AMA

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

SUBMISSION

Sunday, 18 February 2024

AMA submission to the Health Ministers' consultation on the management of professional misconduct and strengthening protections for notifiers

nras.consultation@health.vic.gov.au

The AMA welcomes the opportunity to comment on changes to the National Law proposed by Health Ministers.

The provision of medical care requires the highest levels of trust between patients and their doctors. Patients need to know that their practitioners will practise in a way that justifies their trust and the very high respect that the community places in them.

The AMA does not condone in any way conduct which breaches the trust that the community has in their medical practitioners.

In assessing the Health Ministers' proposals, the AMA considers that the following principles need to be applied:

- Patient safety and trust in their practitioners is of paramount importance
- Patients subjected to sexual misconduct need to be safe in being able to report the conduct they have been subject to
- The operation of the National Scheme needs to ensure the rights of both patients and practitioners are respected
- Sanctions against practitioners need to be proportionate and pertinent to the misconduct
- The processes and systems in place to handle complaints of sexual misconduct must be sensitive to the notifier and practitioner, timely, balanced and robust. They must also be carefully calibrated to minimise the potential for vexatious complaints.

The AMA is generally supportive of the proposed changes subject to the comments below.

Expansion of information available on the public register

The AMA considers that sanctions imposed on practitioners need to be proportionate to the seriousness and nature of the conduct imposed by tribunals. We also take the view, in general, that once the time frame of the sanction imposed on a practitioner has been served out, the practitioner should not be punished in perpetuity provided they do not re-engage in that conduct.

We consider that the proposal for permanent inclusion on the national register of a practitioner's entire regulatory history represents a serious and ongoing punishment in perpetuity. This sanction needs to be balanced against the rights of patients to be able to be absolutely confident in placing their utmost trust in their treating practitioner.

The AMA accepts that in the case of professional misconduct of a sexual nature, the breach of trust between practitioner and patient is of such a nature and degree that tilts the balance in favour of the prospective patient's right to know.

The AMA would therefore support the ongoing publication of the practitioner's regulatory history in relation to all transgressions of a sexual nature including sexual boundary violations.

However we note that the proposed change to the National Law, in addition to the ongoing publication of a practitioner's regulatory history relating to conduct of a sexual nature, will result in the practitioner's entire regulatory history being published in perpetuity – not just the history relating to the sexual misconduct.

The consultation paper does not articulate a rationale for why the full regulatory history of a practitioner should be published, rather than that which relates more directly to conduct of a sexual nature.

Before supporting the publication of the wider, full regulatory history of a practitioner, the AMA considers that Health Ministers should provide further justification as to why they have proposed this wider option, which would transgress the principle that practitioners should not be punished in perpetuity and in a disproportionate way for relatively minor offences (of a non-sexual nature) committed long ago.

Given the very serious impact that the permanent publication on the register of a practitioner's regulatory history will have on the practitioner's personal and professional reputation, the threshold for triggering the permanent publication of the practitioner's regulatory history needs to be clear and in proportion to the seriousness of the practitioner's conduct.

The AMA considers that the threshold of "professional misconduct of a sexual nature" as it is currently understood and applied by the Medical Board of Australia (see Sexual Boundaries in the Doctor-Patient Relationship) as well by the wider medical profession is an appropriate threshold to trigger the proposed sanction. It will be important to ensure that these Guidelines are regularly reviewed to ensure they remain clear, fit for purpose and reflect contemporary professional and community standards.

Establishing of nationally consistent reinstatement orders

The AMA is generally supportive of a nationally consistent approach to practitioners seeking reinstatement. This is a very sensitive area and it is important for public and practitioner confidence in the national scheme that the approach taken is robust and consistent across jurisdictions.

The requirement to seek a reinstatement order from the tribunal responsible for the application of the sanction in the first instance (as currently applies in NSW) retains continuity of responsibility for handling of the practitioner's case and may bring to bear greater knowledge of the particular circumstance of the case in determining whether reinstatement is appropriate at that point in time, which may not be readily apparent to a different agency.

Strengthening protections for notifiers

The AMA is supportive of greater support being provided to people who experience professional misconduct of a sexual nature from a health practitioner – again recognising the need for balance to ensure the rights of all parties are maintained.

The AMA recognises that the regulatory process itself can also be traumatising for people who have already been subject to the harm arising from the misconduct. They should feel safe in being able to report the conduct without fear of reprisals or intimidation.

The AMA would be supportive of nationally consistent safeguards for notifiers as currently apply in NSW and Queensland. We also support clarifying that non-disclosure agreements (NDA) do not remove the right of a patient to make a notification to Ahpra about the conduct of a practitioner which is the subject of an NDA.

Whilst supporting the strengthening of protections for notifiers, the AMA also cautions that the processes for dealing with notifications will need to be sufficiently robust to minimise the risk of vexatious complaints. Unfortunately, the national scheme has and is subject to a proportion of complaints that are of a vexatious or unwarranted nature. These complaints can cause great distress to practitioners during the investigation process. It is critically important that the regulatory agencies have in place robust processes that can deal sensitively with notifiers, whilst ensuring that vexatious and unwarranted notifications are rapidly identified and closed out.

Conclusion

In conclusion, the AMA reiterates the sensitivity of this area and the need for the rights and expectations of practitioners and patients alike to be carefully balanced and calibrated.

Patients need to know that their practitioners will practise in a way that justifies their trust and the very high respect that the community places in them, whilst practitioners should not be punished in perpetuity and in a disproportionate way for offences committed long ago and/or where the individual has served the punishment and no longer poses a threat to the public.