Health Practitioner Regulation National Law and Other Legislation Amendment Bill 2024

Erratum to the Explanatory Notes

Title of the Bill

Health Practitioner Regulation National Law and Other Legislation Amendment Bill 2024

Reasons for the Erratum

The erratum is necessary to address the Health, Environment and Innovation Committee's:

- recommendation 'that the explanatory notes and/or Clause 21 of the Bill be amended to clarify any requisite legislative threshold for sexual misconduct';[1]

- recommendation to amend Clause 21 of the Bill to provide that a decision to publish a health practitioner's regulatory history, based on an inference by National Boards that a tribunal's finding of professional misconduct was based on sexual misconduct, is appellable under Part 8 Division 13 of the National Law;[2]

- concern that the Explanatory Notes uses the terms 'sexual misconduct' and 'serious sexual misconduct' without explaining the difference between those terms.[3]

Action

For ease of reference, this erratum replaces the entire Explanatory Notes.

The substantive changes to the Explanatory Notes are –

- Clarification of the legislative threshold for sexual misconduct. This is done through a replacement of the *Notes on provisions* in relation to clause 21 of the Bill (see Notes on provisions – Part 3 Amendment of Health Practitioner Regulation National Law – Insertion of new ss 225A and 225B) (pages 26 – 29).

- Clarification of why a National Board's decision to publish a health practitioner's regulatory history will not be appellable under Part 8 Division 13 of the National Law. This is done by adding additional information to the *Alternative ways of achieving policy objectives* at pages 11-13 and by clarifying the 'necessary inference' test and its relation to the professional misconduct threshold (see Notes on provisions – Part 3 Amendment

1 Report No.1, 58th Parliament, February 2025, page vi, recommendation no. 2.
2 Report No. 1, 58th Parliament, February 2025, page vi, recommendation no. 3.
3 Report No.1, 58th Parliament, February 2025, page 16, Committee comment.

of Health Practitioner Regulation National Law - Insertion of new ss 225A and 225B) (pages 26 – 29).

- Omission of the shorthand term ‘serious sexual misconduct’, except as required to explain why that term was considered but not adopted during drafting of the Bill (omissions on pages 3, 5, 15).

Health Practitioner Regulation National Law and Other Legislation Amendment Bill 2024

Explanatory Notes

Short title

The short title of the Bill is the Health Practitioner Regulation National Law and Other Legislation Amendment Bill 2024 (the Bill).

Policy objectives and the reasons for them

The Bill amends the Health Practitioner Regulation National Law (National Law). The objectives of the amendments are to:

- protect public safety by establishing a nationally consistent process for practitioners to regain registration after their registration has been cancelled, or they have been disqualified from registration, by a tribunal;

- increase transparency for the public about disciplinary action against health practitioners who have been found by a tribunal to have engaged in professional misconduct involving sexual misconduct; and

- strengthen protections for notifiers and clarify consumer protections in relation to non-disclosure agreements about the health, conduct or performance of health practitioners.

Australian Health Ministers agreed to the National Law amendments out-of-session in July 2024. Under the *2008 Intergovernmental Agreement for a National Registration and Accreditation Scheme for the Health Professions* Ministers' agreement is required for any proposed National Law amendments.

The Bill also modifies the *Health Practitioner Regulation National Law Act 2009* and makes amendments to the *Health Ombudsman Act* 2013 to ensure the National Law amendments operate effectively and efficiently within Queensland's co-regulatory arrangements.

Overview of the National Law and National Registration and Accreditation Scheme

The National Law sets out the legal framework for Australia's National Registration and Accreditation Scheme (National Scheme) for the health professions. Queensland is the host jurisdiction for the National Law, which is set out in the schedule to the *Health Practitioner Regulation National Law Act 2009* (Qld), as amended from time to time. Each participating jurisdiction applies the National Law though local legislation, with local variations.

The objectives of the National Law include to provide for the protection of the public by ensuring that only health practitioners who are suitably trained and qualified to practise in a competent and ethical manner are registered.

The National Scheme commenced in 2010 through the adoption of the National Law by all states and territories. The main guiding principle of the National Scheme is that the protection of the public, and public confidence in the safety of services provided by registered health practitioners and students, are paramount. The National Scheme allows health practitioners to have a single registration recognised anywhere in Australia, and provides for uniform standards for the registration of health practitioners and the accreditation of health education providers.

The National Law establishes 15 National Boards to regulate 16 registered health professions, including the medical, nursing, midwifery, dental, pharmacy, and psychology professions. The National Boards are supported by the Australian Health Practitioner Regulation Agency (Ahpra). The National Boards' functions include the development or approval of standards, codes, and guidelines for the professions, including the development and approval of codes and guidelines that provide guidance to health practitioners registered in the profession. National Boards are also responsible for registering health practitioners and students in their respective health professions.

Queensland's co-regulatory arrangements under the National Law

Queensland is a co-regulatory jurisdiction under the National Law. Under this arrangement, the Office of the Health Ombudsman (under the Health Ombudsman Act) has primary responsibility for dealing with notifications about registered health practitioners. Under the Health Ombudsman Act, notifications are referred to as 'complaints'. In practice, Ahpra deals with practitioner health issues and with less serious conduct and performance issues, while the Health Ombudsman is responsible for investigating and taking most professional misconduct complaints to the Queensland Civil and Administrative Tribunal (QCAT). The Health Ombudsman is also responsible for managing complaints about unregistered practitioners.

Raising the bar for practitioners to regain their registration following cancellation or disqualification

The pathway to regain registration following a tribunal order cancelling a health practitioner's registration or temporarily disqualifying them from registration is not consistent across all states and territories.

Under the National Law, a responsible tribunal has the power to cancel a practitioner's registration and impose a period of disqualification, which prohibits the practitioner from applying for registration as a registered health practitioner. This cancellation or disqualification order prevents the practitioner from holding registration and practising anywhere in Australia.

In all jurisdictions besides New South Wales, following any period of disqualification the person can apply to the relevant National Board for re-registration. The Board then considers the application in the usual manner under part 7 of the National Law. This requires the Board to assess, among other things, whether the person is fit and proper to hold registration and can practise the profession competently and safely.

In New South Wales, a practitioner who has had their registration cancelled or who has been disqualified from being registered in the health profession, must first obtain a reinstatement

order from the New South Wales Civil and Administrative Tribunal (NCAT) before they are eligible to make an application for registration with the relevant National Board. Under New South Wales' local modifications of the National Law, when considering an application for a reinstatement order, the NCAT must determine the appropriateness, at the time of the hearing, of the existing cancellation or disqualification order (section 163C of the *Health Practitioner Regulation National Law (NSW)*). However, it is not to review the original decision to make the order, or any findings made in connection with that decision. If a reinstatement order is granted, the person can then make an application to the National Board for re-registration under part 7 of the National Law. The National Board will then assess the application in the usual manner.

The requirement in New South Wales for a cancelled or disqualified practitioner to obtain a reinstatement order prior to applying for re-registration provides additional public protection by putting the onus on practitioners to satisfy a responsible tribunal that a reinstatement order should be made. It also provides greater transparency in decision making around practitioners who have had their registration cancelled or have been disqualified.

Increasing transparency regarding practitioners who have engaged in sexual misconduct

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

Currently, under the National Law, National Boards are required to publish active disciplinary sanctions on the national public register. The National Law provides mechanisms for information to be removed once actions have ceased. This has resulted in instances where practitioners who have engaged in sexual misconduct have their regulatory history removed after a period of time, resulting in the public being unaware of their regulatory history. Consequently, patients and prospective patients are not able to make fully informed decisions about their choice of healthcare professionals.

To improve transparency, protect public safety, and better meet community expectations, Australian Health Ministers agreed to amend the National Law to expand the information available on the public register for practitioners who have engaged in professional misconduct involving sexual misconduct.

Strengthening protections for notifiers and clarifying consumer rights

A strong reporting culture is fundamental to the effective operation of the National Scheme and to ensuring public safety. Good faith notifications (also known as 'complaints' in Queensland and New South Wales) made under the National Law help protect the public from harm and protect patients from health practitioners who pose a risk of harm. They can also allow for early regulatory intervention before the risk of harm escalates.

The *Royal Commission into Institutional Responses to Child Sexual Abuse* and the National Health Practitioner Ombudsman's *Review of confidentiality safeguards for people making notifications about health practitioners* identified gaps in the National Law in relation to protections available to notifiers under the National Scheme.

The National Law provides the framework for persons or entities to make notifications about health practitioners to the responsible health regulators. Under the National Law, registered health practitioners are also required to make notifications if they hold a reasonable belief that another practitioner has engaged in sexual misconduct, practised while intoxicated by alcohol or drugs, or placed the public at risk by practising with an impairment or in a way that is a significant departure from accepted professional standards.

The only protection available to notifiers who raise concerns in good faith under the National Law is protection from civil, criminal, or administrative liability. In effect, notifiers are not currently protected from reprisals, harm, threats, intimidation, harassment, or coercion. While some jurisdictions do provide for some of these protections in their own health complaints legislation, in circumstances where the National Law imposes a legal obligation for some notifiers to make a notification or provide information to the regulators, the current protections are inadequate or inconsistently applied. Australian Health Ministers have agreed to amend the National Law to strengthen protections for notifiers and potential notifiers.

Separately, in November 2021, the Medical Board of Australia and Ahpra commissioned an external review of patient safety issues in the cosmetic surgery industry. This *Independent review of the regulation of medical practitioners who perform cosmetic surgery* (Independent Review) was led by Mr Andrew Brown, former Queensland Health Ombudsman.

The Independent Review identified that there is a risk health care consumers are not fully aware of their right to make a notification or assist a health regulator with an investigation in circumstances where they have signed a non-disclosure agreement. Australian Health Ministers have agreed to make clear in the National Law that a non-disclosure agreement cannot prevent a person from making a notification or providing information to a health regulator.

Achievement of policy objectives

National Law amendments

The Bill amends the National Law to:

1. require cancelled and disqualified practitioners to seek a reinstatement order from a responsible tribunal before applying to a National Board for re-registration;

2. provide greater information to the public about practitioners who have been found to have engaged in professional misconduct involving sexual misconduct, by expanding the information required to be included on the national public registers; and

3. provide greater protections for people who make notifications or assist regulators during investigations about registered health practitioners.

These reforms, and how they achieve the policy objectives, are outlined below.

Reinstatement orders

To improve public protection and address national inconsistencies in process, the Bill restricts a person who has had their registration cancelled, or who has been disqualified from registration (both classes being a *disqualified person*), from applying to a National Board for

re-registration unless they have first obtained a tribunal order that they are eligible to apply (a *reinstatement order*). This requirement will apply to all disqualified persons, regardless of when their registration was cancelled, or when they were disqualified, unless they have already obtained re-registration or have a current application for registration in progress. This requirement already exists in New South Wales and will now apply to disqualified persons in all states and territories, creating national consistency in the process of obtaining re-registration following cancellation or disqualification.

The Bill provides that a person must make an application for reinstatement to the responsible tribunal in the jurisdiction that made the original cancellation or disqualification order. This will provide clarity for applicants regarding where they must make their application and ensure the tribunal that made the cancellation or disqualification order also considers whether a reinstatement order should be made.

The responsible tribunal considering an application for a reinstatement order must determine, at the time of the proceeding, whether it is appropriate to make the reinstatement order. To determine whether the making of a reinstatement order is appropriate, the tribunal may consider, in addition to any other relevant information, whether the applicant is, at the time of the hearing, a fit and proper person to hold registration and able to practise the profession competently and safely. The tribunal must also consider any notifications made about the person regardless of when the notifications were made.

The role of the tribunal in considering an application for a reinstatement order will not replace the National Boards' separate and independent duty to assess the practitioner's fitness and propriety and, ultimately, to decide whether to re-register the person. While the Board may consider the tribunal's reasons for making the order, the Board will also be able to consider other criteria for registration, including recency of practice and any issues arising between the reinstatement order and the subsequent application for registration.

Upon hearing a reinstatement application, the tribunal may decide to grant the application or dismiss it. If the tribunal grants the application, the Bill provides a discretion for the tribunal to place conditions on the person's registration if the National Board decides to re-register the person. This will not interfere with the National Boards' power to impose conditions on a practitioner upon granting an application for registration. The Bill makes clear that any conditions imposed by a National Board upon registration apply to the extent they are not inconsistent with the conditions imposed by the tribunal. If the tribunal alternatively decides to dismiss the application for a reinstatement order, they can impose a period during which the disqualified person cannot make another application for a reinstatement order.

The Bill provides that the parties to the proceedings for a reinstatement hearing will be the disqualified person (as the applicant) and the National Board who registered the practitioner prior to the cancellation or disqualification order (as the respondent). This will not apply in New South Wales, where local modifications make the relevant co-regulatory authority the respondent, instead of the National Board. It will also not apply in Queensland, where modifications included in the Bill mean the respondent will be either Queensland's Health Ombudsman or a National Board, depending on who brought the original matter resulting in the practitioner becoming a disqualified person.

A tribunal's requirements for constitution and the processes for reinstatement order hearings will be determined by the legislation and rules governing tribunals in each jurisdiction.

These amendments will improve transparency and public protection by ensuring that the relevant jurisdictional tribunal is satisfied that a health practitioner is suitable to apply for re-registration.

Expanding information on the public register

The Bill provides that, if a National Board is satisfied that a responsible tribunal decided, on or after the participation day for the relevant profession, that a practitioner has engaged in professional misconduct on the basis of sexual misconduct, the National Board must record additional information in the relevant National or Specialists Register. This will not apply to students.

Participation day is defined for each profession under the National Law:

- 1 July 2010 - chiropractic, dental (including the profession of a dentist, dental therapist, dental hygienist, dental prosthetist, and oral health therapist), medical, midwifery, nursing, optometry, osteopathy, paramedicine, pharmacy, physiotherapy, podiatry, and psychology (National Law, section 250);

- 1 July 2012 - Aboriginal and Torres Strait Islander health practice, Chinese medicine, medical radiation practice, and occupational therapy (National Law, section 250);

- 1 December 2018 - paramedicine (National Law, section 306).

It is anticipated that a participation day will be prescribed for any other professions that come under the National Law.

As is the case for the current mandatory notification provisions of the National Law, 'sexual misconduct' will bear its ordinary meaning. Given the range of behaviour covered by that term, and the importance of context and unique circumstances in each case, it is not further defined. This issue is further discussed below in relation to clause 21 of the Bill.

Under the National Law, Boards' codes and guidelines for registered health practitioners are admissible in disciplinary proceedings as evidence about what constitutes appropriate professional conduct (for example, the Medical Board's guidelines *Sexual boundaries in the doctor-patient relationship*).

Under the National Law, a tribunal may find that different types of conduct, taken together, amount to professional misconduct. Accordingly, the Bill provides that, to trigger the publication requirements, sexual misconduct need not be the sole or main basis for the tribunal's finding of professional misconduct.

In such cases, the tribunal's decision may not expressly base its finding of professional misconduct on any particular type of conduct, including sexual misconduct. The Bill therefore gives National Boards discretion to infer, on the basis of the tribunal's decision and reasons for decision, that the tribunal's finding of professional misconduct was based on sexual misconduct. The inference must be 'necessary', in that it is required to make sense of the tribunal's decision in the context of the tribunal's findings of fact.

A National Board will have only very limited discretion in deciding whether a tribunal finding of professional misconduct was based on sexual misconduct. Accordingly, the Board's

decision will not be subject to merits review by jurisdictional civil and administrative tribunals. Practitioners will, however, be able to challenge the legality of the Board's decision through judicial review. This is further discussed below in *Alternative ways of achieving policy options*.

The additional information a National Board must publish on the register includes a statement that the practitioner has engaged in professional misconduct on a basis of sexual misconduct, the sanctions imposed, and a link to, or copy of, the tribunal's decision (if published by the tribunal). If the tribunal cancels the person's registration on the grounds of the professional misconduct, or the practitioner is no longer registered, the additional information also includes:

- if the tribunal decided to disqualify the person from applying for registration, the fact that the tribunal decided to disqualify them;

- the period, if any, set by the tribunal for which the person may not apply for a reinstatement order; and

- if the tribunal decided to prohibit or restrict the person from providing a health service or using a title, the fact that the tribunal decided to prohibit or restrict the person and the period of the prohibition or restriction.

The additional information will remain on the register permanently. However, it must not be published contrary to a court or tribunal non-publication order and must be removed if the tribunal's professional misconduct decision is overturned or stayed on appeal. The Boards will also retain their discretion not to publish regulatory history information for health and safety reasons.

These provisions will improve protections for the public by increasing transparency of information about practitioners who have engaged in professional misconduct involving sexual misconduct. Improved transparency will allow the public to make more informed decisions about their choice of health practitioner. The proposed amendments also better meet community expectations about the information that should be available on the public registers.

Greater protection for notifiers

The Bill strengthens the current protections for notifiers (also known as 'complainants' in Queensland and New South Wales) under the National Law. It will be an offence to threaten, intimidate, dismiss, refuse to employ, or subject a person to other detriment or reprisal because they intend to or have made a notification or provided assistance to persons performing functions under the National Law. The protections apply with respect to notifications made in good faith. These provisions will not affect the way in which vexatious complaints are managed under the National Law.

The maximum penalty for an individual will be $60,000 and for a body corporate $120,000, recognising the seriousness of this conduct.

These additional protections will ensure that notifiers are sufficiently protected from any detriment and not just from any legal liability. This is particularly important in circumstances where the National Law creates a legal obligation for registered health practitioners to make mandatory notifications in certain circumstances.

It will also be an offence to enter into a non-disclosure agreement unless the agreement clearly sets out, in writing, that it does not limit a person from making a notification or providing assistance to regulators and others performing functions under the National Law.

The maximum penalty for an individual will be $5,000 and for a body corporate $10,000.

The Bill will also render non-disclosure agreements void to the extent they seek to prevent or limit a notifier from making a notification or providing assistance to persons performing functions under the National Law.

A non-disclosure agreement, for the purposes of these provisions, means a contract or other agreement that prohibits or restricts disclosure of information or documents in relation to the health, conduct or performance of a registered health practitioner or former registered health practitioner.

The offences will only apply prospectively, whereas the voiding of non-disclosure agreements will apply regardless of when the agreement was entered into.

Queensland modifications and Health Ombudsman Act amendments

Reinstatement orders

The Bill modifies the National Law reinstatement order provisions for the Queensland National Law.

The modifications provide that QCAT has the authority to hear and decide reinstatement order applications and related orders in its original jurisdiction.

The modifications also provide that, in Queensland, the respondent in a reinstatement order hearing is either the Health Ombudsman or the relevant National Board, whichever of those entities referred the matter to the tribunal that resulted in the cancellation or disqualification of the practitioner's registration. The Office of the Health Ombudsman is expected be the respondent in most reinstatement matters.

To preserve the effect and period of current disqualifications imposed under the Health Ombudsman Act, the Bill's transitional clauses provide that:

- a person whose registration was, before commencement of the transitional provisions, disqualified from applying for registration as a registered practitioner for a specified period cannot apply for a reinstatement order until the specified period has ended;

- a person whose registration was, before commencement of the transitional provisions, disqualified from applying for registration as a registered practitioner 'indefinitely', cannot apply for a reinstatement order.

Expanding information on the public register

The new requirement for inclusion of additional information on the public registers following a tribunal finding of professional misconduct involving sexual misconduct will apply in Queensland with minor modifications. The modifications reflect the existing ability of QCAT

to indefinitely disqualify a person. This power is maintained in the Bill and modifications are included to ensure any permanent disqualification is recorded on the national registers.

Greater protection for notifiers

To avoid the potential for duplicative offences, the Bill disapplies the new National Law notifier protections in Queensland. However, the Bill broadens the existing protections in the Health Ombudsman Act to the same effect. Under the Health Ombudsman Act, the protections will also apply in relation to non-registered health practitioners.

Alternative ways of achieving policy objectives

As the National Law establishes the operational framework for the National Scheme, legislation is the only feasible option for implementing the three agreed reforms.

However, in agreeing on these reforms, Australian Health Ministers considered a range of ways to achieve the objectives of improving public safety with respect to sexual misconduct and the transparency of information, including through both legislative and non-legislative means.

Expanding information on the public register

With respect to increasing the transparency of information related to sexual misconduct by registered health practitioners, alternative options include publishing the full regulatory history of practitioners found to have engaged in sexual misconduct and/or lowering the threshold for publication to less than a tribunal finding of professional misconduct. These alternative options were canvassed in a national, public consultation process. To address concerns regarding privacy and proportionality, the threshold for publication has been limited to only tribunal findings of professional misconduct based on sexual misconduct, and the sanctions imposed in respect of that finding. Professional misconduct is the highest level of misconduct under the National Law.

Another alternative means of setting a threshold for publication is to include a definition of 'sexual misconduct' or to use the term 'serious sexual misconduct'. This was considered during development of the Bill. However, it was not adopted, for the following reasons:

- Defining the term 'sexual misconduct' would not provide a clear statutory threshold for publication. This is because a definition would need to cover the wide variety of behaviours which may be sexual misconduct and take account of the role of context in determining whether a specific instance of a behaviour amounts to misconduct and is sexual in nature. A definition would therefore be one of the following: over-simplified and generalised, complex and principles-based, or lengthy and highly prescriptive. These models would result in a less clear threshold than that provided for in the Bill and risk excluding target behaviours. By allowing 'sexual misconduct' to take its ordinary meaning, the Bill ensures that the threshold for publication reflects these complex contextual factors.

- An example of the role of context is touching of a patient may or may not constitute sexual misconduct by the practitioner depending on whether the touching is clinically indicated and appropriately performed for a proper purpose. This in turn requires consideration of a range of contextual factors including: the clinical setting; the patient's signs and symptoms; the patient's clinical history; the practitioner's scope of practice; whether and how the

practitioner obtained the patient's informed consent; the nature and duration of the touching; words, gestures and other communications between the practitioner and patient; and other concurrent behaviours by the practitioner.

- Further, allowing the term 'sexual misconduct' to take its ordinary meaning is consistent with the existing use of the term in part 2, division 8 of the National Law.

- Inserting a qualified term such as 'serious sexual misconduct' would also not provide a clear threshold for publication. It also misleadingly implies that some forms of sexual assault are non-serious.

- Instead, the Bill adopts an existing threshold: 'professional misconduct'. As a formal decision the tribunal may make under the National Law,[4] it provides a clear and well-established threshold for the purposes of triggering publication under section 225A. Since professional misconduct is the highest level of misconduct under the National Law, it serves as an appropriate standard.

- This approach also ensures the context of a behaviour and relevant professional standards of conduct are considered in deciding whether the behaviour meets the threshold for publication. The tribunal decides whether the specific behaviour constitutes professional misconduct, taking account of the evidence before it and submissions from both parties.

The professional misconduct threshold is further discussed below in relation to clause 21 of the Bill.

Consideration was also given as to whether a National Board decision to publish regulatory history information should be subject to appeal under Part 8, Division 13 of the National Law. This was not considered appropriate.

The facts of a particular matter will be determined by a tribunal, whose decisions are subject to appeal. Following a tribunal decision of professional misconduct, the Board will decide, based solely on the tribunal's published decisions and reasons, whether sexual misconduct was a basis of the tribunal's finding of professional misconduct.

Because a tribunal's decision may not expressly base its finding of professional misconduct on any particular type of conduct, including sexual misconduct, the Bill gives National Boards discretion to infer, on the basis of the tribunal's decision and reasons for decision, that the tribunal's finding of professional misconduct was based on sexual misconduct.

The Board will not be re-litigating, reviewing or overturning the tribunal's findings in making these decisions.

And, as the Board has only a very narrow discretion (the 'necessary inference' test, which is discussed below in relation to clause 21 of the Bill), there is no strong rationale for subjecting the Board's decision to a merits-based review process.

However, the Board's decision will be subject to judicial review on errors of law. Legal errors may include the Board making an inference that does not meet the 'necessary inference' test.

[4] Section 196(1)(b)(iii)

The decision not to have merits-based review is consistent with the approach taken for similar administrative decisions by National Boards under the National Law. For example, section 227(a)(iii) requires the Board to record, for each practitioner whose registration was cancelled following a public hearing by an adjudication body, 'details of the conduct that formed the basis of the adjudication'. This requires a Board to summarise the practitioner's conduct fairly and accurately for publication, a task involving greater exercise of discretion than a decision under section 225A. This decision is not appellable but remains subject to judicial review.

Non-legislative options

In addition to the three reforms included in this Bill, Australian Health Ministers also endorsed Ahpra's *Blueprint to better protect patients from sexual misconduct in healthcare*. This included administrative actions to increase community participation in decision-making processes, undertaking a public review of the Criminal History registration standard which applies to all registered health practitioners, and undertaking research on the outcomes of sexual misconduct matters.

Additionally, Ahpra has expanded its specialist investigations team to better meet demand and expanded its Notifier Support Service, which provides social worker led support and help to victims and survivors as they navigate regulatory and tribunal processes. Ahpra is also undertaking work to develop greater resources for patients and practitioners on the informed consent process during a consultation, and working to ensure investigations are trauma-informed and nationally consistent.

In addition to the reforms given effect in this Bill, these non-legislative efforts will also contribute to achieving the policy objectives of Health Ministers.

Estimated cost for government implementation

It is anticipated that the overall cost to the Queensland Government of implementing these reforms will be minimal and met through existing budget allocations.

The National Scheme is self-funded by fees paid by registered health practitioners. Fees set by each National Board reflect the cost of regulating each profession under the National Law and are required to be reasonable, having regard to the efficient and effective operation of the scheme.

Consistency with fundamental legislative principles

The Bill is generally consistent with fundamental legislative principles in the *Legislative Standards Act 1992*. Potential departures from fundamental legislative principles are discussed below and are justified to achieve public health and safety objectives. All potential departures have been carefully considered in framing the Bill, and wherever possible the impact of potential departures has been minimised.

Reinstatement orders

Whether the legislation has sufficient regard to the rights and liberties of individuals (Legislative Standards Act, section 4(2)(a))

Consistency with principles of natural justice

Under section 4(3)(b) of the Legislative Standards Act, whether legislation has sufficient regard to the rights and liberties of individuals depends on whether it is consistent with the principles of natural justice.

The Bill establishes a new tribunal process for practitioners to undertake before being eligible to apply for registration following a cancellation or disqualification order. The decision-maker for the reinstatement application will be the responsible tribunal of each jurisdiction (in Queensland, this is QCAT).

Jurisdictional tribunal legislation and rules will govern the conduct of the hearing, which provide for the observance of natural justice. The National Law requires that an entity that has functions under the National Law is to exercise its functions having regard to the objectives and guiding principles of the national registration and accreditation scheme (section 4). The guiding principles include that the scheme is to operate in a fair way (section 3A(2)(a)).

The Bill is therefore consistent with the principles of natural justice including the right to be heard, procedural fairness, and the right to an unbiased decision maker.

Retrospectivity

Under section 4(3)(g) of the Legislative Standards Act, whether legislation has sufficient regard to the rights and liberties of individuals depends on whether it will adversely affect rights and liberties or impose obligations retrospectively.

The presumption against retrospectivity does not apply to a provision that is concerned only with procedure and does not retrospectively impact a substantive right.[5] The Bill will introduce a new procedural step in the process for a person to obtain registration following a prior cancellation or disqualification. There is no substantive right to be re-registered, however, there is a substantive right to apply for re-registration following the expiry of any sanction imposed by a tribunal.

The Bill provides that the reinstatement order process will not apply to a person who has already submitted an application for registration to a National Board. For a person who has not yet made an application to a National Board for re-registration, the provisions create a future procedural requirement. Overall, any retrospectivity is justified as the requirement to obtain a reinstatement order from a responsible tribunal will strengthen the process for cancelled and disqualified practitioners to obtain registration, which is in the public interest and ensures public safety.

[5] *Principles of good legislation: OQPC guide to FLPs: Retrospectivity*, Office of the Queensland Parliamentary Counsel (19 June 2013).

Expanding the information available on the public registers

Whether the legislation has sufficient regard to the rights and liberties of individuals (Legislative Standards Act, section 4(2)(a))

Right to privacy

Although not specifically enumerated, the right to privacy and the disclosure of private information has generally been identified as relevant to whether legislation has sufficient regard to individuals' rights and liberties[6] under section 4(3) of the Legislative Standards Act.

Any limitation imposed by legislation on the rights and liberties of individuals must be justified.

The Bill will limit a practitioner's right to privacy by requiring additional information to be included on the public registers in relation to regulatory actions taken against a practitioner who has engaged in professional misconduct involving sexual misconduct. In addition to more information being publicly available on the register, the information will remain on the register in perpetuity.

The aim of these amendments is to strengthen public safety by ensuring the public has appropriate information available to them in relation to a practitioner who has a finding against them of professional misconduct involving sexual misconduct.

The information to be published will already be publicly available via the public registers and published tribunal decisions. The permanent publication of the information on the register will, however, make it easier to find beyond the life of the sanctions imposed by the tribunal.

Existing protections in the National Law will apply to the publication of this additional information. These are discretionary provisions that protect a practitioner's right to privacy in relation to matters of impairment and to protect against a serious risk to the health or safety of the practitioner, their family, or associates.

The Bill also requires that the information be removed from the register if –

- on appeal, the tribunal decision has been stayed, overturned, or materially modified; or
- publication of the information would contravene a non-publication order by a tribunal or court.

The limitation on the practitioner's right to privacy is a justifiable means of ensuring the public is informed about sexual misconduct by practitioners that a tribunal has found to be a basis for professional misconduct, and thus able to make informed choices about health professionals. This is consistent with the main guiding principle of the National Scheme, which is that the following are paramount –

- protection of the public; and
- public confidence in the safety of health services provided by registered practitioners.

[6] *Fundamental Legislative Principles: The OQPC Notebook*, Office of the Queensland Parliamentary Counsel (January 2008), p113.

Proportionality

When considering whether legislation has sufficient regard to the rights and liberties of individuals, consequences imposed by legislation should be proportionate and relevant to the actions to which the consequences are applied by the legislation.[7]

A finding of professional misconduct is the most serious regulatory finding a tribunal can make in relation to a practitioner, and sexual misconduct amounting to professional misconduct is at the most serious end of that scale. The administrative action of publishing this information permanently on the national public registers is proportionate and relevant to the seriousness of the finding, and proportionate and relevant to ensuring public protection.

Retrospectivity

Retrospective legislation, which operates in relation to facts or events that happened before a Bill is given assent, may interfere with the rights and liberties of an individual under section 4(3)(g) of the Legislative Standards Act.

This fundamental legislative principle reflects the common law presumption that Parliament intends legislation to operate prospectively. If retrospective legislation "*has an adverse effect on rights or liberties, or imposes obligations, then a strong argument is required to justify that impact. However, retrospective legislation may be justified if it is beneficial, curative or validating in nature*."[8] Retrospective legislation is also justified if it is in the public interest.

The Bill will provide a statutory trigger for administrative action to publish additional information on the national public registers for any finding of professional misconduct involving sexual misconduct made since the participation day for the relevant health profession.

The retrospective operation of the provisions is necessary to achieve the policy objective of providing greater transparency to the public in relation to practitioners who have engaged in professional misconduct involving sexual misconduct. It goes to the heart of the National Scheme and addresses the information asymmetry between the public and health practitioners by providing the public with the appropriate information to make informed decisions about the provision of their healthcare.

Further, the National Law already requires National Boards to publish tribunal findings on their website. Therefore, the information is already available to the public, albeit in a different form and location.

[7] *Fundamental Legislative Principles: The OQPC Notebook*, Office of the Queensland Parliamentary Counsel (January 2008), p120.
[8] *Principles of good legislation: OQPC guide to FLPs: Retrospectivity*, Office of the Queensland Parliamentary Counsel (19 June 2013).

Strengthening protections for notifiers

Whether the legislation has sufficient regard to the rights and liberties of individuals (Legislative Standards Act, section 4(2)(a))

Retrospectivity

Section 4(3)(g) of the Legislative Standards Act states that whether legislation has sufficient regard to rights and liberties of individuals depends on whether the legislation adversely affects rights and liberties, or imposes obligations, retrospectively.

The Bill will nullify a non-disclosure agreement to the extent the agreement limits a person from making a notification, in good faith, about a health practitioner or from assisting persons exercising functions under the National Law. This provision is intended to operate with respect to non-disclosure agreements entered into prior to assent of the Bill.

It is essential to the operation of the National Scheme that there is a strong reporting culture and that there are no limitations placed on notifiers in relation to their interaction with the regulators. The retrospective application of these provisions is justified on that basis.

Proportionality

Section 4(2)(a) of the Legislative Standards Act states that legislation must have sufficient regard to the rights and liberties of individuals. Although not specifically enumerated in the Legislative Standards Act, for legislation to have sufficient regard to the rights and liberties of individuals, the consequences imposed by legislation should be proportionate and relevant to the actions to which they are applied.

The Bill includes strengthened protections for notifiers and others who assist regulators in their investigations regarding the health, conduct, and performance of health practitioners. These strengthened protections include the introduction of new offences into the National Law and Health Ombudsman Act.

First, new offences will apply for persons who use threats, intimidation, refuse to employ or dismiss a person, or subject a person to any detriment or reprisals because the other person may make, or has made, a notification or provided assistance to regulators. This offence is similar to the existing offence for taking reprisals in the Health Ombudsman Act.

Consistent with the more serious offences in the National Law, these offences will attract a maximum penalty of $60,000 for an individual or $120,000 for a body corporate.

Finally, a new offence applies for employers, registered health practitioners or health service providers who enter into a non-disclosure agreement with another person that does not clearly set out that the person retains the ability to make a notification or provide assistance to regulators. This offence will attract a lower penalty of $5,000 for an individual or $10,000 for a body corporate.

Regulators are tasked with protecting the public by ensuring registered health practitioners are suitably trained and qualified to practise in a competent and ethical manner. Regulators rely on others to inform them of concerns about the health, conduct, or performance of registered practitioners. As such, a strong reporting culture is essential to public safety. This requires

people to have confidence that their notifications will be considered fairly and that they will be safe from retributions.

The offences in the Bill are designed to ensure notifiers and others who assist regulators have appropriate protections from harm. The offences and associated penalties are consistent with existing comparable offences and penalties within the National Law. The penalties are also proportionate to the seriousness of the offences, particularly considering the risks to individuals stepping forward with information about practitioners.

Consultation

In January and February 2024, national public consultation on the proposed reforms was undertaken. A consultation paper, *Management of professional misconduct and strengthening protections for notifiers* was developed, led by Victoria, who has responsibility for leading interjurisdictional legislative policy development on behalf of Australian Health Ministers.

On 29 January 2024, a targeted information session with patient advocacy groups and sexual violence support services was hosted by Ahpra. The Victorian policy team explained the proposed reforms and provided guidance on how to participate in the consultation process.

Organisations and individual members of the public were invited to participate in the consultation through the Engage Victoria website. Key professional organisations, including health complaints entities, professional associations, specialist practitioner colleges, and Aboriginal and Torres Strait Island health organisations received direct communications about how to participate in the consultation process.

A total of 217 submissions were received from a range of stakeholders, including members of the public, individual practitioners, professional organisations, sexual assault survivor groups, health regulators (including the Queensland Office of the Health Ombudsman), tribunals (including QCAT) and information commissioners.

There was mostly support among stakeholders for all three proposed reforms, with a few key stakeholders raising some concerns.

The public and peak and professional bodies were overall supportive of introducing reinstatement orders to all jurisdictions, with national consistency being an important rationale in the submissions received. The submissions in support of the reforms also indicated that having reinstatement order decisions published publicly would increase transparency around the decision-making about practitioners' fitness for re-registration. Some of the submissions received from stakeholders that were partially supportive of the proposal (including jurisdictional tribunals and professional bodies) suggested that the current process undertaken by National Boards to determine if an individual should be re-registered were sufficient. Jurisdictional tribunals were also concerned with introducing the New South Wales model for reinstatements orders into their jurisdiction. Queensland Health confirmed that it was not the intention to strictly adopt the New South Wales model but rather retain key aspects and ensure flexibility for tribunals to retain their local processes.

In relation to expanding the publication of information on the national registers, the consultation paper sought feedback in relation to permanently publishing a practitioner's full regulatory history upon a finding of professional misconduct involving sexual misconduct. The

public and consumer advocacy groups fully supported this proposal with the main rationale being increased transparency and the public's right to know a practitioner's full regulatory history. Key stakeholders, including jurisdictional information commissioners, partially supported the proposal and raised concerns regarding practitioner privacy and the apparent punitiveness of the proposal, which is not the objective of the National Scheme. To address these concerns, the scope of the additional information to be published was narrowed to only include the regulatory history in relation to the finding of professional misconduct involving sexual misconduct.

A large majority of stakeholders were supportive of the reforms to strengthen protections for notifiers, with the key rationale in submissions being that transparency, protections, and safety for notifiers was essential.

Consistency with legislation of other jurisdictions

If the Bill is passed in Queensland, the changes to the National Law will apply automatically in all other states and territories, except for New South Wales and South Australia where amendments must be adopted by regulation, and Western Australia where Western Australia's Governor must make a proclamation bringing the amendments into operation following their tabling in each House of Parliament.

Notes on provisions

Part 1 Preliminary

Short Title

Clause 1 provides that, when enacted, the short title of the Act will be the *Health Practitioner Regulation National Law and Other Legislation Amendment Act 2024*.

Commencement

Clause 2 provides for the commencement of the Act by proclamation. Commencement by proclamation will allow time for administrative systems to be put in place to support implementation. It will also allow for the provisions to commence at the same time nationally.

Part 2 Amendment of Health Ombudsman Act 2013

Act amended

Clause 3 states this part amends the *Health Ombudsman Act 2013*.

Amendment of s 94 (QCAT's jurisdiction)

Clause 4 amends section 94 of the Health Ombudsman Act, which provides for the jurisdiction of the Queensland Civil and Administrative Tribunal (QCAT).

The amendment provides QCAT with jurisdiction to hear an application for a reinstatement order made under section 198A of the Health Practitioner Regulation National Law (National Law). Section 198A is inserted into the National Law at clause 20.

As set out in section 94(6) of the Health Ombudsman Act, QCAT is to exercise its original jurisdiction to hear and decide applications for reinstatement orders.

Amendment of s 96 (Orders that QCAT may make)

Clause 5 amends section 96 of the Health Ombudsman Act to explain that the National Law, part 8, division 12A provides for the orders that QCAT may make after hearing an application made by a disqualified person for a reinstatement order under the National Law, section 198A. Part 8, division 12A, which includes section 198A, is inserted into the National Law at clause 20.

Amendment of s 97 (Constitution of QCAT)

Clause 6 amends section 97 of the Health Ombudsman Act to provide that QCAT does not need to be constituted by a judicial member when hearing or deciding an application for a reinstatement order made under new section 198A of the National Law. Instead, under the *Queensland Civil and Administrative Tribunal Act 2009*, the President of QCAT will have discretion to choose how to constitute the tribunal, including whether a judicial member should be chosen to preside over a matter.

Amendment of s 107 (Decision about registered health practitioner other than student)

Clause 7 amends section 107 of the Health Ombudsman Act, which sets out the decisions QCAT can make in relation to matters concerning a registered health practitioner, other than a student, referred to QCAT by the director of proceedings under section 103 of that Act.

Subclause (1) makes a minor amendment for consistency with the language of the analogous section of the National Law – section 196(4).

Subclause (2) amends section 107(4)(a) of the Health Ombudsman Act, which sets out additional decisions QCAT can make if it decides to cancel a practitioner's registration or where a practitioner no longer holds registration. The amendments are consequential to the introduction of reinstatement orders in the National Law at clauses 16 through 20. Under the amendments, if QCAT decides to cancel a practitioner's registration or to disqualify a previously registered practitioner from applying for registration, QCAT can also set a period in which the practitioner cannot apply for a reinstatement order. The period set by the tribunal can be permanent. This aligns with the existing legislation, which allows QCAT to 'indefinitely' disqualify a practitioner from applying for registration.

Insertion of new section 125A

Clause 8 inserts new section 125A into the Health Ombudsman Act to provide that part 10, division 6 applies in relation to registered health practitioners and applications made by disqualified persons for a reinstatement order under section 198A of the National Law, as inserted at clause 20. The division already applied in relation to registered health practitioners.

Amendment of s 126 (Tribunal to be assisted by assessors)

Clause 9 amends section 126 of the Health Ombudsman Act, which requires QCAT to be assisted by assessors, unless section 126(2) applies. The amendments omit the words 'relating to a registered health practitioner'. The effect of this amendment, combined with the insertion of new section 125A at clause 8, is that the tribunal is also to be assisted by assessors for proceedings relating to applications for a reinstatement order under section 198A of the National Law, inserted at clause 20. This does not change the existing requirement for tribunals to be assisted by assessors in conducting a hearing of a disciplinary proceeding relating to a registered health practitioner, as the division also applies in relation to registered health practitioners.

Amendment of s 261 (Reprisal and grounds for reprisal)

Clause 10 amends section 261 of the Health Ombudsman Act, which provides protections against reprisals.

The amendments extend the existing protections within the section to persons making a notification under part 8, division 2 or 3 of the National Law and persons providing information, documents or other assistance to a person performing functions under the Health Ombudsman Act or the National Law. These are included as *protected actions*, as defined in new subsection (7) at clause 6. Extending the protections to include notifications made under the National Law acknowledges how notifications under the National Law are dealt with under

section 36 of the Health Ombudsman Act. It also aligns with the amendments to the National Law at clause 22.

Additionally, the amendments broaden the existing protections to prohibit the use of threats or intimidation to dissuade a person from taking a *protected action*.

Finally, to align with the National Law amendments at clause 22, the amendments prohibit a person from taking negative employment action against a person in the belief the person has taken or intends to take *protected action*. Although negative employment action, such as dismissing or refusing to employ a person, would likely already constitute a reprisal under section 261 of the Health Ombudsman Act, the amendments put this beyond doubt, particularly in light of the amendments to the National Law. They also ensure consistency between the Health Ombudsman Act and the National Law.

The new protections are intended to support a strong reporting culture, which is fundamental to public safety. Good faith complaints and participation in investigations and other actions under the Health Ombudsman Act and National Law help protect the public from harm and protect patients from health practitioners who pose a risk of harm. They can also allow for early regulatory intervention before the risk of harm escalates.

Amendment of s 262 (Offence for taking reprisal)

Clause 11 amends section 262 of the Health Ombudsman Act to align the maximum financial penalty for taking a reprisal with the penalty applicable to the analogous offence in the National Law, as inserted at clause 22. The maximum penalty for an individual is 375 penalty units or two years imprisonment and for a corporation is 750 penalty units. The existing imprisonment penalty for an individual is maintained in these amendments.

Under section 271 of the Health Ombudsman Act, the offence of taking a reprisal is an indictable offence that is a misdemeanour.

Insertion of new s 263A

Clause 12 inserts new section 263A into the Health Ombudsman Act. This new section clarifies consumer rights regarding non-disclosure agreements. A *non-disclosure agreement* is defined in new section 262A(3) as a contract or other agreement that limits or prohibits the disclosure of information or documents by a person in relation to the health, conduct or performance of a health service provider or former health service provider.

New section 263A(1) operates to void any provision of a non-disclosure agreement to the extent it prevents or limits a person from—

- making a good faith complaint under the Health Ombudsman Act or notification under the National Law; or

- giving information, documents or other assistance to a person performing functions under the Health Ombudsman Act or National Law.

In the interests of supporting a strong reporting culture, this provision is intended to remove all doubt that any such provisions are unenforceable.

New section 263A(2) makes it an offence for health service providers or employers or former employers of health service providers to enter into a non-disclosure agreement, unless the agreement clearly sets out that the agreement does not prevent the other party from making a good faith complaint or notification or giving information, documents or other assistance to those performing functions under the Health Ombudsman Act or National Law. This offence is intended to apply to employers or former employers and health service providers acting in those respective capacities, rather than in their capacity as a health service consumer. Like new section 263A(1), this is intended to support a strong reporting culture in the interests of public protection.

The maximum penalty for this offence is 30 penalty units for an individual or 60 penalty units for a corporation. These penalties are similar to those in the analogous offence at new section 237B of the National Law, inserted at clause 22.

Insertion of new pt 21, div 4

Clause 13 inserts new part 21, division 4 into the Health Ombudsman Act to provide a transitional provision relating to the amendments to that Act.

New section 320I is a transitional provision with respect to non-disclosure agreements. It provides that new section 263A(1), inserted at clause 12, applies retrospectively, meaning that a provision of a non-disclosure agreement is void to the extent it prevents or limits a person from making a health service complaint, notification under the National Law, or providing information, documents or other assistance regardless of when the agreement was entered into or when the relevant health, conduct or performance issues occurred.

Amendment of sch 1 (Dictionary)

Clause 14 amends Schedule 1 to the Health Ombudsman Act, which comprises the dictionary for the Act.

The amendment inserts the terms *disqualified person* and *reinstatement order*, both defined with reference to the National Law meanings of the terms.

Part 3 Amendment of Health Practitioner Regulation National Law

Law amended

Clause 15 states this part amends the Health Practitioner Regulation National Law as set out in the schedule to the *Health Practitioner Regulation National Law Act 2009*.

Amendment of s 5 (Definitions)

Clause 16 inserts and defines two new terms in section 5 of the National Law.

The term *disqualified person* is defined to mean a person whose registration has been cancelled by a responsible tribunal or a person who has been disqualified by a responsible tribunal from applying for registration, or from being registered, in a health profession. This definition is

intended to capture persons whose registration was cancelled, or who were disqualified from registration, by a tribunal in any participating jurisdiction.

A *reinstatement order* is an order of a responsible tribunal that a *disqualified person* is eligible to apply to a National Board for registration.

Under the amendments at clauses 17 and 20, *disqualified persons* must first obtain a *reinstatement order* before they can apply to a National Board to be re-registered.

Insertion of new s 77A

Clause 17 inserts new section 77A into part 7 of the National Law. This new section establishes that persons who have had their registration cancelled, or who have been disqualified from registration, cannot apply to a National Board for re-registration unless they first obtain a *reinstatement order* from a responsible tribunal.

It is intended that this provision apply nationally. Thus, a person whose registration is cancelled, or who has been disqualified from registration, by a responsible tribunal in any participating jurisdiction cannot apply for registration until the person has obtained a reinstatement order.

Amendment of s 196 (Decision by responsible tribunal about registered health practitioner)

Clause 18 amends section 196 of the National Law, which sets out the decisions a responsible tribunal may make after hearing a matter about a registered health practitioner.

Subclause (1) corrects a typographical error in the National Law.

Subclauses (2) and (3) provide that a tribunal may decide to disqualify a person from applying for registration as a registered health practitioner, and to impose a period of time in which the person may not apply for a reinstatement order. These changes are necessary to ensure *disqualified persons* must first obtain a reinstatement order from a tribunal before they are eligible to apply for re-registration, as set out in the amendments at clauses 17 and 20.

Amendment of s 197 (Decision by responsible tribunal about student)

Clause 19 corrects a typographical error in the National Law.

Insertion of new pt 8, div 12A

Clause 20 inserts new Division 12A (Reinstatement orders) into part 8 of the National Law, comprising new sections 198A to 198E. This division establishes the legislative framework for a *disqualified person* to make an application for a reinstatement order.

Subsection 198A(1) provides that a *disqualified person* may apply to a responsible tribunal for a reinstatement order. This establishes the mechanism for a *disqualified person* to make an application to a responsible tribunal for a reinstatement order.

Subsection 198A(2) establishes that a person seeking a reinstatement order must make the application to the responsible tribunal in the jurisdiction that made the original order cancelling their registration, or disqualifying them from registration. This is to ensure the applicant knows

where they must make their application for reinstatement and also avoids any doubt for the tribunal as to whether they have jurisdiction to hear the application for reinstatement. The responsible tribunal in the jurisdiction that made the original order is the most appropriate tribunal to decide a reinstatement application.

Subsection 198B(1) provides that when determining an application for a reinstatement order, the responsible tribunal must consider whether it is appropriate, at the time of the hearing, for the reinstatement order to be made. This is different to the consideration of the tribunal under section 163 of the *Health Practitioner Regulation National Law (NSW)* which refers to a review of the appropriateness of the original order concerned.

Subsection 198B(2) provides guidance to tribunals when considering an application for a reinstatement order. This is not an exhaustive list. The tribunal may consider any matter it considers appropriate, however, jurisprudence from New South Wales indicates that tribunals routinely consider broadly whether the person is 'fit and proper' and 'competent to practise the profession safely'. These are tests for suitability that the National Boards consider when deciding registration under part 7. There is no intention to interfere with or replace the National Board's duty to also consider these elements when considering a subsequent application for registration.

Subsection 198B(3) provides that when determining an application for a reinstatement order, the tribunal must take into account any notification made about the person, regardless of when that notification was made. This is intentionally broad to ensure that the tribunal has the person's entire complaint history before them when deciding whether it is appropriate to make a reinstatement order.

Section 198C provides that the parties to proceedings for a reinstatement hearing are the disqualified person (as the applicant) and the relevant National Board that registered the person before they were a *disqualified person* (as the respondent). This provision is modified in Queensland at clause 25.

Section 198D provides that a responsible tribunal has the discretion to make any order about costs that it considers appropriate. This provision is omitted in Queensland at clause 25.

Subsection 198E(1) provides that after hearing an application for a reinstatement order, the tribunal may either dismiss the application or grant the reinstatement order.

Subsection 198E(2) provides that if the tribunal makes a reinstatement order, the tribunal has the power to impose conditions on a person's registration that will apply if a National Board decides to re-register the person. The Board must apply this decision as required by section 205(1), however the Board's application of the decision will not itself be a decision that is appellable under section 199.

Subsection 198E(3) provides that if the tribunal decides to impose conditions upon a person's registration, they must decide a review period for the conditions and the review period must start from the date that the person is re-registered. The length of time for the review period specified is at the tribunal's discretion.

Subsection 198E(4) makes clear that, upon re-registration, any conditions that a National Board places on a person's registration under part 7 are to apply in conjunction with any conditions imposed by the tribunal. If a condition imposed by a National Board is inconsistent with a condition imposed by the tribunal, it will not apply to the extent of the inconsistency.

Subsection 198E(5) provides that if the tribunal dismisses the application for a reinstatement order, they have the power to impose a period of time during which the person cannot make another application. The period specified is at the tribunal's discretion. This is intended to prevent repeated, frivolous applications.

Subsection 198E(6) makes clear that a person cannot make an application for a reinstatement order in the period imposed by the tribunal under section 198E(5).

Insertion of new ss 225A and 225B

Clause 21 inserts new sections 225A and 225B into the National Law.

Section 225A establishes a requirement for additional information to be included in the National and Specialists Registers in certain circumstances, as outlined below. The section applies in relation to a health practitioner whose name is recorded in a National Register or Specialists Register kept by the Board.

Subsection 225A(1) provides that section 225A applies if a National Board is satisfied, in relation to a health practitioner whose name is recorded in a National Register or Specialists Register kept by the Board, that two conditions are met.

The first condition, paragraph (a), is that a responsible tribunal decided, on or after the participation day for the relevant profession, that the practitioner behaved in a way that constituted professional misconduct. For the purposes of this section, 'participation day' has the same meaning as in sections 250 and 306 of the National Law.

The second condition, paragraph (b), is that a basis for the tribunal's decision was that the practitioner engaged in sexual misconduct, whether occurring in connection with the practice of the practitioner's profession or not. As the entity responsible for keeping the register, the relevant Board is responsible for deciding whether the tribunal's professional misconduct decision meets this condition.

The Board is to make this decision solely on the tribunal's published decisions and reasons. The Board is not required or authorised to review the merits or legality of the tribunal's decision, or to substitute its own. Specifically, it is not the Board's task to decide whether sexual misconduct by the practitioner amounted to, or was capable of amounting to, professional misconduct.

However, the Board will need to be satisfied that a behaviour on which the tribunal's decision was based was sexual misconduct. This question will arise particularly in cases where the tribunal, in its decision and reasons, does not expressly characterise the behaviour as 'sexual misconduct' (as recognised by section 225A(3)(b)).

The term 'sexual misconduct' is not defined in the National Law or in the Bill for the reasons detailed in these explanatory notes.[9] 'Sexual misconduct' is intended to be read in a broad sense, to encompass the wide range of behaviours that fall within the ordinary meaning of the term. The term 'sexual misconduct' is not intended to establish any particular threshold or standard of misconduct for the purposes of triggering permanent publication of related regulatory history.

[9] See 'Alternative ways of achieving the policy objectives'.

Instead, the threshold for publication is provided by the requirement in section 225A(1)(a) that a tribunal decided the practitioner's behaviour is a basis for a finding of professional misconduct. As the highest level of misconduct under the National Law, professional misconduct serves as an appropriate threshold. In the context of section 225A(1), it captures sexual misconduct at the higher end of the spectrum of misconduct but excludes behaviours which, although sexual misconduct, are unlikely to represent a risk that justifies permanent publication of a practitioner's related regulatory history.

Accordingly, the examples of sexual misconduct provided below will not trigger the publication of the practitioner's regulatory history unless the tribunal has found they were a basis for professional misconduct.

Examples of sexual misconduct may include, but are not limited to, any violation by a practitioner of a professional boundary between the practitioner and a person under the practitioner's care that could be considered sexual, such as:

- any of the following that is not clinically indicated –
    - touching, including hugging, kissing, stroking, caressing, or massaging;
    - intimate physical examination;
    - asking or directing a person to fully or partially undress;
    - seeking or obtaining a sexual history;
    - making sexual comments, suggestions, or gestures;
    - disclosing the sexual history of the practitioner or another person, real or fictional;
    - distributing, sending, displaying, making, or requesting any sexually explicit images, messages or audio/video recordings;
- conveying a desire or willingness to enter a sexual relationship;
- flirting, whether or not the flirting is overtly or expressly sexual;
- engaging in sexual humour or innuendo;
- engaging in any form of sexual activity;
- engaging in sexual behaviours in the presence of the person, either directly or remotely by means of communications technology;
- sexual exploitation, abuse or harassment;
- conduct that facilitates a sexual act or formation of a sexual relationship ('grooming'), including by contacting the person electronically or via social media.

Sexual misconduct may occur in relation to a person under the practitioner's care even if the person consents to, initiates, or willingly participates in the conduct.

Sexual misconduct by a practitioner, in the practise of the practitioner's profession, may also include conduct in relation to a person other than a person under the practitioner's care. This may include, but is not limited to, for example –

- any violation by a practitioner of a professional sexual boundary between the practitioner and a carer of, or other person close to, the person under the practitioner's care;

- workplace sexual abuse, harassment, or impropriety.

Sexual misconduct may also include, but is not limited to, for example, criminal offences, whether committed in connection with the practice of the practitioner's profession or not. For purposes of the National Law, a tribunal may decide a practitioner's behaviour constitutes professional misconduct whether or not the practitioner has been charged with, pleaded guilty to, was found guilty of, or was convicted of a criminal offence.

The National Law includes a mechanism for National Boards to provide guidance to practitioners, including about what they consider may constitute sexual misconduct and to set clear expectations about practitioner conduct. This may serve to aid National Board decision-making under section 225A(1). Section 39 enables a National Board to develop and approve codes and guidelines to provide guidance to registered health practitioners. For example, the Medical Board of Australia approved specific guidelines (*Sexual boundaries in the doctor-patient relationship)* for this purpose. Other National Boards provide guidance via their Codes of Conduct which are the primary instrument for setting expectations in relation to practitioner conduct. Section 41 provides that codes and guidelines are admissible in disciplinary proceedings as evidence about what constitutes appropriate professional conduct.

Section 225A and 225B are not intended to limit the operation of other provisions in the National Law, including for example the requirement under section 225(p) that the National Register or Specialists Register include 'any other information the National Board considers appropriate'. Specifically, these provisions are not intended to prevent the National Boards from including information on the registers (including links to tribunal decisions) relating to professional misconduct findings on bases other than sexual misconduct.

Subsection 225A(2)(a) provides that, for subsection (1)(b), sexual misconduct need not be the sole or main basis for the tribunal's finding of professional misconduct.

Subsection 225A(2)(b) provides that, for subsection (1)(b), it is immaterial if the tribunal did not consider or decide whether the sexual misconduct alone constituted professional misconduct. This subsection acknowledges that a tribunal may find that different types of conduct, taken together, amount to professional misconduct. A note is included to this effect.

Subsection 225A(3)(a) gives National Boards discretion to infer, on the basis of the tribunal's decision and reasons for decision, that the tribunal's finding of professional misconduct was based on sexual misconduct. The inference must be 'necessary', in that it is required to make sense of the tribunal's decision in the context of the tribunal's findings of fact. Accordingly, the Board's discretion to make a 'necessary inference' is extremely narrow.

The inference cannot be said to be necessary if the tribunal's decision and reasons for decision can be understood without inferring that a basis for the tribunal's professional misconduct decision was that the practitioner engaged in sexual misconduct.

This approach ensures that any doubt favours the practitioner, because if the tribunal's decision and reasons for decision can be understood without inferring that sexual misconduct by the practitioner was a basis for the tribunal's professional misconduct decision, the 'necessary' test is not met.

Subsection 225A(3)(b) provides that the National Board may be satisfied for purposes of section 225A(1)(b) regardless of whether or not the tribunal's reasons for the decision expressly provide that sexual misconduct was a basis for the decision. This acknowledges that cases will arise in which the tribunal has based its finding of professional misconduct on sexual misconduct, but has not expressly characterised the behaviour in those terms.

Subsection 225A(4) requires the additional information to be recorded in the National Register or the Specialists Register, within the meaning of sections 222 and 223 of the National Law. The general provisions of section 236 of the National Law will protect persons who perform this function in good faith from personal liability for doing so and transfer any liability to Ahpra. Where the information is already published under section 227, it is not intended for the information to be replicated on the register.

Subsection 225A(5) provides that the additional information must not be recorded in the National Register or Specialists Register if the tribunal decision regarding the professional misconduct is stayed or overturned on appeal or modified to the extent that it is no longer a decision for which section 225A applies. Further, if the additional information has already been recorded and subsequently overturned on appeal, the additional information must be removed from the relevant register.

Subsection 225A(6) provides that the additional information must not be recorded to the extent that doing so would contravene an order of a court or tribunal. This ensures that the requirement to record the additional information does not interfere with any orders relating to non-publication of names or other information. It also requires this information to be removed if it has already been recorded.

This will allow the Board to comply with the order, while maintaining the minimum of information on the register in perpetuity. For example, the tribunal may order non-publication of the practitioner's and the victims' names (to protect the privacy of victims) but publish its decision with pseudonymised names. In this scenario, the Board must not publish a link to the decision against the practitioner's name in the register, as to do so would directly contravene the tribunal's order. The Board may also decide not to publish other information that may allow for simple re-identification of the practitioner, since to do so may indirectly contravene the tribunal's order. However, the Board could still publish the fact of the tribunal finding of professional misconduct and the related sanction, without including a link to the tribunal's decision.

Subsection 225A(7) provides the discretion given to a National Board under sections 226(1) and (2) of the National Law also applies to the additional information to be published under section 225A. Accordingly, a National Board can decide not to publish conditions imposed by a responsible tribunal because the practitioner has an impairment if it is necessary to protect the practitioner's privacy and there is no overriding public interest for the condition to be

recorded. Also, a National Board can decide not to record the additional information if the practitioner asks for the information to not be recorded and the Board reasonably believes publishing the information would present a serious risk to the health or safety of the practitioner, a member of the practitioner's family or an associate of the practitioner.

Subsection 225A(8) requires the additional information to remain on the National or Specialists Register permanently, unless otherwise authorised to be removed under other provisions of the National Law.

Subsection 225A(9) provides that any inconsistencies between the requirements of sections 225A and 225B and sections 232(2), sections 225A and 225B prevail.

Section 225B specifies the additional information that must be recorded in the National and Specialists Registers for purposes of section 225A. This includes information about the tribunal finding, the tribunal sanctions imposed and, if the tribunal decision has been published, a copy of the decision or a link to the decision.

Subsection 225B(2) provides that supplementary information must also be recorded in the relevant register if the tribunal decided to cancel the person's registration on the grounds of the professional misconduct mentioned in section 225A(1), or if the health practitioner no longer holds registration. These conditions reflect the conditions under which the tribunal may exercise its powers under section 196(4) to take the actions described in section 225B(2)(a)-(d).

Insertion of new ss 237A and 237B

Clause 22 inserts new sections 237A and 237B into the National Law.

New section 237A increases protections for persons making certain *protected actions*. The *protected actions* are making good faith notifications under the National Law and giving information, documents, or other assistance in the course of an investigation or for another purpose under the National Law to a person exercising functions under the National Law.

Specifically, this section makes it an offence for a person to:

- use threats or intimidation in an attempt to dissuade another person from taking a protected action;

- dismiss, or refuse to employ another person, because, or in the belief that, the person has taken or may take protected action; and

- subject another person to other detriment or reprisal because, or in the belief that, the person has taken or may take protected action.

The maximum penalty for the offences in this section is $60,000 for an individual or $120,000 for a body corporate.

These new offences are intended to address gaps in protections identified in several reviews, including the *Royal Commission into Institutional Responses to Child Sexual Abuse* and the National Health Practitioner Ombudsman's *Review of confidentiality safeguards for people making notifications about health practitioners*.

The new offences are intended to support a strong reporting culture, which is fundamental to public safety under the National Law. Good faith notifications and participation in investigations and other actions under the National Law help protect the public from harm and protect patients from health practitioners who pose a risk of harm. They can also allow for early regulatory intervention before the risk of harm escalates.

New section 237B clarifies consumer rights regarding *non-disclosure agreements*, which are defined in this section as contracts or other agreements that limit or prohibit the disclosure of information or documents by a person in relation to the health, conduct or performance of a registered health practitioner or former registered health practitioner.

Subsection 237B(1) operates to void any provisions of a non-disclosure agreement to the extent it prevents or limits a person from making a good faith notification under the National Law or giving information, documents or other assistance in the course of an investigation or for another purpose under the National Law to a person exercising functions under the Law. In the interests of supporting a strong reporting culture, this provision is intended to remove all doubt that any such provisions are unenforceable.

Subsection 237B(2) makes it an offence for employers or former employers, health service providers, and registered health practitioners to enter into a non-disclosure agreement, unless the agreement clearly sets out that the other party can, despite the agreement, make a good faith notification or give information, documents or other assistance to those exercising functions under the National Law. This offence is intended to apply to employers or former employers, health service providers, and registered health practitioners acting in those respective capacities, rather than in their capacity as a health service consumer.

The maximum penalty for this offence is $5,000 for an individual or $10,000 for a body corporate. As with new sections 237A and 237B(1), section 237B(2) is intended to support a strong reporting culture under the National Law in the interests of public protection.

Insertion of new pt 16

Clause 23 inserts a new Part 16 in the National Law, setting out three transitional provisions for the *Health Practitioner Regulation National Law and Other Legislation Amendment Act 2024*.

New section 327 is a transitional provision for new section 77A, inserted at clause 17. The provision establishes that section 77A does not apply to applications for registration made before the commencement of this section. Thus, provided they are not disqualified from applying for registration under other provisions of the National Law, a *disqualified person* may apply to a National Board for registration prior to this section commencing without first obtaining a reinstatement order. However, paragraph (b) provides that section 77A applies to a *disqualified person*, regardless of when a responsible tribunal made the decision that resulted in the person becoming a disqualified person. Thus, the requirement to apply for a reinstatement order applies to persons who had their registration cancelled or who were disqualified from being registered prior to the commencement of this section.

New section 328 is a transitional provision relating to eligibility to apply for a reinstatement order under new division 12A of part 8 (as inserted by clause 20). It provides that if a tribunal

has disqualified a person from applying for registration as a registered health practitioner for a specified period, the person may not apply for a reinstatement order during that period.

New section 329 is a transitional provision for new section 237B. It provides that section 237B(1) applies to non-disclosure agreements made both before and after the commencement of this section. Section 237B(1) also applies in relation to the health, conduct or performance of a registered health practitioner or former registered health practitioner both before and after the commencement of this section. Thus, a provision of a non-disclosure agreement is void to the extent it prevents or limits a person from making a good faith notification or providing assistance in the course of an investigation, regardless of whether the non-disclosure agreement was made before this section commenced.

However, the offence provision in section 237B(2) only applies to agreements entered into after the commencement of section 237B. It does not retrospectively make it an offence to enter into a non-disclosure agreement purporting to prevent or limit a person from making a good faith notification or providing assistance in an investigation.

Part 4 Amendment of Health Practitioner Regulation National Law Act 2009

Act amended

Clause 24 states this part amends the *Health Practitioner Regulation National Law Act 2009*.

Insertion of new ss 51A and 51B

Clause 25 modifies the application of section 198C in the National Law (as inserted at clause 20) to accommodate Queensland's co-regulatory arrangements. In Queensland, the parties to the proceedings for an application for a reinstatement order will be the disqualified person (which is the case under the National Law) and either the Health Ombudsman or the National Board, depending on which of those entities referred the matter to QCAT that resulted in the person becoming a disqualified person.

If the National Board referred the matter under section 193B of the National Law, then the National Board will be the other party to the proceedings. If the Health Ombudsman referred the matter to QCAT under section 103 of the Health Ombudsman Act, then the Health Ombudsman will be the other party to the proceedings. This is to ensure that the appropriate entity, who has knowledge of the history of the matter, can appear as the respondent in an application for a reinstatement order.

Clause 25 also modifies the National Law to omit section 198D (Costs) (as inserted at clause 20). In Queensland, part 6, division 6 of the *Queensland Civil and Administrative Tribunal Act 2009* will apply.

Amendment of s 55A

Clause 26 modifies the National Law, section 225B (as inserted at clause 21) to clarify the additional information that is to be recorded in the National and Specialists Register for persons in Queensland who have been permanently disqualified from making an application for a reinstatement order.

New section 55A modifies new section 225B(2) of the National Law in multiple instances to include references to the powers of QCAT under both the National Law and Health Ombudsman Act.

It also modifies new section 225B(2)(a) to provide that in Queensland, if a tribunal has decided to impose a period in which a person cannot apply for a reinstatement order (as opposed to being permanently restricted from making an application for a reinstatement order), the National and Specialists Registers must record that the person may apply to the tribunal for a reinstatement order.

Further, it modifies section 225B of the National Law to insert new subsections (3) and (4). New subsection (3) provides that if a person has been permanently restricted from making an application for a reinstatement order, the National and Specialists Registers must record that fact. New subsection (4) provides that if new sections 328(2) or (4) (as inserted at clause 28) apply, the registers must record that the person cannot apply for a reinstatement order for a period specified by the responsible tribunal, or indefinitely, as the case may be.

Insertion of new s 56AA

Clause 27 modifies the National Law to omit new sections 237A (Protection from reprisals for persons making notifications or otherwise providing information, documents or assistance) and 237B (Non-disclosure agreements), as inserted by clause 22, as these provisions are covered in the amendments to the Health Ombudsman Act at clauses 10, 11 and 12.

Insertion of new ss 58 and 59

Clause 28 replaces new section 328 (Application for reinstatement order) in the National Law (as inserted by clause 23) to provide a transitional provision with respect to applications for reinstatement orders. It provides that a person who was disqualified from applying for registration for a specified period before this section commences, cannot apply for a reinstatement order until that specified period has ended. Further, if a person was indefinitely disqualified from applying for registration under the Health Ombudsman Act before this section commences, the person cannot apply for a reinstatement order at any time.

It also omits National Law section 329 (Application of s 237B) (inserted at clause 23) as this provision is covered in new section 320I (Application of s 263A) of the Health Ombudsman Act (inserted at clause 13).