I appreciate there will be competing concerns about the issue of the register, and I have not considered it more broadly than my terms of reference permit. However, in relation to Dr Gayed, it is my view that the findings, orders and decisions of the Professional Standards Committee and Performance Review Panel and conditions imposed on his registration (excluding where necessary impairment conditions) should have been publicly accessible. It is imperative to be able to ascertain the presence of

a pattern of conduct to determine the management of a practitioner about whom there are concerns.

39. Conclusions and Recommendations

678. Three key issues arose during the inquiry. The first issue was the powers, policy and practice in relation to information sharing between the Medical Board, now Medical Council, and public and private health organisations at which Dr Gayed had or previously had an appointment and in relation to information that Dr Gayed was required to divulge to current or former 'employers'.

679. The second issue was the management of complaints against Dr Gayed in the performance assessment program and the manner in which performance assessments were carried out.

680. The third issue was the monitoring of Dr Gayed and the performance of administrative functions by the Medical Board in relation to Dr Gayed.

39.1 Information sharing

681. Between 1998 until 2017, many critical decisions were made concerning Dr Gayed by various bodies, mainly the Medical Board, Medical Council, and area health services. They included determining how complaints were to be handled; imposing conditions on his practice; varying those conditions; monitoring his compliance with conditions; and hospitals and area health services suspending his appointment and withdrawing and reducing his clinical privileges.

682. In respect of many of these decisions, legislation governed who was to give what information to whom and whether they must or may do so. That legislation has changed over time and many of the issues with the sharing of information in the last two or so decades have been resolved.

683. Chapter 3 sets out the current laws in relation to the exchange of information.

684. This inquiry has identified a number of areas in which the laws may be amended to achieve the object of protecting the health and safety of the public in light of the lessons learned from the management of Dr Gayed.

39.2 Recommendations on information sharing

39.2.1 Health practitioners and employers

685. There is no clear requirement on employers to notify the regulator of a decision to withdraw or restrict privileges. This has been identified in the recent consultation paper issued by the COAG Health Council. That paper suggested that an amendment to this effect would remove uncertainty and enhance the monitoring powers of National Boards to detect at-risk practitioners at an earlier stage, particularly where a practitioner practises across multiple facilities and has had their clinical privileges withdrawn at one facility but not at others. This scenario is one which reflects the position with Dr Gayed at Mona Vale Hospital.

686. A practitioner's obligation under s 99(2) of the *Health Services Act 1997* to report any finding of unsatisfactory professional conduct within seven days of receiving notice of the finding applies with respect to any public health organisations at which he is a visiting practitioner. It does not require the practitioner to inform private hospitals of such findings. In my view, it should be amended. The protection of the public cannot be dependent on whether patients attend a public or private facility, particularly in circumstances where the practitioner concerned has restrictions on his practice based on his professional performance.

39.2.2 Medical Council

687. First, on 1 November 2015, a new s 176BA was introduced. It requires the Medical Council (of NSW) to give written notice to an employer or accreditor of a registered health practitioner, as soon as practicable, if it decides to impose, alter or remove conditions relating to the health, performance or conduct of the practitioner. The section also allows the Medical Council to give notice, if it considers appropriate, to an entity that becomes an employer or accreditor after the decision is made. The section does not require the Medical Council to notify employers or accreditors of a decision by the Medical Council to suspend the doctor. In my view, the legislation should be amended to require notice to be given to employers and accreditors in such circumstances.

688. Secondly, the current law does not expressly allow the Medical Council to provide information to employers or accreditors (as those terms are defined) about a doctor's compliance with conditions on registration.[301] Section 176BA of the National Law is noted above. I note that it will be difficult to definitively state at any given time whether there is compliance with a particular conditions or conditions. However, where the Medical Council is satisfied that it can conclusively advise an employer or accreditor about compliance with one or more condition, it should not be prohibited from doing so.

689. Thirdly, there is no provision permitting the Medical Council to provide a copy of a performance assessment to any person it thinks fit. In my view, the Medical Council should have a discretion to inform employers, broadly described, of the outcome of a performance assessment in circumstances where, as a result, a performance review panel is to be held, the practitioner is counselled or directed to attend counselling or conditions are imposed. Each of these outcomes is relevant to a current employer, as each will tell them there are continuing concerns about the practitioner and enable them to seek further information and impose their own restrictions.

690. I note that, currently, decisions by Performance Review Panels are to be published in a way that does not identify the persons involved. That prohibition on identification should not extend to the practitioner concerned.

691. There are other provisions in the National Law dealing with confidentiality and sharing of information.[302] They should not, in my opinion, act as obstacles to the information-sharing needs I have identified above.

40. Performance assessment

692. Key decisions on how to manage the various complaints and notifications made about Dr Gayed were made from time to time by the Medical Board in consultation with the HCCC.

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[301] *Health Practitioner Regulation National Law* (NSW) s 176BA.
[302] *Health Practitioner Regulation National Law* (NSW), ss 216 and 220.

693. The first decision, made in 1998, was for the HCCC to investigate a complaint by the Southern Area Health Service and therefore take the disciplinary/conduct path. That decision was consistent with the legislation. The next decision in 2001 was the Medical Board's alone and that was to not accept the recommendation of the Professional Standards Committee to have Dr Gayed's performance assessed. That decision is difficult to understand and adequate reasons for it were not recorded. Absent a legislative provision to the contrary, there is no general obligation for a decision-maker to give reasons.[303] However, in circumstances where the Medical Board does not accept a recommendation of a Professional Standards Committee, a prudent decision-maker would record reasons for not doing so.

694. Following a notification by Northern Sydney Health in 2003, in 2004 the Medical Board, with the agreement of the HCCC, determined to have Dr Gayed's performance assessed. I have made observations about the manner and time in which that was conducted. However, the decisions to do so were justified on the information available and consistent with the legislation.

695. A further performance assessment was conducted in 2007, with the agreement of the HCCC and in response to complaints made. A Performance Review Panel followed in 2008, following the recommendation of the assessors. Conditions were imposed which mainly remained in place until 2016, when s 150 was invoked. I say more about the appropriateness of the course of action and the conditions imposed below.

696. Thereafter, Dr Gayed was reassessed on one occasion in 2013 and a Performance Review Panel was held in 2014.

697. For the Performance Assessment Program to be effective, first, the assessors need to be provided with all the relevant and probative information on which the Medical Board relied when making its decision to have the practitioner's performance assessed.

698. I note that s 41O of the National Law requires the Medical Council in the exercise of functions with respect to a complaint about a registered

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[303] *Public Service Board v Osmond* (1986) 159 CLR 656.

medical practitioner, including in exercising its immediate action powers under s 150,[304] to have regard, to the extent the Council reasonably considers the matter to be relevant to the complaint, to:

- the full complaints history of the practitioner, including complaints where it was decided that no further action should be taken,
- a previous finding or decision of a Council inquiry in relation to the practitioner,
- any findings and decisions of a Tribunal or Professional Standards Committee in relation to the practitioner,
- any reports made by an assessor following an assessment of the practitioner's professional performance, and
- recommendations or decisions of a Performance Review Panel in relation to the practitioner.

699. The legislation provides the Medical Council with a clear discretion as to the information to which it is to have regard, that is what it reasonably considers to be relevant.

700. In my view, that provision should apply to the matters to which the Medical Council has regard when determining whether to hold a Performance Assessment. Thus, the performance assessors should have regard to the same material to that to which the Medical Council has had regard.

701. If that material is complex or voluminous, it may be that the assessors need to be adequately briefed and assisted in distilling the issues.

702. Secondly, the nature of the intervention and the period of time over which it occurs needs be tailored so as to best respond to the concerns raised.

703. Finally, and perhaps most significantly, the assessors must observe the procedures the doctor had performed poorly in the past or specifically address the concerns raised.

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[304] Being powers under Subdivision 2 or 7 of Division 3 of Part 8 of the *Health Practitioner Regulation National Law (NSW)*.

704. That was not the case with Dr Gayed. The concerns expressed by the Medical Board appointed ophthalmologist were not addressed in the 2004 assessment. The deficiencies identified in complaints were not the subject of specific focus and, in particular, the assessors did not observe Dr Gayed perform procedures which he had performed poorly in the past. The procedures observed were relatively basic ones. It follows that the performance assessment in 2004 did not adequately observe the poor performance identified through complaints.

705. It was appropriate to respond to the complaints in 2004 by way of performance assessment. However, in 2007 the Medical Board could have and should have exercised its powers under s 66 and placed conditions on his registration. The available evidence would have justified the imposition of conditions to the effect that he was not to perform any procedures in an operating theatre without prior written approval of the Medical Council approved supervisor who had reviewed the patient record and the practitioner's treatment plan. Further, he should have been required to maintain and submit a log of all procedures to the Medical Council on a monthly basis.

40.1.1 Submissions from Medical Council on performance assessment

706. In its submissions to the inquiry, the Medical Council agreed with my recommendation that assessors need to be provided with all the relevant and probative information on which the Medical Board relied when making its decision to have the practitioner's performance assessed. However, it noted that the inclusion of irrelevant matters in a lengthy complaints history could cloud consideration of the essential matters of concern or even bias the assessors against the practitioner.

707. It will be a matter for judgment as to whether a past matter is irrelevant to the decision to hold the performance assessment and is therefore not required to be provided to the assessors. I have made observations on this issue above.

708. In its submission the Medical Council noted that a performance assessment has traditionally considered all aspects of the practitioner's practice as well as the matters giving rise to the assessment. In its

experience a performance assessment can unearth issues in a doctor's practice in addition to the matters giving rise to the assessment.

709. The issue in the case of Dr Gayed was that the initial performance assessment only considered the areas that gave rise to the assessment to a limited extent. I remain of the view that the focus should be placed on the particular concerns which prompt the assessment and, if additional matters are unearthed, depending on what they are, the Council should also tailor its regulatory activities (including the performance assessment if appropriate) to those additional issues.[305]

710. In its submission, the Medical Council submitted that legislative reform is needed to require employers and accreditors to provide to the Medical Council information on a practitioner's compliance with and restrictions imposed by the employer or accreditor on his or her practice. The issue is also relevant to the Medical Council's monitoring obligations under s 157 of the Health Practitioner Regulation National Law (NSW). Based on the terms of reference, I do not consider that I have sufficient information to properly comment upon this recommendation. There would need to be consultation between all relevant stakeholders about this matter.

711. The Medical Council made other suggestions for reform of the performance assessment program which I outline below.

41. Impairment

712. The Medical Board did not adequately assess Dr Gayed's performance of particular procedures by not addressing ophthalmologist Dr J's repeated statement that the only way to assess his vision for telescopic work was to have his function observed by a gynaecologist. That did not happen. Later the Medical Board agreed to the impairment condition being removed without carrying out the investigations recommended by the ophthalmologist's investigation of the effect of Dr Gayed's impairment on his clinical practice.

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[305] The legislation allows the assessors to assess other aspects of the professional performance of the registered health practitioner if during the course of the performance assessment the assessor forms the opinion that other aspects of the professional performance of the practitioner may be unsatisfactory and should be assessed: cl 1, Part 1, Sch 5B, *Health Practitioner Regulation National Law (NSW)*.

42. Monitoring

713. The monitoring of Dr Gayed's compliance with conditions was patchy and there was confusion as to precisely what those conditions were. The Medical Board appeared to believe that his registration was subject to his notifying the Board of appointments, whereas the condition was to work in positions approved by the Medical Board. Consequently, there was no evidence of express approval being given or sought and Dr Gayed's notifications were rarely timely. Similarly, the distinction between orders, recommendations and conditions made by the Professional Standards Committee were lost.

714. The legislation required the Medical Board, and then the Medical Council following the PRP, to (a) monitor compliance with orders made by the Panel; and (b) from time to time evaluate the effectiveness of those orders in improving Dr Gayed's professional performance to a standard commensurate with other practitioners of an equivalent level of training or experience. No significant attention was paid to (b) following either the 2008 or the 2014 Performance Review Panels. It seems that the supervision of Dr Gayed required by the Performance Review Panel in April 2016 did not happen and there was no monitoring by the Medical Board to ascertain whether it was being done. Also, no monitoring of his compliance with the conditions imposed in April 2016 took place prior to 28 September 2017.

43. Other matters

715. The Medical Board was tardy in implementing a number of decisions. The first performance assessment occurred about 12 months after the Medical Board had identified it as 'urgent' in October 2003. The 2012 performance assessment was undertaken four years after the Performance Review Panel direction that his performance be reassessed not sooner than six months after the Panel's decision. Eleven months passed between the resolution that Dr Gayed be counselled and that occurring.

716. The reasons recorded by the Medical Board for significant decisions—such as not adopting the recommendation of the Professional Standards

Committee in 2001 to hold a performance assessment and not taking action in 2007 under s 66—were not always adequate.

717. The outcome of the criminal charge, which was ultimately dismissed, was not followed up by the Medical Board for years.

44. Observations about performance and conduct pathways

718. I set out earlier the provisions and practice concerning the handling complaints and other information through the performance or conduct programs.

719. The Medical Board described the Performance Assessment Program in 2010 as 'very specifically non-disciplinary'. Clearly, the line between performance and conduct will not always be stark, particularly at the time of assessing how to manage the complaint or notification. The different tests for entry to each pathway are whether the conduct involves or is:

    (a) a significant issue of public health or safety (investigation);

    (b) a significant question as to the appropriate care or treatment of a client by a health service provider (investigation);

    (c) sufficiently serious to justify suspension or cancellation (investigation);

    (d) significantly below the relevant standard (investigation); or

    (e) below that standard (performance assessment).

720. It is a question of judgment, experience and clinical assessment as to the characterisation of conduct the subject of a complaint. It is likely that it will be a straightforward decision if the conduct concerns a relevant conviction or charge, an allegation of sexual misconduct, boundary crossing or fraud ('moral turpitude' as conduct matters were historically characterised). It will proceed to investigation and ultimately, if substantiated through that process, to a Medical Tribunal.

721. If the complaint or information concerns treatment which is ascertainable from the medical records, can be observed by other practitioners and can be assisted or resolved by expert or peer opinion, and discloses conduct

that is below the requisite standard, a performance assessment may be appropriate. If the conduct, including performance, is assessed to be significantly below the relevant standard, if substantiated, an investigation followed by a Professional Standards Committee may be necessary.

722. Of course, a complaint is not needed to deal with a practitioner's performance. Thus, if information comes to the attention of the Medical Council and it meets the test set out above (below the standard), the practitioner could be managed through performance assessment.

723. As I have set out above, the performance assessment should be tailored and the assessors should be briefed to ensure that the relevant areas of clinical concern are assessed. The assessors should also have access to all relevant and probative information upon which the Medical Council relied in forming the view that a practitioner's performance should be assessed. Thus, findings and reasons from earlier disciplinary processes, complaints and notifications can all inform the nature and content of an assessment.

724. Currently, the performance pathway operates as a two-stage process, with the first stage (being the performance assessment) involving a review of the available information, carrying out the assessment and expressing a view. The Performance Review Panel is then an opportunity for the practitioner to make submissions and provide evidence, such as assessments by other practitioners.

725. A Performance Review Panel may refer the matter to the HCCC for investigation if it meets the relevant standard. It may be that that investigation is challenging because the nature of the information obtained or collated during the performance pathway does not readily translate into evidence. That may pose challenges for the HCCC.

726. The powers that can be exercised by a Performance Review Panel and by a Professional Standards Committee are not dissimilar. Ultimately, each makes findings as to the unsatisfactory nature of the practitioner's performance or conduct, albeit to a different degree. A Performance Review Panel has most of the powers of a Professional Standards Committee, namely to impose conditions on registration, to order that the practitioner complete an educational course, to order the practitioner to report on his or practice at the times, in the way and to the persons

specified by the panel and to order that the practitioner seek and take advice in relation to the management of his or her practice from persons specified by the panel.[306] Unlike a Professional Standards Committee, it does not have power to order that the practitioner undergo medical or psychiatric treatment or counselling, or to impose fines. Only the Medical Tribunal has power to suspend or cancel a practitioner's registration.

727. Also, unlike a Performance Review Panel, a Professional Standards Committee has power to make a "critical compliance order or condition" being an order that a contravention of a condition or order imposed will result in the health practitioner's registration being cancelled.[307]

728. In its submission, the Medical Council suggested that its protective jurisdiction would be enhanced if performance review panels and Council delegates at s 150 hearings had powers to impose critical compliance conditions, the contravention of which automatically results in cancellation of the doctor's medical registration.

729. Based on the terms of reference, this is a not a matter upon which I can properly comment. As with the other recommendations for statutory change made by the Medical Council, each needs to be the subject of consultation and consideration by those involved in and affected by the potential legislative reform.

730. One limitation with the manner in which the performance pathway currently operates, however, is that the Performance Review Panel may consider itself restricted to a reconsideration of the observations made by the performance assessors, with no ability to consider past incidents or complaints even if the material about past incidents and complaints was before the assessors (as the Performance Review Panel concerning Dr Gayed did in 2008).

731. However, the National Law does not so restrict a Performance Review Panel. It permits a more robust approach to assessment by a Panel following an assessment (including powers to take evidence and obtain documents and reports). How that might fairly and practically occur is another matter.

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[306] *Health Practitioner Regulation National Law (NSW)*, ss 146B, 146D, s 156C.
[307] *Health Practitioner Regulation National Law (NSW)*, s 146B(3), (4).

732. The Medical Council submitted to the inquiry that there are cases where a practitioner's complaints history suggests that a history of poor performance, whilst not reaching the threshold required to refer the matter as a complaint under s 154A, is ongoing so that it may be appropriate for a Performance Review Panel to impose protective conditions. The Medical Council submitted that the National Law should be amended to allow it to refer such matters directly to a panel without having to conduct a prior performance assessment, which is a time consuming process.

733. This raises issues which were not relevant to the direct management of Dr Gayed by the Medical Council. They require consideration of whether the Medical Council should have broader powers to investigate and resolve questions of fact. A procedurally fair process would be required and consistency with the co-regulatory environment would be a matter to be addressed. There will be other complex questions to be resolved before such an amendment should be considered. Consultation with relevant parties would be necessary.

Appendix 1

DATE	EVENT AND COMPLAINT OUTCOMES
17 May 1994	Dr Gayed is registered as obstetrician and gynaecologist to practice in positions approved by Medical Board Dr Gayed commences work at Grafton Hospital, Mid North Coast Area Health Service
1996	Dr Gayed commences work at Cooma Hospital, Southern Area Health Service
July to October 1997	Three complaints to HCCC arising from treatment at Cooma Hospital • Patient A (prosecuted before Professional Standards Committee in 2001) • Patient B (discontinued - no clinical criticism) • Patient C (prosecuted before Professional Standards Committee in 2001)
May 1997-October 1998	15 adverse events at Cooma Hospital reported to Southern Area Health Service
October 1998	Complaint from Southern Area Health Service to HCCC (prosecuted before Professional Standards Committee in 2001)
December 1998	Three complaints to HCCC arising from treatment at Cooma Hospital • Patient F (no further action - no clinical criticism) • Patient D (discontinued - following investigation no clinical criticism) • Patient E (prosecuted before Professional Standards Committee in 2001)
February 1999	Dr Gayed resigns from Cooma Hospital
February 1999	Dr Gayed commences at Manning Base Hospital
June 2000	Two complaints to HCCC arising from treatment at Cooma Hospital • Patient H (prosecuted before Professional Standards Committee in 2001) • Patient G (No further action - no clinical criticism)

October 2001	Professional Standards Committee decision • Guilty of unsatisfactory professional conduct and suffers from an impairment • Reprimand • Condition that not perform microsurgery • Ophthalmologist review • Recommend Performance Assessment
2002	Dr Gayed commences at Mona Vale Hospital, Northern Sydney Area Health Service
2002-2003	Five complaints to Northern Sydney Area Health Service arising from Mona Vale Hospital (Performance Assessment)
September 2003	Dr Gayed temporarily suspended from Mona Vale Hospital then reinstated with condition that appointment be reconsidered if further complaints
13 September 2003	First Performance Assessment by the Medical Board
14 January 2004	Performance Assessment report: at the standard reasonably expected; informal counselling
March 2004	Complaint to HCCC arising from treatment at Mona Vale Hospital (Patient L: No further action – clinical advice not critical)
March 2006	By consent, the Medical Tribunal removed the conditions of not performing microsurgery and ophthalmology review
June 2007	Northern Sydney Area Health Service referred four cases to HCCC occurring from December 2006 to March 2007 (Performance Assessment)
March 2007	Dr Gayed resigned from Mona Vale Hospital when told he would be suspended
March 2007	Dr Gayed's clinical privileges temporarily suspended at Delmar Private Hospital arising from the treatment of three patients (Performance Assessment)
August 2007	Complaint to Medical Board arising from treatment at Mona Vale Hospital and Delmar Private Hospital (Patient FF: Performance Assessment)
October 2007	Second Performance Assessment by Medical Board
January 2008	Performance Assessment report: critical, recommended Performance Review Panel

April 2008	First Performance Review Panel by Medical Board
June 2008	Findings of Performance Review Panel: unsatisfactory professional performance, imposed conditions limiting surgery he could perform, mentor
July 2009	Complaint referred from HCCC to Medical Board arising from treatment at Manning Hospital (Patient M: No further action)
August 2009	Mentoring condition removed
May 2010	Complaint to Medical Board arising from treatment at Manning Hospital (Patient N: discontinued))
July 2011	Complaint to HCCC arising from treatment at Manning Hospital (Patient N: discontinued)
October 2013	Performance Re-assessment by Medical Council: performance unsatisfactory
November 2013	Complaint to HCCC arising from treatment at Manning Hospital (Patient O: discontinued)
October 2014	Second Performance Review Panel by Medical Council
December 2014	Second Performance Review Panel report: satisfactory, minor variation to conditions
March 2015	Complaint to HCCC arising from treatment at Manning Hospital (Patient P: discontinued – already in performance assessment)
November 2015	Second complaint from Patient M to HCCC arising from treatment at Manning Hospital (NCAT)
November 2015	Complaint to HCCC arising from treatment at Manning Hospital (Patient Q: NCAT)
February 2016	Dr Gayed suspended then resigns from Manning Hospital
March 2016	Complaint to HCCC arising from treatment at Manning Hospital (Patient R: discontinued)
March 2016	Hunter New England Local Health District complaint to HCCC • Patient S (NCAT) • Patient T (NCAT) • Patient U • Patient V • Patient W

March 2016	Three patient complaints to HCCC arising from treatment at Manning Hospital • Patient X (discontinued) • Patient T (NCAT) • Patient S (NCAT)
April 2016	Section 150 proceedings by Medical Council: further conditions imposed
May 2017	Complaint to HCCC arising from treatment at Manning Hospital (Patient BB: discontinued)
July 2017	Complaint to HCCC arising from treatment at Manning Hospital (Patient Y: discontinued)
November 2017	Complaint to HCCC arising from treatment at Manning Hospital (Patient Z: discontinued)
November 2017	Complaint to HCCC arising from treatment at Manning Hospital (Patient AA: discontinued)
December 2017	Dr Gayed's registration suspended by Medical Council
February 2018	Medical Council lifts suspension, replaces with condition not to practice
March 2018	Dr Gayed surrenders his registration
June 2018	NCAT disqualifies Dr Gayed from being a registered medical practitioner for 3 years
October 2018	NCAT hands down Reasons for Decision

Appendix 2

Dr Gayed—professional history

1. Background

734. Dr Gayed presented curriculum vitae at the time of his applications for appointment as a Visiting Medical Officer to Manning Hospital (2003) and to Mona Vale Hospital (2002). The professional history described here is largely sourced from those documents.[308] Information about his professional history postdating those applications is sourced from other documents obtained during the inquiry.

2. Qualifications

735. Dr Gayed's curriculum vitae notes that he holds the following qualifications:

(a) M.B., B.Ch., Ain Shams University, Cairo, December 1976;

(b) L.R.C.P. (Edinburgh), L.R.C.S. (Edinburgh), L.R.C.P.S (Glasgow), April 1982;[309]

(c) D. Obst. R.C.P., Ireland, April 1983;[310]

(d) D.R.C.O.G., London, May 1983;[311]

(e) M.R.C.O.G.,[312] London, January 1985;[313]

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[308] Dr Emil Gayed, Curriculum Vitae, undated (likely 2003) (HNELHD documents, tab 2.a.5); Letter from Dr Emil Gayed to Doctor EE, Area Director Clinical Services, Mid North Coast Area Health Service, 20 March 2003, enclosing Mid North Coast Area Health Service, Senior Medical & Dental Staff Application for Employment, signed 20 March 2003 (HNELHD documents, tab 2.a.4); curriculum vitae (NSLHD documents, tab 2.2).

[309] Letter from Registrar, Royal College of Physicians or Edinburgh, Royal College of Surgeons of Edinburgh, Royal College of Physicians and Surgeons of Glasgow to Dr Emil Shawky Gayed, 5 April 1982 (HNELHD documents, tab 2.a.4).

[310] Letter from Secretary, Royal College of Physicians of Ireland to Dr Gayed, April 1983 (HNELHD documents, tab 2.a.4).

[311] Letter from Secretary, Royal College of Obstetricians & Gynaecologists to Dr Emil Shawky Gayed, 20 May 1983 (HNELHD documents, tab 2.a.4).

[312] Medical Council files, tabs 310 and 356.

[313] Letter from College Secretary, Royal College of Obstetricians and Gynaecologists to Dr Emil Shawky Gayed, 25 January 1985 (HNELHD documents, tab 2.a.4).

(f) F.R.A.C.O.G., Australia, October 1993;[314]

(g) F.R.C.O.G., London, April 1998.[315]

3. Training

736. Dr Gayed's curriculum vitae indicated that he held the following general training positions:

(a) 1 March 1977 – 28 February 1978
General and Elective Training
Intern Resident House Officer
Ain Shams University Hospital, Cairo

(b) 1 March 1978 – 31 August 1978
Training in General Surgery
Senior House Officer in General Surgery
Coptic Hospital, Cairo

(c) 1 April 1979 – 31 December 1979
General and Elective Training
Senior House Officer in Geriatric Medicine
Fairfield General Hospital, Bury, Lancashire

(d) 1 February 1980 – 31 July 1980
General and Elective Training
House Officer in General Medicine
Hairmyers Hospital, East Kirlbride, Scotland

(e) 1 August 1980 – 31 January 1981
Training in General Surgery
House Officer in General Surgery
Glasgow, Royal Infirmary, Glasgow.

737. Dr Gayed's curriculum vitae indicated that he held the following training positions in obstetrics and gynaecology:

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[314] Letter from President, The Royal Australian College of Obstetricians and Gynaecologists to Dr Emil S Gayed, 30 October 1993 (HNELHD documents, tab 2.a.4).

[315] Letter from College Secretary, Royal College of Obstetricians & Gynaecologists to Dr ES Gayed, 23 March 1998 (HNELHD documents, tab 2.a.4).

(a) 1 February 1981 – 31 January 1982
Pre-membership Training in Obstetrics and Gynaecology
Senior House Officer in Obstetrics and Gynaecology
Victoria Hospital and Forth Park Hospital, Kirkcaldy, Fife

(b) 1 March 1982 – 10 May 1982
Pre-membership Training in Obstetrics and Gynaecology
Senior House Officer in Obstetrics and Gynaecology
Dyrburn Hospital, Durham

(c) 10 May 1982 – 9 November 1982
Pre-membership Training in Obstetrics and Gynaecology
Senior House Officer in Obstetrics and Gynaecology
St Mary's Hospital, London

(d) 6 December 1982 – 5 July 1983
Pre-membership Training in Obstetrics and Gynaecology
Registrar (Acting) in Obstetrics and Gynaecology
Gravesend and North Kent Hospital, Gravesend

(e) 4 July 1983 – 31 July 1983
Pre-membership Training in Obstetrics and Gynaecology
Registrar in Obstetrics and Gynaecology
East Glamorgan General Hospital, Church Village, Pontyprid, Wales

(f) 1 August 1983 – 31 March 1984
Pre-membership Training in Obstetrics and Gynaecology
Registrar (Acting) in Obstetrics and Gynaecology
Birch Hill Hospital, Rochdale, Lancashire

(g) 1 April 1984 – 20 May 1985
Post-membership training in Obstetrics and Gynaecology
Registrar in Obstetrics and Gynaecology
Stirling Royal Infirmary, Stirling, Scotland

(h) 20 May 1985 – 7 July 1985
Post-membership training in Obstetrics and Gynaecology
Senior Registrar in Obstetrics and Gynaecology
Guy's Hospital, London

(i) 8 July 1985 – 20 July 1986
Post-membership training in Obstetrics and Gynaecology

Senior Registrar (Acting) in Obstetrics and Gynaecology
Farnborough Hospital, Orpington, Kent

(j) 28 July 1986 – 7 September 1986
Post-membership training in Obstetrics and Gynaecology
Consultant Obstetrician and Gynaecologist
Walsgrave Hospital, Coventry

(k) 15 September 1986 – 12 October 1986
Post-membership training in Obstetrics and Gynaecology
Consultant Obstetrician and Gynaecologist
District General Hospital, Eastbourne.

4. Positions held as a specialist obstetrician and gynaecologist other than in New South Wales

738. Dr Gayed's curriculum vitae indicated that he held the following positions as a Specialist Obstetrician and Gynaecologist overseas:

(a) 28 November 1986 – 14 January 1989
Specialist Obstetrician and Gynaecologist
Al Hasa and Dhahran Health Centres
Aramco, Dhahran, Saudi Arabia

(b) 15 January 1989 – 21 April 1994
Head Obstetrician and Gynaecologist
Al Hasa and Dhahran Health Centres
Aramco, Dhahran, Saudi Arabia

(c) 12 April 1988 – 22 April 1988
21 May 1990 – 28 May 1990
15 March 1993 – 28 March 1993
13 January 1994 – 25 January 1994
Locum Consultant Obstetrician and Gynaecologist
(while working in Saudi Arabia)
Farnborough Hospital, Farnborough, Orpington, Kent.

739. In his curriculum vitae, Dr Gayed reported that, while working as a consultant with the Aramco Medical Services Organisation in Saudi Arabia, he was appointed as Chairman of the Quality Assurance Committee.

740. Dr Gayed reported that in 1989, when he was promoted to the position of Head Obstetrician and Gynaecologist (at Aramco), he led a team of 15 consultants. He reported that:

(a) He reviewed organisational policies and procedures and developed new ones, participated in senior staff executive meetings and assisted the General Medical Director in developing best practice management guidelines and protocols.

(b) Coordinated the Perinatal Morbidity/Mortality Committee, organised seminars and meetings for general practitioners and developed a monthly educational conference for obstetricians and gynaecologists.

(c) Supervised, supported and taught registrars and junior medical staff and participated in the teaching of medical students and student midwives.

(d) Ran the Obstetric and Gynaecological Department, including sharing on-call duties, organising duty rosters, reviewing adverse outcomes, addressing complaints, reporting to higher management and assuring the quality of care of all services delivered.

5. Positions held as a specialist obstetrician and gynaecologist in New South Wales / Canberra

741. Dr Gayed's curriculum vitae, other documents and more recent statements required to be provided under the National Law[316] indicate that he held the following positions as a specialist obstetrician and gynaecologist in Australia (noting, however, that there were some discrepancies between CVs presented):

(a) 18 May 1994 – 30 June 1995
Specialist Obstetrician and Gynaecologist—VMO
Grafton Base Hospital, Grafton, New South Wales

[316] For example, notices provided to the Medical Council (Medical Council NSW files, tab 310 and 356).

(b) July 1995 – February 1995
Specialist Obstetrician and Gynaecologist—VMO
Canberra Hospital,[317] ACT

(c) 1 July 1995 – 30 June 2002
Specialist Obstetrician and Gynaecologist—VMO
John James Memorial Hospital, Deakin, ACT

(d) 22 January 1996 – 30 June 2002
Specialist Obstetrician and Gynaecologist—VMO
Calvary Private Hospital, Bruce, ACT

(e) 1 February 1996 – 9 February 1999
Specialist Obstetrician and Gynaecologist—VMO
Cooma Hospital, Cooma, New South Wales[318]

(f) 10 August 1999 – 28 February 2016
Specialist Obstetrician and Gynaecologist—VMO
Manning Base Hospital, Taree, New South Wales[319]

(g) 25 October 1999 – 3 June 2002
Specialist Obstetrician and Gynaecologist—VMO
Kempsey District Hospital,[320] New South Wales

(h) 1 July 2002 – 5 March 2007
Specialist Obstetrician and Gynaecologist—VMO
Mona Vale Hospital, Mona Vale, New South Wales[321]

(i) Mayo Private Hospital, New South Wales
Precise dates unknown: approx 2001–2016

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[317] Dr Emil Gayed, Curriculum Vitae, undated (likely 2001) (PSC documents, tab 19,); but not referred to in the curriculum vitae presented to HNELHD.

[318] Dr Emil Gayed, Curriculum Vitae, undated (likely 2001) (PSC documents, tab 19); Curriculum vitae presented to Mona Vale Hospital (NSLHD documents, tab 2); his 2003 curriculum vitae did not refer to Cooma Hospital experience (HNELHD documents).

[319] Dr Emil Gayed, Curriculum Vitae, undated (likely 2003) (HNELHD documents, tab 2.a.5); Hunter New England Local Health District, Dr E Gayed Employment Timeline (HNELHD documents, tab 1); Letter from Dr Gayed to Doctor FF, Deputy Director Clinical Services, Manning Rural Referral Hospital, 28 February 2016 (HNELHD documents, tab 4.a.59).

[320] Not referred to in curriculum vitae presented to Mona Vale Hospital (NSLHD files, tab 2.2); Letter to Inquiry from MNCLHD, 4 July 2018.

[321] Dr Emil Gayed, Curriculum Vitae, undated (likely 2003) (HNELHD documents, tab 2.a.5); Dr Gayed also had two temporary appointments to Mona Vale Hospital: 10–13 May 2002 and 7–10 June 2002; Letter from Doctor N to Dr Gayed, 9 May 2002 (NSLHD documents, tab 1.1); Letter from Doctor ZZ to Dr Gayed dated 7 March 2006 [with 2006 apparently a typographical error] (NSLHD documents, tab 4.43, p 1096).

(j) Warringah Day Surgery, Brookvale, New South Wales
Precise dates unknown: approx 2008–2016

(k) Delmar Private Hospital, Dee Why, New South Wales
Precise dates unknown: at least 2004–2007.

742. In his curriculum vitae, Dr Gayed reported that in Grafton, New South Wales, he worked a one in two obstetric roster and that he performed 684 gynaecological procedures over a period of 14 months.

743. In his curriculum vitae, Dr Gayed reported that in Canberra he had a well-established private practice with private rights at the John James Memorial Hospital from July 1995 and at Calvary Hospital from January 1996. He reported that he also had a large number of public obstetric patients to whom he provided both antenatal and postnatal care. He reported that he performed a total of 654 gynaecological procedures at Canberra private hospitals.

744. Dr Gayed reported that he held a public position at Cooma, New South Wales, from February 1996 to February 1999. He reported that he performed a total of 477 gynaecological procedures during this time.

745. Dr Gayed reported that he held a position as a Visiting Medical Officer obstetrician gynaecologist at the Manning Base Hospital in Taree, New South Wales, from August 1999. He noted that he participated in a one in four obstetric roster and a busy gynaecological practice.

746. Dr Gayed reported in his curriculum vitae that he had a sub-specialty interest in 'high risk Obstetrics and Maternal–Fetal medicine'. He stated that in gynaecology he had a sub-specialty interest in infertility and gynaecological endocrinology. He stated that he had also 'developed a major interest in minimally invasive surgery in the form of operative hysteroscopy, endometrial ablation and laparoscopic hysterectomy'.

6. Teaching

747. Dr Gayed reported in his curriculum vitae (in both 2002 and 2003) that he was involved in teaching registrars and resident medical officers including at 'morning hand over meetings, ward rounds, weekly educational

sessions, case studies and journal club'. He noted that he regularly gave a lecture or two on an annual basis to GPs in Canberra and Taree and made presentations to the ACT Family Planning Clinic Educational Meetings.

7. Research

748. Dr Gayed noted in his curriculum vitae (as at 2003) that he had completed the following research:

(a) a three-year study in diabetes in pregnancy;

(b) a three-year study in sickle cell disease in pregnancy;

(c) a one-year study in shoulder dystocia and related birth injuries;

(d) monitoring of caesarean sections for seven years; and

(e) development of a large obstetric database program, including data for almost 20 000 patients over a seven-year period in Saudi Arabia.

749. Dr Gayed did not provide information about the location of these studies, other than the obstetric database.

8. Post-membership continuing medical education

750. Dr Gayed reported that he undertook continuing medical education on an annual basis from 1987 onwards.[322] In his 2003 curriculum vitae, Dr Gayed reported that he had completed more than the required amount of continuing medical education for the five-year period ending in November 2003.[323]

9. Patient satisfaction survey and John James Memorial Hospital data

751. On 20 June 2001 the Royal Australian and New Zealand College of Obstetrics and Gynaecology provided Dr Gayed with the results of a patient satisfaction survey. The report noted: 'Overall, these results are a reflection that the majority of your patients are very satisfied with the level of care they receive from your practice. For this you and your staff

[322] Also see Curriculum Vitae (likely 2001) (PSC documents, tab 19).
[323] Dr Emil Gayed, Curriculum Vitae, undated (likely 2003) (HNELHD documents, tab 2.a.5, p 8).

should be congratulated.'[324] He put that survey forward in support of subsequent applications for appointment and later when complaints arose.

752. In July 2001 Dr Gayed made a request to the John James Memorial Hospital for clinical indicator data. On 26 July 2001 the hospital provided clinical indicator results in relation to a number of areas, including unplanned return to hospital within 28 days of discharge; unplanned returns to operating room during the same admission; post-operative pulmonary embolism; clean surgical site infections; contaminated surgical site infections; and hospital-acquired bacteraemia. The data showed Dr Gayed's rates in each area to be lower than both the general hospital rate and the Department of Obstetrics and Gynaecology rate at John James Memorial Hospital.[325]

10. References

753. A significant number of references were provided for Dr Gayed by other practitioners over the years and are among the material made available to the inquiry. Dr Gayed put forward references in a number of contexts: in support of his application for membership of RACOG; for appointment at various hospitals; for the purpose of the disciplinary proceedings in the Professional Standards Committee; and for the purpose of, and in response to, performance assessments undertaken by the Medical Board. An outline of the main references is provided in this section.

754. On 2 September 1993 Doctor S, Director of the District Medical Services Department of Saudi Aramco, provided a reference for Dr Gayed. He stated:[326]

> Dr Gayed has been instrumental in organizing and running the Ob/Gyn until. It's [sic] record speaks for his leadership. As the Senior Obstetrician Gynaecologist, Dr Gayed's skill has been exemplary in case management. He

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[324] Letter from Manager, Fellowship Services to Dr Emil Gayed, enclosing The Royal Australian and New Zealand College of Obstetricians and Gynaecologists, Patient Satisfaction Questionnaire Report, ID No 143 (HNELHD documents, tab 4.a.19).

[325] Letter from Quality Development Unit, John James Memorial Hospital, to Dr Emil Gayed, 26 July 2001 (HNELHD documents, tab 4.a.5).

[326] Letter from Doctor S, Director, District Medical Services Department, Saudi Aramco, to the Chairman, Victorian Training and Accreditation Committee, The Royal Australian College of Obstetricians and Gynaecologists, 2 September 1993 (HNELHD documents, tab 4.a.5).

is experienced and very qualified. He works well with colleagues, nurses and support staff.

755. On 15 September 1993 Doctor AAA, a consultant obstetrician and gynaecologist from Farnborough Hospital in the United Kingdom, provided a reference for Dr Gayed. He stated that Dr Gayed worked as his Registrar in Obstetrics for over a year, commencing in 1985, and had been invited to return to locum senior registrar posts or locum consultant posts. Doctor AAA stated that:[327]

> His clinical abilities are exemplary. He has an excellent pair of hands and is very capable of undertaking all conventional gynaecological and obstetrical procedures with a very low complication rate. ...
>
> I have personally supervised his clinical and surgical performance and without hesitation, the standard of work provided is above average. He doesn't leave anything to chance and has an innate instinct of anticipating and thereby avoiding problems which are not unknown in our practice.

756. On 17 March 1995, Doctor T provided a reference for Dr Gayed. Doctor T noted that Dr Gayed had a suite of rooms in the same specialist clinic in which he worked in Grafton. Doctor T reported that Dr Gayed had a good standard of clinical judgment, had performed the usual range of gynaecological and obstetric procedures, cooperated extremely well with other staff and expressed a keen interest in medical excellence.[328]

757. On 20 July 2001 Doctor U, Gynaecologist and Urogynaecologist, provided a reference for Dr Gayed. He noted:[329]

> Whilst operating in the same hospitals as Emil I have had no reason to doubt his competence. He has performed a large number of elective and emergency procedures in Manning Base Hospital where he has been part of a 1:4 roster. As far as I am aware he has had no major complications or unscheduled returns to theatre in the last 2–3 years.
>
> There have been no concerns raised with me by nursing staff or patients with regard to any aspect of Dr Gayed's practice.

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[327] Letter from Doctor AAA, Consultant Obstetrician and Gynaecologist, to the Chairman, The Victorian Training and Accreditation Committee, The Royal Australian College of Obstetricians and Gynaecologists, September 1993 (HNELHD documents, tab 2.b.2).

[328] Letter from Doctor T to Dr J Houston, Deputy General Manager, Clinical Services, Woden Hospital, 17 March 1995 (HNELHD documents, tab 2.b.2).

[329] Letter from Doctor U, Gynaecologist and Urogynaecologist, to Senior Solicitor, United Medical Protection, 20 July 2001 (PSC documents, tab 10).

758. On 25 July 2001 Doctor V of the Mid North Coast Area Health Service provided a reference for Dr Gayed. He noted:[330]

> Dr Gayed's practice has not suffered any greater infection rates, rates of return to theatre, complication rates in theatre or mortality rates than his peers. These matters are peer reviewed every three months and Dr Gayed's practice has not been a cause for concern at any stage over the last 2 years.
>
> I am very pleased to have an obstetrician / gynaecologist of Dr Gayed's stature and experience on my staff.

759. On 29 July 2001 Nurse A, a registered nurse who worked at the John James Memorial Hospital, provided a reference for Dr Gayed. She noted that Dr Gayed always remained calm, courteous and polite to the entire theatre team. She further noted: 'I have always found him to be very consistent and methodical and I have not been involved in any call-backs with his patients.'[331]

760. On 30 July 2001 Person A provided a reference for Dr Gayed, noting that Dr Gayed had always treated her with respect and behaved in a professional manner towards staff in the operating theatre. This reference did not comment on Dr Gayed's clinical competency.[332]

761. On 31 July 2001 Doctor W, obstetrician/gynaecologist in Canberra, provided a reference for Dr Gayed. Doctor W reported that he had not personally seen Dr Gayed operate but that, as chairman of the Division of Obstetrics and Gynaecology from 1990 to 1996 and as ACT chairman of the College of Obstetrics and Gynaecology since 1996, he had not received or heard one adverse report concerning the care of his patients. Doctor W also noted that he had reviewed data from John James Memorial Hospital and that it would appear from the hospital data that the complication rate concerning Dr Gayed's surgery is lower than the average for his colleagues.[333]

762. On 6 August 2001 the CEO of the Mayo Private Hospital provided a reference for Dr Gayed, noting that Dr Gayed had been a visiting

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[330] Letter from Doctor V, Mid North Coast Area Health Service, to Senior Solicitor, United Medical Protection, 25 July 2001 (PSC documents, tab 9).

[331] Reference from Nurse A for Dr Gayed, 29 July 2001 (PSC documents, tab 13).

[332] Reference from Person A from Dr E Gayed, 30 July 2001 (PSC documents, tab 12).

[333] Letter from Doctor W, Obstetrician/Gynaecologist to Senior Solicitor, United Medical Protection, 31 July 2001 (PSC documents, tab 18).

obstetrician and gynaecologist for two years. The reference noted that, during the period that Dr Gayed had operated at the Mayo Private Hospital, there had been only one complication which was returned to theatre. The reference stated:[334]

> Dr Emil Gayed has been practising at the Mayo Hospital for the past two years and in that time, have [sic] proven to be a competent and diligent surgeon. It would be without hesitation that I would recommend him to any other private facility.

763. On 7 August 2001 Doctor X, consultant anaesthetist, provided a reference for Dr Gayed, noting that he had known Dr Gayed for six years, since he commenced practice at the John James Memorial Hospital in Canberra. Doctor X noted that the hospital regularly publishes clinical indicators that relate to individual practitioners. He stated: 'Dr Gayed's rates are without question excellent and probably the best in the hospital, enforcing my own personal perception.' He further stated: 'I have no hesitation in recommending Dr Gayed to a potential patient. His training and experience has produced a very competent gynaecologist who performs successful surgery with minimum complications.'[335]

764. On 7 August 2001 Nurse B, who worked with Dr Gayed as a perioperative sister in the Mid North Coast Area Health Service. She stated:[336]

> [Dr Gayed] works calmly and effectively in all operative situations and especially when emergencies arise. In the time that I have worked with Dr Gayed I have never known a patient to return for post-operative surgical complications.

765. On 17 August 2001 Dr Gayed's practice manager in Canberra, provided a reference for Dr Gayed. She noted that Dr Gayed was calm and well respected within Canberra Hospitals and that he 'performs minor procedures in his rooms and I do not hesitate to confirm his abilities in this area'.[337]

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[334] Reference from Chief Executive Officer, Mayo Private Hospital for Dr Emil Gayed, 6 August 2001 (PSC documents, tab 7).

[335] Letter from Doctor X, Consultant Anaesthetist to Senior Solicitor, United Medical Protection, 7 August 2001 (HNELHD documents, tab 2.b.3).

[336] Reference from Nurse B for Dr Emil Gayed, 7 August 2001 (PSC documents, tab 11).

[337] Reference from Dr Gayed's practice manager for Dr Gayed, 17 August 2001 (PSC documents, tab 16).

766. On 25 April 2007 Doctor Y, specialist anaesthetist, who had worked with Dr Gayed for eight years at the Mayo Private Hospital in Taree, provided a reference for Dr Gayed. Doctor Y stated:[338]

> He has gentle hands, is quick and efficient, with a good tissue sense, and he achieves what he sets out to do.
>
> In the eight years I have seen not one case come back to theatre, and have heard no adverse comments on his results from either staff, hospital or patients. ...
>
> It is obvious to me that his personality and humanity, coupled with his training and experience, have produced a very competent gynaecologist who performs successful surgery, with minimal complications, while maintaining a pleasant operating environment, happy staff and at the end of it all, very grateful patients.

767. On 5 April 2007 Doctor V, Manager, Clinical Services and Director, Emergency Department, Manning Hospital, provided a reference for Dr Gayed. He reported that Dr Gayed was interested in performance review processes and quality improvement, had been active in junior medical officer teaching and had a strong interest in continuing education. He also reported that Dr Gayed had good relationships with the Emergency Department and with maternity ward staff. He further reported that 'sound advice and prompt attendance in person upon our patients when requested [was] a feature of his practice'. Doctor V said:[339]

> Dr Gayed has not demonstrated untoward infection rates, rates of return to theatre, complication or mortality rates. These matters are peer reviewed every three months and Dr Gayed's practice has not been a cause for concern at any stage since he has worked in Taree. I have not received any substantiated complaints about his practice from either his patients or the hospital staff.

768. On 24 April 2007 Doctor Z, also a Visiting Medical Officer obstetrician gynaecologist at Manning Hospital in Taree, provided a reference for Dr Gayed. She stated:[340]

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[338] Reference from Doctor Y for Dr Gayed, 25 April 2007 (HNELHD documents, tab 2.b.3).

[339] Reference from Doctor V, Manager, Clinical Services and Director, Emergency Department, Manning Base Hospital for Dr Emil Gayed, 5 April 2007 (HNELHD documents, tab 2.b.3).

[340] Reference from Doctor Z, Obstetrician & Gynaecologist, Mayo Specialist Centre for Dr Emil Gayed, 24 April 2007 (HNELHD documents, tab 2.b.3).

> [Dr Gayed is] well liked and respected with the midwifery and nursing staff as well as the theatre staff. I have no doubt in his excellent surgical skills which he is willing to offer and share at any possible time if necessary. Dr Gayed has been an excellent colleague to work with.

769. On 9 December 2007 Doctor AA, a GP in the Manning Valley area, provided a reference for Dr Gayed. He noted that Dr Gayed is one of his main referral specialists in obstetrics and gynaecology and that he had total confidence in him.[341]

770. On 20 December 2007 Doctor BB, a GP in Brookvale, provided a reference for Dr Gayed. He noted that feedback from both gynaecological and obstetric patients had been very positive and that none of his patients operated on by Dr Gayed had had any major surgical complications.[342]

771. On 20 December 2007 Doctor CC, a GP in Brookvale, provided a reference for Dr Gayed. He stated that Dr Gayed had 'approached the various problems presented to him in a competent and thoughtful manner and been very respectful towards my patients'.[343]

772. On 25 January 2008 Doctor DD, a GP in Taree, provided a reference for Dr Gayed. He stated:[344]

> I have found that his management of my patients has been excellent. He has been very attentive to their problems and has been successful in ensuring a good outcome. I have not had any disappointments from my referrals to him.

773. On 18 May 2009 Doctor V, Manager, Clinical Services and Director, Emergency Department, provided a reference for Dr Gayed. Doctor V stated:[345]

> I have known and worked with Dr Gayed for the past 10 years. He stands out as a fine example of the sort of obstetrician I am looking for to employ at my hospital. He has impressed me with his enthusiasm and clinical acumen.

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[341] Reference from Dr Doctor AA for Dr Emil Gayed, 19 December 2007 (HNELHD documents, tab 2.b.3). [342] Reference from Doctor BB, Vale Medical Clinic for Emil Gayed, 20 December 2007 (HNELHD documents, tab 2.b.3).

[343] Reference from Doctor CC for Dr Emil Gayed, 20 December 2007 (HNELHD documents, tab 2.b.3). [344] Reference from Doctor DD for Dr Emil Gayed, 25 January 2008 (HNELHD documents, tab 2.b.3). [345] Reference from Doctor V, Manager, Clinical Services and Director, Emergency Department for Dr Emil Gayed, 18 May 2009 (HNELHD documents, tab 4.a.22).

774. Doctor V' reference reported on Dr Gayed's interest in performance review processes, participation in junior medical officer teaching, interest in continuing education and relationships with Emergency Department and maternity ward staff in substantially similar terms to his reference of April 2007.

775. Doctor V' 2009 reference included the following information (virtually identical to that included in his reference of April 2007):[346]

> Dr Gayed has not demonstrated untoward infection rates, rates of return to theatre, complication or mortality rates. These matters are peer reviewed every three months and Dr Gayed's practice has not been a cause for concern at any stage since he has worked in Taree. I have not received any substantiated complaints about his practice from either his patients or the hospital staff, in fact I am heartened by the fact that Dr Gayed's [sic] has had no serious complications or infections at all in the time I have known him and his mortality rate is zero.

[346] Reference from Doctor V, Manager, Clinical Services and Director, Emergency Department for Dr Emil Gayed, 18 May 2009 (HNELHD documents, tab 4.a.22).