Chapter 4

AHPRA's administration of the complaints mechanism

4.1 This chapter examines the Australian Health Practitioner Regulation Agency's (AHPRA) role in administering the complaints mechanism. The main concerns that have been raised with the committee are:

- the knowledge and administration of national board guidelines and policies;
- timeliness of the process;
- issues around information sharing; and
- appeals.

National board guidelines and policies

4.2 Submitters have raised concerns that AHPRA's staff is not aware of key guidelines and policies that relate to notifications and the assessment process, including guidelines issued by specific national boards.

Single Expert Witnesses

4.3 One important example that was brought to the committee's attention relates to expert psychologists and psychiatrists that practice in family law proceedings.

4.4 In family law proceedings, it is often necessary to have an independent expert psychologist or psychiatrist, who is employed by the court, to assess individuals or families and report back to the court.[1] However, the committee received evidence that some family law litigants have attempted to use the National Law process to discredit practitioners if their report is unfavourable.[2]

4.5 The Association of Family and Conciliation Courts (AFCC) has emphasised that the court requirements of psychiatrists and psychologists contributing to family law proceedings are incompatible with the complaints process under the National Law.[3]

4.6 Dr Jennifer Neoh, Secretary of the Australian chapter of the AFCC, provided evidence to the committee on 17 March 2017 that family law practitioners are subject to the 'strict legal parameters and guidelines' in which they practice. Dr Neoh explained:

- AHPRA has requested that family law practitioners present confidential court documents for use in the complaints process; and

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1 Dr Jennifer Neoh, Secretary, Australian Chapter, Association of Family and Conciliation Courts (AFCC), *Committee Hansard,* 17 March 2017, p. 24.

2 AFCC, *Submission 38*, p. 8; Institute of Clinical Psychologists, *Submission 23*, pp. 4–5.

3 AFCC, *Submission 38*, pp. 3–4.

- AHPRA has initiated investigations against family law practitioners during, or prior to, a practitioners' engagement with a pertinent legal proceeding.[4]

4.7 As providing court documents that identify witnesses is contrary to the *Family Law Act 1975* (Cth), asking practitioners to provide documents in relation to a complaint presents 'professional, legal and ethical' dilemmas to family law practitioners.[5]

4.8 The AFCC noted that AHPRA's requests for confidential court documents are inconsistent with findings of the High Court of Australia which affirm that court documents cannot be used outside of the legal proceedings for which the document was produced without leave of the court.[6]

4.9 Similarly, Mr Vincent Papaleo, Convenor of the Family Law Interest Group, suggests that the involvement of regulatory bodies, such as AHPRA, in investigating notifications related to family law proceedings can compromise the involvement of psychologists in the proceedings.[7]

4.10 To resolve this issue, in 2012 the Psychology Board of Australia published a policy that provided 'AHPRA investigations would not be carried out prior to the conclusion of the proceedings without leave of the court'.[8]

4.11 However, the AFCC submitted that the policy is of 'little practical utility' and that practitioners are still 'routinely' asked to supply court documents.[9] In some cases, the practitioners have handed over documents to AHPRA because they felt pressured to do so.[10]

4.12 This is contested by AHPRA. Mr Matthew Hardy, National Director, Notifications, told the committee that both AHPRA and the Psychology Board of Australia understand that a complaint cannot be pursued against a practitioner without leave of the court and that he was not aware of any case where AHPRA, or the board, had done anything other than follow the policy.[11]

4.13 Mr Hardy said that in cases where practitioners have handed over the documents, the documents have been locked down to ensure there was no detriment to the Family Court process.[12]

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4 *Committee Hansard,* 17 March 2017, pp. 24–25.

5 Dr Neoh, *Committee Hansard,* 17 March 2017, p. 24.

6 Dr Neoh, *Committee Hansard,* 17 March 2017, pp. 24–25.

7 *Submission 116,* p. 3.

8 Dr Neoh, *Committee Hansard,* 17 March 2017, p. 25.

9 AFCC, *Submission* 38, pp. 3–4.

10 Dr Neoh, *Committee Hansard,* 17 March 2017, p. 27.

11 Mr Hardy, *Committee Hansard,* 31 March 2017, p. 24.

12 Mr Hardy, *Committee Hansard,* 31 March 2017, p. 25.

4.14 On notice, AHPRA informed the committee that of the 15 single expert witness complaints that the national board have decided to investigate:

- in eight cases AHPRA was provided a copy of the report prepared for the court;
- in six cases the report was provided by the notifier;
  - two were returned to the notifier without a copy being retained by AHPRA;
  - four reports are retained on AHPRA's database with restrictions on use; and
- in two cases the Family Court granted leave for the board to use the report.[13]

Chiropractor advertising guidelines

4.15 Chiropractors that submitted to the inquiry were very critical of AHPRA's guidelines on advertising and its staff's knowledge of them.

4.16 The Chiropractors' Association of Australia (CAA) submission notes that a high proportion of notifications made about chiropractors to the Chiropractic Board of Australia are related to advertising concerns.[14]

4.17 Confidential submitters to the inquiry expressed apprehension that:

- actions of AHPRA were at times inconsistent with the National Law;
- the guidelines issues by the national boards were unclear; and
- AHPRA employees were not cognisant of critical aspects of the national board's guidelines.

4.18 The CAA suggests that AHPRA and the national boards have a more active role to play in educating practitioners on advertising regulations under the National Law, prior to an assessment being initiated.[15]

Committee view

4.19 The committee is concerned by reports that psychologists and psychiatrists that practice as single expert witnesses in courts are being asked to provide court documents for the purposes of the complaints process.

4.20 However, the committee acknowledges that the National Law imposes obligations on AHPRA and the committee supports all efforts to ensure that Family Court proceedings are not jeopardised by the complaints mechanism. Having said that,

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13 AHPRA and MBA, answers to questions on notice, 31 March 2017 (received 24 April 20174) pp. 1–2.

14 CAA, *Submission 125*, pp. 7–8.

15 CAA, *Submission 125*, pp. 7–8.

there may be a need to review relevant aspects of the National Law to clarify this matter.

4.21 While the committee recognises that AHPRA employees cannot be expected to be expert in all aspects of the National Law and AHPRA's guidelines, evidence provided to the committee suggests that deficiencies in corporate knowledge or training may exist.

Timeliness

4.22 Since AHPRA commenced operation in 2009, the timeliness of the complaints process has regularly been commented on in reviews of AHPRA's work.[16]

4.23 The case of Dr Gary Fettke demonstrates the significant timelines that can occur within the complaints process. Dr Fettke provided evidence at the committee's 1 November 2016 hearing. Details about AHPRA's handling of Dr Fettke's case came to light during the committee's investigation into whether AHPRA had breached parliamentary privilege following Dr Fettke's appearance before the committee.[17] Dialogue Box 4.1 explains AHPRA's handling of Dr Fettke's case.

4.24 In Dr Fettke's case, the process—from notification to finalisation—took two years and five months to complete. In confidential submissions, others have also detailed processes taking up to four years.

4.25 Dr Fettke was investigated for almost two years before the investigation report was submitted to the board. Once the board proposed cautioning Dr Fettke, the notice of proposed decision was not provided to Dr Fettke for another four weeks.

4.26 The practitioner was afforded eight weeks to prepare to provide oral submissions to the board. The board then decided to caution the practitioner.

4.27 Under section 180 of the National Law the practitioner must be provided with notice of a decision 'as soon as practicable' after the decision has been made. Dr Fettke was provided with the notice more than three weeks later.

4.28 The committee received evidence of similar administrative practices, which suggests that Dr Fettke's experience was not an isolated occurrence.

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16 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. 92, http://www.aph.gov.au/Parliamentary_Business/Committees/Senate/Finance_and_Public_Administration/Completed_inquiries/2010-13/healthpractitionerregistration/report/index (accessed 19 April 2017); Senate Community Affairs References Committee, *Medical complaints in Australia*, pp. 24–26; Legislative Council Legal and Social Issues Legislation Committee, Parliament of Victoria, *Inquiry into the performance of the Australian Health Practitioner Regulation Agency*, Report No 2, March 2014, p. 90, http://www.parliament.vic.gov.au/images/stories/committees/SCLSI/Leg_ctee/AHPRA/Final_version_AHPRA_report_30314.pdf (accessed 19 April 2017).

17 For details about the parliamentary privilege matter see Chapter 6.

4.29 Mr Ian and Mrs Rhonda McNees read to the committee a list of findings by the Victorian Government Solicitor's Office. Those findings included that in their cases:

> AHPRA failed to investigate and assess Notifications, or to forward the Board decisions in a timely manner, and in some instances closed matters without providing any communication.[18]

4.30 In cases where a national board has decided to refer a matter to the relevant tribunal, Avant submitted that 12–15 months have elapsed in some cases between the board making the decision and the initiating documents being filed with the tribunal.[19]

4.31 Associations representing medical practitioners also noted that the timeframes in which AHPRA completed investigations were often protracted.[20]

4.32 These reports stand in contrast to the timeframes reported by AHPRA.

4.33 As noted in chapter 2, AHPRA reported that in the 2015–2016 financial year:

> 64% of notifications about doctors were closed following assessment. When no regulatory action was taken, the median time to complete a matter was around two months. If regulatory action was taken, the median time was around three and half months…[21]

4.34 Where a matter required investigation or a health or performance assessment during the 2015–2016 financial year, AHPRA submitted:

> If no regulatory action was taken the median time to complete a matter was just over nine months. If regulatory action was taken, the median time was just over ten months...[22]

4.35 In evidence to the committee on 31 March 2017, Mr Martin Fletcher, Chief Executive Officer, AHPRA, reiterated:

> We are doing a lot to of work to shorten our time frames. This includes: work with the health complaints entities…to make sure a complaint goes to the right place quickly; boosting resources in pressure points in our system; establishing an online complaints portal to give us better information up-front and take action more quickly; trialling innovative ways of working…and inviting practitioners and complainants to provide feedback on their experience of the complaints process via survey.[23]

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18 Mrs Rhonda McNees, *Committee Hansard*, 31 March 2017, pp. 10–11.

19 Avant, *Submission 50*, p. 11.

20 RACGP, *Submission 41*, [p. 4]; Australian Medical Assocation, *Submission 117*, p. 3.

21 AHPRA and MBA, *Submission 119*, p. 9.

22 AHPRA and MBA, *Submission 119*, p. 9.

23 Mr Fletcher, *Committee Hansard*, 31 March 2017, pp. 22–23.

Dialogue Box 4.1 — Case study: Dr Gary Fettke

Dr Gary Fettke is an orthopaedic surgeon in Tasmania. A notification was made to the Tasmanian Board of the Medical Board of Australia (TBMBA) concerning Dr Fettke's provision of particular dietary advice. The notifiers suggested that providing dietary advice was not within Dr Fettke's scope of practice.

The notification was made to the TBMBA in 2014.

Section 149 of the National Law requires that the national board must, within 60 days of receipt of the notification, conduct a preliminary assessment of the notification.

In Dr Fettke's case:

- The initial assessment determined that the notification required investigation. The decision to investigate was taken 49 days after the board received the notification.
- The investigation report was considered by the TBMBA after 1 year, 11 months and 14 days. The TBMBA proposed to caution the practitioner.
- The notice of proposed decision was provided to Dr Fettke 27 days after the board had made its decision.
- Dr Fettke made submissions to the board in accordance with section 179 8 weeks later. Having heard Dr Fettke's submission, the board made the decision to caution Dr Fettke in accordance with section 179(2).

Under section 180 of the National Law the practitioner must be provided with notice of a decision made under section 179(2) 'as soon as practicable' after the decision has been made. In Dr Fettke's case:

- The notice was provided 25 days later; and
- AHPRA issued a media release 15 days after the notice was provided.

Parity of timeframes

4.36 Another aspect of timeliness that was raised by practitioners was the inequitable parity between the lengths of time a matter was being managed by AHPRA or the national board and the amount of time practitioners were given to respond to requests made of them by the national board.[24]

4.37 Medical Insurance Group Australia (MIGA) observed in their submission that at each stage of the process AHPRA or the national board has significantly longer to consider the matter than the practitioner does to respond.[25] For example:

24 MIGA, *Submission 30*, p. 4; Ms Jennifer Smith, *Submission 57*, p. 3; Dr Simon Rosenbaum, *Submission 104*, p. 3.

25 *Submission 30*, p. 4.

- for an initial complaint, the responsible body has at least 60 days to assess it, the practitioner is usually only afforded 7–21 days to respond;
- at investigation stage, the investigation can take one or two years, the practitioner is usually only afforded 14–28 days to respond; and
- if the matter progresses to the tribunal, the prosecutorial body has often had a year or more to prepare for the hearing, while the practitioner is usually only afforded 4–6 weeks to prepare for the hearing.[26]

4.38 Some practitioners consider this inequity to be unfair to the practitioners involved and places them at a disadvantage.[27]

Committee view

4.39 The committee considers that efforts to improve the timeliness of the complaints mechanism must continue.

4.40 The committee acknowledges that AHPRA has tried to improve its timeframes and it commends AHPRA for the steps it has already taken. The committee also acknowledges that the cases shared with the committee may not be indicative of average current timeframes. However, the evidence the committee received indicates that significant work is required to expedite the timeframe for practitioners and notifiers, particularly in circulating and administering decisions once they have been taken by the board.

4.41 The committee acknowledges that a substantial lack of parity in timeframes has the potential to put practitioners at a disadvantage in preparing their responses to the board. The committee encourages the national boards to set reasonable timeframes that balance the practitioner's right to be heard against the need for expediency.

4.42 The committee emphasises that timeliness continues to be an issue, despite AHPRA's ongoing efforts.

Information sharing

4.43 Some submitters expressed concerns about whether important information collected by AHPRA in the course of investigations was communicated to other authorities.

4.44 A confidential submitter expressed serious concerns that allegations regarding sexual boundary violations were not being shared with police. Other submitters confidentially reported that, in their cases, they believe that AHPRA failed to share relevant information with either a college or the police in circumstances that they considered warranted further action.

4.45 These suggestions recognise that AHPRA often collects a considerable quantity of data about the practitioners they investigate. Some submitters have

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26 *Submission 30*, p. 4.

27 Ms Jennifer Smith, *Submission 57*, p. 3; Ms Marianna Masiorski, *Submission 74*, [p. 3]; Dr Simon Rosenbaum, *Submission 104*, p. 3.

considered that the information AHPRA collects could be harnessed to improve practitioner standards.

4.46 AHPRA is one of the only health agencies with a national remit. As Dr Marie Bismark told the committee, this provides potential advantages to Australia to assess the safety and quality of health care:

> …one of the greatest advantages of the establishment of AHPRA is that Australia now has a national system for collecting data both about practitioners who are registered in Australia and also about concerns about the health and conduct and performance of those practitioners. That really opens up unprecedented opportunities to understand the types of concerns that are being brought forward to regulators and to assess the way in which agencies respond to those concerns.[28]

4.47 The Australian Medical Association also suggested that practitioners have the capacity to learn from data that led to no further action.[29] For example, even if no further regulatory action was required, a pattern of notifications may reveal that a certain category of patients may require a different communication strategy.[30]

Committee view

4.48 The committee recognises that data is a valuable resource. The committee encourages AHPRA to explore ways that the data can be used to improve health practice and share knowledge among practitioners, provided it respects the privacy of the patient and the practitioner involved.

Appeals

4.49 In its previous inquiry the committee suggested that further consideration ought to be given to allowing an administrative review of cautions.[31]

4.50 Some submitters to this inquiry again suggested that further amendments ought to be made to the appeals process.[32]

4.51 Avant suggested that practitioners should be able to review immediate action decisions without the need to lodge an appeal in a relevant tribunal and that cautions should be appealable.[33]

4.52 Notifiers also pressed for a more equal appeals mechanism. Under the current arrangements, a practitioner can appeal most decisions to the relevant tribunal, but notifiers can only apply to the Health Practitioner Ombudsman and Privacy

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28 Dr Marie Bismark, Associate Professor, University of Melbourne, *Committee Hansard*, 17 March 2017, p. 7.

29 Australian Medical Association, *Submission 117*, p. 3.

30 *Submission 117*, p. 3.

31 Avant, *Submission 50*, p. 2; Dr Gary Fettke, *Submission 54*, p. 2; Name withheld, *Submission 84*, p. 8.

32 Avant, *Submission 50*, p. 2; Dr Gary Fettke, *Submission 54*, p. 2.

33 Avant, *Submission 50*, p. 5.

Commissioner.[34] Providing both parties with access to the tribunal would create greater equality between the parties.

4.53 However, the tribunal, whilst it is a lower cost jurisdiction than the Supreme Court, remains a costly exercise for many people.[35]

Committee view

4.54 The committee notes that appeals processes are an important mechanism for review to ensure that the correct decision has been made. Whilst the committee recognises that certainty and timeliness are important factors for all parties, the committee sees considerable benefit in ensuring that parties have the ability to seek review of decisions of the boards.

34 Mr Ian McNees, *Committee Hansard*, 31 March 2017, p. 12.

35 Name withheld, *Submission 84*, p. 8.