



Submission to

The Health, Communities, Disability Services and Domestic and Family Violence Prevention Committee

Health Practitioner Regulation National Law and Other Legislation Amendment Bill 2017

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submission

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Introduction

The Queensland Nurses and Midwives' Union (QNMU) thanks the Health, Communities, Disability Services and Domestic and Family Violence Prevention Committee (the Committee) for providing the opportunity to comment on the *Health Practitioner Regulation National Law and Other Legislation Amendment Bill 2017* (the Bill).

The QNMU represents all categories of workers that make up the nursing workforce in Queensland including registered nurses, registered midwives, enrolled nurses and assistants in nursing who are employed in the public, private and not-for-profit health sectors including aged care. The QNMU also retains specialist lawyers to assist its members in their dealings with the Office of the Health Ombudsman (OHO), as well as the Nursing and Midwifery Board of Australia (NMBA) and Australian Health Practitioner Regulation Agency (AHPRA).

Our more than 55,000 financial members work across a variety of settings from single person operations to large health and non-health institutions, and in a full range of classifications from entry level trainees to senior management. The vast majority of nurses in Queensland are members of the QNMU and our membership continues to grow.

The QNMU believes the implementation of the National Registration and Accreditation Scheme (NRAS) has had a significant, positive impact on providing protection for the public and fairness in regulating the health professions. We support the recognition of nursing and midwifery as two separate professions that continue to be regulated by the NMBA.

The QNMU recently made some preliminary comments to Queensland Health about proposed consequential amendments to the *Health Ombudsman Act 2013* (HO Act) to align the HO Act with changes in the *National Law Bill* (the Bill). Here, we comment on several provisions of the Bill that amend both the *Health Practitioner Regulation National Law* (the National Law) and the HO Act.

Summary of Recommendations - the National Law¹

Recommendation 1

The QNMU does not support the amendment to section 31 and recommends there should be no change to the current arrangements.

¹ Proposed additions to wording are in **bold**, deletions in ~~strike through~~

Recommendation 2

The QNMU does not support the amendment to section 56 and recommends there should be no change to the current provision.

Recommendation 3

The QNMU recommends including the following as a new section 149A.

149A Referral of matter to National Board

- (1) The National Agency must immediately refer the matter to the National Board that registered the health practitioner or student.**
- (2) Subsection (1) does not apply if a State Manager of the National Agency believes on reasonable grounds that the referred matter is clearly frivolous, vexatious, misconceived or lacking in substance.**
- (3) If a State Manager of the National Agency makes a decision pursuant to subsection (2), the referred matter is dismissed.**

Recommendation 4

The QNMU does not support the amendment to section 156 and recommends there should be no change to the current provision.

Recommendation 5

The QNMU does not support the replacement of section 180 and recommends there should be no change to the current provision.

Recommendation 6

The QNMU recommends
subsection 184(3) should be amended for clarity.

subsection 184(4) (b) should be amended to read -

- (b) undertaking to be available to attend the hearing within 28 days after giving the notice unless the practitioner or student has a reasonable excuse.**

subsection 184(5) should be amended to read -

- (5) If the health practitioner or student gives a notice under subsection (4), the panel must give the health practitioner or student notice under subsection (1) stating a day for the hearing that is not more than 28 days after the practitioner's or student's notice was given unless the practitioner or student has a reasonable excuse to extend this date.**

Recommendation 7

The QNMU recommends the Bill include an appeal process against decisions made under subsection 191B(4).

Recommendation 8

The QNMU does not support the replacement of subsection 192(4) and recommends there should be no change to the current provision.

Recommendation 9

The QNMU does not support the amendments to subsection 196(4)(b) and recommends there should be no change to the current provision.

Recommendation 10

The QNMU recommends the Bill include a new subsection 199(1)(jb) that reads -

(jb) a decision by a health panel to extend the reconsideration date.

Recommendation 11

The QNMU recommends

section 225 be amended to clearly specify that information can be withheld from the register, specifically in cases of family violence. Further, we ask the Committee to recommend -

- AHPRA amends the registration form to include a statement advising the practitioner they can apply to have certain information withheld from the register;
- AHPRA staff who administer these forms should give priority to requests seeking information be withheld.

Summary of Recommendations - the HO Act

Recommendation 12

The QNMU does not support inclusion of the proposed subsection 58(1)(d) and recommends there should be no change to the current provision.

Recommendation 13

The QNMU recommends –

proposed sections 58A and 58B should clearly specify that the Health Ombudsman may vary or revoke the immediate action decision, or specify in the section that ‘vary’ includes ‘revoke’.

the reference to ‘material change in relation to the matter giving rise to the immediate registration action’ should simply read ‘material change in circumstances’.

proposed subsections 58A(b)(b) and 58B(3)(b) would benefit from additional clarification and specificity.

an ‘approved form’ as proposed in section 58B is not necessary.

Recommendation 14

The QNMU does not support the amendment to section 68 and recommends there should be no change to the current provision.

Recommendation 15

The QNMU recommends -

sections 68A and 68B be amended in the ways we have recommended above relating to sections 58A and 58B.

Recommendation 16

The QNMU does not support the proposed amendment of section 107 and recommends there should be no change to the current provision.

Proposed Amendments to the National Law

Clause 5 Replacement of section 31 enabling a new power for the Ministerial Council to change the structure of National Boards by regulation

The QNMU does not support this amendment.

We contend that providing 'flexibility' for the Ministerial Council to change the structure of National Boards by regulation removes safeguards for National Boards which are currently provided for under the National Law.

To ensure thorough and transparent processes, the QNMU believes it is essential any changes made to the structure of Boards should be undertaken through legislation amendments after full consultation with stakeholders.

Recommendation 1

The QNMU does not support the amendment to section 31 and recommends there should be no change to the current arrangements.

Clause 9 Amendment of section 56 (Period of general registration)

We are unsure of any benefits that may result from an applicant's registration commencing up to 90 days after the applicant's Board has made a decision in relation to their application for registration. We are concerned however about the potential delay in registration being granted.

When the Board has made a decision that a graduating student of a nursing or midwifery program of education or an internationally qualified nurse or midwife is eligible for registration there should be as little delay as possible in advising the outcome of their application and granting registration promptly. While the QNMU appreciates there would be an administrative process following the Board's decision, a period of up to 90 days is not acceptable for a commencement date of registration. We do not support this amendment as this excessive timeframe could have a deleterious effect on a person's ability to obtain employment and commence receiving an income.

Recommendation 2

The QNMU does not support the amendment to section 56 and recommends there should be no change to the current provision.

Clause 22 Amendment of section 151 (When National Board may decide to take no further action)

We agree with the proposed amendments to section 151 of the National Law.

The QNMU is aware of complaints that are clearly without merit, and we consider there would also be value in allowing an AHPRA State Manager to decide that no further action should be taken in relation to a complaint, without the matter needing to be considered by a Board.

Recommendation 3

The QNMU recommends including the following as a new section -

149A Referral of matter to National Board

- (1) The National Agency must immediately refer the matter to the National Board that registered the health practitioner or student.**
- (2) Subsection (1) does not apply if a State Manager of the National Agency believes on reasonable grounds that the referred matter is clearly frivolous, vexatious, misconceived or lacking in substance.**
- (3) If a State Manager of the National Agency makes a decision pursuant to subsection (2) the referred matter is dismissed.**

Clause 24 Amendment of section 156 (Power to take immediate action)

The QNMU recognises notifications are an essential area of the NRAS to assist Boards in their role of protecting the public. In doing so, the system must also provide a level of fairness in dealing with the regulated health professional concerned.

Broadening the grounds on which a National Board may take immediate action against a health practitioner in the way proposed, in our opinion, inserts a significant subjective component.

We are unsure what the additional types of matters are intended to be captured by the proposed amendment. In the QNMU's experience, matters where a practitioner has committed serious offences relating to their personal life are already dealt with by way of immediate action, without enactment of the proposed amendment.

In our view, the current test of posing a serious risk to the public is sufficient grounds for taking immediate action. The current provisions are adequate to permit the relevant body to take action in all required circumstances. It is difficult to imagine any circumstances, outside of the currently permitted 'health, conduct or performance' of the practitioner, and the necessity to take action 'to protect public health or safety' that would require a National Board to take immediate action. We are not aware of any demonstrated necessity for broadening the current grounds. The broadening of the grounds to include a 'public interest' test would potentially create a quite subjective and ambiguous test regarding the conduct of the registrant.

Purported community expectations should not be a deciding factor in deliberations on the risk posed by a registrant.

Recommendation 4

The QNMU does not support the amendment to section 156 and recommends there should be no change to the current provision.

Clause 29 Replacement of section 180 (Notice to be given to health practitioner or student and notifier)

Currently, a notice given to a notifier under subsection 180(1)(2) must include information about the decision made by the Board only to the extent the information is available on the National Board's register. We have serious concerns around the health practitioner's privacy if the reasons for the decision are also included in the notice given to the notifier as subsection 180(2) of the Bill proposes.

Written notice provided by AHPRA that includes information relevant to the decision can be lengthy, complex and sensitive. In our view, providing a notifier with a copy of the extensive reasons for the decision could compromise the health practitioner and others who may be involved in the matter. It could also potentially limit the frankness of health practitioners in their dealings with their National Boards for fear the notifier will be provided with the information the practitioner has supplied.

The QNMU does not support the amendments to section 180 and recommends there should be no change to the current provision.

If reasons for a decision are to be provided to the notifier, we recommend those reasons only include a brief summary, rather than the extensive reasons that are currently provided to practitioners.

Our concerns relating to this proposed amendment also extend to the proposed amendments of other sections relating to providing notifier or complainants with complete reasons for decision.

Recommendation 5

The QNMU does not support the replacement of section 180 and recommends there should be no change to the current provision.

Clause 32 Amendment of section 184 (Notice to be given to registered practitioner or student)

In our view, proposed subsection 184(3)(a) lacks clarity. As it now reads, there are two separate decisions relevant to this section -

1. A panel may decide (the first decision) whether to make a decision entirely on the basis of documents without parties, their representatives or witnesses appearing at the hearing;
2. A panel may make a decision (the second decision) on whether to rely entirely on documents without parties, their representatives or witnesses appearing at the hearing.

Proposed subsection 184(3)(b) then provides -

‘if the hearing is to be decided entirely on the basis of documents – must give written notice *of the decision* to the registered health practitioner....’ (emphasis added)

We presume the reference to ‘decision’ here is intended to refer to the first decision outlined above, however, in our view, this section would benefit from additional clarity of expression.

In addition, proposed subsection 184(4) states that a practitioner may give notice to a panel requesting a hearing, and undertaking to be available to attend within 28 days. In our view, there may be good reasons (such as illness, absence overseas etc.) why a practitioner may not be able to attend a hearing within 28 days.

(1) ...

(b) undertaking to be available to attend the hearing within 28 days after giving the notice, *unless the practitioner or student has a reasonable excuse.*’

Subsection 184(5) should be amended accordingly.

Recommendation 6

The QNMU recommends -

subsection 184(3) should be amended for clarity.

subsection 184(4) (b) should be amended to read –

(b) undertaking to be available to attend the hearing within 28 days after giving the notice **unless the practitioner or student has a reasonable excuse.**

subsection 184(5) should be amended to read –

(5) If the health practitioner or student gives a notice under subsection (4), the panel must give the health practitioner or student notice under subsection (1) stating a day for the hearing that is not more than 28 days after the practitioner’s or student’s notice was given **unless the practitioner or student has a reasonable excuse to extend this date.**

Clause 34 Insertion of new sections 191A and 191 B

191B Change of reconsideration date for suspension of registration

Proposed subsections 191B(4) and (5) provide that a panel may decide a later reconsideration date.

In our view this provision should give rise to the right of appeal for the health practitioner or student.

Recommendation 7

The QNMU recommends the Bill include an appeal process against decisions made under subsection 191B(4).

Clause 35 Amendment of section 192 (Notice to be given about panel's decision)

In similar fashion to the amendment proposed to subsection 180(1)(2) under clause 29, clause 35 proposes an amendment to subsection 192(4) that would allow a notice under subsection 192(2)(b) also to include the reasons for the decision.

Again we express our concerns around the health practitioner's privacy if the extensive reasons for the decision are also included. The QNMU does not support the amendments to subsection 192(4) and recommends there should be no change to the current provision.

Recommendation 8

The QNMU does not support the replacement of subsection 192(4) and recommends there should be no change to the current provision.

Clause 36 Amendment of section 196 (Decision by responsible tribunal about registered health practitioner)

Clause 36 proposes to insert a new subsection 196(4)(b) that would permit a responsible tribunal to, prohibit the person, either permanently or for a stated period, from –

- (i) providing *any health service* (emphasis added) or a specified health service;

The QNMU has concerns about the inclusion of 'any health service' in this provision, given its potentially extremely wide, and uncertain, application.

Section 5 – Definitions – of the National Law defines a health service in the following terms -

health service includes the following services, whether provided as public or private services—

- (a) services provided by registered health practitioners;
- (b) hospital services;
- (c) mental health services;
- (d) pharmaceutical services;
- (e) ambulance services;
- (f) community health services;
- (g) health education services;
- (h) welfare services necessary to implement any services referred to in paragraphs (a) to (g);
- (i) services provided by dietitians, masseurs, naturopaths, social workers, speech pathologists, audiologists or audiometrists;
- (j) pathology services.

Notably, the definition of 'health service' in the National Law is an 'includes' definition, which means its scope is potentially very broad indeed, and uncertain. Tribunal orders should be certain in their application.

Drawing on the current definition, an order prohibiting a person from providing 'any health service' runs the risk of being so broad as to be uncertain in its scope and application. The definition of 'health services' under the HO Act is also different and broader still, adding to the potential for uncertainty.

We consider it is more appropriate that any order made by the responsible tribunal be required to specify the type or types of health service which a person might be prohibited from providing. This will provide clarity for the public, the person, and any potential employer as to the scope of the order.

We have made further comments in this regard under clause 76 that proposes the same amendment to section 107 to the HO Act – Decision about registered health practitioner other than student.

Recommendation 9

The QNMU does not support the amendments to subsection 196(4)(b) and recommends there should be no change to the current provision.

Clause 37 Insertion of new section 196A

Clause 37 proposes to insert a new subsection 196A(2) that will read in part –

A person who is subject to a prohibition order (*the prohibited person*) must, before providing a *health service* (our emphasis), give written notice of the order to the following persons -....

We refer to our comments under clause 36 above relating to the potential breadth and uncertainty of references to 'a health service'.

In addition, we are unsure what this provision might be directed towards - if a person is subject to a prohibition order preventing them from providing a health service, then we are uncertain why they would be giving notice before providing a health service.

Clause 38 Amendment of section 199 (Appellable decisions)

Clause 38 proposes to insert an additional appellable decision under subsection 199(1)(ja) that permits a person who is the subject of a decision by a health panel not to revoke a suspension. The QNMU proposes an additional subsection 199(1)(jb) to enable the health panel to appeal a decision to extend the reconsideration date.

Recommendation 10

The QNMU recommends the Bill include a new subsection 199(1)(jb) that reads –

(jb) a decision by a health panel to extend the reconsideration date.

Section 225 of the National Law - Information to be recorded in National Register

The QNMU also asks the Committee to consider section 225 relating to ‘principal place of practice’, which is not currently covered by the proposed amendments to the National Law.

We presume that one reason for the ‘principal place of practice’ clause (subsection 225 (b) of the National Law) is to allow the public and employers to differentiate nurses and midwives on the register, particularly if they have similar names. However, including principal places of practice can become an issue in situations of family violence (the Australian Nursing and Midwifery Federation has a member who was attacked when her partner was able to track her using the register), or, in smaller communities such as regional and rural areas.

We recognise individual practitioners can apply at any time to have particular information, like principal place of practice not listed on the public register under subsection 226 (2)(a) (removal of certain information at the request of the practitioner), or subsection 226 (2)(b), when the Board reasonably believes the inclusion of the information would present a serious risk to the health and safety of the practitioner.

Recommendation 11

The QNMU recommends -

section 225 be amended to clearly specify that information can be withheld from the register, specifically in cases of family violence.

Further, we ask the Committee to recommend -

- AHPRA amends the registration form to include a statement advising the practitioner they can apply to have certain information withheld from the register;
- AHPRA staff who administer these forms should give priority to requests seeking information be withheld.

Proposed amendments to the HO Act

Clause 65 Amendment of section 58 (Power to take immediate registration action)

Our concerns regarding the proposed amendment of section 58 of the HO Act are the same as our concerns relating to the proposed amendment of section 156 of the National Law relating to immediate action decision. Please refer to our comments above. In our view, there is no demonstrated necessity for widening the current grounds upon which immediate registration action can be taken.

Recommendation 12

The QNMU does not support inclusion of the proposed subsection 58(1)(d) and recommends there should be no change to the current provision.

Clause 66 Insertion of new section 58A and 58B

On the whole, the QNMU supports the insertion of provisions in the HO Act setting out grounds upon which the Health Ombudsman can vary an immediate action decision. However, we submit the proposed provisions should be amended in a number of ways.

The QNMU believes proposed sections 58A and 58B should clearly specify that the Health Ombudsman may vary *or revoke* the immediate action decision, or specify in the section that 'vary' includes 'revoke', out of an abundance of caution.

In addition, we consider the reference to '*material change in relation to the matter giving rise to the immediate registration action*' in these provisions should simply read '*material change in circumstances*'. The matter giving rise to the immediate registration action may always remain the same. For example, a practitioner's misappropriation of medication may have occurred, leading to the immediate action, and that event in the past will not change. However, the

practitioner may have taken such steps to address their own health issues that immediate action is no longer warranted. We consider therefore that the section should simply refer to '*a material change in circumstances*', to allow greater scope for appropriate review and variation or revocation of the immediate action taken.

This would also be consistent with section 125 of the National Law which allows for changing or removing conditions, and refers to a '*material change in circumstances*'.

For consistency, we believe sections 58A and 58b should include the same provisions as section 125 of the National Law.

We also consider that the proposed subsection 58A(b)(b), which states that the Health Ombudsman may vary an immediate registration action only if '*the variation is on the grounds mentioned in section 58*' is unclear, and would benefit from additional clarification and specificity. Proposed subsection 58B(3)(b) is similarly unclear, in our view.

We also submit that an 'approved form', as proposed in section 58B is not necessary, given the informality with which the Health Ombudsman is permitted to deal with other matters, such as accepting verbal complaints.

Recommendation 13

The QNMU recommends -

proposed sections 58A and 58B should clearly specify that the Health Ombudsman may vary *or revoke* the immediate action decision, or specify in the section that '*vary*' includes '*revoke*'.

the reference to '*material change in relation to the matter giving rise to the immediate registration action*' should simply read '*material change in circumstances*'.

proposed subsections 58A(b)(b) and 58B(3)(b) would benefit from additional clarification and specificity.

an 'approved form' as proposed in section 58B is not necessary.

Clause 69 Amendment of section 68 (Power to issue interim prohibition orders)

Our concerns relating to the addition of subsection 68(1)(b) which would permit action to be taken if 'the health ombudsman reasonably believes that issuing the order is otherwise in the public interest' are similar to our concerns outlined above about the proposed amendment of section

156 of the National Law relating to immediate action decision. Please refer to our comments above. In our view, there is no demonstrated necessity for widening the current grounds upon which interim prohibition orders can be made.

Recommendation 14

The QNMU does not support the amendment to section 68 and recommends there should be no change to the current provision.

Clause 70 Insertion of new sections 68A and 68B

Our comments in relation to the proposed insertion of sections 68A and 68B are similar to our comments above relating to sections 58A and 58B. Please refer to our comments above.

Recommendation 15

The QNMU recommends -

sections 68A and 68B be amended in the ways we have recommended above relating to ss 58A and 58B.

Clause 76 Amendment of section 107 (Decision about registered health practitioner other than student)

Our concerns regarding the proposed amendment of section 107 of the HO Act are similar to those relating to the proposed amendment of s 196 of the National Law. Please refer to our comments above.

Section 107 - Decision about registered health practitioner other than student - of the HO Act currently contains provisions which enable the Queensland Civil and Administrative Tribunal (QCAT) to decide to prohibit a person from using a specified title or from providing a specified health service. In our view, given the very broad definition of 'health service' in the HO Act it is appropriate that the type or types of health service which a person might be prohibited from providing be specified with some detail, so the exact prohibitions are clear. This is particularly important given such an order may have indefinite effect.

Drawing on the current definition, an order prohibiting a person from providing ‘any health service’ runs the risk of being so broad as to be uncertain in its scope and application. We consider it is more appropriate for any order made by QCAT be required to specify the type or types of health service which a person might be prohibited from providing.

Recommendation 16

The QNMU does not support the proposed amendment of section 107 and recommends there should be no change to the current provision.