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Health, Communities, Disability Services and Domestic and Family Violence Prevention
Committee (HCDSDFVPC)
Parliament House
George Street
Brisbane QLD 4000

By email: health@parliament.qld.gov.au

Submission to the HCDSDFVPC inquiry into the Health Practitioner Regulation National Law and Other Legislation Amendment Bill 2018

About Pharmaceutical Defence Limited (PDL)

As a member-based mutual representing over 25,000 pharmacy members, PDL is Australia's first national pharmacy body, established in 1912 by pharmacists, for pharmacists.

We are dedicated to our members in the pharmacy profession and attend to a wide network of pharmacist members nationally, comprised of hospital, clinical, research and community pharmacists, students and interns.

PDL provides Professional Indemnity (PI) insurance for its members via a third party underwriter. PDL is not an insurance company, but a cooperative owned by its pharmacist members.

A core function of the organisation is to provide practical support and advice to members on a wide range of practice issues, and most particularly in relation to dispensing errors. Member support is provided via our Professional Officers who are themselves experienced AHPRA-registered pharmacists.



Background

PDL organises support and legal advice to members who are presented with a claim for damages, and/or a complaint or notification from a statutory body, such as the Australian Health Practitioner Regulation Authority (AHPRA) and the National Health Practitioner Boards. PDL supports and advises pharmacists when responding to an official complaint.

It is in this context that we are pleased to be able to contribute to the HCDSDFVPC inquiry into the Health Practitioner Regulation National Law and Other Legislation Amendment Bill 2018 (the Bill).

In our view the proposed reforms achieve the stated aim of striking a sensible balance overall between ensuring health practitioners can seek help when needed, while also protecting the public from harm.

This submission will focus on one particular aspect of the Health Practitioner Regulation National Law Act 2009 (National Law), as it relates to our specific area of expertise and experience. We believe that one aspect of the National Law encompasses an anomaly that potentially impinges on pharmacists' access to Professional Indemnity insurance protection.

We propose the AHPRA Guidelines supporting the Bill enact a simple resolution to the problem, as discussed below.

Section 141 (4) (a) (ii) of the National Law

We note that the proposed changes are limited to a treating practitioner's responsibility in deciding whether a mandatory report about a practitioner-patient's conduct or impairment is required.

However, we believe there is further opportunity to clarify the current legislation to ensure health practitioners can seek help when needed from their professional body and/or professional indemnity insurer, while also protecting the public from harm.

We understand from the consultation paper that the exception to the current requirement of practitioners to make a mandatory notification will not change. Specifically, we refer to Section 4 a. on page 10 of the current AHPRA Guidelines for mandatory notifications and Section 141 (4) (a) (ii) of the National Law.

Practitioners who work for, or on behalf of, a professional indemnity insurer may form a belief of misconduct or impairment of another practitioner because of a disclosure in the course of advising the other practitioner about how the practitioner's professional indemnity insurance policy may respond in the circumstances.



Such complaints do not always progress to legal proceedings. In these circumstances the practitioner working for, or on behalf of, the professional indemnity insurer encourages self-reporting by the treating practitioner.

The Issue

We believe the current exception potentially creates an issue in these circumstances, and seek to clarify the intent.

In the Bill, a treating practitioner is one who provides a health service to another health practitioner (HP). Section 141 C (2) of the amendment proposes the first HP is taken not to form reasonable belief **in the course of providing a health service** if

- (a) The first HP is employed or engaged by a PI insurer

and

- (b) The disclosure by the first HP is in the course of a legal proceeding or provision of legal advice arising from the PI policy.

The first point we seek to clarify is whether we are correct in our view that the interaction that our Professional Officers would have with a pharmacist (considered to be a candidate for mandatory reporting) would be considered to be **providing a health service**.

We submit that on every such occasion, this would involve some form of history taking (in order to ascertain the significance of the risk); care for the HP (asking questions relating to their physical and/or mental health); and recommendation or referral to another HP. In these circumstances we would consider this to be providing a health service.

As mentioned at the recent public hearing on 12th November 2018, there is no requirement on the treating practitioner to investigate the veracity or extent of the HP's impairment, although there is the potential for review of the actions of the treating HP and resultant potential for regulatory action.

There is also the question in Section 141 (4) (a) (ii) of the provision of **legal** advice arising from the policy. While our Professional Officers are not qualified legal practitioners, they do provide suggestions, background information or insights into legal proceedings and regulatory actions, based upon their experience in the role.

Proposed Solution

While amendment to the Bill would be preferable, PDL believes this anomaly could be addressed by way of a slight amendment to the AHPRA Guidelines on how to interpret the



National Law. We believe it would be valuable to have the definition of the advice provided by a PI insurer clarified to cover policy advice and not just legal advice.

Secondly, if we are incorrect in our assumption above, clarification that the obligation to report is overridden by the PI exclusion could be achieved by removal of the term “**providing a health service**”.

If we are correct in our assumption, the matter can be addressed by simply omitting the second use of the term “legal” as follows in the AHPRA Guidelines:

4. Exceptions to the requirement of practitioners to make a mandatory notification

There are particular exceptions to the requirement to make a mandatory notification for practitioners. The exceptions relate to the circumstances in which the practitioner forms the reasonable belief in misconduct or impairment. They arise where the practitioner who would be required to make the notification:

a. is employed or engaged by a professional indemnity insurer, and forms the belief because of a disclosure in the course of a legal proceeding or the provision of ~~legal~~ advice arising from the insurance policy.

This would be in line with the Pharmacy Board of Australia’s previous 2010 Guidelines on mandatory reporting, which were superseded by AHPRA’s Guidelines in 2014.

Why this is important

Practitioners may be discouraged from reporting incidents under the current Guidelines, putting themselves and their patients at potential risk of harm, possibly unsupported by PI insurance.

It is a Condition of Professional Indemnity insurance policies that any claim needs to be reported to the insurer at the time the claim is made against the practitioner. If this does not occur, there is the potential for the claim to be reduced or denied, leaving both the practitioner and any innocent third parties potentially disadvantaged. This is the reason for the current exception.

However, the drafting has left a gap by way of the inclusion of the word “legal”, as explained above. As a result, there is a disincentive for impaired practitioners to notify PDL of a claim due to the risk of a mandatory notification, thereby leaving both the practitioner and any innocent third parties potentially uninsured and exposed.

This issue is not unique to PDL, and would equally apply to other health professions providing a similar service to PDL.



Summary

PDL thanks the HCDSDFVPC for this opportunity to provide input into the finalisation of this important Bill. We have focussed our feedback and commentary specifically on one aspect of the Bill that requires some minor clarification.

PDL supports the Government's initiative in developing the Bill, and trusts that our suggested amendment is seen to be of value.

Please do not hesitate to contact the undersigned, should you wish to further explore our views in relation to this issue.

Yours sincerely,

A handwritten signature in black ink, appearing to read 'DB', with a small dot at the end.

David Brown

Chief Executive Officer