



AUSTRALIAN MEDICAL
ASSOCIATION
ABN 37 008 426 793

T | 61 2 6270 5400
F | 61 2 6270 5499
E | ama@ama.com.au
W | www.ama.com.au

39 Brisbane Ave Barton ACT 2600
PO Box 6090 Kingston ACT 2604

AMA submission on how Ahpra and National Boards propose to use their new power to issue public statements about practitioners

Email: nationallawamendments@ahpra.gov.au

The AMA strongly opposed the introduction of the new powers – and the abrogation of the principles of natural justice and due process they represent – into the National Law at all stages of development of the legislation. As the National Law has been amended to allow Ahpra and the National Boards to make public statements prior to the conclusion of an investigation into the actions of a practitioner, the AMA’s objective is to ensure that these powers are used only in the most extreme situations and as a last resort. The draft guidelines do not achieve this.

At the outset, the AMA would like to express concern about the very short timeframe for a consultation of this nature. Medical practitioners and other health practitioners subject to the National Law are concerned about the permanent impact that the use of these powers will have on their careers and livelihoods. The use of these powers will potentially ruin the professional standing of a practitioner and seriously injure their mental health.

This justifies a longer timeframe to ensure proper consideration can be given to how these proposals will work in practice and to minimise the possibility of permanent damage being done to practitioners where a more thorough investigative process ultimately determines that the issuing of a statement was not justified.

As such the AMA strongly encourages a delay of the release of the *Regulatory Guide* and a further delay to the changes to ensure appropriate consultation and, as a result, acceptable guidelines for the use of the new powers.

This submission provides suggestions on specific components of the Guidelines that should be improved to improve understanding of how and when the powers will be used, improve accountability of using the powers and place additional appropriate limits on the use of the powers.

Threshold for issuing public statements

The AMA supports the threshold for issuing a public statement to be set at a high level. It is also essential that this be a last resort. We would like to see the guidelines clearly state that use of all other powers and processes have been considered and attempted prior to the statement. In addition to this, the AMA recommends adding a fourth point to the components of ‘reasonable belief’ that states that there is no other legislation that already covers the issue in question.

It must be mandated that reasonable efforts to establish prior contact with the practitioner and attempts to resolve the situation by other means have been exhausted before this power is used. This includes powers that exist at a jurisdictional level – where there are already very strong powers

available under public health legislation. Relying on email when only providing one day's notice is unacceptable. We would like to see a provision included that states that the practitioner is directly contacted by Ahpra in addition to the email.

The AMA is also extremely concerned, and disapproving of this one-day timeframe. This has different implications depending on the day of the week and time of day that the email is sent. We would prefer that the one day be 24 hours in the business week. For example, an email sent at 2pm on a Friday afternoon may not be read before the end of the day. For a practitioner closed over the weekend it is reasonable to expect that they may not check their email until Monday morning, by which time the one-day period would have lapsed and a statement may have unnecessarily been made. The timeframe is unrealistic to obtain a response and thus is manifestly unfair.

The AMA suggests that specific examples of situations and guidance where this power might be exercised should be published by Ahpra and the National Boards. We are aware that there is already significant confusion among practitioners as well as the wider community as to the situations where this power might be used. The provision of examples may go some way to providing reassurance to practitioners that the use of these powers is likely to be very rare. The examples of serious risk provided on page 9 of the consultation document lack sufficient detail.

The AMA notes that the consultation document states that the powers "would more likely be used for serious matters involving unregistered people as opposed to currently registered practitioners." The AMA does not support unregistered practitioners from providing care nor practitioners holding out that they are registered healthcare practitioners when they are not.

The decision-maker

The AMA does not support the delegation of the exercise of this power to committees. Given the significance of these powers, the AMA believes that it is essential to know who is the responsible and accountable decision-maker. The powers should only be exercised by the identified CEO of Ahpra and Chair of the relevant Board. It would be appropriate for the decision-makers to liaise with committees as part of a local response after the public statement is made, but the ultimate responsibility must rest with the most senior, public representatives.

Notice to practitioners

As noted earlier, the AMA does not consider the use of email when only giving a day's notice as sufficient, reasonable or fair. Many health practitioners receive hundreds of emails a day within which a notice about a public statement being made could easily be missed; and many practitioners may not review all their emails every day. We believe that there should be a requirement for more than one mode of contact to be used. As a minimum this should include sending an SMS text advising the person of the imminence of the action to be taken against them, as well as attempts to telephone leaving a voice message.

There should also be greater clarification as to what constitutes adequate communication and what is a one-day timeframe. It should be mandated to be at least 24 hours in a business week – taking into consideration all public holidays that could be relevant.

The AMA would like it explicitly stated that 24 hours is the minimum, not the maximum, and that the expectation is that in most instances more than 24 hours' notice would be provided. Noting there is an appeal process and Ahpra and the National Boards are not infallible, providing practitioners with reasonable time to respond is justified.

Appeals and Revocation

More information should be provided on the appeals process. The pathway and process of appeal must be made explicitly clear to a practitioner to be subject to a public statement. This includes giving notice to the practitioner that their appeal needs to specifically include a request for a stay of the making of the statement (and in its absence, the statement will be issued regardless of the outcome of the appeal).

One of the AMA's most significant concerns with this amendment during the public consultation was the irrevocable nature of such a statement. Australia's media landscape is incredibly unkind to health practitioners who are deemed to have practised inappropriately. The issue with these public statements is that will be made prior to the completion of the investigation and hearing. There is a real possibility that one of these statements could be made under false pretences, with the resulting irrevocable public statement ruining the practitioner's career and causing significant distress.

As such, the AMA considers it essential that the revocation of any public statement be accompanied by a media release, where a media release or media reporting of the original public statement has occurred.

Accountability

The new powers lack accountability. The guidelines do set out to establish a high threshold for use of the power, but they also completely absolve the wielders of the power should it have been used inappropriately. Doctors and other health practitioners are rightly concerned about the impact of these powers which fundamentally disregard basic principles of natural justice and were never justified by providing examples of how they would have improved patient safety or outcomes. Practitioners have already expressed discontent with a notifications system where a person is free to submit a vexatious complaint against them and face no consequences. This remains manifestly asymmetrical, and thus unfair. To in part address this, the AMA recommends the introduction of a clear requirement for reporting on the use of this power.

In every instance where this power is used, Ahpra and the relevant National Board must explain why they have used this power. We suggest that the National Health Practitioner Ombudsman is the appropriate reporting body for such detailed explanations. The report should detail who made the decision, what other options were considered which made it the option of last resort, all efforts to communicate with the practitioner and any communications between the regulator and the practitioner. Details of the use of this power should also be included in the Ahpra Annual Report.

FEBRUARY 2023