

Chapter 1

Introduction

Genesis and focus of the inquiry

1.1 Between 2 February and 30 November 2016 the Senate Community Affairs References Committee (the committee) conducted an inquiry into the *Medical complaints process in Australia* (the previous inquiry).¹ That inquiry focussed on bullying in the health professions.

1.2 During the previous inquiry the committee received personal accounts from medical practitioners and complainants that raised systemic issues about the complaints process.

1.3 There was a perception among health practitioners that the complaints process permitted vexatious complaints and that there were deficiencies in the way investigations were handled.² Some patients and their family members were also dissatisfied with their experiences of the complaints process.³ Those accounts prompted the committee to recommend that a new inquiry be established to examine the complaints mechanism as it applied under the Health Practitioner Regulation National Law with the following terms of reference:

- the implementation of the current complaints system under the National Law, including the role of the Australian Health Practitioner Regulation Agency (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

1 The inquiry lapsed with the dissolution of the 44th Parliament and was readopted in the 45th Parliament. See Senate Standing References Committee on Community Affairs, *Medical complaints in Australia*, November 2016, p. 11, http://www.aph.gov.au/Parliamentary_Business/Committees/Senate/Community_Affairs/MedicalComplaints45 (accessed 24 January 2017).

2 Senate Standing References Committee on Community Affairs, *Medical complaints in Australia*, November 2016, pp. 23, 30.

3 Senate Standing References Committee on Community Affairs, *Medical complaints in Australia*, November 2016, p. 22.

- other improvements that could assist in a fairer, quicker and more effective medical complaints process.⁴

Overview of the scheme

1.4 In 2006 the Productivity Commission recommended that health professionals ought to be registered against uniform national standards to improve workforce mobility.⁵

1.5 The Council of Australian Governments (COAG) announced in March 2008 that the Intergovernmental Agreement for a National Registration and Accreditation Scheme for the Health Professions had been signed.⁶ The new scheme commenced operation on 1 July 2010 in all states and territories except Western Australia.⁷

1.6 The Australian Parliament does not have constitutional competence to regulate health practitioners. Therefore, the scheme was implemented by a suite of uniform state legislation that was initially introduced in Queensland as the *Health Practitioner Regulation National Law Act 2009* (Qld). The Health Practitioner Regulation National Law (the National Law) is schedule 1 to the legislation.⁸

1.7 The National Law transferred responsibilities for registration, accreditation and matters that relate to the health, performance or conduct of a practitioner from 80 state and territory boards to ten national boards—one that regulated each of the registered professions.⁹

1.8 The scheme now regulates 14 professions:

- Aboriginal and Torres Strait Islander health practice;
- Chinese medicine;
- chiropractic;
- dental;
- medical;

4 See recommendation 6, Senate Standing References Committee on Community Affairs, *Medical complaints in Australia*, November 2016, p. x.

5 Productivity Commission, *Australia's Health Workforce*, Research Report, January 2006, p. xl, <http://www.pc.gov.au/inquiries/completed/health-workforce/report/healthworkforce.pdf> (accessed 13 January 2017).

6 COAG, *Communiqué*, 26 March 2008, http://webarchive.nla.gov.au/gov/20150301030435/http://archive.coag.gov.au/coag_meeting_outcomes/2008-03-26/index.cfm (accessed 25 January 2017).

7 The scheme commenced in Western Australia on 18 October 2010. Senate Standing References Committee on Community Affairs, *Medical complaints in Australia*, November 2016, p. 6.

8 *Health Practitioner Regulation National Law Act 2009* (Qld), sch 1 (National Law), <https://www.legislation.qld.gov.au/LEGISLTN/CURRENT/H/HealthPracRNA09.pdf> (accessed 25 January 2017).

9 Senate Standing References Committee on Community Affairs, *Medical complaints in Australia*, November 2016, p. 8.

-
- medical radiation practice;
 - nursing and midwifery;
 - occupational therapy;
 - optometry;
 - osteopathy;
 - pharmacy;
 - physiotherapy;
 - podiatry; and
 - psychology.¹⁰

1.9 The national boards are responsible for regulating the registered professions and setting the standards practitioners must meet.¹¹

1.10 The national boards are supported by the Australian Health Practitioner Regulation Agency (AHPRA). AHPRA provides secretariat services, publishes registers of health practitioners, manages registrations, manages investigations, liaises with the health complaints entities and provides advice to the Australian Health Workforce Ministerial Council about the scheme.¹²

1.11 The national boards and AHPRA's mandate is to protect the public from practitioners whose conduct falls below the standards set by the national boards.¹³

2017 amendments to the National Law

1.12 During the committee's inquiry the Australian Health Ministers' Advisory Council (AHMAC) commenced consultation on the first of two tranches of legislation to amend the National Law.¹⁴ A representative of AHMAC, Ms Amity Durham, informed the committee at its public hearing on 17 March that the first tranche of legislation is scheduled to be introduced into the Queensland Parliament in May 2017 with passage expected by August 2017.¹⁵

10 National Law, s. 5 (definition of 'health profession').

11 AHPRA, *2015/16 Annual Report*, November 2016, p. 1, <http://www.ahpra.gov.au/annualreport/2016/downloads.html> (accessed 11 January 2017).

12 AHPRA, *2015/16 Annual Report*, November 2016, p. 1. For an explanation of health complaints entities see [1.18].

13 AHPRA, *2015/16 Annual Report*, November 2016, p. 1.

14 AHMAC, *Submission 75*, [p. 1].

15 Ms Amity Durham, Acting Deputy Secretary, Department of Health and Human Services, Victoria, representing the Australian Health Ministers' Advisory Council, *Committee Hansard*, 17 March 2017, p. 22.

1.13 A comprehensive summary of the proposed amendments is included in AHMAC's submission to the inquiry.¹⁶ For this inquiry, it will suffice to say that the draft Bill will:

- add paramedicine as a registered profession;¹⁷
- allow community members to be appointed as Chairpersons of national boards;¹⁸
- permit notifiers to be given greater information about the work of the board;¹⁹
- require national boards to set a period to review conditions imposed by the board;²⁰
- provide stronger practice prohibition powers for tribunals;²¹
- allow the national boards to request practice information from practitioners;²² and
- add additional grounds on which the national board may decide to take no further action.²³

Co-regulatory jurisdictions

1.14 New South Wales and Queensland do not participate in the part of the National Law that relates to complaints.²⁴ The Office of the Health Ombudsman (OHO) in Queensland and the relevant professional council in New South Wales manage health care complaints in their respective states.²⁵

1.15 These states are known as co-regulatory jurisdictions under the National Law.²⁶

1.16 Complaints received by AHPRA about practitioners in co-regulatory jurisdictions are referred to the relevant body (either the OHO or the relevant

16 *Submission 75—Attachment 1*, pp. 3–9.

17 *Submission 75—Attachment 1*, p. 13.

18 *Submission 75—Attachment 1*, p. 14.

19 *Submission 75—Attachment 1*, p. 25.

20 *Submission 75—Attachment 1*, p. 18.

21 *Submission 75—Attachment 1*, p. 30.

22 *Submission 75—Attachment 1*, p. 21.

23 *Submission 75—Attachment 1*, p. 23.

24 *National Health Practitioner Regulation National Law Act 2009* (Qld), s. 7A; *National Practitioner Regulation (Adoption of National Law) Act 2009* (NSW), s. 6.

25 See *National Health Practitioner Regulation National Law Act 2009* (Qld), s. 7B; *National Practitioner Regulation (Adoption of National Law) Act 2009* (NSW), ss. 6B, sch. 1, s. 41B.

26 National Law, s. 5 (definition of 'co-regulatory jurisdiction').

professional council).²⁷ Under Queensland legislation, the Health Ombudsman can then refer matters back to AHPRA and the relevant national board unless the matter is 'serious'.²⁸

Overview of the complaints process

1.17 Any one may make a complaint about a registered health practitioner.²⁹

1.18 Complaints about registered health practitioners—known as notifications under the National Law—can be made to AHPRA or to the health ombudsman in the relevant state or territory. These health ombudsmen are referred to in the National Law as health complaints entities.³⁰

1.19 Complaints received by AHPRA are assessed to ensure that they relate to a registered practitioner.³¹ Notifications are then referred to the national board.

1.20 The relevant national board and health complaints entity must work together to determine how any notification/complaint about a registered health practitioner will be managed.³² If there is a disagreement between them, the most serious action proposed must be taken.³³

1.21 The complaints process is not linear. As can be seen in Diagram 1.1, the options available to the national board should be conceived of as actions that the board may decide to use at any stage in the process.

1.22 The possible actions are:

- take no further action;³⁴
- take 'immediate action';³⁵
- investigate;³⁶
- request a health or performance assessment;³⁷
- take action by:
 - issuing a caution;

27 National Law, s. 148(2).

28 Mr Leon Atkinson-MacEwen, Health Ombudsman, Office of the Health Ombudsman, Queensland, *Committee Hansard*, 31 March 2017, p. 2.

29 National Law, s. 145.

30 National Law, s. 5 (definition of 'health complaints entity').

31 National Law, s. 148(1).

32 National Law, s. 150.

33 National Law, s. 150(4).

34 National Law, s. 151.

35 National Law, pt 8 div 7.

36 National Law, pt 8 div 8.

37 National Law, pt 8 div 9.

- accepting an undertaking;
- imposing conditions;³⁸
- appoint a panel;³⁹
- refer to a tribunal;⁴⁰ or
- refer to another entity.

Diagram 1.1—The complaints process administered by AHPRA

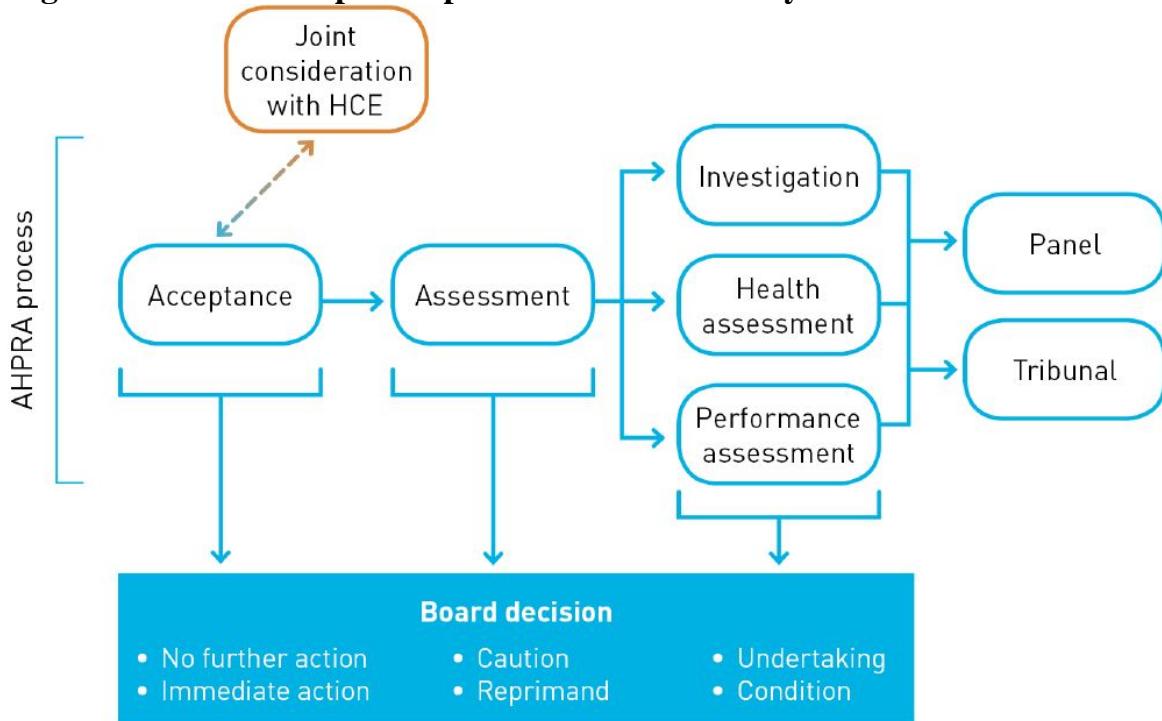


Diagram taken from AHPRA and MBA, *Submission 119*, p. 5.

1.23 Most final decisions are capable of being appealed to the responsible tribunal in the relevant state or territory.⁴¹

Previous reviews

1.24 Since AHPRA's establishment in 2009, a variety of entities have conducted reviews into aspects of AHPRA's administration. The reviews have been met with varying degrees of responsiveness.

38 National Law, pt 8 div 10.

39 National Law, pt 8 div 11.

40 National Law, pt 8 div 12.

41 A list of appealable decisions can be found in National Law, s. 199.

Senate committees

1.25 The Senate Standing Legislation Committee on Community Affairs has considered legislation relating to the National Law on two occasions and the Senate Standing References Committee on Finance and Public Administration examined AHPRA's administration of the National Law in 2011.⁴²

1.26 Most relevantly, in each inquiry submitters raised concerns about the mandatory notification process and the chilling effect it may have on practitioners seeking assistance to manage their own health. In response, the Senate Finance and Public Administration Committee recommended that the effect of mandatory notifications be reviewed.⁴³

Independent review

1.27 AHMAC also commissioned an independent review of the scheme by Mr Kim Snowball, an experienced former public servant.⁴⁴ The Snowball Review made 33 recommendations to improve the National Registration and Accreditation Scheme for the Health Professions.⁴⁵ Four recommendations are relevant to this inquiry: recommendations 9, 10, 28 and 29.

1.28 Recommendation 9 outlined measures that AHPRA should implement to improve the complaints handling system, such as:

- interviewing complainants to ascertain their expectations;
- establishing benchmark timeframes for the completion of key aspects of the process;
- conveying the rationale for deliberations and progress reports to notifiers;

42 Senate Standing Legislation Committee on Community Affairs, *National registration and accreditation scheme for doctors and other health workers*, August 2009, http://www.aph.gov.au/Parliamentary_Business/Committees/Senate/Community_Affairs/Completed_inquiries/2008-10/registration_accreditation_scheme/report/index (accessed 22 December 2016); Senate Standing Legislation Committee on Community Affairs, *Health Practitioner Regulation (Consequential Amendments) Bill 2010 [Provisions]*, 12 May 2010, http://www.aph.gov.au/Parliamentary_Business/Committees/Senate/Community_Affairs/Completed_inquiries/2008-10/health_practitioner_reg/index (accessed 13 January 2017); Senate Standing References Committee on Finance and Public Administration, *The administration of health practitioner registration by the Australian Health Practitioner Regulation Agency (AHPRA)*, 3 June 2011, http://www.aph.gov.au/Parliamentary_Business/Committees/Senate/Finance_and_Public_Administration/Completed_inquiries/2010-13/healthpractitionerregistration/report/index (accessed 13 January 2017).

43 Senate Standing References Committee on Finance and Public Administration, *The administration of health practitioner registration by the Australian Health Practitioner Regulation Agency (AHPRA)*, 3 June 2011, p. 115.

44 Kim Snowball, *Independent review of the national registration and accreditation scheme for health professions*, December 2014, p. 1.

45 Kim Snowball, *Independent review of the national registration and accreditation scheme for health professions*, December 2014, pp. 5–9.

- reviewing correspondence standards to ensure improved sensitivity and clarity in communication.⁴⁶

1.29 Recommendation 10 recommended the national adoption of the Western Australian approach to mandatory notifications.⁴⁷ The Western Australian approach provides an exception from mandatory reporting if the practitioner is providing treatment to the practitioner they would otherwise have to report.⁴⁸ Recommendations 28 and 29 recommended better training for AHPRA investigators and stronger practice prohibition powers for tribunals, respectively.⁴⁹

Responses

1.30 The previous inquiries recommended that decisive actions be taken to improve the existing complaints system. To date, only the following actions have been taken in relation to the previous inquiries.

Senate inquiries

1.31 The Australian Government noted the Finance and Public Administration Committee's recommendation to seek the support of the ministerial council to review the mandatory notification requirement.⁵⁰

Independent review

1.32 The Australian Health Workforce Ministerial Council released the Snowball Review and its response in August 2015.⁵¹ The council accepted recommendations 9 and 28, accepted recommendation 29 in principle pending further advice and did not accept recommendation 10.⁵²

46 Kim Snowball, *Independent review of the national registration and accreditation scheme for health professions*, December 2014, p. 6.

47 Kim Snowball, *Independent review of the national registration and accreditation scheme for health professions*, December 2014, p. 6.

48 *Health Practitioner Regulation National Law (WA) Act 2010*, s. 4(7).

49 Kim Snowball, *Independent review of the national registration and accreditation scheme for health professions*, December 2014, p. 8.

50 Australian Government, *Response to the Senate Finance and Public Administration References Committee's Inquiry into the administration of health practitioner registration by the Australian Health Practitioner Regulation Agency*, 7 February 2012, p. 7, http://www.aph.gov.au/Parliamentary_Business/Committees/Senate/Finance_and_Public_Administration/Completed_inquiries/2010-13/healthpractitionerregistration/index (accessed 7 April 2017).

51 COAG Health Council, *Communique – The independent review of the National Registration and Accreditation Scheme for health professionals*, 7 August 2015, <http://www.coaghealthcouncil.gov.au/Portals/0/The%20Independent%20Review%20of%20the%20National%20Registration%20and%20Accreditation%20Scheme%20for%20Health%20Professions.pdf> (accessed 17 January 2017).

52 COAG Health Council, *Commrique – The independent review of the National Registration and Accreditation Scheme for health professionals*, 7 August 2015, pp. 4–14.

1.33 The 2017 amendments to the National Law will permit notifiers to be provided with information about the rationale behind board decisions in accordance with recommendation 9(d) and provide for stronger practice prohibition powers for tribunals.⁵³

AHPRA

1.34 In response to questions on notice to the previous inquiry, AHPRA informed the committee that it had made progress on the Snowball Review recommendations including:

- revising its three-day investigator training program;⁵⁴
- convening a working group with the health complaints entities to identify areas of change, as recommended by the Snowball Review;⁵⁵ and
- commencing work to implement all parts of recommendation 9 that are controlled by AHPRA.⁵⁶

Conduct of the inquiry

1.35 The Senate referred the complaints mechanism under the Health Practitioner Regulation National Law to the Community Affairs References Committee on 1 December 2016, with a reporting date of 10 May 2017.⁵⁷

Handling of submissions

1.36 The inquiry was advertised on the committee's website and the committee wrote to stakeholders and participants in the previous inquiry.

1.37 On 1 February 2017, the committee clarified the phrase 'medical complaints' in the committee's terms of reference. A statement posted on the inquiry website advised:

The committee intends to adopt a broad interpretation of the phrase 'medical complaints' in terms of reference b., c. and f. to include all registered health practitioners. The committee welcomes all submissions

53 AHMAC, *Submission 75—Attachment 1*, pp. 25, 30.

54 Mr Fletcher, Dr Flynn and Dr Mulcahy, AHPRA, answer to questions on notice, 1 November 2016, [pp. 4–5, 17–18] (received 16 November 2016) http://www.aph.gov.au/Parliamentary_Business/Committees/Senate/Community_Affairs/MedicalComplaints45/Additional_Documents (accessed 24 April 2017).

55 Mr Fletcher, Dr Flynn and Dr Mulcahy, AHPRA, answer to questions on notice, 1 November 2016, [p. 6] (received 16 November 2016).

56 Mr Fletcher, Dr Flynn and Dr Mulcahy, AHPRA, answer to questions on notice, 1 November 2016, [pp. 6–11] (received 16 November 2016).

57 *Journals of the Senate*, No. 23, 1 December 2016, p. 755.

that specifically address the complaints mechanism under the National Law.⁵⁸

1.38 The committee invited submissions to be lodged by Friday 24 February 2017.

1.39 The committee received 139 submissions from individuals and organisations. A list of submissions is available at Appendix 1.

1.40 To assist the committee to understand the existing process, representatives of AHPRA and Ms Karen Toohey, Australian Capital Territory Health Services Commissioner, provided the committee with a private briefing on 16 February 2017.

1.41 The committee held two public hearings in Canberra on 17 March 2017 and 31 March 2017. Transcripts of those hearings are available on the committee's website and a list of witnesses is available at Appendix 2.

Note on references

1.42 In this report, references to *Committee Hansard* are to proof transcripts. Page numbers may vary between proof and official transcripts.

Structure of this report

1.43 Following this introductory chapter, this report consists of four further chapters. The next chapter considers the lodgement and assessment of complaints. The third chapter examines the way AHPRA investigates complaints and the way decisions are made by the national boards. The fourth chapter considers AHPRA's administration of the complaints mechanism and the final chapter contains the committee's conclusions and recommendations.

58 Available on the inquiry webpage, http://www.aph.gov.au/Parliamentary_Business/Committees/Senate/Community_Affairs/ComplaintsMechanism (accessed 7 April 2017).