

Where is the harm?

Mandatory notification requirements for treating practitioners

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This series highlights common medicolegal issues in general practice. Written by a team from medical defence organisation Avant, the scenarios are based on a range of previous cases, with details changed for privacy and some issues summarised for the sake of discussion. This scenario explores the issues surrounding mandatory notifications, in particular the obligations on a medical practitioner under the legislative reforms to come into effect in March 2020, when another health practitioner comes to see them for medical assistance.



Like all registered health practitioners, medical practitioners have a mandatory notification obligation if they form a reasonable belief that another health practitioner has engaged in notifiable conduct.¹ The aim of mandatory notification is to protect the public from being placed at harm.² A common issue, and one that is the cause of widespread discussion and media attention, is the scenario where a medical practitioner sees their GP for assistance because they are not well.³ In 2019, new mandatory notification reforms were passed, which amend the notification obligations doctors have when they are treating other health practitioners. These changes will come into effect in March 2020.

In the scenario below, we look at the obligations under the revised legislation for a GP who is treating a doctor in training. However, the law will not only affect GPs, it applies to all treating health practitioners practising in all states except Western Australia. (Western Australia has a different legislative provision.)

Case scenario

Samantha is a doctor-in-training completing her rotation in the emergency department at a hospital. She attends her regular GP, Dr West, and reports that she is not sleeping well and feels overwhelmed and anxious with everything she has to juggle, both at work and in her home life. She has realised she needs a break and has taken some leave from work but knows she cannot take too much time off.

Samantha explains that her daily commute is an hour each way. She is required to complete 35 hours of patient contact per week as well as study for her examinations. At home, she has a five-year-old child who has just been diagnosed with autism, and her partner is away a lot for work. Samantha is struggling to keep her personal life and work life in order. She is exhausted and barely getting any sleep. Even when she gets to bed, she feels too anxious to fall asleep and lies awake for hours.

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1. GROUNDS FOR MANDATORY NOTIFICATION¹

Current grounds for notification

As the law stands at the time of writing (January 2020), if a practitioner has formed a reasonable belief that another practitioner has engaged in 'notifiable conduct', a report needs to be made to AHPRA to prevent the public being placed at risk of harm.

Currently, notifiable conduct occurs when a practitioner has:

- practised while intoxicated by alcohol or drugs
- engaged in sexual misconduct in connection with their practice
- placed the public at risk of substantial harm in their practice because the practitioner has an impairment
- placed the public at risk of harm because they have practised in a way that constitutes a significant departure from accepted professional standards.

There are exemptions that apply to the general rule above. Medical practitioners do not need to notify:

- if they know or reasonably believe that someone has already reported the conduct
- if they are:
 - providing advice about notifiable conduct for the purpose of legal proceedings or the preparation of legal advice
 - working for an insurer that provides indemnity insurance and becomes aware of notifiable conduct in the course of the provision of legal advice arising from the insurance policy or legal proceedings
 - also a legal practitioner and are providing legal services to the health practitioner
 - a member of a quality assurance committee, health professional council or other approved health body, and are prohibited by legislation from disclosing the notifiable conduct.

Amended grounds for notification

A key aspect of the changes to commence in March 2020 is that the reporting requirements have been redrafted from past tense ('has placed the public at risk') to present tense ('placing the public at risk'). This should have the effect of focusing attention on the issue of whether there is now any risk to the public.

The amendments also introduce specific provisions relating to notifications by treating practitioners. Currently the laws impose the same requirement on all health practitioners, regardless of whether the health practitioners are peers or are in a treating relationship (except in Western Australia). The new provisions introduce a higher threshold for reporting notifiable conduct (except for sexual misconduct) and will require a treating practitioner to assess whether their practitioner-patient is placing the public at 'substantial risk of harm' rather than 'risk of substantial harm'. The provisions also introduce factors for treating practitioners to take into consideration in determining whether the public is being or may be placed at risk of harm.

Although the wording changes may seem nuanced, the legislators have changed the legal test to demonstrate that the threshold for treating practitioners is higher than for other practitioners. This is to encourage health practitioners to seek the health care they need without fear that their treating practitioner will be required to notify AHPRA.

Abbreviation: AHPRA = Australian Health Practitioner Regulation Agency.

Samantha does not feel that any of her patients are in danger when she is at work; however, she is struggling to stay awake, and this is of concern to her particularly when she is driving home after a long day at the hospital. Samantha feels that she cannot continue like this because she is worried that she will start making

mistakes at work. She recently realised something needed to change when, on the way home from work, she found herself driving along the verge of the road, with no idea of how she got there or how she had avoided an accident. This was enough for her to realise that she needed a break from work and to take time off to look

after her child and get some rest.

Dr West completes an assessment. Samantha does not consume alcohol or drugs and does not have any depressive features or suicidal ideation. She does not report any work-related issues of bullying or mistakes with patient care. Samantha looks tired, but a physical examination does not show any abnormalities.

Dr West knows that she has a mandatory notification obligation and is not sure whether Samantha's presentation constitutes notifiable conduct under the category of impairment.

Medicolegal issues

An issue for Dr West is whether she needs to make a report about Samantha to the Australian Health Practitioner Regulation Agency (AHPRA) in accordance with her mandatory notification obligations.

The Health Practitioner Regulation National Law (National Law) provides that a practitioner who has formed a reasonable belief that another practitioner has engaged in 'notifiable conduct' must make a report to AHPRA to prevent the public being placed at risk of harm. Behaviours that form grounds for mandatory notification are detailed in Box 1. They include placing the public at risk of harm by practising:¹

- while intoxicated, or
- while impaired, or
- in a way that constitutes a significant departure from accepted professional standards.

They also include engaging in sexual misconduct in connection with a doctor's practice.

AHPRA and the Medical Board of Australia have stressed that a doctor who seeks help for stress, burnout, anxiety or depression would not meet the definition for impairment under the National Law unless their capacity to practise is significantly affected.⁴ However, many in the medical profession have been concerned for some time that the laws are complex and poorly understood by practitioners, and that this has been a barrier to practitioners seeking

2. PROCESS OF AMENDING MANDATORY NOTIFICATION PROVISIONS

Mandatory notification requirements for health practitioners are contained in the Health Practitioner Regulation National Law (National Law). Despite its name, the National Law is actually contained in several pieces of state legislation, as the Australian parliament has limited power to make legislation about health. When the national scheme for health practitioners was established, it was agreed that Queensland would 'host' the National Law. This means that Queensland passes amendments in a piece of state legislation, which is then adopted by the other states and territories. In this case, Western Australia has its own provisions relating to mandatory notification by treating practitioners, so will not be adopting these particular amendments.

The amendments to the mandatory reporting provisions were passed in Queensland in February 2019 and will commence on a date to be proclaimed. AHPRA has said that the changes are expected to come into effect in March 2020, but at the time of writing the exact date had not been announced.

help.^{5,6} In February 2019, laws were passed which will clarify the notification requirements of health practitioners who treat other health practitioners, as is the case of Dr West and Samantha. The amendments are outlined in Box 1 and the process of amending the laws in Box 2. These laws are yet to come into effect; it is expected this will happen in March 2020.

When the amendments come into effect, treating practitioners (Dr West in this scenario) will need to report a practitioner-patient (Samantha) only if, during the course of providing the health service, the treating practitioner forms the reasonable belief that there is currently a substantial risk of harm to the public caused by the practitioner-patient's practice of medicine:

- while the practitioner has an impairment, or

- while intoxicated by alcohol or drugs, or
- in a way that constitutes a significant departure from accepted professional standards.⁷

Sexual misconduct will continue to be grounds for requiring a mandatory notification. However, this article does not address details of the amendment provisions relating to mandatory notification on the grounds of sexual misconduct.

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AHPRA is currently redrafting its guidelines on mandatory notifications, which will include practical directions to help treating practitioners apply the new laws. The new guidelines are set to be finalised and released before the law takes effect. The guidelines will be available on the AHPRA website (www.ahpra.gov.au/Notifications/mandatorynotifications.aspx).

Although the change in the law may appear largely technical, the lawmakers have stated that their intention is for doctors to have greater confidence to seek treatment without the fear of being reported.⁸ Practitioners treating other practitioners will only need to make a mandatory notification to AHPRA if there is a current substantial risk of harm to patients. This is a high threshold for medical practitioners; it means that if a practitioner-patient attends to see a practitioner for treatment and has taken necessary steps to prevent the public being at risk, such as taking a break from work, there is no obligation to report.

The new legislation explicitly provides that to decide whether a practitioner's conduct is notifiable and putting the public at substantial risk of harm, the following should be considered:

- the nature, extent and severity of the impairment

3. VOLUNTARY NOTIFICATION⁹

In addition to mandatory notification requirements, doctors in all states, including Western Australia, continue to have an ethical responsibility to assist medical colleagues to maintain good health and to act to prevent colleagues putting patients at risk. This may mean making a voluntary report to AHPRA if the threat to patient safety cannot otherwise be addressed.

Abbreviation: AHPRA = Australian Health Practitioner Regulation Agency.

- the practice context, such as whether the practitioner is part of a team or is a solo practitioner
- how well any impairment can be managed with treatment
- how willing the practitioner is to engage in treatment
- any other factors, including whether the practitioner is still working.⁹

Discussion

Dr West will need to decide whether she needs to report Samantha to AHPRA on the basis of an impairment. Under the new laws the key consideration is whether, in practising medicine, Samantha will place the public at substantial risk of harm.

In this context, a crucial consideration is that Samantha has already stopped working, so is not currently placing the public at risk of harm. Also important is that she has attended to see Dr West for assistance and is open to treatment.

Samantha has also informed Dr West that she does not believe that she has placed any patients at risk of harm. Dr West needs to make her own assessment about the risk of patient harm. The fact that Samantha has raised it may be relevant to her level of insight but is not determinative. If Dr West were concerned about patient harm, she would also need to consider the grounds for her concern for patient safety. In this case the grounds for notification would be a concern that Samantha was practising with an impairment. The National Law

defines impairment as a physical or mental impairment, disability or condition or disorder that detrimentally affects or is likely to affect a practitioner's capacity to practise. It is important to remember that a health condition and an impairment are not the same thing. Further, not all impairments need to be reported. There is insufficient evidence in this case to suggest that Samantha is impaired.

When deciding whether or not to make a mandatory notification a medical professional should record their rationale in the medical records.

Practitioners in Western Australia are not legally required to make a mandatory notification about a practitioner-patient. However, doctors' professional obligations to protect patient safety may mean they decide to make a voluntary notification about a practitioner-patient (Box 3).^{10,11}

Outcome

Dr West completes her assessment of Samantha and reaches the conclusion that she does not need to report Samantha. A treatment plan is put in place, and Dr West wants to see Samantha again before she returns to work. On the evidence before her, Dr West does not hold a reasonable belief that Samantha will place the public at substantial risk of harm.

Dishonesty, lack of insight, nonadherence or an intention to self-harm on the part of the practitioner-patient might change the assessment of a treating practitioner. For example, if Samantha lacked insight into her condition, refused to take a break from work or insisted on returning to work against advice, Dr West might need to reconsider her notification obligations.

Conclusion

The decision to make a mandatory report to AHPRA about a fellow health practitioner that you are treating can be difficult. The main purpose of the mandatory notification laws is to protect the public. However, doctors also should be able to obtain health care without the fear of being reported to the regulator.

Physical health conditions and mental illnesses themselves are not impairments that need to be reported. If they cause only a minor detriment to a practitioner-patient's ability to practise and if the risk of harm to patients is low, they do not need to be reported to AHPRA. Instead, they need to be managed by both the treating practitioner and the practitioner-patient in this scenario.

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If you are concerned that you may need to make a mandatory notification, it can be helpful to speak in general terms to a senior colleague (without breaching patient confidentiality). You may also wish to speak to your medical defence organisation so that you can be satisfied that the threshold is met and a mandatory notification is required.

It can also be helpful for treating practitioners to explicitly discuss mandatory notification with the practitioner-patient early in a treatment relationship. Often this would involve reassuring the practitioner-patient about the circumstances in which you would need to consider a mandatory notification. It can also be helpful to explain that you are not currently concerned about patient safety, and that if you were concerned you would discuss with the practitioner-patient how they might address this – for example, by taking time off work. MT

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Further reading

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