

Discussion paper

Mandatory reporting under the Health Practitioner Regulation National Law

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Australian Health Ministers' Advisory Council

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Purpose of this discussion paper

There are currently mandatory reporting obligations on registered health practitioners under the Health Practitioner Regulation National Law (National Law). The mandatory reporting obligations are designed to protect the public by ensuring that the Australian Health Practitioner Regulation Agency (AHPRA) and other regulatory agencies are aware of conduct that can place the public at risk and take any necessary action to address the risk.

However, there are concerns that the current mandatory reporting requirements for treating practitioners under the National Law may be deterring practitioners from seeking assistance and treatment for their health conditions.

At the COAG Health Council meeting on 4 August 2017, Health Ministers agreed that mandatory reporting needed to protect the public from harm and support practitioners to seek treatment, in particular mental health treatment, as soon as possible. Health Ministers also agreed that practitioners should be able to seek treatment for health issues confidentially whilst also preserving the requirement for patient safety. All Health Ministers supported a nationally consistent approach to mandatory reporting provisions. They have asked the Australian Health Ministers' Advisory Council (AHMAC) to provide advice on a nationally consistent approach under the National Law, following the release of a discussion paper and consultation with consumers and practitioner groups.

This paper is designed to assist AHMAC to develop and provide advice to the COAG Health Council. The paper provides an overview of the current mandatory reporting requirements, the issues with the current requirements and considers four options to reform the mandatory reporting obligations to create a treating practitioner exemption that both protects the public and helps ensure that practitioners are not deterred from seeking treatment. If a nationally consistent treating practitioner exemption was created in the National Law, it would apply to any registered health practitioner, such as a medical practitioner, psychologist, dentist, nurse or chiropractor, who treats another registered health practitioner.

It is important to note that if the National Law is amended to create a treating practitioner exemption, other reporting obligations would remain in the National Law. In particular, employers and other registered health practitioners who are not treating practitioners, such as colleagues, would continue to be under an obligation to report notifiable conduct. In addition, treating practitioners would continue to have professional and ethical obligations to report if there is a serious risk of harm. Various other reporting obligations, outside of the National Law requirements, that apply to health practitioners would not be affected if a treating practitioner exemption is created under the National Law. For example, jurisdictional requirements to report children at risk of harm or serious criminal offences would also not be affected by any changes to the National Law.

1. Current mandatory reporting requirements

The National Law sets out mandatory reporting obligations for practitioners and employers. Under the National Law, employers and practitioners are required to notify AHPRA if they reasonably believe a registered health practitioner has behaved in a way that constitutes “notifiable conduct”. Notifiable conduct means that the practitioner has:

- (a) practised the practitioner’s profession while intoxicated by alcohol or drugs; or
- (b) engaged in sexual misconduct in connection with the practice of the practitioner’s profession; or
- (c) placed the public at risk of substantial harm in the practitioner’s practice of the profession because the practitioner has an impairment; or
- (d) placed the public at risk of harm because the practitioner has practised the profession in a way that constitutes a significant departure from accepted professional standards.¹

In the National Law, impairment is defined as meaning the person has a physical or mental impairment, disability, condition or disorder (including substance abuse or dependence) that detrimentally affects or is likely to detrimentally affect the person’s capacity to practise the profession².

The mandatory reporting obligations are intended to protect the public by ensuring that AHPRA, the National Boards and co-regulatory complaints bodies are aware of practitioners who may be placing the public at risk of harm. This allows the appropriate regulatory body to decide whether action is required to protect the public, such as by placing conditions on the practitioner’s registration or suspending the practitioner’s registration and therefore preventing the practitioner from practising. There are currently a number of exemptions to the mandatory reporting obligations in the National Law. The exemptions generally apply to health practitioners who are involved in providing legal advice in the context of insurance requirements or as part of legal proceedings³.

2. Issues with the current mandatory reporting requirement for treating practitioners

There are three general issues with the current mandatory reporting requirements for treating practitioners which may impact on a registered practitioner’s likelihood of seeking treatment: concerns about respecting patient confidentiality; the requirement to report past conduct; and a lack of national consistency.

Patient confidentiality

There are concerns that the mandatory reporting requirements may deter practitioners from seeking treatment for serious health issues, particularly mental health concerns and/or drug and alcohol issues, as the requirements to report apply to treating practitioners. There is anecdotal evidence that some practitioners fear that a treating practitioner will notify AHPRA and this fear has discouraged them from seeking needed care or support. This is because an important element in seeking treatment from a registered health practitioner is the practitioner’s duty of confidentiality. Patients expect that their treating practitioner will generally keep details of their health issues confidential. Confidentiality is a cornerstone of an effective therapeutic relationship between a practitioner and a patient. If a registered health

¹ Section 140, National Law

² Section 5, National Law

³ Section 141(4), National Law

practitioner cannot be assured that their treating practitioner will maintain their confidentiality, they may be less likely to seek treatment. It is not in the public interest for a practitioner to avoid seeking, or continuing to receive, treatment for their health issues as this may cause harm to the practitioner and the wider community.

Of course confidentiality of the treating relationship is not, and should not be, absolute. There are a range of circumstances, particularly in relation to protecting the public from serious threats of harm, in which confidentiality is not, and should not be, guaranteed. However, the mandatory reporting requirements under the National Law obligate a treating practitioner to breach confidentiality and disclose information even if treating practitioner believes there is no current or future risk to the public. The current challenge is to ensure the National Law provides an appropriate balance between maintaining patient confidentiality as much as possible while providing an appropriate mechanism for dealing with circumstances where a practitioner presents a serious risk to the public.

Focus on past conduct

The current mandatory reporting requirements, particularly in relation to impairment matters, require reporting of past conduct, regardless of whether a practitioner poses a current or future risk of substantial harm. A treating practitioner is required to report a patient who is a registered health practitioner who placed the public at risk of substantial harm in the practitioner's practice of the profession because of the practitioner's impairment. In such cases, the reporting requirements apply even if the practitioner is no longer placing the public at risk of substantial harm.

For example, if a practitioner is being treated for a substance abuse problem and discloses to their treating psychiatrist or psychologist that in the past, prior to receiving treatment, they practised whilst intoxicated, the treating practitioner would be obligated to notify AHPRA of the conduct. A notification would be required even if the patient practitioner was now managing their health condition with the support of a treating practitioner and the treating practitioner did not consider that there was any current or future risk. This requirement to report past conduct can mean that even if a practitioner with an impairment seeks treatment, the practitioner may be deterred from disclosing all relevant matters about their impairment and the effects of the impairment, including potential impacts on patients, to their treating practitioner. A failure to disclose all relevant information may compromise the treating practitioner's ability to properly diagnose and treat their patient.

Lack of national consistency

Another issue with the current arrangements is that the mandatory reporting requirements are not nationally consistent. Western Australia (WA) and Queensland have both modified the requirements to create a treating practitioner exemption, although the exemption is different in each state. A lack of national consistency can create difficulties in communicating with, and educating, practitioners across all States and Territories about their reporting obligations. This is exacerbated if a practitioner works in more than one State or Territory, such as Queensland and NSW, where the practitioner has to be aware of, and apply, the different mandatory reporting requirements.

3. Options for reform

Four options for reform are considered further below. A summary of the key features of each option is also at Appendix A.

Option 1

This option would treat impairment matters and other notifiable conduct identically, requiring treating practitioners to report any notifiable conduct.

Key elements

- Treating practitioners are required to report any instances of placing the public at risk of substantial harm because the practitioner has an impairment, past instances of practicing while intoxicated, sexual misconduct and practice outside of accepted professional standards.
- Only past notifiable conduct is subject to mandatory reporting.
- The risk of future notifiable conduct may be subject to a professional or ethical obligation to report.

This option most strongly emphasises the need to protect the consumers of health services from the risk of significant harm which may result from notifiable conduct by health practitioners. All non-impairment forms of notifiable conduct, such as practising while intoxicated and sexual misconduct, would still be required to be reported. In addition, impairment matters, where the practitioner has placed the public at risk of substantial harm would also require reporting. Recognising that past behaviour is a strong potential indicator of current and future behaviour, this gives AHPRA and other regulatory agencies the best opportunity to properly assess the risk posed by a practitioner and to act accordingly.

However, this option involves the greatest disincentive against practitioners seeking treatment for impairment issues. Not only will past instances of other notifiable conduct which they disclose in the course of receiving treatment be reportable, but placing the public at risk of substantial harm due to impairment will also be reportable. This includes where an impaired practitioner has in the past placed the public at risk due to their impairment, but is no longer placing the public at risk of substantial harm.

As with all other options, a treating practitioner would also have a professional or ethical obligation to make a report if they reasonably believed a practitioner they were treating could place the public at serious risk by engaging in notifiable conduct in the future.

This option is based on the National Law as it currently applies in all jurisdictions other than Western Australia and Queensland.

Option 2

Option 2 provides a complete exemption for treating practitioners from the requirement to report all forms of notifiable conduct in respect of their practitioner patients. Under this model, there would be no statutory requirement for a treating practitioner to report a reasonable belief that a practitioner has behaved in a way that constitutes notifiable conduct if this belief arose in the course of providing health services to the practitioner.

Key elements

- Provides an exemption for treating practitioners from the statutory requirement to report all forms of notifiable conduct.
- Entrusts the treating practitioner to make a voluntary notification in accordance with their professional and ethical obligations to protect the health and safety of the public.
- All other practitioners (for example, colleagues) and employers remain under a mandatory obligation to report impairment and other forms of notifiable conduct.

Option 2 would apply to all forms of notifiable conduct and not just impairment issues. It recognises the importance of the therapeutic relationship and the importance of confidentiality. However, as the exemption applies to all forms of notifiable conduct, the exemption means that if a treating practitioner forms a reasonable belief that a patient, who is a registered health practitioner, has engaged in sexual misconduct in their practice of their profession or has practised while intoxicated or placed the public at risk of harm because the practitioner has practised in a way that constitutes a significant departure from acceptable standards, there would be no statutory requirement to notify AHPRA. This broad based exemption means that conduct that may be unconnected to the practitioner's impairment would not be

required to be reported regardless of whether the conduct occurred before or after the practitioner sought treatment.

On the other hand, the removal of the statutory requirement to report in option 1 would not remove a treating practitioner's professional or ethical obligations. In cases where a patient poses a serious risk to the public, professional and ethical obligations would generally require a treating practitioner to report even in the absence of a statutory requirement to do so, and to encourage the practitioner that they are treating to self-report.

Option 2 is based on the current arrangements that apply in Western Australia (WA). Therefore, option 2 has the benefit of being a known model that has been in place since 2010, which means that there are likely to be fewer implementation issues if this model were to be extended nationally. The Independent Review of the National Registration and Accreditation Scheme for health professions noted that the WA model had strong stakeholder support and recommended that it be adopted by all jurisdictions⁴. The Independent Review also noted there was no evidence that the WA model impacted on notification rates⁵. A 2011 Senate Inquiry also recommended that jurisdictions consider the WA model⁶.

Option 3

Option 3 would exempt treating practitioners from the requirement to report impairment matters if the impairment matter will not place the public at substantial risk of harm.

Key elements

- Provides an exemption for reporting impairment matters only if the treating practitioner considers the impairment will not place the public at substantial risk of harm.
- The treating practitioner's consideration is focussed on current and future risk rather than past behaviour, although past behaviour may be considered as part of this assessment.
- Retains the requirement to report all other types of notifiable conduct, namely having practiced while intoxicated, sexual misconduct and having practiced outside of accepted professional standards.

Under this model, there must be a substantial risk of harm. In other words, only an impairment which reaches this very significant threshold is required to be reported by a treating practitioner.

This option would ensure that treating practitioners are only required to report patients who are practitioners who have an impairment if they continue to place the public at substantial risk of harm. Treating practitioners would continue to be obligated to report non-impairment forms of notifiable conduct, including sexual misconduct, having practised while intoxicated, or having placed the public at risk of harm because the practitioner has practised the profession in a way that constitutes a significant departure from accepted professional standards.

By focusing on whether the practitioner's impairment *will* place the public at substantial risk of harm, option 3 mitigates issues associated with the requirement to report past conduct associated with a health practitioner's impairment. However, under option 3, the assessment of current and future risk only applies to the practitioner's impairment and not to other forms of notifiable conduct. For example, if a practitioner's impairment relates to a substance use disorder that the treating practitioner considers will not pose a substantial risk of harm, even if the impairment caused such a risk in the past, the exemption would apply. However, if the treating practitioner is also aware that in the past the practitioner practised

⁴ Final Report, Independent Review of the National Registration and Accreditation Scheme for health professions, page 37, <http://www.coaghealthcouncil.gov.au/Publications/Reports/ArtMID/514/ArticleID/68/The-Independent-Review-of-the-National-Registration-and-Accreditation-Scheme-for-health-professionals>

⁵ Ibid, page 36

⁶ The administration of health practitioner registration by the Australian Health Practitioner Regulation Agency (AHPRA), Finance and Public Administration References Committee, recommendation 10, http://www.aph.gov.au/Parliamentary_Business/Committees/Senate/Finance_and_Public_Administration/Completed_inquiries/2010-13/healthpractitionerregistration/report/index

while intoxicated, including because of their impairment, then the treating practitioner is obligated to make a notification even if the practitioner assesses there is no current or future risk. As such, option 3 may not encourage practitioners with an impairment to fully disclose issues to their treating practitioner about all of their past behaviour.

Similarly, if the treating practitioner is aware that their practitioner-patient has engaged in sexual misconduct in the past, and that this conduct was connected in some way with an impairment, then the treating practitioner would be obliged to report, even where they form a view that there is no risk of recurrence of the misconduct.

This approach retains a strong consumer protection focus, ensuring health consumers are not placed at undue risk by health practitioners with unresolved issues of impairment, such as a practitioner who may not be complying with treatment. It also requires mandatory reports to be made about other forms of notifiable conduct which occurred in the past, including sexual misconduct. This model ensures that treating practitioners who are aware of risks to the public have an obligation to report them, in preference to maintaining patient confidentiality. From a health consumer perspective, this may be considered to strike a better balance than a model which provides a blanket exemption regardless of the severity of a practitioner's impairment or conduct.

Option 4

This option would exempt treating practitioners from the requirement to report impairment matters and to only require reporting of other forms of notifiable conduct where there is a current or future assessment that these types of notifiable conduct are likely to occur.

Key elements

- Provides an exemption for treating practitioners to report impairment matters only.
- Requires treating practitioners to report on current and future instances of other types of notifiable conduct, namely practicing while intoxicated, sexual misconduct and practice outside of accepted professional standards. Reporting future conduct is based on an assessment that the conduct is likely to occur.
- Removes the requirement to report on past instances of practicing while intoxicated, sexual misconduct and practice outside of accepted professional standards.

Option 4 would, like option 1, create a complete exemption for treating practitioners to report impairment matters. However, as with option 1, professional and ethical obligations to report conduct that presents a serious risk of harm would remain.

Like option 3, all other forms of notifiable conduct, including practising while intoxicated and sexual misconduct, still require a report. However, to address some of the difficulties associated with requiring treating practitioners to report past conduct where they believe there is no current risk, option 4 would only require treating practitioners to report other forms of notifiable conduct where there is a current or future risk of harm to the public.

This model would mean that practitioners with health issues could seek treatment, and disclose the past effects of their health issues, without fear that the treating practitioner will be obliged to report their past history to AHPRA. This may encourage practitioners to seek treatment and assist in strengthening the therapeutic relationship between practitioners and treating practitioners.

On the other hand, by exempting reporting of non-impairment forms of notifiable conduct where the treating practitioner believes there is no current or future risk, there could be concern that AHPRA and other regulatory agencies are not able to properly assess the risk of the practitioner. Past conduct by a practitioner can be relevant to current and future risk. Further, with some forms of notifiable conduct, particularly sexual misconduct, the treating practitioner may not be in the best position to assess risk and

a lack of mandatory reporting to AHPRA would deny the regulatory agencies a chance to properly assess the risk of practitioners and take any necessary steps to protect the public. As such, it could be that option 4 is modified to require reporting of some other forms of past notifiable conduct, particularly sexual misconduct. That said, mandatory reporting requirements would still remain for other practitioners and employers and treating practitioners would still be able to make voluntary reports if they held serious concerns. Professional and ethical obligations to report would also remain.

4. Students and mandatory reporting

The Paper is also calling for submission on whether there should be any changes to the mandatory reporting requirements in respect of student health practitioners.

There are modified mandatory reporting obligations in respect of students. Under the National Law, registered health practitioners, including treating practitioners, and education providers must mandatorily report a student if the student has an impairment that, in the course of the student undertaking clinical training, may place the public at substantial risk of harm.⁷ Many of the issues canvassed in this paper relating to the impact of the mandatory reporting requirements on practitioners receiving treatment may be applicable to students. On the other hand, the test for a mandatory report by students is different, and a report is only required if the impairment may place the public at risk of substantial harm.

5. Questions for consultation

- Which option would provide the optimal nationally consistent approach to mandatory reporting that both protects the public and supports practitioners to seek treatment for their health conditions as soon as possible?
- Should any changes be made to the preferred option or are there other options not considered here?
- Should there be any changes to the mandatory reporting obligations in respect of students?

6. Submissions

Stakeholders are asked to provide submissions on the issues raised in this paper to assist in framing the Australian Health Ministers' Advisory Council advice to the COAG Health Council in relation to mandatory reporting. Submissions should be made to:

Legal & Regulatory Services – Legal Services
NSW Ministry of Health
Locked Bag No. 961
North Sydney NSW 2059
Email: legalmail@doh.health.nsw.gov.au

Submissions must be received by 29 September 2017.

⁷ Sections 141 and 143 of the National Law

Appendix A - Summary of options for consideration

		Is a mandatory report required?	Threshold for mandatory report to be made	Timeframe for conduct to which threshold applies
Option 1	Health practitioner has an impairment [#]	Yes Only if the impairment reaches the threshold	Risk of substantial harm	Past
	Health practitioner: <ul style="list-style-type: none"> • Practises while intoxicated • Engages in sexual misconduct • Places public at risk of harm through a significant departure from accepted professional standards 	Yes	Past notifiable conduct	Past
Option 2	Health practitioner has an impairment [#]	No, but professional and ethical obligations apply*	Not applicable	Not applicable
	Health practitioner: <ul style="list-style-type: none"> • Practises while intoxicated • Engages in sexual misconduct • Places public at risk of harm through a significant departure from accepted professional standards 	No, but professional and ethical obligations apply *	Not applicable	Not applicable
Option 3	Health practitioner has an impairment [#]	Only if the impairment reaches the threshold Professional and ethical obligations also apply*	Substantial risk of harm	Current and future
	Health practitioner: <ul style="list-style-type: none"> • Practises while intoxicated • Engages in sexual misconduct 	Yes	Past notifiable conduct	Past

		Is a mandatory report required?	Threshold for mandatory report to be made	Timeframe for conduct to which threshold applies
	<ul style="list-style-type: none"> Places public at risk of harm through a significant departure from accepted professional standards 			
Option 4	Health practitioner has an impairment [#]	No, but professional and ethical obligations apply *	Not applicable	Not applicable
	Health practitioner: <ul style="list-style-type: none"> Practises while intoxicated Engages in sexual misconduct Places public at risk of harm through a significant departure from accepted professional standards 	Only if the conduct reaches the threshold Professional and ethical obligations also apply*	Assessment that notifiable conduct will re-occur now or in the future	Current and future

*Even if a mandatory obligation to report does not apply, a treating practitioner may still be subject to a professional or ethical obligation to voluntarily report current or past notifiable conduct or the risk of future notifiable conduct.

[#]Impairment is defined in section 5 of the National Law as ‘...a physical or mental impairment, disability, condition or disorder (including substance abuse or dependence) that detrimentally affects or is likely to detrimentally affect ... [a] person’s capacity to practice [their] profession.’

Mandatory reporting of health practitioners by treating practitioners: Options for consideration

Option 1

Impairment
Mandatory reporting of impairment

Other forms of notifiable conduct
Mandatory reporting of other forms of notifiable conduct

Option 3

Impairment
No mandatory reporting of impairment, unless it poses a current or future risk of significant harm

Other forms of notifiable conduct
Mandatory reporting of other forms of notifiable conduct

Option 4

Impairment
No mandatory reporting of impairment

Other forms of notifiable conduct
No mandatory reporting of other forms of notifiable conduct, unless they are occurring or at risk of recurring in the future

Option 2

Impairment
No mandatory reporting of impairment

Other forms of notifiable conduct
No mandatory reporting of other forms of notifiable conduct

Current National Law approach

(No exemption to mandatory reporting for treating practitioners)

Narrower exemption from mandatory reporting

Broader exemption from mandatory reporting

Effect of option 1

No distinction is made between impairment and other forms of notifiable conduct. Impairment, practising while intoxicated, sexual misconduct and substandard performance are subject to mandatory reporting if they have occurred in the past.

Future risk of notifiable conduct may also be subject to a professional or ethical obligation to report voluntarily.

Effect of option 3

Impairment is not subject to mandatory reporting, unless it poses a current or future risk of significant harm. Past impairment may also be subject to a professional or ethical obligation to report voluntarily.

Practising while intoxicated, sexual misconduct and substandard performance remain subject to mandatory reporting if they have occurred in the past.

Effect of option 4

Impairment is not subject to mandatory reporting. This includes past and current impairment, as well as the risk of future impairment.

Practising while intoxicated, sexual misconduct and significant departure from accepted professional standards are not subject to mandatory reporting, unless they are currently occurring or at risk of occurring in the future.

Any notifiable conduct may also be subject to a professional or ethical obligation to report voluntarily.

Effect of option 2

Practising while intoxicated, sexual misconduct, impairment and significant departure from accepted professional standards are not subject to mandatory reporting. This includes past and current conduct, as well as the risk of the conduct recurring in the future.

However, any notifiable conduct may still be subject to a professional or ethical obligation to report voluntarily.