



Submission by the National Health Practitioner Ombudsman and Privacy Commissioner

Senate Community Affairs References Committee:
Inquiry into the medical complaints process in Australia

May 2016

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Background

In 2008, the Council of Australian Governments agreed to establish a single National Registration and Accreditation Scheme for registered health practitioners and students undertaking programs of study that provide a qualification for registration in a health profession or clinical training in a health profession (the National Scheme). The National Scheme is governed by the *Health Practitioner Regulation National Law* as in force in participating states and territories (the National Law), which came into effect 1 July 2010 (except in Western Australia, where it came into effect on 18 October 2010).

The objectives and guiding principles of the National Scheme include:

- protecting the public by ensuring that only health practitioners who are suitably trained and qualified to practice in a competent and ethical manner are registered
- imposing restrictions on the practice of a health professional only if it is necessary to ensure the safe provision of appropriate quality health services
- ensuring the fair, transparent, accountable, efficient, and effective operation of the National Scheme.¹

The Australian Health Practitioner Regulation Agency (AHPRA) is the national agency responsible for administering the National Scheme. AHPRA supports the 14 National Health Practitioner Boards (the National Boards) to exercise their functions, which include:

- registering qualified and competent health practitioners and, if necessary, imposing conditions on their registration
- developing standards, codes and guidelines for the 14 registered health professions
- approving accredited programs of study
- overseeing the assessment and investigation of notifications (complaints) about registered health practitioners
- establishing panels to conduct hearings about the performance or health of health practitioners and, where necessary, referring matters to the responsible tribunal in a participating jurisdiction.²

The National Law also establishes the National Health Practitioner Ombudsman and Privacy Commissioner (the NHPOPC). The main purpose of the NHPOPC is to provide ombudsman, privacy and freedom of information oversight of the National Scheme, particularly in relation to the administrative actions of AHPRA and the National Boards.

The NHPOPC is an independent statutory officer appointed by the Australian Health Workforce Ministerial Council. The current NHPOPC is Samantha Gavel. Ms Gavel is assisted by a small staffing complement, which includes staff who have expertise in investigations and complaints handling.

¹ National Law, s 3.

² National Law, s 35.

Introduction

On 2 February 2016, the Senate referred the matter of the medical complaints process in Australia to the Senate Community Affairs References Committee (the Committee) for inquiry and report.

This submission is intended to inform the Committee's understanding of the role of NHPOPC in relation to the medical complaints process in Australia. Importantly, the NHPOPC represents an existing oversight mechanism in the context of the administrative actions of AHPRA and the National Boards.

This submission also responds to the inquiry's terms of reference where it is appropriate for the NHPOPC to provide comment (based on its complaints statistics and experience in dealing with complaints about the administrative actions of AHPRA and the National Boards). Comments are provided in relation to parts (c), (d), (f) and (g) of the inquiry's terms of reference. In summary, the NHPOPC is of the view that:

- it is important to ensure that any proposed measures to address the small number of potentially vexatious notifications made against health practitioners should not have the effect of making it more difficult for people to make notifications
- existing provisions in the National Law provide health practitioners with some safeguards against the possibility of the regulatory system being used to bully or harass health practitioners
- there should not be stronger requirements for patient outcome specific data to be used in both lodging and investigating complaints
- requiring that people who lodge a notification sign a declaration that they are acting in good faith is not likely to reduce the number of notifications made or the incidence of possibly vexatious notifications
- concerns about vexatious notifications could be addressed by introducing better complaint triage processes and improving communication with notifiers (particularly at the beginning of the investigation process).

Part 1: Role of the National Health Practitioner Ombudsman and Privacy Commissioner

The office of the NHPOPC is an independent, statutory agency established under the National Law to provide ombudsman, privacy and freedom of information oversight of the national agencies that have a role in the National Scheme, namely:

- AHPRA
- the National Boards, including
 - 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
 - Pharmacy Board of Australia
 - Physiotherapy Board of Australia
 - Podiatry Board of Australia
 - Psychology Board of Australia
- AHPRA's Management Committee
- the Australian Health Workforce Advisory Council.

In general, the role of the NHPOPC is to handle complaints and, where appropriate, conduct investigations into the administrative actions of AHPRA and the National Boards in order to assist people who are dissatisfied with the way a matter has been handled in the context of the National Scheme.

History of the office of the NHPOPC

The separate roles of the National Health Practitioner Ombudsman and National Health Practitioner Privacy Commissioner were established on 1 July 2010, to coincide with the introduction of the National Law. For efficiency, these roles were combined to form the single office of the National Health Practitioner Ombudsman and Privacy Commissioner.

From its inception, the office of the NHPOPC encountered problems with resourcing and effectively managing its statutory responsibilities. By 2014, a backlog of approximately 350 complaints had accumulated. Following an independent review of the office by KPMG in early 2014, a new Ombudsman and Privacy Commissioner was appointed and key changes were made to improve processes and resolve the office's resourcing issues.

Ms Gavel was appointed to the role of NHPOPC in November 2014 for a term of three years. The office of the NHPOPC has achieved significant progress since Ms Gavel's appointment, including:

- completion of work on the complaints backlog
- recruitment of suitably qualified and experienced staff
- launch of a redeveloped website, including an animated video explaining the role of the NHPOPC
- production of the office's first annual report publication
- development of a new logo and visual identity
- implementation of Memorandums of Understanding between the NHPOPC and AHPRA, and the NHPOPC and the Victorian Department of Health and Human Services (the host jurisdiction of the NHPOPC).

As the complaints backlog has now been addressed and office resourcing concerns have been resolved, the office intends to move into a new phase of development. The current focus of the NHPOPC is to raise the public profile of the office, as it appears that many people are currently unaware of the free and independent complaint handling service that the office provides. The NHPOPC will achieve this goal through the development of a comprehensive stakeholder engagement framework and by publishing information resources for the general public and health practitioners.

Powers of the NHPOPC

The NHPOPC seeks to ensure that the objectives and guiding principles of the National Scheme are adhered to by providing an independent and free complaint-handling mechanism for members of the public, health practitioners and relevant students in relation to the administrative actions of agencies established under the National Scheme.

The NHPOPC's complaint-handling powers are derived from the following pieces of legislation:

- *Health Practitioner Regulation National Law*, as in force in participating states and territories
- Health Practitioner Regulation National Law Regulation (No. 42/2010)
- *Ombudsman Act 1976* (Cwlth), as modified by the National Law Regulation
- *Privacy Act 1988* (Cwlth), as modified by the National Law Regulation
- *Freedom of Information Act 1982* (Cwlth), as modified by the National Law Regulation.

The NHPOPC can only deal with complaints about the administrative actions of the agencies established by the National Scheme. Generally, this means that a complaint is from one of the following:

- a registered health practitioner
- an individual who has applied to AHPRA for registration as a health practitioner
- an individual who has made a notification or a complaint to AHPRA about a registered health practitioner
- the nominated representative of an individual in one of the above categories.

An administrative action is any action taken by an agency in relation to carrying out its duties and functions, or in exercising its powers or discretion in doing so. Administrative actions that may be the subject of a complaint include:

- the actions taken by AHPRA to assess and investigate notifications or complaints made under the National Law

- the actions of a National Board when making a decision in relation to matters raised as a result of a notification or complaint
- the actions of a National Board when making a decision to refuse registration or place conditions on the registration of a health practitioner.

The NHPOPC also investigates complaints about how AHPRA has handled personal information or a freedom of information request.

Another important part of the NHPOPC's work is to provide feedback to AHPRA and the National Boards to assist them to continuously improve their processes and policies. Complaints can provide valuable insights for process improvements to prevent similar problems in future, particularly in relation to systemic issues.

Consistent with the Commonwealth Ombudsman and most Ombudsman bodies, the NHPOPC has the power to make formal recommendations at the conclusion of an investigation. It is therefore imperative for the NHPOPC to establish collaborative relationships with its stakeholders in order to effectively resolve issues and ensure recommendations are appropriately accepted.

In summary, the NHPOPC can:

- investigate the administrative actions of AHPRA and the National Boards
- determine whether AHPRA and the National Boards have complied with relevant legislation, acted consistently with applicable policies and procedures, and have taken into account all relevant considerations when making a decision
- recommend to AHPRA and the National Boards that it –
 - reconsider a decision
 - review or change a policy or procedure
 - offer an apology to an affected person
 - expedite a delayed action
 - provide a better explanation to a person affected by a decision of AHPRA or a National Board.

The NHPOPC cannot:

- overturn a decision of AHPRA or a National Board, or force AHPRA or a National Board to review or change a decision
- provide legal advice or act as an advocate for anyone aggrieved by a decision or action taken by AHPRA or a National Board
- recommend that AHPRA or a National Board pay compensation to an affected person
- force AHPRA or a National Board to release a document determined to be exempt under the *Freedom of Information Act*
- recommend that AHPRA or a National Board take an action that is not available to them under the National Law.

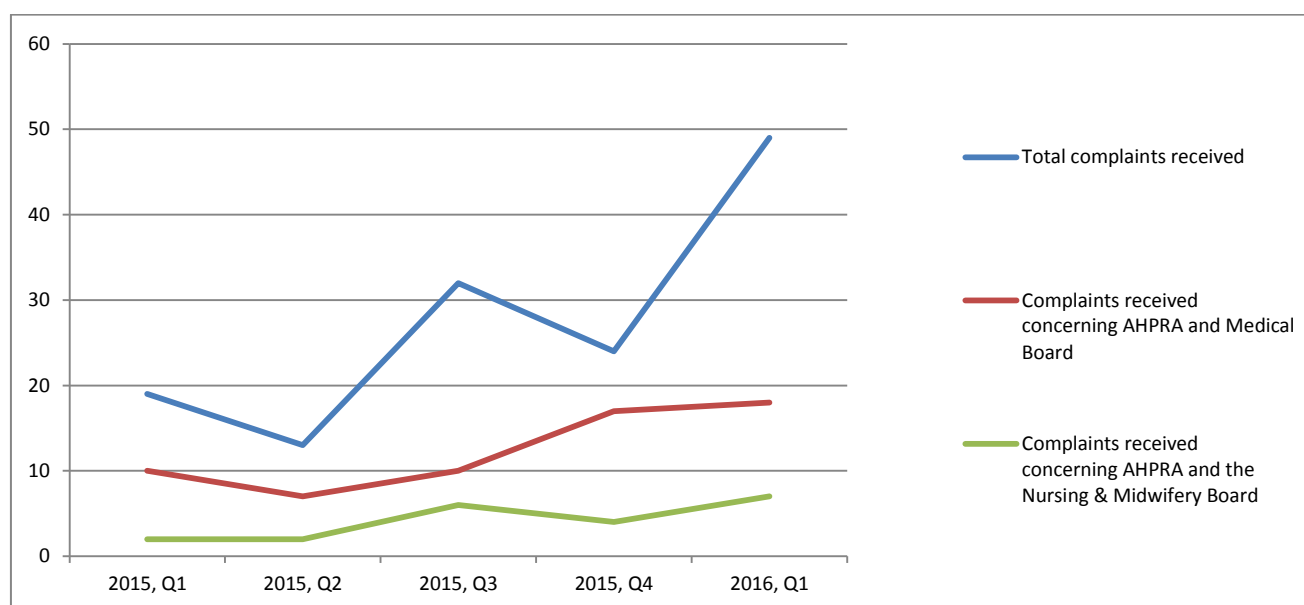
Number of complaints received by the NHPOPC

The NHPOPC's jurisdiction focuses on the administrative actions of AHPRA and the National Boards. The office also has jurisdiction to investigate complaints about privacy and freedom of information

complaints relating to AHPRA (and the National Boards), however, these complaints currently form a small portion of the total complaint caseload.

Based on current Year-to-Date figures, the total number of approaches (both complaints and inquiries) to the office of the NHPOPC has increased during 2015-16. In particular, the total number of complaints received by the office increased significantly during the period from the first quarter of 2015 to the first quarter of 2016.

Chart 1: Complaints received by the NHPOPC 2015-16



Key complaint issues

The overwhelming majority of complaints received by the NHPOPC concern the administrative actions of AHPRA and the National Boards in relation to notifications about the health, conduct or performance of health practitioners.³

For context, anyone can make a notification about a registered health practitioner. In general, when AHPRA receives a notification, staff investigate the notification and put the information gathered before the relevant National Board. The National Board then determines whether the health practitioner's conduct meets the threshold for action against their registration. If a National Board decides to take action against a health practitioner's registration, they have a number of options, including issuing a formal caution or imposing conditions on their registration. In the most serious cases, the practitioner can be suspended or de-registered. A National Board can also decide to take no further action against a health practitioner after considering the information gathered by AHPRA.

³ The NHPOPC does not have jurisdiction to deal with notification complaints from New South Wales and only limited jurisdiction to deal with notification complaints from Queensland. Notification complaints are dealt with by the New South Wales Health Care Complaints Commission and initially dealt with by the Queensland Office of the Health Ombudsman (OHO), rather than by the AHPRA, as in the other states and territories. The NHPOPC is able to deal with Queensland notification complaints if the matter is transferred to AHPRA by the OHO.

In 2014–15, almost half (47%) of the complaints to the NHPOPC were lodged by notifiers in relation to the way their notification about a health practitioner was handled by AHPRA and the National Boards. Twenty-three per cent of complaints received were lodged by health practitioners regarding the way a notification made against them was handled by AHPRA and the National Boards. Twenty-four per cent of complaints received were from health practitioners regarding problems with their registration.

Table 1: Complaint issues 2014–15

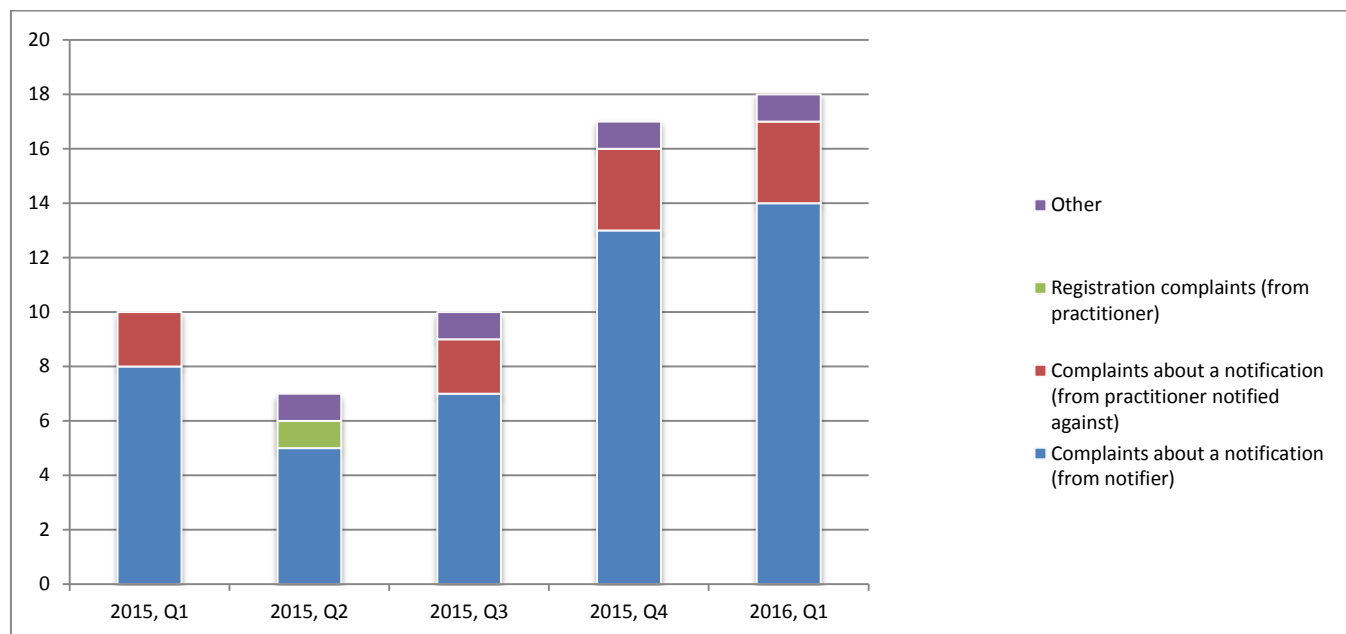
Complaint issue	Number of complaints received
Notification – complaint by notifier	35
Notification – complaint by health practitioner notified against	17
Registration – delay	13
Registration – process or policy	5
Accreditation process	1
Freedom of information complaint	1
Privacy	3

Complaints concerning AHPRA and the Medical Board

Specific analysis of the complaints received by the NHPOPC in relation to AHPRA and the Medical Board reveals that the large majority of these complaints are made by notifiers who express dissatisfaction about the handling of a notification they have made against a doctor. Common concerns are that AHPRA and the Medical Board did not take into consideration all of the information presented by the notifier, AHPRA and the Medical Board did not comprehensively investigate the issues raised in the notification (i.e. they did not speak to witnesses or obtain full medical records), and that AHPRA and the Medical Board did not appropriately explain the reasons for its decision in relation to the notification.

A much smaller portion of complaints are received from medical practitioners who have concerns about how a notification made against them has been handled by AHPRA and the Medical Board.

Chart 2: Complaints about AHPRA and the Medical Board by complaint issue

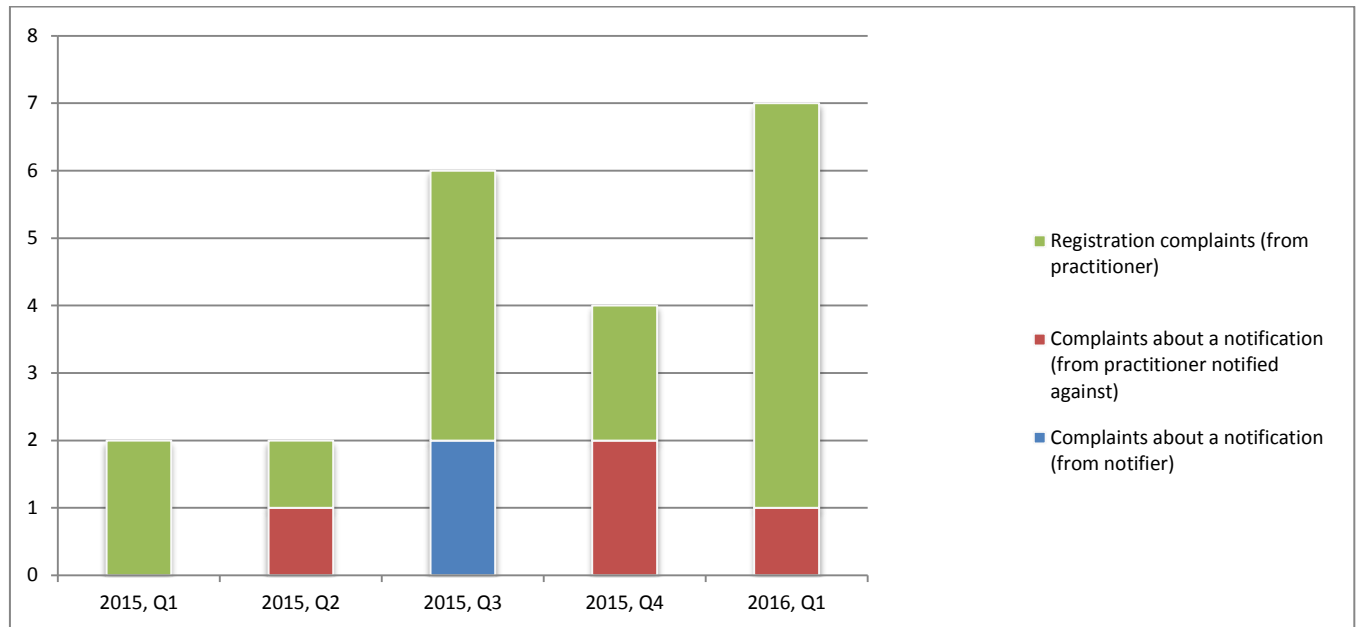


Complaints concerning AHPRA and the Nursing and Midwifery Board

In general, the NHPOPC receives a much smaller number of complaints involving AHPRA and the Nursing and Midwifery Board when compared to the number of complaints received about AHPRA and the Medical Board. The breakdown in complaint issues is also somewhat different. Complaints about the administrative actions of AHPRA and the Nursing and Midwifery Board most commonly concern registration issues, particularly in relation to the Board's decision to refuse registration on the basis that the applicant has not satisfied all of the requirements for registration.

In comparison to the complaint data relating to AHPRA and the Medical Board, the NHPOPC receives very few complaints relating to how notifications made against nurses/midwives are handled, particularly from notifiers who have made a notification against a nurse/midwife.

Chart 3: Complaints about AHPRA and the Nursing and Midwifery Board by complaint issue



Part 2: Response to inquiry's terms of reference

This part of the submission responds to the inquiry's terms of reference where it is appropriate for the NHPOPC to provide comment (based on its complaints statistics and experience in dealing with complaints about the administrative actions of AHPRA and the National Boards). These comments are provided in the context of the Committee's guide on how to interpret the terms of reference.

Response to part (c)

The terms of reference are:...

(c) the roles of the Medical Board of Australia, the Australian Health Practitioners Regulation Agency and other relevant organisations in managing investigations into the professional conduct (including allegations of bullying and harassment), performance or health of a registered medical practitioner or student;

Note on terms of reference (c):

Are the complaints and investigation processes of the relevant medical boards, nursing and midwifery boards and AHPRA able to be used vexatiously for bullying or harassment, particularly by other medical professionals?

The role of the NHPOPC in relation to the Scheme is outlined in detail in Part 1 of this submission.

Under the National Law, anyone can make a notification about a health practitioner. This ensures there are no formal barriers to making a notification if a person has concerns about a health practitioner's conduct, performance, health or any other grounds under the National Law.

While it is the case that anyone can make a notification, the National Law differentiates between circumstances where a person is required to make a mandatory notification and circumstances where a person may choose to make a voluntary notification.

In the case of voluntary notification, a person (or unincorporated body) may make a notification if they believe that a ground on which a voluntary notification may be made exists in relation to a registered health practitioner.⁴ Possible grounds for making a voluntary notification include if the practitioner's professional conduct is, or may be, of a lesser standard than that which might reasonably be expected of the practitioner by the public or the practitioner's professional peers, or, if the knowledge, skill or judgment possessed, or care exercised by, the practitioner in the practice of the practitioner's health profession is, or may be, below the standard reasonably expected.⁵

In the case of mandatory notifications, registered health practitioners and employers of registered health practitioners must make a notification about a health practitioner if they come to form the reasonable belief that the relevant health practitioner has behaved in a way that constitutes notifiable conduct (for example, practised while intoxicated, engaged in sexual misconduct or placed the public at risk of substantial harm because of practising the profession in a way that constitutes a significant departure

⁴ s 145 of the National Law

⁵ s 144 of the National Law

from accepted professional standards).⁶ There are possible consequences for registered health practitioners and employers of health practitioners who do not comply with the requirement to make a mandatory notification; in the case of a registered health practitioner, failure to make a mandatory notification may constitute behaviour for which action may be taken against them by the relevant National Board, and in the case of employers, AHPRA must give a written report about the failure to notify AHPRA of notifiable conduct to the responsible Minister for the participating jurisdiction in which the notifiable conduct occurred.

A possible effect of the mandatory notification requirements is that a health practitioner who is notified against may feel that they are being bullied or harassed, while at the same time the notifier may feel that they have no option but to make a notification on the basis that they have formed the requisite reasonable belief about notifiable conduct. The key issue here is that a notification is dependent on a person forming a reasonable belief about the practitioner's conduct. It may be that different health practitioners have different thresholds for forming a reasonable belief about notifiable conduct, and the practitioner who has been notified against may also view the situation differently. It is therefore important that the notification processes utilised by AHPRA and the National Boards appropriately address the concerns raised in a notification to ensure that all issues are fairly assessed in light of the overarching principle of protecting the public.

In the opinion of the NHPOPC, the ability to make notifications under the National Law is an important public protection mechanism. While it must be acknowledged that there is an identifiable risk that the notifications can be used vexatiously for bullying or harassment, the NHPOPC's experience in handling complaints about the administrative actions of AHPRA and the National Boards does not suggest that there is a high incidence of people intentionally using notification processes for vexatious purposes.

A small number of complaints to the NHPOPC involve issues that have the potential to raise questions about the motivation of the notifier, for example:

- notifications made by health practitioners about other health practitioners in circumstances where there has been a breakdown of a business or personal relationship
- notifications about health practitioners made by friends or family members of the health practitioner, particularly in the context of a relationship breakdown
- notifications made by a member of the public about health practitioners who have produced medico-legal reports which have resulted in claimants not receiving the entitlements they were expecting under work cover or insurance arrangements.

In the NHPOPC's experience, even where there may be questions about the ultimate motivation of a notifier, there may also be genuine issues that need to be investigated in order to ensure that the public is effectively protected. The NHPOPC is satisfied that the notification assessment and investigative processes of AHPRA and the National Boards are focused on the principle of protecting the public. Complaints received by the NHPOPC indicate that AHPRA and the National Boards relevantly explain the purpose of the National Scheme to notifiers when a notification raises particular issues that they have no role in looking at; for example, the NHPOPC is aware that AHPRA has explained to some notifiers that they have no role in investigating matters that fall outside the context of the health

⁶ Division 2 of the National Law. It is noted, however, that the National Law for mandatory notifications is applied differently in Western Australian and Queensland where exemptions from making a mandatory notification exist in relation to treating practitioners.

practitioner/patient relationship. Further to this, a National Board may decide to take no further action in relation to a notification if the National Board reasonably believes that the notification is frivolous, vexatious, misconceived or lacking in substance.⁷ The NHPOPC therefore believes that there are mechanisms currently in place to effectively deal with vexatious complaints (as is discussed further below in the NHPOPC's response to part (d) of the inquiry's terms of reference).

Most importantly, discouraging people from making notifications could mean that behaviour that may impact on the safety of the public is not reported, which could have adverse consequences for patients. For this reason, the NHPOPC believes that measures to address the small number of potentially vexatious notifications should not focus on making it more difficult for people, including health practitioners, to make notifications.

Response to part (d)

The terms of reference are:...

(d) the operation of the Health Practitioners Regulation National Law Act 2009 (the National Law), particularly as it relates to the complaints handling process;

Note on Terms of Reference (d):

Does the legal framework under which the relevant medical boards and AHPRA operate have appropriate safeguards against being used vexatiously for bullying or harassment?

The National Law contains a number of safeguards to protect against the National Law being used vexatiously, and also provides for procedural fairness in relation to regulatory action taken by AHPRA and the National Boards.

As a starting point, the National Law provides that the relevant health practitioner must be provided with written notice of the notification received about them and must be advised of the nature of the notification (except where it is reasonably believed that doing so would prejudice an investigation of the notification or would place at risk a person's health or safety, or place a person at risk of intimidation or harassment).⁸ While receiving such notice may be distressing to some health practitioners, this provides an important opportunity to the health practitioner who has been notified against to respond to the notification, particularly if they believe that the notification has been made vexatiously or with the intent to bully or harass them. Any response from the relevant health practitioner may have an important role in the National Board's assessment of the notification.

The relevant National Board must make a decision about what action to take in relation to a notification. The key provision in this context is s 151(1)(a) of the National Law, as it clearly allows a National Board to decide to take no further action in relation to a notification if the National Board reasonably believes the notification is frivolous, vexatious, misconceived or lacking in substance.

If a National Board intends to take some form of action in response to a notification, a National Board is required to instigate a 'show cause' process in some circumstances; for example, if a National Board is proposing to take immediate action that consists of suspending or imposing a condition on a health practitioner's registration (s 157), or if a National Board is proposing to take 'relevant action' in relation to

⁷ s 151(1)(a) of the National Law.

⁸ s 152 of the National Law.

a health practitioner (s 179). The show cause process includes the requirement for the health practitioner to be notified of the proposed action and given the opportunity to provide a submission to the relevant National Board about the proposed action. The effect of these provisions is that the relevant health practitioner is provided with an important opportunity to be heard, and the health practitioner can also use this opportunity to express any view that they may have regarding whether the notification has been made vexatiously.

It is noted that in the past year, AHPRA has been working to improve its communication with health practitioners and is now providing more detailed letters which outline the reasons for a National Board's decision regarding a notification. Providing clear and transparent reasons for decisions is an important element of procedural fairness.

A health practitioner can also appeal a number of decisions under s199 of the National Law, including:

- (a) decision by a National Board to refuse to register the person
- (b) a decision by a National Board to refuse to endorse the person's registration
- (c) a decision by a National Board to refuse to renew the person's registration
- (d) a decision by a National Board to refuse to renew the endorsement of the person's registration
- (e) a decision by a National Board to impose or change a condition on a person's registration or the endorsement of the person's registration, other than—
 - (i) a condition relating to the person's qualification for general registration in the health profession; and
 - (ii) a condition imposed by section 112(3)(a)
- (f) a decision by a National Board to refuse to change or remove a condition imposed on the person's registration or the endorsement of the person's registration
- (g) a decision by a National Board to refuse to change or revoke an undertaking given by the person to the Board
- (h) a decision by a National Board to suspend the person's registration
- (i) a decision by a panel to impose a condition on the person's registration
- (j) a decision by a health panel to suspend the person's registration
- (k) a decision by a performance and professional standards panel to reprimand the person.

It is noted, however, that a decision to caution a health practitioner is not an appellable decision under the National Law. A caution is generally considered to be the minimum level of regulatory action that a National Board can take in relation to a health practitioner, which may explain why the legislation does not permit a health practitioner to appeal against such a decision. The NHPOPC has recently received complaints regarding this matter, as some health practitioners have questioned the fairness of this outcome. This is a complex issue that the NHPOPC is currently discussing with AHPRA, as although a caution is not usually recorded on the national register (and is therefore not information that is generally available to the public), the National Board is obliged to give written notice of the decision to issue a caution to the relevant health practitioner's employer.

The National Law also establishes that NHPOPC as important accountability mechanism for the National Scheme. The NHPOPC has substantial powers under the *Ombudsman Act* to investigate complaints about the administrative actions of AHPRA and the National Boards. Anyone, including health practitioners, can complain to the NHPOPC.

It is the opinion of the NHPOPC that these provisions provide health practitioners with appropriate safeguards against the regulatory system being used to bully or harass health practitioners.

Response to part (f)

The terms of reference are:...

(f) the benefits of 'benchmarking' complaints about complication rates of particular medical practitioners against complication rates for the same procedure against other similarly qualified and experienced medical practitioners when assessing complaints.

Note on Term of Reference (f):

Should there be stronger requirements for patient outcome specific data to be used both in lodging and investigating complaints?

The NHPOPC believes that requiring patient outcome specific data to be used in lodging complaints would place a significant barrier in the path of a person wanting to make a notification. The NHPOPC does not believe this would be in the interests of protecting the public, which is a key objective of the regulatory scheme.

While patient outcome specific data could be useful in investigating the issues raised in some notifications, data of this kind would not be relevant for every investigation. In this regard, it is important to note that not all notifications made about health practitioners are about issues relating to complications of surgery or other health interventions.

Health practitioners are able to submit information to the relevant National Board in relation to a notification that has been made against them, which could include this type of data, if available. The NHPOPC is aware through its handling of complaints about notifications that National Boards generally take a range of factors into account when deciding what action to take in response to a notification. This includes information such as that some complications are a known risk of surgery and may not necessarily reflect issues regarding the skill or performance of the health practitioner, and also the health status and risk profile of the patient. The NHPOPC is generally satisfied that the range of information that the National Boards currently consider when assessing notifications is sufficient.

It is also significant to note that the National Boards include as their members health practitioners with expertise in a wide range of areas. In cases where additional expertise is needed, the NHPOPC is aware that AHPRA and National Boards will seek independent third party medical opinions to assist in their consideration of notifications.

In the NHPOPC's view, National Boards are best placed to weigh up the various relevant factors when making decisions about what action to take in response to a notification, including whether more information is needed, on a case by case basis.

For the reasons outlined above, the NHPOPC does not believe there should be stronger requirements for patient outcome specific data to be used in lodging and investigating complaints.

Response to part (g)

The terms of reference are:...

(g) the desirability of requiring complainants to sign a declaration that their complaint is being made in good faith;

Note on Terms of Reference (g):

Is there evidence to suggest vexatious complaints are being made, and if so, what systems could be put in place to reduce the prevalence?

The possibility of people making vexatious complaints is a known risk for any organisation that handles complaints. In general, such complaints are small in number, but have the potential to use a significant portion of an organisation's resources in managing and responding to them. Such complaints can also be distressing and have a significant adverse impact on the person being complained about.

The NHPOPC has received a small number of complaints about notifications which could be considered vexatious due to the nature of the issues raised or the behaviour of the notifier during and after the investigation of their notification.

Under s 6 of the *Ombudsman Act*, the NHPOPC has discretion not to investigate certain complaints (and not to continue to investigate certain complaints once an investigation has commenced). This discretion can be exercised in circumstances including where the Ombudsman is of the opinion that:

- the complaint is frivolous or vexatious or was not made in good faith
- the complainant does not have sufficient interest in the subject matter of the complaint
- an investigation, or further investigation, of the action is not warranted having regard to all the circumstances.

This discretion is an important and necessary part of the NHPOPC's suite of powers, but it is only used in relation to a small number of complaints.

The National Law provides similar discretion to the National Boards. Section 148 of the National Law requires that AHPRA must refer a notification to a National Board or co-regulatory authority. If the notification is referred to the National Board, the Board must conduct a preliminary assessment within 60 days after receiving the notification. Following the preliminary assessment process, a National Board may decide to take no further action in relation to a notification on a number of grounds under s 151 of the National Law. The first of these grounds is if the National Board believes the notification is frivolous, vexatious, misconceived or lacking in substance.

As identified in the NHPOPC's response to part (c) of the inquiry's terms of reference, a notification may be made to AHPRA in two situations:

- in the case of voluntary notification, where a person (or unincorporated body) believes that a ground on which a voluntary notification may be made exists in relation to a registered health practitioner⁹
- in the case of a mandatory notification, where a registered health practitioner or employer of a registered health practitioner comes to form the reasonable belief that the relevant health practitioner has behaved in a way that constitutes notifiable conduct.

⁹ s 145 of the National Law

The National Law therefore operates on the basis that the ability to make a notification is dependent on the notifier forming a particular belief about the health practitioner's health performance or conduct. It is important to note that, in the experience of the NHPOPC, persons making notifications to AHPRA (or a complaint to the NHPOPC) generally believe that that they have formed a reasonable belief about the relevant health practitioner and that they are acting in good faith. In this context, the NHPOPC does not believe that requiring people who lodge notifications to sign a declaration that they are acting in good faith will reduce the number of notifications made or the incidence of possibly vexatious notifications.

The consequences of discouraging people from making notifications could mean that behaviour that may impact on the safety of the public is not reported, which could have adverse consequences for patients. For this reason, the NHPOPC believes that measures to address the small number of potentially vexatious notifications should not focus on making it more difficult for people, including health practitioners, to make notifications. Vexatious notifications could be better addressed through the adoption of comprehensive complaint triage processes and improved communication with notifiers, particularly at the beginning of the investigation process. The NHPOPC notes that AHPRA is currently implementing a number of process improvements in relation to both of these areas. While these are not specifically aimed at reducing potentially vexatious notifications, it is likely that these improvements will assist to address these concerns.

Further information about the NHPOPC is available on the office website at

www.nhpopc.gov.au.