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To whom it may concern,

Re: Consultation on the review of the Criminal history registration standard and other work to improve public safety in health regulation

Thank you for inviting MIPS to respond to this consultation. MIPS is a member-based organisation that provides professional indemnity insurance to over 50,000 health practitioners and students. MIPS has extensive experience assisting its members respond to regulatory notifications that are investigated by Ahpra and referred to National Boards for regulatory sanctions, including matters arising from criminal conduct.

MIPS commends the work of Ahpra in ensuring that its registration standards remain current and fit-for-purpose and in its ongoing efforts to maintain a paramount focus on public protection. However, MIPS has long argued that this must be achieved through fair and transparent regulatory processes. It is critical that Ahpra's registration standards and any associated decision-making guidance adequately considers the importance of striking the right balance. Caution needs to be exercised when drawing broad assumptions about the categories of criminal offending and their connection, or lack thereof, to a practitioner's suitability to practise.

Focus area one – The Criminal history registration standard (Attachment A)

1. **The Criminal history registration standard (Attachment A) outlines the things decision-makers need to balance when deciding whether someone with a criminal history should be or stay registered such as the relevance of the offence to practice, the time elapsed and any positive actions taken by the individual since the offence or alleged offence. All decisions are aimed at ensuring only registered health practitioners who are safe and suitable people are registered to practise in the health profession. Do you think the criminal history standard gets this balance right? If you think the Criminal history registration standard does not get this balance right, what do you think should change to fix this?**

MIPS believes that the Criminal History Registration Standard ("the Standard") appropriately balances completing considerations when making regulatory decisions on the basis of a criminal history. However, the Standard lacks the detail of Attachment B. MIPS suggests that much of the content of Attachment B could be incorporated into the Standard.

2. **Do you think the information in the current Criminal history registration standard is appropriate when deciding if an applicant or registered health practitioner's criminal history is relevant to their practice? If not, what would you change?**

As set out in 1, MIPS believes that the information contained in Attachment B is useful not only for decision-makers, but also for the public and for practitioners to whom the Standard applies. In the interests of greater transparency, MIPS believes that much of Attachment B could be usefully incorporated into the Standard to provide more detailed information to

practitioners about how regulators determine the relevance of a practitioner's criminal history to their practice. This could provide practitioners with significant reassurance about the aims and priorities for regulators, especially if practitioners are required to disclose minor traffic infringements.

3. **Do you think the information in the current Criminal history registration standard is clear about how decisions on whether an applicant or registered health practitioner's criminal history is relevant to their practice are made? If you think it is not clear, what aspects need further explanation?**

See answers 1 and 2.

4. **Is there anything you think should be removed from the current Criminal history registration standard? If so, what do you think should be removed?**

Nothing needs to be removed from MIPS' perspective.

5. **Is there anything you think is missing from the 10 factors outlined in the current Criminal history registration standard? If so, what do you think should be added?**

The current Standard focuses on factors that might be relevant to a practitioner's practice, but does not specifically highlight factors that might not be relevant to a practitioner's practice. The Standard appears to focus heavily on aggravating factors, rather than mitigating factors. The consideration of mitigating factors is also relevant to public protection, particularly if it means avoiding lengthy regulatory investigations or prevents unnecessary delays in granting registration to practitioners in the context of workforce shortages.

6. Is there anything else you would like to tell us about the Criminal history registration standard?

No.

Focus area two – More information about decision-making about serious misconduct and/or an applicant or registered health practitioner's criminal history

7. Do you support Ahpra and National Boards publishing information to explain more about the factors in the Criminal history registration standard and how decision-makers might consider them when making decisions? Please refer to the example in Attachment B. If not, please explain why?

Yes. MIPS is supportive of Ahpra and the National Boards publishing Regulatory Guidance that supports a consistent approach to decision-making. However, MIPS urges that it must include balanced evidence-based information that neither over-states nor downplays the relevance of certain criminal offending to a practitioner's suitability to practise. Information contained in these Regulatory Guidance notes must be fair, transparent, and accurately reflect Court and Tribunal jurisprudence.

8. Is the information in Attachment B enough information about how decisions are made about practitioners or applicants with a criminal history? If not, what is missing?

The information in Attachment B is helpful and sets out the broad factors that should be considered by decision-makers when making regulatory decisions about a practitioner's criminal history. However, MIPS believes that further information could be incorporated into Attachment B, as outlined in 9.

9. Is there anything else you would like to tell us about the information set out in Attachment B?

Yes. The following table sets out some suggestions and comments in relation to Attachment B.

Paragraph	Problem	Suggested amendment
1	Attachment B clearly states that "public protection" is the primary goal of the Standard, but fails to state that punishment is not a goal of Ahpra. This is especially germane in the context of a Criminal History Registration Standard.	Add a second sentence to paragraph 1 that states "Punishment of practitioners is neither a goal of the National Law, nor of the the Criminal History Registration Standard".
3 & 4	These two paragraphs define "nature" and "gravity" but seem out of place in the middle of this section. It is also not clear that they are intended to be definitions.	These two paragraphs might be better placed at the beginning of this section and clearly marked as definitions. For example: *"Nature"* refers to… *"Gravity"* refers to…
14	While minimising or denying responsibility can be an aggravating factor, this needs to be balanced against the right of practitioners to reasonably resist allegations or prior findings, without fear that their resistance will unreasonably count against them in a regulatory context.	Suggest changing to: "information that the individual continues to **unreasonably** deny responsibility"
17	It ought not be assumed that the conduct occurred simply because it is alleged.	…"where the nature of the **alleged** conduct or behaviour"…
26	Offences committed overseas where the behaviour is not an offence in Australia would, in most cases, be irrelevant. To reassure practitioners who may have suffered traumatic experiences overseas, this could be more reassuringly worded.	Suggest changing "may not" to "will not usually".
28	The first half of this paragraph talks about how suitability to practise the profession relates to public safety. However, the second half relates to **public confidence** but does not explain how the nature or gravity of offending or its connection to the practice of healthcare will differ when considering public confidence as opposed to public safety.	Suggest a new paragraph 29 that clearly sets out how public confidence will be determined, where a practitioner with a criminal history is found not to pose a risk to public safety. Is the threshold different? If so, how? What factors will be considered by the regulator? Public risk and public confidence are related but separate concepts, and regulators must be clear the basis upon which regulatory decisions are founded. These are important matters that must be clearly articulated by the regulator.

10. Thinking about the examples of categories of offences in Attachment C, do you think this is a good way to approach decision-making about applicants and registered health practitioners with criminal history? If you think this is a good approach, please explain why. If you do not agree with this approach, please explain why not.

Unlike Attachment B, MIPS does **not** consider the approach in Attachment C helpful. Attachment B sets out in detail the relevant factors that decision-makers should consider when making regulatory decisions based on a criminal history. Importantly, Attachment B discusses the relevant aggravating and mitigating factors that decision-makers should consider, and paragraph 6 specifically mentions examples of the type of criminal convictions that might be relevant. Attachment B also recognises and discusses the nuances of criminal offending, by highlighting that some more serious matters might not give rise to a risk of harm to the public, whereas some less serious matters might give rise to a risk of public harm. On the other hand, Attachment C reduces a criminal history to three broad categories that may be helpful when generally considering the spectrum of gravity of offences, but is less helpful when considering how those offences relate to a practitioner's suitability to practise or be registered.

Therefore, MIPS suggests that a non-exhaustive list of examples under Categories A, B and C could be included in tabular form immediately after paragraph 6 of Attachment B. This would provide greater context and understanding for users of the document. Over-reliance on Attachment C in isolation may mislead practitioners and decision-makers.

11. Do you think there are some offences that should stop anyone practising as a registered health practitioner, regardless of the circumstances of the offence, the time since the offence, and any remorse, rehabilitation, or other actions the individual has taken since the time of the offence? Please provide a brief explanation of your answer. If you answered yes, please explain what you think the offences are.

No. Every citizen, including a registered health practitioner, has a right to a fair and timely decision. Some criminal convictions may relate to extremely serious conduct that, *prima facie*, puts the public at ongoing (or even long-term) risk of significant and unacceptable harm. While the threshold for demonstrating a connection between a criminal history and the practitioner's practice of their profession may be very low in cases involving very serious offences, Ahpra and the National Boards must, in every case, be able to identify and enunciate a contemporaneous connection between past proven criminal misconduct and the current practice of the practitioner's profession. This necessitates an examination of the evidence adduced in any criminal proceedings as well as the matters outlined in Attachment B. Regulators should be wary of relying on decisions made by different bodies, with different functions, addressing different questions at a different time – especially where criminal findings of guilt do not specifically address issues of public protection from a regulatory perspective.

12. Is there anything else you would like to tell us about the possible approach to categorising offences set out in Attachment C?

No.

Focus area three – Publishing more information about decisions that are made about serious misconduct by registered health practitioners

13. Were you aware that disciplinary decisions by tribunals about registered practitioners were published to Ahpra and National Board websites and are linked to an individual practitioner's listing on the public register?

Yes.

14. Do you think decisions made to return a practitioner to practice after their registration has been cancelled or suspended (reinstatement decisions) for

serious misconduct should be published where the law allows? Please explain your answer.

See MIPS' response to question 15 below. MIPS does not support including a practitioner's disciplinary history on the public register, other than when conditions or a suspension are currently being served. MIPS believes that it is critical to differentiate the public's *right* to know about a practitioner's disciplinary history from their *need* to know. However, were this practice to commence (or continue, in the case of publishing Tribunal links), MIPS believes that it is important that all information is available to the public, including information that sets out the reason why a practitioner's registration was reinstated. In other words, if the public is going to be informed of prior risks and sanctions, then the public ought to also be informed of relevant current protective or mitigating factors. This would ensure that information on the register was fair and balanced.

15. Is there anything else you would like to tell us about the approach to publishing information about registered health practitioners with a history of serious misconduct?

MIPS reiterates its position previously advanced in response to Ahpra's proposed Data Strategy that included questions about inclusion of information on the public register. MIPS does **not** support Ahpra or the National Boards adding health practitioners' disciplinary history to the public register. MIPS also does not support the current practice of attaching links to prior tribunal decisions about individual practitioners on the public register. This is for the following reasons.

First, the case for adding this information is weak. If existing regulatory processes and sanctions are effective and fit-for-purpose, then the public should be sufficiently confident that when a National Board restricts a practitioner's registration (through the imposition of conditions or a suspension, or the acceptance of an undertaking), that action was necessary to protect the public from an identified risk of harm posed by that practitioner. Likewise, the public should be sufficiently confident that once a National Board lifts a practitioner's restrictions, it is because a previous risk to the public no longer exists or can no longer be identified. Clearly, if there is determined to be an ongoing risk, then existing sanctions should be used to manage that risk. This would not only provide better protections for the public, but would also ensure that practitioners can access avenues of review or appeal.

Second, MIPS questions whether the inclusion of a practitioner's disciplinary history is evidence-based or consistent with the theory of "right-touch regulation". Regulatory action should be guided by an assessment of the nature of possible harms, an assessment of the likelihood and severity of the risks posed, and an assessment of whether regulatory interventions can control perceived risks. In a criminal context, overseas public registers that include identifying information about individuals convicted of serious offences have been shown not to improve public safety and do not reduce the risk of recidivism. Likewise, there is no evidence that inclusion of a practitioner's disciplinary history would improve public safety or reduce future substandard professional conduct or performance. Once current sanctions have expired or been lifted, MIPS believes that the public neither has the right nor the need to know the details of the practitioner's disciplinary history because they lack relevance to the practitioner's current risk.

Third, MIPS is very concerned that the inclusion of a practitioner's disciplinary history may also undermine efforts by that practitioner to reintegrate into their profession or workplace, or to successfully rehabilitate following a period of impairment. In those circumstances, continuing to publish a practitioner's disciplinary history could have ongoing consequences for practitioners, beyond the intended protective effect of regulatory action. MIPS believes that the same holds true with respect to the existing practice of including links to tribunal decisions.

Fourth, MIPS believes that a practitioner's disciplinary history should not be included on the public register as a vehicle for protecting the reputation of the regulator. MIPS understands the concerns raised by Ahpra that where prior conditions have been reported in the media and remain in the public domain, the public might question why they do not appear on a

public register. However, MIPS believes that public confidence in the regulator must be clearly differentiated from public protection, which must be secured with as little impact on practitioners as possible, consistent with their purpose. Protection of the reputation of the regulator is not a guiding principle under the National Law.

Finally, although MIPS is opposed to any disciplinary history appearing in the public register, MIPS is especially opposed to the following information being included on the public register:

- Notifications: MIPS is concerned that the inclusion of notifications (as opposed to sanctions) would be punitive and unfairly prejudicial to the interests of practitioners. The inclusion of unsubstantiated notifications may be confusing or misleading to the public, which may place undue weight on allegations or assertions, rather than on proven facts.
- Immediate action: MIPS strongly opposes any move for the outcomes of prior immediate action to be included on the public register, especially where the final regulatory outcome is that no further action was taken. One of the inherent limitations that regulators face in taking immediate action is that it is based on serious allegations alone without the ability to test evidence or reach conclusions of fact. This already puts practitioners in a challenging evidentiary position. Information about these interim decisions should not appear on the public register because they are based on incomplete information and untested assertions.
- Health impairment: health information about practitioners is especially sensitive and personal. There is growing evidence that fear and shame associated with mental health and substance use challenges limits practitioners' willingness to seek help early. The publication of details about health impairments on the public register would be particularly disastrous for unwell practitioners, who should be afforded a degree of privacy and circumspection to allow them to recover and regain their health. If practitioners knew that information about their health would appear on the public register, this could act as a further disincentive to seek support and treatment for their health. This could paradoxically increase the risk of harm to the public. The threat of inclusion of health information on the public register would impede Ahpra's commitment to improve the regulatory experience for impaired practitioners.

Focus area four – Support for people who experience professional misconduct by a registered health practitioner

> **16. What do you think Ahpra and National Boards can do to support individuals involved in the regulatory process who are affected by sexual misconduct by a registered health practitioner? (For examples, see paragraph 47 of this paper.)**

MIPS recognises that support for individuals affected by sexual misconduct is critical, not only for their own wellbeing, but to ensure those who come forward to report misconduct feel validated and can do so in an environment of psychological safety. Ahpra can and should continue to adopt trauma-informed processes, not only for the benefit of notifiers, but also for registrants who are subject to regulatory processes.

> **17. Is there anything else you would like to tell us about how we can support individuals affected by a registered health practitioner's professional misconduct?**

No. MIPS is supportive of Ahpra assisting notifiers who report sexual misconduct. However, it is critical that, as a regulator making regulatory decisions about registrants, Ahpra maintains neutrality and does not involve itself in matters that might undermine its capacity to remain unbiased or that engage resources in a way that delays the expeditious investigation of notifications. If Ahpra were to provide support as proposed in paragraph 47 of the consultation paper, this would need to be clearly at arms-length from its regulatory functions.

Focus area five – Related work under the blueprint for reform, including research about professional misconduct

18. Are the areas of research outlined appropriate?

MIPS agrees that empirical research into what conduct impacts the public's confidence is critical in shaping frameworks for decision-making in this space. Understanding what the public expects of practitioners and regulators will assist in informing what matters are important to weigh when considering "public interest". Of particular relevance would be research that examines how the public views criminal conduct or allegations that are unrelated to the practitioner's practice of their profession and occur outside a therapeutic context. It is also critical that any research in this area asks questions that tease out how the public reasonably expects regulators to respond to such conduct, especially in circumstances where conduct may be alleged rather than proven. For example, any research that examines public confidence needs to ask participants whether they think it is appropriate for regulators to take action against practitioners on the basis of untested and unproven allegations and, if so, what factors are relevant considerations when determining when and if to take action.

19. Are there any other areas of research that could help inform the review? If so, what areas would you suggest?

Ahpra is unique among global regulators in that it has been collecting national data relating to nearly 800,000 practitioners across multiple health professions for over a decade. Using its own administrative data, Ahpra could commission research to retrospectively examine the relationship between a prior criminal history disclosed to it by a practitioner and their future risk of complaints or notifications arising. Ahpra has a responsibility to practitioners and the public to be basing its regulatory approach and strategy on evidence.

Additional question (This question is most relevant to jurisdictional stakeholders):

20. Are there opportunities to improve how Ahpra and relevant bodies in each jurisdiction share data about criminal conduct to help strengthen public safety?

Although MIPS is unable to identify opportunities in this space, MIPS is supportive of proposals that reduce the regulatory burden and red tape for practitioners, while also protecting their privacy and promoting their agency when it comes to decisions that are made about their personal information.

Please do not hesitate to contact me if you require any further information. I can be contacted on [redacted] or [redacted].

Yours sincerely

Dr Owen Bradfield
Chief Medical Officer, MIPS