Australian Government
Department of Health

COMMUNITY AFFAIRS REFERENCES COMMITTEE

MEDICAL COMPLAINTS PROCESS IN AUSTRALIA

AUSTRALIAN GOVERNMENT DEPARTMENT OF HEALTH

SUBMISSION

OCTOBER 2016

The Department of Health is providing a summary of actions being taken by multiple parties in response to claims that there are issues of bullying and harassment in the medical profession. The Department's submission will also outline the operation of the National Registration and Accreditation Scheme (the Scheme) in relation to the medical complaints process and a summary of how the Scheme contributes to better health outcomes in Australia.

Prevalence and Reporting related to Bullying and Harassment in Australia's Medical Profession

Effective learning by health professionals in the development of their clinical skills relies strongly on good supervision with effective communication between junior and more senior professionals. The traditional model of learning in health professional clinical training is that of apprenticeship learning where students start by observing clinical practitioners and are gradually given more tasks to perform and allowed greater independence of practice as their competence grows. While this model ensures that the skills and knowledge of experienced clinicians are passed on to the next generation of professionals, an identified issue with this model is that it can present a barrier of reporting of discriminatory culture by the more junior professionals and students. Where a practitioner feels that they are on the receiving end of bullying behaviour from a more senior or supervising practitioner, there can be a reluctance to report this behaviour because of fear of reprisal, lack of confidence in the reporting process and fear of impact on career.

Media attention, particularly in 2015, has highlighted these issues where more senior medical practitioners have been accused of bullying junior medical practitioners and nurses.

In recognition of the seriousness of the issue, the Australian Health Practitioner Regulation Agency (AHPRA), the Medical Board of Australia (MBA), the Royal Australian College of Surgeons (RACS), and the Australian Medical Association (AMA) have all made statements about the actions they are taking around the issue[1][2][3][4][5].

Health Departments, through Australian Health Ministers' Advisory Council (AHMAC) have begun work to identify and address issues that are the responsibility of employers and government.

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[1] *Discrimination, Bullying and Harassment – Report to RACS.* Available at https://www.surgeons.org/media/22045685/EAG-Report-to-RACS-Draft-08-Sept-2015.pdf

[2] *RACS Action Plan - Bullying and Harassment.* Available at http://www.surgeons.org/media/22260415/RACS-Action-Plan_Bullying-Harassment_F-Low-Res_FINAL.pdf

[3] AHPRA Media Statement available at https://www.ahpra.gov.au/News/2015-09-10-media-statement.aspx

[4] AMA Position Statement *Workplace Bullying and Harassment – 2009. Revised 2015.* Available at https://ama.com.au/position-statement/workplace-bullying-and-harassment

[5] AMA Position Statement *Sexual harassment in the medical workplace -2015*. Available at https://ama.com.au/position-statement/sexual-harassment-medical-workplace

Complaints and Notifications under the National Law

Under the *Health Practitioner Regulation National Law Act 2009* (the National Law) AHPRA and the relevant national board, to a large extent, can only commence an investigation into a practitioner regulated under the Scheme when they receive a complaint (known as a notification under the National Law, except in Queensland where, under its legislation, it is known as a complaint). There is, however, one provision in the legislation which allows a National Board to make an 'own motion' and initiate an investigation where they believe that a practitioner's conduct or performance may be unsatisfactory (s.126).

The National Law sets out a detailed process for handling all notifications received by AHPRA (s.146). These requirements include appeal rights and other protections for affected practitioners. It also sets out requirements for both mandatory (s.140 to 143) and voluntary notifications (s.144). Registered health professionals, employers and higher education providers have a legal responsibility to provide a mandatory report about either a student or registered health professional once a certain threshold has been reached. These provisions are designed to ensure that misconduct is reported to AHPRA, and all notifications are investigated appropriately, striking a balance between the concerns of the notifier and the rights of the practitioner.

The National Law also specifies the requirement for a formal complaints process. If a notifier is not satisfied with the notifications handling process, they can inform AHPRA of their experiences. AHPRA will handle complaints about a Board, a committee, AHPRA or its staff.

Notifications can be made about a health practitioner's health, conduct or performance. Anyone can raise a concern about a registered health practitioner by contacting AHPRA (s.145).

AHPRA will conduct an initial assessment of a notification, and if it cannot be resolved easily, will refer the matter to the relevant national board for assessment and possible investigation. A board may establish a performance and professional standards panel, if it decides it is necessary or appropriate to do so and believes that either the way a registered practitioner practises or their professional conduct is unsatisfactory (s.181 to 192). A board can also refer a matter to a tribunal for hearing (s.193 to 198). This happens only when the allegations involve the most serious professional misconduct and a board believes suspension or cancellation of the practitioner's registration may be warranted. Most decisions made by a National Board or a panel can be appealed through the relevant tribunal. It is important to note that processes for review of tribunal decisions are determined by different legislation in each jurisdiction.

There are differences across two states on how notifications (complaints) are managed. New South Wales (NSW) and Queensland (QLD) both operate as co-regulatory jurisdictions. At the establishment of the Scheme, NSW retained its

complaints handling system through the Health Care Complaints Commission (HCCC). All notifications about NSW health practitioners are handled by and investigated through the Health Care Complaints Commission (HCCC). Notifications about practitioners which warrant further investigation may be referred to the relevant NSW Health Profession Council. The 14 Health Professions Councils in NSW have similar powers to the National Boards, and may convene a professional standards committee to hear matters, or refer them to the tribunal.

In 2014, the Office of the Health Ombudsman (OHO) was established in Queensland. The OHO receives all complaints about health practitioners in Queensland. Following assessment, the OHO may deal with the complaints it receives or choose to refer them to AHPRA. The OHO will handle all complaints involving professional misconduct, or where there may be grounds for suspension or cancellation of registration. They will generally refer less serious matters to AHPRA and the relevant National Board to handle. Under the legislation, AHPRA must refer back to the OHO any matters where, in the course of an investigation, they form a reasonable belief that professional misconduct has occurred. The OHO will investigate these matters and may take action against a practitioner, or refer the matter to the tribunal.

It is important to note that in both the Queensland and NSW systems, if a decision is made to place restrictions on a practitioner's practice, whether that be suspension or cancellation of registration, or conditions placed on registration, this is communicated to AHPRA for inclusion on the AHPRA public register of health practitioners.

There is general acknowledgement that the handling of complaints about health practitioners requires sensitivity, and that outcomes on a practitioner's registration can be viewed as contentious. For example a notifier may see a decision as being too lenient in relation to the issue they experienced with the services provided by the practitioner, while an impacted practitioner may see decisions on their registration status as being overly punitive. There is a significant level of complexity in achieving a balance in protecting public safety (the primary objective of the Scheme), while also providing affected practitioners with natural justice and procedural fairness.

The role of the National Health Practitioner Ombudsman and Privacy Commissioner (NHPOPC)

Under the National Law (s.235) and the *Health Practitioner Regulation National Law Regulation 2010* (Part 4) there is an additional independent mechanism to provide notifiers and practitioners with an avenue to address concerns about how a complaint or notification was handled by AHPRA or other bodies within the Scheme.

The NHPOPC acts as an independent and impartial third-party reviewer in relation to complaints about aspects of the national scheme. It also provides feedback to AHPRA and the National Boards about systemic issues identified through complaints and assists them in improving their processes.

The NHPOPC has a relatively narrow jurisdiction, which focuses on the administrative actions of AHPRA and the Boards with respect to their regulation of Australian health practitioners. Administrative actions include those taken by AHPRA to assess and investigate notifications under the National Law, and the way the relevant board makes decisions on matters raised. It examines whether due process is followed and if relevant considerations are taken into account.

The NHPOPC has no power to overturn the decisions of AHPRA or the relevant board. However, based on evidence, it can raise issues with these bodies and make recommendations for them to consider. The office also has jurisdiction to investigate complaints about privacy and freedom of information issues, but these complaints currently form only a very small portion of the complaint caseload.

Independent Review of the Scheme

In line with the 2008 Intergovernmental Agreement (IGA) and after more than three years of operation, the Australian Health Workforce Ministerial Council (AHWMC) agreed to an independent review of the Scheme. The Independent Reviewer, Mr Kim Snowball, examined to what extent the implementation of the Scheme and the regulation of the professions under the Scheme is meeting the objectives. The Final Report of the *Independent Review of the National Registration and Accreditation Scheme for health professions*[6] (the Final Report) was completed in December 2014 and publicly released by Health Ministers in 2015. The release of the Final Report was accompanied by a Communiqué[7] outlining Health Ministers' responses to the 33 recommendations in the Report (refer Attachment A). The Final Report recognised the significant achievements made by the Scheme in its initial years of operation, but noted areas which needed improvement.

As a matter of priority, Health Ministers agreed to the immediate implementation of key recommendations 9 and 28 to improve complaints and notifications systems and to strengthen community participation in National Board governance to ensure that the National Scheme is responsive to consumers.

Recommendation 9 and 28 are listed below:-

Recommendation 9

Measures to be taken within the Scheme to ensure the following principles are met within the design and operation of the complaints and notifications process, in particular:

a) establish a process where complaints and notifications involve a shared assessment of the appropriate means of investigating and addressing the issues between AHPRA and Health Complaints Entities (HCEs). Complainants whose issue is referred to a National Board as a notification are to be interviewed to determine their expectation and be advised of the relevant processes;
b) investigations and reports to be shared between National Boards, AHPRA and HCEs as required;

[6] Australian Health Ministers' Advisory Council, 2014. Available at: www.coaghealthcouncil.gov.au/Publications/Reports
[7] COAG Health Council, 2015. Available at: www.coaghealthcouncil.gov.au/Announcements

c) establish benchmark timeframes for completion of key aspects of notification management;
d) rationale for deliberations and progress reports to be routinely and quarterly conveyed to notifiers and health practitioners in plain language;
e) National Boards to be authorised to refer matters for Alternative Dispute Resolution to HCEs;
f) any adverse findings and disciplinary decisions to include the timeframe for inclusion of the decision or finding on the registrants' record. These decisions should be supported by strengthened monitoring of practitioner compliance with restrictions on registration, including adequacy of supervision;
g) the National Law to be amended so that notifiers personally impacted by practitioner conduct can be informed in confidence by the National Board about the process, decision and rationale for the decision regarding their case;
h) National Boards and AHPRA to review correspondence standards with notifiers to ensure improved clarity and sensitivity in communication; and
i) HCEs to file complaints so practitioners can be searched according to their AHPRA registration number to allow authorised persons to access data for research into the predictability of professional misconduct.

Recommendation 28
That AHPRA conduct specific education and training programs for investigators. These should be designed in consultation with National Boards, Tribunals and Panel members to develop more consistent and appropriate investigative standards and approaches, consistent with the requirements of the National Law, including the primacy of public safety over other considerations within the matters.

Health Ministers have delegated the implementation of recommendations in the Final Report to AHMAC and its Health Workforce Principal Committee.

AHPRA has noted these recommendations and, in response, has commenced progressing actions. AHPRA has been requested to provide regular updates to Health Ministers through AHWMC meeting processes on progress of both of these recommendations.

In 2014, AHPRA commissioned the Victorian Health Issues Centre to provide recommendations to AHPRA on potential actions to increase public confidence in the organisation and, specifically, to improve the experience of consumers as notifiers. The report *Setting things right: Improving the consumer experience of AHPRA including the joint notification process between AHPRA and OHSC* [8] was published in June 2014 and has streamlined and improved the way in which information is provided to both notifiers and affected practitioners. Work on the recommendations from the review will build on these achievements to further improve the complaints and notifications system within the Scheme.

[8] *Setting things right: Improving the consumer experience of AHPRA including the joint notification process between AHPRA and OHSC.* Available at https://www.ahpra.gov.au/Notifications/The-notifications-process/Improving-our-work.aspx

Health Outcomes for Patients

Strategies to measure and improve health outcomes are multi-faceted and multi-layered, and the Scheme is only a small part of achieving the best possible health outcomes for patients.

One of the primary objectives of the Scheme, established in 2010, is protection of the public. This Scheme for the first time initiated nationally consistent standards for the registered professions, provided mobility for professionals to work across jurisdictions and allowed the development of a national public register of registered health professionals.

Accreditation standards approved by the National Boards ensure that higher education courses for health professionals are of a high and consistent quality and that graduates of these programs have the knowledge, skills and professional attributes to practise the profession in Australia.

All registered health practitioners must meet the requirements stipulated by their National Board's registration standards, codes and guidelines to ensure that they are suitably trained and qualified to provide quality and safe healthcare. This includes mandatory registration standards including continuing professional development and recency of practice to ensure practitioners' skills are up to date and to provide protection for the public.

AHPRA's national searchable public register of all practitioners registered under the Scheme contains details of any conditions that may have been imposed on the registration of an individual health practitioner. A separate register also lists those practitioners who have had their registration cancelled. These registers enable members of the public and employers to verify the registration status of practitioners and to be aware of any conditions under which they may be practising.

Importantly, any action against a practitioner as a result of a complaint or notification in any jurisdiction occurs on a national level. This means that practitioners can no longer simply move to a different state or territory to avoid sanctions, and a complete picture of a practitioner's practice can be maintained. This national approach further protects the public from malpractice or professional misconduct.

The mandatory reporting provisions under the National Law are another important mechanism to protect the public and improve health outcomes. Health practitioners are obligated to make a notification under the Scheme if the actions or behaviour of another registered practitioner are placing the public at risk. These notifications are then investigated and it is determined whether action must be taken in the public interest. This can include the power to take immediate action, if there is a sufficient belief this is necessary to protect the public.

AHPRA is working to improve the time taken to address notifications and to close matters which were reported under previous legislation. On 1 July 2010 at the outset of the Scheme, there were 3296 open notifications inherited from state-based schemes. At 30 June 2015, this had been reduced to 48. AHPRA provides regular formal updates to Health Ministers and works collaboratively to address issues raised by Health Ministers.

Declaration by complainants

The inquiry asks whether it would be desirable to require complainants to sign a declaration that their complaint is being made in good faith. While the National Law does not require notifications to include a declaration of good faith, it does contain a number of provisions dealing with false and misleading information. For example, it is an offence to make a false or misleading statement to an inspector or give an inspector false or misleading documents (s.21, 22 of Schedule 6, for s.238). If an investigation is commenced on the basis of a notification containing false and misleading information, the person who made the complaint would then be committing an offence if they repeated the false or misleading information in the course of the investigation.

An investigation usually requires the National Board to seek more information. This may come from a range of sources, including:

- further information from the notifier;
- responses and explanations from the practitioner about whom the notification was made;
- an examination of patient records;
- information from other practitioners involved if relevant;
- material relating to the care of the patient or client;
- information from other relevant people;
- independent opinions from experts;
- police reports; and/or
- data from other sources.

A National Board will use these sources of information to determine whether any action needs to be taken in relation to the practitioner. If the complaint is found to be vexatious, the notifier would be committing an offence under the National Law.

Importantly, while the National Law includes provisions making the giving of false or misleading information an offence, it also includes provisions to mandate reporting where patient safety could be at risk (s. 140 to 143). Concerns are sometimes raised about the underreporting that could affect public safety. For example, the Coroner's report of 2015 regarding the nursing home fire at Quakers Hill in 2011 noted that a number of health practitioners working with Mr Dean raised concerns about the safety of his practice as a registered nurse. However these concerns were not reported to AHPRA.

Background

Genesis of the Scheme

In 2004 the Productivity Commission was tasked by the Council of Australian Governments (COAG) to examine issues impacting on the health workforce including the supply of, and demand for, health workforce professionals, and propose solutions to ensure the continued delivery of quality health care over the next 10 years. The Productivity Commission produced the report *Australia's Health Workforce* in 2005[9]. The report outlined a number of recommendations including to establish a national accreditation body and a national system for registration of health professionals. These actions were recommended in order to develop a more sustainable and responsive health workforce while maintaining quality outcomes and protecting public safety.

In response, by agreement with the Commonwealth and all state and territory governments, the COAG established a single national registration and accreditation scheme to support national consistency in the health workforce. An IGA[10] was signed on 26 March 2008 to establish the Scheme, which was introduced on 1 July 2010.

On commencement in 2010, ten health professions were included in the Scheme with another four being included in 2012. The 14 health professions are: Aboriginal and Torres Strait Islander health practice, Chinese medicine, chiropractic, dental, medicine, medical radiation practice, nursing and midwifery, occupational therapy, optometry, osteopathy, pharmacy, physiotherapy, podiatry, and psychology.

The Scheme provides a common regulatory framework for all the professions; and for each profession, the requirements for registration are the same in all states and territories. This ensures consistent standards for training, registration and professional conduct across Australia, increasing public safety, and providing mobility for health practitioners.

Each profession is regulated by a National Board. The 14 national boards are supported by AHPRA in performing their roles under the legislation. The National Boards and AHPRA operate independently of governments. The MBA is responsible for regulation of the medical profession, while the Nursing and Midwifery Board of Australia (NMBA) is responsible for regulation of the nursing and midwifery professions. The MBA and NMBA are supported by state and territory based boards. These boards have delegated powers to make individual registration and notification (complaints) decisions, based on the national policies and standards set by the MBA or NMBA.

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[9] *Australia's Health Workforce* in 2005. Available at http://www.pc.gov.au/inquiries/completed/health-workforce/report/healthworkforce.pdf

[10] *Intergovernmental Agreement for a National Registration and Accreditation Scheme for the Health Professions*, 2008. Available at: https://www.ahpra.gov.au/documents/default.aspx?record=WD10%2F36&dbid=AP&chksum=NwgooGtzxb6JjNBIEP9Lhg%3D%3D

The National Law

The *Health Practitioner Regulation National Law Act 2009* (the National Law) as enacted in each state and territory established the Scheme. An applied laws model was used for the implementation of the Scheme. The Queensland Parliament was responsible for passing the National Law. The remaining states and territories, with the exception of Western Australia, then passed legislation applying the National Law as a law of their own jurisdiction. The Western Australian Parliament passed the legislation with a number of amendments. The Commonwealth is not required to apply the National Law as under the Constitution the regulation of health practitioners is the responsibility of states and territories.

The Role of Health Ministers

The National Law established the AHWMC which is comprised of the Health Ministers of all states and territories, and the Commonwealth. Through the AHWMC, all Health Ministers jointly provide policy oversight of the Scheme. The role of the AHWMC also includes appointing members of the National Boards and approving profession-specific registration standards. As specified in the IGA, the role of the AHWMC does not include decisions relating to the day-to-day operations of AHPRA or the National Boards and in particular, the AHWMC cannot intervene in matters related to individual practitioners.

Objectives and principles of the Scheme

The objectives of the Scheme, as set out in the legislation, are:

- to provide for the protection of the public by ensuring that only health practitioners who are suitably trained and qualified to practise in a competent and ethical manner are registered;
- to facilitate workforce mobility across Australia by reducing the administrative burden for health practitioners wishing to move between participating jurisdictions or to practise in more than one participating jurisdiction;
- to facilitate the provision of high quality education and training of health practitioners;
- to facilitate the rigorous and responsive assessment of overseas-trained health practitioners;
- to facilitate access to services provided by health practitioners in accordance with the public interest; and
- to enable the continuous development of a flexible, responsive and sustainable Australian health workforce and to enable innovation in the education of, and service delivery by, health practitioners.

The Scheme operates under the following principles:

- to operate in a transparent, accountable, efficient, effective and fair way;
- fees required to be paid are to be reasonable having regard to the efficient and effective operation of the scheme; and
- restrictions on the practice of a health profession are to be imposed only if it is necessary to ensure health services are provided safely and are of an appropriate quality.