ROYAL AUSTRALASIAN COLLEGE OF SURGEONS RACS

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Dear Hon Dr Steven Miles MP, Minister for Health and Minister for Ambulance Services,

QUEENSLAND: HEALTH PRACTITIONER REGULATION NATIONAL LAW AND OTHER LEGISLATION AMENDMENT BILL 2018

Thank you for providing the Royal Australasian College of Surgeons (RACS) with the opportunity to comment on proposed amendments to the Queensland Health Practitioner Regulation National Law. I write to you on behalf of the Royal Australasian College of Surgeons (RACS) in Queensland.

RACS has been established in 1927 and is the leading advocate for surgical standards, professionalism and surgical education in Australia and New Zealand. RACS is a not-for-profit organisation representing more than 7,000 surgeons and 1,300 surgical trainees. Approximately 95 per cent of all surgeons practicing in Australia and New Zealand are Fellows of our College (FRACS).

Introduction

In principle RACS Queensland supports a non-punitive and non-rigid regime for mandatory reporting in our state while respecting the discretionary and professional clinical expertise of a treating practitioner. While the amendments presented to us are agreeable in principle, the detail and minutiae of what is being proposed does raise some concerns in light of recent political and historic events in our state.

RACS agrees with studies[i] that suggest a successful mandatory reporting regime requires the right questions to be answered which we will attempt to do so in light of the amendments being proposed.

1. **Is the threshold appropriate?**
    - Yes. Raising the bar to "substantial risk of harm" as opposed to "risk of substantial harm" appears in principle to be a step in the right direction. Allowing the treating practitioner to form a reasonable belief does ensure that a mandatory report of notifiable conduct is based on their professional judgment and expertise. However, the legal semantics does leave the door open to judicial interpretation.
2. **Are the reports made in a timely fashion?**
    - No. Under the proposed regime and linguistic legislative changes there appears be to a sense of urgency where the treating practitioner is rushed and pressured into making a decision. This is further compounded by doubling the penalties for allegedly medical practitioners *holding out*. With recent reports of a backlog of complaints to the Queensland Ombudsman, RACS fears that procedural fairness will be weaken by the growth of complaints to be decided and assessed as

opposed to more funding being contributed to assist with possible systemic failures in our State's healthcare system.

3. **Are the reporting requirements embedded and intrinsic in our health system so as to prevent and mitigate risks?**
    - Undecided. There is some confusion as to the meaning of "impairment" and its actual definition. Not all impairments will necessarily constitute a risk. This may eventuate in policy being determined by the courts whereby the judiciary to the task of interpreting the new laws when challenges are met.

RACS wishes to avoid a perfect storm for our Fellows where unclear guidelines and rushed policy influenced by the media's concentration on outlier cases and underfunded bureaucratic complaints processes equates to a regime that punishes doctors suffering from mental illness. With recent studies and reports highlighting suicides amongst medical practitioners, a wiser and gentler approach is required. The quality, safety and care of our patients is without a doubt our primary objective and this can be greatly advanced with quality care of our Fellows' mental wellbeing.

Doctors in a highly pressurised profession who are "unwell need to feel they can attend their treating doctor without the stumbling block of mandatory reporting."[ii] The favoured Western Australia approach from 2010 provides a "unique statutory exemption" for a treating practitioner.[iii] Under this scheme a "reasonable belief" is required to form a discretionary decision which is akin to the Queensland proposal. As an aside it is interesting to note that a study has shown mandatory notifications nationally between the years 2011-2013 demonstrates that with the presence of WA exemptions it "has not inhibited reporting."[iv]

Legal Semantics - *Substantial Risk of Harm* v *Risk of Substantial Harm*

The summary of differences provided by the Queensland parliament is patterned on the revised phrase "substantial risk of harm". On closer analysis the differences between the current national law, the current provisions as applied in Queensland and the new provisions to be amended by the Bill are semantic and based on tense.[v] In terms of impairment, intoxication and substandard practice the final Queensland amendments have shifted from "has placed" to "is placing the public at substantial risk of harm."

The argument being by COAG Health Ministers is that the threshold is "significantly higher"[vi] as opposed to the current definition of "notifiable conduct" under 140(c) of the *National Law* to be a "risk of substantial harm".[vii] Sexual misconduct follows a similar transition but is also inclusive of a retrospective position from "has engaged" to "has engaged or is at risk of harm" which RCS agrees with. Changes being made reflect a more immediate response to behaviour that is current and in the case of sexual misconduct those that have occurred in the past.

While the proposed Queensland amendments appears to raise the threshold at ss141B(1), the immediate responsibility placed upon a treating practitioner with "is placing", or present tense "placing" creates an atmosphere of urgency and places additional pressure to make a determination. This process may be premature or invalidated without substantial reflective analysis by a treating practitioner.

Currently under s5 of the *Health Practitioner Regulation National Law (Queensland)* the definition of impairment entails that a "person has a physical or mental impairment, disability, condition or disorder (including substance abuse or dependence)."[viii] The definition of "impairment" would appear to be unchanged despite raising the threshold. Some academics have argued that many practitioners can "practise safely with illness and disability."[ix] But with the doubling of penalties from $30,000 to $60,000 for *holding out* by an alleged impaired medical practitioner, you inadvertently create a punitive regime compounded by the urgency to report.

Historic & Political Catalysts to Queensland Amendments

RACS understands the unique set of circumstances which exist in Queensland as it relates to our Office of Health Ombudsman and historic incidences of past outlier medical practitioners who have faced serious charges of unprofessional misconduct. While we recognise the influence this will have on the proposed amendments, RACS cautions the government from introducing a harsh regime which may push vulnerable doctors in need of help further underground. RACS supports procedural fairness for all parties involved when agencies like the Ombudsman investigate complaints made against medical practitioners.

The Office of the Health Ombudsman Annual Report of 2016-17 stated that there has been a "significant year-on-year increases in complaints made to the office since 1 July 2014."[x] Health service complaints has "rose for the third year in a row with 6201 complaints made to the OHO in 2016–17, up 14 per cent on the previous year" with 467 medical specialists being complained about as opposed to 2,035 GPs.[xi] In 2017 former Health Ombudsman Leon Atkinson-MacEwan was suspended over a Mater Hospital incident concerning an anaesthetic technician with Deputy Health Ombudsman Andrew Brown being promoted into the role.[xii]

Media reports in Queensland have emphasised a "backlog of unresolved public complaints, and deepening mistrust from the health sector."[xiii] Every complaint should be met on its own merits and our legal code supports the principles of being innocent until proven guilty. The same report drew a connection between the increase of complaints with legislative timeframes required to accept or dismiss new complaints as well as assessing them under the law. A decision requires 7 days to decide how to proceed with a complaint under s35[xiv] of the *Health Ombudsman Act* 2013 and 30 days for completing an assessment under s49.[xv] Mr Brown has argued that such increases were not unique to his state but evident across all states.[xvi]

However, cases associated with Patel[xvii] and Khalafalla[xviii] were based in Queensland and has left an indelible mark with Patel having worked in Bundaberg Queensland as a surgeon and Khalafalla working at the Mackay Base Hospital. This led to the Health Quality and Complaints Commission recommending a national reporting scheme which would require doctors "to report on colleagues whom they suspect of being underqualified."[xix] The timing of which led to the introduction of the National law in 2010. But it must be reminded that these are extreme outlier cases.

Suicides in Queensland

A Queensland study on the suicide of medical doctors and nurses has shown that that poisoning was the most commonly used method of suicide for this demographic (59.3% & 44%) absent of any published analyses on a national level in 2016.[xx] A major contributing factor was due to some "form of somatic condition" associated with perhaps anxiety or fatigue with such psychiatric disorders being more prevalent amongst medical doctors (59.3%). While it was stated that "individuals working in the medical and nursing professions do not appear to be at greater risk of suicide when compared to the total population of suicide cases" it doesn't negate the fact that between 1990 to 2007 there were some 27 suicides by medical doctors in Queensland[xxi] or that polices and laws need to be put into place to encourage doctors to seek help and not to cover up their conditions for fear of punishment and loss of registration.

Conclusion: Holistic Solution

RACS understands that simply changing the laws will not on its own rectify this problem. Our research has shown that "49% of Fellows, trainees and international medical graduates report being subjected to discrimination, bullying or sexual harassment."[xxii] RACS has attempted to rectify this by addressing the issue with our Building Respect and Improving Patient Safety Initiative which attempts to change behaviour and improve our professional

culture via education modules and courses[xxiii] as well as a complaints hotline.[xxiv] While such behaviour is not always linked to suicides within our profession, RACS wants to help reduce the numbers by creating a more caring environment. Partnering with Converge International to provide confidential support is another avenue RACS is committed to with the use of supportive counsellors.[xxv] Providing a mandatory reporting regime that is not overtly punitive and rigid can also assist in this holistic strategy which requires uniform collaboration between all stakeholders and law makers alike.

Yours sincerely

Dr Brian McGowan
Chair
Queensland State Committee
Royal Australasian College of Surgeons

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[iii] Ibid p.209, 214
[iv] Goiran et al, p.218-219
[v] Queensland Parliament., "Summary of differences between the current National Law provisions, Queensland's provisions and the provisions in the Bill" Last accessed 23 November 2018 https://www.parliament.qld.gov.au/documents/committees/HCDSDFVPC/2018/HealthPractRegNLAOLAB18/tp-12Nov2018.pdf
[vi] Queensland Government., *Health Practitioner Regulation National Law and Other Legislation Amendment Bill 2018 - Explanatory Notes* p.11 Lasted accessed 23 November 2018 https://www.parliament.qld.gov.au/Documents/TableOffice/TabledPapers/2018/5618T1770.pdf
[vii] *Health Practitioner Regulation National Law* (Qld) s140 Definition of notifiable conduct http://classic.austlii.edu.au/au/legis/qld/consol_act/hprnl509/s140 html
[viii] *Health Practitioner Regulation National Law (Queensland)* s5 Definitions http://classic.austlii.edu.au/au/legis/qld/consol_act/hprnl509/s5.html
[ix] Ibid., Bismark M.M et al 1 December 2014
[x] Office of the Health Ombudsman., *2016-2017 Annual Report*, p.7 https://www.oho.qld.gov.au/wp-content/uploads/2017/09/OHO-annual-report-2016-17.pdf

[xi] Office of the Health Ombudsman., *Office of the Health Ombudsman 2016-17 annual report tabled*, Wednesday, 4 October 2017, https://www.oho.qld.gov.au/office-health-ombudsman-2016-17-annual-report-tabled/

[xii] Stone L., "Doctors call for improvements to Health Ombudsman complaint timelines" *Brisbane Times* 9 June 2018 https://www.brisbanetimes.com.au/national/queensland/doctors-call-for-improvements-to-health-ombudsman-complaint-timelines-20180608-p4zket html

[xiii] Stone L., "Clearing the backlog of Queensland's health complaints" *Brisbane Times* 17 September 2018 https://www.brisbanetimes.com.au/national/queensland/clearing-the-backlog-of-queensland-s-health-complaints-20180917-p504bt.html

[xiv] *Health Ombudsman Act 2013*, s35 Deciding how to proceed http://classic.austlii.edu.au/au/legis/qld/consol_act/hoa2013162/s35 html

[xv] *Health Ombudsman Act 2013*, s 49 Period for completing assessment http://www5.austlii.edu.au/au/legis/qld/consol_act/hoa2013162/s49 html

[xvi] Ibid Stone L., 17 September 2018

[xvii] Taylor, John., "Bundaberg surgeon Jayant Patel barred from ever practising medicine again in Australia" *ABC News Online* 15 May 2015 http://www.abc.net.au/news/2015-05-15/jayant-patel-barred-from-practising-medicine-again-in-australia/6472234

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[xix] "Qld Health rocked by another doctor scandal" *ABC News Online* 5 August 2008 https://www.abc.net.au/news/2008-08-05/qld-health-rocked-by-another-doctor-scandal/464474

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[xxiii] "About Respect: Addressing bullying and harassment", Royal Australasian College of Surgeons https://www.surgeons.org/about-respect/

[xxiv] "Complaints Hotline", Royal Australasian College of Surgeons https://www.surgeons.org/about/racs-complaints-hotline/

[xxv] RACS Support Program 'Converge International' https://www.surgeons.org/member-services/college-resources/racs-support-program/