Senate Finance and Public Administration Committee

Finance and Public Administration—References Committee

Inquiry into the administration of health practitioner registration by the Australian Health Practitioner Regulation Agency (AHPRA)

SUBMISSION

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Inquiry into the administration of health practitioner registration by the Australian Health Practitioner Regulation Agency (AHPRA)

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http://www.aph.gov.au/senate/committee/fapa_ctte/health_practitioner_registration/info.htm

Introduction:

On 23 March 2011 the Senate referred the following matter to the Finance and Public Administration References Committee for inquiry and report by 13 May 2011.

Background:

From 1 July 2010 Australian health practitioners became regulated under a single national registration and accreditation scheme. Designed to improve the quality and safety of health services, the national law provides for, among other things, nationally uniform health, performance and conduct provisions for health practitioners.

The legislation in New South Wales however retained many of its pre-existing functions of the former Medical Board.

The Government of Western Australia passed different legislation in particular regarding the mandatory requirement for Practitioners to report Health Professionals who were unwell (see attached pdf file).

The activities of the Agency need not only to be scrutinised but reformed as I will expand upon below.

The mandatory notification provisions require a registered health practitioner to notify the National Agency, the Australian Health Practitioner Regulation Agency ("AHPRA") of conduct by another practitioner after forming a reasonable belief that such conduct is notifiable under *the Health Practitioner Regulation National Law Act 2009 (Qld)* ("the Act").

Sexual misconduct, intoxication by alcohol or drugs or drugs or mental or physical impairment are clearly defined by the Act as constituting notifiable conduct and leave little scope for interpretation. However notifiable conduct may also arise from conduct that constitutes a "significant departure from accepted professional standards". Combined with the subjective test intrinsic to the notion of "reasonable belief", the threshold for the requirement of triggering notification is low. It follows that the mandatory notification process is potentially open to abuse by claims made in bad faith with the intention of

adversely affecting the registration status and the subsequent employability of a health practitioner.

This is particularly relevant to overseas trained practitioners. The most common pathway for overseas trained practitioners to secure work in Australia is via sponsorship by an employer. If the employer ceases sponsorship, the employee has an option of either returning to their country of origin or finding another visa sponsor. The latter option is only available if the employee's position has not been jeopardised by referral to a regulatory authority.

Overseas trained practitioners are therefore particularly vulnerable and potentially exposed to employers holding their visa status against them as leverage; it is trite to say that such experiences may leave the overseas trained practitioner professionally and psychologically devastated and their livelihood jeopardised.

Terms of the Legislation/Process

On 29 October 2009, the Queensland Parliament passed the Act, which commended nationally on 1 July 2010. It overarching purpose is to protect the public by setting up a single national registration and accreditation scheme for the health professions. Its objectives are set out in s3(2) of the Act:

(a) 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; and

(b) 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; and

(c) to facilitate the provision of high quality education and training of health practitioners; and

(d) to facilitate the rigorous and responsive assessment of overseas-trained health practitioners; and

(e) to facilitate access to services provided by health practitioners in accordance with the public interest; and

(f) 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 guiding principles of the national registration and accreditation scheme, is to operate in a transparent, accountable, efficient, effective and fair way. The restrictions on the practice of a health profession are to be imposed under the scheme only if it is necessary to ensure health services are provided safely and are of an appropriate quality: (s3(3)).

It is against these objectives and guiding principles that the Act introduces the mandatory notification as a method of regulating and monitoring the health, performance and conduct of registered health practitioners.

The Act provides that the first health practitioner (including an employer) (see s142) must as soon as practicable notify AHPRA of notifiable conduct engaged in by the second health practitioner, where the first practitioner has formed a reasonable belief in the course of her or his profession that the second practitioner (including an employee) has behaved in a way that constitutes notifiable conduct (see s141).

"Notifiable conduct" is defined by the Act as the practitioner having:

(a) practised the practitioner's profession while intoxicated by alcohol or drugs; or

(b) engaged in sexual misconduct in connection with the practice of the practitioner's profession; or

(c) placed the public at risk of substantial harm in the practitioner's practice of the profession because the practitioner has an impairment; or

(d) placed the public at risk of harm because the practitioner has practised the profession in a way that constitutes a significant departure from accepted professional standards.

"Impairment" includes a physical or mental impairment, disability, condition or disorder (including substance abuse or dependence) that detrimentally affects a practitioner's capacity to practice the profession (see s5).

The Act does not offer any definition of reasonable belief or significant departure from accepted standards of professional conduct.

The practitioners who, in good faith, make a mandatory notification are afforded protection from civil, criminal and administrative liability (see s237). The Act further provides that making a notification does not constitute a breach of professional etiquette or ethics or a departure from accepted standards of professional conduct, nor does notification incur any liability for defamation (see s237(3)).

On the other hand sub-sections 142(2)&(3) of the Act provide that if AHPRA becomes aware that an employer of a registered health practitioner has failed to notify AHPRA of notifiable conduct as required, AHPRA must give a written report about the failure to the responsible Minister for the participating jurisdiction in which the notifiable conduct occurred. As soon as practicable after receiving a report, the responsible Minister must report the employer's failure to notify AHPRA of the notifiable conduct to a health complaints entity, the employer's licensing authority or another appropriate entity in that participating jurisdiction.

AHPRA must as soon as practicable after receiving a notification about a registered health practitioner refer the notification to the National Medical Board. The National Medical Board must conduct a preliminary assessment of the notification and must as soon as practicable give written notice of the notification to the practitioner (see ss149 & 152).

The National Medical Board may take immediate action in relation to a registered health practitioner if it gives the practitioner notice of the proposed immediate action and invite the practitioner to make a submission to the Board within the time stated in the notice (see ss 156 & 157).

Immediately after deciding to take immediate action the National Medical Board must give written notice of the decision. It must give reasons for the decision and that the practitioner may appeal the decision, and how the appeal may be made (s 158).

These new provisions promote a culture that resorts to peer reporting for fear of legal repercussions (see reference to s142(2)&(3) above), or as a method of filtering out those practitioners struggling to gain integration and acceptance within the profession or indeed another avenue for employers to act against an employee without first initiating normal workplace processes. The reporting is based on conduct constituting a significant departure from accepted professional standards. Combined with the subjective test intrinsic to the notion of "reasonable belief", the threshold for the requirement of triggering notification is low. It follows that the mandatory notification process is potentially open to abuse by claims made in bad faith with the intention of adversely affecting the registration status and the subsequent employability of a health practitioner.

The introduction of mandatory notification provides a response to the public reaction to publicised incidents involving professional misconduct by health practitioners or adverse incidents in the health care system. This process has the potential to have an negative effect on the medical profession and the retention/attraction of overseas trained practitioners.

A case I have been involved with:

A list of the agency's actions are listed below. A full brief is provided confidentially to the committee. This is because the names of the Dr who suffered through the process, the notifying practitioner and officers of the agency are all visible. A de-identified set of documentation can be provided if requested.

By way of synopsis:

The initial contact was in the form of "Show Cause" documentation from the agency to the accused Dr which was sent to a non-existent address. It proposed to summarily impose untenable conditions of restricted practice not compatible with being able to work. This is despite the requirement under the legislation to conduct a preliminary assessment of the notification and as soon as practicable give written notice of the notification to the practitioner and invite the practitioner to make a submission within certain time.

The notice imposing restrictions on the practice came after the Dr left the employ of the notifier and a few days before commencing a new practice.

The agency contacted the Dr 2 days before the due date for the "Show Cause" notification by phone. Legislative requirements and processes had not been followed, in particular no appeal mechanism had been alluded to.

The agency granted an extension to the period before the "Show Cause" notice would commence by only 1 week.

When the agency was contacted, and in ear-shot of a supporting Dr, it was stated to me that

the Dr accused was a “dangerous doctor” and the expectation was the Dr would not be permitted to practice, especially as that Dr was in ‘solo’ private (general medical) practice.

The agency then sent out further accusatory documentation, which pre-dated the first set of documents, with no offer of an extension to the time to reply nor any explanation as to why the accusations were coming from the same and only notifier at different times. Further no attempt had been made to confirm the nature of the relationship between the notifier and the Dr accused. The notifier was in fact the former employer of the Dr.

Just prior to dispatching a final deposition in response to the “Notice” the accused Dr’s solicitor sought to clarify from the agency that no further material and documentation was to be relied upon by the agency.. More information was found in the agency’s file. This information had not been forwarded. There was no recognition that this was a most distressing situation that needed to be handled with care and sensitivity. The deposition included assessments conducted on the Dr by senior and respected practitioners to provide tangible evidence of the abilities and competence of the Dr.

Many days passed between submission of the deposition and the meeting of the Medical Board and a decision being conveyed. The Dr was informed by phone that the case had been considered and the Dr had been exonerated. More time passed before this was confirmed in writing.

Although some information about processes was contained in the letters from AHPRA the way in which information would be assessed and by whom was unclear.

The Dr describes being in a state of ‘shell-shock’ since the moment the Show cause notice was delivered. The notice itself, the actions of the agency, the allegations and the possibility of losing the ability to practise before a full investigation had taken place was devastating. The Dr was concerned that the agency should not initiate its immediate action of power without a more compelling case in the future.

The Dr did take the advice of legal and professional support to seek independent assessments of the Dr’s work: the documentation supplied to ensure the bona fides and fitness to practice were confirmed.

The consequences of this summarily executed judgment would have been a loss of any ability to practice in Australia and indeed anywhere in the World. Processes of such investigations are notorious protracted and suspending or limiting practice can be deleterious to the survival of practitioners and their families in particular if they are not eligible for Medicare of Centrelink benefits.

Without the very strong and direct support the mental and physical health of the Dr would have been placed in jeopardy.

The agency was unable to decide whether the matter was reported in good faith or otherwise. The agency stated in writing that there is no current legislation that allows it to deal with doctors that have made vexatious notifications about other doctors. Because

there was deemed to be no legislation the agency closed this matter.

Despite being "exonerated" the Dr was challenged by the medical press following the reporting of concerns about her by the Notifier. That press outlet did not publish the case.

Following this, the notifier sought full disclosure of information about the case from the agecy under the *Freedom of Information Act* . Without following the process under the FOI Act the simply handed over the information. The Dr who has objected to the release is appealing the decision to QCAT (yet to be heard). The agency has revealed that it has already released the information to the notifier, discounting any fairness or rights to privacy or natural justice of the Dr whom the AHPRA had exonerated and others involved in her assessment.

At no time has there been any attempt to apologise to the Dr.

At every opportunity as witnessed in the letters submitted the attitude has been high handed, officious, thoughtless, unprofessional, unforgiving and the principles of natural justice, access to common law rights, the presumption of innocence have been ignored. There is no respect as the notion is one of absolute power which cannot be questioned. An expectation that the high handed manner must be tolerated and there will be no detractors for fear of retribution from the Agency.

Section 236 says that a protected person (see definition below) is not personally liable for anything done or omitted to be done in good faith in the exercise of a function under this Law; or in the reasonable belief that the act or omission was the exercise of a function under this Law. Any liability resulting from an act or omission that would attach to a protected person attaches instead to AHPRA. This suggests no accountability for the work or how it is done.

In this section 236 a protected person means a number of people, but relevantly in this case includes:

- · a member of a National Board or a committee of the National Board;
- · a member of an external accreditation entity;
- · a member of the staff of AHPRA;
- · a consultant or contractor engaged by AHPRA;
- · a person appointed by the AHPRA to conduct an examination or assessment for a National Board;
- · a person employed or engaged by an external accreditation entity to assist it with its accreditation function.

Further, there is no clarity about which Minister is ultimately responsible for the actions and consequences of those actions.

General discussions with other APHRA governed Health Professional Bodies make it very clear to me that this is not an isolated incident. Further many of the groups were of a mind to make representations about their concerns. Rather than outline these, I would leave it to those groups to speak for themselves.

This compounds the whole way in which the AHRA and associated committees are 'doing their work' with no regard to the normal courtesies of normal dealings with people. They continue in an authoritarian high hand superior manner and ultimately protected to being unresponsive and ignorant about their work....and can get away with it.

A way forward:

There needs to be clear accountability for the work done by AHPRA and its constituent bodes.

The manner in which the complex and multiple tasks are conducted needs to be more collaborative with the professions registered.

The way in which the Agency works must be respectful and alert to the significant harm that can be the result of its actions.

The place of consideration and tact and support from those within professions with knowledge and experience can add to improve the activities of the Agency.

A process that enshrines good administration, including fairness, natural justice, presumption of innocence, access to common law rights and full disclosure of rights including those for appeal must be insisted upon.

Proper investigative processes with a right of reply from a registrant is necessary.

The definition of what constitutes a “reasonable belief or significant departure from accepted standards of professional conduct” is necessary.

The threshold for triggering a process needs to be less onerous and clear and it must not be used for trivial concerns.

Understanding that it is necessary to investigate concerns, the process needs to be fair and thorough and invole “trusted peers” (trusted byt the Agency and the Health community).

Vexatious claims must be punished.

Delays must be avoided and clear timelines must be set.

The legislation must be amended to bring clarity to what is deemed a departure from accepted practice and how this is set and how it is decided upon.

The legislation regarding mandatory reporting of practitioners who are unwell must be changed to reflect that in Western Australia to permit and encourage treatment for ill health.

The rights of Citizens must not impeded because they are Health Professionals.

There must be Ministerial oversight of this process and being a National scheme, that should be the Federal Minister for Health and Ageing.

Health Professionals involved in the scheme must be encouraged and supported to identify flaws and to suggest improvements in this scheme.

“The true cost of liberty's eternal vigilance.”

“All that is necessary for the triumph of evil is that good (wo)men do nothing.”

Terms of Reference

On23 March 2011 the Senate referred the following matter to the Finance and Public Administration References Committee for inquiry and report by 13 May 2011:

The administration of health practitioner registration by the Australian Health Practitioner Regulation Agency (AHPRA) and related matters, including but not limited to:

(a) capacity and ability of AHPRA to implement and administer the national registration of health practitioners;

(b) performance of AHPRA in administering the registration of health practitioners;

(c) impact of AHPRA processes and administration on health practitioners, patients, hospitals and service providers;

(d) implications of any maladministration of the registration process for Medicare benefits and private health insurance claims;

(e) legal liability and risk for health practitioners, hospitals and service providers resulting from any implications of the revised registration process;

(f) liability for financial and economic loss incurred by health practitioners, patients and service providers resulting from any implications of the revised registration process;

(g) response times to individual registration enquiries;

(h) AHPRA's complaints handling processes;

(i) budget and financial viability of AHPRA; and

(j) any other related matters.

Finance and Public Administration—References Committee

Members
Senator Fifield (*Chair),* Senator Polley (*Deputy Chair)* and Senators Faulkner, Kroger, Siewert and Williams

Substitute member
Senator Stephens to replace Senator Polley from 3 to 6 May 2011

Participating members
Senators Abetz, Adams, Back, Barnett, Bernardi, Bilyk, Birmingham, Bishop, Boswell, Boyce, Brandis, Bob Brown, Carol Brown, Bushby, Cameron, Cash, Colbeck, Coonan, Cormann, Crossin, Eggleston, Ferguson, Fierravanti-Wells, Fielding, Fifield, Fisher, Forshaw, Furner, Hanson-Young, Heffernan, Humphries, Hurley, Hutchins, Johnston, Joyce, Ludlam, Macdonald, McEwen, McGauran, Marshall, Mason, Milne, Minchin, Moore, Nash, O'Brien, Parry, Payne, Polley, Pratt, Ronaldson, Ryan, Scullion, Stephens, Sterle, Troeth, Trood, Wortley and Xenophon