Avant
By doctors for doctors

Avant Mutual Group Limited
ABN 58 123 154 898

Registered office
Level 6, Darling Park 3
201 Sussex Street, Sydney NSW 2000

Postal address
PO Box 746 Queen Victoria Building
Sydney NSW 1230

DX 11583 Sydney Downtown

avant.org.au

Telephone 02 9260 9000 **Fax** 02 9261 2921
Freecall 1800 128 268 **Freefax** 1800 228 268

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Engage Victoria
Department of Health

By email: NRAS.Consultation@health.vic.gov.au

Public consultation on the proposed reforms to the Health Practitioner Regulation National Law

Thank you for the opportunity to provide a response to the consultation on the proposed reforms to the Health Practitioner Regulation National Law regarding the management of professional misconduct and strengthening protection for notifiers.

Our submission is attached.

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

Yours sincerely

Georgie Haysom

Georgie Haysom
General Manager, Advocacy, Education and Research
Email: georgie.haysom@avant.org.au

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Response template

Name/Organisation	Avant Mutual
Email	georgie.haysom@avant.org.au

Would you/your organisation like to receive project updates via email?

Yes ☒

No ☐

Avant Submission to the consultation on proposed reforms to the Health Practitioner Regulation National Law regarding the management of professional misconduct and strengthening protection for notifiers

Avant is a member-owned doctors' organisation and Australia's largest medical indemnity insurer, committed to supporting a sustainable health system that provides quality care to the Australian community. Avant provides professional indemnity insurance and legal advice and assistance to more than 86,000 healthcare practitioners and students around Australia (more than half of Australia's doctors). Our members are from all medical specialities and career stages and from every state and territory in Australia.

We assist members in civil litigation, professional conduct and regulatory matters, coronial matters and a range of other matters. Our Medico-legal Advisory Service provides support and advice to members and insured medical practices when they encounter medico-legal issues. We aim to promote quality, safety and professionalism in medical practice through advocacy, research and medico-legal education.

We welcome the opportunity to provide input into this consultation.

We understand and support the regulatory principle of keeping the public safe and we understand the need to regulate sexual misconduct, sexual boundary violations and/or criminal sexual offences.

However, it is important to achieve the right balance between the need to protect the public and the needs and interests of practitioners in a fair process and a proportionate response. We have some concerns about the proposed reforms.

1. We do not support the proposal for permanent publication of a practitioner's full regulatory history as it is unfair and unreasonable.

The need for transparency of information should not be at the expense of fairness to the practitioner. Therefore, whilst we acknowledge the arguments in favour of publication for the most serious offences, we do not consider it fair or reasonable that it would apply to all professional misconduct findings for sexual misconduct.

Fundamentally, perpetual and indefinite publication of professional misconduct findings and sanctions is out of proportion to the risk that is being managed.

It not only has a detrimental impact on the individual practitioner but also potentially undermines the trust and confidence placed in the medical profession and the regulator's processes by seeming to invite questioning of the reasons why a practitioner would be able to practise while having faced the listed sanctions.

2. If the proposal does proceed, the threshold should be high and only apply to the most serious conduct.

Any publication of information about practitioners' regulatory history must be fair and proportionate.

The definition of sexual misconduct includes a spectrum of behaviour, some of which is not indicative of an ongoing risk to the public and therefore permanent publication as proposed would be overly punitive while serving limited if any protective purpose.

More work needs to be done on the definition of full regulatory history given the potential detrimental impact on practitioners who have otherwise rehabilitated and where the time period for any conditions and other sanctions has expired.

3. Even if the threshold for publication is met, a practitioner's full regulatory history should not be published permanently.

Any publication of a practitioner's regulatory history should be in place only for the time period that any sanctions or conditions are in place and not permanently. To do otherwise is no longer protective but punitive, contrary to a number of legal principles against indefinite penalties, and contrary to the principles enshrined in the National Law.

4. If the proposal does proceed it should not apply retrospectively.

The proposal should not apply retrospectively to all findings of professional misconduct for sexual misconduct since the National Law came into effect in 2010 as this is punitive and poses a real risk of re-traumatisation for the practitioners involved.

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Part 1 – Expansion of the information available on the national public register of health practitioners

1. Do you support the publication of practitioners' full regulatory history where there has been a finding of professional misconduct because of:

   - sexual misconduct; or
   - sexual boundary violations.

or where there has been a:

   - conviction or finding of guilt for a sexual offence.

   Yes / No / Unsure. Please explain why.

We have concerns about this proposal.

We understand that the current position is that if a practitioner's registration has been cancelled as a result of a finding of misconduct, their name is removed from the register (and placed on a list of cancelled practitioners). If that practitioner wishes to be re-registered, they must apply to do so, with the regulator (and in New South Wales, the tribunal as well) considering whether the practitioner is a fit and proper person to practise and no longer a risk to the public. The considerations outlined on page 10 of part two of the consultation paper are taken into account. Under the proposal, if the practitioner is reinstated/reregistered, then their "full regulatory history" would then be included on their entry on the register, and would remain there permanently.

If a practitioner is found guilty of professional misconduct, but is permitted to continue to practise, with or without conditions to protect the public, the current position is that any sanctions or conditions are included on their register entry (and this available to the public), until they have been fulfilled and removed. The proposal seeks to add the practitioner's "full regulatory history" to their entry on the register, to remain forever, even once any sanction has been served and any conditions have been met. Once a practitioner has served their sanction and fulfilled any conditions (whether that be education, mentoring, suspension or deregistration) and have been rehabilitated they should be able to return to practice without ongoing publication of those sanctions or their regulatory history.

During the period of any sanctions or conditions, the regulator can monitor the practitioner's conduct within the scope of those sanctions, which should be sufficient to offset any potential concerns that could arise after the sanctions have expired and/or been fulfilled. If it is deemed inappropriate for the practitioner to return to practice, then the regulator can take steps to ensure that within the existing mechanisms.

One of the potential unintended consequences of this proposal is that practitioners may be more likely to challenge the allegations made against them. This has the potential to undermine the extensive work the regulator has done to create an environment where practitioners are encouraged to and understand the benefits of showing insight, making admissions, and agreeing to sanctions (education conditions, mentoring, suspensions). If doing so is going to mark their publicly available registration history forever, this may have the unintended consequence of dissuading practitioners from doing so. This could lead to more contested hearings and increased court and regulatory costs.

"Regulatory history" is broadly defined in the consultation paper and includes all actions the Board might take in response to notifications, and would appear to therefore include health and performance matters as well as conduct matters. We have commented further on regulatory history in question 3 below.

We are also concerned about the prejudicial nature of such action where 'regulatory history' includes "the way the practitioner practises their profession is or **may be** unsatisfactory" (emphasis added). This suggests regulatory history includes matters still under investigation and these absolutely should not be published prior to any investigation concluding and findings reached. If there are any concerns that the practitioner is a risk to the public, immediate action can be taken to protect the public pending the outcome of the investigation, and any conditions in this regard will be included on the register. Anything else should not be included pending the outcome of an investigation. Similarly, health and performance matters should not be included in the definition of "full regulatory history".

We support transparency where it protects the public. A practitioner who has served their sanction, fulfilled any conditions, has been reinstated to the register and/or is allowed to continue to practise, is considered fit to practise and no longer a risk to the public, even in the context of a conviction for criminal sexual offences. To have their full regulatory history on the register permanently in these circumstances is no longer protective and can only be punitive.

The proposed reforms may also have consequences from a human rights perspective in relation to effectively repeatedly punishing someone for the same offence. This has been carefully considered in the establishment of sex offenders registers in the various Australian jurisdictions, which are not publicly available documents and people are only included on those registers for finite periods of time based on the nature and number of offences.

By contrast, these proposed reforms will have offences and all regulatory history permanently and publicly available. This is potentially contrary to the principle of someone not being punished more than once for the same offence and therefore, the ongoing reputational and personal impact of publication must be considered very carefully.

We are also concerned about the proposal that these reforms will apply retrospectively. To republish a practitioner's regulatory history that has already been removed where the sanctions, conditions and the like have already expired would have the potential to retraumatise those practitioners affected by this.

2. Is a tribunal finding of professional misconduct because of sexual misconduct or, sexual boundary violations or criminal convictions for sexual offences the appropriate threshold for prompting publication and retention of practitioners' regulatory history?

   Yes / No / Unsure. Please explain why.

No. While the consultation paper states that the threshold is high, we do not believe it is high enough, because of the wide scope of conduct that could lead to a finding of professional misconduct for a sexual misconduct/sexual boundary violation matter.

The definition of sexual misconduct is very broad and encompasses a range of behaviour. The range of matters we see in assisting doctors includes, for example:

- sexual misconduct and abuse where the doctor has clearly taken advantage of the imbalance of power and the vulnerability of the patient
- a doctor who has a consensual relationship with a patient where the patient is not vulnerable
- a doctor who is awkward in their examination and who doesn't explain things properly, leading to misunderstanding or misperception by the patient

- a doctor who is taken advantage of by a manipulative patient or who feels spurned when rejected by that doctor.

All of these examples would fall within the definition of sexual misconduct in the Medical Board of Australia's guidelines and may be found by a tribunal to be professional misconduct.

For the first type of matter, whilst we understand the arguments in favour of publication, we do not consider it should be permanent. For the remaining types of matters listed, we do not believe that it is fair or proportionate for these types of matters to be subject to this proposal (even if there is a finding of professional misconduct), nor would it serve the public interest or the practitioner's interests for information about those to be publicly available for the entire length of the practitioner's registration.

As stated above in answer to question one, if one of the consequences is a permanent notation on the register of a finding of misconduct, practitioners are more likely to challenge those allegations. The regulator has done a lot of work to create an environment where practitioners are encouraged to show insight, make admissions, and agree to sanctions (for example education conditions or undertakings, mentoring, suspensions). Practitioners may be less inclined to do so if the consequence is that this will be permanently recorded on their entry in the register. This would lead to more contested hearings and increased court and regulatory costs.

If however, this proposal is to proceed, then a distinction should be made between conduct regarded as serious (for example, sexual assault/true predatory type behaviour/highly vulnerable patients) versus less serious (for example, sexual comments/consensual sexual relationships where the patient is not vulnerable), with a high threshold for inclusion of a practitioner's regulatory history on the register. If the proposal proceeds, inclusion of a practitioner's full regulatory history should only occur in the most serious of matters, such as where they have been convicted or subjected to a finding of guilty for a criminal, sexual offence by a court (as noted on page 14 of the consultation paper).

Also, as mentioned elsewhere in this submission, further clarification is needed regarding the meaning and intention of "full regulatory history" being published.

3. A practitioner's regulatory history could include any undertakings, conditions, reprimands, and prohibitions orders. The National Law does not currently allow this history to remain on the public register when they are no longer in force.

   Do you support publication and retention of these elements if the circumstances for publication are met?

   Yes / No / Unsure. Please explain why.

No. This would be disproportionate, unfair and punitive. It also contravenes established legal principles regarding indefinite penalties.

Whilst we acknowledge there is a public interest in transparency, this needs to be balanced against the interests of the health practitioner and the ongoing burden and distress that can be caused by permanent publication of their regulatory history.

A practitioner who has served their sanction, fulfilled any conditions, has been reinstated to the register and/or is allowed to continue to practise, is considered fit to practise and no longer a risk to the public. Historical conditions or undertakings often have no relevance to how a practitioner currently practises, and ongoing publication of them goes beyond any sanctions imposed by the tribunal or National Board at the time. To have their full regulatory history on the register permanently in these circumstances is no longer protective but punitive.

The health of practitioners who are the subject of regulatory proceedings is often impacted by regulatory action, sometimes quite severely, as demonstrated by Ahpra's own research[1]. If historical conditions or undertakings are added to the public register, the impact on those practitioners will be extended, often for a seemingly indefinite period. There are very few, if any, other occupations in society where past disciplinary history is available to the public.

Further, publication of this information may have the unintended consequence of diminishing public confidence in the regulatory system. Only practitioners who are suitably qualified and competent should be registered. If the Board considers a practitioner's registration history means they are not suitably qualified or competent to hold registration, they will not be granted registration.

If this proposal is enacted, the discretion under the National Law for Boards to exclude or remove information from the public register outlined on pages 11-12 of the consultation paper should be retained. We strongly agree there should be exemptions, as proposed on page 15. The National Law should include a mechanism for practitioners to apply for information to be expunged from the register and for information to be removed if a finding is overturned on appeal.

We note one of the proposals is that practitioners may request that information be expunged where a tribunal or court suppresses information. We suggest that where there is a suppression or non-publication order, the National Board should not publish any information in the first instance. If for whatever reason publication occurred, then the Board should be required to remove information from the register on their own motion rather than requiring the practitioner to make a request for removal as proposed.

4. It is proposed to use the guidelines in the Medical Board of Australia's *Guidelines: Sexual Boundaries in the Doctor-Patient Relationship*[2] to define the scope of behaviours covered by these reforms.
    a) Does this sufficiently encompass all conduct which should be considered in scope for this reform?
    b) Should other specific conduct, such as grooming, be included?

Question 4a. Does this sufficiently encompass all conduct which should be considered in scope for this reform?

No. The guidelines are too wide to be used to define the scope of application of these proposals. It includes a range of conduct from very serious conduct to less serious issues such as: asking a patient about their sexual history or preferences, when these are not relevant to their healthcare and without explaining why it is necessary to discuss these matters.

Question 4b. Should other specific conduct, such as grooming, be included?

No. These will be caught under the definition of sexual misconduct and we do not consider that terminology needs to be specifically included.

We note that those Guidelines were released in December 2018 with a planned five-year review cycle outlined in the Guidelines. We would welcome the opportunity to be involved in any future review of those Guidelines.

[1] See 'Virtually daily grief'—understanding distress in health practitioners involved in a regulatory complaints process: a qualitative study in Australia | International Journal for Quality in Health Care | Oxford Academic (oup.com) and Australian Health Practitioner Regulation Agency - Improving the notifications experience (ahpra.gov.au)

[2] Ahpra and National Boards, 'Guidelines: Sexual boundaries in the doctor-patient relationship' https://www.medicalboard.gov.au/Codes-Guidelines-Policies/Sexual-boundaries-guidelines.aspx#.

In the meantime, if the Guidelines largely remain fit for purpose, we note that they apply to a spectrum of behaviours and not all of those behaviours should be subject to the proposed reforms.

5. Are there any other initiatives or actions which could improve public protection and transparency regarding practitioners' regulatory history?

No. We consider that the current mechanisms in the National Law are sufficient.

6. Do you have any further comments or suggestions?

Spent convictions legislation will need to be carefully considered in relation to these proposals. Certain jurisdictions have protection for people from having their spent convictions disclosed or relied upon in making decisions (for example under the *Equal Opportunity Act 2010* (Vic)).

These reforms may lead to less public confidence in the system and to the public questioning why the regulator or tribunal has considered someone with a history of sexual misconduct to be fit to practise medicine.

We are also concerned that these reforms may create mistrust between the regulator and the practitioner, and may lead to a more adversarial environment. As noted above, practitioners may be less likely to cooperate and accept conditions and more inclined to challenge allegations. This could lead to an increase in regulatory costs and will not advance the principle of protection of the public.

Instead, at the time of imposing sanctions or conditions on individual practitioners, the appropriateness of how long that and the practitioner's regulatory history should be listed on the public register can be considered by the decision makers at that time and therefore informed by the individual circumstances of that matter. This would achieve appropriate recognition of the broad spectrum of behaviours these proposed reforms would apply to, and allow a fair balancing of the interests of the practitioners with public safety concerns.

Finally, there are several issues that will arise when implementing this proposal, if it proceeds, that need to be clarified. We agree in principle, as outlined on page 16, that there should be guidance documents supporting implementation of any form of this proposal to encourage consistency. Some of the implementation issues that arise that would need to be clarified in such guidance include:

- What is the process for publishing past and expired offences and findings of professional misconduct? Are there criteria or a process for deciding not to list any of these on the public register?
- What is the proposed timing for listing the findings on the public register, given the availability of the appeals process?
- How will the information appear on the public register, in terms of the words used and the way it is presented to members of the public?

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Part 2 – Establishing of nationally consistent reinstatement orders

1. Do you support a nationally consistent requirement for practitioners to seek a reinstatement order from a tribunal before applying for re-registration after being disqualified or cancelled? Yes / No / Unsure. Please explain why.
Avant supports national consistency of regulation wherever possible.
2. Do you agree that the National Law should be amended to adopt the New South Wales model for reinstatement orders? Yes / No / Unsure. Please explain why.
There is merit in a tribunal having oversight of this process, as a tribunal is an independent body, rather than the National Board which is also the prosecuting body in prior disciplinary proceedings. However, we are concerned about the procedural burden this may place on state tribunals. State tribunals are already under resourced and face challenges dealing with expanding jurisdictions. The consultation paper (page 12-13 of part two) makes it clear that the state tribunals and National Boards will have separate processes for determining appropriateness of reinstatement and re-registration respectively. This could lead to further delays and impact on practitioner's wellbeing and livelihood. Another consideration is that having multiple state tribunals with their own original jurisdiction may potentially lead to more inconsistency.
3. Are there any other initiatives or actions which could improve public protection and support national consistency for practitioners seeking re-registration after being disqualified or cancelled?
Based on our experience, we consider that practitioners would benefit from information and resources regarding the process of seeking re-registration from Ahpra and the National Boards which could be available on the respective websites.
4. Do you have any further comments or suggestions?

Part 3 – Strengthening protections for notifiers and prospective notifiers

1. Do you support the proposed reforms to strengthen protections for notifiers and prospective notifiers? Yes / No / Unsure. Please explain why.
We agree that there should be protections for notifiers from potential harms so they feel safe and have confidence in the notifications process. As the consultation paper outlines, there are existing protections in the National Law and we consider that these are sufficient to serve that purpose.
2. Do you support changes to make it an offence to seek to include an NDA in an agreement without advising the affected person that they can still make a notification to Ahpra, National Boards or another relevant regulatory body? Yes / No / Unsure. Please explain why.

We do not consider that it is necessary to create a new offence of this nature. The existing protections for notifiers should be sufficient to provide the protection and confidence in the system. It is unclear how it is intended that this proposed reform will be implemented and enforced. On the face of it, enforceability would be challenging in that it would be limited to situations where the NDA otherwise comes to the regulator or complaint body's attention. We therefore consider that focusing on greater education about the notifications process would a better approach, potentially accompanied by optional suggested wording for inclusion into NDAs about the right to make a notification to achieve consistency.
3. Do you support changes which would mean that an NDA is void to the extent that it prevents a person making a notification to Ahpra, National Boards or other regulatory body? Yes / No / Unsure. Please explain why.
We agree that any provision in an NDA that purports to prevent a person from making a notification to Ahpra, National Boards or another regulatory body should be void. The remainder of the NDA should be unaffected.
4. Are there any other initiatives or actions which could improve protections for notifiers and prospective notifiers?
We consider that public education regarding the right to make a notification about a practitioner and the notifications process would be preferable to introducing increased protections and new offence provisions. This would serve to educate the public about their rights and accessibility of the process. It would overcome the concerns expressed regarding consumers being unaware of how the terms of any NDA they enter into align with their ability to make notifications, and any concerns regarding access to legal advice (as referred to in part three of the consultation paper on page 10).
5. Do you have any further comments or suggestions?

Avant Mutual
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