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Since 1919

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Committee Secretary
Health, Communities, Disability Services, and Domestic and Violence Prevention Committee
Parliament House
George Street
Brisbane Qld 4000

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

Dear Secretary

I welcome the opportunity to provide a submission in relation to the *Health Practitioner Regulation National Law and Other Legislation Amendment Bill 2017* on behalf of Maurice Blackburn Lawyers.

Please do not hesitate to contact me and my colleagues if we can further assist with the Committee's important work.

Yours faithfully

Sarah Atkinson
Principal

Introduction

Maurice Blackburn Lawyers was established in 1919 and is Australia's leading social justice law firm. Maurice Blackburn's areas of expertise include medical negligence litigation, asbestos related diseases, class actions, personal injury claims, worker's compensation, employment law, superannuation claims and financial services disputes.

Maurice Blackburn's medical negligence department is a leading national practice, with departments based in Victoria, New South Wales, Queensland and Western Australia and South Australia. The practice is one of Australia's largest and maintains a keen focus on health and patient safety issues.

We also receive thousands of enquiries from patients each year relating to failings and complications in the health system, many of which intersect with other complaints mechanisms like the Health Quality and Complaints Commission. As such, Maurice Blackburn is uniquely placed to comment on the regulation of health services and the problems experienced by patients and consumers.

Our Submission

An effective framework for the regulation of health services is critical to ensure public safety. It also plays a crucial role in maintaining public confidence in the medical profession and health systems. To achieve these aims, the national framework must value transparency and accountability.

We acknowledge that the rights of health service providers ('providers') must also be protected and they must be afforded due process with respect to notifications and complaints. We accept that the competing interests of providers and patients/consumers can be difficult to manage. However, in our submission, the current balance does not provide adequate protection to the public and the national regulatory framework needs improvement and strengthening in a number of areas.

To the extent that the proposed changes to the Health Practitioner Regulation National Law (National Law) contribute to this aim, they are welcomed and supported by Maurice Blackburn. However, there are a number of issues that require further consideration.

National Regulation of Paramedics

Paramedics provide critical 'front line' acute care service across Australia. They respond to a variety of different emergency and trauma medical situations and their clinical practice includes basic life support, IV cannulation, drug therapy, fluid therapy, advanced airway management and other medical intervention. The profession must be held to the same standards as other health professionals and, as such, it is anomalous that they are not covered by the same regulatory framework.

Maurice Blackburn supports the proposed changes because they will improve the quality of service and increase patient safety. It will also increase public confidence in the profession.

Improvements in Complaints (Notifications) Management, Disciplinary & Enforcement Powers of National Boards

From a public safety perspective, the notifications and disciplinary system is the most important function of the National Law. As such, it is crucial that the notifications system is comprehensive, with the National Boards having appropriate powers and resources to

facilitate the timely and thorough investigation of notifications. Further, the process must be sensitive and responsive to the needs of notifiers. If the system is perceived to be too difficult, onerous or frustrating, it deters notifications and obscures the real incidence of adverse outcomes and complaints. We commonly hear patients say that they cannot be 'bothered' making a complaint, or that the system favours providers. This perception needs to change if the notification system is to be effective.

The notification and investigation processes must also be transparent. A lack of transparency and appropriate communications can undermine public confidence in the regulatory scheme and our health services.

As noted, we understand that the rights of providers and the public must be balanced appropriately. However, all Australians have a vested interest in the proper regulation of our health service providers, particularly given the often catastrophic consequences that flow from medical errors and poor practice. For this reason, we submit that the proposed amendments need further refinement.

National Board May Ask Registered Health Practitioner for 'Practice Information'

Maurice Blackburn welcomes the proposed changes to sections 206 and 132 of the National Law, which will clarify and expand the scope of employment and practice arrangements for the purpose of the National Boards notifying employers and practices. The purpose of this section is to allow the National Boards to notify all employers or practices of a notification or prohibition order and, in that context, a provider's particular employment arrangements should be largely irrelevant. An unnecessarily restrictive definition of 'employer' only undermines the purpose of the National Law and the Boards' ability to protect the public.

Section 132(4) of the proposed Bill contains a comprehensive definition of 'practice information'. However, it is unclear whether the practice information that must be provided relates to health services of the kind subject to the notification, or health services of any kind. In our submission, it must be the latter if the intent of the legislation is to be given proper effect. Further, it is unclear whether a provider is compelled to provide practice information in all jurisdictions. Further clarification of these points may be required.

Grounds for Taking 'Immediate Action' under the National Law

While Maurice Blackburn supports attempts to expand the grounds on which the National Boards may take 'immediate action' against a registered provider, we submit that further clarification of the proposed 'public interest' test is required.

While a 'public interest' test could conceivably cover a range of circumstances not currently contemplated or allowed by the National Law, the proposed amendments provide no guidance as to the scope and operation of the test. In our submission the National Law should contain clear articulation of the factors to which a National Board should have regard when considering the test.

Further, the list of examples should also be expanded. Currently, it only includes a provider facing criminal charges but, in our submission, there are less extreme examples that may also warrant immediate action.

Scope of Application of Prohibition Orders & Offences for Breach of Prohibition Order

We welcome the proposed amendments to section 196(4)(b) of the National Law, which will allow the National Boards to prohibit a provider from providing any health service or using

any protective title if appropriate. This is a significant improvement on the current position, which allows the National Boards only to prohibit a provider from providing a specific service or using a specific title.

In considering this amendment, it is important to acknowledge that it applies in situations where a finding of serious misconduct has already been made out against a provider. In such circumstances, we submit that the balancing of interests should be weighted in favour of public safety, not the provider. A finding of serious misconduct in relation to one aspect of a providers practice should not be viewed in isolation and there will often be a likelihood that the competency and/or behavioural issues in question could impact other areas of practice. The proposed changes will allow the National Boards to widen the effect of a Prohibition Order when appropriate, thereby ensuring public safety. However, it must also be acknowledged that the operation of this power could also have a significant impact on providers. It is therefore important that the power be utilised judiciously and providers be afforded due process.

The changes will also play an important role in maintaining public confidence in the National Boards. In our experience, in certain cases, the public are unlikely to accept that a provider should be allowed to continue practising at all if a finding of serious misconduct in a specific area of practice has been made out.

With respect to failures to comply with a prohibition order, we agree that change is necessary and support the introduction of specific offences. However, in our submission, the proposed penalties are not sufficient to deter breaches, particularly given the potentially lucrative nature of some health and related services. Accordingly, we submit that the proposed maximum penalties should be increased.

Further, with respect to the offence of 'failure to inform patients or employees of a prohibition order in writing prior to providing any health service' (proposed sections 196A(2) and (3)), no guidance is provided about the meaning of 'failure'. For example, is it sufficient for a provider to only advise a patient about the existence of a Prohibition Order, or do they need to explain the substance? Clarification of the requirement that patients be informed 'in writing' is also needed. For example, is it sufficient to have a signed posted somewhere in the practice or must a practitioner specifically draw the patient's attention to it?

These distinctions are important in practice and the legislation must be constructed in a way that prevents circumvention. At this point, it is again important to note that these considerations arise only when a provider is already subject to a Prohibition Order, so has already been found guilty of serious misconduct of some kind. As noted above, we believe that public safety must be prioritised at that point.

Public Register of Prohibition Orders

In our experience, a lack of transparency and information about findings and sanctions made against providers is one of the most common complaints made by patients and consumers. Maurice Blackburn therefore welcomes the proposed requirement that National Boards keep a register of providers subject to Prohibition Orders, including a copy of the order itself.

Patients are better informed than ever before and are going to increasing lengths to investigate their health, medical treatment and choice of provider. It is undeniable that this information may inform and influence their treatment choices and, for that reason, ought to be provided. Additional transparency also increases public confidence in the regulatory system.

The proposed register would have the additional benefit of helping the National Boards to monitor compliance with Prohibition Orders as it will likely lead to increased notifications about possible breaches from the public.

Improving Communication with Notifiers

Many of our clients have expressed frustration with the lack of communication and transparency following a notification. A common complaint is that a patient makes a notification and later is told that the relevant Board has decided not to take further action. Even if the outcome is justifiable and appropriate, the lack of communication and transparency undermines confidence in the process and of the Boards' ability to protect the public. That the National Boards 'look after their own' is a commonly held view amongst our clients. In that sense, we wholeheartedly agree with the final report of the Independent Review of the National Registration and Accreditation Scheme for Health Professions when it identified poor communication, inadequate explanation of outcomes and patients feeling their concerns had not been 'heard' as common frustrations with the process.

The substance of the proposed changes will go some way to addressing these concerns. In particular, we agree that notifiers should be notified following action pursuant to sections 158, 167 and 177 and that reasons should also be provided for the decision. However, we strongly oppose the proposal that this communication be left to the discretion of the National Board. Instead, the Boards should be compelled to notify the notifier of the relevant decisions and provide reasons for that decision. To put it plainly, notifiers have a right to be properly informed about the outcome of their complaint and this right should be properly enshrined in the legislation.

If these powers are to remain discretionary ones, then we submit that communications under the proposed sections 159A, 167A and 177A must be properly monitored to ensure that the powers are actually being utilised by the National Boards. If the discretionary powers are not actually used, then the proposed amendments lose any force and do little to solve the problem.

In addition, we submit that an audit of compliance with section 161 of the National Law should be undertaken. Ensuring compliance with the requirement that notifiers receive quarterly updates would go some way to addressing the concerns outlined above.

Disclosure to Protect Health or Safety of Patients or Other Persons

Maurice Blackburn supports the proposed amendments as they strengthen the ability of the National Boards to disseminate information and protect the public. Widening the scope of these powers to include providers who are not registered providers is also entirely appropriate. Failure to do so would undermine the force of the legislation, particularly given it would limit the national Boards ability to protect the public from providers who have already been de-registered.