Australian Medical Network

Proposed Changes to the Health Practitioner Regulation National Law Act 2009 (National Law)

Briefing Paper

September 2022

PROPOSED CHANGES TO THE *HEALTH PRACTITIONER REGULATION NATIONAL LAW ACT 2009* (NATIONAL LAW)

BRIEFING PAPER

"We need to talk about censorship"

EXECUTIVE SUMMARY

Proposed changes to the law regulating health professionals throughout Australia will destroy the doctor patient relationship if passed as planned by the Queensland Parliament on 11 October 2022.

PURPOSE

The purpose of this briefing paper is to explain and draw attention to the national implications of the proposed change to the National Law currently before the Queensland Parliament and to call for the change to be opposed.

BACKGROUND

1. Health professionals are under a National Scheme established by the *Health Practitioner Regulation National Law Act 2009* (National Law).

2. The National Scheme regulates health professions in Australia and is administered by the Australian Health Practitioner Regulation Agency (AHPRA) and National Boards including for example the Medical Board of Australia.

3. Four inquiries over 12 years have been highly critical of AHPRA in relation to the way it conducts investigations and abuses its power, to the point where AHPRA can fairly be described (at best) as dysfunctional.[1] In these matters, AHPRA is answerable to the National Board.

[1] For example, see Community Affairs References Committee, *Administration of registration and notifications by the Australian Health Practitioner Regulation Agency and related entities under the Health Practitioner Regulation National Law* (The Australian Senate, 2022) which cited "an absence of natural justice; failures of internal communication; and a lack of engagement with the professional community", and recommended (for example) that "AHPRA undertakes urgent and immediate action in relation to supervisory failures" (Recommendation 4).

PROPOSED CHANGE TO THE NATIONAL LAW

4. A Bill[2] is before the Queensland Parliament to change the National Law in a way which will give AHPRA greater discretion in the way it exercises its powers.

5. The Bill is scheduled to be debated in the Queensland Parliament on 11 October 2022.

6. Amongst other changes, the Bill seeks to insert the following guiding principle as the paramount principle for the Scheme (emphasis added):

   (1)(b) *public confidence in the safety of services provided* by registered health practitioners and students (Clause 34)

7. This is in place of the current requirement in Queensland to make *health and safety of the public* paramount.

8. So instead of *health and safety of the public* being the paramount concern of the regulators, the paramount concern of the regulator will be *public confidence* in safety.

9. Doctors will have to provide advice promoting confidence even if this is not in the individual patient's best interests.

10. This is in stark contrast to the Code of Conduct for doctors in Australia which stipulates, at paragraph 3.1, that "the care of your patient is your primary concern."

11. The proposed change legislates AHPRA's current regulatory approach which at present is supported only by a "Joint Position Statement" issued by media release on 9 March 2021 by AHPRA and the National Board.

IMPLICATIONS OF THE PROPOSED CHANGE

Implications of the proposed change to the National Law are set out below.

12. Doctors may be unable to comply with their Code of Conduct in instances where their professional opinion differs from what the regulator deems to be supportive of confidence in safety

12.1. The proposed change means that AHPRA would have the legal authority, and indeed obligation, to impose an immediate action suspension on health professionals who say or do anything which is out of step with whatever the government of the day says is the correct approach to medical treatment of any condition about which the government decides to make a pronouncement. This is an inappropriate intrusion by the government in the doctor/patient relationship.

12.2. The immediate action suspension of a doctor is intended to be a temporary and interim measure, however AHPRA misuses this power by punishing doctors with an indefinite suspension rather than referring them immediately for a trial at the Tribunal.

[2] *Health Practitioner Regulation National Law and Other Legislation Amendment Bill 2022 (Reference No. 2).*

12.3. AHPRA might even apply the public confidence test retrospectively so that doctors will need to second guess whether AHPRA might decide at some later date that their preferred treatment for a particular patient might one day be deemed to have undermined confidence in public health.

12.4. Doctors are obliged under their Code of Conduct and the common law to disclose material risks to patients[3], go through a proper process to obtain informed consent, and recommend for or against treatment based on what is best for the patient using their professional judgement and due care and skill.[4]

12.5. Doctors who comply with their code of conduct and common law obligations by discussing risks and benefits of a particular treatment are at risk of suspension or deregistration if AHPRA deems that discussion to be detrimental to confidence in the safety of services provided.

12.6. In instances where the doctor's professional opinion differs from what the regulator deems to be supportive of confidence in safety, the doctor would have to choose either:

- to comply with their code of conduct and common law duties to inform the patient and exercise their professional judgement with due care and skill,

OR

- to stay silent in order to remain registered.

12.7. The relationship between doctor and patient is, amongst other things, a contractual relationship.[5] The proposed change to the National Law prevents doctors from fulfilling their contractual obligations to the patient, namely that the doctor would comply with the code of conduct and with their common law obligations including the duty to disclose material risks.

12.8. When Australians become aware that doctors are not allowed to be open and honest with them about risks and benefits of a medical treatment, confidence in public health and safety will be greatly diminished and will force patients to seek underground medical treatment.

12.9. Many doctors and other health professionals will leave their professions either voluntarily because it is no longer tenable to practice as a health professional in this country, or because they are suspended or deregistered by AHPRA. The exodus of health professionals is already occurring and there is a systemic decline in younger doctors specialising in general practice[6].

[3] *Rogers v Whitaker* (1992) 175 CLR 479
[4] *Breen v* Williams (1996) 186 CLR 71 (Breen v Wiiliams)
[5] *Breen v Williams*
[6] http://medicalrepublic.com.au/racgp-calls-crisis-summit-for-next-week/77755

13. It would no longer be possible for patients to give informed consent

13.1 If a doctor is unable to comply with their duty to advise the patient of material risks because to do so would, in the regulator's view, undermine public confidence in safety. Under these circumstances, it would not be possible to provide the patient with the necessary information in order for the patient to be able to give their informed consent, regardless of the regulator's view this would make the doctor negligent.

14. Doctors' constitutional right to freedom of political communication would be curtailed

14.1. The proposed change to the National Law removes doctors' ability to say anything which in the regulator's view would undermine confidence in public health or safety.

14.2. The proposed change to the National Law is unconstitutional because it purports to curtail freedom of communication.

14.3. Freedom of communication is implied by the Constitution of Australia[7]which:

> *"… presupposes an ability of represented and representatives to communicate information, needs, views, explanations, and advice. It also presupposes an ability of the people of the Commonwealth as a whole to communicate, among themselves, information and opinions about matters relevant to the exercise and discharge of governmental powers and functions on their behalf…[T]here is to be discerned in the doctrine of representative government which the Constitution* ***incorporates an implication of freedom of communication of information and opinions about matters relating to the government of the Commonwealth****."*[8]

REACTION TO THE PROPOSED CHANGE

15. The change is opposed by the **Australian Dental Association (Qld Branch)** on the basis that public confidence should not be the paramount concern.[9]

16. The change is opposed by the **Insurance Council of Australia**[10] which points out that:

16.1. public confidence is "an inherently vague and uncertain concept" open to interpretation and inappropriate influences;

16.2. the need to include this principle has not been demonstrated, noting that it originates from a policy direction issued by Australian Health Ministers rather than from any of the reviews that have informed the development of the Bill, and that accordingly the rationale for this amendment is not as well established as the other amendments.

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[7] By analogy, the same freedom is implied in the State and Territory constitutions.
[8] *Nationwide News Pty Ltd v Wills* (1992) 177 CLR 1, at 72-3 (emphasis added).
[9] Submission to Queensland Health and Environment Committee available at https://www.parliament.qld.gov.au/Work-of-Committees/Committees/Committee-Details?cid=169&id=4162
[10] Submission available via the link in footnote 13 above.

17. Medical Insurance Group Australia Pty Ltd (**MIGA**) objects to public confidence being a paramount consideration on the basis that it lacks clear definition and scope, and proposes instead that a better paramount consideration, based on case law, would be "integrity of a health profession" as this in turn gives rise to public confidence.[11]

18. Further criticisms can be found in other submissions to the Queensland Parliamentary Committee's inquiry.[12]

19. Attempts by Queensland Health to justify the change are set out in the Queensland Parliamentary Inquiry's report.[13]

OTHER DIFFICULTIES WITH THE WAY THE PROPOSED CHANGE INTERFERES IN THE DOCTOR-PATIENT RELATIONSHIP

20. Unconstitutional conscription of doctors

    20.1. Under the Australian Constitution[14], the government is able to make laws relating to "the provision of medical services (but not so as to authorize any form of civil conscription)".

    20.2. The proposed change is unconstitutional in that it purports to conscript doctors into providing medical services in a particular way.

IMPACT ON OTHER STATES AND TERRITORIES

21. The proposed changes to the National Law in the Bill are supported by all Australian health ministers, having been agreed on 18 February 2022.[16]

22. If the Bill is passed by the Queensland parliament, the changes to the National Law will apply automatically in other jurisdictions except New South Wales and South Australia, which must make regulations to adopt the changes, and Western Australia, which enacts its own separate legislation.

23. In Victoria, for example, any amendments made to the National Law by the Queensland Parliament *automatically also apply in Victoria.*[17] This means that Victorians are denied representation in the parliamentary process, having handed over the governing of these matters to the parliament of Queensland.

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[11] Submission available via the link in footnote 13 above.
[12] Available here: https://www.parliament.qld.gov.au/Work-of-Committees/Committees/Committee-Details?cid=169&id=4162
[13] Report No. 21, 57th Parliament Health and Environment Committee July 2022 https://www.parliament.qld.gov.au/Work-of-Committees/Committees/Committee-Details?cid=169&id=4162
[14] Section 51 (xxiiiA); and by analogy, in the context of a National Scheme, under the State and Territory constitutions.
[16] https://www.health.gov.au/resources/publications/hmm-communique-health-practitioner-regulation-national-law-amendments
[17] *Health Practitioner Regulation National Law (Victoria) Act* 2009, s4.

WHAT NEEDS TO HAPPEN

24. Queensland parliamentarians must vote against the Bill, demanding a conscience vote if necessary.

25. The *Health Practitioner Regulation National Law (Victoria) Act* 2009 should be amended so that any changes to the law applicable in Victoria are made in the Victorian Parliament rather than the Queensland Parliament (and similarly in other States).

CONCLUSION

26. The Bill is bad law and should be opposed:

- it is a legislative gag on doctors across the entire country;
- it significantly interferes with the doctor patient relationship; and
- it is open to abuse.

CONTACT DETAILS

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