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Avant submission on Mandatory reporting under the Health Practitioner Regulation National Law – Discussion Paper

Thank you for the opportunity to provide a submission on the mandatory reporting discussion paper.

Avant Mutual Group Limited ("Avant") is Australia's largest medical defence organisation, and providing legal advice and assistance, and medico-legal education to over 72,000 medical and allied health practitioners and students in Australia, including on health practitioners' reporting obligations under the National Law.

Key points

Avant strongly believes that:

1. Mandatory reporting provisions under the National Law continue to cause confusion and concern, despite having been in place for seven years and it is time for them to be changed.

2. Mandatory reporting provisions should be nationally consistent.

3. Option 2 is the option that achieves the best balance between protection of the public and healthcare access for the practitioner. This is a model that is currently in place and is the simplest to implement.

4. We need to ensure that patients are properly protected but at the same time ensure that practitioners obtain the treatment they need.

5. A practitioner who is unwell and afraid of seeking treatment is not good for patient safety.

The reasons for this position are outlined below.

National consistency

Australia currently has three different mandatory reporting regimes – one in Western Australia, one in Queensland and one in the remaining states and territories.

This causes confusion for practitioners as well as difficulties for regulators who monitor the legislation.

Avant agrees with COAG Health Ministers that a nationally consistent approach to mandatory reporting provisions will provide confidence to health practitioners that they can feel able to seek treatment for their own health conditions anywhere in Australia.

Time for change

1. Mandatory reporting laws continue to cause confusion and concern, despite having been in place for seven years.

In our experience, there is widespread misunderstanding and confusion about the threshold for mandatory reporting, the precise legislative requirements, and how the provisions apply in practice. This is despite AHPRA producing comprehensive guidelines on the topic,[1] and other organisations, including Avant, providing advice and education to their members. We have attended at least one conference presentation where a member of a practitioner board provided incorrect information about mandatory reporting obligations.

There is a feeling among members of ours that despite the high threshold, there is a "lowering [of] the threshold for reporting, probably in the face of concern for their own welfare if they don't report."

Further education alone will not overcome existing misunderstanding and confusion. Deciding whether to make a mandatory report is encountered infrequently by health practitioners and the application of the law is objectively complicated.

2. Confusion is caused by the way the current legislative provisions are drafted.

Legislative provisions should provide certainty and be easy to understand and implement. This is not the case with the current provisions. There are mixed tenses in the legislation that makes it difficult to understand and apply. The definition of "impairment" is in the present and future tense ("detrimentally affects or is likely to detrimentally affect). The definition of "notifiable conduct" is in the past tense ("practised … while intoxicated", "engaged in sexual misconduct", "placed the public at risk…").

Despite the wording of the provision, discussion about the legislation is not in terms of past conduct. For example, the 2011 Senate Committee report of its inquiry into the administration of the National Scheme noted that:

[1] Australian Health Practitioner Regulation Agency "Guidelines for mandatory notifications" http://www.medicalboard.gov.au/documents/default.aspx?record=WD14%

Notifiable conduct includes practising while intoxicated by alcohol or drugs; and placing the public at risk of substantial harm because the practitioner has an impairment or the practitioner has practised in a way that constitutes a significant departure from accepted professional standards.[2]

Different types of notifiable conduct require a practitioner to make a different assessment of risk and this leads to uncertainty and confusion:

- Sexual misconduct requires no risk assessment. The definition of sexual misconduct under the Medical Board's guidelines[3] on sexual boundaries is broad and is not limited to sexual assault or serious sexual misconduct. All forms of conduct outlined in the guidelines are required to be reported regardless of seriousness or an assessment of risk.[4]
- Practising while intoxicated requires no risk assessment.
- Impairment must have placed the public "at risk of substantial harm"
- Departure from accepted standards must have placed the public "at risk of harm".

Reasonable minds can differ on whether certain conduct falls within the definition of notifiable conduct (that therefore must be reported). In our experience, even those working within medical defence organisations can have differing views on whether conduct is notifiable.

3. *What is happening in practice does not reflect what the law requires*

Research published in the MJA[5] found that:

- Most treating practitioner reports were linked with situations in which the treating practitioner was struggling to safely manage the risk that the practitioner-patient posed.
- Most reports were focused on current or future risk including where there was an impediment to risk reduction, including lack of insight into the risk posed, deliberate dishonesty, deliberate disregard for treatment advice or patient safety, or ongoing intention to self-harm with accessible medicines.

The Medical Board of Australia has stated that "an unwell practitioner whose health is being well managed does not need to be reported to the board."[6] The legislative focus on past conduct is at odds with what is happening in practice.

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[2] Senate Finance and Public Administration Committee *The administration of health practitioner registration by the Australia Health Practitioner Regulation Agency (AHPRA)* June 2011, p.100 http://www.aph.gov.au/Parliamentary_Business/Committees/Senate/Finance_and_Public_Administration/Completed_inquiries/2010-13/healthpractitionerregistration/report/index

[3] Medical Board of Australia "Sexual boundaries Guidelines for Doctors" http://www.medicalboard.gov.au/documents/default.aspx?record=WD11%2f6692&dbid=AP&chksum=%2bSkQuHFu9dnNUTI7eBu2qQ%3d%3d

[4] Other National Boards have similar guidance for members of their professions. See further each National Board's Professional Codes and Guidelines accessible via AHPRA's website.

[5] Bismark M, Spittal M, Morris J, Studdert D "Reporting of health practitioners by their treating practitioner under Australia's national mandatory reporting law" Medical Journal of Australia 204(1) 18 January 2016 https://www.mja.com.au/journal/2016/204/1/reporting-health-practitioners-their-treating-practitioner-under-australias

Below is a letter from the partner of one of our members outlining their experience with mandatory reporting.

This week I read the June 2017 newsletter from AHPRA. The enormity of what has happened became crystal clear.
Dr Joanna Flynn (Chair, Medical Board of Australia) wrote:
"Doctors are human. We get sick, sometimes we feel anxious, overtired or burnt out"… a "further barrier for some doctors (to seek help) is fear of Mandatory Reporting… The threshold for requiring mandatory report is high, only reached when an impaired doctor is placing the public at risk of substantial harm"

Since reading that, I am struggling. I cannot understand. [redacted] was unwell. I had noticed substantial changes in him, something wrong, something in his brain. I discussed my concerns with my GP, and then [redacted] and made an appointment with his GP. Blood tests, a cerebral CT scan and a referral for Neuropsychological testing were organised.

The Neuropsychologist gave an opinion based on the information at the time. In retrospect, probably an incorrect diagnosis. Alzheimer's disease, we would [sic] both shocked and distressed. It would have been helpful to have time to absorb this. To go back to [redacted]`s GP to discuss this further. To find out the results of the cerebral CT scan (a critical piece of information which provides a valid differential diagnosis). To be given an appropriate medical plan: Time off work, referral to a specialist, further investigations, time to think about the future.

The laws pertaining to practising doctors meant that the Neuropsychologist felt obliged to discuss her initial findings with the Medical Board. Their advice was that Mandatory Reporting was necessary. There was a sense of urgency about this. She gave us the name and phone number of the contact at the Medical Board to ring, and the phone number of the Doctors Health Advisory Service.

This was not discussed with [redacted]`s GP who made the referrals and had the other test results. [redacted] was not allowed to be a doctor "seeking help" and there was no time for liaison between his doctors and the Medical Board. It was, in one fell swoop, a Legal issue. He is an "impaired doctor" and not a patient.

As an "impaired doctor" he cannot help me with advice to organise appropriate follow-up for his 800 or so patients. The "mandatory report" added a level of uncertainty to his future over which he, and his doctors, have no control.

The consequences have been catastrophic, for us, and for his patients.

He was a Psychiatrist. The doctor/patient relationship has level of complexity unique to that specialty. A few of his patients are angry: "Where will I go now, there are no psychiatrists with the books open". A large number distressed. There have been many in tears, many well wishes and cards. I find these the hardest, from people grateful he has changed their lives. He was competent, caring and empathic.

[redacted] never placed "the public at risk of substantial harm". He sought medical care, and is on sick leave. It should be between him and his doctors to make appropriate decisions about his health.

[6] Flynn J "The who, when and what of mandatory reporting" Australian Doctor, 17 June 2015

Whether or not he can return to work in a limited capacity after a period of recovery should be a Medical decision. It is a Legal decision now, and there is a high degree of anxiety for us about that process.

Until the Law is changed about Mandatory Reporting to distinguish between criminal behaviour and illness in doctors, nothing can change. Until then, for all doctors, this will remain a barrier to the basic right to medical treatment afforded to every other Australian.

I have been supported by some trusted colleagues and discussed what has happened. The consensus remains: "Don't get sick and if you do, don't tell anyone."

4. *Mandatory reporting laws are a barrier to health practitioners seeking treatment for their medical conditions. This puts practitioners and their patients at risk and is contrary to the public interest.*

There are widespread concerns that doctors who are ill, or impaired, are reluctant to consult with a treating practitioner out of fear that they will be reported to the regulator. These concerns are long standing. Concerns about practitioners not seeking help were identified for example in a 2009 Senate committee inquiry into the proposed national registration scheme,[7] and in the subsequent 2011 Senate committee inquiry into the administration of the National Scheme.[8]

Avant has heard and continues to hear of many instances of doctors being fearful of seeking appropriate treatment because of the risk of being reported.

An April 2014 Avant survey of doctors showed that 40% of general practitioners and surgeons and 33% of physicians surveyed were most concerned about mandatory reporting because it discourages doctors from seeking treatment for fear of being reported.

Beyondblue's National Mental Health Survey of 12,252 doctors found that over 34% regarded the impact of seeking treating on their registration and their right to practise as a barrier to seeking help.[9]

This fear is exacerbated by the disciplinary and adversarial nature of the notifications process (despite the health program intending to be non-disciplinary).

The former Western Australian Minister for Health, Kim Hames, told the ABC that doctors were travelling to Western Australia for treatment because of the exemption that exists in that state:

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[7] Senate Standing Committee on Community Affairs *National registration and accreditation scheme for doctors and other health workers* August 2009, pp.23-27 http://www.aph.gov.au/Parliamentary_Business/Committees/Senate/Community_Affairs/Completed_inquiries/2008-10/registration_accreditation_scheme/report/index

[8] Senate Finance and Public Administration Committee *The administration of health practitioner registration by the Australia Health Practitioner Regulation Agency(AHPRA)* June 2011, pp.100-103 http://www.aph.gov.au/Parliamentary_Business/Committees/Senate/Finance_and_Public_Administration/Completed_inquiries/2010-13/healthpractitionerregistration/report/index

[9] Beyondblue 2013, National Mental Health Survey of Doctors and Medical Students, http://www.beyondblue.org.au/docs/default-source/default-document-library/bl1132-report---nmhdmss-full-report_web

"They clearly do that because they're scared of being reported. So they come here for that anonymity and for getting treatment early when they think they might have a condition. Sometimes you don't even know how bad you are and what the problem is, and it takes others to recognise it. It's really important for people who have a mental illness particularly to seek early treatment and management" [10]

Practitioners should be able to seek treatment for health issues with confidentiality and without the fear of being reported.

Confidentiality is at the heart of a trusting therapeutic relationship and is required to ensure that patients provide full and frank disclosure of their condition so that they can obtain appropriate treatment. Failure to maintain confidentiality breaches trust and undermines the relationship, with the risk that the patient will not trust their treating practitioner and the advice they give. The public interest in allowing patients to obtain appropriate treatment is such that confidentiality should only be breached in very limited circumstances. Health practitioners should not be treated any differently when they enter into therapeutic relationships than other members of the community.

5. ***Practitioners are not taking on health practitioner patients because of the risk of action against themselves for failing to report.***

Failure to make a mandatory report is grounds for the regulator to take action against a practitioner. An addiction medicine practitioner told us that they had decided not to take on health practitioners as patients because of the risk of being reported themselves for not reporting notifiable conduct. This is a further barrier to health practitioners seeking treatment.

Avant strongly supports national adoption of the WA treating practitioner exemption – option 2

Option 2 is the option that achieves the best balance between protection of the public and healthcare access for the practitioner, that is the simplest to implement, and that avoids the problems of interpretation of the legislation.

We have had seven years of experience with the WA treating practitioner exemption. It is a known and tested model. There is no evidence that the treating practitioner exemption has had an impact on mandatory reporting rates in Western Australia. Treating practitioners do make notifications in WA, and the rates of mandatory notification in Western Australia are within the range of notification rates in other states and territories.[11]

There is widespread support for option 2.

In the 2014 independent review of the NRAS (**the Snowball review**), Avant and others advocated for the national adoption of the WA treating practitioner exemption. The independent reviewer's report noted that written submissions expressed strong support (74% of respondents) for the option of a national exemption for treating practitioners to make mandatory notifications.

[10] Doctors in distress, 2015, podcast, Australian Broadcasting Corporation, Sydney, N.S.W., 13 February, viewed April 2015, http://www.abc.net.au/radionational/programs/breakfast/concerns-mandatory-reporting-putting-doctors-at-risk/6090586

[11] Australian Health Practitioner Regulation Agency Annual Reports and state-specific reports https://www.ahpra.gov.au/Publications/Corporate-publications/Annual-reports.aspx

The independent reviewer further noted that the WA exemption received the strongest stakeholder support, and that there was no evidence that this approach had impacted on mandatory notification rates. The independent review recommended that the national law be amended to adopt the WA position.

National adoption of the WA exemption will lead to a nationally consistent approach to health practitioners under treatment which 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.[12]

As stated by one of our members recently:

"This is about creating an environment where the everyday sensible doctor with a mental health issue feels they can approach their treating practitioner and expect a normal therapeutic relationship with the confidentiality that brings."

Problems with options 3 and 4

These options have not been tested so it is unknown whether they will work in practice.

Option 3 appears to be a modified version of the current Queensland law. Because of the way the Queensland section is worded, the mandatory reporting obligation will only be triggered if the practitioner has placed the public at risk in the past, and there is also a risk in the future. If there is only a future risk there will not be any mandatory obligation to report. This compounds the confusion noted above created by references to past conduct and future risk.

We believe that these options will not resolve the confusion caused by the current law. There are still mixed tenses in the provisions and both require a risk analysis by the treating practitioner.

We believe that the nuances and complexities of options 3 and 4 will be lost on most practitioners and will not overcome the problems with the current model. Because there is still a requirement for treating practitioners to report in certain circumstances, these options will not encourage full and frank disclosure by the health practitioner/patient of their condition and history.

There can be overlap between impairment and other types of notifiable conduct. If impairment is the root cause of the conduct, having to report the conduct will subvert the policy aim of removing a barrier to seeking treatment, and reducing the risk to patients. As a result, the risk to patients will increase.

Our fear is that treating practitioners who are concerned about the consequences of not reporting will err on the side of caution and report, rather than not report.

The consequence will be that options 3 and 4 will result in very little real change in practice.

[12] Goiran, N, Kay, M, L, Nash & G, Haysom 2014, "Mandatory reporting of health professionals: The case for a Western Australian style exemption for all Australian health practitioners" Journal of Law and Medicine, Volume 22/1, pp.188-209

What will remain the same if option 2 is adopted

The public is still protected from the risk of harm which may result from the conduct of health practitioners.

The exemption applies to **treating practitioners only**. It will not apply to non-treating health practitioners, including colleagues.

Health practitioners who are not treating practitioners will continue to have mandatory reporting obligations for all types of notifiable conduct under section 141 of the National Law.

Employers will continue to have mandatory reporting obligations under section 142 of the National Law.

Health practitioners, both treating and non-treating, will continue to be able to make a voluntary notification if they are concerned about a fellow practitioner's practice. Any person can make a report about a practitioner under section 144 of the National Law if they are concerned about a practitioner's practice, including their competence, that they may be practising at a lesser standard than their peers, that they have contravened the law, or that they have an impairment.

Any person who makes a mandatory or a voluntary report in good faith is protected under the National Law from liability.

All practitioners including treating practitioners will continue to have a professional obligation to report another practitioner where they are concerned that the practitioner is placing the public at risk (in the absence of a statutory obligation to do so).

As noted in the discussion paper, treating practitioners will continue to have other legislative reporting obligations such as reporting children at risk of harm.

Sexual misconduct

Avant has heard concerns expressed about exempting treating practitioners from reporting sexual misconduct. This is generally expressed as a concern about protecting sexual predators. While we understand these concerns, we have not seen any evidence that treating practitioners are aware of sexual misconduct and not reporting it. The evidence confirms that treating practitioners have reported sexual misconduct (albeit in very small numbers).[13]

Nevertheless, in light of these concerns, it may be appropriate to exclude serious sexual misconduct from the exemption (so that a treating practitioner is still required to report serious sexual misconduct).

[13] Bismark M, Spittal M, Morris J, Studdert D "Reporting of health practitioners by their treating practitioner under Australia's national mandatory reporting law" Medical Journal of Australia 204(1) 18 January 2016 https://www.mja.com.au/journal/2016/204/1/reporting-health-practitioners-their-treating-practitioner-under-australias

Please contact me on the details below if you require any further information or clarification of the matters raised in our submission.

Yours sincerely

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