



National Health  
Practitioner  
Ombudsman

# Submission

Preliminary consultation on the review of the  
Criminal history registration standard and  
other work to improve public safety in health  
regulation

14 September 2023

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# Submission

The office of the National Health Practitioner Ombudsman (NHPO) welcomes the opportunity to comment on the preliminary consultation on the review of the Criminal history registration standard (the Standard) and other work to improve public safety in health regulation.

The NHPO strives for fair and positive change in the regulation of registered health practitioners for the Australian community. The NHPO champions fairness through investigating complaints, facilitating resolutions and making recommendations to improve the regulation of Australia's registered health practitioners. The office's primary role is to provide oversight of bodies in the National Registration and Accreditation Scheme (National Scheme), including the Australian Health Practitioner Regulation Agency (Ahpra), the National Health Practitioner Boards (the Boards) and accreditation organisations. The office accepts:

- complaints to the National Health Practitioner Ombudsman (the Ombudsman)
- privacy complaints to the National Health Practitioner Privacy Commissioner (the Commissioner)
- applications for a review of Ahpra's Freedom of Information (FOI) decisions.

The Ombudsman and Commissioner is supportive of Ahpra and the Boards' commitment to improving the transparency of decisions regarding the criminal history of, and serious misconduct by, health practitioners.

## Complaints related to the Standard

In general, the NHPO does not receive a significant number of complaints about the Standard. Between 1 July 2020 and 31 August 2023, the NHPO received eight complaints relating to the Standard.<sup>1</sup> The office recorded 11 issues across these eight complaints.<sup>2</sup> The top two issues related to the complainant's concern that:

- an unfair or unreasonable decision had been made about the Standard
- the process was unfair.

The NHPO recorded 130 complaint issues across the five core registration standards between 1 July 2020 and 31 August 2023. The NHPO recorded fewer complaint issues about the Standard than for two of the other core registration standards, the English Language Skills Registration Standard and the Recency of Practice Standard (see Table 1).

**Table 1: Issues recorded across the core registration standards between 1 July 2020 and 31 August 2023**

Registration standard	Number of issues recorded
English language skills	95

<sup>1</sup> Please note that the 8 complaints were received from 6 different complainants.

<sup>2</sup> The NHPO can identify and record multiple issues on each complaint.

Recency of practice	20
Criminal history	11
Continuing professional development	3
Professional indemnity insurance	1

There could be a variety of reasons why the NHPO has received a low number of complaints about the Standard. Health practitioners may, for example, be reluctant to make a complaint to our office because of the sensitive nature of the concerns being raised and may feel uncomfortable about disclosing information that they are embarrassed or ashamed of. The NHPO further notes that decisions relating to a person's registration are typically appealable to the relevant tribunal, which may result in the NHPO receiving less complaints about this topic.<sup>3</sup>

## Criminal history registration standard

The NHPO is supportive of Ahpra and the Boards publishing more information about their decision-making on matters that require consideration of a person's criminal history. However, further clarification and guidance is required to clearly communicate the purpose of the Standard and the circumstances when it will be applied.

### Better articulating the Standard's purpose

The consultation paper outlines several ways that a practitioner's criminal history may be taken into consideration by the Boards, including in relation to decisions about whether:

- an applicant should be registered, or a health practitioner's registration renewed
- changes to a health practitioner's registration status are required if they commit a criminal offence while registered (including, for example, through immediate action)

The NHPO recognises that Ahpra has sought to outline the purpose of the Standard and how it relates to public safety and confidence. However, the NHPO suggests that the Standard's purpose and role could be better clarified.

### Ensuring the Standard's application is clear

The consultation paper suggests that the Standard is currently focussed on determining whether "a person's criminal history is relevant to the practice of their profession." The factors outlined in the Standard relate solely to this question. However, the NHPO suggests that the Standard has a broader aim than this. Determining whether criminal conduct is relevant to the practice of their profession is arguably the first of two components the National Law requires Ahpra and the Boards to consider. The second component is "to determine whether someone with a criminal history is a suitable person to be registered."

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<sup>3</sup> See section 199 National Law.

Despite this, the Standard does not explicitly address what it considers to be a ‘suitable person to be registered.’ As such, it is not clear what assessment framework is being used to weigh the different factors when making a decision, or the standard against which the assessment is being undertaken. It may be, for example, that the assessment framework to answer the question of suitability may be more appropriately derived from a public interest test or a risk-based rubric.

In addition, the NHPO found that the Standard could more clearly articulate how it relates to, and is applied, when a health practitioner is registered, but commits an offence, or is the subject of a notification. The consultation paper recognises, for example, that a health practitioner’s criminal history is used in the context of the Boards’ powers to take immediate action if it is in the public interest to do so. However, the Standard does not specifically address how it is applied if a criminal offence is committed when the practitioner is registered, nor how the information gained as part of their criminal history is considered when a notification is made about them.

The NHPO therefore suggests that there is a need to clarify the Standard’s application as it relates to immediate action decisions and the notifications process. Confusion about the relationship between the Standard and these processes could lead to inconsistent assessments, or assessments based on different criteria. This is because notifications are primarily decided upon based on a risk assessment, whereby the primary factor considered is the future risk the practitioner poses to the public. As outlined above, however, the purpose of the Standard is different, as it is focused on determining whether a person’s criminal history is relevant to the practice of their profession, and whether the person is suitable to be registered.

The NHPO suggests it is important that there is a clear distinction between the purpose of the Standard and the purpose of the notifications and immediate action processes. Clarity about how and when the Standard should be applied is necessary to ensure consistency.

### **Clarifying what is expected of applicants and health practitioners**

Currently, the Standard outlines a set of guiding factors for the Boards to consider when assessing whether “a person’s criminal history is relevant to the practice of their profession.” The Standard does not, however, set a clear expectation about what is expected of health practitioners and the standard they must meet.

In relation to determining standards regarding criminal history, the NHPO’s desktop review found that some other regulators specify criminal offences that preclude an individual from working in a respective profession. Requirements are therefore set based on what is not accepted (rather than what is). Applicants applying to become registered or reregistered as a teacher in Victoria will have their application refused if they have been charged, convicted or found guilty of a Category A offence.<sup>4</sup> Similarly, a person is precluded from working in aged care if they have been convicted of murder, sexual assault or imprisoned for any other form of assault.<sup>56</sup>

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<sup>4</sup> See *Education and Training Reform Act 2006* (Vic).

<sup>5</sup> Department of Health, *Aged Care Worker Screening Guidelines*, July 2021

<sup>6</sup> Please note that these requirements have a legislative basis.

Consistent with the approach adopted by comparable organisations, Attachment C of the consultation paper categorises offences. Category A offences are said to be incompatible with a person being granted or maintaining registration except for in the ‘most extraordinary of circumstances.’ However, the offences listed are expansive and because of this, there is no clear indication of whether certain offences would preclude a person from being registered, re-registered or maintaining their registration. Similarly, there is no guidance or further clarification as to what constitutes ‘extraordinary circumstances.’

The NHPO suggests that the Standard should clearly articulate whether certain offences preclude a person being registered in a health profession. Ahpra may wish, for example, to consider whether a refined version of Category A offences should be formalised as part of the Standard. Noting the variation of accepted language for offences in state and territory criminal codes, it may also be useful to adopt broad definitions to account for the different jurisdictions. The NHPO notes that consideration of such a change would require more comprehensive consultation, a sufficient evidence base, and an assurance that the Board retains discretion to make an exemption where necessary based on the specific circumstances of each applicant (and the criteria for doing so).

## Decriminalisation of an offence

In deciding whether a health practitioner’s criminal history is relevant to the practise of their profession, the Board considers whether an offence has been decriminalised. The Standard outlines that decision makers will ‘generally place less or no weight’ on offences that have been decriminalised since the health practitioner committed or allegedly committed the offence/s.

The NHPO suggests that offences that have been decriminalised should not be included in the relevant Boards’ consideration of a matter and should have no bearing on a health practitioner’s ability to practise. The decriminalisation of an offence, by its very nature, indicates that the behaviour should no longer be considered as criminal. It therefore seems counterintuitive that decriminalised offences should be considered as part of a practitioner’s criminal history.

## Confluence of issues related to professional and sexual misconduct and the criminal history standard

The consultation paper acknowledges that “on some occasions serious misconduct might be reported to the National Board that could be a criminal offence, but the police or prosecutors have chosen not to pursue a criminal charge, or a charge has been made and not proven.” The paper goes on to outline that Ahpra and the Boards therefore have similar approaches to considering criminal history and other serious misconduct by health practitioners.

The NHPO acknowledges that there may be some circumstances where serious professional misconduct has implications for a health practitioners’ criminal history. However, as outlined, not all findings of professional misconduct meet the threshold of a criminal offence. It is therefore important to make this distinction and consider how decision makers will decide on issues relating to serious professional misconduct in circumstances where it is not relevant to a person’s criminal

history. In these circumstances the Standard and the guiding factors that inform its application would not apply.

Further, while Ahpra has acknowledged that similar approaches are taken by the Boards when assessing a practitioner's criminal history and professional misconduct, no detail is provided about what these approaches are and how they vary. It is acknowledged that the public interest test in relation to immediate action may apply in both contexts. However, the relationship between professional misconduct and the Standard is not clear when a practitioner may engage in conduct, performance or behaviour that constitutes professional misconduct but is not criminal in nature.

The NHPO supports Ahpra and the Boards providing further information about how professional and sexual misconduct are managed. The NHPO suggests that information about how Ahpra and the Boards assess the seriousness of this conduct is essential to ensuring appropriate assessment and robust decision-making. The NHPO suggests that Ahpra and the Boards continue to develop and publish further resources about how professional and sexual misconduct matters are managed. These resources should not, however, be limited to considerations relevant to the criminal history standard.

## Management of serious professional misconduct, including sexual misconduct

In general, the NHPO is supportive of Ahpra and the Boards publishing more information about its approach to deciding on matters related to serious professional misconduct, including sexual misconduct.

It is also vital that Ahpra raises awareness about how it will support those coming forward with allegations of sexual misconduct and the process for managing notifications that may give rise to a finding of serious professional misconduct.

The NHPO would welcome the opportunity to consider further measures Ahpra and the Boards propose to support these aims.

## Publishing information about serious misconduct

It is widely accepted that entities providing services that benefit the public should be open and transparent about their processes. Public reporting on relevant processes is important for accountability. The NHPO is therefore generally supportive of Ahpra and the Boards publishing relevant information about decisions that are made concerning serious misconduct by health practitioners.

Publishing sufficient information about disciplinary decisions will ensure consistency across jurisdictions and allow the public to make more informed decisions regarding their healthcare. It also aligns with the scheme's paramount principle of public protection.

The proposal to publish insights and trends in relation to notifications and decisions about serious misconduct may also improve public trust and confidence in Ahpra and the Boards as health care regulators. This information could support efforts by various organisations and health care related

entities to respond to systemic issues and provide valuable data to assist in prioritising resources to address identified problems.

The NHPO notes, however, that the publishing of relevant information would need to appropriately consider rights to privacy and confidentiality under the National Law. Ahpra and the Boards would also need to ensure there are appropriate grievance processes for practitioners to raise concerns about the information published about them.

Our office would welcome the opportunity to provide feedback on further proposals related to publishing more information about disciplinary proceedings and the options for publishing reinstatement decisions.

## Support for people

As noted in the consultation paper, Ahpra currently operates a Notifier Support Service which assists some individuals in boundary violation matters before tribunals. Due to the inherent power imbalance between health practitioners and patients, it is important that appropriate supports are in place for notifiers to feel confident in raising their concerns. While this is particularly important in a tribunal setting, it is similarly important that there are support mechanisms in place for notifiers outside of this context if they wish to access such a service.

The NHPO supports a focus on expanding the Notifier Support Service to assist individuals who have been impacted by sexual boundary breaches and misconduct.

The NHPO notes that there are also opportunities to provide greater support to all notifiers. In New Zealand, for example, there is a Nationwide Health and Disability Advocacy Service which is free and provides independent advice about consumer's rights when using health or disability services. The service provides advice, including about how to make a notification about a health practitioner. Further, the Health and Disability Commissioner in New Zealand is empowered to receive notifications, and its role is to promote and protect rights as set out in the Code of Health and Disability Services Consumers' Rights. The NHPO encourages Ahpra and the Boards to continue considering further opportunities to ensure notifiers are supported throughout the notifications process.

## Research about professional misconduct

The NHPO agrees that the suggested research topics are valuable and would positively contribute to Ahpra and the Boards' knowledge base concerning serious misconduct matters.

Ahpra may also consider broadening the identified areas of research to include consideration of the effectiveness of existing regulatory measures to address professional and sexual misconduct. This could include measures from skills-based communication training to the use of gender restrictions.

It may also be beneficial to further examine the circumstances which may increase the risk of notifications being made in relation to misconduct, and continued misconduct. Further research on potential risk indicators, such as levels of supervision or other situational factors, may assist Ahpra and the Boards to better prioritise resourcing to address higher-risk issues.



## Contact details

The Ombudsman and Commissioner has welcomed the opportunity to provide these initial comments on the preliminary consultation on the review of the Criminal history registration standard and other work to improve public safety in health regulation.

Please feel free to contact the NHPO for further information about this response.

E: [REDACTED]

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