

23 December 2019

NRAS Review Implementation Project Secretariat
Health and Human Services Regulation and Reform Branch
Department of Health and Human Services
GPO Box 4057
Melbourne VIC 3001

Via email: NRAS.Consultation@dhhs.vic.gov.au

Dear Secretariat

Re: Proposed amendments to the Health Practitioners Regulation National Law

Thank you for providing the Australian Dental Association (ADA) with the opportunity to provide feedback on the proposed changes to the Health Practitioner Regulation National Law. The ADA notes there are two proposed amendments being canvassed in the consultation paper.

Proposal 1 – Amend the guiding principles of the National Law to prioritise public protection and public confidence in the National Scheme.

The ADA does not see any particular issues with the proposed amendment as the co-regulatory jurisdictions of Queensland and New South Wales already reference public protection and consistency across jurisdictions is appropriate.

Proposal 2 Requirement to notify an employer during a notification or investigation process when necessary to protect the public.

The consultation paper poses a series of questions to assist with responding to this proposed change which we have addressed in turn below. Before doing so, the ADA notes that the proposed amendment appears to provide the power to report to an employer to both a National Board and AHPRA. The ADA firmly believes that if this amendment were to go ahead, only a National Board should have the authority to enact this provision and while that authority may be delegated to AHPRA by a National Board, AHPRA should not have the authority directly.

1. **Should a National Board or AHPRA be required to notify an employer of a matter during the notification or investigation process, if it reasonably believes that there may be a serious risk to public health or safety?**

No. The ADA believes there must be procedural fairness for the employee. A complaint needs to be verified prior to notification of an employer. Vexatious and unfounded claims have significant and detrimental effects on health practitioners that can severely affect their practice and potentially result in mental health issues.

The health practitioner should be protected against these very negative outcomes by withholding notification to employers until a complaint has been established as legitimate. The negative consequences are even more relevant for contracted healthcare professionals who are often not afforded the same level of workplace protections in relation to reasonability and fairness.

2. In what circumstances do you think that the proposed requirement for a National Board or AHPRA to notify employers could enhance public safety?

While it is difficult to think of a situation where such a requirement would exist, it may be useful in circumstances where the National Board, are unable to effectively utilise the immediate action (IA) powers under the legislation and required the employer to take action to protect the public.

The proposed threshold is a 'reasonable belief that there may be a serious risk to public health and safety'. This threshold is high and is mirrored in the IA threshold. Therefore, the only time the proposed changes would be invoked, is when the matter is in the IA process.

The IA process has a very tight and effective turnaround. Essentially, with the proposed changes, the employer might receive notice about a week or two before any IA is taken. There would be limited benefit to the public and significant hardship to the practitioner (discussed further below).

The employer would have limited information and be required to make a judgement call about the practitioner's employment (likely stand them down) without a fair process and without any finding by the relevant Board.

Whilst it can enhance public safety, if and when a claim has been established - it can actually decrease public safety in cases where the claim is unfounded or found to be vexatious. This is because the health practitioner may be severely affected, unable to provide their usual services to patients and may result in delays and/or disruptions to service provision.

3. In what circumstances might there be challenges applying the proposed requirement?

The greatest challenge will be determining the validity of the notification and that the threshold has been met. There are quite serious ramifications flowing from the premature sharing of information to the employer, and if the changes are imposed, and this is why the ADA believes the decision about the threshold being met should only be made by a National Board.

There will be unintended and unwanted effects from applying such a requirement and then finding that the claim was not legitimate. There would need to be a clearly documented process on how the notification be rescinded effectively once it has already caused significant impacts both on the practice, reputation and stress/mental health of the practitioner. Consideration should also be given as to how the practitioner might be compensated under the National Law for the breach of privacy and the distress caused.

4. What unintended consequences might be created by the proposed requirement? How might these be managed?

An employer who receives information from the regulator that there is a 'reasonable belief' of a 'serious risk' is more than likely going to mitigate their own risk and stand an employee down. This would happen before natural justice has been followed and a final decision has been made. In some organisations, the return to work process may be incredibly slow due to internal investigations, processes and bureaucracy. This would have a negative impact on a practitioner's livelihood, and their reputation in the workplace.

There is already a huge stigma among health practitioners about receiving a notification. It is not something that is spoken about and practitioners bear the burden alone. To have an employer notified before natural justice has taken place would have the effect of punishing the practitioner and offer little to no additional protection to the public.

This is why the ADA believes that the only way to avoid such unintended consequences is to withhold employer notification until a claim is verified.

5. Does the potential of the requirement to enhance public safety outweigh any difficulty it may create for practitioners or employers? How might these difficulties be managed?

No. There is little to no additional protection to the public by notifying an employer prematurely. A National Board needs to also uphold the rights of the registrant.

The simplistic but important notion of thoroughly assessing on a case by case basis is imperative. There will always be a degree of "guilty until proved innocent" that will impact on the practitioner. The regulator must act to investigate promptly and have practitioner support protocols in place.

Practitioner effects must be equally weighted with public safety otherwise there could be an increase in vexatious claims. The difficulties are best managed by withholding employer notification until a claim has been verified.

Unless Health Ministers have information to the contrary, the ADA is not aware of any evidence that the IA process as it is currently defined, does not protect the public adequately.

6. Is the proposed threshold for requiring a National Board or AHPRA to notify employers correct? (i.e. a reasonable belief that there may be a serious risk to public health or safety)?

No. The threshold to notify an employer should remain as it currently is under the legislation – i.e. after procedural fairness has been followed and a final decision has been made.

A claim must be verified and found to pose a serious risk to public health/safety, not at the notification stage as the risk of practitioner health from unintended consequences of unfounded and vexatious complaints is high.

The ADA would be happy to expand on any of the comments in this letter. Please do not hesitate to contact Mr Damian Mitsch, Chief Executive Officer on ceo@ada.org.au or alternatively on, 02 8815 3300 if necessary.

Yours sincerely

A handwritten signature in blue ink that reads "Carmelo Bonanno". The signature is fluid and cursive, with a horizontal line underneath the name.

Dr Carmelo Bonanno
Federal President