

4 May 2017

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



This information follows from the AFCC submissions to the **Senate Inquiry into *Complaints mechanism administered under the Health Practitioner Regulation National Law***, the opening statements provided in person by AFCC members on 17 March 2017 and the statements made by Mr Mathew Hardy, head of notifications at AHPRA, on 31 March 2017.

On 31 March 2017, Mr Matthew Hardy in the presence of Mr Fletcher CEO of AHPRA said “*I think it is important to put some context around the particular complaints that have been made in the national scheme about single court appointed experts. From our perspective, rather than say that we have judged people as guilty before there has been an investigation conducted, it might be worth putting on the record that in fact for those matters no decision can be made because of the rules of the Family Court, which say that we cannot investigate a complaint without leave of the Family Court to investigate that complaint. So where there is a complaint made about a single court appointed expert in their capacity as a psychologist who is registered under the national scheme the Psychology Board of Australia agreed with the association and with the family courts a process and a policy for managing those types of complaints which said that the complaint effectively would sit on hold until the Family Court proceedings related to that matter were concluded and that the Family Court had considered giving us leave to rely on the report for the benefit of the investigation*”.

and

*“There is no case that I am aware of where we have done anything but comply with the policy that was agreed by the association and by the Family Court. There are a number of matters where there have been complaints made and we have been unable to get on and investigate those complaints because we are subject to completion of the Family Court proceedings and then subject to leave being granted by the Family Court”.*

Mr Hardy suggested that AHPRA treats all complaints about single expert witnesses the same, that is, both psychologist and psychiatrists, but referred to the Psychological Board of Australia’s policy which is not applied in AHPRA investigations and decisions before the medical board. He indicated that sometimes Single Expert Witness reports are provided by complainants and referred to his belief that AHPRA ‘shelves’ Single Expert Witness reports and does not use them in investigations unless the Family Court matter is resolved.

We provide information in the form of a selection of cases (anonymously published) where AHPRA has had access to reports written by Single Expert Witnesses DURING Court proceedings, and judgements where AHPRA has investigated complaints DURING Court proceedings.

These are a few examples only and this should not be considered an exhaustive list as

- Austlii does not publish all Family Law judgements,
- NSW complaints are not administered by AHPRA and therefore not included and
- Search parameters struggle to capture all instances as Judicial Officers use a variety of terms to describe complaints and AHPRA.

There is also some difficulty in supplying this information as

- Family Court cases are anonymised and the SEW are rarely identified (Single Expert Witnesses are identified more commonly in the Family Court of Western Australian)
- Often the practical issues of whether a complaint is being pursued by AHPRA is difficult to understand because this is not the focus of the Court and mentioned only briefly in judgements

Sometimes we have been able to capture information from the Single Expert Witness involved who can confirm AHPRA's request for documentation and investigation of the complaint concurrently with the Family Law proceedings. However, there is a natural reticence by practitioners to provide direct information about complaints against them as the research has shown this is usually an extremely stressful event or events that carries elements of shame and other negative emotions. Practitioners also report that they are concerned about potential personal repercussions from AHPRA if they report to us, and others have stated that they are involved in ongoing investigations against them and cannot provide information at this time.

Only AHPRA's records can provide an accurate estimate of complaints against SEWs and the frequency with which they are investigated where AHPRA have requested reports and Court documents during ongoing Court proceedings. Despite multiple requests to AHPRA (where invariably we have received no response), there is no reported data or statistical analysis in relation to complaints from Family Law litigants about Single Expert Witnesses. Although it has been suggested to AHPRA that the policy of the Psychology Board in relation to Single Expert Witness should be posted on the complaints page for the benefit of both complainants and AHPRA staff, this has also been ignored.

Nevertheless, we have been able to find some case examples where AHPRA had been given the Single Expert report by the practitioner on request. One clear case is Psychology Board of Australia v Tubaro [2014] QCAT 303 (26 June 2014) –where the psychologist's report, written as a Single Expert Witness for the Family Law Courts, was used by AHPRA and supplied to an external psychologist for the purposes of a review. In addition to disregard for the Family Court process, the

actions of AHPRA in providing the report externally were undertaken without regard for the fact that the report held confidential information about other family members for which they had not given consent, and there were no controls around the use and dissemination of that confidential information. It is noted that AHPRA's investigating officers are not held to any known ethical standards of practice around protection of such confidential material.

In *Psychology Board of Australia v Tubaro (No 2)* [2015] QCAT 141 (28 April 2015) the Board (and AHPRA) also took the most bizarre step of deciding that the psychologist had committed 'perjury' based on the board's perusal of Court transcripts, and referred the matter to the Australian Federal Police (who subsequently took no action). The extraordinary actions taken by the board (and AHPRA) were compounded by their lack of disclosure to the practitioner who was only informed of the referral to the AFP (which presumably included Court documents and information) 12 months or so later.

Other cases clearly showing that AHPRA was investigating a complaint during Court Proceedings are as follows:

*Pettit & Anor & Fairs & Anor* [2016] FCCA 2693 (20 October 2016) where Justice Bennett in para 206 stated "*It is the Father's evidence that he had made a formal complaint to the Australian Health Practitioner Regulation Agency ("AHPRA") about Dr N*" and where the practitioner received a request dated 27 July 2016 (AHPRA reference number 00328830) for documents in the practitioner's possession for them to respond to the complaint and where the complainant used portions of the report in the complaint. AHPRA concluded their investigations on 11 October 2016, 9 days before the Final Orders were made in the Federal Circuit Court of Australia.

*Cannon & Acres* [2014] FamCA 104 (6 March 2014) in para.s 468 to 480 and particularly para 470 where Justice Benjamin states that "*By letter dated 19 February 2014 the father was informed by AHPRA that they would investigate his complaint*", yet the proceedings were not concluded until March 2014.

In *Prantage & Prantage (No 2)* [2014] FamCA 563 (23 July 2014) in para. 44 where there is reference to the litigant father making several complaints about the Single Expert Witness during Court proceedings. Justice Bennett states "*Insofar as Dr NZ referred to complaints made by the father about her to her professional standards board. I directed that she produce a complete copy of those complaints to the Court by causing them to be delivered to the Subpoena Documents Clerk. I provided each party with an opportunity to inspect those documents and make such further submissions as they wish to make in writing by 10.00 am yesterday. No further submissions were received. I have regard to the father's admission that he has made several complaints about Dr NZ but I have not had regard to the documents produced by Dr NZ*". The practitioner advises that requests were made by AHPRA for the supply of the report and documents, and several investigations were undertaken during the Court proceedings. The complainant supplied Family Court documents including the Family Reports. Information obtained under FOI indicated that a Single Expert Witness report dated 30 May 2011 was used in the investigation undertaken in April 2012, that AHPRA had access to information obtained under subpoena for the Family Law

proceedings<sup>1</sup> and confidential information about other family members who did not provide consent for this to be used in the AHPRA investigations. Another notification in 2013 in the same matter refers to AHPRA having access to the report of the Single Expert Witness dated 10 May 2013. This Family Law matter did not conclude until July 2015.

In the matter of Cape and Cape [2013] FCWA 35 (11 April 2013) in para 18 it is indicated that the litigant made a complaint about the Single Expert Witness during Court proceedings. The practitioner reports that AHPRA not only asked for and received his report but conducted an investigation concurrently with the Family Law proceedings.

We also provide below the AHPRA complainant reference numbers (for easy identification by AHPRA but allows anonymity for the practitioner) for cases where practitioners have received letters informing them of a complaint, indicating that an investigation is commencing and requesting reports, files and notes **DURING** current Family Law Proceedings.

- 28 November 2013- AHPRA Reference number 00270403
- 4 June 2014 – AHPRA Reference number 00284493
- February 2013- AHPRA Reference Number 00249100
- November 2011 – AHPRA Reference number 00214767
- October 2010 – AHPRA Reference number 00185042 where the practitioner was not only a Single Expert Witness in the Family Law proceedings but also in the Supreme Court of Victoria and requests were made for their files and reports

We note further such cases as Thorpe & Thurston [2011] FamCA 73 (17 February 2011) where the father disputes a diagnosis of Narcissistic Personality Disorder and threatens to make complaints about the practitioners involved or Gleeson & Gleeson [2013] FCCA 1932 (4 October 2013) Para. 231 which clearly indicates that the mother had made complaints about each of the Single Expert report writers.

We again reiterate that allowing complaints to be addressed during Court proceedings and informing the practitioner of them introduces the potential for allegations by the complainant of apprehended bias against the practitioner, and compromises their role and the Court process bringing the potential for family members to undergo further assessments with other practitioners with all the associated financial and emotional costs of doing so.

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<sup>1</sup> In Psychology Board of Australia & Anor and Vicary & Ors [2013] FCWA 7 Justice Moncrieff of the Family Court of Western Australia specifically ordered that subpoenaed material was not to be allowed to be part of any complaints process with AHPRA

Submitted on behalf of the Subcommittee for Complaints to professional bodies about Single Expert Witnesses and AFCC legal Issues Subcommittee

Contact:

Dr Jennifer Neoh, Secretary  
Association of Family and Conciliation Courts AFCC Australian Chapter  
123 Lower Plenty Rd, Rosanna, VIC 3084  
AusAFCC@gmail.com

CC: Mr Matthew Hardy, head of notifications AHPRA