

Health Practitioner Regulation National Law and Other Legislation Amendment Bill 2024

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26 September 2024

Mr Aaron Harper MP
Member for Thuringowa
Chair, Health, Environment and Agriculture Committee
Parliament House
George Street
BRISBANE QLD 4000

Via email: HEAC@parliament.qld.gov.au

Dear Mr Harper

Submission on the *Health Practitioner Regulation National Law and Other Legislation Amendment Bill 2024*

Thank you for inviting Ahpra and the National Boards to make a submission to the Health, Environment and Agriculture Committee (the Committee) on the *Health Practitioner Regulation National Law and Other Legislation Amendment Bill 2024* (the Bill) that was introduced into Queensland Parliament by the Hon Shannon Fentiman MP, Minister for Health, Mental Health and Ambulance Services and Minister for Women, on 11 September 2024.

Background to amendments

Australian Health Ministers decided in April 2023 that patients should be aware of previous serious sexual misconduct of any health practitioner and agreed that the National Law should be amended to ensure any such proven allegation remain on a practitioner's record in perpetuity. Health Ministers agreed the Bill in July 2024 for introduction into the Queensland Parliament.

The Bill responds to the continuing rise in reporting of sexual misconduct matters involving registered health practitioners and the need for stronger protections for people and practitioners (as notifiers) who courageously raise their concerns with us – including in complex and sensitive areas such as professional and sexual boundary violations.

The Bill also reflects Health Ministers support for Ahpra's and the National Boards' efforts to progress change as part of our [actions to improve public safety involving sexual misconduct in healthcare](#) and provides stronger protections for notifiers.

The Bill includes amendments to the *Health Ombudsman Act 2013* (Qld) and local modifications to the *Health Practitioner Regulation National Law Act 2009* (Qld) to support the National Law¹ as applied in Queensland as a co-regulatory jurisdiction in the National Registration and Accreditation Scheme (the National Scheme). Ahpra has developed a strong working relationship and communicates regularly with the Queensland Health Ombudsman and her office (the OHO), including through the joint consideration process for individual complaints. We are confident that these local amendments will support our continued cooperation and coordination between the OHO and Ahpra and the National Boards.

Our support of the Bill

Ahpra and the National Boards **support the Bill as introduced** and provide comments on the three key reforms and related implementation activities.

¹ The Health Practitioner Regulation National Law, as in force in each state and territory.

a. Permanent publication of additional information on the national public registers about disciplinary action against health practitioners who have been found by a tribunal to have engaged in serious sexual misconduct

Ahpra and the National Boards condemn sexual misconduct in all of its forms by registered health practitioners. Any sexual exploitation is a gross abuse of trust and can lead to long lasting and profound damage.

Ahpra and the National Boards have worked together to continuously improve how we manage and regulate sexual misconduct by registered health practitioners. Our ongoing work to improve the protection of the public is set out on our [website](#). Over the last 12 months, for matters relating to boundary violations, the increased commitment of resources and training have seen a 10% reduction in open investigations, a 24% reduction in open aged investigations, and a 20% increase in tribunal referrals. The boost in resources is a key part of Ahpra's efforts to respond to allegations of sexual misconduct by registered health practitioners, in the context of growing numbers of notifications.

As a result, we have seen a sustained jump in reports to authorities as well as the number of practitioners facing regulatory action to protect the public. In 2022-23, 841 complaints were received about boundary violations by health practitioners. The allegations relate to 728 registered health practitioners. That's 223% higher than three years ago and represents a growing trend of patients coming forward to report allegations of inappropriate behaviour.

The latest data are almost 50% higher than the number of boundary violation notifications reported two years ago, when Ahpra introduced new concern types as part of wider measures to condemn and stamp out sexism, sexual harassment or gendered violence in healthcare. This year's complaints also follow on from a record 925 boundary violation notifications received last year.

We support the Bill enabling the publication of additional information on the register in perpetuity when the threshold is met. The additional information would include a statement that the practitioner has engaged in professional misconduct on a basis of sexual misconduct, the sanctions imposed, and the tribunal's decision (if published by the tribunal).

This change clearly aligns with the paramount principle of the National Law to protect the public and ensure public confidence in the safety of services provided by registered health practitioners and students. Publishing additional information on the public register will better address community expectations about having access to information about professional misconduct (involving sexual misconduct by health practitioners) and will help support the public make informed choices when accessing the health services of registered practitioners. The change also aligns with the range of reforms that Ahpra and the National Boards are progressing as part of our actions to improve public safety involving sexual misconduct in healthcare.

Appropriate threshold for publication of additional information

We acknowledge that a balance needs to be struck between protecting the public and meeting community expectations about transparency of information made available on the public register about registered health practitioners that they place their trust in; and affording procedural fairness for practitioners involved in notification and tribunal processes.

A finding of professional misconduct is the most serious finding that a tribunal can make. Under the National Law, a tribunal may find that different types of conduct, taken together, amount to professional misconduct. The Bill sets the appropriate threshold for the recording (publication) of additional information in the public register when it is proven that a practitioner has engaged in professional misconduct on the basis of sexual misconduct.

The tribunal process is rigorous and ensures that the allegations and evidence are tested in an independent forum before a finding is made.

Under the Bill, 'sexual misconduct' bears its ordinary meaning. The Bill also provides that – to trigger the publication requirements – sexual misconduct need not be the sole or main basis for the tribunal's finding of professional misconduct. The Bill provides National Boards with a very limited discretion in deciding whether a tribunal finding of professional misconduct was based on sexual misconduct. A Board's decision will not be subject to merits review by a state or territory tribunals however, a practitioner will be able to challenge the legality of the Board's decision through judicial review. These are sensible provisions that will support National Boards' to consider tribunal findings and judiciously exercise their obligation to publish the additional information on the register.

Matters involving sexual misconduct can be complex and sometimes involve a range and pattern of behaviours and conduct. Recent tribunal findings of professional misconduct involving sexual misconduct illustrate this point, and include:

- A South Australian tribunal making a finding of professional misconduct and cancelling a doctor's registration, and disqualifying him from applying for registration and from providing any health services for four years following an investigation into his unprofessional sexual conduct toward a co-worker; his use and supply to others of illegal drugs, and complaints about him inappropriately prescribing (including self-prescribing) and supplying medicines;
- A Victorian tribunal cancelling a doctor's registration and disqualifying him from reapplying for 15 years after being convicted of raping two patients and inappropriately touching another;
- A Victorian tribunal cancelling a nurse's registration and disqualifying him from reapplying for registration until April 2025 after intentionally touching and, in one case groping, the breasts of two unconscious female patients;
- A West Australian tribunal cancelling a doctor's registration and disqualifying him from applying for registration for 12 months following a finding that he transgressed professional and sexual boundaries with three of his female patients;
- A Victorian tribunal disqualifying a physiotherapist for six years and making a prohibition order after he was found to have asked a female patient to unnecessarily remove her underwear during treatment and touching her in a sexual manner;
- A Western Australian tribunal cancelling an occupational therapist's registration and disqualifying him from reapplying for registration for three years after being convicted of indecently dealing with a child of or over the age of 13 years and under the age of 16 years;
- A Victorian tribunal reprimanding a doctor, cancelling his registration, disqualifying him from applying for registration for 8 years, and prohibiting him from providing any health service which involves physical contact with a female, when he is alone with a female, after he was found to have made unnecessary and inappropriate physical contact with five female patients when performing a medical examination and that the physical contact was for a sexual purpose;
- A South Australian tribunal disqualifying a nurse from re-applying for registration for five years after he continually sexually harassed a work colleague for seven months.

Notifier supports

People who come forward to us with their concerns about sexual misconduct are offered support. Ahpra expanded its social work led Notifier Support Service (NSS which provides support to victims and survivors navigate the regulatory and Tribunal process. The NSS pilot program has proven to meet a significant need, receiving 278 referrals since its commencement in September 2021. The NSS was originally scoped to provide service in relation to sexual boundary breaches and sexual misconduct matters only. The NSS has grown to 3.1 FTE (from an initial 2.0 FTE) which enables the service (with existing staff arrangements) to have two social workers located in Adelaide and two in Melbourne providing a service in all Ahpra jurisdictions. The social workers' backgrounds variously include experience with DPP victim and witness support, criminal justice, sexual assault, domestic violence and Office of the Public Advocate.

Expansion of the NSS to date has positively impacted service levels by ensuring that a greater cohort of those persons within scope are able to be referred to the NSS. This has further enabled planning to begin regarding the expansion of the service into matters other than those involving sexual boundary breaches and sexual misconduct.

Support and procedural safeguards for practitioners

The Bill makes it clear that additional information must not be published on the register contrary to a court or tribunal non-publication order and must be removed if the tribunal's professional misconduct decision is overturned or stayed on appeal. The Boards retain their discretion not to publish regulatory history information for health and safety reasons. We agree that practitioners are entitled to confidentiality regarding their personal health.

While National Boards take immediate action to suspend a practitioner's registration to protect the public while investigating allegations of sexual misconduct, where there is a case to answer, these serious matters are referred to tribunals in each state and territory for hearing. Only a tribunal can cancel a

practitioner's registration, disqualify a person from applying for registration for a time, prohibit a person from using a specified title or prohibit them from providing a specified health service.

Ahpra has a dedicated webpage with information for practitioners who are subject to a notification which can be accessed [here](#). Independent and accessible support is available to health practitioners who are subject to a notification to Ahpra and the National Boards. We recognise that for registered health practitioners, having a concern raised about them is very stressful. We encourage all practitioners that are subject to a notification process to use the independent [practitioner support](#) services and other [support services](#) that are available. Practitioners who are the subject of a notification are also advised of the available support services during their initial phone contact and correspondence from Ahpra. Practitioners are encouraged to contact their indemnity insurer as soon as practicable via our verbal contact with them.

b. Nationally consistent process for practitioners to regain registration after their registration has been cancelled, or they have been disqualified from registration, by a tribunal (reinstatement orders)

Ahpra and the National Boards **support** this change to provide for a nationally consistent approach for reinstatement orders to provide greater transparency in the process for the public.

Requiring state and territory tribunals to decide if practitioners who have had their registration cancelled or disqualified can apply for re-registration is a key measure raised in our *action plan to better protect patients from sexual misconduct in healthcare*. Importantly, the provisions in the Bill have been crafted in a way that recognises that the tribunals in each state and territory are constituted under local legislation and rules governing proceedings are specific to each tribunal. This approach will support national implementation while ensuring the changes are workable for tribunals in each state and territory.

The Bill provides that an application for a reinstatement order is to be made to the tribunal in the jurisdiction that made the original cancellation or disqualification order. We **support** this provision, as it will provide necessary clarity for health practitioners about the tribunal that will hear their application.

Following the issue of a reinstatement order (including any conditions imposed by the tribunal), we **agree** that the decision to grant registration to a practitioner who has previously had their registration cancelled or been subject to a disqualification period must remain with the relevant National Board/s and be decided under the National Law taking account of all registration requirements that practitioners need to meet to obtain and retain their registration. If the National Board does not agree to register the practitioner, the practitioner may appeal the decision. More information on our regulatory processes related to registration may be found in our published [Regulatory Guide](#).

We acknowledge that there will inevitably be an impact on the resourcing and workload of state and territory tribunals, as reinstatement orders are currently only within the remit of the New South Wales Civil and Administrative Tribunal (NCAT). Based on available data, there were 28 individuals that had a reinstatement order issued by NCAT and had applied for re-registration. Of the 28 applications for re-registration, 27 practitioners have been granted re-registration following the issuing of a reinstatement order and 1 application was withdrawn by the applicant before a decision could be made on re-registration,

c. Strengthening protections for notifiers (complainants) against reprisals or other detriment, threats and intimidation, and clarify consumer protections in relation to nondisclosure agreements about the health, conduct or performance of health practitioners.

More protections for notifiers

Ahpra and the National Boards **support** the change to make it an offence to threaten, intimidate, dismiss, refuse to employ, or subject a person to other detriment or reprisal because they intend to or have made a notification or provided assistance to persons performing functions under the National Law. We agree that setting the maximum penalty for an individual at \$60,000 and for a body corporate at \$120,000, is an appropriate penalty that recognises the seriousness of this conduct. We note these protections would apply with respect to notifications made in good faith and will not affect the way in which vexatious complaints are managed under the National Law.

The National Health Practitioner Ombudsman's (NHPO) *Review of confidentiality safeguards for people making notifications about health practitioners* was conducted at the request of Ahpra following the conviction of a general practitioner for the attempted murder of a pharmacist who had made a notification about his prescribing practices. The NHPO examined Ahpra's management of confidential and

anonymous notifications at the time, and whether there were ways in which safeguards could be strengthened to ensure the safety of notifiers. While the review found that Ahpra's practices for managing confidentiality and anonymity were reasonable and consistent with the practices of other regulators internationally, there were improvements that could be made. Recommendation 9 of that report was for Ahpra to seek an amendment to the National Law to make it an offence for a registered health practitioner to harm, threaten, intimidate, harass or coerce a notifier. We accepted all of the recommendations of the NHPO's report to strengthen the protection of notifiers while recognising the importance of fairness for health practitioners who are the subject of a notification that were within our remit.

Non-disclosure agreements (NDA)

We **support** the Bill making it an offence to enter into an NDA unless the agreement clearly sets out, in writing, that it does not limit a person from making a notification or assisting regulators and others performing functions under the National Law. We welcome the Bill rendering NDAs void to the extent that they seek to prevent or limit a notifier from making a notification or assisting persons performing functions under the National Law. Setting a maximum penalty for an individual at \$5,000 and a body corporate at \$10,000 is an appropriate deterrent.

The use of NDAs is not unique to either the cosmetic surgery industry or to health regulation. NDAs are a common feature of dispute resolution across many professions and industries. It follows that as a regulatory policy issue, the broader issue of being able to obtain information that is the subject of an NDA arises for many regulators. If this amendment is passed, it would also address the issue for the National Scheme's co-regulatory partners, the NSW Health Care Complaints Commission and the Queensland Health Ombudsman.

By way of background, in September 2023, Ahpra and the National Boards wrote to Health Ministers asking that consideration be given to changing the National Law to clarify that an NDA does not prevent a person from making a notification to Ahpra or a National Board about their treatment by a registered health practitioner. We did this because *The Independent review of the regulation of medical practitioners who perform cosmetic surgery* noted situations where an NDA had been used by some practitioners in the course of resolving a complaint from a patient. Such an NDA appeared to interfere with some consumers' understanding of their right to make a notification to Ahpra and the Medical Board of Australia, or to assist with an investigation. Ahpra advised the independent review that such NDAs would likely be unenforceable. The review recommended (recommendation 4c) that Ahpra and the Medical Board consider making public their position in relation to practitioners' use of NDAs as a means to prevent consumers making a notification.

Ahpra and the Medical Board accepted this recommendation and published a statement on our Cosmetic Surgery Hub which includes the following: *We think that NDAs do not prevent patients from making a notification. However, if you have signed an NDA and want to make a notification to Ahpra, we encourage you to check with your lawyer to make sure they have no concerns about you raising your concern with us in a notification.* Ahpra's Cosmetic Surgery Oversight Group noted that Ahpra had published its position on NDAs but asked that a wider piece of work be undertaken to clarify whether NDAs prevent a person making a notification to a complaints body. The outcome was the view that a change to the National Law should be sought to put this beyond doubt and the Bill as drafted will achieve this.

Implementation

The 57th Parliament, including its committees, will be dissolved from 1 October 2024, ahead of the Queensland State Election. As a result, we understand that your inquiry will cease and all Bills before Parliament will lapse, and reintroduction of the Bill will be a matter for the 58th Parliament.

Noting the above, if Queensland Parliament passes the Bill (or a successor Bill into law), Ahpra will be tasked with implementing the changes nationally. We **support** changes in the Bill commencing on proclamation to support a smooth transition, enable adequate time for system and policy and procedure changes, and to communicate what these changes mean in practice for the public, practitioners and other interested stakeholders. We expect implementation activities will take up to 12 months using current resources. Having these provisions commence at the same time across all jurisdictions will be critical to mitigating any risk of inconsistent application of the National Law in participating states and territories.

National implementation of the changes to support publication of additional information on the public register in perpetuity will require dedicated resources to consider professional misconduct matters dating

back to the start of the scheme in July 2010.² There have been approximately 1,265 findings of professional misconduct following notifications relating to sexual boundaries that we will need to review.

In order to fairly and carefully do this, our Ahpra legal team will need to:

- identify all matters involving a finding of professional misconduct since 1 July 2010 and determine if the threshold is met;
- review each of those matters to determine whether this finding related to sexual misconduct;
- for each of those matters, write to the affected practitioner advising them that the relevant details will be included on the register in perpetuity;
- address any arguments and any legal challenges;
- include the relevant information on the register following procedures that will be developed by Ahpra.

This will be a time intensive exercise as professional misconduct matters involve a range of regulatory sanctions which may not be easily summarised. Publishing will be a relatively manual process and will likely occur at a time when Ahpra is implementing a new regulatory operating system to modernise our practices and replace the original IT system provided at the start of the National Scheme in 2010.

Our published [Regulatory Guide](#) which sets out how Ahpra and the National Boards manage notifications about the health, performance and conduct of practitioners will also need to be updated. New and revised internal policies and procedures will also take time to develop. Ahpra will work with the National Boards and delegated decision makers and Ahpra staff to ensure the changes are well understood to support nationally consistent decision-making.

Boarder communication with stakeholders on the changes in the Bill will also be important. Ahpra will likely develop a plain English guide for the changes, and what they mean for the public and registered health practitioners, as this was well received for our implementation of the Tranche 2 reforms to the National Law. Community education to support implementation of improved protection for patients and the public regarding the use of NDAs by practitioners may also be helpful.

About us and our work as national risk-based regulators of registered health practitioners

Trust is fundamentally important to be an effective regulator. Ahpra and the National Boards rely on members of the community, health practitioners, students, employers, co-regulators, educators and many others to engage and work with us as national regulators. They expect us to be fair, transparent, responsive, empathic and accountable as we regulate and work effectively with our partners to keep the public safe. Ahpra maintains a wide range of important relationships and partnerships across the health care system in Australia as well as internationally. Our [National Scheme engagement strategy 2020-2025](#) demonstrates our commitment to working with a broad range of stakeholders and doing our part to protect the health and safety of the public within a wider network of regulation.

The National Scheme is now in its 14th year of operation. The Committee understands the work that we do in Queensland in conjunction with the Queensland OHO. Nationally, Ahpra works in partnership with 15 National Boards to regulate over 900,000 registered health practitioners from 16 health professions. Together, our primary role is to protect the public and set the standards and policies that all registered health practitioners must meet. Our mission is to protect the public by regulating health practitioners fairly and effectively to facilitate access to safer healthcare. The National Law prescribes the roles and powers that National Boards and Ahpra have in addressing concerns about the practice and conduct of registered health practitioners (and in certain circumstances, registered students).³

In New South Wales, Ahpra and National Boards do not manage notifications about registered health practitioners. They are managed by the NSW Health Care Complaints Commission and the 15 health professional councils in that state, supported by the Health Professional Councils Authority. In Queensland, the Office of the Health Ombudsman (OHO) receives all complaints regarding registered

² We note that this change is retrospective and applies from the **participation day** for each profession under the National Law. This means 1 July 2010 for chiropractic, dental, medical, midwifery, nursing, optometry, osteopathy, paramedicine, pharmacy, physiotherapy, podiatry, and psychology; 1 July 2012 for Aboriginal and Torres Strait Islander health practice, Chinese medicine, medical radiation practice, and occupational therapy; and 1 December 2018 for paramedicine.

³ Part 5 of the National Law sets out the functions of National Boards. Part 4 sets out the functions of Ahpra as the National Agency for the scheme. Part 8 sets out health performance and conduct powers. The National Law, as it applies in each state and territory, is accessible from that jurisdiction's Legislation website.

health practitioners and through a process of joint consideration work with Ahpra to decide whether it will keep the complaint or refer it to a National Board and Ahpra to manage.

Our published [Regulatory Principles](#) underpin the work of the National Boards and Ahpra in regulating Australia's registered health practitioners. They shape our thinking about regulatory decision-making and have been designed to encourage a culturally safe and responsive, risk-based approach to regulation across all professions. The regulatory principles consider community expectations and reflect ministerial directions.

The National Boards and Ahpra adopt a risk-based approach to the regulation of health practitioners. When performing their duties, the Boards (and their committees) and Ahpra identify the risks posed by the health, conduct and performance of health practitioners, consider the possible consequences of those risks, and respond accordingly. When considering risk in response to a concern raised regarding the health, performance or conduct of a registered health practitioner, consideration of a matrix of factors may be considered including those which may escalate or conversely mitigate risk. Factors that may influence risk include:

- Individual risk controls – actions taken by practitioners to improve their practice; eg, engagement with peers, reflecting and responding to risk, updating of knowledge or skills according to risk.
- Organisational risk controls – provided by an organisation or structure a practitioner works in. These may support a practitioner, and therefore safe care to the public by, for example (but limited to) clinical audits, risk management policies and procedures, established complaint management systems, staff education and professional development, supervision of practitioners, peer review and performance management of practitioners. Organisational risk controls may be reflected in the fundamental pillars of clinical governance.
- Regulatory risk controls – restrictions on a practitioner's registration placed by a Board, in response to an existing and ongoing risk. These do not hold punishment of the practitioner as a primary focus but work to enable the practitioner to undertake professional and safe practice. The Board considers these controls are necessary to address the risk(s) to the public.

When considering the risk posed by a registered health practitioner's health, conduct and/or performance the **infographic provided** on our [Notifications - how we manage concerns](#) webpage provides an overview of the Boards' role in promoting safe professional practice and the management of inherent risks in healthcare through to the considerations where there has been serious departure from accepted standards. This approach improves our understanding of risk and ensures that matters of significant risk progress to investigation, while low risk matters can be finalised more expeditiously.

Closing

In closing, Ahpra and the National Boards **commend the Bill** to Queensland Parliament. The changes will provide more transparent information about sexual misconduct by registered health practitioners; better support consumer choice; and strengthen protections for notifiers who raise concerns in good faith.

We recognise and value the leadership of Health Ministers and their commitment to addressing sexual misconduct by health practitioners, and the substantial collaboration and engagement nationally during legislative policy development and the drafting of the Bill, led by Queensland and Victoria.

Ahpra notes that submissions accepted by the due date will be proceedings of the committee and will be available to a successor committee. Ahpra would appreciate the opportunity to contribute to any subsequent discussions on the amendments and welcome an opportunity to speak with the Committee (or its successor) at a public hearing on the Bill. As Queensland is a co-regulatory jurisdiction for notifications/complaints, it may be helpful for Ahpra and the Queensland OHO to jointly appear, as both agencies will undertake implementation activities to support changes if passed by Parliament.

If you have any queries about this response, please do not hesitate to contact me.

Yours sincerely



Martin Fletcher
Chief Executive Officer