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

August 2023

Australian Health Practitioner Regulation Agency
National Boards
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Ahpra and the National Boards regulate these registered health professions: Aboriginal and Torres Strait Islander health practice, Chinese medicine, chiropractic, dental, medical, medical radiation practice, midwifery, nursing, occupational therapy, optometry, osteopathy, paramedicine, pharmacy, physiotherapy, podiatry and psychology.

Ahpra acknowledges the Traditional Owners of Country throughout Australia and their continuing connection to lands, waters and communities. We pay our respect to Aboriginal and Torres Strait Islander cultures and Elders past and present.

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Introduction

The Australian Health Practitioner Regulation Agency (Ahpra) works in partnership with 15 National Boards to help protect the public by regulating over 850,000 health practitioners through the National Registration and Accreditation Scheme (the National Scheme). As part of our commitment to improving public safety, Ahpra outlined in February 2023 a blueprint to improve public safety in health regulation (the blueprint for reform). This work includes a range of reforms to better protect patients from serious misconduct, including sexual misconduct, by registered health practitioners.

Work on these reforms has started and we are now inviting you to have your say on some of what we are doing. Your feedback will help us in this work.

We want your feedback

We want to hear from you about our work on some of the reforms outlined in the blueprint. As part of reviewing the *Criminal history registration standard,* we are inviting responses to questions about how the standard is applied, as well as general comments.

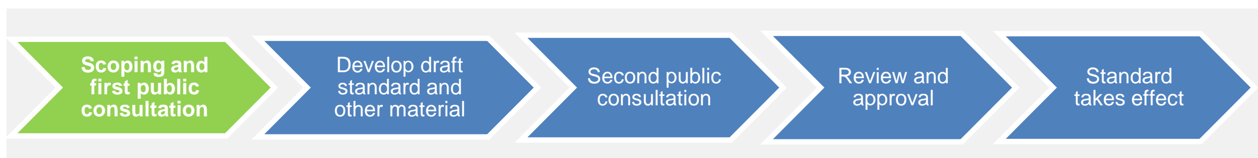
We will then consider your feedback which will inform proposed changes to the *Criminal history registration standard*, a set of principles about how we work with people affected by professional misconduct by registered health practitioners and any other related guidance we develop.

In addition to the *Criminal history registration standard,* we are also consulting on the future direction for several focus areas, including:

- Publishing information about how decisions are made when a health practitioner has a criminal history.
- Publishing more information about the decisions made about health practitioners who are found to have engaged in serious professional misconduct.
- Looking at how we support those affected by professional misconduct by registered health practitioners.
- Research about misconduct matters.

In addition to asking the public questions, we are also consulting other stakeholders. This will help inform our approach to this work and ensure we have heard a range of views before a revised *Criminal history registration standard* is developed.[1]

The invitation to provide feedback is part of the first phase of the review and there will be more opportunities for feedback. This will include a public consultation on a proposed revised *Criminal history registration standard* that must be approved by Health Ministers before it can be implemented.



How to have your say

You can provide feedback using our online form.

Alternatively, you can provide feedback using the submission template at **Attachment D** and email us at AhpraConsultation@ahpra.gov.au

[1] National Boards complete a patient health and safety impact assessment for any new or revised registration standard, code or guideline. As no changes are proposed to the current standard in this consultation, a patient health and safety impact assessment has not been prepared yet. The patient health and safety impact assessment statement will accompany the next consultation on any proposed revisions to the *Criminal history registration standard.*

Submissions open on **3 August 2023** and close on close of business 1**4 September 2023.**

The questions in the online form and submissions template are the same and are based on the questions for consideration listed on Page 11 of this consultation paper.

Publication of submissions

We publish submissions at our discretion. We generally publish submissions on our website to encourage discussion and inform the community and stakeholders about consultation responses. Please let us know if you do not want your submission published.

We will not place on our website, or make available to the public, submissions that contain offensive or defamatory comments or which are outside the scope of the subject of the consultation. Before publication, we may remove personally identifying information from submissions, including contact details.

We can accept submissions made in confidence. These submissions will not be published on the website or elsewhere. Submissions may be confidential because they include personal experiences or other sensitive information. A request for access to a confidential submission will be determined in accordance with the *Freedom of Information Act 1982* (Cth), which has provisions designed to protect personal information and information given in confidence. Please let us know if you do not want us to publish your submission or if you want us to treat all or part of it as confidential.

Published submissions will include the names of the individuals and/or the organisations that made the submission unless confidentiality is expressly requested.

Consultation paper

Background

1. The review of the *Criminal history registration standard* (the criminal history standard) and the broader work being carried out is part of Ahpra and the National Boards' blueprint for reform. This work recognises the increasing public expectations of health practitioners and of the National Boards and Ahpra as health practitioner regulators. Ahpra and National Boards are committed to strengthen how we manage serious misconduct by health practitioners and how we explain our approach.

2. The core role of Ahpra and the National Boards when regulating health practitioners is to keep the public safe. We do this by checking people are appropriately qualified and suitable to be registered as health practitioners. National Boards set the standards for registration and how to stay registered as a health practitioner and are supported by Ahpra to manage concerns about registered health practitioners.

3. The importance of this work was reinforced in 2019 when Health Ministers issued a directive that National Boards must consider the potential impact of a practitioner's conduct on the public, including vulnerable persons such as children, the aged, those living with disability and people who are potential targets of family and domestic violence. This directive was reinforced by changes to the Health Practitioner Regulation National Law, as in force in each state and territory (the National Law), that came into effect in October 2022, which establish that the paramount considerations in administering the National Law are public protection and public confidence in the safety of health services.

4. Health practitioners are in positions of power and responsibility. National Boards expect health practitioners to put patients first, and the public expect that only practitioners who are fit to practise will be registered. Practitioners who engage in criminal conduct and professional misconduct, including sexual misconduct, abuse the trust the public puts in them. This conduct can lead to long lasting and profound damage, both to the patient, and to the wider community's trust in other health practitioners and the health practitioner regulator. In this first consultation, as well as getting your feedback on the current criminal history standard, we want to explore your views and suggestions to inform our work on increasing transparency around decisions regarding criminal history and serious misconduct by practitioners, in particular sexual misconduct, where the law allows.

5. Our work on standards for registered health practitioners has changed over the years, to meet public expectations of both health practitioners and the health practitioner regulator. The public are now more empowered to communicate with practitioners and to speak up when things go wrong. The public also expect a regulator to communicate better and be more transparent about what we do, including how we deal with criminal and other serious misconduct by health practitioners. As recent survivor led activism has shown, many instances of sexual assault or harassment have been historically dismissed or unreported in cases where there was a power imbalance between the perpetrator and victim survivor. Serious misconduct by health practitioners can have significant impacts on individuals and a permanent, tangible impact on the public's trust in medical and other health practitioner professions and the health practitioner regulator.

6. It is also important that we examine whether the criminal history standard provides for fair and equitable outcomes for all registered health practitioners or all people applying to be registered health practitioners. An example of where the standard may lead to inequitable outcomes is in its application to Aboriginal and/or Torres Strait Islander people. There are many reports and inquiries which consistently speak to the factors behind why Aboriginal and Torres Strait Islander people are over-represented in the criminal and youth justice systems. We know for example that the harm from institutional racism, inequitable access to justice for Aboriginal and Torres Strait Islander people, and other impacts of colonisation, such as the Stolen Generations, have led to individuals being given a criminal history just because they are an Aboriginal and/or Torres Strait Islander person. It is important that the criminal history standard recognises this inequity and is flexible enough to appropriately take into account the broader context of an individual's life and experience to inform decisions regarding criminal history.

7. While we explain how we manage concerns generally, we could do better at explaining how we manage different types of concerns and how we apply standards such as the criminal history standard. For example, while we published information about our review of chaperone conditions (practice restrictions used in connection with some sexual misconduct cases) we have made many changes following this review that may not be clear to the public. A patient raising a concern about inappropriate sexual conduct by their doctor for example, may not know that there is a:

- specialised team at Ahpra to speak with them and manage that concern
- specialist decision-making committee to make decisions about the matter, or
- notifier support service that may be available to them, depending on the seriousness of the case.

Why are we reviewing the Criminal history registration standard?

8. The National Law requires the National Boards to establish five core registration standards, including a standard for assessing the criminal history of people who apply for registration as a health practitioner and any changes to the criminal history of health practitioners and students registered by a National Board.

9. The five core registration standards are an important part of regulation for each profession. They set national standards that practitioners must meet to be registered and stay registered, they make the National Boards' requirements of practitioners clear, and they inform decision-making when concerns are raised about a registered health practitioner's conduct, health, or performance.

10. The review of the criminal history standard is one part of the work outlined in the blueprint for reform. The review is exploring what factors are relevant when decision-makers assess a practitioner's criminal history, and how these factors should be applied. We want to make sure the criminal history standard is still relevant.

What is the purpose of the Criminal history registration standard?

11. A function of the National Boards under the National Law is to set standards to support safe practice by registered health practitioners. Being safe to practise not only means a person has the appropriate training and qualifications in their chosen profession, but that they are also a suitable person to be a registered health practitioner. All National Boards expect registered health practitioners to behave in a way that justifies the trust and respect the community place in them. National Boards consider someone's criminal history when deciding whether they are suitable to be a registered health practitioner.

12. The criminal history standard provides important information to the public, to applicants for registration and to registered health practitioners and students about what National Boards will consider when an applicant or a registered health practitioner has a criminal history. Decision-makers must decide whether a person's past criminal actions mean they should not be a registered health practitioner, or whether the actions are no longer relevant and so would not preclude someone from being a registered health practitioner.

13. The criminal history standard helps a National Board to determine whether someone with a criminal history is a suitable person to be registered. One aspect of this decision is for the National Board to determine whether someone's criminal history is relevant to the practice of their profession and their suitability to be a registered health practitioner. The National Law requires the *Criminal history registration standard* to include information on considerations when deciding if an individual's criminal history is relevant to the practice of their profession.

What is meant by 'criminal history'?

14. The definition of 'criminal history' in the National Law is broader than people might think and includes every:

    - conviction for an offence
    - plea of guilty to an offence, and
    - court finding of guilt about an offence, even if a conviction is not recorded.

    This means that penalties like 'good behaviour bonds' and 'diversion orders' will appear on criminal history records obtained under the National Law.

15. Criminal history obtained under the National Law also includes any 'spent convictions', which means applicants and registered health practitioners must tell the National Board about all their criminal history in Australia, or any other country they lived in as an adult, even if the criminal offence was a long time ago.

When does a National Board consider a person's criminal history?

16. A National Board will consider a registered health practitioner's criminal history at different times.

17. Whenever a person applies for registration as a health practitioner, a National Board must check that person's Australian criminal history. If a person applying for registration has lived overseas for six months or more as an adult, the person's international criminal history is also checked to find out if they have a criminal history outside Australia.

18. Each year when health practitioners renew their registration, they must tell the relevant National Board about any changes to their criminal history since the last time they renewed their registration. This includes if the criminal history happened overseas. Ahpra and the National Boards conduct audits of random samples of health practitioners in all professions periodically to make sure the declarations registered health practitioners make when renewing their registration are true.

19. Under the National Law all registered health practitioners and registered students must tell their National Board and provide additional information within seven days any time they are charged with a serious offence (punishable by 12 months or more in prison) or if they are convicted or found guilty of any offence punishable by any time in prison.

20. When a National Board finds out that a practitioner's criminal history has changed, it will decide whether the individual's criminal history is serious enough that the practitioner is no longer fit and proper to hold registration in their profession or whether the person is suitable to continue to practise their profession. Serious criminal conduct does not need to be connected with the person's practice as a health practitioner for the National Board to consider that the person should not stay registered in their profession.

21. The *Regulatory guide* published on the Ahpra website provides more information about how National Boards respond to criminal history, including the power of a National Board to take 'immediate action' when it becomes aware of a registered health practitioner's criminal history.

About the current Criminal history registration standard

22. The first version of the criminal history standard was approved by the Ministerial Council on 31 March 2010. The same criminal history standard applied to the first 10 professions regulated under the National Scheme.

23. A revised version of the criminal history standard was approved on 17 March 2015 and has been in effect since 2 July 2015. The same criminal history standard has been approved for all professions (with very minor edits for paramedics).

24. The current criminal history standard explains what is meant by 'criminal history' and sets out 10 factors that decision-makers will consider when deciding if a person's criminal history is relevant to the practice of their profession.

Issues for consultation

Focus area one – The Criminal history registration standard

25. The current *Criminal history registration standard*, which appears at Attachment A, sets out the factors decision-makers use to decide if a person's criminal history is relevant to the practice of their profession. The current criminal history standard does not explain how the 10 factors are applied to decision-making about criminal history including decisions about whether someone should be registered, or how they relate to any public interest in the individual practising the profession.

26. The factors that are considered relevant for practice might sometimes be given different weight, depending on the profession. For example, a decision-maker may decide that a criminal history regarding driving offences is not relevant to a registered nurse working in an operating theatre, but the same criminal history could be very relevant to a paramedic whose work requires them to drive an ambulance.

27. The current criminal history standard has been in force, in roughly the same form, for over 10 years. We know that the environment in which decisions are made about serious criminal misconduct, particularly

serious sexual misconduct, has changed and what the public expects in relation to these decisions has shifted.

28. We want any revisions to the *Criminal history registration standard* and/or its supporting material to reflect our commitment to ensuring a culturally safe health workforce, along with increased Aboriginal and Torres Strait Islander Peoples' participation in the registered health workforce. Ahpra and the National Boards acknowledge that the contemporary circumstances of Aboriginal and Torres Strait Islander Peoples are inextricably linked to experiences of colonisation and that this includes the experiences of Aboriginal and Torres Strait Islander Peoples who interact with Australia's criminal justice system. We are proposing to include draft guidance for decision-makers to ensure they consider the disproportionate burden Aboriginal and Torres Strait Islander Peoples experience within the criminal justice system.

29. We want the criminal history standard and the materials that support it to reflect what the public considers important when decisions are made about who should and should not be registered in a health profession. We also want to better explain how we make decisions about all criminal history matters of applicants for registration and registered health practitioners.

30. We plan to publish information about how Boards consider particular types of criminal conduct. For example, we intend to publish further information about National Board's decisions in relation to domestic violence and the connection between domestic violence and decisions about registration as a health practitioner.

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

31. Patients and consumers seeking healthcare should be able to trust their health practitioners and expect that registered professionals will provide safe care and act in their best interests. National Boards expect registered health practitioners to behave in a way that justifies the trust and respect the community place in them. It is important then that we explain how we manage serious misconduct by registered health practitioners, particularly when serious criminal offences and/or sexual misconduct is involved.

32. We know that when a National Board considers allegations of serious misconduct or a practitioner's criminal history, they must consider the nature and seriousness of the conduct or offence, its relevance to the practice of that health profession and whether there is a future risk to patients. National Boards will place more weight on conduct and offences that are serious, offences that are more relevant to health practice and conduct and offences that pose a future risk to the public, and offences that may affect the public's trust in the whole profession.

33. When the National Board makes these types of decisions it is considering the conduct of the practitioner that led to the criminal offence, rather than just the type of criminal offence. The circumstances or the conduct that led to a criminal offence can sometimes vary greatly. 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 but not proven. For this reason, we apply similar approaches in how we think about decisions about criminal history and how we think about other serious misconduct.

34. We think we could explain our regulatory approach much better. As part of our work to review the *Criminal history registration standard*, we looked at information from overseas health practitioner regulators about criminal history and serious misconduct more broadly. We noticed that several regulators, who have a similar focus to us on public protection and public confidence in registered health practitioners, publish a lot more information about their decision-making approach than the National Boards and Ahpra currently publish. For example, in the United Kingdom some regulators have published:

    - Guides for decision-makers on how to consider matters where a registered health practitioner has a criminal history. For example: The Health and Care Professions Council (HCPC) in the United Kingdom publishes a list of aggravating factors which should be considered when looking at an individual's criminal history (see HCPC Sanctions policy), and the Nursing and Midwifery Council (NMC) in the UK has published Guidance on health and character, along with information on the most serious cases of criminal offences (see 'Criminal convictions and cautions' on the NMC website).
    - Information on how they investigate a practitioner where there has been a police investigation, including where the investigation did not result in a conviction.
    - A list of examples of serious offences that could lead to interim actions (called 'immediate actions' in Australia) and/or that could amount to professional misconduct.

35. We are planning to publish more information on how decision-makers make decisions in matters where criminal history is being considered. We may do this by publishing a guide for decision-makers. See Attachment B for an example of what this guidance might include. In this guidance we want to explain several things about how decisions are made, including that:

- any decision must have public protection as the paramount consideration
- in making decisions about criminal history decision-makers look at the type and seriousness of the offence and the risk that may be posed to public safety and balance this against other considerations, for example, the time since the offence and the behaviour of the individual since the offence, and
- generally offences that involve serious disregard for public or individual safety, such as offences involving violence or negligence, or offences that relate to dishonesty, such as fraud or deception, or offences against public order or against indivdiuals, such as racial villification or harassment, are considered particularly seriously, particularly where the offending involved a relationship of trust or reliance.

36. We are also considering compiling and publishing examples of types of offences and, how they may impact on whether or not it is appropriate for a practitioner to either be registered in the first instance or to keep their registration. See Attachment C for an example of this type of material.

37. In looking at categorising offences we want to explore whether there are some offences that are so serious they may be inconsistent with an individual being registered in a health profession, regardless of whether the offence occurred in connection with the practice of a health profession, and regardless of the amount of time or other circumstances around the offending.

38. Decision-makers will always exercise their discretion in making decisions about criminal history. However, there may be some offences where, unless extraordinary circumstances apply, it can generally be assumed that the offence shows such a level of disregard for the wellbeing of others and/or demonstrates behaviour so serious that it betrays the trust and respect the community places in registered health practitioners, that an individual with this type of criminal history should not be registered in the profession.

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

39. In addition to the proposed guidance outlined above, we could also provide more information about how we publish disciplinary decisions about serious misconduct by health practitioners.

40. Ahpra and the National Boards currently publish summaries of court and tribunal decisions on our court and tribunals webpage. Tribunal decisions are about complaints or concerns about the conduct, performance, or behaviour of a health practitioner. Court decisions can sometimes refer to an appeal of a tribunal decision or may be about a criminal matter. We also publish a link to tribunal or court decisions on an individual health practitioner's record on the national register of practitioners. By publishing outcomes, we can help educate practitioners to better understand what behaviour falls below expected standards while also providing the public with information about what conduct results in regulatory action.

41. Most importantly, publishing these decisions helps us to show members of the public what is an acceptable and unacceptable level of care and behaviour.

42. We understand there is public interest in decisions made by National Boards about serious misconduct matters, and in some cases about registration matters, particularly if a practitioner is applying to return to practice after their registration has been cancelled or suspended (often called 'reinstatement decisions').

43. The information we publish on the public register about individual practitioners is limited by the National Law. For example, if a National Board imposes conditions, they will be published but not the reasons behind the Board's decision. We are exploring how and when it might be possible and appropriate to publish more information about individual decisions, such as reinstatement decisions where a practitioner has previously been found to have engaged in serious misconduct. In some jurisdictions the tribunal is responsible for making decisions about reinstatement, and in those cases, we can publish the decision. This is an approach we will explore further in consultation with relevant stakeholders.

44. We also plan to expand what we publish about insights and trends we are seeing in notifications and decisions about serious misconduct.

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

45. When individuals experience or witness serious professional misconduct by registered health practitioners, we know that the experience may be stressful and at times damaging. Participation in regulatory processes about this experience is often emotionally challenging and complex to navigate and a range of factors, such as experiences of trauma, mental health, diversity needs, and access to support, can affect a person's experience of the process. We want to reduce the distress and re-traumatisation that may occur through the process and support people to engage and participate in all stages of the process.

46. While Ahpra is currently operating a Notifier Support Service for some individuals involved in matters before tribunals that involve sexual boundary breaches and misconduct, we know there are gaps between the protections that exist for victims in criminal cases and protections that exist in misconduct matters (in the tribunal in each state and territory). We are keen to extend the support for those involved and advocate for similar protections for people raising concerns about sexual boundary breaches. We also have work underway to improve the cultural safety of our processes for Aboriginal and Torres Strait Islander notifiers.

47. To help achieve this we could expand on the principles within our Service charter or develop a statement of our commitments in supporting through the regulatory process those affected by sexual misconduct. We also want to acknowledge the impact sexual misconduct by registered health practitioners and involvement in the regulatory process may have on an individual, and the important role they play in keeping the public safe by coming forward. This may include, for example, recognising that an individual affected by serious professional misconduct by a registered health practitioner may wish to provide a statement about how this has affected them and, where appropriate, taking steps to facilitate this.

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

48. Ahpra's blueprint for reform identifies additional areas of work that are linked to the review of the criminal history standard including:

    a. Commissioning research on the outcomes of sexual misconduct matters, looking at whether patients are being protected and what might need to change.
    b. Ensuring the needs of Aboriginal and Torres Strait Islander Peoples are prioritised: Establishing new shared governance arrangements with Aboriginal and Torres Strait Islander peak bodies via the National Health Leadership Forum to oversee implementation of our culturally safe notifications program and the broader health strategy towards eliminating racism from healthcare.
    c. Strengthening the role in regulation of patients and the public: Increase the role of community members in decision-making committees about practitioner misconduct.
    d. Greater tribunal transparency: Seek amendments to the National Law requiring tribunals to decide – in an open hearing – if practitioners who have had their registration cancelled can apply for re-registration.
    e. More information on the public register.

49. Some of this work will inform the review or progress in parallel to the review, while some areas such as publishing more information on the public register may require legislative change.

50. We have identified several areas of research to improve our knowledge about serious misconduct matters and their management that will support our work in this area. Potential research topics include research on public attitudes and what conduct impacts public confidence in health professionals and looking at international research and what our data and experience can tell us about reoffending, particularly in the context of sexual misconduct offences. Some of this research would happen as part of the consultation on this review and would inform the guidance to support the criminal history standard and/or improving our processes for managing serious misconduct matters.

Questions for consideration

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?

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?

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?

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?

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?

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

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?

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?

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

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.

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.

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

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?

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.

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?

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.)

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?

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

18. Are the areas of research outlined appropriate?

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

    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?

Attachment A – Current Criminal history registration standard

Registration standard: Effective from 1 July 2015

Registration standard: Criminal history

Effective from: 1 July 2015

Summary

This registration standard sets out the factors the National Board will consider in deciding whether a health practitioner's criminal history is relevant to the practice of their profession under the Health Practitioner Regulation National Law as in force in each state and territory (the National Law). While every case will need to be decided on an individual basis, these 10 factors provide the basis for the Board's consideration.

Does this standard apply to me?

This standard applies to all applicants for registration and all registered health practitioners. It does not apply to students.

Requirements

In deciding whether a health practitioner's criminal history is relevant to the practice of their profession, the Board will consider the following factors.

1. **The nature and gravity of the offence or alleged offence and its relevance to health practice.**

   The more serious the offence or alleged offence and the greater its relevance to health practice, the more weight that the Board will assign to it.

2. **The period of time since the health practitioner committed, or allegedly committed, the offence.**

   The Board will generally place greater weight on more recent offences.

3. **Whether a finding of guilt or a conviction was recorded for the offence or a charge for the offence is still pending.**

   In considering the relevance of the criminal history information, the Board is to have regard to the type of criminal history information provided. The following types of criminal history information are to be considered, in descending order of relevance:

   a. convictions
   b. findings of guilt
   c. pending charges
   d. non conviction charges; that is, charges that have been resolved otherwise than by a conviction or finding of guilt, taking into account the availability and source of contextual information which may explain why a non-conviction charge did not result in a conviction or finding of guilt.

4. **The sentence imposed for the offence.**

   The weight the Board will place on the sentence will generally increase as the significance of the sentence increases, including any custodial period imposed. The Board will also consider any mitigating factors raised in sentencing, where available, including rehabilitation.

5. **The ages of the health practitioner and of any victim at the time the health practitioner committed, or allegedly committed, the offence.**

   The Board may place less weight on offences committed when the applicant is younger, and particularly under 18 years of age. The Board may place more weight on offences involving victims under 18 years of age or other vulnerable persons.

6. **Whether or not the conduct that constituted the offence or to which the charge relates has been decriminalised since the health practitioner committed, or allegedly committed, the offence.**

   The Board will generally place less or no weight on offences that have been decriminalised since the health practitioner committed, or allegedly committed, the offence.

7. **The health practitioner's behaviour since he or she committed, or allegedly committed, the offence.**

   Indications that the offence was an aberration and evidence of good conduct or rehabilitation since the commission, or alleged commission of the offence, will tend to be a mitigating factor. However, indications that the offence is part of a pattern of behaviour will tend to have the opposite effect.

8. **The likelihood of future threat to a patient of the health practitioner.**

   The Board is likely to place significant weight on the likelihood of future threat to a patient or client of the health practitioner.

9. **Any information given by the health practitioner.**

   Any information provided by the health practitioner such as an explanation or mitigating factors will be reviewed by the Board and taken into account in considering the health practitioner's criminal history.

10. **Any other matter that the Board considers relevant.**

    The Board may take into account any other matter that it considers relevant to the application or notification. A Board will not require an applicant or registered health practitioner to provide further information that may prejudice their personal situation pending charges and the Board must not draw any adverse inference as a result of the fact that information has not been provided.

Note: the above factors have been numbered for ease of reference only. The numbering does not indicate a priority order of application.

Review

This standard will commence on 1 July 2015. The Board will review this standard at least every five years.

Authority

This registration standard was approved by the Australian Health Workforce Ministerial Council on 17 March 2015.

Registration standards are developed under section 38 of the National Law and are subject to wide ranging consultation.

Definitions

Criminal history is defined in the National Law as:

- every conviction of the person for an offence, in a participating jurisdiction or elsewhere, and whether before or after the commencement of this Law
- every plea of guilty or finding of guilt by a court of the person for an offence, in a participating jurisdiction or elsewhere, and whether before or after the commencement of this Law and whether or not a conviction is recorded for the offence
- every charge made against the person for an offence, in a participating jurisdiction or elsewhere, and whether before or after the commencement of this Law.

Under the National Law, spent convictions legislation does not apply to criminal history disclosure requirements. This means that when making a declaration about criminal history, applicants and registered health practitioners must declare their entire criminal history, from Australia and any other country, including any spent convictions.

Ahpra & National Boards

Attachment B – Information or guidance on decision-making regarding an applicant or registered health practitioner's criminal history

This may include, but may not be limited to the following:

The primacy of public protection

1. In any decision-making and application of the National Law, the protection of the public is the paramount consideration, and this includes the need to maintain public confidence in the profession and in the regulatory processes of the National Law.

The nature and the gravity of the offence or alleged offence and its relevance to health practice

2. The more serious the offence or alleged offence, and the more connection it has to health practice, the more weight will be assigned to it in decision-making.

3. The nature of the offence relates to the type of offending, for example offences against property or offences against people.

4. The gravity of the offence relates to the seriousness of the offending.

5. The more serious the offending and the more the nature of the offence relates to health practice, the stronger the likelihood that the criminal history will impact on decision-making.

6. Some offences are of a nature and gravity that they are considered to indicate behaviour that may pose a risk to the public and may be inconsistent with the individual being registered in the profession. Examples of these types of offences include serious offences again a person (for example, murder, people trafficking or serious assault), offences involving dishonesty or a breach of trust (for example, serious stealing and fraudulent acts), sexual offences and offences in relation to pornography and child exploitation, serious drug offences, serious offences against public health.

7. Generally, offences involving violence pose a greater risk to the public and will impact on decision-making. Similarly, offences related to deliberate or reckless acts involving abuse of trust, such as dishonesty or sexual offences are considered particularly seriously in the content of health practice and would weigh significantly against registration as a health practitioner. Offences against particularly vulnerable people, such as children, older people, or people with a disability, would also have similar weight.

8. Multiple serious or lesser offences may indicate a pattern of behaviour that may also need close consideration in decision-making. While an individual case of these offences may not seem relevant, when considered together they may indicate a pattern of behaviour that may compromise the ability and suitability of a practitioner to practise safely and appropriately.

The period of time since the individual committed or allegedly committed the offence

9. The period of time is a relevant consideration in decision-making around criminal history. Generally, the time that has elapsed since the individual committed or allegedly committed the offence, the less weight that may be given to the offending in making a decision. This is because the passing of time may have led to a positive change in the individual's circumstances, and so the offending is no longer relevant, particularly where more than 10 years have passed and there has been no subsequent offending.

10. However, this consideration depends on the nature and severity of the type of offending. The more serious types of offending are likely to still weigh against registration, regardless of the time elapsed since the offence was committed.

Aboriginal and Torres Strait Islander experiences of the criminal justice system

11. When considering criminal history, recognition should be given to the disproportionate representation of Aboriginal and Torres Strait Islander people within Australia's criminal justice system, which occurs for a range of reasons, including historic and ongoing levels of racism, dispossession and disadvantage due to colonisation. In considering the criminal history of Aboriginal and Torres Strait Islander applicants or registrants the possibility that an individual's criminal history may arise from different treatment of Aboriginal and Torres Strait Islander Peoples and other Australians, rather than differences in behaviour, should be recognised.

The age of the individual at the time they committed or allegedly committed the offence.

12. Similar to considerations of the time elapsed since the offence, the age of the individual at the time of the offence may be given weight in decision-making about their criminal history. Generally, offences committed when the individual was likely to be young and immature, and where the offending represents a minor, isolated incident are not likely to be given much weight in decision-making about criminal history. However, if the offending was of a serious nature or represents a continued pattern of behaviour, the age of the individual may not be a consideration.

The individual's demonstrated behaviour since the offence or the alleged offence

13. The conduct of an individual since an offence is considered in decision-making regarding criminal history. Where information indicates that an offence was an aberration, and there is evidence of good conduct or rehabilitation since the offence, this is likely to be a mitigating factor in any decisions regarding criminal history. So too is the ability of the individual to demonstrate genuine insight into their behaviour and steps to remediate or address the behaviour.

14. However, indications that the offence was part of a pattern of behaviour or information that the individual continues to deny responsibility or justify the behaviour would have the opposite effect.

Whether a conviction or finding of guilt was recorded for the offence or a charge for the offence is still pending

15. A conviction or finding of guilt is likely to be considered more relevant and therefore weigh against a decision to grant, reinstate or to continue registration than charges that are still pending or resulted in a no conviction finding.

16. However, if the alleged offending is serious and indicates a pattern of behaviour it may be that a decision is made before the charges are heard.

17. Similarly, where the nature of the conduct or behaviour is serious and considered to pose a risk to the public, a decision may be made regardless of the fact there has been no conviction or no finding of guilt.

The sentence imposed for the offence

18. Generally, the impact on decision-making of the sentence imposed for the offence increases with the significance of the offence imposed, and particularly where a custodial period has been imposed.

19. There is a range of sentences imposed for criminal offences, depending on the nature and gravity of the offence. Usually, the sentence imposed reflects the gravity of the offence, and in some cases the individuals' prior convictions.

20. Criminal offences punishable by imprisonment are the most serious offences. If a criminal history shows the individual was sentenced to a period of imprisonment, this should generally be given significant weight against a decision to register or to permit a practitioner to continue practising their profession.

21. Among the other sentencing options other than imprisonment, such as fines, correction orders or youth detention orders, a penalty imposed at the upper end of the range of sentencing options would indicate that the offence was considered more serious and therefore this will increase the weight given to this factor in any decision-making about criminal history.

22. A sentence imposed is, however, not a definitive guide to the seriousness of the offence or its relevance to practice. Decision-makers should not assume that a non-custodial sentence imposed in criminal proceedings implies an offence is not serious in the context of health practice. As the role of the National Boards is to protect the public, there are different considerations to decisions under the National Scheme, than those taken into account in a criminal court.

The impact or potential impact of the offence committed, or allegedly committed, on people vulnerable to harm

23. Due to the nature of health practice, offences committed against vulnerable people are regarded as more serious. This is because these types of offences usually involve an abuse of trust, which is at the heart of the health practitioner's relationship with the public. An abuse of this trust will weigh heavily against a decision to register or permit a practitioner to continue practising their profession.

24. In this context, people vulnerable to harm include infants and children, the elderly, people experiencing mental illness, and people with a physical or intellectual disability.

Whether or not the conduct constituted the offence or to which the charge relates has been decriminalised since the health practitioner committed or allegedly committed the offence.

25. Generally, significantly less weight, or in some circumstances no weight will be given, to offences that have been decriminalised since the time the individual committed or allegedly committed the offence. This is particularly relevant for offences where there is no uniformity about the particular offence across states and territories, for example, marijuana offences.

26. Similarly, offences committed in other countries, where the behaviour does not constitute an offence in Australia, may not impact on decisions about criminal history and registration.

The likelihood of future threat to the safety of a patient of the health practitioner or the safety of the public

27. This factor is closely related to the nature and gravity of the offence, and generally there is likely to be significant weight give to a criminal history that indicates a likelihood of future threats to patients or the public.

28. Public safety is the fundamental consideration for the National Scheme and any criminal history that demonstrates that the individual is a high risk to the public in the context of their practice of the profession is likely to weigh significantly against the individual being found to be an appropriate person to practise the profession or that it is in the public interest that this person practises the profession. This would include circumstances where the registration of the individual, having regard to the nature and gravity of their criminal history, is likely to undermine the public's confidence in the profession.

Ahpra & National Boards

Attachment C – Possible examples of categories of criminal offences and the application of the Criminal history registration standard

Possible types of offences and their categories are:

Category A

Category A contains criminal offences of a nature and gravity that may be presumed to be so serious they are incompatible with the individual being granted or maintaining registration as a health practitioner, regardless of the timeframe since or the circumstances around the offending, except in the most extraordinary of circumstances. This category of offence is always relevant to the profession, regardless of whether they occurred in connection with the practice of the profession.

Examples of possible Category A criminal offences are:

- Homicide and related criminal offences – this may include criminal offences such as murder, manslaughter, and other acts that involve deliberate attempts to kill people or demonstrate a serious disregard to the life of a person.
- Acts intended to cause injury – such as aggravated and serious assault and other criminal offences that involve a deliberate attempt to inflict direct injury or harm, including serious domestic violence offences.
- Serious sexual assault and related criminal offences – this includes rape, sexual assault, sexual offences against children, possession of child abuse material, sexual servitude offences and other offences involving acts of a sexual nature against another person where the acts are non-consensual, or consent is proscribed.
- Serious drug related offences – this may include manufacture for non-personal use/supply/import for non-personal use and export or trafficking.
- Serious offences involving hostility to others based on race, ethnicity, age, sexual orientation.
- Offences against morality – offences such as sexual abuse of a person with a disability.

Category B

Category B contains offences of a nature and gravity that may or may not be presumed to be incompatible with the individual being granted or maintaining registration, depending on whether the individual can demonstrate that the amount of time since the offending or alleged offending, and/or some other circumstances around the offending or alleged offending, mean that there is no longer risk to the public.

These types of offences include:

- Common assault/reckless injury
- Wilful/indecent/obscene exposure
- Drug cultivation/possession/use
- A pattern of repeat offending in relation to driving under the influence of alcohol or drugs
- Dangerous driving – causing death, grievous bodily harm, occasioning bodily harm
- A pattern of repeat offending in relation to high level speeding/unlicensed driver
- Theft/stealing/robbery/burglary with no violence
- Dishonesty/deception – including information/property/corporate
- Offences related to domestic violence
- Animal cruelty

Category C

Category C contains offences that are unlikely to be considered relevant to the practice of a health profession and are unlikely to impact on decisions regarding the appropriateness of an individual being granted or maintaining registration in their profession, unless other circumstances indicate that the offending is more serious.

These types of offences include:

- Minor drug offences
- Traffic offences (depending on the profession)
- Public nuisance
- Council by-laws

Attachment D – Submissions Template

Public consultation: Review of the Criminal history registration standard and other work to improve public safety in health regulation

The Australian Health Practitioner Regulation Agency (Ahpra) and the National Boards are inviting stakeholders to have their say as part of our review of the *Criminal history registration standard* (the criminal history standard). There are 19 specific questions we'd like you to consider below (with an additional question 20 most relevant for jurisdictional stakeholders.) All questions are optional, and you are welcome to respond to any you find relevant, or that you have a view on.

Your feedback will help us to understand what changes should be made to the criminal history standard and will provide information to improve our other work.

Please email your submission to AhpraConsultation@ahpra.gov.au

The submission deadline is close of business **14September 2023**

How do we use the information you provide?

The survey is voluntary. All survey information collected will be treated confidentially and anonymously. Data collected will only be used for the purposes described above.

We may publish data from this survey in all internal documentation and any published reports. When we do this, we ensure that any personal or identifiable information is removed.

We do not share your personal information associated with our surveys with any party outside of Ahpra except as required by law.

The information you provide will be handled in accordance with Ahpra's privacy policy.

If you have any questions, you can contact AhpraConsultation@ahpra.gov.au or telephone us on **1300 419 495.**

Publication of submissions

We publish submissions at our discretion. We generally publish submissions on our website to encourage discussion and inform the community and stakeholders about consultation responses. Please let us know if you do not want your submission published.

We will not place on our website, or make available to the public, submissions that contain offensive or defamatory comments or which are outside the scope of the subject of the consultation. Before publication, we may remove personally identifying information from submissions, including contact details.

We can accept submissions made in confidence. These submissions will not be published on the website or elsewhere. Submissions may be confidential because they include personal experiences or other sensitive information. A request for access to a confidential submission will be determined in accordance with the *Freedom of Information Act 1982* (Cth), which has provisions designed to protect personal information and information given in confidence. Please let us know if you do not want us to publish your submission or if you want us to treat all or part of it as confidential.

Published submissions will include the names of the individuals and/or the organisations that made the submission unless confidentiality is expressly requested.

Initial questions

To help us better understand your situation and the context of your feedback please provide us with some details about you. These details will not be published in any summary of the collated feedback from this consultation.

Question A

Are you completing this submission on behalf of an organisation or as an individual?

Your answer:

☐ Organisation

Name of organisation:

Contact email:

☐ Myself

Name:

Contact email:

Question B

If you are completing this submission as an individual, are you:

☐ A registered health practitioner?

Profession:

☐ A member of the public?

☐ Other:

Question C

Would you like your submission to be published?

☐ Yes, publish my submission **with** my name/organisation name

☐ Yes, publish my submission **without** my name

☐ No – do not publish my submission

Focus Area One – The Criminal history registration standard

Question 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?

Your answer:

Question 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?

Your answer:

Question 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?

Your answer:

Question 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?
Your answer:
Question 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?
Your answer:
Question 6 Is there anything else you would like to tell us about the *Criminal history registration standard*?
Your answer:

Focus area two – More information about decision-making about serious misconduct and/or an applicant or registered health practitioner's criminal history
Question 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?
Your answer:
Question 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?
Your answer:
Question 9 Is there anything else you would like to tell us about the information set out in Attachment B?
Your answer:

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

Focus area three – Publishing more information about decisions that are made about serious misconduct by registered health practitioners
Question 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?
Your answer:
Question 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.
Your answer:
Question 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?
Your answer:

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

Question 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 the consultation paper)

Your answer:

Question 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?

Your answer:

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

Question 18

Are the areas of research outlined appropriate?

Your answer:

Question 19

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

Your answer

Additional question

This question is most relevant to jurisdictional stakeholders:

Question 20

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

Your answer: