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14 May 2021

Committee Secretary
Senate Standing Committees on Community Affairs
PO Box 6100
Parliament House
Canberra ACT 2600

By email: community.affairs.sen@aph.gov.au

Dear Secretary

Administration of registration and notifications by the Australian Health Practitioner Regulation Agency and related entities under the Health Practitioner Regulation National Law

Thank you for the opportunity to make a submission and for the extension of time in which to do so.

Avant Mutual Group Limited ("Avant") is Australia's largest mutual medical defence organisation and medical indemnity insurance provider, with over 78,000 medical practitioner and student members.

Avant assists and represents individual doctors in professional conduct complaints and disciplinary investigations in all states and territories in Australia, advocates on behalf of its members, and provides education and risk management services to support quality, safety and professionalism in medicine and to reduce medico-legal risk.

Our submission is attached.

Please contact me if you would like any further information or clarification of the matters raised in this submission. We would welcome the opportunity to elaborate on our submission if that would be of assistance to the Committee.

Yours sincerely

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Avant submission

Inquiry into the Administration of registration and notifications by the Australian Health Practitioner Regulation Agency and related entities under the Health Practitioner Regulation National Law

About Avant

Avant Mutual Group Limited ("Avant") is Australia's largest mutual medical defence organisation and medical indemnity insurance provider, with over 78,000 medical practitioner and student members. Avant assists and represents individual doctors in professional conduct complaints and disciplinary investigations in all states and territories in Australia, advocates on behalf of its members and provides education and risk management services to support quality, safety and professionalism in medicine and to reduce medico-legal risk.

Avant welcomes the opportunity to provide input into this Inquiry. In addition to representing individual members in responding to notifications, Avant has participated in numerous reviews and inquiries into complaints/notifications systems within the National Registration and Accreditation Scheme (the National Scheme) and co-regulatory jurisdictions, and the operation of the National Scheme more broadly.

General comments

Overall, there have many improvements in the National Scheme since it was established in 2010 and following the various reviews and inquiries into its operation.

However, with increasing numbers of notifications received by Ahpra each year, the National Scheme is under strain. This affects timeliness in Ahpra and the National Boards' operations and can have a negative impact on the practitioner.

Some of our ongoing concerns relate to the policy positions taken by Health Ministers that flow through into amendments to the Health Practitioner Regulation National Law (the National Law) that underpins the National Scheme. Other concerns relate to the way that Ahpra and the National Boards operate. As to the latter we have a good working relationship with Ahpra and the Medical Board of Australia, and we are able to raise concerns that we have about policy or operational issues with them directly.

Timeliness: some improvement but more work to do

Although we have seen some improvements, there continue to be delays in managing notifications. Aphra's annual report 2019/20 noted an increase in the number of open investigations, health assessments and performance assessments by 16.6%, and an increase in the proportion of notifications that have been open for longer than 12 months from 13.7% to 15.4%.

To its credit, Ahpra is trying innovations to improve the way it handles notifications, for example through changes to its assessment processes and investigations processes (via Operation Reset) introduced in the last six months. These have seen some improvements but there are instances where these are not working as anticipated.

We have been involved in cases where doctors feel they have been caught out and made admissions that were ultimately used against them following a 'cold call' from an Ahpra staff member. For example, we assisted a practitioner where immediate action was taken and the member was suspended. One of the reasons for taking the action was that the Immediate Action Committee (IAC) accepted the notifier's version over the practitioner's version, due to conflicting accounts given at the initial telephone call and written/verbal submissions to the IAC which followed.

Complaints processes continue to negatively impact health practitioners

Complaints/notifications processes can and do have a significant impact on the health and wellbeing of practitioners. This has been recognised by the tribunals in professional conduct hearings, for example:

> *Whilst the protection of the public is and must remain the paramount consideration, the impact of immediate action on a health practitioner cannot be underestimated* (Pearce v Medical Board of Australia [2013] QCAT 392)

There continues to be a perception by many in the medical profession that regulatory bodies take a punitive and adversarial approach to regulation of the profession.

We hear from many doctors that they are fearful of the process and the impact that a complaint or notification may have on their personal lives and professional standing and reputation. This has a flow-on effect on the communities the practitioners serve and ultimately on patient safety.

We accept that public protection is the main objective of the National Scheme, but we are concerned to ensure that regulatory responses are fair and proportionate, and that the practitioner's right to privacy is protected.

Increased regulation is not necessarily better regulation

It appears to us that from a policy perspective, increased regulation is often a knee-jerk reaction to a perceived crisis, which in our experience usually involves an extreme case. The response is to impose regulation based on the extreme case or outlier that can be disproportionate and unfair when applied to the majority, in a "one size fits all" approach. Implementation of the recommendations of the 2017 *Independent review of the use of chaperones to protect patients in Australia* by Professor Ron Paterson is one example.

The major recommendation of the review was that chaperone conditions should no longer be used as an interim restriction while allegations of sexual misconduct are being investigated. The Medical Board agreed to adopt all of the report's recommendations, which meant that the imposition of chaperone conditions, which in many cases appropriately balances the risk to the public and fairness to the practitioner, was no longer available as a regulatory option. However, tribunals have confirmed that chaperone conditions may be appropriate in some circumstances (see for example *Colagrande v Health Ombudsman* [2017] QCAT 108, and very recently *Lanahis v Medical Board of Australia (Review and Regulation)* [2021] VCAT 440).

It is important to ensure that extreme cases do not lead to unfair and disproportionate regulation for the majority who are practising well.

We are also concerned about the potential influence of the Royal Commission into Misconduct in the Banking, Superannuation and Financial Services Industry on regulatory philosophy. In his report Commissioner Hayne referred to a "why not litigate" regulatory approach in the context of the enforcement culture of the Australia Securities and Investments Commissioner (the corporate, markets and financial services regulator). We are concerned about the possibility that Ahpra and the Medical Board will be required to take this approach. We believe that this would not assist in protecting the public, it would amplify the fear currently felt by practitioners about the process and potential consequences for their personal and professional lives, and it would add delays and cost to the system which appears to be struggling under the weight of its workload.

An example is where the Board pursues disciplinary action in a tribunal against a practitioner who has surrendered their registration, on the grounds that this sends a general deterrence message, when there is already a significant body of law about these issues.

The regulatory system should have the confidence of the professions it seeks to regulate. Taking a "right touch", risk-based, non-punitive and educative approach will best achieve this (see for example the work done by Gerald Hickson and his team at Vanderbilt University, outlined in Gerard Hickson: Changing Behaviour MJA Insight 12 August 2013).

Doctors are human, like everyone else, and like everyone else, they can make mistakes. In our experience, in most cases, doctors will learn from those mistakes, through education and reflection, so that mistakes are not repeated. Ahpra has appropriately acknowledged this in the risk assessment approach introduced in 2019/20 to manage concerns raised about practitioners (see Aphra's website: How we manage concerns).

There needs to be an appropriate balance between community expectations, public protection and fairness to practitioners

Over the life of the National Scheme there has been increasing community input into the regulatory system. Most recently, the 2020 COAG Health Council policy directives state that National Boards "must give at least equal weight to the expectations of the public as well as professional peers regarding the expected standards of practice by the registered

practitioner." There is often a fine balance between managing community expectations and fairness to practitioners. "Expectations of the public" is undefined. The expectations placed on medical practitioners can be unrealistic. We are concerned about the implication in this policy directive that community expectations might trump professional peer opinion about the appropriate standard of practice, particularly where the practitioner's clinical judgment is at the heart of the notification.

Comments on the Terms of Reference

(b) the role of AHPRA, the National Boards, and other relevant organisations, in addressing concerns about the practice and conduct of registered health practitioners

The conduct of health practitioners is highly regulated. In addition to Aphra and the National Boards, there are several organisations involved in addressing concerns about the practice and conduct of medical practitioners, depending on the issue, including:

- State/territory health complaints entities and ombudsmen
- Privacy commissioners
- Professional Services Review and Medicare
- Hospitals and health services
- State/territory pharmaceutical services branches and medicines regulators
- Workplace regulators

Practitioners' conduct may also be scrutinised or addressed via coronial inquiries and the criminal and civil justice systems.

One incident can be dealt with by multiple organisations, sometimes concurrently, but at other times sequentially, leading to duplication of processes and increased stress on the practitioner concerned. Proposed amendments to the National Law allowing National Boards to refer matters to another entity after preliminary assessment may assist in reducing duplication.

As noted in our submission to the 2017 inquiry into the complaints mechanism under the National Law, regulators are willing to engage with stakeholders such as Avant to discuss our members' experience of the notifications process and to consider changes to improve systems and processes for handling complaints.

(c) the adequacy and suitability of arrangements for health practitioners subject to supervised practice as part of the registration process or due to a notification

There are two main types of practitioners who require supervision:

- Practitioners who have conditions imposed due to health, performance or conduct.
- International medical graduates yet to progress to general or specialist registration.

The process for approving nominated supervisors is time-consuming, and in many circumstances, practitioners cannot practise until they have an approved supervisor. The process involves finding a willing supervisor and then forwarding the application to Ahpra for consideration and approval by the National Board. In our experience it can often take months for a supervisor to be approved.

It would be helpful if approvals could be delegated to Ahpra, or otherwise fast-tracked. Ahpra should have capacity and ability to assess that nominees are in good standing, and are otherwise appropriate, and make a decision earlier.

As outlined below in relation to term of reference (d), for international medical graduates, supervision itself could be improved.

(d) the application of additional requirements for overseas-qualified health practitioners seeking to become registered in their profession in Australia

Where there are additional supervision requirements for international medical graduates, these could be improved. Apart from those who commence in junior positions in hospitals, the supervision varies. There is a disparity in the capacity of supervisors to provide supervision and support. Inadequate supervision can flow through to the regulatory system via notifications. We often assist international medical graduates with notifications that are ultimately due to a lack of understanding of the Australian system, a lack of adequate supervision, or a combination of these. This should not be seen as the fault of the practitioner but deeper systemic issues referable to support and training provided to these practitioners.

For international medical graduates entering general practice on limited registration, they are usually in areas that are the hardest – rural, remote, after hours deputising, higher patient to doctor ratios, but often with limited support. Ideally, they should be commencing in a heavily supervised supportive environment, similar to the environment Australian graduates are compelled to start in in general practice (a GP training program and position). The solution to this is not just in medical regulation, it needs to be a coordinated approach with government funding for training, an expansion of training positions, with involvement of the Royal Australian College of General Practitioners and the Australian College of Rural and Remote Medicine.

(f) access, availability and adequacy of supports available to health practitioners subject to AHPRA notifications or other related professional investigations

Many supports are available for medical practitioners subject to notifications and professional investigations, including Doctors Health Advisory Services (funded from practitioners' registration fees, via the Medical Board of Australia) and support from organisations such as ours. In its initial letters to practitioners, Ahpra notes that these supports are available and recommends that medical practitioners seek the advice of their medical indemnity insurer to assist in responding to the notification.

We acknowledge Ahpra's work on the practitioner experience of the complaints process with a view to reducing the impact of the process. Nevertheless, we do have practitioners who feel harmed by the process.

In our experience the role of the National Health Practitioner Ombudsman in managing complaints about how Ahpra or the National Boards handled a notification or registration matter or used personal information is not well known. There could be better visibility and clarity of this avenue of complaint for doctors (as well as notifiers) concerned about the way in which their matter was handled by Ahpra.

(g) the timeliness of AHPRA's investigation of notifications, including any delays in handling, assessment and decision-making, and responsiveness to notifiers

As noted in our general comments, while there have been improvements overall to timeliness, there continue to be delays in managing notifications, approval of supervisors and approval and removal of conditions.

Some investigations continue to take a year or more, but it is unclear why this is the case. We understand that the investigation process can include obtaining:

- Clinical records from practitioner
- Clinical records from other entities
- Statements from relevant parties, such as patients or other practitioners involved
- An independent opinion
- A submission from the practitioner

However, unless there is a paused investigation (eg where there are other proceedings afoot), in most circumstances this process should not take a prolonged time. This has an impact on all parties, including for the practitioner involved, and also for the patient/notifier, and diminishes confidence in the scheme.

The current process for dealing with practitioners who are acutely impaired could be improved. The way for these doctors to get better is aligned with keeping the public safe. Ahpra and the Medical Board should be able to be reassured and to guide them towards help, rather than simply taking immediate action to suspend a few weeks later (which is commonly changed into supervised practice with health conditions once a health assessment has taken place, or an adversarial process has commenced).

(h) management of conflict of interest and professional differences between AHPRA, National Boards and health practitioners in the investigation and outcomes of notifications

A situation of conflict of interest may arise where a member of an Immediate Action Committee sits on multiple but unrelated hearings about a practitioner, such that it may be difficult for that committee member to bring an impartial and unprejudiced mind to the matter. It is important for notifiers and practitioners that conflicts of interest are appropriately managed, to avoid bias and ensure natural justice.

In making decisions under about a notification, Ahpra and the National Boards should be guided by clinical input including independent opinion obtained by Ahpra and by the practitioner concerned. We advocated for early clinical input into notifications, and this has now been implemented. This allows Ahpra to resolve many notifications early which saves time and costs. For investigations into a practitioner's professional performance independent expert clinical opinion should guide decision-making.

There does continue to be some lack of transparency about independent experts. For instance, the practitioner under review should be able to obtain all of the briefing material an independent expert has been given by Ahpra (as would be the case in a usual litigation process). Further to that, the practitioner should be given an opportunity and reasonable time to obtain any expert opinion in response.

(i) the role of independent decision-makers, including state and territory tribunals and courts, in determining the outcomes of certain notifications under the National Law

It is vital that there is independent oversight of the decisions made by Ahpra and the National Boards on notifications. This comes primarily through the tribunals and courts, in which disciplinary action is prosecuted, where appeals are heard and where judicial review can be sought.

The National Health Practitioner Ombudsman also has a role in overseeing and reviewing Ahpra through its role in managing complaints about how Ahpra or the National Boards handled a notification or registration matter or used personal information. As noted above, in our experience the role of the Ombudsman is not well known among the profession, and there could be better visibility of this avenue of complaint.

(j) mechanisms of appeal available to health practitioners where regulatory decisions are made about their practice as a result of a notification

There are rights of appeal from most regulatory decisions under the National Law. Our main concern in terms of appeals is the significant delays that can occur in state/territory civil and administrative tribunals before appeals or review applications are heard. This is due to resourcing issues within states and territories.

For example, if a doctor wishes to appeal a decision to impose a condition on their practice, unless they can get a stay (which is not available in Queensland for immediate action decisions), it can take months and months to have the decision reviewed by a tribunal. In the meantime, the condition is active, and compliance is required. This can have significant repercussions for a practitioner.

(k) how the recommendations of previous Senate inquiries into the administration of notifications under the National Law have been addressed by the relevant parties

We were pleased that Aphra introduced a framework for considering vexatious complaints, as the way in which Ahpra managed these complaints was of one of our concerns (Recommendation 2, 2017 Inquiry).

Ahpra has improved its communication with practitioners, and provides more regular updates, however often correspondence merely states that the matter is still progressing (Recommendation 14, 2017 Inquiry).

We were pleased that Health Ministers agreed to make changes to the mandatory reporting requirements under the National Law for treating practitioners, although in our view the changes did not go far enough.

The amending legislation was passed in 2019 and came into effect in early 2020 and included a higher reporting threshold and a list of facts to consider when deciding to report impairment. We recognise that the recent changes are a step in the right direction, and we are reassured by public statements by Ahpra and the Medical Board of Australia that "illness is not an impairment", and that practitioners should be reassured that they can seek help when they need it.

Nevertheless, we continue to prefer the position for which we have advocated for many years, namely the national adoption of an exemption for treating practitioners from mandatory reporting obligations, as currently exists in Western Australia.

Not only will this lead to a nationally consistent approach to health practitioners under treatment but also it will be fairer to practitioners around Australia. It will reduce real and perceived barriers to treatment, so that doctors can obtain the treatment they need without the fear of being reported, and the potential impacts of on their personal and professional lives.

Finally, as noted in our general comments, it does appear to us that Ahpra and the Boards are under significant strain and this is flowing through to timeliness and can have a negative impact on practitioners (Recommendation 13, 2017 Inquiry). It is not clear to us that Ahpra and the Boards currently have sufficient resources to fulfil the objectives outlined in the National Law.

Avant Mutual
14 May 2021