Chapter 2

Lodgement and assessment of complaints

Introduction

2.1 This chapter focuses on the first part of the complaints process, up to and including assessment.

2.2 Submitters' main concerns about this part of the complaints process were:

- knowing where to lodge a complaint; and
- eliminating vexatious complaints.

2.3 In relation to the second issue, this chapter considers the concerns raised by submitters, the evidence regarding the prevalence of vexatious complaints and examines some of the proposed solutions.

Knowing where to lodge a complaint

2.4 Before a complaint can be lodged, people seeking to make a complaint about a health practitioner need to find the appropriate forum to do so. In most jurisdictions there are multiple entities to which a complaint may be made.[1] Consumers are required to identify which entity is the most appropriate to deal with their concerns. Depending on the circumstances, it may not be clear where they should lodge a complaint.

2.5 The Health Practitioner Regulation National Law (the National Law) refers to a complaint about a registered health practitioner as a notification.[2] The person that makes the notification is referred to as the notifier.[3]

2.6 A concerned potential notifier may choose to approach the practice or entity where the patient received treatment, the health complaints entity (often a health complaints commissioner) in their state or territory or the Australian Health Practitioner Regulation Agency (AHPRA).[4]

2.7 As noted in Chapter 1, matters about a registered health practitioner or student are referred to the relevant national board that regulates the profession.[5]

2.8 To assist notifiers, the National Law requires that if a health complaints entity receives a complaint about a registered health practitioner, it is required to notify the relevant board and provide a copy of the complaint.[6] The complaints entity and the

---

1 Carers Victoria, *Submission 113*, [p. 3].

2 *Health Practitioner Regulation National Law 2009* (Qld) (National Law), sch. 1, s. 140.

3 National Law, s. 5 (notifier).

4 *Submission 113*, [p. 3].

5 National Law, s. 148(2).

6 National Law, s. 150(2).

national board must then seek to reach agreement on how the complaint ought to be managed.[7]

2.9 The committee received evidence from the heads of the health complaints entities in the Australian Capital Territory, South Australia and Queensland about the process through which complaints were referred to the relevant national board, through AHPRA, in those jurisdictions. Each of these jurisdictions reported a positive relationship with AHPRA that included regular meetings to monitor progress.[8]

2.10 The commissioners reported that they were kept informed at each stage of the process at those regular meetings.[9] Mr Steve Tully, Commissioner, Health and Community Services Complaints Commissioner (SA) noted that:

> …there has been a significant improvement around consultation and keeping up to date with where things are at, and we can certainly raise issues at any time.[10]

2.11 Despite these efforts, other submitters noted that confusion remains about responsibilities for handling complaints about health practitioners. [11]

2.12 It appears that notifiers who initially lodge their complaints with the health complaints entity are then transferred to AHPRA if their notification requires it. Mr Tully explained to the committee that, currently, a lot of notifiers come back to the health complaints entity if they are dissatisfied with the outcome of the AHPRA process rather than directly approaching the National Health Practitioner Ombudsman and Privacy Commissioner. [12]

2.13 To improve the experience of notifiers, AHPRA has established an online complaints portal.[13]

2.14 AHPRA started surveying notifiers about their experiences in November 2016 in an attempt to improve their experience of the process.[14] Survey data provided with AHPRA's submission revealed that:

---

7 National Law, s. 150(3).

8 Mr Steve Tully, Commissioner, Health and Community Services Complaints Commissioner (SA), *Committee Hansard*, 31 March 2017, pp. 1, 5; Ms Karen Toohey, ACT Health Services Commissioner, ACT Human Rights Commission, *Committee Hansard*, 31 March 2017, p. 5; Mr Leon Atkinson-MacEwen, Health Ombudsman, Office of the Health Ombudsman (Qld), *Committee Hansard*, 31 March 2017, p. 5.

9 Ms Toohey, *Committee Hansard*, 31 March 2017, p. 5; Mr Atkinson-MacEwen, *Committee Hansard*, 31 March 2017, p. 5; Mr Tully, *Committee Hansard*, 31 March 2017, p. 5.

10 Mr Tully, *Committee Hansard*, 31 March 2017, p. 5.

11 Tasmanian Government, *Submission 131*, p. 3; Name withheld, *Submission 122*, p. 1; Women's Legal Services Australia, *Submission 80*, pp.4–5.

12 Mr Tully, *Committee Hansard*, 31 March 2017, p. 3.

13 Mr Martin Fletcher, Chief Executive Officer, AHPRA, *Committee Hansard*, 31 March 2017, p. 22.

14 AHPRA and MBA, *Submission 119*, p. 25.

- 53 per cent of respondents agreed or strongly agreed that it was easy to find information about how to make a complaint with AHPRA;[15]
- 78 per cent of respondents said locating the online portal was 'very easy' or 'easy';[16] and
- 75 per cent of respondents said that using the online portal was very easy or easy.[17]

2.15 However, as Dr Judith Healy commented to the committee:

> …it is very complicated to find out where you go. So it certainly helps to have one portal… you can go to lodge a complaint. But I do not know how well it is advertised to the public. I do not think it is…I think people are just not very clear on where that information lies.[18]

Committee view

2.16 The committee notes that navigating where to lodge a complaint has been confusing for consumers. The committee supports the work AHPRA is undertaking to attempt to make the process of lodging a complaint easier for consumers.

2.17 This is a complex area of regulation with many possible points of entry. The committee acknowledges that knowing where to lodge a complaint continues to be an ongoing issue for some people.

Vexatious complaints

2.18 During the committee's previous inquiry, it found that the complaints process can sometimes be used by health practitioners for bullying or harassment.[19]

2.19 Similarly, most of the submissions to this inquiry from health practitioners, or groups aligned with health practitioners, considered vexatious, or baseless, notifications to be a significant issue for the complaints process.[20]

15 *Submission 119*, p. 25.

16 *Submission 119*, p. 26.

17 *Submission 119*, p. 27.

18 *Committee Hansard*, 17 March 2017, p. 14.

19 Senate Community Affairs References Committee, *Medical complaints in Australia*, November 2016, p. 40.

2.20 It has been proposed by several witnesses that when vexatious notifications are not identified early in the complaints process, health practitioners can be subjected to unmerited adverse consequences including reputational damage;[21] misrepresentation in media reporting;[22] significant levels of stress;[23] and risks the loss of the practitioner's employment.[24]

2.21 The problem for the committee was that it received only limited independent evidence about the prevalence of these types of complaints.

Evidence of prevalence

2.22 Most of the evidence the committee received about vexatious complaints was from practitioners who expressed concern that complaints made against them, their colleagues or members of their association were vexatious.

2.23 For example, the Australian Dental Association (ADA) reported to the committee that of the 421 notifications made against New South Wales dental practitioners in the 2015–16 financial year, 208 were dismissed by the Dental Council of New South Wales.[25] The inference seemed to be that the 208 notifications were vexatious, although that is not necessarily the case.[26]

2.24 The Association of Family and Conciliation Courts (AFCC) explained that single expert witnesses in family law proceedings have been subjected to notifications initiated by family law litigants seeking to 'find fault or discredit opinions given in the course of family law proceedings'.[27]

---

20 Mr Joel Levin, *Submission 27*, [p. 2]; MIGA, *Submission* 30, p. 9; Ms Kate Greenaway, *Submission 33*, p. 4; Royal Australian College of General Practitioners, *Submission 41*, [p. 2]; Ms Jennifer Ellis, *Submission 42*, [p. 2]; Avant, *Submission 50*, p. 2; Dr Gary Fettke, *Submission 54*, p. 4; Ms Jennifer Smith, *Submission 57*, p. 2; Dr Jeremy Rourke, *Submission 61*; [p. 2]; Ms Caroline Raphael, *Submission 69*, p. 2; Ms Elizabeth Dolan, *Submission 71*, p. 3; Dr Rachel Mascord, *Submission 73*, [p. 3]; Ms Marianna Masiorski, *Submission 74*, [p. 2]; Mr Harrison White, *Submission 79*, [p. 3]; Name withheld, *Submission 85*, [p. 2]; Ms Zoe Sherrin, *Submission 98*, [p. 2]; Ms Cristina Vitellone, *Submission 99*, [p. 2]; Australian Dental Association, *Submission 108*, [p. 1]; Dr Maxine Szramka, *Submission 109*, [p. 2]; Dr Vincent Papaleo, *Submission 116*, [pp. 2-3]; Australian Medical Association, *Submission 117*, p. 5; Ms Marg Fitzpatrick, *Submission 126*, [pp. 4–5]; Australian Psychological Association, *Submission 130*, p. 6–7.

21 Mr Joel Levin, *Submission 27*, p. 2.

22 Ms Johanne Brown, *Submission 7*, p. 1.

23 Dr Edwin Kruys, Vice-President, Royal Australian College of General Practitioners, *Committee Hansard*, 17 March 2017, p. 25.

24 Australian Medical Association, *Submission 117*, p. 5.

25 ADA, *Submission 108*, p. 2.

26 For other reasons no further action may be taken see [2.33].

27 AFCC, *Submission 38*, p. 4.

2.25 The considerable anecdotal evidence provided by practitioners stood in contrast to independent evidence provided to the committee by the National Health Practitioner Ombudsman and Privacy Commissioner (NHPOPC).

2.26 The NHPOPC provided the committee with analysis of complaints lodged with her office. The NHPOPC's analysis suggests that there are not a significant number of cases in which the respective health practitioner believed the notification against them was made vexatiously.[28]

2.27 In response to a question on notice to the committee's previous inquiry, NHPOPC submitted that she received two vexatious notifications each year in 2014–15 and 2015–16. As a proportion of NHPOPC's total notifications for these periods, vexations notifications comprised three per cent and one per cent respectively.[29]

2.28 NHPOPC's submission to the committee also indicates vexatious notifications for the 2016–17 year were trending higher than in the previous two years, with an estimated twelve complaints received at the time of submission, or 6.5 per cent of the total notifications received during the period.[30]

2.29 The conflict between the perspectives of the practitioners and the findings of the NHPOPC may be explained by differing interpretations of the use of the word vexatious.

2.30 During the hearing on 31 March 2017, AHPRA's Community Reference Group were asked about what constituted a vexatious complaint. In their answer to the question on notice, AHPRA's Community Reference Group provided 13 possible definitions of the word 'vexatious'.[31] The definitions provided are consistent with how practitioners may view the complaints.

2.31 However, Ms Georgie Haysom, Head of Advocacy at Avant noted that there is a difference between a lay definition of vexatious and the legal definition of vexatious. Ms Hayson explained:

> The legal meaning of 'vexatious' is different from the ordinary meaning, and at law the definition of 'vexatious' is very narrow and the threshold for a complaint or other legal action to be considered to be vexatious is high. So the number of complaints that fall within this legal definition is likely to be very small. I think that the ordinary meaning of that is broader, though, and probably the word is used in that broader meaning by many who talk about vexatious complaints.[32]

28 NHPOPC, *Submission 105*, p. 11.

29 NHPOPC, answers to questions on notice, 1 November 2016 (received 10 November 2016).

30 NHPOPC, *Submission 105*, p. 11.

31 AHPRA Community Reference Group, answers to questions on notice, 31 March 2017 (received 24 April 2017), [pp. 2–3].

32 *Committee Hansard*, 17 March 2017, p. 32.

Power to take no further action

2.32 If vexatious notifications are identified, it is within the power of the national boards to 'take no further action' in relation to a notification made under the National Law.[33]

2.33 However, it would be incorrect to assume that all matters that result in no further action being taken were vexatious. Mr Martin Fletcher, Chief Executive Officer of AHPRA informed the committee that this may be the case if the practitioner 'has already taken steps to address the concern' or there is no ongoing risk that needs to be managed.[34]

2.34 Following the preliminary assessment of a notification, AHPRA is required to refer a notification to the relevant national board that regulates the registered health practitioner to which the notification pertains.[35] Following the receipt of a referred notification, the national board is required to decide what action, if any, should be taken.[36] Under section 151 of the National Law, a national board may decide to take no further action on the basis that the national board has reasonable grounds to believe that the notification was made vexatiously.[37]

2.35 The power of a national board to take no further action can be employed at a relatively early stage in the complaints process. Despite this, some health practitioners perceive that the power is being exercised too late.[38]

2.36 All decisions, including those to take no further action, are required to be assessed by the national board or a committee of the national board.[39] In its submission to the inquiry, AHPRA reported that in an analysis of 2718 complaints closed about doctors during the 2015–16 financial year, 64 per cent of complaints were closed following assessment.[40] Complaints were closed in a median timeframe of around two months when regulatory action was not taken.[41] In instances when regulatory action was taken, the median timeframe to close the complaint was three and a half months.[42]

---

33 National Law, s. 151.

34 *Committee Hansard*, 31 March 2017, p. 22.

35 National Law, s. 148(1).

36 See paragraph [1.22] for the list possible actions available to a national board.

37 National Law, s. 151(1)(a).

38 Australian Medical Association, *Submission 117*, p. 3.

39 Mr Fletcher, *Committee Hansard*, 31 March 2017, p. 22.

40 AHPRA and MBA, *Submission 119*, p. 9.

41 *Submission 119*, p. 9.

42 *Submission 119*, p. 19.

2.37 NHPOPC's submission to the inquiry noted it did not identify any issues with AHPRA's application of the power to dismiss vexatious notifications.[43]

Suggestions

2.38 Submitters proposed a number of reforms that may assist to minimise the prevalence of vexatious complaints.

History of complainants

2.39 Submissions from several health practitioner organisations suggested that a complaints entity, in its early assessment of notifications, should consider the notification history of complainants.[44]

2.40 The rationale underpinning the proposed consideration of a complainant's history is to address what has been described as AHPRA's 'guilty until proven innocent' approach.[45] In reviewing the history of notifications made by a complainant, vexatious complainants may be identified earlier in the complaints process and this information can be used to inform the subsequent deliberations of the national boards.

Triaging complaints

2.41 Another recurring suggestion from witnesses and submitters to potentially eliminate vexatious complaints and increase timeliness was that AHPRA should recruit health practitioners to assist in triaging complaints.[46]

2.42 In November 2016, AHPRA advised the committee that 42 of 180 staff employed in its notifications division had a clinical background and that another 15 clinically trained staff advise the notifications, registration, compliance and legal teams.[47]

2.43 Under the existing process, the members of the board—both practitioners and community members—consider each notification to assess its seriousness and whether the board ought to open an investigation.[48]

---

43 NHPOPC, *Submission 105*, p. 12.

44 Australian Medical Association, *Submission 117*, p. 5; Australian Psychological Society, *Submission 130*, pp. 7–8.

45 Dr Jennifer Neoh, Secretary, Australian Chapter, Association of Family and Conciliation Courts, *Committee Hansard*, 17 March 2017, p. 25.

46 Dr Marie Bismark, Associate Professor, University of Melbourne, *Committee Hansard*, 17 March 2017, p. 10; Mr Rhett Clayton, National Liability Claims Manager, Guild Insurance, *Committee Hansard*, 17 March 2017, p. 31; Health Consumers' Council, *Submission 96*, p. 4; Guild Insurance, *Submission 48*, p. 3.

47 Mr Fletcher, Dr Flynn and Dr Mulcahy, answer to questions on notice, 1 November 2016 [p. 3] (received 16 November 2017) http://www.aph.gov.au/Parliamentary_Business/Committees/Senate/Community_Affairs/MedicalComplaints45/Additional_Documents (accessed 24 April 2017).

48 Dr Joanna Flynn, Chair, Medical Board of Austraia, *Committee Hansard*, 31 March 2017, p. 29.

2.44 However, Dr Joanna Flynn, Chair of the Medical Board of Australia (MBA) explained to the committee that the MBA was currently refining its processes, saying:

> …we have been trialling another process that I think is very productive, which is that the original letter of notification goes straight to a committee within a week of it being received.[49]

2.45 Dr Flynn informed the committee that the trial process was also under consideration by a number of other states and territories.[50]

2.46 The committee was surprised to learn that the original notification is not routinely provided to the board.

2.47 Submitters and witnesses raised the prospect that the boards and participants may benefit from more specialised clinical input at the initial stages of the process. For example, the AFCC suggested that complaints be screened by someone with family law experience where notifications were made about single expert witnesses in family law proceedings.[51]

2.48 In its submission, AHPRA confirmed that it had:

> increased clinical input into the complaints assessment process earlier in the process, for example, through earlier and quicker clinical triage and assessment mechanisms.[52]

2.49 At the committee's public hearing on 31 March, Mr Fletcher reiterated that AHPRA was focussed on improving its assessment and triage processes.[53]

2.50 Avant Mutual Group Limited also submitted that triaging was an area that AHPRA had worked to improve.[54]

Committee view

2.51 The committee notes the perspective of some health practitioners—including the perspective of professional bodies representing health practitioners—that notifications made under the National Law are, at times, misused for the purpose of making a vexations complaint against a registered health practitioner.[55]

2.52 Whilst the committee acknowledges the concerns raised by health practitioners, the independent evidence received by the committee does not suggest that vexatious notifications are a widespread issue; rather, they appear to be relatively infrequent.

---

49 Dr Flynn, *Committee Hansard*, 31 March 2017, p. 27.

50 Dr Flynn, *Committee Hansard*, 31 March 2017, p. 27.

51 AFCC, *Submission 38*, p. 9.

52 AHPRA and MBA, *Submission 119*, p. 4.

53 Mr Fletcher, *Committee Hansard*, 31 March 2017, p. 27.

54 Avant, *Submission 50*, p. 3.

55 Mr Joel Levin, *Submission 27*, p. 2; AFCC, *Submission 38*, p. 4.

2.53 In instances where vexatious notifications are made, the committee recognises that there can be unwarranted and disproportionate adverse consequences for the health practitioner concerned. Accordingly, the committee considers it is essential for vexatious complaints to be identified and dismissed at the earliest possible stage in the complaints process through the 'take no further action' mechanism.

2.54 The committee maintains the view that it is central to the integrity of the complaints mechanism that prospective complainants are not discouraged from raising a notification. Excessive regulation of the 'front door' of the complaints mechanism may increase the risk that genuine complaints are not addressed. Such an outcome would diminish the efficacy of the regulatory protections offered by the complaints mechanism.

2.55 To that extent, the committee commends AHPRA's efforts to triage complaints to streamline the complaints process. The new trial process appears to enhance the existing triaging system and supports its expansion to the remaining jurisdictions. However, the committee considers that more can be done.