



0421 366 238
(02) 8277 4556
tony@afsolitors.com.au
www.afsolitors.com.au
Level 25, Tower 3,
300 Barangaroo Avenue,
Sydney, NSW, 2000, Australia

2 March 2022

The Australian Health Practitioner Regulation Agency

Mr Martin Fletcher (& Senior Managers)

Chief Executive Officer

GPO Box 9958

Melbourne, VIC 3001

Dear Mr Fletcher,

I confirm that I am instructed by several doctors registered with AHPRA.

I am instructed that the doctors have registered with our office their social media account details which are being held as public interest disclosures pursuant to the various *Public Interest Disclosure Act[s]* ("PIDA") and other relevant Whistle-blower/Commercial/Criminal laws available in Australia.

It is important that I apply some context to this letter and whilst many may not wish to understand what may be occurring, understanding the gaps is vital for the community to have confidence in the medical and scientific community.

Who is AHPRA?

It is most concerning that AHPRA describes itself as:

*"The Australian Health Practitioner Regulation Agency (Ahpra) works with the **"15 National Boards"** to help protect the public by regulating Australia's registered health practitioners. Together, our primary role is to protect the public and set standards and policies that all registered health practitioners must meet. Each Board has a health profession agreement with Ahpra that sets out fees, budget and the services provided by Ahpra".*

Managing Public Interest Disclosures with AHPRA

It is important to summarise the Whistleblower policy for AHPRA. At page [3 of 19] is stated:

1. This Policy is about how AHPRA and the Boards manage public interest disclosures – that is, whistleblowing

*"A public interest disclosure is the **disclosure of information** about a person, public officer or public body which shows, or tends to show, improper conduct. This Policy is about public interest disclosures of such improper*



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conduct or corruption, and reprisals against people who make such disclosures (**'public interest disclosures'**).
Simply put, this Policy is about how we deal with whistleblowing.

I will not cover each aspect of this policy in this letter, rather **attach** the Whistle-blower policy for your attention and encourage you to read this policy.

Public Interest Disclosure Laws

The idea that AHPRA decide whether they will comply to law demonstrates a serious misunderstanding of the whistle-blower provisions and policies enshrined in federal law and available to those individuals or corporations that make a relevant disclosure and seek protections for doing so.

By way of example, at page [4] of AHPRA's *Public Interest Disclosure Policy*¹ it relevantly states:

"Even though AHPRA and the Boards are not subject to Public Interest Disclosure Acts in some States and territories, to the extent we can, we will comply with those Acts. This includes receiving and dealing with public interest disclosures in all States and territories".

Table 1

State/Territory	Name of Act	Does the Act apply to AHPRA and the Boards
Commonwealth	<i>Public Interest Disclosure Act 2013</i>	No
ACT	<i>Public Interest Disclosure Act 2012</i>	Yes
New South Wales	<i>Public Interest Disclosures Act 1994</i>	No
Northern Territory	<i>Independent Commissioner Against Corruption Act 2017</i>	Yes
Queensland	<i>Public Interest Disclosure Act 2010</i>	No
South Australia	<i>Public Interest Disclosure Act 2018</i>	Yes
Tasmania	<i>Public Interest Disclosures Act 2002</i>	No
Victoria	<i>Public Interest Disclosures Act 2020</i>	Yes
Western Australia	<i>Public Interest Disclosure Act 2003</i>	Yes

It is most concerning that the AHPRA encourages the disclosure of information from whistle-blowers and on the other hand, decides whether the laws apply to its conduct. At page [7] of the AHPRA Whistle-blower policy states:

¹ *Ahprra and National Boards – Public Interest Disclosure (Whistle-blower) Policy (12 May 2020)* date reviewed (May 2021) - Kym Ayscough (Executive Director, Regulatory Operations) with Jamie Orchard (General Counsel).

"In States and territories whose Public Interest Disclosure Acts apply to AHPRA and the Boards, those Acts protect people who make public interest disclosures from certain criminal and civil liability in relation to making the disclosure. For example, a person who makes a legitimate public interest disclosure of information contrary to confidentiality and privacy laws that might otherwise apply to that information, may be protected from liability for making that disclosure".

"Importantly, in some States the relevant Public Interest Disclosure Acts do not apply. In these States, protection from civil and criminal liability may not be available to people who make public interest disclosures." (See table above)

There seems to be a gap in the provision, application and protections available to those who decide to take the brave step of making a disclosure in the interests of what may be public safety. Although there is a semblance that protections may be available, these protections appear **illusory** as the **implication is that AHPRA can itself choose to take retaliatory action against any such practitioner acting in the public interest, on the basis that it (AHPRA) declares itself immune from law[s]** or decides how those laws deemed applicable may apply to them and to what extent.

I am concerned that the Whistle-blower policy as espoused by AHPRA does not adequately protect individuals. An individual cannot safely seek any protection from the policy as written and as a consequence **the lives of Australian citizens may be endangered** due to the lack of confidence in doctors' independence arising as a result of the policy. This is because whistle-blowers who come forward with information that can save lives or expose corruption, wrongdoing or misconduct may be subject to retaliation and prosecution by AHPRA if they make disclosures even though they are in the public interest.

Based upon the information provided pursuant to the Whistle-blower policy for AHPRA, State and Federal Laws, there is no conceivable reason how anyone would take comfort in wanting to come forward to report misconduct, corruption or wrongdoing (generally) as the policy appears to be one that encourages disclosure but provides illusory protections.

Applicability of the Corporations Act 2001 (Cth)

We direct your attention to the *Corporations Act 2001 (Cth) s9.4AAA*. From **1 July 2019**, the whistle-blower protections in Part 9.4AAA the *Corporations Act 2001* (Corporations Act) have been expanded to provide greater protections for whistleblowers who report misconduct about **companies and company officers**. The reforms to the regime were contained in the *Treasury Laws Amendment (Enhancing Whistleblower Protections) Act 2019*, which received Royal Assent on **12 March 2019**.

I draw your attention to the contents of the Act which I have enclosed. **I would take this opportunity to remind you that, as a public entity, you are bound by the Act. This means that you, or any employees of AHPRA, are prohibited in Law from taking punitive action against said doctors on the basis of any public interest disclosures released under their social media accounts or any other method of public disclosure.**

Disclosure to legal practitioner – *Corporations Act 2000* (Cth)

1317AA(3) *A disclosure of information by an individual qualifies for protection under this Part if the disclosure is made to a legal practitioner for the purpose of obtaining legal advice or legal representation in relation to the operation of this Part.*

SECTION 1317ADA DETRIMENT

1317ADA In sections 1317AC and 1317AD, **detrimment** includes (without limitation) any of the following:

- (a) dismissal of an employee;
- (b) injury of an employee in his or her employment;
- (c) alteration of an employee's position or duties to his or her disadvantage;
- (d) discrimination between an employee and other employees of the same employer;
- (e) harassment or intimidation of a person;
- (f) harm or injury to a person, including psychological harm;
- (g) damage to a person's property;
- (h) damage to a person's reputation;
- (i) damage to a person's business or financial position;
- (j) any other damage to a person.

The 9 March 2021 Edict

I understand that AHPRA implemented an edict on the **9 March 2021** with the effect of prohibiting/restricting and/or unduly influencing practitioners in Australia from making any statements that espouse any concerns regarding the safety or efficacy of covid-19 vaccines. Given that such statements are likely to be in the public interest in terms of advising the community about risks and benefits, that these would fall under the confines of the *Public Interest Disclosure Act* and bring the issues squarely within AHPRA's Whistle-blower policy thus giving rise to potential legal liability to officers and the entity as a whole.

Of equal concern is the potential for expert witnesses instructed for the purpose of providing courts with forensic evidence being adversely influenced by the **9 March 2021** letter.

Should we become aware that a doctor who has registered their public disclosure with our office has been reprimanded or censured by AHPRA on the basis of a qualifying disclosure, we will not hesitate to take action against any employee of AHPRA that, in so doing, breaks the law. This may include criminal referrals where appropriate.



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The Need for a Review

1. The Whistle-blower policies must be immediately revoked and replaced with substantive protections and guarantees for qualifying disclosures that are compliant with the aforementioned Acts.
2. I require that you revise the edict of the **9 March 2021** to ensure that it complies wholly with the *Public Interest Disclosure Act[s] and Corporations Act 2000*.
3. AHPRA must commit and disclose that it will be Governed by Australian laws. This refers to the notion that **AHPRA cannot decide which laws apply to its operations**, rather they must commit to a genuine whistle-blower law that protects substantive protections for those who disclose.
4. Whistle-blower policy **must** take into consideration the power imbalances between the parties and seek to remediate such imbalances by allowing disclosees to select an agency or legal representative whom they are comfortable with.
5. AHPRA must immediately commit to create a consultative committee of independent professionals to assist with the drafting of the new policy. The members of the committee must be open to full disclosure of financial or other interests and all documents relating to the committee formation, consideration and action must be fully disclosed to the Australian public.

Yours faithfully

Tony Nikolic

Ashley, Francina, Leonard

Yours faithfully

Gerard Rennick

Australian Senator

CC: WhistleblowerHotline@deloitte.com.au

Encl: Book Chapter -International Handbook of Whistleblower Research