Senate Community Affairs References Committee

Inquiry into the medical complaints process in Australia

Questions taken on notice
Public Hearing, 1 November 2016, Sydney

Question: **1**
Hansard page reference: **5**
Hansard extract:

Senator XENOPHON: Can you, on notice, advise how many complaints you received about an allegation of vexatiousness—that it was a bad faith complaint—and what the outcomes have been in respect of those?
Ms Gavel: Yes. Is that for the financial year 2015-16?
Senator XENOPHON: Well, in the last year—yes, 2015-16 and the year before, if you could do that.
Ms Gavel: Okay, I can do that.

Answer:

My office has received a small number of complaints from health practitioners that primarily raise concerns about the handling of vexatious notifications by the Australian Health Practitioner Regulation Agency (AHPRA) and the Medical Board of Australia (the Board). In summary, office records indicate that during 2014-2015, my office received 2 complaints of this nature, and in the following year (2015-2016), my office similarly received a total of 2 complaints. To date, I have received 2 complaints in 2016 -2017 that raise these concerns. To give some perspective to these figures, complaints of this nature represented around 3% of all complaints received in 2014-15, and approximately 1% of all complaints received in 2015-16.

In these cases, the complainants generally expressed the view that the notification made about them was vexatious and that AHPRA and the Board should not have entertained the notification, or that the notification was handled inappropriately.

The issues raised in the complaints to my office were comprehensively considered. After making inquiries or conducting investigations into these complaints, no areas of concern were identified in relation to the administrative actions of either AHPRA or the Board in dealing with these 'vexatious' notifications. In general, it was considered reasonable for AHPRA and the Board to deal with the 'vexatious' notifications in the manner they had, as the notifications raised concerns about the health practitioner's health, performance or conduct. In summary, the *Health Practitioner Regulation National Law 2009* (the National Law) requires AHPRA to refer a notification to the Board (s 148(1)) and to conduct a preliminary assessment of a notification (s 149(1). It is then open to the Board to decide to take no further action in relation to the notification if it reasonably believes the notification is vexatious pursuant to s 151(1)(a) of the National Law. It is, however, also open to the Board to decide to investigate the matter if it decides it is necessary or appropriate to do so (s 160(1)(a) of the National Law). I have not identified any concerns in the administrative actions of AHPRA or the Board in applying these provisions of the National Law in the context of complaints about vexatious notifications.

I note that my office has also recorded 3 contacts from health practitioners (1 in 2015-2016, and 2 in the current financial year) where the health practitioner primarily indicated that they believed vexatious notifications had been made about them and that they were being 'bullied' by AHPRA and the Board. These cases did not proceed to the complaint stage, as the health practitioners did not provide sufficient details or supporting documentation to my office.

Question: **2**
Hansard page reference: **10**
Hansard extract:

Senator XENOPHON: At page 15 of your submission you state that you are currently discussing with AHPRA the issuing of cautions. However, under the national law there is not opportunity to appeal a caution decision, and some health practitioners have questioned the fairness of that situation. What has been the outcome of those discussions with AHPRA? Are they continuing? Can you provide an update. What is your view, as Ombudsman, whether a caution can itself be appellable or challenged if a practitioner feels it is manifestly unfair?
Ms Gavel: The issue with a caution is that it is actually the least action that AHPRA can take. At the same time, I understand—I would have to check—that you can appeal to the Supreme Court about a caution.
Senator XENOPHON: You might want to take that on notice.
Ms Gavel: Yes.

Answer:

It is correct that a decision to caution a health practitioner is not an appellable decision under the National Law. It is my understanding, however, that the Supreme Court in each jurisdiction is able to conduct a judicial review of, or statutory appeal from, the conduct or decisions of lower courts, tribunal and other external persons or bodies. In general, it appears that this would involve a review of any question of law involved in making the decision and not a merits review.

A health practitioner who has been issued with a caution can therefore seek judicial review of the Board's decision in the Supreme Court, and I believe that this avenue for review has been pursued by a small number of health practitioners.

This is a complex issue that I have discussed with AHPRA in the past in order to ensure that there is clarity regarding possible avenues for appeal or review. Any continuing discussions with AHPRA will occur on a case-by-case basis, for example, where I identify an area of concern in relation to an administrative action associated with the decision to issue a caution to a health practitioner.

My office has received complaints concerning cautions issued by a National Board and many of these complaints raise questions about the fairness of being unable to appeal the decision. I note, however, that a caution is generally considered to be the minimum level of regulatory action that a National Board can take in relation to a health practitioner, which may explain why the legislation does not permit a health practitioner to appeal against such a decision. In addition, s 179 (1) of the National Law requires a National Board to give the health practitioner written notice of the proposal to caution them and invite the health practitioner to make a submission to the Board about the proposed caution.

I also consider that the National Law establishes my office as an important accountability mechanism for the National Scheme. I have substantial powers under the *Ombudsman Act 1976* (Cwlth) to investigate complaints about the administrative actions of AHPRA and the National Boards. In addition to this, the ability to seek judicial review in the Supreme Court has been confirmed. In light of this, I consider that there are available options for health practitioners to pursue if they have concerns about the actions of AHPRA and/or a National Board in relation to the decision to issue a caution.