

Guild Insurance

**Submission to the Senate Community Affairs References Committee for
inquiry and report**

**Inquiry into the Complaints mechanism administered under the Health
Practitioner Regulation National Law**

February 2017

Introduction

Guild Insurance Limited is an Australian owned APRA authorised insurer. The company is a wholly owned subsidiary of the Pharmacy Guild of Australia and has been in operation since 1963. As a part of the Guild Group of Companies, Guild Insurance is a niche provider of general insurance products to professional service providers, predominantly though not exclusively in the allied health sectors.

We have significant market penetration, providing professional indemnity insurance solutions for ten of the fifteen professions nationally regulated by AHPRA and we currently partner with peak Association bodies who represent practitioners in eight of these professions (many of whom have provided their own independent submissions). We insure the majority of practitioners across most of these professions. We offer Inquiries and Proceedings cover to assist our insured practitioners in responding to complaints that are processed through AHPRA under the National Law. We believe our National presence, close ties to Allied Health Professional Associations, claims experience and exposure to the majority of professions that AHPRA oversees places us in a unique position to provide a submission to the Senate Committee in the circumstances.

Guild appreciates the opportunity to provide comments on the administration of the health practitioner registration by the Australian Health Practitioner Regulation Agency (AHPRA).

Our submission addresses each of the terms of reference for the inquiry. There is inevitable crossover between terms of reference and therefore we have not attempted to address each in turn.

In making these submissions Guild has also examined the previous Senate Committee report into AHPRA dated June 2011.

A number of the concerns raised in that report that were the subject of recommendations by the Committee are the subject of this submission. Where this occurs we have referenced the earlier report.

Executive Summary

We have dealt with the specific Terms of Reference of the Inquiry throughout the paper. However the main points we would like to raise can be summarised as;

- The National Law and the AHPRA complaints handling framework create a system that easily provides for patients, other practitioners and the general public to raise concerns over health care practitioners.
- Guild's chief concern with the system is from the perspective of the professional the subject of the complaint. For the reasons outlined in our paper Guild do not consider the current complaints system allows for a "level playing field" and that this may lead to different outcomes that arise only because of a professional's location and profession.
- We are also concerned that the current complaints system may inadvertently be encouraging frivolous and vexatious complaints as well as anti-competitive behaviour. We are seeing an increased number of open complaints, which may be as a result of this.
- In addition to the increasing number of complaints, we are seeing the duration of complaints increase. This may be a product of the higher number of open complaints.
- Working closely with our professional insureds we see the negative personal and professional impacts that an open complaint can have on them. As this has the potential to impact on patient care, we believe it is in the interest of AHPRA to reduce the duration of the complaints process.
- Ultimately any improvement to the complaints process should be done with a view to ensuring it is fair, fast and effective for *all* participants.
- Guild believes that the current complaints process could be improved in a number of ways which are outlined in the body of our submission, principally around:
 - National consistency
 - Clear Scope and Delineation of Roles
 - The Process for Making a Complaint
 - Triage and Vetting of complaints
 - Advertising Guidelines
 - Access to other Practitioners
 - Provisions for Legal Cost Awards

Response to the Terms of Reference

Guild believes that the National Law and AHPRA play an important role in the oversight and management of complaints within the health industry. In our experience the vast majority of complaints are dealt with fairly and result in no further action against the Practitioner.

While we have raised a number of matters as issues below we have done so with the intent of providing constructive feedback to assist the Inquiry to explore improvements that properly balance the need for public safety with the inevitable impact of the process on the practitioners that are the subject of a complaint.

The National Law, AHPRA and the Boards

Guild understands that the National Law and current AHPRA complaints system was developed with the intent of creating a single national and consistent system for dealing with complaints against Health Professionals. Prior to this, such matters were dealt with via the various State regulatory and complaints bodies, leading to different outcomes for complaints that were substantially similar, with the outcome being dependant on the State in which the Professional practiced.

From this perspective the implementation of The National Law, AHPRA and the Boards has not been successful.

While the National Law is uniform, and the National body supports the National Boards, the processes for dealing with complaints vary from state to state, with the NSW HCCC and QLD OHO having their own standalone processes as good examples of this. We refer you to Case Study A as an actual example of how these localised processes can create different outcomes and do note that this observation was made as part of the 2011 report.

Registering a Complaint

The on-line complaint lodgement process is simple and easy to use from the perspective of a complainant. While Guild recognises the need for AHPRA and the National Law to cater to a medically unsophisticated public and that they should not be seen to discourage complaints, the current lodgement process is arguably too easy when considering the potential impacts on the practitioner that is subject to the complaint.

The online form can be submitted in a substantially incomplete state or can otherwise be influenced by the use of prescriptive drop down menus. For the sake of respecting a complainant's right to anonymity, dummy information can be entered meaning that the identity of the complainant is not even known to AHPRA. Because of this our insureds are often asked to respond to vague complaints that inevitably result in no further action. These matters attract an actual cost to insurance schemes as well as being a burden on the time and resources of the practitioners involved and AHPRA, while not adding value from the point of view of improving public safety and health outcomes.

Triage and Vetting of Complaints

Guild's experience of the breadth of complaints that we assist our insureds with is that all complaints (excluding those that result in immediate action hearings) are investigated and dealt with similarly. This results in all complaints taking a similar amount of time to reach conclusion. Guild believes that a robust triage and vetting system at the time of registration of a complaint could allow for less serious matters to be managed under a fast tracked process. In addition a revised triage and process would ensure that AHPRA only deal with complaints that are within their scope and may allow for frivolous or vexatious complaints being dismissed.

We believe this would have a positive impact on the open duration of complaints and limit the impact on practitioners, particularly where the complaint is either unfounded or required no further action.

Scope of Complaints Managed

Guild has observed some scope creep in terms of what AHPRA accept as a Healthcare complaint. AHPRA's own terms of reference limit its complaints handling to matters of the quality of the treatment, the practitioner's behaviour (misconduct) and the practitioner's fitness to practice, with a focus on public safety. We have however observed complaints that clearly do not have public safety implications, for example, complaints over billing. Guild believes these types of matters are best managed under a general consumer complaints process rather than a Health Complaints system.

In addition we have seen recent examples where AHPRA and the National Boards have become involved in matters and making decisions that influence what is considered the scope of practice for the professions. It is not entirely clear that this is within AHPRA's remit and Guild believes this should be clarified.

Advertising Complaints

The Advertising guidelines have generated a high volume of complaints. We acknowledge that a significant proportion of these complaints are directed at a single industry, we have observed that the application of the guidelines in practice are very difficult given the level of subjectivity that can be applied to them. We have observed that the Healthcare practitioners we deal with have trouble understanding what is required of them and believe these guidelines need to be much clearer.

Finally we believe that the National Law is lagging behind social norms from the perspective of Social Media, which is playing an increasingly large role in commerce and indeed healthcare. As an example, we have seen instances of complaints being referred to AHPRA and practitioners being investigated for advertising breaches where members of the public "like" their Facebook profile on the basis this was an endorsement.

Timeliness

After seeing duration decrease over a number of years, we have recently observed the duration of complaints increasing (Figure A) and this has coincided with the increase in the volume of open complaints (Figure B). NOTE: Actual numbers are redacted as they are commercially sensitive

Duration (Number of Days) - Rolling 24 Months

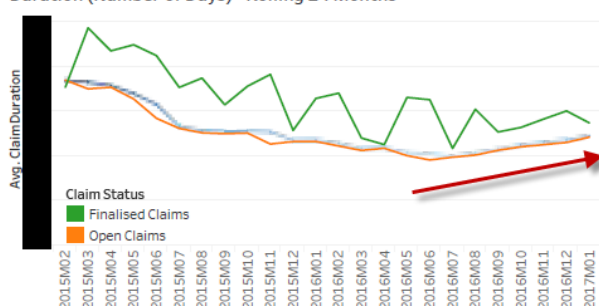


Figure A

Open Claims - Rolling 24 Months

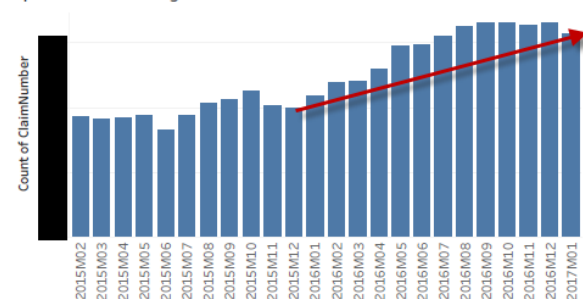


Figure B

The increase in duration is concerning for a number of reasons. Increases in duration result in an increase in costs. Professional indemnity insurance tends to be based on a "community" pricing model where increases in claims costs are invariably passed onto all insureds, who may or may not pass those costs onto their patients. Increased costs to a practice are a driver for stress in practitioners that has the potential to impact on their mental health and therefore their fitness to practice.

Additionally, practitioners that are the subject of a complaint report the significant personal and financial stress of an ongoing investigation as a result of a complaint. For example, a practitioner that is the subject of an immediate action hearing that results in conditions being placed on their registration may have to wait a more than 12 months for the matter to be finalised, regardless of the outcome. As well as the stress on the practitioner, this has an obvious financial impact as well.

Even in circumstances where their practice is not restricted, our insureds report significant levels of stress through the period of an investigation of a complaint.

A robust triage and vetting system and containment of scope creep as mentioned earlier may be effective at reducing duration.

Access to the Complete Medical Picture

The health care of an individual patient is almost always multi-disciplinary; however the complaints process tends to consider one practitioner in isolation and based on the perspective of the patient. We have had complaints that have resulted from one practitioner comment on the treatment of another during a consultation. In order for a practitioner to provide a fully informed response and for AHPRA to consider such a complaint we believe AHPRA should have the ability to access either clinical notes or a response from other medical practitioners involved in a complainant's treatment.

Mandatory Reporting

Some of our Association partners employ practicing clinicians in Peer Support and Advisory roles on a part time basis and in many cases are operating under a Corporate Authorised Representative agreement on behalf of Guild. The provisions for Mandatory notification by a Health Practitioner under s141 of the National Law do not definitively exclude a practitioner acting in this capacity for the Mandatory Notification obligations.

These practitioners not only assist in managing complaints and claims but they also provide a valuable service in assisting members that call in with an issue to work through to an appropriate solution, often avoiding situations escalating into a complaint. The system requires a level of trust and confidentiality so that practitioners can seek advice and guidance without fear of being reported. Unfortunately in a recent instance a Mandatory Report was made.

Guild believes that practitioners acting in these types of roles should be expressly exempt from the mandatory reporting requirement as the support and service they provide is of significant value.

Changes to the National Law and Other Improvements to the Complaints Process

Guild believes that the matters below be explored in order to improve the complaints process to ensure it is fair, fast and effective for all participants.

- National consistency
 - Guild strongly believes that a practitioner has the right to expect that they will go through the same process and have the same outcome regardless of which State they practice in, what profession they practice and which Professional Organisation they belong to.
 - The National Law provides a consistent national framework which, under the current system, is subject to State based variances. We believe these variances should be removed.
 - Each State based system will have strengths and weaknesses. A proper examination of all of the State based nuance, as well as the NSW HCCC and QLD OHO would allow a National model to represent best practice.
- Clear Scope and Delineation of Roles
 - AHPRA need to create a very clear scope of the complaints they can and should deal with under the national law.
 - We have summarised AHPRA's role as managing complaints over the quality of the treatment, the practitioner's behaviour (misconduct) and the practitioner's fitness to practice, with a focus on public safety. We agree with this scope and believe that AHPRA should limit its involvement to these complaints.
 - Guild would like clarity on whether AHPRA and the National Boards should be involved in determining issues of scope of practice. If so this should be clearly articulated in their scope.
- The Process for Making a Complaint
 - The on-line complaint registration process should be reviewed.
 - Although we agree with the proposition that a complainant may not wish for the practitioner to know their identity, we do not believe that a complainant ought to be able to make a complaint anonymously.
 - AHPRA ought to be able to test the identity and therefore the veracity of a complaint in order to vet vexatious or malicious complaints. We believe that the supply of a sufficient level detail for AHPRA to be satisfied that a complaint is genuine is not too high a bar when balanced against the potential impact for a practitioner.
 - The minimum level of detail required in the form should be reviewed to ensure that practitioners are not required to respond to vague and general complaints.
 - The "drop down" menus should be reviewed to ensure they do not influence the direction of the complaint.
- Triage and Vetting of complaints
 - AHPRA should consider creating a more sophisticated triage and vetting process for new complaints.
 - Utilisation of a more senior public servant at the initial assessment phase may allow the exercise of discretion in dismissing frivolous and vexatious complaints at an initial phase.
 - Utilising Health Professionals either in the triage process or consultatively may even allow complainants to understand that a complaint over the way a treatment is provided may actually be normal clinical practice.
 - A more detailed scaling of the seriousness of a complaint may allow for less serious complaints to be dealt with under a less formal or "fast track" style process, meaning they can be dealt with more quickly.
 - Guild believes these steps would benefit AHPRA, the complainants and practitioners by ensuring that resources are not used on processes that do not add value. This would ease the strain of administration on AHPRA and ensure that practitioners are not left waiting for an outcome for longer than is absolutely necessary.
- Advertising Guidelines
 - We believe the current advertising guidelines should be reviewed to ensure they are much clearer about the expectations on practitioners.
 - We also believe they should be updated to reflect the realities of social media.

- Mandatory Notifications
 - We believe that Practitioners acting in an advisory or peer support role should be exempt from Mandatory Notification requirement to retain a sense of trust and confidentiality. Practitioners ought to be able to utilise peer support to prevent situations from escalating without the fear of being reported.
- Access to Other Practitioners
 - AHPRA should have the power of discovery to properly consider all of the facts relevant to a complaint.
 - We believe that AHPRA should develop protocols that detail when this power may be used.
 - The protocol should also cover when and how these records may be shared with both the complainant and the practitioner subject of the complaint to allow them procedural fairness in providing a properly informed response.
- Legal Cost Awards
 - A prosecution against a practitioner can result in them having to pay the costs of the prosecution.
 - There is no corresponding ability for them to seek costs when a prosecution is not successful.
 - Cost awards are intended to compensate a successful party to litigation for the legal cost of bringing or defending their action. In the interests of fairness and to ensure that decisions to prosecute are not taken lightly then practitioners ought to be able to seek costs when they successfully defend a prosecution

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Case Studies

NSW

Complaints against registered health practitioners in NSW will in the first instance be considered by the Health Care Complaints Commission with consultation then taking place at an early stage with the relevant state professional council, eg Pharmacy Council of NSW, Dental Council of NSW. The inherent benefit in consultation taking place with a professional council is the application of particular professional expertise to the complaint at hand. Regardless of the ultimate outcome of the complaint, the complaint handling process is greatly assisted by early consideration by a peer of the health practitioner the subject of the complaint. A decision is then made as to whether no further action will be taken, or the complaint is escalated for handling by the professional council. Given that the peer review takes place at an early stage of the process both complainant and respondent are advised of the outcome of the complaint in a timely manner.

ACT

In contrast, complaints made against registered health practitioners in the ACT are in the first instance considered by the Health Services Commissioner ACT Human Rights Commissioner. In our experience, the Commissioner does not make clear whether, or at what stage of the process, the complaint undergoes peer professional review. Certainly in our experience, peer professional review is not undertaken at an early stage. Upon receipt of a complaint an initial decision is made as to how the matter will be dealt with. The options open to the Commissioner are Commission investigation, conciliation, referral to the AHPRA Agency for their assessment, or referral back to the provider, with a request from the Commission that the parties engage in a complaint resolution process. In the majority of complaint matters against health practitioners with which we have had some involvement, referral is rarely made to the AHPRA Agency or peer professional review at an early stage if at all.

In Practice

Guild was involved in multiple disciplinary complaints that were lodged against a group of practitioners in 2013 arising from disparaging comments being made on an association's Facebook page against another practitioner, the complainant. In Victoria, following initial responses to the complaints being made, AHPRA closed its investigations into 7 practitioners. In NSW, the complaint was investigated by the Health Care Complaints Commission and following receipt of the practitioner's response, the HCCC referred the matter to the practitioner's Professional Council of NSW and the practitioner was ordered to attend a counselling session.