Avant mutual group

Avant submissions on the Health Practitioner Regulation National Law and Other Legislation Amendment Bill 2017

Avant Mutual Group Limited ("Avant") is Australia's largest medical defence organisation and medical indemnity insurance provider. Avant welcomes the opportunity to comment on the Health Practitioner Regulation National Law and Other Legislation Amendment Bill 2017 ("the Bill").

Amendment of s 56 (Period of general registration)

The Bill provides for the date of registration to start *when the Board make the decision; or on a later date ….not more than 90 days* ***after*** *the day the Board makes the decision* (our emphasis).

In Avant's submission to the NRAS review undertaken by Kim Snowball in 2015,[1] we commented (at page 37) on the proposed legislative amendment regarding commencement of registration. We noted that unintended adverse effects can flow from the inability by a Board to backdate a registration. We recommended that the National Law be amended to give a Board the discretion to determine a date of registration which could be **before** or **after** the date of the decision.

Gaps in registration can occur as a result of an accidental oversight on the part of a practitioner or for some other minor reason such as the failure to lodge a renewal on time. In some situations the gap can occur due to a matter completely outside the control of the practitioner, such as administrative error at AHPRA or due to the actions of a third party. Avant has assisted members manage the legal consequences where there was a gap through no fault of their own, of which they were unaware, and as a result of which they have continued to practise. The gap in registration can mean that a practitioner is uninsured for any work done during the relevant period (and therefore at personal risk for any claims), or is not entitled to claim Medicare benefits for the period (and therefore liable to payback Medicare).

Amending the National Law to give the Board discretion to determine the date of registration in appropriate circumstances would overcome the potentially onerous consequences of working while there is a gap in registration.

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[1] Avant submission to the Independent Review of the National Registration and Accreditation Scheme for Health Professions dated 10 October 2014. http://www.avant.org.au/WorkArea/DownloadAsset.aspx?id=25769806248

Amendment of s. 206 (National Board to give notice to registered health practitioner's employer and other entities)

Avant is concerned about the proposed amendment of section 206 which provides for a broad notification power and requires a Board to notify a decision to take health, conduct or performance action to a wide range of entities. The Bill provides that notice must be given to employers and other entities, such as those to which a health practitioner provides honorary services, while the giving of notice to colleagues of practitioners in shared practices is discretionary.

Avant understands that there may be circumstances where, given the nature of the issue, broad notification is warranted. However there are many circumstances where it is not appropriate to notify all the entities particularly if the outcome of a matter could be the issue of a caution or does not raise a threat to public safety.

It is Avant's view that this broad notification power should be qualified to make it discretionary for the Board as regards all entities. Notification should only be required where the public is at risk due to the particular circumstances of the matter or the nature of the work of the practitioner. The practitioner should also be given notice of the Board's intention to exercise this notification power and provided with an opportunity to make submissions on whether the discretion should be exercised.

Amendment of s. 156 (Grounds for taking immediate action under the National Law and to ss. 58 of the Health Ombudsman Act)

We do not agree with the expansion of the powers of a National Board to allow it to take immediate action "in the public interest". The notion of the "public interest" is open to interpretation, including, in our experience in NSW, by panel members charged with applying the test. Our experience with a similar provision in NSW is that it is starting to be used as a matter of routine rather than as an exception. We accept that this issue was considered carefully by the NRAS implementation group during the consultation process, and we note the reassurance in the explanatory notes at page 13 that the Board will take a risk-based approach to exercise of this power.

However there is no legislative requirement in this respect. Therefore we recommend that the provision be amended to include the requirement that the power be exercised in a way that is proportionate to the risk posed.

Amendment of s 151 (When the National Board may decide to take no further action)

We welcome the proposed amendments s 151. We also recommend an additional ground for a decision to take no further action where alternate dispute mechanisms are available, or where the notifier has not first raised the matter with the respondent to a notification.

The scenario we envisage is one where a complainant is able to raise a matter with a respondent to the complaint and, in the absence of a valid reason, fails to do so. An analogy can be drawn with the complaints handling process under the *Privacy Act* 1988 (Cth). Section 40(1A) of the *Privacy Act* states that the Office of the Australian Information Commissioner (OAIC):

> *… must not investigate a complaint if the complainant did not complain to the respondent before making the complaint to the Commissioner under section 36. However, the Commissioner may decide to investigate the complaint if he or she considers that it was not appropriate for the complainant to complain to the respondent.*

This approach is consistent with AHPRA's own guidance to notifiers which states:

> *If you want an apology, an explanation or a review of the care or treatment a health practitioner provided to you, you should first contact the place where you received the care…*[2]

In these circumstances, if a notifier without good reason declines to approach a health practitioner, in our view, a National Board should be entitled to take no further action on a complaint until such time as the patient contacts the relevant health practitioner.

In addition, we recommend that the National Law include a provision which allows the Medical Board to not take action in relation to a notification which is solely about a medico-legal assessment or report or evidence given by a registrant in a legal proceeding unless:

1. the notification is from the presiding judge or decision maker in the legal proceeding;
2. the process for which the medico-legal assessment or report has been conducted has not come before a court or decision making body, and the notifier can demonstrate that he or she has no avenue within the legal process for which the assessment or report was made to raise and resolve the concerns.
3. The notification raises concerns of professional misconduct such as an assault in the course of the assessment or perjury.

In Avant's experience the vast majority of notifications about medico-legal assessments or reports are found to have no substance and consume a significant portion of the resources of AHPRA and the doctor's representatives. The motive behind such notifications often is to undermine the reliability of an assessment or report the notifier considers unfavourable to the notifier's legal case. In many cases the notifier takes the position that the doctor performing the assessment is biased or

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[2] See http://www.ahpra.gov.au/Notifications/Make-a-complaint/How-are-complaints-managed.aspx

unreasonable, matters which the Medical Board is not as able to resolve as the courts and processes for which such reports are prepared.

Avant considers notifications arising from a medico-legal matter should only be entertained in the circumstances referred to above.

Amendment of s 199 (Appellable decisions)

We recommend that section 199 be further amended to allow an appeal from a caution.

Avant has consistently called for the right of practitioners to appeal against a caution. There is no valid reason that a caution, as one of a number of decisions available to a National Board, should be excluded from the appeal process. All other Board decisions are subject to appeal. While AHPRA may regard a caution as "*at the very low end of the regulatory response*"[3] the impact upon a practitioner of a caution should not be underestimated. Medico-legal matters which may result in a caution can have a significant impact on a practitioner's sense of self and on their professional and personal lives.[4]

The absence of an appeal against a caution was most recently considered in Senate inquiries into the complaints mechanism administered under the Health Practitioner Regulation Law.[5] Both inquiries recommended that the National Law be amended to allow an appeal from a caution.

Avant contact details

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[3] Evidence on 1 November 2016 of Ms Kym Ayscough of AHPRA to Senate Community Affairs References Committee *Medical complaints process in Australia*. Available at: http://www.aph.gov.au/Parliamentary_Business/Committees/Senate/Community_Affairs/MedicalComplaints45/Report
[4] See Avant's position paper: "The impact of claims and complaints on doctors' health and wellbeing". Available at: http://www.avant.org.au/impact-of-complaints/
[5] Senate Community Affairs References Committee *Medical complaints process in Australia*. Available at: http://www.aph.gov.au/Parliamentary_Business/Committees/Senate/Community_Affairs/MedicalComplaints45/Report . Senate Community References Committee *Complaints mechanism administered under the Health Practitioner Regulation National Law*. Available at: http://www.aph.gov.au/Parliamentary_Business/Committees/Senate/Community_Affairs/MedicalComplaints45/Report