29 June 2022

Criminal Procedure Review—Magistrates Courts
GPO Box 149
BRISBANE QLD 4001

By email: Criminal-Procedure-R@justice.qld.gov.au

To the Criminal Procedure Review Team,

Submission to the Criminal Procedure Review – Magistrates Court

Thank you for the opportunity to provide a submission on this important review of Queensland's criminal procedure in the Magistrates Court.

Overview

Ahpra is an independent, national statutory body whose main aim is to protect the health and safety of the public. We are established under, and responsible for ensuring compliance with, the *Health Practitioner Regulation National Law*, as in force in each state and territory (the **National Law**). We work in partnership with the following national health practitioner boards representing the 16 health professions regulated under the National Law:

- Aboriginal and Torres Strait Islander Health Practice Board of Australia
- Chinese Medicine Board of Australia
- Chiropractic Board of Australia
- Dental Board of Australia
- Medical Board of Australia
- Medical Radiation Practice Board of Australia
- Nursing and Midwifery Board of Australia
- Occupational Therapy Board of Australia
- Optometry Board of Australia
- Osteopathy Board of Australia
- Paramedicine Board of Australia
- Pharmacy Board of Australia
- Physiotherapy Board of Australia
- Podiatry Board of Australia
- Psychology Board of Australia

The National Law as in force in Queensland is the *Health Practitioner Regulation National Law (Queensland)* (the National Law Qld).

The paramount guiding principle of the National Law is that the health and safety of the public are paramount[1]. One of the objectives is to protect the public by ensuring that only health practitioners who are suitably trained and qualified to practise in a competent and ethical manner are registered.

[1] Section 3A of the National Law Qld

In furtherance of this objective, one of Ahpra's functions is to investigate and prosecute offences under the National Law. The most common offences we investigate and prosecute are the indictable offences of using a protected title (such as 'psychologist' and 'nurse')[2], holding out as a health practitioner[3], and performing restricted practices[4], when not registered in the relevant profession under the National Law.

In Queensland, all offences under the National Law must be heard and decided summarily, unless the Magistrates Court considers that there are exceptional circumstances, or that the defendant may not be adequately punished on summary jurisdiction[5]. The maximum penalty that may be imposed on summary conviction for an indictable offence under the National Law Qld is 165 penalty units. As such, Ahpra's primary prosecution jurisdiction in Queensland is the Magistrates Court.

To date all Ahpra prosecutions in other jurisdictions have also been conducted in the relevant Magistrates or Local Court, rather than upon indictment in the higher courts.

Ahpra welcomes the proposal to introduce legislation to replace or reform the *Justices Act 1886* (Qld) (the **Justices Act**). As Ahpra prosecutes offenders throughout Australia, we are well placed to observe procedural differences in the various jurisdictions. As a statutory body that prosecutes in its own right, our experience with prosecutions offers a different perspective from that of the police and Office of the Director of Public Prosecution.

Further information about Ahpra's function as a prosecuting authority under the National Law, can be found at https://www.ahpra.gov.au/Notifications/Concerned-about-a-health-practitioner/Reporting-a-criminal-offence.aspx

Of the matters raised in the consultation paper, Ahpra's submissions relate to:

- Technology and the courts
- How proceedings are started
- Case conferencing;
- Proceeding in the defendant's absence; and
- Costs.

Technology and the courts

Ahpra strongly supports the proposal that the new Act contain general provisions to allow for electronic processes and procedures. The costs incurred by Ahpra are ultimately borne by registered health practitioners (as outlined in more detail below in our submissions regarding costs). As Ahpra uses external lawyers (either from Crown Law or a private law firm) to represent Ahpra in its prosecutions, any amendments which reduce the time spent on administrative steps and unnecessary physical attendance at court reduces the direct financial cost of the prosecution for both Ahpra and defendants (and ultimately health practitioners), and frees up resources for substantive matters. Ahpra strongly supports amendments to facilitate electronic files and online filing. Ahpra also supports online mentions and adjournments, provided that checks and balances are included to ensure that parties cannot indefinitely defer the hearing of a matter .

Ahpra considers that a small proportion of its cases might be suitable for remote summary hearing, for example where the issues in dispute are largely matters of law rather than factual disputes the

[2] Section 113 of the National Law

[3] Section 116 of the National Law

[4] These include performing a restricted dental act, prescribing an optical appliance and performing a restricted manipulation of the cervical spine (sections 121-123 of the National Law).

[5] Section 241A of the National Law Qld.

subject of witness testimony. Where issues of credit are concerned, in person hearings are almost always considered to be preferable in the interests of justice.

How proceedings are started

Ahpra has no powers of arrest and accordingly starts proceedings by way of a complaint and summons pursuant to section 42.of the Justices Act, in the name of a duly authorised public officer complainant. This requires attending before a justice of the peace, and is time consuming for the authorised public officer. The constraints posed by movement restrictions and the introduction of remote working in recent years, heighten the burden imposed by this requirement. As a national agency, Ahpra's staff are employed in offices throughout Australia.

Other jurisdictions permit the commencement of prosecutions by notice. In New South Wales for example, the legislation provides for a court attendance notice to be issued by a public officer[6].In Victoria a criminal proceeding is commenced by filing a charge-sheet signed by the informant.[7] Ahpra has commenced many prosecutions in NSW and Victoria and found this approach to be far more efficacious than complaint and summons. There does not appear to be any public interest in continuing to require public officers to attend before a justice of the peace to commence a prosecution.

Ahpra strongly supports the proposal to allow public officers to commence proceedings by notice rather than requiring a complaint and summons.

Case conferencing

Ahpra takes pride in being a model litigant. Ahpra would welcome any amendments that support parties attempting to resolve matters before a hearing.

In Ahpra's experience in other jurisdictions, case conferencing can result in the prompt resolution of matters, avoiding the need for the matter to proceed to a defended hearing. This is particularly so as defence lawyers tend to be unfamiliar with the National Law.

Proceeding in the defendant's absence

Ahpra supports the retention of the ability to proceed in the defendant's absence[8].

Ahpra acknowledges that the power to hear and determine a matter in the defendant's absence is a power that must be exercised with great care and accompanied by legislative safeguards. Ahpra considers the current law strikes the right balance for both defendants and prosecutors.

The current regime is of heightened importance for non-police agencies such as Ahpra. Unlike the police, Ahpra cannot arrest a defendant for whom a warrant has issued. Where a warrant for arrest has been issued only the Police, who have not otherwise been involved in the matter and have significant competing priorities, can locate the defendant, execute the warrant for arrest, and bring the defendant before the court. Altering the ability to proceed in the absence of the defendant could result in perverse outcomes for non-police prosecutions, where the defendant could avoid the prosecution simply by not attending, or relocating interstate.

Costs

<u>Why Ahpra seeks costs under the Justices Act</u>

As a statutory body, Ahpra strongly supports any proposal which enables costs orders to be made.

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[6] *Section 173 Criminal Procedure Act 1986* (NSW) and section 113(1) of the *Criminal Procedure Regulation 2017* (NSW)

[7] Section 6 of the *Criminal Procedure Act 2009* (Vic)

[8] *Justices Act 1886* (Qld): s 142(1)

It is noted that the Queensland Police Service do not often seek costs (as referred to anecdotally, at paragraph 3.166 of the consultation paper), despite having the power to do so under the Justices Act. It might be assumed that this is in part because the police have access to the resources and funding of the State.

Although Ahpra is a statutory body, it does not receive any government funding. Ahpra's operations are funded by registration fees paid by registered health practitioners. In the event Ahpra is unable to recover the costs of a prosecution, those costs are effectively borne by registered health practitioners. When Ahpra prosecutes a defendant, and a finding of guilt follows, it is axiomatic that the defendant has shown a disregard for the protective function of the National Law. Registered practitioners, doing the right thing, should not be required to bear the costs of proceedings against those who have not done the right thing.

In accordance with Ahpra's prosecution guidelines, a prosecution will only be commenced if it is in the public interest and there is a reasonable prospect of conviction. The public interest requires Ahpra to have regard to how resources are allocated, or to put it another way, how the funds it receives from registered health practitioners are used. In accordance with the public interest imperative, complaints which raise concerns that pose a greater risk to the safety of the public will have more resources allocated to their investigation.

If the ability to recover legal costs is diminished or denied, then this will impact upon the public interest calculus, as (without increases to practitioner fees) there will likely be fewer resources available for investigating potential offending under the National Law. The fewer resources available, the more restrictive the public interest test may become in its application – which is a significant potential consequence of requiring Ahpra to do the same amount of work with fewer resources. Whilst the practical implications that reduced costs recovery would have on Ahpra would be difficult to quantify, with fewer funds, public interest considerations may make it more likely that investigations are narrowed in scope or discontinued altogether. In short, the ability to recover costs assists Ahpra in fulfilling its core purpose of protecting the public.

Given the different criminal procedures in each jurisdiction, Ahpra instructs external lawyers with the relevant expertise at the time of drafting charges to conduct the prosecution.

Ahpra's experience with costs under the Justices Act

In the majority of prosecutions successfully brought by Ahpra throughout Australia, a costs order has been made in Ahpra's favour where sought.

In Queensland, as costs are often restricted by the scale within Schedule 2 of the *Justices Regulations 2014* (Qld) (the **Justices Regulations**), the costs awarded to Ahpra are often substantially less than those actually incurred. It is to be noted that Ahpra only ever seeks costs in relation to the costs incurred by their external solicitors, and does not seek costs relating the investigation or internal legal work.

The scale under the Justices Regulations awards up to $1,500 for the hearing (which includes instructions and preparation), with $875 per day of hearing thereafter, and $250 per other court attendance. In practice, the majority of legal costs are accumulated in preparing the matter (that is, conferencing, drafting and researching) prior to hearing. $1,500 for a day of hearing, including preparation, does not appropriately account for the majority of work undertaken, and legal costs incurred.

In Ahpra's experience, costs are not often awarded under section 158B(2) of the Justices Act, which allows for costs to be awarded above the scale. That is, the threshold for what is considered a case involving 'special difficulty, complexity or importance' is a high one and not regularly met.

On the question of what is considered a matter of 'special difficulty, complexity or importance', the New Zealand case of *Interclean Industrial Services Ltd v Auckland Regional Council* [2002] NZLR 489 has been referred to with approval in many Queensland cases (see: *Guilfoyle v Niepe Constructions Pty Ltd (No 2)* (2021) QMC 3 at [13]; *Travers v McDonagh; Carey v La Rocca* [2013] QDC 177 at [23]; *Whitby v Stockair Pty Ltd & Anor* [2015] QDC 79 at [39]; *Schloss v Bell; Bell v Schloss* [2016] ICQ 17 at [41]; and *Bell v Townsend* [2014] QMC 30 at [70].) It states at 496-7:

> *As observed in Tipping J in T v Collector of Customs (High Court, Christchurch, AP 167/94, 28 February 1995) at p 2 'The use of the word 'special' when applied to the concepts of difficulty, complexity or importance means that* ***it is not enough simply to say that the case was difficult, complex or important.*** *The necessary difficulty, complexity or importance* ***must be such that it can be said to be significantly greater than is ordinarily encountered****. Similarly the focus on the case itself means that it is not enough for the applicant to be able to say that by dint of its features the case had special importance to him'.*

Ahpra's submission on costs reform

Ahpra submits that the Magistrates Court should continue to be empowered to award costs that it considers just and reasonable, as currently set out in section 158 of the Justices Act. It is considered that more specific statutory restrictions on such a power such as those currently in section 158B are not necessary in the interests of justice, and in the case of statutory authority prosecutions, can lead to outcomes that do not reflect the realities of a statutory authority prosecution.

Conferring a wide discretion which empowers magistrates to apportion costs flexibly is an approach which has worked effectively in Victoria. Drawing on Ahpra's experience as a national regulator, we consider the legislative framework in force in Victoria to be the most effective at regulating the apportionment of legal costs in criminal proceedings at the Magistrates Court level. In summary proceedings, the Magistrates Court has an unfettered discretion to make costs orders in criminal proceedings.[9] All the costs of, and incidental to, all criminal proceedings are in the discretion of the court and the court has full power to determine by whom, to whom and to what extent the costs are to be paid.[10]

We consider the Qld scale of costs has become outdated, and if it were to be retained is in need of updating to bring it more into line with the market realities for the cost of legal services when prosecuting regulatory offences. The restrictive scale under the Justices Regulations does not adequately reflect costs actually incurred or capture the circumstances in which they are primarily incurred. By prescribing set fees according to the type of appearance or hearing, the scale does not adequately account for the fact that most legal costs are incurred during the preparation phase of proceedings. Furthermore, the presumption that recoverable costs be calculated according to the scale – unless the threshold of s 158B(2) is met – creates a one-size-fits-all approach. In our view, the application of a costs scale operates best when it acts as a guide, rather than a parameter, on the exercise of a magistrate's discretion.

In our view, departure from the scale, should it be retained, should not be contingent upon the threshold test contained in section 158B(2) being satisfied. Under the current regime, magistrates may only award costs above the scale if they find the case involves a level of "difficulty, complexity or importance" which is "special" or out of the ordinary. This binary test for calculating quantum – whereby a case is either ordinary or extraordinary – creates a blunt instrument which is unable to be deployed with nuance and flexibility and does not recognise the special importance of the role of statutory authorities, such as Ahpra, upholding laws to protect the public. Some prosecutions by Ahpra may be legally straightforward and lead to a relatively low penalty, but the importance of Ahpra's role in enforcing the National Law does not vary according to the complexity of the particular prosecution. Ahpra submits that the binary test created by section 158B should be abolished and replaced with a statutory provision which empowers magistrates to depart from the scale if it is considered just and reasonable to do so. Such an approach would be predicated on the sound recognition that legal costs should be viewed as a sliding scale, with quantum moving up or down that scale, guided by the overarching principles of just and reasonable.

In closing

Thank you for the opportunity to comment on this important body of work. We look forward to ongoing consultation in the reforms.

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[9] *Criminal Procedure Act 2009* (Victoria): s 401
[10] Ibid., s 401

If you require any further information, please do not hesitate to contact me via e-mail at

Yours sincerely,

Dr Jamie Orchard
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