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Avant submission on NSW Health's Discussion Paper on the Statutory Review of the Health Practitioner Regulation National Law (NSW)

Avant welcomes the opportunity to provide input into NSW's Health Discussion Paper.

Avant is a medical indemnity organisation representing over 64,000 medical and allied health practitioners and students in Australia, and more than 23,900 practitioners and students in New South Wales.

Our members provide important health services to communities across Australia, but are also the subject of complaints and notifications made to health regulatory agencies.

Our Sydney office assists medical practitioners in complaints handled by the Health Care Complaints Commission and the NSW Medical Council, and we have significant experience in dealing with many of the issues raised in the Discussion Paper.

We provide the attached submission based on this experience.

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

Yours sincerely

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Avant Submissions on
NSW Health's Health Practitioner Regulation National Law (NSW)
Statutory Review Discussion Paper

General Comments

Avant supports a nationally consistent approach to regulating medical practitioners, not only in terms of process but also in terms of outcomes. In light of an increasingly mobile workforce, the fact that New South Wales is a co-regulatory system does not detract from the need for national consistency.

Although the paramount consideration of the NSW health regulatory system is protection of the public, it is important that the voice of practitioner is not lost, and that a responsive, risk-based regulatory approach is taken. Practitioners are entitled to a fair process in which the rules of natural justice are adhered to. Regulatory action should be proportionate to the harm to be averted. This is particularly important in the context of this review which is considering Parts 5A and 8 of the National Law as it applies in New South Wales.

Comments on selected consultation questions

9. *Is the current complaints model whereby there are different and distinct streams, health, conduct and performance, to deal with complaints appropriate and effective?*

Avant endorses the current model with the three distinct streams of health, conduct and performance as each involves a quite separate process, albeit towards the same objective.

However, we believe that internal processes could be improved and streamlined to enable a practitioner to be managed in concurrent pathways without duplication and without different Committees of the Council making decisions. For example, where both an impairment and a performance issue is identified in one practitioner, these issues should be dealt with together.

Many Medical Council panel members sit across each stream and therefore combining functions at an operational level could be an effective mechanism for dealing with issues that arise across streams.

Conduct stream

10. *What changes, if any are required for PSCs and Council inquiries to hearing complaints in a timely, cost effective manner that both protects the public and ensures natural justice for practitioners the subject of the complaint?*

Avant acknowledges that Professional Standards Committees (PSCs) have become more formal and legalistic over the years. As noted in the Discussion Paper, legislative changes before the commencement of the National Law permitted legal representation in PSCs, and the PSC is presided over by a legally qualified Chairperson. This has resulted in the evolution of a more formal and costly process, with Counsel appearing regularly for both the practitioner and the Health Care Complaints Commission.

Although we support PSCs remaining in NSW to deal with the lower level of serious complaints relating to conduct matters, we submit the following:

- We do not support PSCs having the power to suspend or cancel a practitioner's registration. The power to suspend or cancel a practitioner's registration should be solely reserved for a fully constituted Tribunal with a presiding judicial officer.

- Legal representation for the practitioner should remain unchanged, as it is an important safeguard for the practitioner and assists the Committee in avoiding appellable error.

PSCs' current power to conduct the hearing with as little formality as possible should be encouraged. However, maintaining a level of legal formality ensures that the hearing remains confined to the scope of the inquiry before it, and ensures proper procedural fairness to all parties.

We believe that the following changes should be made to improve the operation of PSCs.

PSC should be closed hearings

PSCs are now open to the public as a result of legislative changes before the National Law commenced. The consequences of open hearings are significant. Practitioners in PSCs have been verbally attacked by persons attending the hearing (for example, by relatives of the patient) outside the hearing room and have been forced to sit with those persons inside the hearing room due to space restrictions.

The publication of PSC decisions has often resulted in irreparable long term damage to the practitioner which often is out of proportion to the seriousness of the original complaint.

Similar panels in the National Law jurisdictions do not hold open hearings. This places NSW practitioners at an unfair disadvantage compared with practitioners appearing before panels in other jurisdictions.

Proceedings before a PSC should be recorded

Recording the hearing is very important, because it assists the Committee in accurately reporting the evidence in its written reasons for decision, assists the parties in making accurate submissions, and aids the correction of errors. Without a transcript, appeals on a question of law or judicial reviews can be complicated.

Factual errors made in decisions are very hard to overcome but may have a significant impact on the practitioner's reputation. While the outcome in general terms might be acceptable, factual errors can potentially have long lasting ramifications that outlive any conditions that may be placed on the practitioner's practice. The only remedy is to appeal to the Tribunal for a full rehearing simply in an attempt to adjust a factual finding or statement. This is costly and inefficient.

Health stream

11. Should the requirement that a medical practitioner sit on Impaired Registrants Panel remain in the legislation?

Yes. Medical practitioners bring important expertise to the panel in terms of considering what appropriate action, if any, is needed in dealing with an impairment notification.

13. What changes, if any, are required to the Impaired Registrants Panel, particularly in respect of the powers of the Panels, to ensure that complaints that raise impairment issues are handled in a cost effective, fair and timely manner?

Avant agrees that the Impaired Registrants Panel (IRP) should make a finding that there is an impairment before exercising its powers to counsel the practitioner or to recommend that conditions be placed on the practitioner's registration. This requires more than simply assuming there is an impairment solely on the basis of a notification.

We do not agree that the panel should be empowered to take action directly. Recommendations should continue to be referred to the Medical Council for action.

We believe that the following changes should be made to improve the operation of IRPs.

Reasonable belief should be incorporated into s152D

Sections 152B and 152C require that the Council has a reasonable belief that the practitioner or student has or may have an impairment before taking action. We submit that the same should apply to the decision to refer a practitioner to an IRP under s152D.

There should be a discretion not to proceed with or to hold an inquiry under s152E

The IRP has no choice but to hold an inquiry once the matter is referred under s152E. Currently the Health Committee of Council may decide to refer a practitioner to an IRP before an assessment report is received or even required. If the assessment report does not indicate the practitioner is impaired, there is no discretion under the legislation for the Council to not proceed with or to decline to hold an inquiry. This leads to unnecessary cost and stress to the practitioner and should be changed.

We submit that section 152E should be amended so that there is a discretion **not** to proceed with or to hold an inquiry.

An IRP should able to take action even if there is an HCCC investigation

An Impaired Registrants Panel should be able to investigate or take other action even if the Health Care Complaints Commission is carrying out an investigation. This will improve the timeliness of dealing with impairment matters, and will better protect the public by allowing impairment issues to be addressed at the same time as any HCCC investigation. For example if a practitioner has health conditions imposed at a s150 hearing, and the matter is referred to the HCCC, referral to the HCCC prevents the practitioner from being managed on the impairment program in the interim which is detrimental to the practitioner's prospects for employment, recovery and rehabilitation, and makes reviewing the conditions difficult. We therefore submit that s152F be deleted.

The process for reviewing conditions under s152K should be simplified

The section states that the Council must require an IRP to review the matter when it receives a request for review. We submit that it is not necessary in every case to convene an IRP or to make a formal written application, particularly if the practitioner has been regularly attending review interviews. For example, making the practitioner wait until either another interview or another IRP to simply increase hours of work is unfair. We believe that variations to conditions, if approved by the review interview, should be able to be actioned by Council delegates without the need for an IRP. We therefore submit that s152K should be amended accordingly.

Not agreeing to conditions should not automatically be treated as a complaint under s152L

If a practitioner does not agree to conditions, it should not be automatically treated as a complaint (and referred to the Commission), as required by section 152L. This approach is not cost effective or fair, and contradicts the notion that managing an impaired practitioner is not disciplinary in nature. We recommend that section 152L be amended so that the Council has a discretion in whether to adjourn or deal with the matter as a complaint or via some other mechanism, such as referral for a performance assessment, or referral to a s150 hearing process to impose conditions.

Performance stream

14. Should the Performance Review Panels be abolished?

No. Performance Review Panels (PRPs) serve an important educational purpose and exercise an important oversight function by considering the findings of the performance assessment and making recommendations based on the assessment report.

15. Are there other options to simplify and streamline the processes while maintaining the effectiveness of the Performance Stream?

We believe that it is not necessary in every case to hold a formal inquiry before a PRP. A PRP could make recommendations on the papers and/or with the consent of the practitioner.

In our submission the practitioner should be provided with the assessor's report and recommendations. If the practitioner accepts the report and recommendations, he or she can also agree to conditions, subject to some ability to negotiate or make submissions. If he or she does not consent, the practitioner should have the opportunity to have a hearing before a promptly convened PRP. This would streamline the process considerably and limit the number of cases that go before a PRP.

Section 150 processes

18. Are changes required to s.150 to ensure that immediate action can be taken to protect the public while still ensuring natural justice for practitioners?

Yes. We submit that changes are required to section 150.

In our experience, s150 is being used inappropriately. The power under s150 is exceptional – it is described as an 'emergency power' and 'urgent'. [1] Yet the threshold for the exercise of this power is currently very low. In our experience, the Council exercises its power, particularly to impose registration conditions on a practitioner, as a matter of routine and not as an exception. The decision to convene a s150 hearing is made by the relevant Council committee and it is unclear if the committee members turn their minds to balancing the s150 process with the least restrictive means of achieving the public policy objectives of the National Law.

In our experience, s150 proceedings are often not urgent in terms of an imminent threat. For instance

- Imposing conditions under s150 where the only issue is prescribing a particular class of medication and the practitioner has surrendered his/her authority to prescribe that class.

- Where the only evidence of unsafe practice is nothing more than a matter of differing professional opinion.

- Where the issue is a breach of a condition, for example, a supervision condition. Council's delegates are not able to make factual findings on material issues of culpability. Therefore, except for cases where there is an immediate and substantial concern of dangerous practice if unsupervised, the practitioner's non-compliance should be properly dealt with as a disciplinary complaint to the Health Care Complaints Commission.

In other jurisdictions, the threshold for taking immediate action to impose restrictions under the National Law is that there is a reasonable belief that it is "necessary" to do so in the public interest. In NSW there is no pre-condition to the exercise of power in terms of forming a belief that the action is necessary. However, s150 should be read in conjunction with section 3(c) of the National Law, which limits the restrictions to be imposed on the practitioner's practice to those that are "necessary". This behoves the Council, in our submission, to justify its action in terms of what its action does to protect the public against an identified risk, and cannot simply rely on being satisfied that it is "appropriate".[2]

We submit that the Council ought to take a risk based approach to the use of the s150 power that is responsive and proportionate to the risk of harm to the public. This requires that the minimal regulatory action be taken. It is important that fair and reasonable consideration be given to the impact of the action on the practitioner, and that the requirements of natural justice and procedural fairness are adhered to in the exercise of power under s150.

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[1] see Medical Council NSW Annual Report 2013-2014

[2] See for example, *Dr Reid v Medical Council of NSW* [2014] NSWCATOD 152 where the delegates were satisfied that it was " appropriate" to suspend the registration of the practitioner, but on appeal, the Tribunal said : *they have not said how and why any of these matters has created a risk to the health and safety of any person and why in the aggregate it is in the public interest to suspend the registration of the appellant in all the circumstances.*

Section 150 should be amended

We therefore submit that in s150 the word "appropriate" should be omitted and replaced by "necessary" in s150(1) and ss150(1)(b) and (c)

We also submit that due to the exceptional nature of the powers under s150 the following amendments should be made to:

- allow legal representation at a s150 inquiry so that a practitioner's rights (such as the right against self-incrimination and the right to procedural fairness) can be adequately protected during the hearing. In our experience, there is currently an inconsistent approach taken in s150 hearings regarding the extent to which assistance can be provided.

- extend the protection that currently applies under s150B(2) to recordings of s150 proceedings against production in civil and criminal proceedings to all s150 material including the decision and evidence.

- ensure that decisions made under s150 are confidential - the relevant provisions in the legislation should be amended accordingly.

- review suspension orders in the Medical Tribunal after a set period of time, for example 12 weeks. This would re-inforce the interim nature of orders made pursuant to s150, and would also afford some protection for a practitioner who may otherwise be suspended from practice for a very lengthy period.

Tribunals

19. Should the Tribunal have a power to make an interim suspension order?

No. There are adequate mechanisms to protect the public, such as the Tribunal's general powers and the power of the Council to take action under s150.

22. Should Part 8 of the Health Practitioner Regulation National Law (NSW) be amended to clarify that the Tribunal can hold an inquiry where a complaint has been admitted?

No. In our view, no amendment to the National Law is necessary. The Tribunal has a wide discretion as to how it proceeds in relation to the need to conduct an inquiry into a complaint. If the complaint has been admitted, the Tribunal can decide the scope of any inquiry it wishes to hold, within the confines of the complaint, for example by limiting the inquiry to accepting the admissions and considering what protective orders are sought as a result of its findings.

23. Should a new section be included in Part 8 requiring the Tribunal to give written reasons when making orders in circumstances where a complaint has been admitted?

No. In our view a new section requiring the Tribunal to give reasons where a complaint has been admitted is not necessary as the Tribunal has an obligation to provide a written statement of decision after an inquiry or appeal under s165M. Reaching a finding that a complaint has been proved on the basis of an admission would constitute a limited inquiry, in

our view, for the purposes of this provision. The reasons for the resulting orders need not be elaborate.

24. Should the legislation be amended to clarify who should have a right to appear before or to be heard in matters where an application for a review is made under s.163A?

Yes.

26. Should Schedule 5D clause 12 be amended to give a list of mandatory factors a PSC or Tribunal must consider in determining whether it is not in the public interest for an inquiry or appeal to continue?

No. We agree that a list of mandatory factors is not necessary.

When practitioners change their place of residence

27. Are the current administrative arrangements for dealing with practitioners who have conditions on their registration adequate or are legislative amendments required?

No. Current arrangements are not adequate for practitioners who have moved jurisdictions.

28. If legislative amendments are required, what changes are needed?

In our view s125 of the National Law must be amended. We have been involved in several cases where practitioners who have moved to NSW from interstate are subject to conditions which can only be amended (and which are only applicable) in the original jurisdiction, or subject to prosecution in the other jurisdiction. This has prevented the practitioners from accessing the NSW Part 8 provisions, for example, referral to the Impaired Registrants Program.

Mandatory notifications

29. What is the best way to protect the public from practitioners who may be placing the public at risk of substantial harm in the professional practice because of the practitioner's impairment? and
30. Are any changes to the legislation required?

Yes.

The treating practitioner exemption from Western Australia should be adopted

Avant submits that mandatory notification provisions should be amended to reflect the exemptions included in the Western Australia legislation covering health practitioners under treatment.

The intent of the Western Australian exemption ("WA exemption") is that a treating practitioner is exempt from making a notification where the practitioner was undergoing active treatment and did not impose a risk to the public. We agree with this intention and this principle.

The Independent Review of the National Registration and Accreditation Scheme undertaken by Mr Kim Snowball looked at this issue and recommended that the Western Australian exemption be adopted nationally. We agree with this recommendation, and we were disappointed to see that Health Ministers did not accept it. We acknowledge that further research is underway. Nevertheless we believe that there is sufficient reason currently to amend the legislation notwithstanding the outstanding research.

We believe that:

- 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 as they will be subject to the same laws. Differences in approach cause confusion and uncertainty and result in different outcomes

- it will reduce real and perceived barriers to treatment. The beyondblue report on its National Mental Health Survey of 12,252 doctors[3] found that doctors seeking treatment for mental health conditions faced many barriers including:

  - lack of confidentiality or privacy (reported by 52.5%);
  - embarrassment (37.4%);
  - impact on registration and right to practise (34.3%);
  - preference to rely on self or not seek help (30.5%);
  - lack of time (28.5%); and
  - concerns about career development or progress (27.5%).

- the variation in Western Australian law does not appear to have made a material difference to the rate of mandatory notifications.[4]

- treating practitioners have an ethical obligation so are able to report if they feel their practitioner/patient is a risk to the public.

The tense of the mandatory reporting provision should be amended

Avant submits that the wording of the mandatory reporting provision (s 140 of the National Law) should also be changed. The provision is worded in the past tense, which suggests an obligation to report past rather than current impairment, and an obligation to report even if the practitioner is under active and successful treatment for their impairment.

The wording of the New South Wales legislation introduced in 2008[5] that preceded the National Law used the present tense rather than the past tense.

We believe that the s140 should be amended so that the definition of "notifiable conduct" is in the present tense.

[3] Beyond Blue, *National Mental Health Survey of Doctors and Medical Students* (October 2013), http://www.beyondblue.org.au/docs/default-source/default-document-library/bl1132-report---nmhdmss-full-report_web

[4] See Bismark et al "Mandatory reports of concerns about the health, performance and conduct of health practitioners" MJA 201(7) 6 October 2014; AHPRA Annual report 2012/2103

[5] *Medical Practice Act 1992* (NSW), s 71A (1).

31. Should there be additional information provided to practitioners to ensure that they understand their mandatory reporting obligations?

In our experience, practitioners still misunderstand their mandatory reporting obligations. Further education is required. There is a currently available resource in the Medical Board of Australia's Guidelines on Mandatory Reporting. This is a useful guide to mandatory reporting obligations and all practitioners should be made aware of it.

Referral of mental health matters to councils

32. Should the reporting requirements of medical superintendents remain?

No.

33. Should s.151 of the National Law be amended to require the medical superintended to notify a health practitioner Council of a registered health practitioner or student who is detained in a mental health facility under the Mental Health Act only after either the s.27 examinations have occurred or the patient has been seen by the Mental Health Review Tribunal?

If these reporting requirements remain, medical superintendents should only be required to report after either the section 27 examinations have occurred or the patient has been seen by the Mental Health Review Tribunal.

Structure and content of part 8

35. What changes should be made to Part 8 to make it more user friendly?

Part 8 should be drafted in a way that is precise, flows logically, and is easy to use. We support the Ministry reviewing the structure of Part 8 to achieve this.

Proposed minor amendments as set out in Appendix A

In general, we agree with the proposed changes under Appendix A, with the following comments:

Wording of ss148E, 149A and s150 - while we agree in principle that consistent wording should be used throughout, the different functions of the Council, its appointees and delegates, and the Tribunal, needs to be considered. There is little difference in terms of the effect on the practitioner between what a Council can do under s148E and what a PSC can do under s 146B, and what a Tribunal can do by way of an order under s149A (although a Tribunal cannot suspend or cancel under s149A). A council's delegates may order suspension under s150 (in exceptional circumstances) and order that conditions be imposed, but there is an implied limitation on what may be included in conditions imposed under s150 by the absence in the provision of the suite of orders available after the usual inquiry into a complaint – because of the interim nature of the orders that can be made – and this should not be overlooked in any proposed amendments.

The different mechanisms for imposing conditions and making orders can cause confusion, in particular, because of a perceived inability to vary previously imposed conditions and

orders. In our view, the amendments should be contained in the review and appeal provisions, in Divisions 6 and 7, to clarify what orders (and conditions) can be reviewed and varied.

Interlocutory orders - We submit that the National Law should be amended to allow a single member of the Tribunal (the presiding i.e judicial member), **or** the List Manager to hear interlocutory applications and make orders.

Power of single member of Tribunal to hear application for withdrawal- We agree that Schedule 5D, Clause 12 should be clarified to allow the List Manager, in addition to the presiding member of the Tribunal, to determine an application to withdraw a complaint or terminate an inquiry.

Amendment of Division 11 of Part 8 - We agree to an amendment that would allow a PSC to continue in the absence of a member of the profession who is not the Chairperson. We have some reservations a regarding the unavailability of the lay member as that would significantly alter the constitution of the Committee by removing the community representative.

Appeal rights in the Tribunal - The National Law notes these are external appeals under the *Civil and Administrative Tribunal Act*.

S175 appeals against decisions of the National Board are merits reviews. For the sake of clarity there should be a provision indicating the nature of the appeal and how it is to be dealt with. Similarly s159A is lacking an indication of the type of appeal (although it may be inferred).

Appeals under ss158, 159, 159A and 160 relate to disciplinary or other findings made by a Council or delegates or appointees of the Council. In our view the different language reflects the matters that are subject to the appeal e.g. a 'hearing' by a PSC or PRP or a 'consideration' by Council when exercising powers where there is no statutory framework for a formal hearing, for example, proceeding by way of s150 and s152.

These provisions allow further evidence to be given on appeal by both the applicant and respondent. Each of these appeals are merits reviews and in our submission there are real issues as to how the appeal is to be conducted and whether the 'de novo' review should be limited so that it is not 'open slather'.[6]

Avant submits that the nature of the original decision is critical to determining the extent of fresh evidence to be introduced at a review or on appeal. For example the extent of the new evidence permitted in an appeal from a Tribunal decision would be different from that permitted in a review of s150 proceedings. In the case of a s150 decision, the practitioner on appeal is put in the position of defending a case that is currently still under investigation by another authority.[7] The courts have recognised that new material introduced at a review

[6] See comments of the Victorian Court of Appeal in *Kozanoglu v Pharmacy Board of Australia* [2012] VSCA 295 (12 December 2012) regarding the 'hybrid' nature of an appeal against immediate action under the National Law '*whereby the material to be considered is confined to that placed before the initial decision-maker, but with the opportunity available to both parties to present additional evidence which bears directly upon that decision as originally taken. It is not 'open slather', but nor is it an appeal confined to error*.'

[7] If an application for review of the immediate action is made by the practitioner, and a full hearing as to the conduct takes place, and findings in relation to the conduct are made, questions arise as to the effect of those findings of fact on any subsequent hearing of a disciplinary complaint about the same events *Liddell v Medical Board of Australia* [2012] WASAT 120

or appeal that was not before the original decision-maker can put the practitioner at a significantly unfair disadvantage[8].

Avant submits that consideration should be given to clarifying the nature of the 'fresh evidence', for example by limiting it to evidence that bears directly on the matter before the decision-maker when the original decision was made.

Other comments

Review and appeal

Where the Council is the appropriate review body under s163A to review conditions imposed by a Tribunal, and where the Council refuses to alter or remove conditions, there is currently no mechanism to lodge an appeal under s159 against Council's refusal.

Section 159 should be amended to permit appeals to the Tribunal from a Council's refusal to alter or remove conditions previously imposed by a Tribunal.

Confidentiality

The confidentiality provisions in the National Law need revision as they are confusing and piecemeal.

Avant Mutual Group
17 August 2015

[8] It would mean that the responsible tribunal would be considering the wider issue of the professional competence [of the pharmacist] based upon material gained in an investigation undertaken subsequent to the immediate action determination: *The Tasmanian Board of the Pharmacy Board of Australia v Balzary* [2011] TASHPT 2, [4]-[5].