SENATE STANDING COMMITTEE

ON FINANCE AND PUBLIC ADMINISTRATION

REFERENCES COMMITTEE

SUBMISSION OF AVANT MUTUAL GROUP

RELATING TO THE INQUIRY INTO THE ADMINISTRATION OF HEALTH PRACTITIONER REGISTRATION BY THE AUSTRALIAN HEALTH PRACTITIONER REGULATION AGENCY

Terms of Reference

The terms of reference[1] for the inquiry will be known to the Committee and will not be repeated. These submissions will directly address the following matters:

1. Performance of the Australian Health Practitioner Regulation Agency (**AHPRA**) in administering the registration of health practitioners.

2. Impact of AHPRA processes and administration on health practitioners, patients, hospitals and service providers.

3. Legal liability and risk for health practitioners, hospitals and service providers resulting from any implications of the revised registration process.

4. Liability for financial and economic loss incurred by health practitioners, patients, and service providers resulting from any implications of the revised registration process.

5. Complaints handling processes of AHPRA.

Avant Mutual Group

Avant Mutual Group (**Avant**) is Australia's largest medical defence organisation with a membership of more than 55,000. We provide medical indemnity policies for health practitioners and private hospitals as well as risk advisory and educational services. Avant has offices in every State and is the only medical defence organisation with a substantial body of in-house lawyers who provide advice to, and act for, members pursuant to their medical indemnity policies.

A number of doctors have sought assistance from Avant in relation to dealings with either the Medical Board of Australia (**MBA**) or its agency, AHPRA. From this point on we will refer to both entities collectively as AHPRA, as all dealings with the MBA are through AHPRA. Whilst the majority of doctors seek assistance in relation to complaints and the investigation process relating to complaints, since 1 July 2010 there has been a substantial increase in the number of doctors who have sought assistance in relation to registration issues.

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[1] Senate Finance and Public Administration References Committee Terms of Reference for inquiry into administration of health practitioner registration by Australian Health Practitioner Regulation Agency (AHPRA)

Registration issues dealt with by Avant

Avant has been asked to assist doctors with the following types of registration issues:

1. Situations where doctors' registration has lapsed;

2. Changes in regulatory policy;

3. Where details on the public register of doctors for a particular doctor have been incorrect;

4. Refusal of applications to renew a doctor's registration – this is almost always related to international medical graduates (**IMGs**);

5. Where AHPRA has unilaterally decided to alter the registration of a practitioner – again this, in Avant's experience, has been almost always related to IMGs; and

6. Delays in processing registration.

We now give examples of Avant's experience in these areas including experience with previous medical boards.

1. <u>Lapse of registration</u>

Both prior to the national system, and subsequently, Avant has assisted doctors whose registration has lapsed. Prior to the national system, this was sometimes due to the doctor not receiving the renewal form and sometimes due to problems in completed forms being received or processed. With the introduction of the national system there were a number of data transfer problems, so that some doctors did not receive their renewal forms for registration. Practising while unregistered, even unknowingly, can potentially have a number of consequences including:

(a) Disciplinary action;

(b) Invalidation of insurance policies which generally provide, through an exclusion, that cover will not be given where a doctor is not registered as required by the legislation; and/or

(c) The potential for Medicare to either not pay Medicare benefits for patients seen in the relevant period or claim back payments for such consultations.

The national legislation is a significant improvement on the legislation which used to prevail, for example, in Queensland. The current legislation allows a period of grace of one month during which the registration of the medical practitioner is not cancelled[2]. It is only after that period of one month following the expiry of the registration that the registration in fact lapses.

In terms of process, prior to the national law, where a doctor found that his/her registration had lapsed inadvertently, it was usually a straight forward matter of filling out a form and sending it in to the relevant state board with the necessary fee. The registration could then be renewed generally on the same day that the application was received. As it stands now, AHPRA is required to carry out, at the very least, a criminal history check which takes some days. This means that a doctor can be unregistered for a number of days which can have very serious consequences including:

(a) If the doctor is in a remote area, there may not be other doctors available to see patients who need to be seen urgently. This can have a significant impact on public health;

(b) The doctor in question is unable to earn an income. Depending on the nature of the doctor's practice, this can result in a substantial loss of income.

Avant has found AHPRA registration officers generally helpful in dealing with renewals of lapsed registration. However, the need for the criminal check to be done before the renewal is granted is a significant obstacle. It should be possible to renew a doctor's registration pending a criminal history check and if that is of concern, to suspend the registration until the concern is resolved.

2. <u>Changes in regulatory policy</u>

One of the difficulties faced by IMGs who arrived in Australia before 2007 has been the frequent changes in policy concerning demonstration of competence. Initially the only requirements were for the practitioner to be supervised and for the supervisor to provide reports to the relevant medical board about the

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[2] *Health Practitioner Regulation National Law Act* s 108(2)

international graduate. In 2007 a requirement was introduced (in some jurisdictions) that IMGs pass particular Australian qualifications within 4 years. Then in 2009 (in some jurisdictions) a requirement was introduced that the IMGs had to demonstrate certain progress towards passing the Australian qualification. Then at the end of 2009 at least one jurisdiction introduced a requirement that IMGs sit the Structured Clinical Interview (**SCI**) if they had not passed an Australian qualification.

These changes made it very difficult for many IMGs who had worked safely and competently in Australia for many years, including in areas where Australian graduates would not work, and who had purchased houses, and made other significant commitments believing they met the relevant (pre-2007) requirements only to find they were required to invest considerable additional time in order to comply with the frequent changes post 2007. This often posed additional stresses on the doctors and their families in adjusting to their new life in Australia.

3. Errors on the public register

Avant has had experience in assisting members to have registration details corrected. Incorrect details appearing on the medical register can have a major impact on the medical practitioner.

Case study 1

Avant assisted a doctor, whose registration incorrectly contained an entry indicating that he was subject to conditions on his registration. This was pointed out to AHPRA and was eventually corrected, but this took a number of days. This had a particularly significant impact upon the doctor concerned who had developed a locum business. With remote locum positions the communities require doctors to be available at the earliest possible time and the doctor loses substantial amounts of income for each day he/she is unable to work. The doctor concerned was unable to apply for locum positions whilst there was a suggestion that his registration was subject to conditions. It was therefore harmful not only to the doctor, but also likely caused inconvenience to patients in the areas where

he could have worked but for the conditions. In another case, it took several weeks to correct the register of details for a locum physician.

4. Refusal to renew registration

The issue which significantly contributed to this matter coming to the attention of the Senate is the fact that a number of doctors had their applications for renewal of their existing registration declined. Avant has found that there is a substantial difference between the approach taken in Queensland and in other states on this issue based on the number of cases where Avant members have sought assistance. This difference may be due to:

(a) States, other than Queensland, having an inappropriately low level of concern about doctors' competence; or

(b) Queensland having an inappropriately heightened level of concern about doctors being required to prove competence.

In Avant's view the first scenario is unlikely as all of the state boards, and now the state boards of the national board, have clearly demonstrated their commitment to the need to consider public safety. To suggest that state boards, other than Queensland, are lax in monitoring and supervising issues of patient safety would be quite wrong.

In the circumstances, the most likely explanation in our view is the second. The reason that the Queensland Board may have an inappropriately heightened level of concern, or be taking an unduly 'harsh' view, may be a consequence of the *Patel* case. That is, it is possible that the former Queensland Board (now state board of the MBA) feels compelled to take an unduly 'harsh' stance.

In the majority of cases with which Avant has become involved, IMGs, whose application to renew registration has been refused, have been practising in Australia, in some cases, for more than nine years without attracting any complaints. They have practised under supervision and their supervisors have provided regular reports to the relevant medical board indicating whether or not there were any deficiencies in the relevant assessment areas. Nevertheless, the Medical Board of Queensland, as it then was, decided in the year 2009/2010, that it required some independent form of assessment of doctors' competence and required a number of doctors to sit an SCI. This interview was carried out under

the auspices of the Australian College of Rural and Remote Medicine (**ACRRM**). The interviews lasted generally less than 90 minutes and involved four scenarios. No actual patients were available for the doctors (who were being interviewed) to demonstrate their medical skills. The SCI was solely based on discussion. If a negative report was received in relation to an SCI, the Medical Board of Queensland refused the application to renew the doctor's registration. This is despite the doctor having been under the supervision of a medical practitioner for a period of years, who had discussed numerous cases with the doctor concerned, not simply four scenarios, who had seen the doctor actually deal with patients, and who had reviewed the doctor's actual medical notes. The vast majority of supervisors indicated that the international doctor's medical competence and skill was satisfactory.

Concerns which were identified by Avant's lawyers in relation to various decisions of the then Medical Board were as follows:

1. The results from the SCI were given much greater weight than reports from the supervisors of the doctors. The explanation given was that the Board considered that the reports of supervisors might not be entirely independent and objective as supervisors were likely to be receiving some financial benefit from having the doctor working at the supervisor's practice. We consider this view is flawed because:

   (a) The supervisor has a serious responsibility of which the supervisor is aware, such that in each case it was highly unlikely that a supervisor would jeopardise his/her professional standing and reputation and the safety of patients.

   (b) A number of supervisors were in fact employed by the practice and did not receive any direct financial benefit from the supervised doctor working at the practice.

2. Other concerns identified during the litigation processes relating to the SCIs were that:

   (a) It was far less useful a tool in assessing a doctor's competence compared with the practice based assessment process developed by the Royal Australian College of General Practitioners (**RACGP**) whereby consultations with patients were taped and examined by experienced general practitioners and where the assessors actually sat

in the practice watching candidates examine real patients with real problems and reviewed the notes of those doctors.

(b) There was no advice given to doctors on how to prepare for the SCI.

(c) There was little information given about how the SCI was to be conducted or what scenarios may be presented.

(d) It was a very stressful experience for the candidates and a number felt that the attitude of the persons conducting the interview was quite hostile. Some candidates found it difficult because they were not given the opportunity to finish answering one question before another of the three interviewers would ask a different question.

(e) Another problem identified during the litigation process was that in a number of cases the interviewers had reached different conclusions as to the rating which was given to the practitioner for the different scenarios. It appeared that inevitably the lowest possible rating out of three ratings was chosen. The process appeared to be unscientific and not subject to the same level of careful assessment and review afforded by other medical assessments.

The MBA appears to have acknowledged the deficiencies in the SCI process although it is still to be used for pre-employment situations. However, for doctors who have been working in Australia for significant periods of time, the MBA has decided to proceed with a different assessment process which is being developed by the Australian Medical Council. At this stage Avant has no details of how this process will work.

Case study 2 - a cardiologist

The Medical Board of Queensland had asked for advice from the Royal Australian College of Physicians ("RACP"). The doctor in question had received his qualifications in the United Kingdom. These had been deemed to be substantially equivalent to Australian qualifications. However, the RACP had suggested that the doctor should undergo a period of 12 months practice based assessment to ensure that his level of care was appropriate. It indicated that this should occur in both private and public facilities. The doctor was working under the supervision of

another cardiologist. They initially shared rooms but there was then a break down in the relationship. Whether this related to financial issues or personality issues or real concern about competence, is unclear. However, the cardiologist in question became unwilling to continue to supervise the doctor. In the region in question another cardiologist was not available to supervise the doctor, at least in a public setting. The Board refused to renew the doctor's registration because it felt bound by the advice of the RACP that the assessment should take place in private and public facilities. Potential criticisms of this approach include that:

(a) The process may have caused the Board to be directed, or influenced, on registration issues by a College; and

(b) The process failed to consider whether there was in effect any real difference between supervised practice in a private setting and supervised practice in a public setting.

Avant has found that in some cases where stays were granted by a Tribunal asked to review decisions of AHPRA, there have been delays of a number of days in correcting the public register to record that the practitioner was able to practise. This is unfair and has created a great deal of stress for doctors who are entitled to return to work but need to satisfy employers that they are entitled to work.

5. <u>Altering registration unilaterally</u>

In at least two cases, both in Queensland, the MBA has unilaterally altered a doctor's registration without following the process set out in the *Health Practitioner National Regulation Law Act* 2009[3].

Case study 3

The doctor in question was working as a deemed specialist in psychiatry in a regional hospital which was deemed to be

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[3] Section 81 of the *Health Practitioner Regulation National Law Act* 2009

in an area of need. The doctor had been given a certain period of time in which to obtain a Fellowship of the Royal College of Physicians. He had attempted one examination and had failed. It was Avant's understanding that at this point the period of time had not yet elapsed by when he was required to obtain Fellowship of the College. Nevertheless, the Medical Board of Australia through the state board in Queensland/AHPRA, reduced his registration from that of a deemed specialist to that of a general registrant. As the doctor could only be employed in a much more junior position consistent with that level of registration, his income was going to be reduced by two thirds. Additionally, his ability to see difficult cases and develop the experience and practice to be able to obtain Fellowship, would be adversely affected. Although he had the support of the hospital where he was working, and was in a position where he could see patients as a specialist, his being unable to do so would limit the services available to patients in that area. After a submission from Avant, the Medical Board of Australia acknowledged that it had made an error in not following due process and restored the doctor's registration to that of a deemed specialist. However, this required intervention of Avant and engagement of legal practitioners at some cost.

Case study 4

A doctor was registered in two different states which had different registration regimes. The doctor was registered in New South Wales as a general registrant because New South Wales did not have a specialist register. The doctor was also registered in Queensland as a deemed specialist in a relevant specialty area. Under a transition plan agreed between the health ministers, a doctor registered in New South Wales with general registration would be entitled to specialist registration when the national registration scheme commenced on 1 July 2010, if the doctor:

(a)Was on a register of practitioners which Medicare accepted to be specialists; or

(b)Had been accepted by the relevant college as a specialist.

In this doctor's case the doctor was listed on the register of specialists with Medicare. When national registration was about to commence, the doctor received a letter stating that the case had been assessed and it was decided that the doctor would be entitled to general and specialist registration under the national registration scheme. The doctor was given a certificate stating that he had general and specialist registration. He practised as a specialist pursuant to that registration for a period of almost six months under the national regulation scheme. In December 2010, without any prior notice, AHPRA made a decision that the doctor's registration had been granted in error and changed the registration to that of a deemed specialist. When it was pointed out on behalf of the doctor that the doctor was required to work at tertiary hospitals within the period of 12 months to satisfy requirements of the relevant college and that he could not do this if he was only working as a deemed specialist, which limited him to an area of need (which excluded a tertiary hospital), the registration was changed to that of general registration only. There was a most confusing turn of events - AHPRA changed the doctor's registration five times in seven days. The doctor had to apply to the Queensland Civil and Administrative Tribunal to review the decision of the Medical Board of Australia and obtained a stay of the decision. However, for a period of at least three months the doctor suffered a substantial reduction in income.

In the circumstances, the following suggestions would address these types of situations:

(a) A doctor's registration should not be altered without following the process set out in the Act, even if it is considered that the registration was granted in error.

(b) AHPRA should follow the transition plan agreed between the states which should be given the recognition of subordinate legislation.

(c) Suggestions that the transition plan is contrary to the actual Act should be addressed by making any necessary changes to the national Act to ensure that it provides for registration as set out in the transition plan.

(d) Under the Commonwealth scheme relating to maladministration, compensation should be offered to doctors whose incomes have reduced as a result of inappropriate changes in registration.

6. <u>Delays in processing registrations</u>

Delays have occurred in circumstances where complaints were received despite it being a minor complaint not requiring any action.

Case study 5

A doctor received a letter from the HCCC, New South Wales, concerning a complaint from a patient. The complaint was that there had been students present in the operating theatre for a particular procedure. The patient was an inpatient at a teaching hospital. The complaint was dismissed. The member declared the complaint to AHPRA as required by the renewal of registration form. That was in November 2010. The member's registration was not processed until April 2011 and then only after representations were made on the doctor's behalf by a solicitor. The processing seems to have been delayed because of the complaint declaration. Four months delay in the circumstances of a trivial complaint is inappropriate.

AHPRA's complaint handing processes

Another matter which is included in the terms of reference relates to the functioning of AHPRA's complaints handling processes. In general these processes are, in Avant's view, working well. Certainly the processing of complaints appears to be taking no longer and is often much quicker, than the time taken for processing complaints by some of the previous state boards.

There is a concern that the approaches to complaint handling are not consistent nationally. Apart from different approaches to registration, which is discussed above, there also appears to be a difference in the willingness of some state boards/AHPRA to accept and act on notifications. Avant has concerns that some notifications are generated not in good faith yet AHPRA seems to be unwilling to consider the issue of good faith.

Case study 6

In Queensland AHPRA has given a medical practitioner a notice of its intention to impose onerous and restrictive conditions on the doctor's practice because a current competitor of the doctor (for whom the doctor receiving the notice had once worked), had made a complaint suggesting the doctor was not competent to practice. The time given for the doctor to respond to the notice to show cause was very short. There was no supporting material provided with the complaint. After Avant became involved and senior practitioners had assessed the doctor in question, it was clear that the doctor was competent to practice. However, the expense required to respond to this complaint, which appeared to be based on anti-competitive issues, was significant.

Other complaints have been made by ex-spouses of doctors in circumstances of a bitter family break up, while other complaints have been made anonymously. The necessity for AHPRA to be take care in accepting and acting on such complaints including using its emergency powers as set out under section 156, needs to be emphasised

Conclusion

It is Avant's submission that to manage the registration and regulation of doctors in a fair and consistent way the following steps need to be taken:

1. All reasonable steps need to be taken to ensure that details about doctors on the public register are correct;

2. Where details concerning a practitioner on the public register are incorrect the register needs to be corrected preferably on the same day that this is brought to AHPRA's attention, or certainly no later than 24 hours after the error is brought to AHPRA's attention;

3. Staff of AHPRA need to be trained and instructed on the necessity to implement steps 1 and 2;

4. IMGs need to be given clear statements of the expectations and requirements for continued practice in Australia, including all required tests or assessments, the time frames for passing those assessments and the consequences of not passing those assessments. This information needs to be provided before the practitioner accepts an offer of employment in Australia. This may require some direction and provision of information to employment companies and migration agents dealing with IMGs;

5. AHPRA and the State Boards need to be directed that the appraisal by supervisors of IMGs should be given equal if not greater weight than assessments like the SCI;

6. The registration conditions for IMGs who have been working satisfactorily in Australia for a significant period of time (say more than 2 years) should not be altered except for very good reason. In such a circumstance extra time should be allowed for such graduates to comply with the new system;

7. Registration should not be altered without AHPRA following the requirements of section 81 of the *Health Practitioner Regulation National Law Act 2009* except if the registration was obtained by fraud;

8. Registration applications should be determined within 1 month of the application unless the MBA has reasonably sought further information or required the applicant to undergo one of the forms of assessment allowed by the Act. In these circumstances applications should be determined within 14

days of the further information being provided or the assessment being completed;

9. A direction on the use of the section 156 powers should be issued to make it clear these powers should only be exercised if there is clear and cogent evidence of a real risk to public safety, rather than just a possibility, particularly where a notification has any of the following characteristics:

   a. It is made anonymously;

   b. It is made in circumstances suggesting an absence of good faith

   c. No particulars are provided of allegations;

   d. Other facts known to, or reasonably ascertainable by, AHPRA raise doubts about the veracity or reliability of the notification.

Avant Mutual Group