

Public consultation: Review of the Criminal history registration standard and other work to improve public safety in health regulation

By email to AhpraConsultation@ahpra.gov.au

14 September 2023

Avant submission to the public consultation on the review of the criminal history registration standard and other work to improve public safety in health regulation

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 almost 86,000 healthcare practitioners and students around Australia (more than half of Australia's medical practitioners). 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 matters, coronial matters and a range of other matters. We have a Medico-legal Advisory Service that 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, education and medico-legal education.

Avant welcomes the opportunity to provide feedback on this consultation.

If further information is required in relation to this submission, please contact Ms Georgie Haysom, General Manager, Advocacy, Education and Research at Avant on georgie.haysom@avant.org.au.

Yours sincerely



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Initial questions
<i>To help us better understand your situation and the context of your feedback please provide us with some details about you. These details will not be published in any summary of the collated feedback from this consultation.</i>
Question A Are you completing this submission on behalf of an organisation or as an individual?
Your answer: <input checked="" type="checkbox"/> Organisation Name of organisation: Avant Mutual Contact email: georgie.haysom@avant.org.au <input type="checkbox"/> Myself Name: Click or tap here to enter text. Contact email: Click or tap here to enter text.
Question B If you are completing this submission as an individual, are you: <input type="checkbox"/> A registered health practitioner? Profession: Click or tap here to enter text. <input type="checkbox"/> A member of the public? <input type="checkbox"/> Other: Click or tap here to enter text.
Question C Would you like your submission to be published? <input checked="" type="checkbox"/> Yes, publish my submission with my name/organisation name <input type="checkbox"/> Yes, publish my submission without my name/ organisation name <input type="checkbox"/> No – do not publish my submission

General comments

Avant welcomes the opportunity to provide input into the consultation on the review of the criminal history registration standard and other work to improve public safety in health regulation.

It is important to achieve the right balance between the need to protect the public and the interests and needs of practitioners. In general, we support steps taken to provide clarity in relation to the criminal history registration standard, and also in explaining how decisions are made regarding the relevance of a practitioner's criminal history and the processes that underpin this. Our experience shows there is some inherent confusion in relation to the role and relevance of criminal history in the registration and renewal of registration process, and obligations to report criminal offences or charges. We therefore recommend that this is considered as part of the review and have referred to this below.

The other issues raised as part of this consultation are broad ranging and some require detailed consideration and consultation in their own right. We have addressed these in our specific comments below but note that some would benefit from greater details to be able to comment on sufficiently.

Our key points include:

- Any process for assessing practitioners' criminal history must be fair and balanced.
- Information and reasons need to be provided to explain why spent convictions are included in the criminal history disclosure requirements, given the intention of these legal provisions.
- Reinstatement decisions should not be published as this amounts to republication of the original decision and would be prejudicial to practitioners, when the appropriate body has already made a decision about risk to the public.
- Whilst it may be appropriate for Ahpra and the National Boards to raise awareness of support services, they should not directly provide such support.
- Assessing alleged practitioner misconduct and the appropriate consequences are complex matters and it is not appropriate for consumers to be involved at the decision-making stage as proposed.

Focus area one – The Criminal history registration standard

Question 1

The *Criminal history registration standard (Attachment A)* outlines the things decision-makers need to balance when deciding whether someone with a criminal history should be or stay registered such as the relevance of the offence to practice, the time elapsed and any positive actions taken by the individual since the offence or alleged offence. All decisions are aimed at ensuring only registered health practitioners who are safe and suitable people are registered to practise in the health profession.

Do you think the criminal history standard gets this balance right?

If you think the *Criminal history registration standard* does not get this balance right, what do you think should change to fix this?

Your answer:

Avant supports the general position that there needs to be appropriate criminal history checking of registrants. The process for assessing criminal history must be fair and balanced. Any decision by the Board to take action against a practitioner because of their criminal history must be based on a considered and measured assessment of the relevant factors outlined in the standard.

In general, the content of the registration standard is clear and helpful. We have made some specific comments below.

The terminology 'criminal history' can be confusing for practitioners given that the definition includes charges against a practitioner, when these allegations may not be proved against them. The factors considered by decision makers are the same for alleged offences and proven offences but the approach taken to a conviction is likely to be very different to an allegation. We suggest that the definition of 'criminal history' is included at the start of the registration standard, not the end of the document. The registration standard should also include a statement or other information about how decision makers approach alleged offences in particular proven offences. This could either be included as a general overarching section or in section 3.

Question 2

Do you think the information in the current *Criminal history registration standard* is appropriate when deciding if an applicant or registered health practitioner's criminal history is relevant to their practice? If not, what would you change?

Your answer:

The definition of criminal history, which comes from the National Law, needs to be more prominent in the document. See above in answer to Question 1.

The registration standard should explain the approach taken by decision makers to ‘spent convictions’ or findings of guilt where no conviction has been recorded. The aim of spent convictions legislation is to prevent discrimination, by limiting the use and disclosure of older, less serious convictions and findings of guilt. It arguably goes against the intention of spent convictions legislation to include these in the definition and require them to be disclosed. Therefore, we recommend that the registration standard and/or supporting documents explain the reasons behind their inclusion.

The criminal history registration standard does not expressly deal with international convictions. While the definition refers to ‘any other country’, this is the only place international criminal history is referred to. We recommend that the definition be moved to the start of the document and some general information or an additional numbered paragraph be included referring specifically to international convictions.

Question 3

Do you think the information in the current *Criminal history registration standard* is clear about how decisions on whether an applicant or registered health practitioner’s criminal history is relevant to their practice are made? If you think it is not clear, what aspects need further explanation?

Your answer:

As mentioned above, more information should be included regarding the reasoning behind the inclusion of spent convictions in the definition of criminal history. More information should also be included about the how international convictions are dealt with as this is not currently explained.

Question 4

Is there anything you think should be removed from the current *Criminal history registration standard*? If so, what do you think should be removed?

Your answer:

N/A

Question 5

Is there anything you think is missing from the 10 factors outlined in the current *Criminal history registration standard*? If so, what do you think should be added?

Your answer:

N/A

Question 6

Is there anything else you would like to tell us about the *Criminal history registration standard*?

Your answer:

It would be beneficial to consider the criminal history registration standard, and any new supporting documents, in the context of registration and renewal of registration processes, and the obligation under section 130 of the National Law.

In our experience in assisting our members, there is often confusion about what charges and offences need to be disclosed and when. There is also confusion about what needs to be disclosed at the time of annual registration renewal. We appreciate the steps Ahpra has taken to clarify this over recent years but perhaps some additional guidance regarding criminal history and its relevance to registration could be included in the registration standard of supporting documents.

In some cases, confusion is created or exacerbated by the terminology which refers to “criminal history” perhaps suggesting that this only relates to determined criminal convictions in the past, not pending charges. It may be beneficial for the registration standard to add in wording that refers to and explains the requirements in section 130 of the National Law to help raise awareness.

Focus area two – More information about decision-making about serious misconduct and/or an applicant or registered health practitioner’s criminal history

Question 7

Do you support Ahpra and National Boards publishing information to explain more about the factors in the *Criminal history registration standard* and how decision-makers might consider them when making decisions? Please refer to the example in **Attachment B**. If not, please explain why?

Your answer:

Avant supports the provision of additional information as this increases understanding and awareness of the registration standard and how it is applied. The use of examples and the explanation of the position will also enhance this understanding.

Question 8

Is the information in **Attachment B** enough information about how decisions are made about practitioners or applicants with a criminal history? If not, what is missing?

Your answer:

The information in paragraphs 27 and 28 (page 18 or 29) would benefit from further explanation. For example, in paragraph 27, how will decision makers determine whether a practitioner’s criminal history “indicates a likelihood of future threats to patient or the public”? The meaning or intention of paragraph 28 is not clear.

Question 9

Is there anything else you would like to tell us about the information set out in **Attachment B**?

Your answer:

We are concerned regarding the implications for procedural fairness of the information set out in paragraphs 16 and 17. We suggest that more information is provided about this approach and how it will be applied and decisions will be made.

Question 10

Thinking about the examples of categories of offences in **Attachment C**, do you think this is a good way to approach decision-making about applicants and registered health practitioners with criminal history? If you think this is a good approach, please explain why. If you do not agree with this approach, please explain why not.

Your answer:

We suggest that it is made clear that this is not an exhaustive list.

In category A, we suggest amending the wording to change ‘offences against morality’ as this language is outdated and arguably not applicable when referring to criminal offences (nor moral offences). In some jurisdictions, the type of offence in the example is a separate offence recognising the different nature of that offence. Alternatively, this item in the list could be deleted and the apparent intention of this could be incorporated into the third bullet point with some wording around consideration being given to the circumstances of the alleged victim of such offences (age, disability etc).

Question 11

Do you think there are some offences that should stop anyone practising as a registered health practitioner, regardless of the circumstances of the offence, the time since the offence, and any remorse, rehabilitation, or other actions the individual has taken since the time of the offence? Please provide a brief explanation of your answer. If you answered yes, please explain what you think the offences are.

Your answer:

No.

Question 12

Is there anything else you would like to tell us about the possible approach to categorising offences set out in **Attachment C**?

Your answer:

We recommend that Attachment C make it clear that the examples for each category are not exhaustive.

We also recommend that the attachment includes a review period, to ensure that the example and approach remain current and appropriate.

Focus area three – Publishing more information about decisions that are made about serious misconduct by registered health practitioners

Question 13

Were you aware that disciplinary decisions by tribunals about registered practitioners were published to Ahpra and National Board websites and are linked to an individual practitioner's listing on the public register?

Your answer:

Yes.

Question 14

Do you think decisions made to return a practitioner to practice after their registration has been cancelled or suspended (reinstatement decisions) for serious misconduct should be published where the law allows? Please explain your answer.

Your answer:

Any public interests served by publishing the decisions would be outweighed by the potential harm to the practitioner in publishing that decision.

Publishing any information about decisions to reinstate a practitioner has the potential to amount to republication of the original decision that led to a practitioner's registration being cancelled or suspended. We do not consider that this is appropriate, due to the disproportionate impact that this would likely have on the practitioner's reputation and wellbeing.

A public interest in decisions made about practitioners (as referred to on page 5 of the Guide to review of the Criminal history registration standard') is more about the public finding it interesting rather than there being a legitimate issue of public safety or risk to the public being served by publication of this information. This is an important distinction.

It is a matter for the appropriate National Board, or tribunal or body, to determine whether the practitioner's registration should be reinstated and if reinstated, then the past decision and the decision

to allow the practitioner to return to practice should not be published on the Ahpra/National Boards' websites. The decision about any risk to public safety has been made and it has been determined that no risk is posed. Making details of these decisions available potentially leads the public to feel like they are expected to make their own assessment regarding any risk posed, which could lead to the decisions of the Boards, and/or tribunals, and the role of the regulator being undermined.

Question 15

Is there anything else you would like to tell us about the approach to publishing information about registered health practitioners with a history of serious misconduct?

Your answer:

It is vitally important that the balance between the interests of the public and the practitioner is appropriate, taking into account the potential harm caused by publication of unnecessary and prejudicial information about a practitioner. Where the appropriate body has assessed a practitioner's history of serious misconduct and determined they are fit to practise, it does not serve any interest to have that information published and could potentially suggest a lack of faith in the decision makers and their processes.

The information is otherwise already available in the published tribunal decisions and these can be sought out if relevant.

We broadly support the plan to publish insights and trends in notifications and decisions about serious misconduct as referred to in paragraph 44. We consider that publication of that sort of information would serve the purpose outlined in paragraph 40 regarding helping educate practitioners and give them a greater understanding of the conduct that leads to regulatory action. This is a better approach than focusing on publishing individual outcomes and/or linking them to the public register.

Focus area four – Support for people who experience professional misconduct by a registered health practitioner

Question 16

What do you think Ahpra and National Boards can do to support individuals involved in the regulatory process who are affected by sexual misconduct by a registered health practitioner? (For examples, see paragraph 47 of the consultation paper.)

Your answer:

We acknowledge that there can be significant impact for those affected by proven serious professional misconduct by practitioners. At the same time, it is also important to recognise the impact of the regulatory process on practitioners, personally and professionally. This is exacerbated when allegations are made and are not proven but the negative impact continues even after the practitioner is exonerated.

We have reservations about the extent to which this is the role of Ahpra and the National Boards and suggest that it might be best managed by external third party organisations, of which there are already many in existence. We do not agree with Ahpra and the National Boards extending their role in this regard as mentioned in paragraph 46. It may be appropriate for Ahpra and the National Boards to raise awareness of the existence of appropriate services, but the support should not be directly provided by Ahpra or the National Boards.

The language of paragraphs 45 to 47, including the heading and any future headings, should be reworded. Suggesting support be provided throughout the regulatory process suggests that this is provided before the decision has been reached. If this is the intention, then amendments should be made to recognise that notifications about professional misconduct are not always proven.

Paragraph 47 talks about supporting those affected "through the regulatory process" which implies that at that stage, there would not have been any finding of misconduct. It may be that the process leads to

a finding that no misconduct occurred. Any support for those affected by alleged or proven misconduct should be separate from those investigating the misconduct.

The stress and damage referred to in paragraph 45 also applies to practitioners and we suggest this is more appropriately reflected in the language of paragraphs 45 to 47 and in Ahpra and the National Boards' approach to support during the notification process. It is vital that an appropriate balance is reached.

Question 17

Is there anything else you would like to tell us about how we can support individuals affected by a registered health practitioner's professional misconduct?

Your answer:

It is important to recognise that individuals affected by professional misconduct include the practitioner accused of the conduct, and other practitioners who work with them. Language that uses the term 'victim', such as that which was used in the Ahpra blueprint, is not appropriate given that much of that language is about someone who has made a notification, prior to any findings being made.

We are also concerned that the review of the criminal registration standard is not necessarily the appropriate context for considering this issue.

Focus area five – Related work under the blueprint for reform, including research about professional misconduct

Question 18

Are the areas of research outlined appropriate?

Your answer:

Any research done must be robust and with a proper evidence base. It is unclear how the timing of proposed research fits with the timing of the review of the criminal history registration standard and the current consultation, given the length of time proper research is likely to take.

To some degree, the areas of research appear appropriate and valuable. For example, research about the outcomes of sexual misconduct matters could help in educating practitioners and decreasing future behaviour. Also, research regarding having more information on the public register could be beneficial if it helps inform the appropriateness of any future steps to expand the information available on the public register, before any changes are made.

However, we do not consider the areas outlined in 48(c) and 48(d) are appropriate. It is clear from the consultation documents and knowledge of the regulatory space that there is great complexity to the decisions made regarding practitioner conduct. It is difficult to see how an appropriate role would be conceived for the public or patients in the decision making. A public consultation such as this one allows for public input as appropriate. We are concerned about the potential consequences, for practitioners affected and the greater public, if there is greater involvement of patients and the public in decision making. We note that tribunals include non-practitioner members already which allows for perspectives from outside the profession.

The research referred to in paragraph 50 regarding public attitudes about practitioner conduct is another way of obtaining public input into the process, and would be a better and more appropriate option than great involvement in the decision making. It is not clear how the role of these individuals in decision would work in practice, for example in the exercise of discretion to ensure all decisions were appropriate, proportionate and consistent. There is a risk that there could be a gradual erosion of procedural fairness as 'lay people' became involved in these complex decisions.

Question 19

Are there any other areas of research that could help inform the review? If so, what areas would you suggest?

Your answer

N/A

Additional question

This question is most relevant to jurisdictional stakeholders:

Question 20

Are there opportunities to improve how Ahpra and relevant bodies in each jurisdiction share data about criminal conduct to help strengthen public safety

Your answer:

N/A

Avant Mutual

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