Health Practitioner Regulation National Law and Other Legislation Amendment Bill 2022

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AustralianDoctorsFederation
A Better Future for Patients and Doctors

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Health Practitioner Regulation National Law and Other Legislation Amendment Bill 2022 (the Bill).

Summary:

The ADF has major concerns with the above Bill as proposed. Those concerns relate to the Bill's intention to establish broad objectives whilst at the same time widening the power of regulators to achieve those objectives.

This will mean that an inter-governmental agency, with control over 800,000 health professionals, which answers to no single jurisdiction, will be given powers to do whatever it thinks is "necessary or convenient".[1] Few, if any, government agencies are granted this scope of power. It amounts to a blank cheque.

The ADF argues that when broad undefined objectives are combined in legislation with wide undefined executive powers, the possibility of abuse of process, intentional or unintentional, is greatly increased.

The Bill as presented leaves broad areas of interpretation and discretionary decision-making to regulators and hence bypasses or subdues established legal processes that are designed to work against injustice.

The ADF maintains that an essential test of any changes to legislation/regulation is whether the changes will improve confidence in the regulation process by those being regulated as well as the public who the regulation is designed to protect.

Regulation is most effective when there is a high level of cooperation and support from those being regulated.

The ADF also has major concerns over the Bill's changes to established accreditation processes and its impact on medical professionals and medical standards. The ADF maintains that any move to weaken the role of the Australian Medical Council (AMC) as the accreditor of medical training, medical schools and individual doctors will be detrimental to Australian healthcare. The Bill proposes to delegate standards-setting authority to "*any entity it considers appropriate to exercise those powers*". [2] Another blank cheque.

In this submission, with specific regard to the medical profession, the ADF advocates broader reform that provides the means to improve regulatory accountability and confidence, namely a return of all functions currently performed by AHPRA and the Medical Board of Australia (MBA) to the single Queensland jurisdiction.

The ADF recommends that the Bill should not proceed in its current form and that a more detailed evaluation of the impact of some of the amendments needs to be undertaken to ensure that the Bill

[1] Health Practitioner Regulation National Law and Other Legislation Amendment Bill 2022 Explanatory Notes, p48.
[2] Health Practitioner Regulation National Law and Other Legislation Amendment Bill 2022 Explanatory Notes, p12.

does not defeat its own purpose to *"strengthen public safety and confidence in the provision of health services"*.[3]

Scope of legislation:

1. This Bill represents the second stage of changes that are being implemented following internal reviews into the functioning of NRAS (National Registration and Accreditation Scheme) and AHPRA (Australian Health Practitioner Regulator Agency).
2. The Bill (if passed) will produce changes that will automatically flow on to other States.
3. As there is no Upper House in Queensland to further debate and review the Bill, it is critical that this review take time to widely consult with the medical profession over the concerns raised.

Granting any regulator broader objectives and wider powers is a recipe for injustice:

4. The central flaw in the legislation is granting to unelected executive government agencies both **broader objectives and wider powers**. These two elements combined are a red flag for the potential abuse of process through executive overreach (intentional or unintentional), which may take years to redress due to the complex legal remediation processes required. Administrative injustice also takes its personal toll on the wrongly accused, their families and their patients, and leads to a loss of confidence by health professionals and the public in the independence of the regulator and the justice of the process.
5. An example of this broad executive power is as follows ***"In addition, the Bill clarifies that the National Agency may do anything necessary or convenient for the effective and efficient operation of the National Scheme, within the scope of the National Law."*** (page 12).
6. **"*Second, the amendments add new section 25(ka), establishing a function of the National Agency to do anything else necessary or convenient for the effective and efficient operation of the National Scheme*"** (page 48). Who defines what is necessary or convenient?
7. The ADF draws Parliamentarians' attention to those recent court cases whereby AHPRA/Medical Board disciplinary procedures against certain medical practitioners have been found by courts to be unwarranted and have been overturned, with three practitioners recently reinstated (Drs Hobart, Oosterhuis and Pridgeon). This is clear evidence that under current law, it is possible to get it very wrong. With the changes proposed by the Bill, the risk of this type of injustice will increase substantially.
8. The ADF maintains that the accountability of the executive/regulator is diminished when their defence of any action can simply be that *"it was necessary or convenient".*
9. In addition to the broad discretionary powers introduced by the *"whatever you think is necessary and convenient"* principle, the legislation grants the broadest possible objectives on which to exercise these broad discretionary powers.
10. According to the explanatory notes at page 4

    Broadly, the main objectives are to:

    - ***"strengthen public safety and confidence in the provision of health services;***
    - ***improve the governance of the National Registration and Accreditation Scheme for health professionals (National Scheme); and***
    - ***enhance the effectiveness and efficiency of the scheme."***

11. At first glance these are noble objectives and good intentions. However, we know that there are widely different interpretations of what actions constitute a defence of public safety and

[3] Health Practitioner Regulation National Law and Other Legislation Amendment Bill 2022 Explanatory Notes, p1.

confidence and that decisions made with insufficient information and without appropriate investigation can lead to grave injustice.

The potential to undermine Australia's world-standard accreditation system for medical practitioners:

12. The Australian Medical Council provides an internationally recognised accreditation process that has maintained a high level of public confidence in the Australian medical profession. As an independent accreditor, the AMC's decisions have not previously been subject to political, commercial or bureaucratic influence. Any move to bypass or override the AMC's current role puts the safety of the public and their confidence in Australian medicine at risk.
13. *"The Bill will allow the Ministerial Council to delegate its powers to approve registration standards to any entity it considers appropriate to exercise those powers. For example, the Ministerial Council may consider delegating certain powers to the Agency Management Committee (being re-named by the Bill to the Agency Board) acting on the advice of the National Agency and jurisdictions, or to the Health Chief Executives Forum. Under section 29 of the National Law, a formal instrument of delegation will be established should Ministers choose to delegate these powers, and the Ministerial Council will retain its obligation to ensure that the function is properly exercised. Section 29 also prohibits sub-delegation of the powers."*[4]
14. The ADF argues that this unspecified approach to accreditation standards ("*any entity it considers appropriate*") contradicts the Bill's intention to protect the public and promote public confidence. There should be no blank cheques regarding who sets the standards of Australian medicine and what their credentials are in making potentially life-changing decisions.

Granting the regulator the ability to make public statements prior to the conclusion of an investigation (naming and shaming) is unnecessary and creates the potential for serious injustice:

15. *"Clauses 20 and 100 introduce a power for regulators to issue public statements about a person … Under the amendments, the National Agency, National Boards, and Health Ombudsman can make a public statement about a person, including a registered practitioner, if they become aware of a serious risk to public health or safety during an investigation, prosecution or other disciplinary proceeding caused by the person's conduct."*[5]
16. The ADF does not support dangerous and incompetent practitioners being able to continue in practice once it has been objectively established that the public are at risk.
17. Currently, AHPRA has the authority to suspend a health practitioner if they believe they are a risk to the public as well as require that practitioner to report for assessment of competency.
18. However, the ADF cannot support naming and shaming provisions of this Bill as stated. Public statements about medical practitioners by regulators and the executive without clear and full examination of the evidence is a recipe for injustice and serious error.
19. Publicly naming any health practitioner is a judgment of guilt that cannot be reversed by any subsequent finding of innocence. Reputations wrongly damaged cannot be fully restored, and patients deprived of medical expertise may suffer needlessly.
20. ***Our current parliamentary system grants all parliamentarians, including the relevant Health Ministers, the privilege of making public statements without fear or favour, including warning the public of potential hazards to their health and safety.***
21. The ADF maintains that there is no justification for the executive to have these naming and shaming powers for individual health practitioners and that state health ministers can make

[4] Health Practitioner Regulation National Law and Other Legislation Amendment Bill 2022 Explanatory Notes, p12.

[5] Health Practitioner Regulation National Law and Other Legislation Amendment Bill 2022 Explanatory Notes, p20.

appropriate public statements on matters which they believe are reasonable and necessary in the public interest, within the appropriate safeguards that the parliament has established for truth and accuracy.

22. Our objection does not exclude public servants from raising general areas of concern publicly in line with their delegated role.

The need for urgent reform of the AHPRA/NRAS model in regard to the medical profession:

23. Successive inquiries both Senate and external of AHPRA's performance as a regulatory model provide clear evidence that in regard to the medical profession, the model has not resulted in a better, safer system of regulation.
24. This legislation unless altered will perpetuate the problems generated by a relatively autonomous bureaucracy with a practically unlimited ability to increase its scope and power to control services they regulate.
25. Such a process is prone to deliver regulatory creep, as is evident in this proposed legislation.
26. Delegating authority to AHPRA to act entirely as it sees fit may appear attractive to some legislators. However, the model is absent of any democratic input such as having medical boards elected by the profession and carries a high risk of a knowledge deficit with impaired decision making about the environment it seeks to regulate.
27. This in turn will lead to alienation of the medical profession and an erosion of trust in the regulator and in governments who advocate such models.
28. It must be remembered that AHPRA is a monopoly which does not answer to any single jurisdiction, so there can be no verification of its claims to act purely in the interests of patient safety and maintaining confidence.
29. As a result of all the above, the ADF maintains that a return to State and Territory medical boards with the authority to regulate the profession in their own jurisdiction is urgently required.

The decision to include Queensland only regulations in the Bill could be used to improve accountability of the regulator:

30. The ADF notes with interest that section of this Bill which will allow Queensland government to make regulations under the National Law. ***"The inclusion of a regulatory-making power for Queensland provides more flexibility for accommodating Queensland specific circumstances."*** [6] The ADF welcomes this partial return to State based regulation, however it needs to go further, including changing the name from National Health Law to Queensland Health Law.

Recommendations:

1. That the Bill be redrafted to remove the broad discretionary powers granted to the regulator and that the regulator's role in achieving the broad objectives of the legislation be clearly defined. Regulators should not have a blank cheque.
2. That processes of response and redress for health professionals being investigated be clearly defined and accessible to prevent injustice and serious error.
3. That any ability to name and shame a health practitioner before it has been concluded that the practitioner is guilty of any offence be removed from the Bill, given that under current legislation dangerous practitioners can be suspended and recalled for assessment to protect the public. Where public statements about individuals have to be made to protect the public, this can currently be done under parliamentary privilege. State public health officials in accordance with their designated roles have the ability to warn the public of health risks without naming and shaming prior to appropriate investigation.

[6] Hon. YM D'ATH, Qld Hansard 11 May 2022 (Introduction), p1036

4. That the Bill include clear appeal and redress processes for health practitioners who are incorrectly targeted by regulators in order to provide a deterrent for abuse of process and accountability for decision-making.
5. That the Bill include provisions that make it clear that medical practitioners are not restricted in engaging in clinical debate on clinical issues and the effectiveness of treatment modalities as well as advising their patients of their opinions on any matter raised by the patient in the course of a clinical consultation.
6. That the broad objectives of the Bill be further defined in order to prevent abuse of process.
7. That the Australian Medical Council's role as the independent regulator of the Australian medical profession be specifically protected in the Bill.
8. That the Queensland Parliament change the National Law to allow all functions currently performed by AHPRA to be returned to the Queensland jurisdiction including the reinstatement of the Queensland medical board as an elected body, with authority to regulate the medical profession registration and disciplinary processes without the need to refer to other states.
9. That the AMC be legislated as the sole standard setter of all medical education, training & individual medical practitioner accreditation.
10. That the Bill include regulations that will allow and encourage the ongoing contribution of senior doctors within existing safeguards, particularly in emergency situations.

The ADF would welcome the opportunity to address the points we have made in the submission.

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The Australian Doctors' Federation, previously The Australian Doctors' Fund, is a national organisation of medical practitioners from all disciplines who advocate for improvements in Australian healthcare.