



# Avant Position Paper

## Mandatory reporting

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# Mandatory reporting

Avant accepts that mandatory reporting has a role to play in appropriate situations, to ensure that the public is protected from the risk of significant harm.

Avant believes that regulators should ensure that mandatory notifications are properly assessed and filtered early to ensure that:

- ▶ action is only taken where the public is at risk of harm
- ▶ matters where notifications appear to have been made vexatiously (for example where competitive interests lie at the heart of the complaint) are filtered out to reduce the significant impact complaints of this nature can have.

Avant supports further research to explore concerns about the inappropriate use of mandatory reporting.

Avant calls for:

- ▶ adoption nationally of the Western Australia exemption from mandatory reporting obligations for the treating health practitioner
- ▶ amendments to the National Law to clarify mandatory reporting requirements including whether past action needs to be reported and to incorporate the high threshold required.

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## Background

Health practitioners, employers and education providers have a mandatory obligation under the Health Practitioner Regulation National Law (National Law) to report another health practitioner or a student to the Australian Health Practitioner Regulation Agency (AHPRA) in certain circumstances.

Mandatory reporting for medical practitioners was first introduced in New South Wales in 2008 in response to perceived failures of the regulatory system to protect the public from poorly performing practitioners.<sup>1</sup> This requirement was later extended nationally to all health professions regulated under the National Registration and Accreditation Scheme (National Scheme) that commenced operation in 2010.

Mandatory reporting seeks to protect patients from health practitioners who may not be fit to practise. It does so by requiring a health practitioner, who has a concern that another practitioner is acting in a way that is putting the public at risk, to report that practitioner to the regulator.

All practitioners have an obligation to report if they form a reasonable belief that another health practitioner has engaged in “notifiable conduct” (unless an exemption applies). A practitioner will have engaged in notifiable conduct if the practitioner has:

- ▶ practised the practitioner’s profession while intoxicated by alcohol or drugs; or
- ▶ engaged in sexual misconduct in connection with the practice of the practitioner’s profession; or
- ▶ placed the public at risk of substantial harm in the practitioner’s practice of the profession because the practitioner has an impairment; or
- ▶ placed the public at risk of harm because the practitioner has practised the profession in a way that constitutes a significant departure from accepted professional standards.<sup>2</sup>

The obligation to report includes reporting students who have an impairment that may place the public at substantial risk of harm in the course of undertaking clinical training.

A practitioner who fails to report another practitioner may themselves be the subject of disciplinary action.<sup>3</sup> There are some limited exemptions under the National Law.<sup>4</sup> Western Australia, unlike other jurisdictions, has a unique exemption (the “WA exemption”) so that in that state, a health practitioner is not required to report their patients who are health practitioners.<sup>5</sup>

This paper focuses on the mandatory reporting obligation as it relates to doctors.

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# The data on mandatory reporting

A recent study of mandatory notifications received by AHPRA (involving all health practitioners regulated under the National Law, not only doctors) reported that:

- ▶ 62% of mandatory notifications were made on the professional standards ground
- ▶ 17% related to impairment
- ▶ 13% related to practising while intoxicated
- ▶ 8% related to sexual misconduct
- ▶ in 80% of the notifications, the profession of the notifier and respondent were the same (where it was possible to identify their profession). 73% of these were doctor-on-doctor notifications.<sup>6</sup>

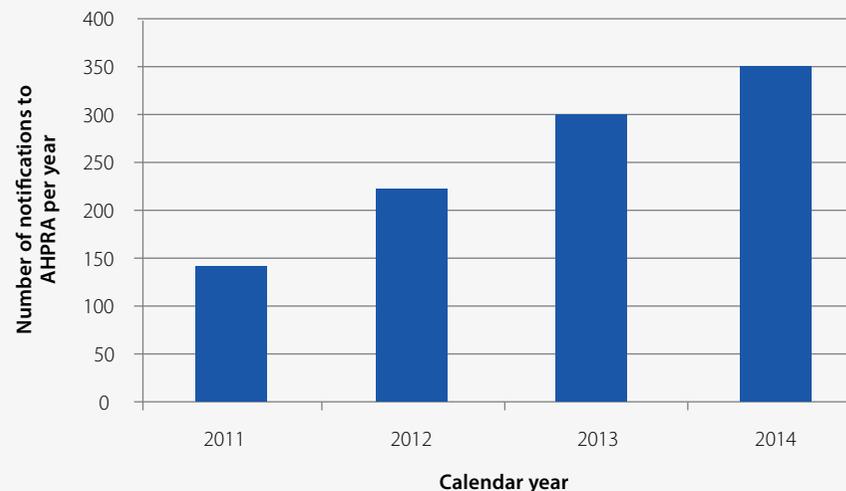
The medical profession has the highest mandatory notification rate of the 14 professions registered under the National Scheme at 27.2 notifications per 10,000 practitioners.<sup>7</sup> The number of notifications for medical practitioners has increased since the National Scheme's inception in 2010 with a 17% increase in mandatory notifications for doctors from 2013 to 2014.

The 2013/14 AHPRA annual report noted for medical practitioners that:

- ▶ 31% of all mandatory reports relate to doctors
- ▶ 6% of all notifications for medical practitioners are mandatory reports

- ▶ 61% of mandatory notifications for doctors at closure ended in no further action (excluding New South Wales)
- ▶ 52% of mandatory notifications of doctors ended in no further action in New South Wales.

**Figure 1: Number of mandatory notifications for registered medical practitioners<sup>8</sup> –2011-2014**

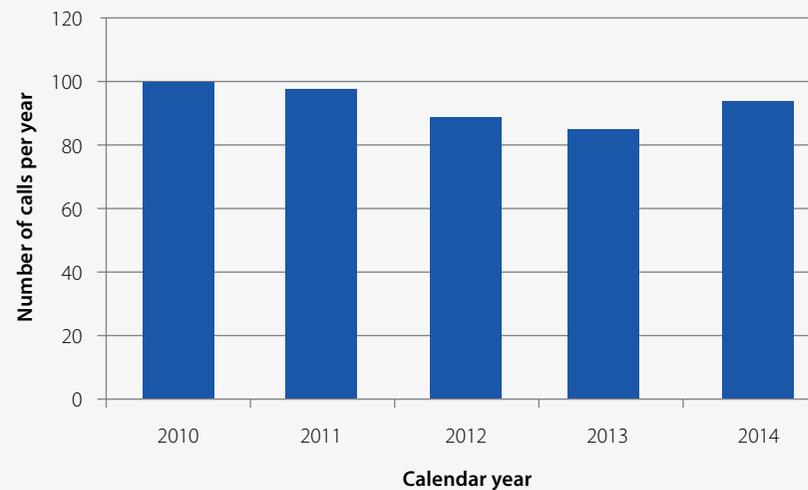


## Avant's experience

Avant is Australia's leading medical defence organisation representing more than 64,000 health practitioners and students. Avant assists medical practitioners in responding to patient complaints and notifications to AHPRA and health complaints entities, including notifications made under mandatory reporting obligations.

Avant's Medico-legal Advisory Service (MLAS) provides support and advice to members when they encounter medico-legal issues. Between 2010 and 2014, there have been approximately 90 calls per year from members seeking advice about their mandatory reporting obligations under the National Law.

**Figure 2: Number of MLAS calls about mandatory reporting for registered medical practitioners – 2010-2014**

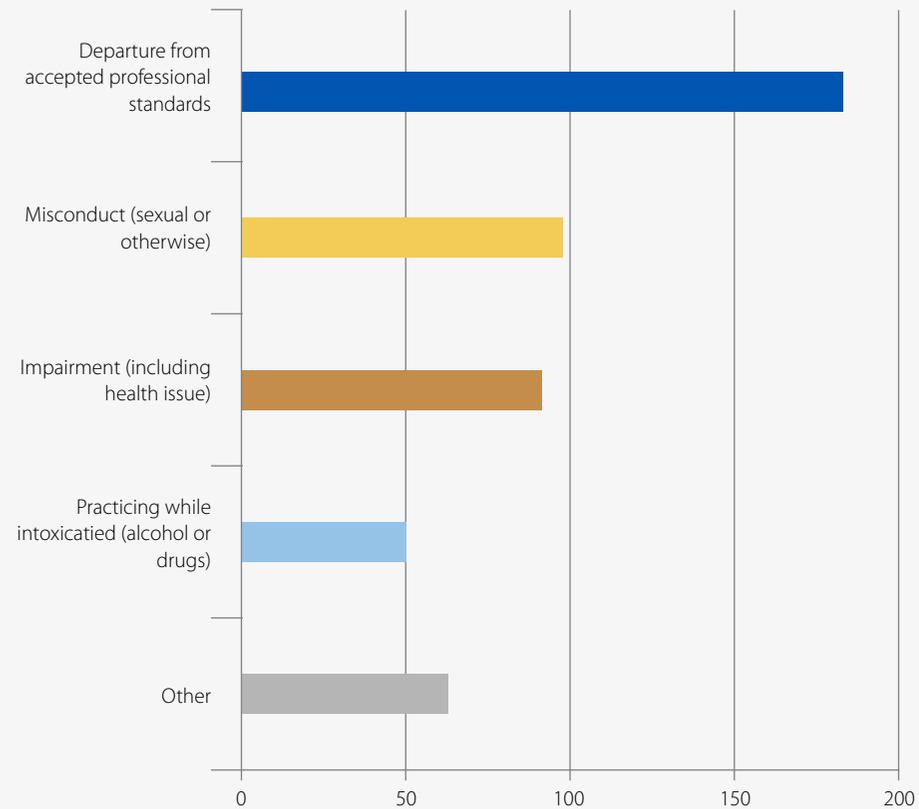


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Analysis of Avant MLAS calls data highlights the following:

- ▶ The majority of enquiries focussed on whether a practitioner's conduct met the high threshold of a significant departure from professional standards (39% of MLAS calls as identified in Figure 3).
- ▶ Alleged practitioner misconduct, including sexual misconduct, Medicare fraud, medication theft and behavioural issues, was raised in 20% of calls.
- ▶ Other calls included queries about practitioners practising whilst intoxicated or with health issues affecting their practice (physical impairment, mental illness, lack of cognitive ability etc.).

**Figure 3: Mandatory reporting grounds identified in MLAS calls – 2010-2014**



## Analysis and recommendations

### Inappropriate use of mandatory reporting obligations

Avant is concerned that mandatory reporting is being used vexatiously, for reasons other than protection of the public. In a survey of doctors carried out by Avant in April 2014, 30% of surgeons and 20% of physicians surveyed were concerned that mandatory reporting may be used for improper purposes such as being misused by competitors for anti-competitive reasons.

In Avant's experience, the professional standards ground of notifiable conduct is the provision, most likely to be used for improper purposes. Under this provision a doctor has a mandatory obligation to report another doctor to AHPRA where one practitioner has a reasonable belief another has engaged in conduct that (relevantly) has:

*Placed the public at risk of harm because the practitioner has practised the profession in a way that constitutes a significant departure from accepted professional standards.*

Avant has represented medical practitioners in over 20 matters resulting from mandatory reports (not only relating to professional standards, but also including other forms of notifiable conduct) where there is a genuine and reasonable perception by the practitioner under investigation that the report was made vexatiously or may have been motivated by reasons other than protection of the public. These types of reports can significantly affect a practitioner's health, finances and professional reputation.

Some of the issues associated with vexatious reporting could be alleviated by a focus on ensuring that further action is taken only in those complaints where the public is truly at risk of harm.

The following is an example of how the existing process for mandatory reports can affect a medical practitioner adversely.

#### Case study

A surgeon (Dr X) was the subject of complaints made in 2010 under the mandatory reporting provisions by two fellow practitioners. The complaints alleged that he was practising below the acceptable standard of care for his speciality because he had recommended or performed unnecessary surgery over a 15 year period, involving 26 patients.

The complaints were investigated by the relevant complaints body. The investigation took over 20 months and a decision was then made in 2012 to prosecute 17 of the 26 complaints in the relevant Tribunal. The hearing in the Tribunal was to commence in February 2014, over three and a half years after the initial mandatory reports were made. The decision to prosecute Dr X was based on the opinion of a peer reviewer that Dr X had acted below the required professional standards in his treatment of the patients.

Importantly, none of the 26 patients had made any complaint against Dr X. The conduct called into question was in no sense a "flagrant" breach of acceptable surgical standards which might endanger the public – rather each of the complaints required a fine clinical judgment to be made about best practice at the time and in the relevant context. This was not, in Avant's view, a case where the public was at genuine or serious risk of harm, and certainly not from a "bad doctor".

In December 2013, the complaints body indicated that it would withdraw all of the complaints (thus abandoning the Tribunal hearing) because of the expert opinion Avant had obtained on Dr X's behalf – the expert engaged by the complaints body indicated that he would defer to expert opinion obtained on behalf of Dr X. The legal costs in Dr X's case were significant. Had the matter run to a hearing as originally intended, it is estimated that it would have cost Dr X in excess of \$1 million and the complaints body significantly more than it had already spent.

Responding to these complaints over a considerable period of time had a devastating impact on Dr X financially, personally and professionally. His professional and personal reputation in his community was severely tarnished by an investigation at the end

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of which his professional conduct was accepted to have been entirely up to the standards set for him by his College and entirely satisfactory to his peers and patients.

Avant supports further research on this aspect of mandatory reporting to explore these issues.

Avant believes that regulators should ensure that mandatory notifications are properly assessed and filtered early to ensure that:

- ▶ action is only taken in those complaints where the public is truly at risk of harm
- ▶ matters where notifications appear to have been made vexatiously (for example where competitive interests lie at the heart of the complaint) are filtered out to reduce the significant impact complaints of this nature can have.

### Confusion over reporting requirements – lack of clarity in legislation

AHPRA has produced guidelines that outline the circumstances under which a report should be made. The guidelines clearly state that the threshold to make a mandatory report is high<sup>9</sup>.

Despite this guidance, in Avant's experience there is often confusion about when a mandatory reporting obligation exists, and the threshold that must be reached before a report is made.

One cause of confusion stems from the wording of the definition of "notifiable conduct" in the National Law, which is written in the past tense (see in Background above). This suggests that there is an obligation to report all past actions, even if the practitioner is no longer placing the public at risk. This is of particular concern in the context of impairment, and implies an obligation to report even if the practitioner is under active and successful treatment.

The wording of the New South Wales legislation introduced in 2008<sup>10</sup> and of the Queensland legislation<sup>11</sup> that preceded the National Law used the present and future tense rather than the past tense.

Avant supports further education of practitioners about their mandatory reporting obligations. Avant recommends:

- ▶ amendment of the National Law so that the definition of "notifiable conduct" is in the present tense
- ▶ amendment of the National Law to incorporate the high threshold that must be reached for mandatory reporting.

### Medico-legal Advisory Service call examples: seeking advice about whether to report

A doctor telephoned for advice about whether there was a mandatory reporting obligation in relation to a doctor-patient who had recently been charged with fraud for not filing tax returns for 17 years. There were no concerns about the doctor's ability to practise medicine.

Medico-legal Advisory Service call

A psychiatrist member sought advice on whether they had a mandatory obligation to report an allied health practitioner. The allied health practitioner had a mental health condition that caused them to behave inappropriately towards patients.

Medico-legal Advisory Service call

### Mandatory reporting as a barrier for practitioners seeking treatment

Avant shares widespread concerns that doctors who are ill, or impaired, may be reluctant to consult with a treating practitioner out of fear that they will be subject to having conditions placed upon their ability to practise.<sup>12</sup> Such an outcome could have a detrimental impact not only on the employment, health and wellbeing of the doctor in need of treatment, but ultimately on patient safety.

There is evidence to support this concern. Avant has heard many stories of doctors being fearful of seeking appropriate treatment because of the risk of being reported and the potential impact this could have on their reputations and ability to practise. In a survey of doctors carried out by Avant in April 2014, what most concerned 40% of general practitioners and surgeons and 33% of physicians surveyed about mandatory reporting was that it discourages doctors from seeking treatment for fear of being reported. Similarly, beyondblue's National Mental Health Survey of 12,252 doctors found that over 34% saw the impact of seeking treatment on their registration and their right to practise as a barrier to seeking help.<sup>13</sup>

#### Medico-legal Advisory Service call example: barrier to treatment

A doctor suffering depression and experiencing thoughts of self-harm indicated he would not seek treatment because he felt that a treating practitioner had a mandatory obligation to report him.

Medico-legal Advisory Service call

It has been reported that interstate doctors are travelling to Western Australia for treatment because of the exemption that exists in that state.<sup>14</sup> Western Australia, unlike other jurisdictions, has in place an exemption that covers health practitioners under treatment in these circumstances. The intent of the Western Australian exemption is that a treating practitioner is exempt from making a report where the practitioner was undergoing active treatment and did not impose a risk to the public. Avant agrees with this intention and this principle.<sup>15</sup>

Avant recommends that existing mandatory notification provisions throughout Australia be amended to address this issue, by the adoption nationally of the WA exemption.

National adoption of the WA exemption will lead to a nationally consistent approach to health practitioners under treatment which will be fairer to practitioners around Australia. It will reduce real and perceived barriers to treatment, so that doctors can obtain the treatment they need without the fear of being reported.<sup>16</sup>

There is widespread support for the national adoption of this exemption: it has been recommended by the Victorian Legislative Council's Committee on Legal and Social Issues and by a Senate Inquiry into the administration of health practitioner registration by AHPRA.<sup>17 18</sup> The Medical Board of Australia has indicated that it would not oppose amendments to the National Law.<sup>19</sup>

This amendment is unlikely to make a material difference to the rate of mandatory notifications.<sup>20</sup> Further, treating practitioners have an ethical obligation (which manifests in the voluntary notification provisions in the National Law<sup>21</sup>) so are able to report if they feel their practitioner-patient is a risk to the public. Avant believes that the public is adequately protected by the existence of voluntary notification provisions.

## Avant's position

Avant accepts that mandatory reporting has a role to play in appropriate situations, to ensure that the public is protected from the risk of significant harm.

Avant believes that regulators should ensure that mandatory notifications are properly assessed and filtered early to ensure that:

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Avant calls for:

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## Key links

- ▶ Avant's Health and Wellbeing website  
<http://www.avant.org.au/health-and-wellbeing/>
- ▶ Avant's Head of Advocacy, Georgie Haysom's co-authored article Mandatory reporting of health professionals: The case for a Western Australian style exemption for all Australian practitioners  
<http://www.avant.org.au/news/journal-of-law-and-medicine---mandatory-reporting-of-health-professionals/>
- ▶ Avant's Risk IQ Webinar Psychiatrists case study panel discussion  
<http://www.avant.org.au/resources/public/20120512-video-psychiatrists-case-study-panel-discussion/>
- ▶ ABC Radio National Background Briefing program, Doctors in distress  
<http://www.abc.net.au/radionational/programs/breakfast/concerns-mandatory-reporting-putting-doctors-at-risk/6090586>

## References

1. Goiran N, Kay M, Nash L, Haysom G. Mandatory reporting of health professionals: The case for a Western Australian style exemption for all Australian practitioners. *Journal of Law and Medicine* 2014; 22(1): 188-209.
2. Health Practitioner Regulation National Law Act 2009 (Qld) s140.
3. Health Practitioner Regulation National Law Act 2009 (Qld) s140; *The Medical Board of Australia v Al-Naser* [2015] ACAT 15.
4. Health Practitioner Regulation National Law Act 2009 (Qld) s140.
5. Goiran N, Kay M, Nash L, Haysom G. Mandatory reporting of health professionals: The case for a Western Australian style exemption for all Australian practitioners. *Journal of Law and Medicine* 2014; 22(1): 188-209.
6. Bismarck, M. Mandatory reports of concern about the health, performance and conduct of health practitioners. *MJA* 2014; 201(7): 399-403.
7. Australian Health Practitioner Regulation Agency. 2013/14 Annual Report: AHPRA and National Boards.
8. *Ibid.*
9. Australian Health Practitioner Regulation Agency. Guidelines for mandatory notifications – for registered health practitioners. March 2014.
10. Medical Practice Act 1992 (NSW), s 71A (1).
11. Health and Other Legislation Amendment Act 2009 (Qld).
12. Beyondblue 2013, National Mental Health Survey of Doctors and Medical Students, [http://www.beyondblue.org.au/docs/default-source/default-document-library/bl1132-report---nmhdmss-full-report\\_web](http://www.beyondblue.org.au/docs/default-source/default-document-library/bl1132-report---nmhdmss-full-report_web)
13. *Ibid.*
14. ABC Radio National: Background Briefing. Doctors in distress. 13 February 2015. [Available from: <http://www.abc.net.au/radionational/programs/breakfast/concerns-mandatory-reporting-putting-doctors-at-risk/6090586>]
15. Avant's submission to the Review of the National Registration and Accreditation Scheme for Health Practitioners.
16. Goiran N, Kay M, Nash L, Haysom G. Mandatory reporting of health professionals: The case for a Western Australian style exemption for all Australian practitioners. *Journal of Law and Medicine* 2014; 22(1): 188-209.
17. Legal and Social Issues Legislation Committee. Inquiry into the performance of the Australian Health Practitioner Regulation Agency, Report No. 2. Parliament of Victoria, 2014.
18. Community Affairs Legislation Committee. National registration and accreditation scheme for doctors and other health workers. The Senate, 2009.
19. ABC Radio National: Background Briefing. Doctors in distress. 13 February 2015. 20 Australian Health Ministers' Advisory Council. Review of the National Registration and Accreditation Scheme for health professions: Consultation paper. August 2014 21 Health Practitioner Regulation National Law Act 2009 (Qld) s144.
20. Australian Health Ministers' Advisory Council. Review of the National Registration and Accreditation Scheme for health professions: Consultation paper. August 2014
21. Health Practitioner Regulation National Law Act 2009 (Qld) s144.

# Contact us

## New South Wales

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Level 28, HSBC Centre, 580 George Street  
Sydney NSW 2000  
PO Box 746 Queen Victoria Building NSW 1230  
Telephone 02 9260 9000 Fax 02 9261 2921

## Queensland

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Level 11, 100 Wickham Street  
Fortitude Valley QLD 4006  
GPO Box 5252 Brisbane QLD 4001  
Telephone 07 3309 6800 Fax 07 3309 6850

## South Australia

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Level 1, 195 Melbourne Street  
North Adelaide SA 5006  
GPO Box 1263 Adelaide SA 5001  
Telephone 08 7071 9800 Fax 08 7071 5250

## Tasmania

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Suite 4, 147 Davey Street  
Hobart TAS 7000  
PO Box 895 Hobart TAS 7001  
Telephone 03 6223 5400 Fax 1800 228 268

## Victoria

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Level 2, 543 Bridge Road  
Richmond VIC 3121  
PO Box 1019 Richmond North VIC 3121  
Telephone 03 9026 5900 Fax 03 8673 5015

## Western Australia

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Level 1, 91 Havelock Street  
West Perth WA 6005  
PO Box 950 West Perth WA 6872  
Telephone 08 6189 5700 Fax 08 6189 5713

 **1800 128 268**  **avant.org.au**

1048 08/16 (0657-4)