Australian Dental Association (Queensland Branch) Submissions in response to the Health Practitioner Regulation National Law and Other Legislation Amendment Bill 2017

1. The Australian Dental Association Queensland Branch ("ADAQ") is grateful for the opportunity to respond to this Amendment Bill.

2. Where amendments to the Bill are not resisted by ADAQ or not relevant, no comments will be made.

3. Where amendments are suggested, ADAQ will make comments with reference to the proposed section number that is being amended.

Amendment of Section 132 (National Board may ask registered health practitioner for Employers details)[1]

132 National Board may ask registered health practitioner for practice information

4. In relation to this section, ADAQ understands why, because of the changes in health practitioner engagement as either employees, independent contractors or putative independent contractors, that there were practitioners who were escaping the requirement to provide employment details, or at least engagement details because of the widespread practice of dentist members particularly being engaged as independent contractors.

5. ADAQ cannot resist the intention of the legislation to make sure that people or entities who employ, work with or engage otherwise with a subject registrant, meaning the health practitioner who may be the subject of a notification, ought to be able to be broadened to include persons other than employees, if for no other reason that an employee determination can only be made under a number of various jurisdictional tests, not limited to workers' compensation, taxation, superannuation considerations and the Fair Work Act.

6. However, ADAQ is unsure of the reason as to why the shared premises provisions set out at (4)(a) and the provisions at (4)(b) are different. It is submitted with respect, that the shared premises dichotomy would attempt to cover circumstances under which practitioners are in a putative employment relationship as independent contractors within a facility with other putative independent contractors, and the requirements as set out in (4)(a) that the practitioner is self-employed, shares premises and shares the cost, are so vague as to be almost meaningless without definition.

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[1] *Clause 20, page 19-21 of the Health Practitioner Regulation National Law and Other Legislation Amendment Bill 2017 ("the Bill").*

7. For example, self-employed could mean a sole trader or a corporate employing an individual, in which case they would not be self-employed but would be employees. Shared premises can mean a number of things, including but not limited to paying rent on a site, working on a site with other health practitioners, and because of the requirement apparently to be self-employed and to share premises, to be caught by these provisions also must share the cost of the premises.

8. It is submitted that this section presents difficulty for interpretation and could be significantly simplified, such that the practitioner ought to be under an obligation to supply practice information at all sites at which he or she practices their profession, including the address of each of the premises and the business names.

9. The requirement to provide the names of other health practitioners 'with whom the practitioner shares premises' could be problematic in circumstances where these arrangements are tenuous at best, and a full disclosure of all of those registered health practitioners, about whom the subject registrant has knowledge might be problematic.

10. It is submitted that this section as drafted is overly complicated and unnecessary and will create interpretation issues for both registrants and the regulator.

Amendment of section 156 (Power to take immediate action)[2]

11. In relation to the amendment of section 156, ADAQ understands that this amendment relates to all health practitioners under the National Law operating in each State, but the National Board presumably is forming the reasonable beliefs through information provided by investigators in State who report to the Registration Notifications Committee in each State.

12. It is trite to say that immediate action being in the public interest is a much lower threshold for the National Board to take immediate action. Because of the ramifications for immediate action under the National Law and equally the Office of the Health Ombudsman legislation, this can often amount to suspension and significant conditions. Caution would need to be exercised by the National Board in deciding whether an action is in the public interest.

13. ADAQ does not resist the proposition that where a registered health practitioner was charged with a serious criminal offence, the National Board may be of the view that suspension is appropriate in the circumstances. However, that belief, the exercise of the discretion and the formation of that belief needs to be performed with utmost caution in the circumstances.

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[2] *Clause 24, page 22, lines 8-20 of the Bill*

14. It is submitted that the provisions of 156(1) in the present legislation, being that action may be taken where the National Board reasonably believes that because of the registered health practitioner's conduct, performance or health, the practitioner poses a serious risk to persons and it is necessary to take immediate action to protect the public health or safety, are such that 156(1)(a)(ii) is sufficient.

15. If this submission is not accepted, then section 156 (1)(a)(ii) could be modified to state that it is necessary to take immediate action to protect public health or safety and insert the words "and to maintain public confidence in the provision of services by health practitioners".

Insertion of new section 167A and new section 177A

16. Section 167A[3] is of concern to ADAQ. In circumstances where a the Board makes a decision under section 167, which is making a decision after an investigation, the National Board's ability or discretion to inform a notifier who made the notification of the decision is not resisted, but the reasons for the decision, particularly in circumstances where those reasons may be prejudicial to the practitioner's health and confidentiality, is of concern.

17. It is submitted that section 167A(2) should be limited to the words, "After making the decision, the National Board may inform the notifier who made the notification of the decision".

18. Reasons for decision are provided to allow the Respondent practitioners an explanation of the administrative process, to unsure that it is fair and reasonable.

19. ADAQ resists the position that the complainant needs to be provided reasons for the decision, particularly if the decision is adverse to the registrant practitioner.

20. If reasons for the decision are to be provided, then the National Board should give the respondent registrant an opportunity to comment and make submissions about the release of the reasons for the decisions and the form and extent of the material to be released as reasons for the decision.

21. Similarly, the same view is held by ADAQ in relation to section 177A about an assessors report.[4]

Amendment of section 184 (Notice to be given to registered practitioner or student)[5]

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[3] *Clause 26, page 23 of the Bill*
[4] *Clause 28, page 23-24 of the Bill*
[5] *Clause 32, page 26 of the Bill*

22. In relation to Section 184, ADAQ notes that at 184(4) a health practitioner may within 14 days after receiving the notice under subsection (3)(b) about a hearing, may give a written notice to the panel, requesting a hearing and undertaking to be available within 28 days after giving the notice (to the panel).

23. Whilst seeming to take away the right to an *in personam* hearing, ADAQ understands the background the reason for being able to proceed on the basis of a hearing on the papers, despite the inherent procedural unfairness in the circumstances where a practitioner may not be able to have a presence at a hearing to present their case at its highest.

Amendment to section 206 (National Board to give notice to registered health practitioner's employer)

24. In relation to section 206[6] ADAQ suggests that where the Board may give written notice to each of those practitioners at 206(2)(a)[7], the written notice should only include a decision other than to caution a practitioner.

25. In relation to 206(2)(a) the intent seems to be that written notice may be given if a practitioner is self-employed and shares premises, the information may be given to each of those practitioners that shared premises.

26. The legislation is silent in relation to paragraph 132(4)(b), but in relation to paragraph (c) and (d) where there is a positive obligation on the Board to give written notice to the entity, that again ADAQ suggests that such a written notice be given only in circumstances where there is a performance action, other than a caution.

27. Cautions by way of their implicit private nature, ought not be publicised at all.

The Health Ombudsman Act 2013

28. In relation to the proposed changes to the Ombudsman Act 2013, ADAQ repeats and relies upon its submissions of the 6th of April 2017.

Authorising the Health Ombudsman to take immediate action against a health practitioner on public interest grounds.

29. This is a very significant broadening of the power with limited restraint for the Health Ombudsman ("HO") to take immediate action and to impose interim prohibition orders.

30. This will mean that the HO can take immediate action if he believes the

[6] *Clause 39, page 31 of the Bill*
[7] *Clause 39 page 31-32 of the Bill*

action is in the public interest rather than only if a practitioner poses a serious risk to the public because of the practitioner's health, conduct or performance, and it is necessary to take action to protect public health or safety.

31. This will be broadened by the reduction of the language to say that the OHO can take action if they believe the action is in the public interest.
32. Presently, the HO has no requirements to be timely in decision making and administration other than under section 84 of the *Health Ombudsman Act 2013* ("the Act") in relation to investigation.
33. It is submitted that **there ought to be requirements for timeliness by the HO for example in relation to approval of conditions precedent in relation to imposition of conditions**.
34. With respect, the HO regularly requests affected practitioners to respond within timeframes up to twenty-eight (28) days, and then does not reciprocate.
35. The proposed broad power **ought to be balanced by the ability of affected practitioner to make application to QCAT to stay the decision of the HO (presently prohibited by section 100 of the Act)**.
36. Presently, affected practitioner's only option to stay a decision to take immediate registration action is to make application to the Supreme Court of Queensland for a stay.
37. The **broadening of this power without an appropriate mechanism to challenge the immediate action orders** is of great concern.
38. Similarly, if conditions are imposed, the preconditions to the practical operation of these conditions is regularly delayed for long periods.
39. If the HO is to have these new powers, **then the office must be resourced to be able to deal with conditions on practice promptly**.
40. Also, there should be a requirement where the Ombudsman decision is delaying for example a return to practice, that a decision is made on the threshold issue within 14 days after the required practitioner information and submissions are provided.
41. Where a decision is not made, then the affected practitioner ought to be able to bring the issue of the delay to QCAT by application on an urgent basis.
42. ADAQ submits that there is no need to broaden the threshold issue and the Act should not be modified to include the public interest test.

Authorising (the) QCAT to prohibit a health practitioner from providing any health service or a specified health service

43. In relation to amendment two (2), the best example of this, of course, is the one at the bottom of page 8 under the heading *Relevant HO Act Provisions*. A good example is a physiotherapist who has an interim prohibition order on a practice but who can presently work in a nonregistered capacity as a massage therapist.

44. The dental example would be an affected dental practitioner working as a dental technician or as a dental assistant, perhaps with expanded function duties.

45. For that reason, it makes it perhaps appropriate because there are many health services that are provided by people who are not registrants, but the definition of a health service (particularly in a support role) is quite broad.

46. As long as the proposed amendment does not prohibit an affected practitioner from perhaps working in other capacities to allow them to earn income in the health sector more broadly, then it is quite a sensible provision.

47. If this amendment is to be made, then health service under section 7 in the present act should be defined as being a service or support service where the provider is in contact with a patient.

48. This would allow an affected registrant to work in sales or administration.

Clarifying that the information which the Health Ombudsman and other authorised persons may require the practitioner to provide includes *practice information*

49. The third amendment, at paragraphs 3(a) to (e), as set out in this document provides categories of self-employment.

50. The intent of the legislation is not unreasonable even if the way the National Bill is drafted (which is apparently mirrored) is somewhat inelegant. It is appropriate that the widespread independent contractor arrangements are considered.

51. ADAQ can see significant issues depending on the precise wording of this section and the categorisation of engagement allowing the information as to action by the HO to be provided to any health practitioner who shares premises.

52. Shared premises is not defined (other than not being a residence) but it is too broad a term, and open to significant interpretation issues.

Ensuring that when disciplinary or enforcement action is being taken against a health practitioner, then the Ombudsman is able to inform all places at which the practitioner practices.

53. Under category (b) of the contracts for service arrangements where a practitioner is self-employed, shares premises and the costs of those premises are shared with other practitioners, affected practitioners will need to provide the business name they operate under, the address of the premises and the names of the other registered practitioners with which the practitioner shares that premises.

54. Then depending on the risk to the public and the particular arrangements of the practice, there is a discretionary power as proposed, for the Ombudsman to notify the other practitioners – presumably at that location.

55. It is interesting that paragraph (b) refers to 'shares the costs of the premises' and differentiates affected practitioners caught in paragraph (c), and one can only presume that is the difference the National Board suggests and the HO adopts is that, if a practitioner works with other practitioners and shares the costs of the premises they will be obliged to provide the business name under which they operate, the address of each of the premises, and the names of all other health practitioners with which the practitioner shares premises.
56. This would appear to mean that if one pays rent or somehow contributes to the cost of the premises, then the practitioner must tell the Ombudsman and the Board the names of all other health practitioners with whom they share premises.
57. However, if affected practitioners do not share the costs of the premises, then they merely need to inform the National Board and the Ombudsman the name, address and contact details of their principal, being an employer or otherwise.
58. It is not clear why this rather complex and odd distinction has been made.
59. This proposed amendment does not address the complexities around corporate practice.
60. This proposed amendment needs much more consideration.
61. 'Informing all places at which the (affected) practitioner works' is too broad and non-particularised, particularly in a complex corporate environment.
62. **This proposed amendment may well have effects that are unintended because of the lack of clarity around the categories, definitions of terms used to define the categories and rationale for these categories.**

Enabling a health service being investigated by the Health Ombudsman, and the relevant complaint (if any), to waive the right to receive three-monthly notice about progress of the investigation

63. Amendment eight (8) is in relation to the three-monthly notice about progress of an investigation.
64. ADAQ submits that the waiver should not be a default position, and that such a waiver ought to be in writing.
65. These three month notices are often very limited.
66. If the HO says this opportunity for waiver will relieve an administrative load, **then in circumstances were the waiver is not given, the notices ought to be detailed.**
67. If there is a waiver that may be provided by the affected registrant as proposed, then the HO ought to provide notices (in circumstances where a waiver is not elected by the affected practitioner) that address (non-exhaustively) the following:

a. The expected time frame for completion of the investigation, including:
b. An expected range of time for completion for the investigation;
c. An expected range of time for a decision after the completion for the investigation.
d. Specifics about what parts of the investigation are completed, what parts are in progress and what parts are yet to be commenced.

Amendment to section 282 (Notice to employers about other matters)[8]

68. At Clause 82, in relation to the amendment of Section 282, ADAQ objects to 282(2)(a) the words that "the health ombudsman believes is an employer of the practitioner".

69. With respect, it is not open for the Ombudsman to decide who is an employer or not of the practitioner. To have a clause including the words believes, almost falls to the level of a mere suspicion and the wording in this circumstances ought to be modified, such that "a person that engages with the practitioner for the provision of clinical services, whether by way of an employment contract or other contractual arrangement".

70. It is submitted this would remove the uncertainty and the unacceptable mere suspicion, would be a better and more sure wording of the section for the benefit of both the practitioners and also for the Ombudsman.

71. **In conclusion** ADAQ would welcome the opportunity for further discussion on issues where the basis for these submissions are accepted.

[8] *Clause 82, page 68 of the Bill*