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Senate Enquiry into ‘*Complaints mechanism administered under the Health Practitioner Regulation National Law*’

Terms of reference

- **the implementation of the current complaints system under the National Law, including the role of the Australian Health Practitioner Regulation Authority (AHPRA) and the National Boards;**
- **whether the existing regulatory framework, established by the National Law, contains adequate provision for addressing medical complaints;**
- **the roles of AHPRA, the National Boards and professional organisations, such as the various Colleges, in addressing concerns within the medical profession with the complaints process;**
- **the adequacy of the relationships between those bodies responsible for handling complaints;**
- **whether amendments to the National Law, in relation to the complaints handling process, are required; and**
- **other improvements that could assist in a fairer, quicker and more effective medical complaints process.**

Introduction

To provide context we have attached (Appendix A) the submission made 11 April 2011 by the Australian Psychological Society (APS) Family Law and Psychology Interest Group (FLAPIG) to the Senate Standing Committee on Finance and Public Administration References - Inquiry into the administration of health practitioner registration by the Australian Health Practitioners Regulation Agency (AHPRA) which address the terms of reference of that enquiry in relation to

the impact of AHPRA processes and administration on health practitioners and AHPRA's complaints handling processes.

The paper below summarises the particular legal and ethical problems faced by practitioners who work within the Family Law population and specifically assessments as a Single Expert Witness SEW for the Family Court of Australia, the Federal Circuit Court of Australia and the Family Court of Western Australia. The paper also explains why SEW attract more complaints across psychiatry and psychology than any other types of practice both in Australia and internationally and explores why this is so, the motivation of Family Law litigants and the problems with how AHPRA has dealt with these types of complaints.

Since the 2011 submission was made, the Psychology Board of Australia has published an "Interim" policy paper (Appendix B) entitled the 'Management of Notifications about Single Court Appointed Psychologists in Family Law Courts Proceedings' dated 21 October 2011.

This Psychology Board policy notes *"The Court has jurisdiction to control proceedings before it, and this includes management of Experts appointed by the Court. The Court also retains ownership of documents generated for its purposes or by orders. To date, the Family Court of Australia and Family Court of Western Australia have not issued specific practice notes or protocols in relation to complaints against Experts"*.

The policy states *"In relation to psychologists who have been appointed as Experts, the Board must seek leave of the Court before exercising its powers under the National Law in relation to a registered practitioner who is a Court appointed Expert"*.

There are some important points to note in this policy, such as that the Board recognises the sovereignty of the Court to deal with complaints in the first instance, that documents generated as part of Family Law proceedings belong to the Court and at the time of the policy Family Court of Australia and Family Court of Western Australia had not issued specific practice notes or protocols in relation to complaints about experts.

This last point is no longer valid and the Family Court of Western Australia now employs Standing Orders as follows:

- 1. The parties and the Independent Children's Lawyer be restrained and an injunction is hereby granted restraining each of them from providing copies of any Single Expert's report prepared for the purpose of these proceedings, or permitting any other person to do so, to any person or entity other than their solicitor or counsel in these proceedings, without first obtaining leave of the Court.*
- 2. The parties and the Independent Children's Lawyer be restrained and an injunction is hereby granted restraining each of them from making any complaint to a professional body or association concerning the conduct of the Single Expert or concerning the content of the Single Expert's report, or permitting any other person to do so, without first obtaining leave of the Court.*

3. *The preceding orders shall remain in full force and effect following completion of the proceedings.*
4. *For the purposes of the preceding orders, leave of the Court may be sought by:*
 - a. *the filing of a written request by the Independent Children's Lawyer, copied to both parties to the proceedings;*
 - b. *the filing of a Minute of Consent orders signed by the Independent Children's Lawyer and all parties or their legal representatives; or*
 - c. *by a formal application with a brief affidavit in support.*

The relevant issues in these Court Orders from Western Australia are that parties are prohibited from making complaints about Single Expert Witnesses unless they obtain the leave of the Court, the Orders remain in place beyond the completion of the proceedings and the mechanisms to obtain leave to make a complaint are clearly set out.

The terms of reference addressed in this submission concern “*the implementation of the current complaints system under the National Law, including the role of the Australian Health Practitioner Regulation Authority (AHPRA) and the National Boards*” and “*whether amendments to the National Law, in relation to the complaints handling process, are required*”.

Submission

It is clear to psychologists (and psychiatrists) who work as a Single Expert Witnesses in the Family Law Courts that despite initiatives to better manage complaints about them there are significant failures and administrative problems with AHPRA that cause interference with Family Law cases and compromise the role of the practitioner.

The problems appear endemic

- Practitioners are routinely contacted and informed of complaints by Family Law litigants during Family Law proceedings, this immediately compromises the practitioner and raises the issue of apprehended bias
- Practitioners are routinely asked to supply Family Law documents and the file notes which creates ethical, legal and professional dilemmas for the practitioner who is required to make declarations and adhere to provisions in the Family Law Act 1975 in relation to confidentiality of the parties and under ethical responsibilities also potentially compromises the confidentiality and rights of others involved in the Family Law proceedings including the other parent, the children and other family members whose consent is not obtained
- Practitioners are subject to the numerous harassing complaints by one party in Family Law proceedings.
- AHPRA officers appear unaware of the Psychologists Board of Australia policy regarding Single Expert Witnesses

- For complaints from Western Australia AHPRA Officers appear unaware of Family Court of Western Australia Standing Orders

We refer to the APS FLIG submission of 2011 to emphasise that Single Expert Witnesses involved in Family Law proceedings attract complaints due to the very nature of the work. Family Law litigants are motivated to find fault and discredit opinions given in the course of Family Law proceedings with the most common motivations to invalidate the opinion of the clinician, to use legal leverage by excluding the psychologist from future court proceedings and to gain revenge and retribution on the psychologist when the opinions expressed in reports do not favour them.

In addition to being regularly asked to respond to complaints from current litigants with requests to supply documents and files, some case examples that underscore our concerns follow.

- The regional Psychology Board in Queensland looked at a transcript of evidence given by a SEW in a Family Law matter and ‘determined’ that she had committed perjury and made a complaint to the Australian Federal Police (and without notifying the practitioner)
- AHPRA accepted and investigated five serial complaints from one Family Law litigant over a three-year period, and not until the practitioner threatened to obtain an Intervention Order against the litigant for stalking and harassment and joining the Board as a party did AHPRA appear to refuse to accept the litigant’s complaints
- A psychologist responded to a complaint that was eventually dismissed, but the complaint resubmitted another complaint soon after, which was also eventually dismissed
- A woman who made a complaint against a practitioner prior to the introduction of the National Law was allowed to submit the exact same complaint to AHPRA seven years later
- Three separate complaints about a Victorian psychologist that took years to complete (and all eventually dismissed) where the issues were the litigant’s disagreement with the opinions expressed rather than transgressions of professional practice

Conclusions

It is clear that a policy published by the Psychology Board of Australia has little practical utility. It is proposed that changes to the National Law incorporate some fundamental exclusions such as that leave must be obtained from the Family Law Courts before pursuing investigations (including restrictions on contacting the practitioner during ongoing Court proceedings) and that documents generated in Family Law Courts proceedings remain the property of the Court.

Although the Family Court of Western Australia indicate Standing Orders extend beyond the completion of the family law proceedings and litigants must return to the Court to obtain leave to

pursue complaints against practitioners, we consider that the National Law should contain either a statute of limitations on complaints or endorse the Family Court of Western Australia's position.

We would also endorse any mechanism which allows for the agreement of both parties before complaints are taken by AHPRA.

Subcommittee for Complaints to professional bodies about Single Expert Witnesses

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Appendix A

Submission by the Australian Psychological Society (APS) Family Law and Psychology Interest Group to the Senate Standing Committee on Finance and Public Administration References - Inquiry into the administration of health practitioner registration by the Australian Health Practitioners Regulation Agency (AHPRA)

And specifically

- The impact of AHPRA processes and administration on health practitioners
- AHPRA's complaints handling processes

Since the introduction of the new Australian Health Practitioners Regulation Agency (AHPRA) to investigate complaints about psychologists' professional conduct, those psychologists who work in the family law arena have been beset with complaints and AHPRA's handling of these types of complaints has been negligent, incompetent and uniformed. Further, psychologists have been placed in untenable positions where they could potentially face legal ramifications and consequences if they follow the demands of AHPRA staff and investigators.

Psychologists who undertake assessments in family court matters are routinely regularly reported to AHPRA following family court assessments.

This has been recognised internationally in family law to be reflective of the nature of Family Law processes, and generally represent the litigant's attempt

- to invalidate the opinion of the clinician,
- to use legal leverage by excluding the psychologist from future court proceedings
- and to gain revenge and retribution on the psychologist when the opinions expressed in reports do not favour them

AHPRA fails to consider the particular professional, financial and physical risks for psychologists specialising in Family Law and the potential for competing responsibilities between our duty to the court and current parameters for professional practice.

While we do not suggest that Family Law psychologists should be exempt from complaints about their professional practice, we submit that the high number of complaints to psychologist registration boards and professional bodies, not just in Australia but internationally, represents a base rate problem that we are seeking AHPRA acknowledge in their initial investigation of complaints.

We submit that there needs to be some changes in the way AHPRA approaches these complaints. Firstly, some of our concerns relate to the failure of AHPRA to consider the motivations of complainants. We submit that there needs to be some mechanism where these complaints are

screened to avoid wasting time, energy and money in undertaking investigations where the litigant obviously has malicious motives.

We also emphasise that AHPRA consistently fails to appreciate the legal context and our obligations under the *Family Law Act 1975* and the *Family Law Rules 2004*. For example, it is not uncommon for AHPRA to demand our file or reports when the disclosure of such information is constrained under section 121 of the *Family Law Act 1975*.

AHPRA also routinely ignores the rights of other parties and children involved in assessments. It is typical practice for AHPRA to rely on the complainants view without seeking input from the other party and to demand files and reports without consideration for the other participants' rights and our ethical and legal responsibilities to them.

It has also become clear that some Family Law litigants who do not get the professional psychological opinion that they expect in a Family Law assessment frequently use the complaint process to pervert the legal process.

In Victoria, the Psychologists Registration Board of Victoria had historically recognised that complaints about psychologists arising from litigants in Family Court matters have particular attributes and require some consideration about the motivations of the complainants, the context of the complaint and the legal jurisdiction.

Importantly, up until AHPRA took over responsibility the Psychologists Registration Board of Victoria had refused to investigate complaints about psychologists who had been appointed by the court to undertake assessment for the court, when the matter is still proceeding through the court. As having an ongoing AHPRA investigation of a complaint naturally forces the psychologist to withdraw from the case, this was some recognition that litigants can use the complaint process to exclude the psychologist in the legal matter and reject the psychological opinion given in a report as a legal gambit.

We also know of examples where lawyers have encouraged clients to make a complaint as a legal strategy to prevent an unfavourable opinion of their client being admitted to the Court. Since the evolution of APRHA, complaints are now being actioned and investigated during the progress of the legal matter. We submit that AHPRA should develop some protocols to prevent this occurring. If a litigant is unhappy with a psychological opinion, the proper jurisdiction to challenge this in the first instance is before the Court, not AHPRA.

We are also concerned about the confusion of investigation and judicial powers and that AHPRA does not have open and transparent processes. We have grave concerns about the lack of independence and have noted that investigating board members may also sit on the Board and participate in decision making.

Additionally, APRHA have typically had psychologists assess these complaints whose experience does not allow them to be fully equipped to evaluate the practice of the psychologist, as it is well recognized that the family court arena poses specific challenges that are outside the expertise of most psychologists. Soon our members may be forced, under new mandatory

reporting rules, to begin making allegations of professional incompetence against psychologists working for AHPRA for undertaking forensic interviews and investigations without competence in either forensic investigations or psychological practice in family law.

It is a significant failure of AHPRA's operations that there has been no education of their staff or attempts to understand these issues.

We submit that changes should be made in how investigations of complaints by AHPRA are undertaken, specifically

- that complaints are not actioned until the legal proceedings are completed
- that complaints are initially screened by someone who has Family Law experience to avoid unnecessary investigations by vexatious litigants
- that AHPRA investigators acknowledge of our legal responsibilities, including appreciating that the court is our client, that a health model is not appropriate and an understanding of the legal parameters under which we work so they do not repeatedly demand that we violate those responsibilities
- that AHPRA psychologist investigators have competence in forensic investigation and family law experience
- that investigation and judgement become independent and separate processes

Signed

Dr Jennifer Neoh
Secretary APS Family Law and Psychology Interest Group
On behalf of members
11 April 2011

Appendix B

The management of notifications about Single Court Appointed Expert Psychologists in Family Law Courts proceedings: Interim Policy



The management of notifications about Single Court Appointed Expert Psychologists in Family Law Courts proceedings: Interim Policy

Summary

Single Court Appointed Experts (**Experts**) are appointed through Family Court of Australia, the Federal Magistrates Court of Australia and the processes of the Family Court of Western Australia (**Court**) to provide expert opinion in relation to parties and children in Court proceedings.

This Interim Policy (**Policy**) sets out how notifications to the Australian Health Practitioner Regulation Agency (**AHPRA**) about Experts should be managed.

The Policy recognises the jurisdiction of the Court to control proceedings before it, and also to provide guidance on the discharge of the functions of the Psychology Board of Australia's (**Board**) management of notifications about psychologists appointed as Experts.

For the purpose of this policy, 'psychologist' means a person who holds registration as a psychologist under Part 7 of the *Health Practitioner Regulation National Law Act* as in force in each state and territory of Australia (the **National Law**).

Scope of policy

This interim policy applies to notifications about registered psychologists appointed by the Court as single experts in court proceedings.

Policy

The Board was established under the National Law and exercises all functions for which it was established. Under the National Law, the Board has a range of powers to take action to protect the public after receiving a notification about a registered practitioner and assessing the available evidence about a specific matter. This includes the power to take 'immediate action' to restrict or limit the registration of a psychologist if this is necessary to protect the health and safety of the public. The Board may also decide to take no further action in relation to a notification.

In relation to psychologists who have been appointed as Experts, the Board **must** seek leave of the Court before exercising its powers under the National Law in relation to a registered practitioner who is a Court appointed Expert. Leave **may** be sought when the Board considers it is necessary to proceed with an investigation of a practitioner and it is not in the public interest to defer the investigation until the Court proceedings have concluded.

This policy is given effect as follows:

1. When a notification is received by AHPRA about a registered psychologist who has been appointed an Expert in proceedings before a court, the Board:

- 1.1 **must** perform any relevant functions required under s 35 the National Law, including receipt, assessment and investigation of notifications about specified health practitioners (s 35(g)). (Note that both AHPRA and the Board **must** perform their respective obligations in relation to 'Preliminary assessment' as set out in Division 5 of Part 8 of the National Law)
- 1.2 **may** decide to take no further action in relation to a notification, pursuant to s 151 of the National Law, in specified circumstances, including if the Board reasonably believes the notification is frivolous, vexatious, misconceived or lacking in substance, or if the subject matter of the notification is being dealt with, or has already been dealt with, adequately by another entity
- 1.3 **may** take immediate action if s 156 of the National Law applies, specifically, the Board reasonably believes that because of the registered health practitioner's conduct, performance or health, the practitioner poses a serious risk to persons and it is necessary to take immediate action to protect public health or safety, but
- 1.4 **must not** undertake an investigation, or any further action (excluding a decision to take no further action) in relation to the notification, unless:
 - 1.4.1 leave of the relevant court is obtained, or
 - 1.4.2 the matter before the court has concluded, whichever occurs first.

'May' and 'must' should be interpreted in accordance with clause 14 of Schedule 7 to the National Law.

Policy basis and legislative objectives

Section 3(2) of the National Law provides that an objective of the national registration and accreditation scheme is 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'.

Section 4 requires an 'entity that has functions under this Law [is] to exercise its functions having regard to the objectives and guiding principles of the national registration and accreditation scheme'. The Board's powers to manage notifications about practitioners, including powers to conduct an investigation, have been conferred on it for the purpose of achieving this objective.



The management of notifications about Single Court Appointed Expert Psychologists in Family Law Courts proceedings: Interim Policy

The Court has jurisdiction to control proceedings before it, and this includes management of Experts appointed by the Court. The Court also retains ownership of documents generated for its purposes or by orders. To date, the Family Court of Australia and Family Court of Western Australia have not issued specific practice notes or protocols in relation to complaints against Experts.

Authorisation

The Psychology Board of Australia resolved to adopt this policy on 21 October 2011.

Review

This policy will take effect from 30 January 2012. The Board will review this interim policy within 12 months and thereafter, at least every three years.

