Health Practitioner Regulation National Law and Other Legislation Amendment Bill 2022

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Dear Committee Secretary

Submission - Health Practitioner Regulation National Law and Other Legislation Amendment Bill 2022

Avant welcomes the opportunity to comment on the *Health Practitioner Regulation National Law and Other Legislation Amendment Bill 2022*.

Attached are Avant's general comments and a table addressing several of the proposed changes.

Please contact me if you have any queries as we would be very happy to discuss these issues further.

Yours sincerely

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Avant Submission to the Health Practitioner Regulation National Law and Other Legislation Amendment Bill 2022

General comments

Avant is Australia's largest medical defence organisation, providing professional indemnity insurance and legal advice and assistance to more than 78,000 healthcare practitioners and students around Australia. Avant provides assistance and advice to members involved with complaints and notifications to Ahpra and the Medical Board of Australia, and 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 National Law, since the inception of the National Scheme.

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. It is important to get the balance right between the need to protect the public and ensuring that the process is proportionate and fair to practitioners.

We do however have concerns regarding the Bill. In several provisions there is a lack of clarity in the wording and the Bill proposes actions that are not proportionate and where the risk to the practitioner would outweigh the risk to the public. We have made suggestions for amendments in the attached table.

A number of the proposals erode important rights of privacy and natural justice and procedural fairness. These include the proposals regarding Public Statements (Part 23) and access to previous practice information (Part 15).

We suggest that this Bill is an opportunity to revisit the provisions relating to mandatory notification of notifiable conduct (section 140). In our view, the amendments that came into effect in March 2020 to change the legislation with respect to treating practitioners did not go far enough. Our longstanding position is that the WA version of the section, whereby treating practitioners are exempt from mandatory notification obligations, should be adopted nationally. Most recently this was recommended in the report of the Senate Community Affairs References Committee in April 2022 of its review of Ahpra.[1] Fear of mandatory reporting is an ongoing barrier to health practitioners seeking appropriate care. This amendment Bill is an opportunity to bring this recommendation into effect as soon as possible.

[1] Senate Community Affairs References Committee Administration of registration and notifications by the Australian Health Practitioner Regulation Agency and related entities under the Health Practitioner Regulation National Law – Parliament of Australia (aph.gov.au), April 2022

Topic	Bill Reference	Avant Comment
Functions of National Agency (Part 6, Clause 52)	Section 25	The proposed amendments give broad powers to Ahpra. It is important that, when giving advice to the Ministerial Council, Ahpra consult the relevant National Board and obtain their input into professional issues as appropriate. Ensuring that the National Board is appropriately consulted is important for engendering the relevant profession's confidence in the regulatory framework.
Approval of registration standards (Part 7, Clause 54)	Section 12(4)	We agree that minor amendments or amendments of no policy significance do not need Ministerial Council oversight. However, there is no guidance in the section about what entity the Ministerial Council can delegate to, nor the basis upon which the Ministerial Council might consider delegation appropriate. We suggest that there should be more detail about the scope of the Ministerial Council's power to delegate, and the entities to which delegation might be appropriate. For example, new registration standards or major amendments to current standards should not be referred for approval to the Board that drafted them. This is a conflict of interest and the Ministerial Council should have oversight of these.
Acceptance of undertakings on registration (Part 9, Clauses 60-66)	Sections 52, 62, 112 New sections 83A, 103A,	We support the proposal that the Board should be able to accept an undertaking on first registration or at renewal. Under these amendments the Board can refuse to renew a practitioner's registration for failure to comply with an undertaking. Refusing to renew for failure to comply with an undertaking is tantamount to deregistration. We submit that this power needs to be exercised in a way that is proportionate to the nature of the breach. This should be explained in the relevant section for clarity and to ensure adherence to the principle of proportionality.

		We would be concerned if the Board were to refuse to re-register a practitioner in response to very minor breaches of undertakings or breaches due to inadvertence. If the breach is minor, this should be able to be reviewed by the Board in an expedited fashion.
Notifying Ahpra about Medicare matters (Part 14, Clause 81)	Section 130	We are pleased that the name of the relevant legislation is to be amended to name the correct Act as this has been a cause of confusion for practitioners since the National Law was first enacted.
Notifying Ahpra about scheduled medicine offences (Part 14, clause 81)	Section 130	We do not support this provision and recommend that it be removed. We are concerned that the requirement that a practitioner report all scheduled medicine offences places the threshold too low and would require practitioners to report relatively minor offences. It may also be unnecessary in cases of isolated breaches which have already been remedied to the satisfaction of the local medicines regulation units. Whilst the provision allows jurisdictions to exempt the reporting of minor offences, we are concerned this is not sufficient protection.
Previous practice information (Part 15, clauses 82-83)	Section 132 Section 206	We do not support this provision as it is too broad, unfair and could cause significant reputational damage. We recommend that the provision be removed. It requires a practitioner to give practice information about all previous practices including volunteer and honorary positions, and it is not time limited. This could be a long list and onerous to provide and is unfair, prejudicial and punitive, and potentially impinges on the practitioner's right to privacy. The implications of providing this information are potentially significant. The Board has a wide discretion under section 206 to give written notice to previous practices, but with no qualifications as to time or the subject of the action. Giving written notice is likely to have a significant adverse impact on the practitioner's reputation. See also our comments below about the proposed new section 220A.

		When this was consulted on in October 2018, it was not clear precisely what circumstances this proposed amendment was intending to cover. It was stated in the consultation paper that the power would only be exercised where there is a reasonable belief that the health practitioner's health, conduct or performance *may* have exposed patients to harm. The proposed amendments to section 206 refer to "a risk of harm" and "a risk to public health and safety". This is a broad test with a low threshold. We stated the following in our October 2018 submission to the proposed reforms: *We were informed at one of the stakeholder forums that this was intended to cover situations where a lookback was required for example for an infectious disease or where there are concerns that a practitioner may have misread pathology or radiology.* *Issues relating to infectious diseases are currently dealt with under public health legislation. This is sufficient and should continue.* *While the proposed amendment may be appropriate in the limited circumstances noted above, we would be concerned about a general power to provide information to former employers. If the practitioner no longer works at a practice and there is no longer a risk to patients of that practice, then informing a previous employer of a change in registration process can only be punitive and/or a means of encourage patients to make notifications or bring civil claims.* This provision erodes important rights of privacy and fairness especially as the Board has the ability to take immediate action where there is a risk of serious harm to the public.
Advertising offences (Part 16, Clause 85)	Section 133(1)	There is persistent misunderstanding or lack of awareness from practitioners that they are obliged to comply with advertising obligations contained in section 133(1) of the National Law and that there are statutory offences for which they can be prosecuted. If the prohibition on testimonials in section 133(1)(c) is removed, it needs to be accompanied by education about what a legal and appropriate testimonial is, with reference to the Australian Consumer Law. There also need to be amendments to the

		current version of Ahpra's 'Guidelines for advertising a regulated health service', which are an important source of guidance for practitioners understanding their advertising obligations. As such, we recommend that there should be a phased introduction of any amendment to section 133 to give practitioners sufficient time to understand the impact of the amendments and for Ahpra to issue updated guidance.
Disciplinary action against unregistered health practitioners (Part 18, Clause 90)	Section 5 Sections 138 and 139	This amendment follows a consultation on whether the National Law should be amended to provide Boards with the discretion to deal with a practitioner who has inadvertently practised while unregistered for a short period by applying the disciplinary powers under Part 8 rather than prosecuting them for an offence under Part 7. We agreed with this. However, the new section 138 has broader implications that the position consulted on. It allows notifications to be made and proceedings to be taken against a person who is registered in relation to behaviour that occurred *before* the practitioner was first registered. On a plain reading, this is too broad and goes beyond the policy position that was the subject of the consultation in October 2018. It is unfair and inappropriate for Boards to be able to take action against a practitioner for conduct that occurred before they first became a registered health practitioner. If this is not the intention, then the provision should be amended to make this clear. Section 138(2) is confusing and does not appear to clarify the position.
Records for preliminary assessment (Part 20, Clause 92)	New sections 149A and 149B	We support the proposal that the legislation be amended so that the Board may give a notice to a person to provide documents in the assessment phase following receipt by Ahpra of a notification or complaint, and we agree with the qualification that the practitioner will not be compelled to provide information that might incriminate them.

Public statements (Part 23, Clause 100)	New sections 159P-T	These provisions are of great concern. A public statement carries significant risk of reputational damage and therefore should only be used in exceptional circumstances. There should be a high threshold for action to be taken under these provisions. It is important that a public statement is proportional to the risk and the power is only exercised when the risk to the public outweighs the risk of harm to the practitioner. It should only be used when there is no other means of averting this risk. We strongly support that this power is subject to a show cause process. The provision includes the requirement that the Board must revoke the statement if the grounds on which it was made no longer exist or did not exist when the statement is made. We are particularly concerned about the situation where grounds for making the statement did not exist at the time the statement was made. While the decision to make a public statement is appellable, this is not sufficient to protect against the significant reputational damage likely to follow a public statement if not exercised cautiously. Because of this, we submit that: • there should be a requirement that the public statement be revoked within one business day's notice of the Board discovering that there were no grounds or that the grounds no longer exist; • the revocation should be by way of public statement, with reasons; and • where the public statement is revoked because the requisite grounds did not exist at the time the statement is made, the revocation should be accompanied by an apology. This is especially important given that section 159Q(4) provides that no liability is incurred by the regulatory body for making a public statement under this section in good faith, which implicitly recognises the damage that can result from a statement of this nature.

Referral to other entities (Part 24, Clauses 103-104)	New section 150A Amendment to section 151	We support the proposal that the Board be empowered to refer matters to another entity after preliminary assessment. However, the provision in section 150A(2) allows the Board to continue to deal with this matter even if referred elsewhere. The policy reasons for this proposal include to improve efficiency and reduce duplication and this provision seems contrary to this. If the intention is that other aspects of the same notification remain with the Board and duplication is indeed avoided, this should be clarified in the provision. We also recommend that the legislation be amended to allow an additional ground for not accepting a complaint or for taking no further action, namely that the notifier has not first raised the matter with practitioner about whom the notification is made. This would improve the efficiency of the process and encourage notifiers to seek to resolve matters directly with practitioners first. A similar provision is contained for example in the Commonwealth *Privacy Act* 1988 and in section 35A of the *Health Ombudsman Act* 2013.
Discretion not to refer to tribunal (Part 26, Clauses 107-109)	Section 178 Section 193 New section 193A	We support the proposed amendments and agree with the policy rationale. There does not appear to be a strong policy reason why expensive, resource intensive and time-consuming proceedings should be pursued where there are no ongoing risks to the public nor any public benefit in doing so.
Disclosure of information to protect the public (Part 27, Clause 110)	New section 220A	We do not support this provision and recommend that it be removed. This provision is intended to apply *before* a Board takes action against a practitioner if it reasonably believes the conduct poses a serious risk to the public and it is necessary to give notice to protect public health and safety. Given the significant potential for reputational damage, this is unfair and prejudicial to the practitioner, especially in the absence of any show cause process. Immediate action is the mechanism by which the Board can protect the public.

		If the Board thinks there is a serious risk, it should take immediate action and proceed to a hearing where its belief can be tested, before notification to employers.
Exclusion of info from register to protect the health and safety of the practitioner or family member or associate (Part 30, Clause 116)	Section 226	We support this proposal. We note that this section also gives the Board a discretion to record information which it previously excluded under this section if it reasonably believes that circumstances on which the exclusion was based have changed. The purpose of this section is to protect the health and safety of practitioners and/or their family members or associates. Therefore, if the Board wishes to record previously excluded information then it should give the practitioner notice of this and an opportunity to be heard on whether the circumstances have changed. This should be included in the legislation.

Avant Mutual
1 June 2022