



National Health
Practitioner
Ombudsman

Submission

Data strategy

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Contents

- Submission..... 4**
- Determining the current state4
- Statements of intent, domains and objectives5
- Confidentiality and privacy.....6
- Information security.....8
- Transparency and accountability9
- Cost recovery..... 10
- Register of practitioners..... 11
- Data sharing 16
- Advanced analytics..... 19
- Contact details22**

Submission

The office of the National Health Practitioner Ombudsman (NHPO) is pleased to provide this submission in response to the Australian Health Practitioner Regulation Agency's (Ahpra) public consultation on its draft data strategy.

The NHPO champion fairness through investigating complaints, facilitating resolutions and making recommendations to improve the regulation of Australia's registered health practitioners. Its primary role is to oversight bodies in the National Registration and Accreditation Scheme (National Scheme), including Ahpra and the 15 National Health Practitioner Boards.

The NHPO recognises the importance of ensuring the data Ahpra collects, uses and holds supports its primary objective of protecting the public, while ensuring it complies with the confidentiality and privacy requirements of the Health Practitioner Regulation National Law (the National Law), the Privacy Act 1988 (Cth) (the Privacy Act) and other relevant legislation.

This submission is largely based on the information the NHPO has received and considered as part of its complaints handling work, including complaints to both the National Health Practitioner Ombudsman and the National Health Practitioner Privacy Commissioner. The NHPO also draws on the Commissioner's role in receiving notifications from Ahpra of eligible data breaches under the Notifiable Data Breaches Scheme and overseeing Ahpra's plan to comply with the Information Publication Scheme.

Due to the nature of the NHPO's role in the National Scheme, this submission focusses on considering and providing suggestions related to good and lawful administrative decision-making. This includes a focus on ensuring that Ahpra's data strategy appropriately considers relevant privacy and information security requirements, and the principles of transparency and accountability.

Determining the current state

The draft strategy's remit is broad. The consultation paper states that it is a:

... 'high level' guiding framework to inform how we [Ahpra] use and share the data we collect and hold. It focuses on how we use our data internally, as well as how we share data externally. It does not include the plan for implementing the strategy, which is subject to finalising the strategy.

The development of a successful data strategy is predicated on Ahpra ensuring it has a thorough understanding of its current state and capabilities regarding data and information management. The NHPO found that the consultation paper did not provide significant detail regarding the data Ahpra currently collects, uses and discloses or in-depth analysis regarding its current approach to data or information management. Audits of information that is currently collected, and analysis of existing data sharing arrangements, provide necessary context for the development of a realistic and relevant data strategy.

The NHPO acknowledges that without the necessary context regarding the current state of Ahpra's data, it is challenging to provide a more comprehensive response to the suggested ideas in the consultation paper.

Suggestion

Ahpra ensures it has conducted a thorough review of its current state, including an audit of its data systems, and undertakes consultation internally regarding its strengths and areas for improvement.

Statements of intent, domains and objectives

The NHPO recognises the importance of Ahpra establishing overall objectives in relation to collecting, using, disclosing and storing information. Similarly, the NHPO supports the regulator's action to better articulate the principles behind its decision-making in relation to sharing data.

The draft strategy outlines five statements of intent and four domains and objectives: regulatory efficiency and effectiveness, trust and confidence, insight generation and shared data value.

However, the NHPO suggests that the draft data strategy would benefit from clearer articulation of Ahpra's overall vision and objectives. The NHPO suggests that using vision statements and objectives which more closely relate to the regulator's role will allow it to develop a resulting action plan that is focussed on achieving its regulatory aims. Examples of vision statements provided by the Office of the National Data Commissioner include, for example:

- Data drives decision-making to achieve policy outcomes
- Public trust is enhanced through transparent collection and use of data
- Data is F.A.I.R (findable, accessible, interoperable, and reusable).¹

Suggestion

Ahpra clarify its vision for its data strategy in line with its legislative framework and regulatory functions.

¹ Office of the National Data Commissioner, The Foundational Four – Starting an ongoing data improvement journey, Commonwealth of Australia, 2020. Accessed January 2023: www.datacommissioner.gov.au/node/105

Confidentiality and privacy

In general, Ahpra is required to keep information that has come into its possession while exercising its functions confidential, except in limited circumstances.²

As outlined in Ahpra's privacy policy, it also chooses to act consistently with the requirements of the Privacy Act and the 13 Australian Privacy Principles (APPs). The APPs outline standards, rights and obligations related to:

- collecting, using and disclosing personal information
- governance and accountability
- integrity and correction of information
- an individual's right to access their personal information.³

The NHPO acknowledges that one of the draft data strategy statements of intent reads, "We respect the privacy of an individual's data." However, the NHPO suggests that this statement does not accurately convey Ahpra's legislative responsibilities to protect personal information – 'respecting' an individual's privacy in relation to their data does not connote that Ahpra is legislatively obliged to protect personal information. Indeed, when viewing the one-page summary, it is not clear that Ahpra has governing legislation it is required to comply with, and that non-compliance can have significant consequences. The NHPO suggests that Ahpra strengthen the language used regarding the protection of personal information to better reflect its obligations and the circumstances which require the appropriate use, collection, storage and disclosure of information.

Suggestion

The data strategy should clearly articulate Ahpra's legislative responsibilities regarding privacy and the protection of personal information.

Privacy by design

The NHPO acknowledges that the consultation paper clearly outlined that Ahpra intends to comply with its privacy obligations under the National Law and the Privacy Act. However, the NHPO suggests that it is important Ahpra embraces a 'privacy by design' approach for its data strategy. This approach recognises that it is easier to proactively manage potential privacy risks, rather than retroactively address them if issues arise. According to the Office of the Australian Information Commissioner (OAIC), privacy by design is a

...process for embedding good privacy practices into the design specifications of technologies, business practices and physical infrastructures. This means building privacy into the design specifications and architecture of new systems and processes.⁴

² See s. 216 of the National Health Practitioner Regulation Law

³ OAIC, Australian Privacy Principles. Accessed January 2023: www.oaic.gov.au/privacy/australian-privacy-principles

⁴ OAIC, Privacy by design. Accessed January 2023: www.oaic.gov.au/privacy/privacy-for-organisations/privacy-by-design

Privacy Impact Assessments

The first step to ensuring good privacy practices are built in is to identify how privacy may be affected through a privacy impact assessment (PIA). A PIA would involve identifying the impact that Ahpra's proposed actions may have on individuals' privacy to make recommendations for how to manage, minimise and eliminate those impacts.⁵ The NHPO acknowledges that Ahpra's privacy policy similarly states that PIAs are undertaken to ensure projects comply with it. Given the significance of any changes to Ahpra's approach to managing data, the NHPO suggests that the data strategy should be accompanied by a PIA.

In addition, the NHPO suggests that a PIA will be necessary for any future projects Ahpra intends to undertake as part of the data strategy's action plan. Conducting PIAs for each individual project could result in Ahpra adopting simple actions to address potential privacy risks, such as deidentifying data prior to disclosure where appropriate.⁶ The NHPO suggests that including the PIA in consultation documents may also assist those considering the proposed changes to better understand how Ahpra seeks to comply with its legislative requirements.

As outlined by the OAIC, there may also be benefits in seeking an independent review of the PIA. The NHPO suggests this is particularly important given the significance of potential changes to Ahpra's data use related to the data strategy. An independent review can help ensure the PIA is comprehensive and the recommendations are evidence-based and effectively implemented.

Collection statements/privacy notice

APP 5 requires Ahpra to take reasonable steps when collecting personal information about an individual to notify them or make them aware of:

- its name and contact details
- the fact and circumstances of collection
- whether the collection is required or authorised by law
- the purposes of collection
- the consequences if personal information is not collected
- the usual disclosures of personal information of the kind collected by the entity
- information about its Privacy Policy
- whether it is likely to disclose personal information to overseas recipients, and if practicable, the countries where they are located.⁷

The NHPO suggests that close attention is paid to whether Ahpra's existing collection statements or privacy notices would need to be updated in light of any changes suggested through consultation on the draft data strategy.

⁵ Ibid.

⁶ Successfully deidentified data is no longer defined as personal information under the Privacy Act.

⁷ OAIC, Chapter 5: APP 5 – Notification of the collection of personal information. Accessed January 2023: www.oaic.gov.au/privacy/privacy-for-organisations/privacy-by-design

Suggestion

Ahpra adopt a 'privacy by design' approach to developing its data strategy and actions stemming from it, including undertaking a Privacy Impact Assessment where appropriate and updating or creating accurate collection statements/privacy notices.

Information security

The importance of ensuring information security as part of Ahpra's data strategy cannot be understated. The NHPO notes that while there is mention of Ahpra's Information Security policy in the consultation paper, ensuring information security does not appear to be a focus of the draft data strategy.

Recent events have reinforced to community members the importance of ensuring personal information is stored securely and is protected against unauthorised access, including hacking. Inappropriate or mishandling of personal information can undermine trust and confidence in Ahpra and can lead to significant harms for individuals. It is vital that Ahpra proactively considers information security concerns when developing its data strategy.

Legislative framework

The NHPO notes that the consultation paper does not mention Ahpra's records management responsibilities, or information and data security requirements. There are complexities associated with the legislative framework which governs Ahpra's responsibilities regarding record management and information and data security, as it is based on the relevant legislation of the relevant states and territories. Nevertheless, due to the importance of securing personal information, the NHPO suggests that Ahpra further considers the protective security framework it is currently using or is planning to use.

The NHPO notes that Australian Government agencies must comply with policies outlining the relevant requirements for protective security and standardised information security practices across government. These policies include the:

- Attorney-General's Department's [Protective Security Policy Framework](#) (the Framework)
- Australian Signals Directorate's [Information Security Manual](#) (the Manual).

Information security risk assessments

An information security risk assessment (ISRA) involves the identification and evaluation of security risks, and the potential impacts of these risks to information.⁸ An ISRA facilitates a review of information security controls, and the regular review and monitoring of these controls is essential. ISRAs are commonly undertaken alongside a PIA.

⁸ OAIC, Guide to securing personal information. Accessed January 2023: www.oaic.gov.au/privacy/guidance-and-advice/guide-to-securing-personal-information

The NHPO suggests that ISRAs are likely also a necessary consideration for Ahpra's data strategy, and certain projects stemming from its action plan. ISRAs are particularly important while Ahpra considers new uses or methods for storing or sharing information, particularly given technological security risks are constantly evolving.

Suggestions

Ahpra considers its information security and record management obligations and undertakes information security risk assessments for its data strategy and relevant actions or plans which stem from it.

Transparency and accountability

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 Information Publication Scheme established under the Freedom of Information Act 1982 (Cth) (FOI Act) has an intrinsic link to Ahpra's data strategy. As required from 2019, Ahpra, the National Boards and Ahpra's Board have shared information as part of their Information Publication Plan. Under this plan, Ahpra is required to publish:

- its Information Publication plan
- details about its role and structure
- details of certain statutory appointments
- details of consultation arrangements for members of the public to comment on policy proposals
- information that is routinely provided through Freedom of Information requests
- information that the agency routinely provides to Parliament
- contact information to seek access to information
- operational information that assists to perform or exercise functions or powers in making decisions or recommendations that affect members of the public.

Ahpra publishes a range of data and information about registered health practitioners, including in its annual reports, profession-specific reports, workforce data, performance reports and quarterly registration data. The NHPO recognises the unique value this provides, and the depth of information that is already publicly available in relation to many areas of interest in the National Scheme.

The role of additional publicly available deidentified data

The NHPO suggests that Ahpra further considers how its data strategy can build on the intentions outlined in its Information Publication Plan. In particular, the NHPO acknowledges that a range of the suggestions considered in the consultation paper would likely be subject to the plan, including for example, data relied on to determine risk factors relevant to Ahpra's risk assessments.

The NHPO suggests that greater transparency about Ahpra's performance is important, and its efforts to provide deidentified data to the public about issues of interest could be further enhanced.

For example, Ahpra recently released data and information regarding the overseas qualified health practitioner workforce.⁹ Providing data about an issue of public importance can have multiple benefits. In relation to releasing deidentified information about the overseas qualified health practitioner workforce, for example, benefits included:

- informing the public about how Ahpra exercises its functions in relation to an issue of national importance
- raising awareness about how applicants can avoid known problems which are likely to increase the time taken to finalise assessments of overseas practitioner’s qualifications.

This example also highlights that successfully deidentified data, which does not pose risks to individual privacy, can be used to provide insight into Ahpra’s processes. This in turn can offer opportunities to consider how to improve these processes and communicate these solutions to those affected.

Suggestion

Ahpra continue to make deidentified data publicly available that is of public interest and helps to explain its role and performance of its functions in the National Scheme.

Ahpra consider mechanisms to use deidentified data to improve internal processes, including issues such as the likely causes of delay in finalising a matter.

Cost recovery

The NHPO notes that an objective outlined in the draft data strategy relates to ensuring data provision and services are “subject to cost recovery where appropriate to ensure sustainability of data exchange.” The NHPO recognises that the National Scheme operates on a cost-recovery basis with each Board meeting the full costs for the professions they regulate. However, the NHPO recommends that Ahpra carefully consider its application of cost recovery in relation to its data strategy.

The NHPO notes that in providing the Practitioner Information Exchange service (PIE), Ahpra refers to the federal Department of Finance’s Cost Recovery guidelines to suggest the PIE is appropriate for a cost recovery model.¹⁰ However, Ahpra’s website does not provide comprehensive information about how Ahpra has applied the model, nor does it include a Cost Recovery Implementation Statement.

The NHPO suggests that Ahpra ensure its cost recovery principles are clearly outlined, and that a Cost Recovery Implementation Statement is provided for its data strategy and each relevant related project where Ahpra has decided to apply charges. The NHPO suggests that Ahpra may wish to consider the cost recovery implementation statements of similar programs, such as the statement

⁹ Ahpra, ‘International health worker registrations grow to pre-pandemic levels,’ 20 December 2022. Accessed January 2023: www.ahpra.gov.au/News/2022-12-20-workforce.aspx

¹⁰ Ahpra, Practitioner Information Exchange – PIE FAQ. Accessed January: www.ahpra.gov.au/Registration/Employer-Services/Practitioner-information-exchange/PIE-FAQ.aspx

for the National Joint Replacement Registry.¹¹ It is critical that information is publicly available regarding the associated costs of accessing certain data initiatives, and that there is transparency regarding the rationale for these charges.

In addition, the NHPO cautions against the use of a cost recovery model where the information requested is:

- largely already available as part of Ahpra's regular reporting activities or the information it already publishes
- relevant to Ahpra's performance and functions in the National Scheme, and where deidentified information could be made available for public benefit.

Suggestion

Ahpra considers its application of cost recovery, including by outlining its cost recovery principles and ensuring a Cost Recovery Implementation Statement is provided for the data strategy and projects stemming from its action plan.

Register of practitioners

The register of practitioners helps keep people safe by providing up-to-date information about registered health practitioners so that they can make informed decisions about their healthcare. Patients and employers can use the register to determine if a health practitioner is appropriately qualified and has met the requirements for registration.

The NHPO has previously engaged with Ahpra about concerns it has received regarding the register. Concerns raised by members of the public generally related to the accessibility of information, including an inability to find individual practitioners. Health practitioner concerns, in comparison, generally related to privacy and the type of information published about them on the register. Between 1 July 2020 and 23 December 2022, the NHPO recorded 17 complaints made to the Ombudsman where information on the register was identified as an issue (less than 2 per cent of all complaints received during this time). The office also received one notification of an eligible data breach from Ahpra related to the register and one privacy complaint concerning the disclosure of information under section 219 of the National Law during this time.

Register accessibility

Prior to July 2021, the NHPO had received several concerns that the register was not accessible. However, the NHPO has found Ahpra to be responsive to the Ombudsman's comments and suggestions for improvement in relation to the register. In July 2021 Ahpra made several changes to

¹¹ National Joint Replacement Registry Cost Recovery Implementation Statement - 1 July 2022 to 30 June 2023. Accessed January: www.health.gov.au/resources/publications/national-joint-replacement-registry-cost-recovery-implementation-statement-1-july-2022-to-30-june-2023?language=en

the register, including improving its search filters and functionality to enable searches by location and in 15 of the most common community languages.

It is important to note that recent changes to the National Law also have implications for the register's accessibility. For example, practitioners can now choose to practise under an alternative name and to have that name published on the public register alongside their legal name. Issues related to finding practitioners working under a different name had been a concern raised several times with the NHPO.

While the NHPO does not collect quantifiable data about awareness levels regarding the register, based on its engagement with complainants the NHPO believes awareness is quite low. This has important implications for Ahpra's data strategy, as it cannot be assumed that providing additional information on the register will assist consumers if awareness of the register remains very low in the community.

Additionally, the information contained on the register can be challenging for people to understand, particularly if they are unfamiliar with the regulator or the types of regulatory action taken by the National Boards. For example, a complainant contacted the NHPO because they thought a practitioner was choosing to not see patients of a particular gender and was therefore unfairly discriminating against that gender when they found on the register that the practitioner had gender-based restrictions on their registration. It is therefore important that discussions regarding expanding the information on the register also consider how that information will be made more available to, and explained in plain English to, the general public.

Generally, the NHPO favours as much information as possible being made available on the register in line with the National Scheme's guiding principle of transparency. The NHPO acknowledges that the level of information available on the register does not always meet the public's expectations. The NHPO received a complaint, for example, that the register should provide information about which health practitioners bulk bill. Another complainant suggested that a practitioner's current workplace address should be available so that patients can locate the practitioner if they need their services in the future. The NHPO acknowledges that providing information on the register that facilitates improved access to health care supports the National Scheme's overarching objectives. However, these benefits need to be weighed against the factors against disclosure of additional information detailed later in this submission.

Suggestion

Ahpra considers the use of register data in the context of low community awareness about the register's existence (and relevant regulatory actions described on it) in determining its approach. Awareness raising may be necessary to see greater benefits from increasing information available on the register.

Maintenance of the register

The NHPO notes that the complaints it has received from health practitioners often point to the broader role that the register plays in relation to the provision of healthcare. For example, practitioners raised concerns that:

- certain qualifications had been removed from the register without explanation
- information had been included on the register, but was not communicated to Medicare or the practitioner
- information had been removed from the register early, which affected their ability to access Medicare rebates for patients or was done without informing the practitioner.

These issues point to concerns about the real-time nature of the register, and the immediate impacts which can result from administrative errors. In saddening circumstances, the NHPO heard concerns from complainants that information about a practitioner who was deceased was not removed from the register in a timely manner.

The NHPO acknowledges the challenges Ahpra faces in terms of maintaining an active, real-time register of registered health practitioners. However, there can be consequences for patients and practitioners if the register is not updated in a timely manner. The NHPO suggests building capability to ensure accurate information is promptly available on the register.

Verified or self-reported

The NHPO notes that it is not a reasonable expectation for Ahpra to verify all information provided to it by practitioners. The NHPO suggests, however, that at a minimum it is made clear to the public which information available on the register is self-reported and which information is verified by Ahpra. This distinction likely has knock-on effects for the data strategy as a whole, because verified data is likely needed in certain circumstances while a blended data set may be appropriate in other circumstances.

Suggestions

Ahpra consider building its capacity to ensure timely, complete and accurate information is available on the register.

Ahpra provide sufficient information on the register for the public and practitioners to understand which information is verified by Ahpra and which information is provided by the practitioner.

Exclusion of information

The NHPO also often hears from health practitioners who are concerned about the information that is made available on the public register about them.

Publishing conditions on the register

The NHPO has heard from practitioners who are concerned about the publication of conditions on the register. These practitioners raised concerns including that they:

- believe publishing conditions on the register is punitive
- do not agree with the Board's decision to impose the conditions and then publish those conditions
- believe conditions related to a practitioner's health should not be published
- believe conditions should not be published if a Tribunal is involved and has not yet made a decision.

The NHPO understands why health practitioners may be concerned or feel uncomfortable with the publishing of conditions on the register. The NHPO recognises that health practitioners may believe that publishing this information can affect their careers and how patients engage with them.

However, it is clearly the intention of the National Law that conditions which have been imposed on the practitioner's registration are published on the register.¹² The National Law is clear that public interest concerns are of paramount importance when considering which information should be recorded on the register. The NHPO agrees that the public interest is served by making this information available to the public.

It is important, however, that practitioners who believe that the conditions published relate to a health impairment have the opportunity to raise these concerns with Ahpra and the Boards, and that this information is considered in line with the National Law. Similarly, practitioners must be provided with the opportunity to inform the relevant National Board if they believe there is evidence that publication may not be in the public interest or may present a serious risk to the health and safety of a practitioner, their family or their associates.

Privacy

The NHPO has heard from some practitioners that certain information should not be provided on the register to protect their privacy. For example, one practitioner was concerned that they were contacted by a third party which had accessed their information through the register. Another practitioner proactively sought to remove certain identifying information from the register because of a third party's data breach involving their personal information.

The NHPO has welcomed the recent amendment to the National Law which provides greater discretion for the Boards to exclude information from the register that may present a serious risk to the health and safety of a practitioner, their family or their associates. This amendment provides a mechanism for health practitioners to raise concerns about their privacy as it relates to safety.

However, the NHPO suggests that careful consideration should be given to the public interest when deciding whether to not publish certain information on the public register. Any decision to exclude information from the public register should consider both risks to the health and safety of a practitioner, their family and their associates, and the overall purpose of the public register (and the National Scheme): to protect the public and ensure patient safety.

¹² See section 225(K) and 226 of the National Law. There are some circumstances where the Board may decide not to record information on the register, including if the practitioner has an impairment.

Suggestion

Ahpra and the National Boards carefully consider the public interest when deciding whether to not publish certain information on the register.

Student register

The NHPO suggests that an additional area of focus for the data strategy should be ensuring that the student register is maintained in a way that meets Ahpra's legislative requirements and is in line with the National Law's principles of transparency and efficiency. The NHPO notes that the data available from the student register is significantly smaller than the register of registered health practitioners. However, the NHPO suggests that the student register performs an important role and should therefore also be considered as part of Ahpra's data strategy.

The National Law stipulates that the student register must not be open to inspection by the public. The only disclosure it expressly requires is that notice must be given to an education provider with which a student is undertaking an approved program of study when a student's registration is suspended, restricted with conditions, or an undertaking from the student is accepted. It is critical this compliance is assured through Ahpra's data strategy.

The NHPO is concerned that Ahpra's processes for maintaining the student register are not well developed. The NHPO suggests there should be a focus on ensuring:

- appropriate collection notices are provided when collecting student's personal information for the student register
- appropriate validation of certain information provided by students in relation to their registration
- data and information held, used and disclosed by Ahpra on the register is accurate, complete and up to date
- quality processes guiding the creation, maintenance and deletion of information related to the student register and how education providers are notified of conditions, restrictions or undertakings on a student's registration
- appropriate mechanisms are available to students seeking access to, or correction of, the personal information Ahpra holds about them.

Suggestion

Ahpra and the National Boards ensure the student register is maintained in a way that meets its legislative requirements and is in line with the National Law's principles of transparency and efficiency. This includes ensuring:

- appropriate collection notices are provided when collecting student's personal information for the register
- appropriate validation of certain information provided by students in relation to their registration

- data and information held, used and disclosed by Ahpra on the register is accurate, complete and up to date
- quality processes guiding the creation, maintenance and deletion of information related to the student register and how education providers are notified of conditions, restrictions or undertakings on a student's registration
- appropriate mechanisms are available to students seeking access to, or correction of, the personal information Ahpra holds about them.

Data sharing

The NHPO notes that the consultation paper outlines several organisations Ahpra currently receives or shares information with, including:

- co-regulators (NSW Health Professions Councils Authority (HPCA) and the Office of the Health Ombudsman Queensland (OHO))
- the Departments of Health and Services Australia (for data about Medicare billing and Pharmaceutical Benefits Scheme prescribing)
- the drugs and poisons regulator in each jurisdiction
- courts
- the police
- accreditation authorities, and
- health complaints entities.

The consultation paper also mentions that Ahpra provides regular updates on the registration status of registered health practitioner employees. The NHPO notes that Ahpra offers the register data to data partners via the PIE. In addition, Ahpra's website outlines that it also accepts external research data requests, and that certain information is publicly available in published research.

The NHPO welcomes Ahpra's commitment to better understanding its data-sharing capabilities and how data it collects and holds can inform health workforce planning, public safety and improve access to health services.

Data availability and transparency

It is widely accepted that public reporting on relevant processes is vital to increasing transparency and accountability, and that this can often be achieved by publishing deidentified data that is relevant to the public interest. This information is likely of interest to a wide variety of stakeholders.

Open data sources

It is important that Ahpra considers which deidentified data sets can be published because they are in the public interest, and how these data sets can be made more accessible. For example, Data.gov.au provides a platform for anyone to access the anonymised public data published by federal, state and local government agencies. The website provides a user-friendly search bar and

other relevant visualisation tools.¹³ Other regulatory bodies have taken similar steps to ensure deidentified data sets are made publicly available. For example, the Australian Financial Complaints Authority (AFCA)'s data cube houses visualisations of its complaints data. Individuals can easily access information based on common searches, such as by location, firm or product.¹⁴

Although Ahpra does currently publish information about its regulatory functions, this information is often contained in published documents, such as annual or performance reports. The NHPO therefore suggests that further consideration is given to how to make Ahpra's deidentified data sets more accessible and available to the public.

Access to unpublished data sets

The NHPO notes the recent introduction of the Data Availability and Transparency Act 2022 (Cth) (the Data Act) in April 2022. The Data Act established the DATA Scheme which seeks to increase the availability and use of Australian Government data to deliver government services, inform government policies and programs, and support research and development.¹⁵ The Data Act does not override the Privacy Act, instead it seeks to ensure data sharing is consistent with it. In line with the objectives of the DATA Scheme, the Office of the National Data Commissioner (ONDC) manages a whole of government platform, Dataplace, to:

- facilitate data requests to an Australian Government agency (data custodians)
- help Australian Government agencies manage requests and data sharing agreements
- accredit organisations as a data user or data service provider
- publicly report on Australian Government data sharing activities.¹⁶

The NHPO suggests that Ahpra may wish to consider the objectives of the Data Act and the DATA Scheme in relation to the availability of data regarding the work of the regulator, National Boards and accreditation organisations. In addition, Ahpra may wish to consider the function of Dataplace, and whether it may be suitable for data exchange purposes.

The NHPO notes that Ahpra currently has a process for individuals or organisations to request information and it also maintains formal research partnerships. Ahpra's website notes that the release of data or information is at the discretion of Ahpra's CEO or their delegate. However, the NHPO suggests that the assessment process for considering these requests currently lacks rigour. Ahpra's website outlines that in addition to consideration of its legislative requirements and staff availability, it will also assess the:

- quality, accessibility and suitability of the data requested
- purpose for which it is requested

¹³ Australian Government. Data.gov.au. Accessed January 2023: www.data.gov.au

¹⁴ AFCA. AFCA Datacube. Accessed January 2023: www.data.afca.org.au

¹⁵ Office of the National Data Commissioner. Introducing the DATA Scheme. Accessed January 2023: www.datacommissioner.gov.au/the-data-scheme

¹⁶ Australian Government. Dataplace. Accessed January 2023: www.dataplace.gov.au

- the proposed methodology if carrying out research.¹⁷

The NHPO suggests that more could be done to clarify the criteria used by Ahpra to determine whether it would assist with a request, and that these principles should be linked to the data strategy.

Suggestions

Ahpra considers which deidentified data sets can be published because they are in the public interest, and how to increase the accessibility of these data sets.

Ahpra clarifies the criteria used to determine whether it would assist with a data request.

Using data to improve internal processes

The NHPO supports the rationale behind the draft data strategy's objective regarding "adopting best practice, innovative and advanced analytical methods to inform and improve the work we do." The NHPO suggests, however, that a focus on improving internal processes through breaking down siloed work areas (and the data these work areas hold) should also be of high importance.

Broadly, Ahpra has three areas in which it undertakes its functions: registration, notification and accreditation. The NHPO has regularly seen instances where information is not shared quickly or consistently between these different areas. This is not uncommon for large organisations undertaking multiple functions. However, the NHPO suggests that internal data sharing is fundamental to improving communication between these different areas.

Suggestion

Ahpra focus on breaking down siloed work areas to better share its data internally.

Improving the quality and use of notifications related data

The NHPO suggests that notification-related data could be used to a greater extent to inform the ongoing training of registered health practitioners. A 2021–22 Senate Committee inquiry heard from numerous witness who posited that it would be beneficial to share data about the most prevalent types of notifications to allow for targeted information and education.¹⁸ In this sense, notifications data could be used to highlight any patterns of poor performance or misconduct within a profession to identify areas in need of further training. The NHPO acknowledges that due to Ahpra's current data management systems, collating data of this nature is challenging and time consuming. The NHPO suggests that further consideration about how Ahpra collects information about the issues

¹⁷ Ahpra website. Data not publicly available? Accessed January 2023: www.ahpra.gov.au/About-Ahpra/What-We-Do/Data-access-and-research/Data-not-publicly-available.aspx

¹⁸ Senate Community Affairs References Committee, Administration of registration and notifications by the Australian Health Practitioner Regulation Agency and related entities under the Health Practitioner Regulation National Law, April 2022

leading to a notification may assist in the development of a data strategy which can address these issues.

The Senate Committee inquiry also pointed to the importance of Ahpra and the Boards improving the notifications data it collects and publishes. It was posited that this would help Ahpra to understand where protracted timeframes are experienced and the reasons for any delay.¹⁹

Suggestion

Ahpra considers how it uses notifications data to inform the ongoing training of registered health practitioners.

Advanced analytics

The NHPO is pleased that Ahpra has outlined its commitment to ensuring that “new technology is applied within a strong legal and ethical framework, that complies with administrative law and the principles of good administrative practice.” The NHPO notes Ahpra’s reference to the NSW Ombudsman’s report on using machine technology in administrative decision-making and welcomes Ahpra’s focus on ensuring that machine technology is used to help individuals to make regulatory decisions.

The NHPO acknowledges the benefits new machine technologies provide in assisting decision-making and agrees that machine learning and advanced analytics have the potential to support more effective and efficient processes, particularly when used as a tool to assist decision making (rather than automating decision-making). Machine learning tools can process larger quantities of data than humans, and this can facilitate more accurate decisions.²⁰ However, there are also a number of issues associated with the use of advanced analytics, and particularly machine-based learning, which need to be considered.

Human rights considerations

The Australian Human Rights Commissioner’s (AHRC) 2021 Human Rights and Technology report focused on two key human rights issues in relation to artificial intelligence (AI) (the definition of which included machine-based learning):

- the use of AI in decision-making. The report found that while decision-making can be improved through better use of data, it can also cause harm.
- how people with disability experience digital communication technologies and the importance of ensuring accessibility of the goods, services and facilities that use these technologies.²¹

¹⁹ Ibid.

²⁰ Centre for Law and Social Justice, University of Newcastle, Briefing paper – Technology and Justice Intersections. Accessed January 2023: www.newcastle.edu.au/__data/assets/pdf_file/0006/789927/Tania-Sourdin-Technology-and-Justice-Intersections.pdf

²¹ Australian Human Rights Commissioner, Human Rights and Technology, Final Report, 2021.

Algorithmic bias

There are ongoing concerns that the use of advanced analytics, such as machine learning, can reproduce or intensify biases or existing structural inequalities. According to the AHRC:

The problem of ‘algorithmic bias’ can arise where an AI-informed decision-making tool produces outputs that result in unfairness. Often this is caused by some forms of statistical bias. Algorithmic bias has arisen in AI-informed decision making in the criminal justice system, advertising, recruitment, healthcare, policing and elsewhere.²²

In these instances, the training data can skew the results of machine learning. This may be due to:

- bias in historic decisions that impact on the data
- bias in historic ‘facts’
- overrepresentation or underrepresentation of particular populations
- feedback loops, where the data collected is affected by decisions influenced by machine learning.²³

The NHPO notes that concerns regarding algorithmic bias apply, in particular, to the analysis of the notifications-related data Ahpra holds. For example, in response to a commissioned independent review into the use of chaperones,²⁴ and the Final Report of the Australian Government’s Royal Commission into Institutional Responses to Child Sexual Abuse,²⁵ Ahpra and the MBA implemented a range of changes in how sexual boundary violations are handled within the regulatory system. Evidence of this is clear from more recent data regarding medical sexual boundary notifications. For example, in the first two years following implementation of these changes:

- the rate of notifications resulting in no further action decreased from 71 per cent to 60.2 per cent
- the rate of referral of notifications to independent panels and tribunals increased from 7.4 per cent of all cases to 17.3 per cent.²⁶

It is clear that shifts in policies, processes and cultural changes can affect how data is interpreted and considered, as well as the types of historic facts which may have been documented or the number of concerns raised by a particular group of people. The inherent biases of Ahpra’s historical data sets related to notifications could unintentionally build in biases that the regulator seeks to avoid.

²² Ibid.

²³ Australasian Institute of Judicial Administration, *AI Decision-Making and the Courts. A guide for Judges, Tribunal Members and Court Administrators*, 2022. See ‘Things to consider – questions for those considering the use of IA systems in courts, tribunals and registries.’

²⁴ Paterson, Ron, *Independent review of the use of chaperones to protect patients in Australia*, February 2017.

²⁵ Commonwealth of Australia, *Final Report of the Australian Government’s Royal Commission into Institutional Responses to Child Sexual Abuse*, 2017.

²⁶ Christine Gee, Anne Tonkin, Sharon Gaby, Veronika, Sarah Anderson, Matthew Hardy, Martin Fletcher, *Responding to Sexual Boundary Notifications: The Evolving Regulatory Approach in Australia*, *Journal of Medical Regulation*, 2021, 107 (2) pp 25–31.

Impacts on regulatory principles and risk-based assessments

The NSW Ombudsman provides a summary of how machine technology can affect four of the key requirements of administrative law for good decision making: proper authorisation, appropriate procedures, appropriate assessment and adequate documentation. Similarly, the Australasian Institute of Judicial Administration's (AIJA) guide on AI Decision-Making and the Courts has closely examined how AI tools are being used in Courts, and the impact of these tools on core judicial values, namely: open justice, judicial accountability, impartiality and equity before the law, procedural fairness, access to justice and efficiency. The benefits and disadvantages discussed in these guides, and their resulting suggestions, are relevant to the regulatory environment given the significant overlap with the regulator's core values and activities.

The risk-based nature of Ahpra's assessments also raises concerns about the use of predictive data based on machine learning. For example, as articulated by the University of Newcastle's Centre for Law and Social Justice, there is a risk of overgeneralisation in machine-learning algorithms because they become too attuned to the "idiosyncrasies or biases in the training set" and therefore cannot predict future novel scenarios or deal with the diversity of future cases.²⁷ There is also a risk of greater unpredictability in decision-making because of decision-makers' 'automation bias' or 'under trust' in the algorithm. For example, a person may believe the algorithm "despite contradictory evidence or a clearly unfair result." Alternatively, the person may not want to accept the algorithm's recommendations.²⁸

The NHPO suggests that the consideration of these issues, and human rights more broadly, is critical for the development of Ahpra's data strategy. The NHPO suggests that the recommendations made by the Human Rights Commission in its report, and other relevant guidance referenced, should be considered in developing any approach that involves the use of advanced analytics. Most notably, this includes requirements to:

- test machine technology-informed decision making prior to using it
- notify individuals if machine technology is used in decision-making
- ensure individuals affected by a machine technology-informed decision are:
 - given reasons for the decision
 - offered complaint or appeal mechanisms
- monitor machine technology-informed decision making as it operates
- provide information about how services can be accessed by people with disability.

The NHPO also suggests that Ahpra consider the role of human rights impact assessments as part of its data strategy alongside the consultation requirements outlined in the National Law, and other relevant legislative requirements.

²⁷ Centre for Law and Social Justice, University of Newcastle, Briefing paper – Technology and Justice Intersections. Accessed January 2023: www.newcastle.edu.au/__data/assets/pdf_file/0006/789927/Tania-Sourdin-Technology-and-Justice-Intersections.pdf

²⁸ Ibid.

The NHPO notes that the AIJA guide also has very useful ‘questions for courts to consider’ throughout it, which could be adapted should Ahpra choose to further pursue advanced analytics. Similarly, the NSW Ombudsman’s report contains thorough guidance regarding how to design machine technology to comply with the law and fundamental principles of good government.

In addition, the NHPO suggests that any consideration of the use of advance analytics also takes account of the core principles discussed throughout this submission, including accessibility, transparency, privacy and data security. This includes, for example, the need to undertake relevant privacy and information security impact assessments for any use of advanced analytics.

Suggestion

Ahpra reviews existing reports and considers available guidance on ensuring machine technology operates fairly and in line with the principles of administrative law, the National Law, the Privacy Act and is consistent with human rights.

Ahpra consider the following if developing any approach that involves the use of advanced analytics:

- testing machine technology-informed decision making prior to using it
- notifying individuals if machine technology is used in decision-making
- ensuring individuals affected by a machine technology-informed decision are:
 - given reasons for the decision
 - offered complaint or appeal mechanisms
- monitoring machine technology-informed decision making as it operates
- providing information about how services can be accessed by people with disability.

Contact details

The NHPO has welcomed the opportunity to provide this submission.

Please feel free to contact the office’s Senior media and communications adviser, [REDACTED], for further information about this submission.

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