

Health Insights

Striking the balance: Do the recent amendments to mandatory reporting obligations go far enough?

Despite significant resistance by key stakeholders, amendments to mandatory reporting obligations in respect of registered health practitioners treating other health practitioners for medical conditions, including mental health issues, have now been passed by the Queensland parliament.

This article follows Meridian Lawyers' earlier Health Insights article (which can be read [here](#)), wherein we discussed the Council of Australian Governments (COAG) Health Council's unanimous agreement to provide exemptions from the reporting of 'notifiable conduct' by treating practitioners, in April last year.

With the agreement of the COAG, the *Health Practitioner Regulation National Law and Other Legislation Amendment Act 2019* (Qld) (**the Act**) now seeks to amend the current mandatory reporting requirements for treating health practitioners contained in the *Australian Health Practitioner Regulation National Law Act* (2009) (**National Law**). Although the date for commencement of the amendments is uncertain at this stage (with the Act to commence on a date to be fixed by proclamation) it is expected in late 2019 or early 2020. Once commenced, the revised mandatory reporting requirements will become law in all States and Territories except Western Australia, where treating health practitioners remain exempt from mandatory reporting provisions.

The changes have been the subject of debate by registered practitioners and their professional bodies, health regulators, and members of the public. Calls from stakeholders¹ to adopt the Western Australian model, which exempts treating health practitioners from reporting their health practitioner patients, were rejected.²

The current mandatory reporting laws require a treating practitioner to report any health practitioner patient if a reasonable belief is formed that the practitioner patient has behaved in a way that constitutes 'notifiable conduct'. The National Law presently defines 'notifiable conduct' to mean, in respect of impairments, a registered health practitioner who has placed the public at risk of substantial harm in the

¹ 'Queensland doctors call on State Government to save lives' joint Media Release by RACGP, AMA Qld, RANZCP Qld, ACRRM and ACEM 4 Dec 2018, accessed at <https://www.racgp.org.au/gp-news/media-releases/2018-media-releases/december-2018/queensland-doctors-call-on-state-government-to-save>.

² Health Communities Disability Services and Domestic and Family Violence Prevention Committee, *Health Practitioner Regulation National Law and Other Legislation Amendment Bill 2018*, February 2019. (The Report).

practitioner's practise of the profession because the practitioner has an impairment. An 'impairment' is recognised to mean that a person has a physical or mental impairment, disability, condition or disorder (including substance abuse or dependence) that detrimentally affects or is likely to affect the person's capacity to practise the profession.

In contrast, the Western Australian model provides treating practitioners with a complete exemption from mandatory reporting across all forms of 'notifiable conduct.'

A review of the national registration scheme³ showed strong support for a national exemption for treating practitioners to make mandatory notifications, and called for national consistency in line with Western Australian provisions. National consultation⁴ revealed issues with current mandatory reporting requirements which may affect a registered practitioner's likelihood of seeking treatment, including:

- Concerns about respecting patient confidentiality;
- The requirement to report past conduct; and
- A lack of national consistency.

Stakeholders have expressed concerns that mandatory reporting requirements for treating practitioners can deter practitioners from seeking help for serious health issues, particularly mental health concerns and drug and alcohol related issues. Practitioner fears that a treating practitioner will notify the Australian Health Practitioner Regulation Agency (**AHPRA**) (or the Office of the Health Ombudsman (**OHO**) in Queensland), resulting in sanctions or loss of registration, can act as a barrier to seeking treatment for these issues.⁵

Proponents of the Act believe it strikes the right balance between ensuring health practitioners can seek help for health conditions, by raising the mandatory reporting threshold for treating practitioners, while also maintaining strong protections for health consumers.⁶

The key changes contained in 141A to 141C of the National Law are a higher threshold for mandatory reporting of impairments such as mental health issues, and a holistic assessment of risk. Under the amendments, a report to AHPRA will be required only where a treating practitioner forms a reasonable belief about another registered health practitioner or student who 'is placing the public at substantial risk of harm'.⁷

While the current obligations mandate reporting where there is 'a risk of substantial harm', the amended provisions raise the threshold to 'a substantial risk of harm' arising from impairment, intoxication, or practise outside of accepted professional standards. Moreover, 'notifiable conduct' is amended to refer to

³ Australian Health Ministers' Advisory Council, Independent Review of the National Registration and Accreditation Scheme for health professions, Dec 2014, accessed at <http://www.coaghealthcouncil.gov.au/Publications/Reports/ArtMID/514/ArticleID/68/The-Independent-Review-of-the-National-Registration-and-Accreditation-Scheme-for-health-professionals>

⁴ Above n 2 The Report, Appendix D, 41.

⁵ Above n 1.

⁶ Explanatory Notes, Health Practitioner Regulation National Law and Other Legislation Amendment Bill 2018, 5, accessed at <https://www.legislation.qld.gov.au/view/html/bill.first/bill-2018-036/lh>

⁷ Above n 3, 4.

practitioners who 'are placing' the public at risk, where the current obligations refer to practitioners who 'have placed' the public at risk. That is, the amendments raise the current threshold from a focus on past risk of any harm, to current or future risk of substantial harm. There is otherwise no change to the mandatory obligations to report another registered health practitioner who has behaved in a way that constitutes 'notifiable conduct'.

The amendments also provide guidance to treating practitioners about factors they may consider when assessing whether an impairment represents a substantial risk of harm to the public, such as:-

- the nature, extent and severity of the impairment;
- the extent to which the practitioner-patient is taking or willing to take steps to manage the impairment;
- the extent to which the impairment can be managed with treatment; and
- any other matter the treating practitioner considers is relevant to the risk of harm the impairment poses to the public.

The higher threshold for reporting, along with the guidance for assessment of risk, seek to reassure treating practitioners that only serious impairments that are not being appropriately managed through treatment or mitigation strategies should be reported, if patient safety would be at substantial risk.⁸

AHPRA CEO Martin Fletcher has said AHPRA will work closely with the National Boards, professional bodies, state and territory health departments and employers to raise awareness and address misunderstandings about mandatory reporting to help spread the message that practitioners should be supported and encouraged to seek help about their health issues.⁹ On 11 September this year, AHPRA and the National Boards initiated a public consultation on the *Guidelines for mandatory notifications* (the **Guidelines**), which seek to explain the thresholds and requirements for making a mandatory notification in light of the recent amendments. The consultation period for the Guidelines closes on 6 November 2019. Links to AHPRA's consultation paper and draft revised Guidelines can be found [here](#).

Although the prospect of reform regarding mandatory reporting obligations for treating practitioners was promising, there remain significant concerns that the amendments have not gone far enough. While the recent amendments are certainly a step in the right direction, there are concerns that treating practitioners may remain overly cautious in reporting practitioner patients who may not strictly fall under the mandatory reporting obligations, where there remains a risk of registration action on the treating practitioner should they fail to do so in appropriate circumstances.¹⁰

Whether the new amendments will result in impaired practitioners being more likely to seek help, and adhere to treatment, remains to be seen.

⁸ Explanatory Notes, Health Practitioner Regulation National Law and Other Legislation Amendment Bill 2018, 5, accessed at <https://www.legislation.qld.gov.au/view/html/bill.first/bill-2018-036/lh>

⁹ AHPRA press release, 'Legislative amendments on mandatory reporting and fake practitioners', 26 Feb 2019, accessed at www.ahpra.gov.au/News

¹⁰ Under Part 8 of the National <http://www.ahpra.gov.au/News> Law, and In Queensland action may also be taken under the *Health Ombudsman Act* 2013.

This article was written by Principal, [Daniel Davison](#) and Lawyer, Rosemary Blanden. Please contact Daniel Davison if you have any questions or if you would like further information



Daniel Davison
Principal
+61 7 3220 9358
ddavison@meridianlawyers.com.au

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