

Health Practitioner Regulation National Law and Other Legislation Amendment Bill 2024

Statement of Compatibility

Prepared in accordance with Part 3 of the *Human Rights Act 2019*

In accordance with section 38 of the *Human Rights Act 2019*, I, Shannon Fentiman MP, Minister for Health, Mental Health and Ambulance Services and Minister for Women make this statement of compatibility with respect to the Health Practitioner Regulation National Law and Other Legislation Amendment Bill 2024 (the Bill).

In my opinion, the Bill is compatible with the human rights protected by the *Human Rights Act 2019*. I base my opinion on the reasons outlined in this statement.

Overview of the Bill

There has been a concerning increase in the number of complaints against registered health practitioners for serious misconduct, including sexual misconduct. In 2022-23, regulators received a total of 841 allegations of sexual misconduct in relation to 728 registered health practitioners, a figure 223% higher than the three years prior.

To improve public protection and public confidence in the safety of services provided by registered health practitioners, Health Ministers across Australia agreed to reforms to strengthen the management of professional misconduct under the Health Practitioner Regulation National Law (National Law), increase transparency for patients around practitioners' regulatory history relating to sexual misconduct, and strengthen protections for notifiers and prospective notifiers.

The Bill implements Health Ministers' agreed reforms. Specifically, it amends the National Law to:

- require practitioners who have had their registration cancelled by a responsible tribunal, or have been disqualified from registration, to obtain a reinstatement order from a responsible tribunal before applying to a National Board for re-registration;
- require National Boards, in conjunction with the Australian Health Practitioner Regulation Agency, to permanently publish additional information on the public register for health practitioners who have been found to have engaged in professional misconduct involving sexual misconduct;
- strengthen protections for notifiers against reprisals or other detriment, threats and intimidation and void non-disclosure agreements that purport to prevent someone from making a notification.

The Bill also amends the *Health Ombudsman Act 2013* and makes local modification to the *Health Practitioner Regulation National Law Act 2009* (Qld) to ensure the reforms operate effectively within Queensland's co-regulatory arrangements.

Human Rights Issues

Human rights relevant to the Bill (Part 2, Division 2 and 3 *Human Rights Act 2019*)

In my opinion, the human rights that are relevant to the Bill are:

- Right to privacy and reputation (section 25)
- Right to a fair hearing (section 31)

If human rights may be subject to limitation if the Bill is enacted – consideration of whether the limitations are reasonable and demonstrably justifiable (section 13 *Human Rights Act 2019*)

(a) the nature of the right

Privacy and reputation

The Bill engages the right to privacy and reputation (section 25 of the Human Rights Act). A person has a right to not have their privacy unlawfully or arbitrarily interfered with and to not have their reputation unlawfully attacked.

The scope of the right to privacy is broad, encompassing protection of personal information and interference with a person's private life more generally, including their physical and mental integrity. The right protects against 'unlawful' or 'arbitrary' interference in a person's privacy. The concept of arbitrariness in the context of the right to privacy includes when something is lawful, but is capricious, unreasonable or disproportionate to the aim sought.

The protection against an attack on someone's reputation is limited to 'unlawful' attacks. This means attacks that are intentional and based on untrue allegations.

The Bill limits the right to privacy and reputation by requiring National Boards to permanently include 'additional information' on the public national register about a practitioner who a tribunal has found has engaged in professional misconduct (the highest level of misconduct under the National Law) involving sexual misconduct.

Fair hearing

The Bill engages the right to a fair hearing (section 31 of the Human Rights Act). A person has the right to have civil proceedings decided by a competent, independent and impartial tribunal following a fair, public hearing. However, a court or tribunal may exclude media representatives, other persons or the general public from a proceeding in the public interest or interests of justice. The right to a fair hearing includes that all decisions made by a tribunal in civil proceedings must be made publicly available.

The Bill limits the right to a fair hearing by providing that the tribunal which cancels a person's registration or dismisses the person's application for a reinstatement order may specify a period for which a person may not apply (or re-apply) for a reinstatement order. In Queensland, the tribunal will also continue to be able to permanently disqualify the person from applying for a reinstatement order. The person is thus denied access to the tribunal for that purpose for the specified period, or permanently, as the case may be.

- (b) the nature of the purpose of the limitation to be imposed by the Bill if enacted, including whether it is consistent with a free and democratic society based on human dignity, equality and freedom

The purpose of the limitation on the right to privacy and reputation is to protect public safety by better informing health care consumers about serious sexual misconduct by registered health practitioners.

The purpose of the limitation on the right to fair hearing is to protect public safety against harm from persons who are unsuitable to practise in a registered health profession.

The purpose of protecting public safety is consistent with the main guiding principle of the National Registration and Accreditation Scheme (National Scheme) established by the National Law, which is that the following are paramount: a) protection of the public, and b) public confidence in the safety of services provided by registered health practitioners.

Protecting public safety against unsafe or unethical health practitioners is consistent with a free and democratic society based on human dignity, equality and freedom. In the context of the information asymmetry in health services, consumers are at high risk of serious harm by providers who are not appropriately qualified, not suitable persons to provide health services, or not able to provide services competently and safely. In addition to causing pain and suffering, serious harms negatively impact individuals' ability to live with dignity and exercise rights and freedoms, including the right to life, freedom of movement, and freedom to participate in public life. Conversely, protecting against these harms promotes the exercise of rights and freedoms that underpin a free and democratic society.

- (c) the relationship between the limitation to be imposed by the Bill if enacted, and its purpose, including whether the limitation helps to achieve the purpose

Privacy and reputation

Permanently including the additional information on the public registers will enable health consumers to make better-informed decisions about their healthcare providers. This is consistent with the National Law model, which addresses information asymmetry in health services by restricting the use of protected titles to persons registered by National Boards, following assessment of their qualifications, suitability, safety, and competence to practise the relevant professions. The National Law also provides for management of health, performance and misconduct issues arising with registered practitioners, with sanctions including suspension or cancellation of registration. This allows health consumers to make informed choices about health care providers based on the use of protected titles, significantly reducing the risk of harm and promoting public health.

Fair hearing

The reinstatement order provisions require a person whose registration in a health profession has been cancelled by a tribunal, or whom a tribunal has disqualified from applying for registration, to obtain a *reinstatement order* from the tribunal before they can re-apply to the National Board for registration. In determining whether a reinstatement order is appropriate, the tribunal must consider whether the person is a fit and proper person to hold registration and whether the person is able to practise competently and safely.

The associated limitation on the right to a fair hearing achieves the purpose of protecting public safety by authorising a tribunal to exclude a person whom it considers unlikely to obtain a reinstatement order within a specified period (or, in effect, ever) from applying for a reinstatement order, and consequently from applying for registration in a health profession, for the specified period (or permanently).

- (d) whether there are any less restrictive (on human rights) and reasonably available ways to achieve the purpose of the Bill

Privacy and reputation

There is no less restrictive, reasonably available way to achieve the protect public safety objective of the additional information provisions.

The status quo does not adequately achieve the intended purpose. Under the current National Law, the public registers do not include sufficient detail to inform health consumers about practitioners' past serious sexual misconduct. The Boards are required to include tribunal sanctions on the register but are not required to retain that information on the register beyond the period of any sanctions imposed by the tribunal. Nor are they required to retain historical information on the register in respect of practitioners who achieve re-registration after their registration was cancelled by a tribunal. This means that currently, for example, practitioners who have had their registration cancelled by a tribunal and subsequently achieve re-registration have no information in relation to the cancellation sanction on their entry in the public register.

The threshold for inclusion of the additional information on the register is set as high as is possible under the National Law. It requires a tribunal finding that a practitioner behaved in a way that constitutes professional misconduct involving sexual misconduct. Tribunals are independent statutory bodies which alone have the power under the National Law to decide professional misconduct matters and cancel a practitioner's registration. Professional misconduct is the highest level of misconduct under the National Law.

There is no alternative database through which to link practitioners' registration information and their regulatory history. The statutory register of health practitioners is established under the National Law to be the sole authoritative source of information about individual registered practitioners.

The 'additional information' to be published on the register will be information that is or was in the public realm, but not in a readily accessible place or form. Tribunals routinely publish their decisions (including reasons) and, under the National Law, the Boards are

required to keep and publish on their website a record of tribunals' decisions (subject to non-publication orders). However, there is currently no requirement for Boards to link a tribunal's decision to the subject practitioner's entry on the public register. It is therefore challenging for health consumers to locate and interpret tribunal decisions, or otherwise gather information about a practitioner's regulatory history.

The Bill also includes safeguards to protect privacy. First, the Boards must not publish information that is subject to a tribunal or court non-publication order, including an order made to protect the privacy of a victim of sexual misconduct. Second, the information must be removed if, on appeal, the tribunal's decision is stayed, overturned, or materially modified. Third, the existing safeguards to protect the health and safety of the practitioner, their family and associates apply to the additional information.

Also, any decision to include the additional information on the register will be subject to judicial review. This provides a safeguard against the improper exercise of the power.

Fair hearing

Less restrictive alternative ways of protecting public safety are, in the context of the National Law, to provide that a person whose registration has been cancelled by a tribunal, or whom a tribunal has disqualified from applying for registration, can:

- apply to the National Board for re-registration, without first requiring a reinstatement order; or
- apply for a reinstatement order at any time.

The first of these alternatives, the status quo under the National Law, does not adequately protect public safety. Health Ministers have determined that instances of persons gaining re-registration under current process do not meet community expectations about suitability to be registered in a health profession.

The second alternative is not reasonably available because it would require tribunals to hear, and National Boards and co-regulatory authorities to respond to, serial applications from individual practitioners. Tribunals would not have a clear power to prevent serial applications in cases where, for a given period, there is no real prospect the tribunal would grant a reinstatement order. This would place an unjustifiable burden on tribunal and regulator resources.

Rights of appeal against tribunal decisions are governed by the legislation and rules for the relevant tribunal in each participating jurisdiction.

- (e) the balance between the importance of the purpose of the Bill, which, if enacted, would impose a limitation on human rights and the importance of preserving the human rights, taking into account the nature and extent of the limitation

The purpose of the Bill, protection of public safety, is critical to the effective functioning of Australia's health system. Protecting the public from unsafe or unethical health practitioners prevents harm to individuals and promotes confidence in the health services provided by registered practitioners. It is the rationale for the National Law and National Registration and Accreditation Scheme.

Privacy and reputation

The right to privacy and reputation is important in the context of the National Law, which closely regulates the collection, disclosure, and publication of information about registrants (part 10).

The Bill's limitation on the right to privacy and reputation is minimal. The threshold for triggering permanent publication of additional information is set at the highest level possible under the National Law (professional misconduct) and only in relation to sexual misconduct. The additional information is, or was, publicly available, albeit in a less accessible and digestible way. The limitation is subject to non-publication orders and other privacy safeguards.

The additional information provisions therefore strike a fair balance between the purpose of the provisions and the limitation on the right to privacy and reputation.

Fair hearing

The right to a fair hearing is important in the context of the National Law and the National Scheme. Procedural fairness in tribunal hearings is afforded by legislation and rules governing the relevant tribunal in each participating jurisdiction, rather than by the National Law. However, the National Law requires that any entity that has functions under the National Law is to exercise those functions having regard to the guiding principles for the National Scheme, including that the scheme is to operate in a transparent, accountable, efficient, effective and fair way (ss 3A and 4). The Bill does not alter these arrangements.

The Bill's limitation on the right to a fair hearing is minimal. The tribunal power to exclude a person from applying for a reinstatement for a specified period (or permanently) applies only to an appropriately narrow class of persons and is discretionary in nature. Tribunals will decide the appropriate period (if any) following a hearing of either a) the matter for which the tribunal cancelled the person's registration or disqualified the person from applying for registration, or b) the person's application for a reinstatement order. The tribunal thus has discretion to specify the period for which the person may not apply (or re-apply) for a reinstatement order, having regard to the nature and detail of the matter before it.

The reinstatement order provisions therefore strike a fair balance between the purpose of the provisions and the limitation on the right to a fair hearing.

(f) any other relevant factors

Nil.

Conclusion

In my opinion, the Health Practitioner Regulation National Law and Other Legislation Amendment Bill 2024 is compatible with human rights under the *Human Rights Act 2019* because it limits human rights only to the extent that is reasonable and demonstrably justifiable in a free and democratic society based on human dignity, equality and freedom.

THE HONOURABLE SHANNON FENTIMAN
MINISTER FOR HEALTH, MENTAL HEALTH and AMBULANCE SERVICES
and MINISTER FOR WOMEN

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