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Strengthening the National Registration and Accreditation Scheme for health professions to better protect the public - Two proposed amendments to the Health Practitioner Regulation National Law

AMA submission to Australian Health Practitioner Regulation Agency (AHPRA) on the National Registration and Accreditation Scheme Review Implementation Project Secretariat – proposed amendments to the Health Practitioner Regulation National Law.

NRAS Review Implementation Project Secretariat
NRAS.Consultation@dhhs.vic.gov.au.

The AMA would first like to record its protest about the form of this consultation. The consultation paper itself states:

Input is sought from:

- *existing forums within the National Scheme such as the Forum of NRAS Chairs (which consists of the chairperson of each National Board); the Professions Reference Group (which consists of a representative from each regulated health profession's professional body); and the AHPRA Community Reference Group (which consists of individual members of the community who are not registered health practitioners).*
- *healthcare consumer representative bodies.*

States and territories may choose to consult with local stakeholder organisations.

The AMA has two main issues with this consultation:

- Inadequate time for consultation
  COAG Health Council released its consultation paper - *Regulation of Australia's health professions: keeping the National Law up to date and fit for purpose* on 30 July 2018 closing the consultation on 30 October 2018. The Council has given itself a full 12 months to consider the submissions received. Providing less than a month (by the time the consultation document was distributed to the Professions Reference Group) for such significant reforms of the National Law is manifestly inadequate.

- Inadequate breadth of consultation
  The National Registration and Accreditation Scheme (NRAS) was established to regulate health practitioners and the scheme is entirely funded by practitioners' annual registration fees. But health practitioners are not listed, nor have they been included in the distribution of the consultation document. As Health Ministers are proposing significant reforms to the National Law including amending the guiding principles, the AMA believes a broader consultation with all the health professions was warranted.

Proposal 1: Amend the guiding principles of the National Law to prioritise public protection and public confidence in the National Scheme

Should the guiding principles of the National Law be amended to make explicit that the guiding principle for administering the Act is that public protection and confidence in the National Scheme is paramount? What are your reasons?

It is difficult for the AMA to comment on Proposal 1 given that the Consultation Paper does not set out the proposed wording and it is described in multiple ways. For example, on page 9 it is described as:

> *a requirement in the law placed on regulators (the National Boards and AHPRA) and the regulated professions to prioritise the protection of the public*

Any new positive obligation on practitioners to take additional steps to protect the public would be a substantial change to the National Scheme. The AMA assumes that this is not the intention. Rather the new provision would operate as a “guiding principle” that assists in interpreting the National Law.

There is also some inconsistency in the Consultation Paper as to whether the new wording would prioritise:

- “the protection of the health and safety of the public” – being the wording used in New South Wales and Queensland; or
- “public protection and confidence” – being the wording used on pages 7, 8, 9 and 10.

These are two different things. The AMA assumes that the intention is to focus on the actual health and safety of the public (rather than the public’s perception of health and safety). For example, the evidence shows that vaccines are safe even though some segments of the population do not believe this.

The AMA also has a number of concerns about how the guiding principle would apply in practice.

Mandatory Reporting

The AMA has repeatedly highlighted that ambiguities in mandatory reporting provisions discourage doctors from seeking treatment. The AMA has worked hard to ensure doctors have

a greater level of certainty to seek treatment. Health Ministers have stated that they have raised the threshold for reporting to increase health practitioner certainty. AHPRA are working on the guidelines and education which support the legislative amendments that passed through Queensland Parliament earlier in 2019.

However, this approach will need to be reconsidered if the entire National Law is subject to a guiding principle that makes "public protection and confidence" paramount over all other considerations, including the health and safety of practitioners. Doctors are likely to believe that the new principle will override the small adjustments to the mandatory safety thresholds. The result will be that practitioner doctors will continue to report unnecessarily and even if they don't, patient doctors will think the risk is too great and continue to not seek treatment. And unfortunately, doctors will continue to suffer or die without seeking the treatment that could save their lives.

Notifying a practitioner's employer

The AMA notes that this "guiding principle" will also apply to any other provisions that are ambiguous or requires the exercise of discretion. For example, Proposal 2 proposes that APHRA be required to notify a practitioner's employer whenever it forms the view that there "may be a serious risk". The standard should consider both likelihood and consequence. Otherwise regulators must, having regard to the new guiding principle, over-notify. This would both reduce the effectiveness of disclosures and unnecessarily stigmatise the doctors' concerned. Medical practitioners appreciate that a system of registration and regulation is required in order to ensure that standards are maintained, and rogue practitioners controlled. This is why they have continued to support and fund the National Registration and Accreditation Scheme.

As discussed further below, every year notifications are made about 5% of medical practitioners. In some cases, they are voluntary disclosures by the medical practitioners themselves. However, (according to AHPRA data) 80% of these notifications lead to no further action and less than 1% result in registration being cancelled or suspended. Medical care – particularly where patients have comorbidities or other risk factors – is not risk free and if something does not go to plan, patients or their relatives may choose to notify APHRA. While it is important for an independent body to investigate any issues, this process must be fair to all parties and recognise the emotional and financial impact it has on medical practitioners and their families and colleagues. Medical practitioners find the current APHRA process incredibly stressful regardless of the outcomes.

In short, currently sections 2 and 3 of the National Law recognise that the National Scheme involves a number of competing considerations and that it is important for regulators to consider all these principles in administering the National Law. Proposal 1 upsets this balance by assuming that the "Customer is always right" and "Where there is smoke there is fire". The vast majority of medical practitioners work hard to achieve the best outcomes for their patients and the National Law should continue to reflect that.

Proposal 2 – Requirement to notify an employer during a notification or investigation process when necessary to protect the public

The proposed standard "may be a serious risk" does not include any requirement for APHRA and National Boards to assess the likelihood of the serious risk. If there is a one in a million chance of a serious risk, then APHRA and the National Board would be required to notify. The risk should be likely, or at least material.

The proposed standard does not reflect the acknowledgment by Health Ministers that, given the potential damage to a practitioner's livelihood and reputation, notice only be issued where APHRA and the National Boards can demonstrate "that they had sufficient evidence to reasonably believe that there is a potential public health and/or safety risk that employer action may be able to address or mitigate". How will APHRA and the National Boards assess whether the employer will be able to take action to mitigate the risk?

The AMA is particularly concerned about the suggestion that employers be routinely informed of notifications. According to the 2018/19 AHPRA Annual Report [1], in each of the last two financial years, notifications were made about 5.1% and 5.9% of medical practitioners. However, over 80% of the notifications involving medical practitioners closed with "No further action".

An alternative would be for APHRA to consider whether notification is warranted when it refers a matter for investigation, health assessment or performance assessment.

It is unclear how the proposal is intended to apply to voluntary notifications. Practitioners will be less inclined to make voluntary notifications if they will be routinely forwarded to their employer and other entities (including entities where they volunteer).

It is also unclear how the proposal is intended to apply to anonymous complaints. If APHRA receives an anonymous complaint with no or limited supporting information which alleges conduct which, if true, "may" pose "a serious risk", will APHRA be legally required to report the allegation to the practitioner's employer? If so, this would provide a clear avenue for malicious or disgruntled patients or co-workers to cause immense damage to medical practitioners and their families. There is also the potential for patients and co-workers to threaten to notify conduct in order to achieve other outcomes.

There is also no detail in the Consultation Paper about how the practitioner will be consulted or even informed that their employer or another entity has been notified. An alternative would be for APHRA to issue a "show cause" notice to the practitioner giving them an opportunity to provide any reasons why their employer should not be notified.

[1] http://www.ahpra.gov.au/annualreport/2018/notifications.html (Table 12)

Resourcing issues

According to AHPRA data, 12,445 practitioners had a notification made about them nationally in 2018/19 which is an increase of 13.8% from 2017/18. Last year 2,584 practitioners were monitored by AHPRA for health, performance and/or conduct during the year. Whilst the AMA commends the work that AHPRA and the Medical Board have been doing to reduce the time taken to resolve notifications and investigations, in 2018/19, 31.8% of investigations took longer than 6 months to complete, 11.7% longer than 12 months and 4.9% more than 24 months. The AMA understands (from AHPRA data provided to the AMA) that this equated to 1,330 medical practitioners waiting longer than six months to have their cases resolved. Considering the significant levels of anxiety and stress caused by a notification or investigation on any individual, the AMA considers that these levels are still manifestly unacceptable.

Therefore, it is of considerable concern to the AMA that APHRA is likely to need increased resources in order to consider in each case (particularly if it applies to all notifications) whether it is legally required to issue a notice to an employer. The AMA is very concerned that this increased workload will impact on the ability of AHPRA to complete its core work (namely its investigations) in a timely manner.

Employers – including public hospitals – will also have a legal duty of care to consider each notice promptly. In some cases, employers will also need to notify insurers. At the same time employers will need to ensure that they treat employees fairly and provide them with natural justice. Depending on the level of detail provided in the notice, employers may be in a position where they are unable to take sensible action.

There are also likely to be some circumstances where notifications from a regulatory body may trigger rights for the counterparty to terminate the contract. Accordingly, it is important that AHPRA not be in a position where it is legally required to notify a trivial risk, particularly if the notification turns out to be vexatious.

Comments from medical practitioners

In preparing this submission we sought comments and advice from medical practitioners across Australia. They have significant reservations about the proposed changes. We have provided some of their most important issues (Attachment A) to provide further context.

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Contact

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Attachment A

Vexatious complaints

Vexatious complaints were raised as a significant issue. A number of practitioners have strong concerns that AHPRA will take action, only later to determine that the complaint was indeed vexatious.

The AMA has long received anecdotal information regarding vexatious complaints, that is health practitioners lodging a complaint against another health practitioner for personal or professional gain, or to bully another practitioner.

The AMA also welcomed the finding of the research report released by AHPRA in 2018 that;

> *The report found that the number of vexatious complaints dealt with in Australia and internationally is very small, less than one percent, but they have a big effect on everyone involved*[2].

According to their latest annual report AHPRA received 12,445 notifications[3]. Even at a figure of less than one percent that is around 120 health practitioners per year that could be the recipient of a complaint that "is groundless and made with the intent of causing distress or harm to the subject of the complaint" Associate Professor Bismark[4].

The AMA has strong concerns about reports that (after investigation) turn out to be ill founded and or vexatious. Even if it is a small fraction of these 120 vexatious reports, significant privacy and detrimental stigma can apply even after a complaint has been quashed.

Reputational Damage

The landscape of complaining about your doctor has changed markedly over time. There was a time when the only way to do it was to sue for damages, costly for the patient and therefore only done if there was a very high chance of finding in the patient's favour. So, any complaint came with a presumption of validity.

The landscape now is quite different. It costs nothing to complain and access to the complaints service is well publicised. 80% of complaints are dismissed with no further action, effectively finding in favour of the doctor.

This is manageable for employment in the public sector. The public sector employer could stand down a doctor on full pay then reinstate them without irreparable damage to the doctor financially and professionally. The case in the private sector is entirely different. A private sector doctor's career could be ended by a complaint which is later dismissed or not found to be as significant as first reported.

[2] https://www.ahpra.gov.au/News/2018-04-16-vexatious-complaints-report.aspx
[3] https://www.ahpra.gov.au/Publications/Annual-reports/Annual-Report-2019/Notifications.aspx
[4] https://www.ahpra.gov.au/News/2018-04-16-vexatious-complaints-report.aspx

There is no way to repair the financial, professional and emotional damage where this occurs.

In addition, our medical practitioners also raised the following issues:

- Impact on medical practitioner's health;
- Impact on employers of health practitioners who would be obliged to take action when notified by AHPRA regardless of the nature and/or severity of the complaint;
- Potential reduction in services provided by medical practitioners under investigation which would also impact patients;
- Undermining confidence in the AHPRA system, particularly for self-reporting.