Inquiry - Health Practitioner Regulation National Law and Other Legislation Amendment Bill 2024

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Avant
By doctors for doctors

Avant Mutual Group Limited
ABN 58 123 154 898

Registered office
Level 6, Darling Park 3
201 Sussex Street, Sydney NSW 2000

Postal address
PO Box 746 Queen Victoria Building
Sydney NSW 1230

DX 11583 Sydney Downtown

avant.org.au

Telephone 02 9260 9000 Fax 02 9261 2921
Freecall 1800 128 268 Freefax 1800 228 268

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Health, Environment and Innovations Committee
Queensland Parliament

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

Avant submission to the inquiry regarding the *Health Practitioner Regulation National Law and Other Legislation Amendment Bill 2024* (Qld)

Thank you for the opportunity to provide a response to the inquiry regarding the *Health Practitioner Regulation National Law and Other Legislation Amendment Bill 2024* (Qld).

Our submission is attached.

Please contact me on the details below if you require any further information or clarification of the matters raised in the submission. We are also available to appear at the Committee's public hearing on Tuesday 28 January 2025 to discuss these issues further.

Yours sincerely

[redacted]

Georgie Haysom
General Manager, Advocacy, Education and Research
Email: [redacted]

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Avant submission to the parliamentary committee inquiry regarding the *Health Practitioner Regulation National Law and Other Legislation Amendment Bill 2024* (Qld)

Avant is a member-owned doctors' organisation and Australia's largest medical indemnity insurer, committed to supporting a sustainable health system that provides quality care to the Australian community. Avant provides professional indemnity insurance and legal advice and assistance to more than 90,000 healthcare practitioners and students around Australia (more than half of Australia's doctors). Our members are from all medical specialities and career stages and from every state and territory in Australia.

Avant provides assistance and advice to members involved with complaints and notifications to Ahpra and the Medical Board of Australia, to regulators in the co-regulatory jurisdictions, and to Health Complaints Entities (HCEs). We have provided submissions to the various consultations on amendments to the *Health Practitioner Regulation National Law* (the National Law), since the inception of the National Registration and Accreditation Scheme (National Scheme). That included a submission to Engage Victoria during the consultation on proposed amendments to the National Law now included in the *Health Practitioner Regulation National Law and Other Legislation Amendment Bill 2024* (Qld) (the Bill).

Overall, we agree that the National Scheme needs to be efficient, fair and responsive for both health consumers and practitioners. We support the risk-based regulatory approach taken by Ahpra and the National Boards in their work to protect the public. In this work it is important to appropriately balance the need to protect the public and the need to ensure that the process is proportionate and fair to practitioners. In that context, we have set out areas for further clarification as well as concerns regarding the Bill, summarised as follows:

1. We do not support the proposal for permanent publication of a practitioner's regulatory history regarding professional misconduct findings as it is unfair, unreasonable, punitive and potentially disproportionate. Any publication of findings against a practitioner should be in place only for the time period that any sanctions or conditions are in place and not permanently.

2. We are concerned about aspects of the proposals that give powers to National Boards that potentially usurp and undermine the decision-making role of tribunals.

3. We support the protection from reprisals and detriment for notifiers who make notifications in good faith and recommend that there be further clarification to avoid unintended consequences.

4. Any amendments passed should be accompanied by information and education for practitioners and the public to clarify the impact of the changes made and outline why the changes are necessary to protect the public.

Information on the public register – proposed sections 225A and 225B

There are several aspects that are unfair and unreasonable. While we acknowledge the arguments in favour of publication for the most serious offences, the need for transparency of information should not be at the expense of fairness to the practitioner.

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Specifically, the following aspects of the proposed provisions are of concern.

1. Publication would apply to all professional misconduct findings where sexual misconduct is "a basis" for the tribunal's decision.

   As noted in the explanatory notes (pages 22-23), the definition of sexual misconduct is very broad and encompasses a range of behaviour, some of which may not be indicative of an ongoing risk to the public.

   Take the following case scenario. Say, for example, a tribunal found a practitioner guilty of professional misconduct in relation to prescribing issues, and also made a finding within the factual matrix that forms the basis of the professional misconduct that the practitioner had made an inappropriate comment of a sexual nature to a patient (which would fall within the definition of sexual misconduct under the Medical Board's sexual boundary guidelines). The inappropriate comments do not reach the threshold for a finding of professional misconduct if they were a standalone issue. The sanctions imposed by the tribunal include prescribing prohibitions and supervision conditions and there are no sanctions relating to the inappropriate sexual comment.

   The effect of the proposed legislation is that the practitioner's entry on the register in this scenario would permanently record that the professional misconduct included sexual misconduct (among other things required by s.225B). This is disproportionate and unfair.

   Permanent publication as proposed serves limited, if any, protective purpose where a tribunal has determined there is no ongoing risk to the public. It is not proportionate to include all types of sexual misconduct within this proposal and in these circumstances is punitive, particularly when taken together with the other issues outlined below.

2. There is a mechanism for a National Board to essentially make its own decision about whether sexual misconduct formed a basis for a tribunal's finding of professional misconduct (if not expressly stated).

   This proposal is new and has not previously been the subject of public consultation.

   The rationale for the proposal is not clear: either the tribunal makes a finding of professional misconduct based on sexual misconduct or it does not. There should be no further role for a National Board to play in deciding whether the tribunal's decision was so based. A National Board should not be given a discretion to draw inferences from a tribunal's decision and decide whether a behaviour on which the tribunal's decision was based was sexual misconduct where the tribunal has not made such a finding. This is inappropriate and unfair and usurps and undermines the role of the tribunal.

   Where a Board was a party to the proceedings before the tribunal it had the opportunity to make submissions on the evidence about the findings the tribunal should make. In the co-regulatory jurisdictions, it is not appropriate for a Board as a non-party to substitute its view for that of the tribunal. The proposal suggests that a National Board does not consider it should be bound by the decisions of a tribunal.

   The unfairness of this mechanism is compounded because, as noted in the explanatory notes (page 6), the merits of a Board's decision in this regard are not able to be challenged.

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Further, proposed section 225B requires that a Board include a statement that the tribunal decided that the person behaved in a way that constituted professional misconduct and "that the professional misconduct included sexual misconduct", which may not be the case. Instead, it may be that the Board has, based on section 225A, inferred that the professional misconduct included sexual misconduct. Section 225A is stated to prevail where there is inconsistency between sections 225A and 225B.

The practical consequence of this is that a doctor may have a permanent record that they have been found guilty of professional misconduct based on sexual misconduct, when they have not. This is unfair, and particularly so in the context of conduct such as for example flirting or engaging in sexual humour or innuendo (such as in the case scenario outlined above).

3. The provisions would apply retrospectively to all relevant decisions since the "participation day".

   Applying this retrospectively is procedurally unfair and punitive. At the time of defending the matter, the practitioner who was the subject of the original decision did not have the opportunity to argue that permanent publication of the tribunal decision and sanctions is a sanction in itself. This would have been a relevant consideration to be taken into account by the tribunal at the time, when deciding appropriate sanctions.

   Applying this retrospectively also poses a real risk of re-traumatisation for the practitioners involved.

4. Information would be published permanently, including after any conditions or sanctions related to conduct have expired.

   We support transparency where it protects the public. A practitioner who has served their sanction, fulfilled any conditions, and is allowed to continue to practise, is considered by a Board and/or tribunal to be fit to practise and no longer a risk to the public. To have the information published on the register permanently in these circumstances is no longer protective and can only be punitive.

   This is also potentially inconsistent with another aspect of the proposed legislation, which requires a tribunal to consider a reinstatement application and thereby decide on whether the practitioner is fit to practise and is no longer a risk to the public.

   Having information published permanently will have ongoing reputational and personal impacts on the practitioners involved. It potentially undermines the trust and confidence placed in the medical profession and the regulator's and tribunal's processes by seeming to invite questioning of the reasons why a practitioner would be able to practise while having faced the sanctions that would be listed on the public register. Permanent publication of professional misconduct findings and sanctions is potentially disproportionate to the risk that is being managed.

One of the potential unintended consequences of this proposal is that practitioners may be more likely to challenge the allegations made against them, to mitigate the potential for a sanction being published in perpetuity. This has the potential to undermine the extensive work the regulator has done to create an environment where practitioners are encouraged to understand the benefits of showing insight, making admissions, and agreeing to sanctions (education conditions, mentoring, suspensions). If doing so is going to mark their publicly available registration history forever, this

may dissuade practitioners from engaging in this process. This could lead to more contested hearings, impacting and traumatising notifiers who will need to give evidence, and increase court and regulatory costs.

The proposed reforms may also have consequences from a human rights perspective in relation to what amounts to repeated sanction for the same misconduct. This has been carefully considered in the establishment of sex offenders registers in the various Australian jurisdictions, which are not publicly available documents and people are only included on those registers for finite periods of time based on the nature and number of offences.

Protection for notifiers – proposed sections 237A and 237B

Overall, we agree that notifiers should not be subject to reprisal or detriment for making a notification in good faith.

We have assisted members who have been subjected to detriment, particularly in an employment setting, as a result of making a notification about another health practitioner, including when the notification is made under mandatory notification provisions. The explanatory notes specifically refer (on page 7) to health practitioner mandatory notification obligations in the context of the proposed section. The risk of reprisal can be a barrier to mandatory reporting and the proposed section makes it clear that this type of behaviour is not acceptable.

We are concerned about one potential unintended consequence of the proposed section, particularly given the significant penalties that attach to a breach of that section.

We have assisted members who have faced further complaints or other legal action for ending a treating relationship after a patient has made a notification about their care or conduct, on the basis that termination of that treating relationship is a detriment. ‘Other detriment or reprisal’ is not defined in the proposed section 237A.

Termination of the doctor-patient relationship should not be considered a “detriment’ that falls within the scope of the section. In most situations, a notification or other complaint or legal action means that the necessary trust and confidence that is the foundation of the doctor-patient relationship has been eroded. In these circumstances it is in the best interests of the patient for the treating relationship to end and care be transferred.

The risk of unintended consequences could be rectified by clarifying in the bill and/or the explanatory notes and in other accompanying guidance or education that ‘detriment’ does not include appropriate termination of the doctor-patient relationship and arrangements for ongoing care where necessary, in accordance with the Code of Conduct.

In relation to non-disclosure agreements (NDA), we agree that any provision in an NDA that purports to prevent a person from making a notification or providing assistance to Ahpra, National Boards or another regulatory body should be void. We are pleased to see that the retrospective application of the provisions only applies to the relevant section of an NDA being void (proposed new section 237B(1)) with all remaining proposed amendments being prospective only. It will be important to provide education about this provision to both the medical and legal professions.

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Reinstatement applications – proposed sections 198A-198E

There is merit in a tribunal having oversight of the reinstatement process, as a tribunal is an independent body, rather than the National Board which may have been the prosecuting body in prior disciplinary proceedings.

However we are concerned about the process involved, the role of National Boards once a reinstatement order is made, and the potential impact on tribunal resrouces.

The proposed process for reinstatement is that a tribunal will consider an application for reinstatement, with the relevant Board being a party to that proceeding. The tribunal must consider whether the applicant is a fit and proper person to hold registration and whether they are able to practice competently and safely. The tribunal can grant the reinstatement order, with conditions "if the National Board decides the re-register the person" (proposed section 198E(2)).

The effect of this is that a National Board is not bound by the tribunal's decision. It can decide whether or not to re-register the person, regardless of the tribunal determining the practitioner can be reinstated, and it can decide to impose additional conditions (as long as they are not inconsistent with any conditions imposed by the tribunal). There is no transparency of the Board's decision-making in this regard.

This is unfair and potentially usurps and undermines the role of the tribunal, which will have heard evidence relevant to the application, in proceedings where the National Board is a party.

Boards should be required to place all relevant information before the tribunal in the reinstatement application, including any conditions that it might propose on re-registration. As a matter of fairness, the Board should be bound by the tribunal's decision and should not be able to include additional conditions on re-registration that have not been considered by the tribunal (as is contemplated by proposed section 198E(4)).

We are also concerned that this proposal could place additional burden on state tribunals (many of which are under-resourced), with the potential for further delays in dealing with matters, subsequent impacts on practitioners' wellbeing and livelihood, and the potential for inconsistencies in decisions.

Conclusion

Wee acknowledge there is a public interest in transparency. However, this needs to be balanced against the interests of the health practitioner and the ongoing burden and distress that can be caused by permanent publication as proposed.

Any publication of the findings against a practitioner should be in place only for the time that any sanctions or conditions are in effect and not permanently. To do otherwise is no longer protective but punitive, contrary to the principles enshrined in the National Law.

The proposed provisions should be amended so that if information to be published, it is only published for the period of time any sanctions or conditions are in place and then removed from the register.

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A National Board should add information to the register based on the tribunal's decision and should not be given a discretion to draw inferences from a tribunal's decision and reasons.

A National Board should not be able to decide whether or not to follow a tribunal's reinstatement order or to impose additional conditions once a tribunal has made its decision.

Avant Mutual
9 January 2025