AMA QUEENSLAND

Office of the Health Ombudsman

AMA Queensland's Vision for an Effective Medical Regulator

Queensland requires an effective health service complaints regulator. Ensuring a fair and fast response to the handling of medical complaints should be one of the highest principles of such a body. A well resourced and appropriately governed regulator would help ensure the public is protected from both individual and broader systematic problems, and would help to maintain high professional standards among the medical profession. By ensuring a fair and fast response to the handling of medical complaints it would retain the trust and confidence of both the profession and the public.

The Office of the Health Ombudsman (OHO) was established by the Queensland Government in 2013 to strengthen the health complaints management system. It replaced the Health Quality and Complaints Commission (HQCC), an organisation that had been criticised for fundamental deficiencies in the way it handled complaints, as well as unjustified delays in dealing with complaints against medical practitioners.

The OHO has, in our view, succumbed to the same inefficiencies and poor complaints management processes that drove the Government to replace the HQCC.

AMA Queensland seeks to highlight the following problems within the OHO and possible areas for reform, namely:

1. The Absence of Medical Practitioner Leadership and Guidance

AMA Queensland considers that clinical guidance and oversight is absolutely essential. We have concerns that there are no legislated requirements for medical leadership and advice in the notifications process. It is possible, in theory, for a serious matter to be resolved without any appropriate clinical input whatsoever.

2. Structural Conflicts That Inhibit Fairness and Impartiality

We have significant concerns over the structure of the OHO and its ability to truly act independently and fairly. We are concerned that the independence of the OHO is compromised because it ultimately reports to, and can be directed to investigate by, the Queensland Health Minister.

3. Suspension of Natural Justice and Procedural Fairness in Investigations

Our members have repeatedly indicated that they have had negative experiences with the conduct of the OHO in how it undertakes investigations. An effective medical regulatory system must maintain procedural fairness to both parties. Our members have found the approach of the OHO unnecessarily antagonistic.

4. Unreasonably Prolonged Complaints Resolution Time

Our members have consistently raised concern regarding the considerable delays in OHO decision-making, even where the matter is trivial or vexatious. Given the mandated time frames were a key feature of the Health Ombudsman Bill 2013 (Qld) they should be strictly followed and, if not, appropriate explanations must be given as to why not. This is aggravated by the 'bounce' phenomena wherein complaints are part handled by the OHO and AHPRA further adding to delays in resolution.

5. Health Ombudsman Weakening the National System

We have major concerns that OHO, as it currently operates, weakens the national regulatory system through the creation of differing standards and thresholds between itself and the Medical Board of Australia. This, in turn, reduces the consistency of decisions, the comparability of data, and the ability of both medical practitioners and patients to have confidence in the decisions of both bodies.

AMA Queensland believes the OHO has the potential to be an effective regulator. To this end, we have undertaken extensive consultation with members of the medical and legal communities to find solutions to the issues that are preventing the OHO from effectively acquitting its duty to the public, the practitioner, and the broader health system.

Further improvements are required to ensure that the current Queensland framework functions as effectively as possible. We offer these comments to emphasise where incremental reform can be made to improve the current arrangements for the benefit of Queensland patients and their healthcare providers.

The Background of Medical Regulation in Queensland

The Australian Health Practitioner Regulation Agency (AHPRA) operates in concert with the Medical Board of Australia as the national medical regulator due to the National Registration and Accreditation Scheme. Its primary objective is to protect certain titles and ensure that individuals who represent as such are appropriately qualified.[1] It takes action, where appropriate, to protect the public and maintain high professional standards among the medical profession.[2]

Queensland, like every other state and territory, has conducted numerous reviews and inquiries into real and perceived problems in the state's health sector.

The Davies Inquiry (2005), following the issues raised in Bundaberg, noted a culture in Queensland Health that was focused on economic rationalism rather than patient care and safety, an unhealthy culture for staff to complain and report incidents, a culture of concealment, and a culture of bullying.[3]

The Forster Review (2005) characterised Queensland's health complaints system as suffering from:

- Inconsistent approaches and lack of co-ordination;
- Difficulties in gaining local resolution
- Fear of service closures in rural communities inhibiting people from making complaints;
- Frustrations at delays in resolution;
- Ineffectual management and lack of staff confidence in managing complaints; and
- Absence of report mechanisms to Queensland Health

The Chesterman Report (2013) highlighted problems in the length of time to consider complaint matters, lack of clarity around the roles and responsibilities of AHPRA, the HQCC and the MBA, and inadequate communication and explanation of decisions to the public and health practitioners. The Chesterman report, in particular, recommended that a panel review should be undertaken to determine whether the Queensland Branch of the Medical Board of Australia had made timely and appropriately responses to the complaints and recommendations; and whether it was achieving the objectives of the Health Practitioners (Professional Standards) Act 1999 to protect the public, uphold standards of medical practice and maintain public confidence in the medical profession.

Flowing on from the Chesterman Report recommendation a review panel, chaired by Dr Kim Forrester,[4] examined the files of the MBQ/QBMBA and AHPRA where:

- the Medical Board of Queensland had started but not completed dealing with a complaint or notification against a medical practitioner prior to 1 July 2010 and the matter had been transferred to QBMBA under the Health Practitioner Regulation national Law Act 2009; or
- where the QBMBA had dealt with the matter or where AHPRA had recommended disciplinary action against a medical practitioner on or after 1 July 2010

The panel consequently examined 596 files determined as being within scope. Of these files 233 were considered to have been dealt with in a timely and appropriate manner.[5] The major issues with the 363 files that the panel considered as not having been dealt with in a manner that was timely and/or appropriate and/or in compliance with the legislative objectives were:

1. delays in the timeliness of complaints/notifications progressing from receipt through the various assessment and disciplinary processes to a final decision by the Board
2. a lack of consistency and predictability of outcomes in the decisions of the Board across complaints/notifications of a similar nature;
3. considerable delays and inconsistencies in a significant number of files resulting from the cross-jurisdictional referral, consultation and information sharing obligations imposed under the current legislative scheme

The review panel did note that there were progressive improvements in the length of time from the receipt of a notification. However, they did not consider that these processes did not meet reasonable expectations that notifications were consistently and predictably dealt with in a timely manner.[6] The review panel suggested the following changes to the processes utilised by AHPRA and the Medical Board:[7]

- The appointment of one or more experienced and senior investigators to 'triage' on notifications, fast tracking investigations and Board decisions in matters which raise immediate concern about the safety of the public based on the nature of the notification, the source and detail of the notification and the nature of prior notifications concerning the practitioner
- Establish a more effective case management system whereby:
  - Timelines for assessment, investigations and decisions are established;
  - Overview systems are put in place so deviations from timelines are identified and managed to ensure that the timeline is met or, when necessary modified to take into account unpredicted developments
  - Any such modifications to the established timeline should be subject to being over-ruled by the Board;
- Simplifying the process whereby the multiple internal referrals of decisions between committees and the Board are streamlined and endorsed by the Board
- To ensure and improve consistency of decisions, a formal process should be put in place whereby prior decisions of the Board and/or QCAT, in relation to similar matters, are formally reviewed by the Board prior to a new decision being taken to ensure that subsequent matters are in range and consistent over time
- This review of decisions should include decisions taken for similar notifications and findings in relation to other regulated health professionals such as nurses, pharmacists and dentists

Consequently, and citing the findings of the Chesterman and Forester Reports, the Newman Government established the Office of the Health Ombudsman (OHO).[8]

The OHO now operates as the single point of contact for all health complaints in Queensland. OHO may then make a decision on whether

to accept, assess, investigate the complaint and, if necessary, to instigate proceedings. The OHO may also, where appropriate, refer the complaint to another regulatory body such as AHPRA to be considered by the Queensland Board of the Medical Board of Australia.[9] Serious complaints, such as those involving professional misconduct, or that form potential grounds for suspension or cancellation of a practitioner's registration, are only meant to be dealt with by the Office of the Health Ombudsman.[10]

AMA Queensland raised concerns, in our submission to the Health Ombudsman Bill 2013 (Qld), that the new Health Ombudsman would:

- Drive a risk-management approach to patient care and clinical decision-making;
- Restrict clinical innovation, with practitioners continuing outmoded models of care to manage medicolegal risk/exposure;
- Increase unnecessary and costly follow-up treatment and care;
- Work against the concept of role delegation, with medical practitioners reluctant to handover the more routine procedures and treatments to more junior practitioners; and
- Lead to a migration of our highly-skilled workforce to other jurisdictions as a result of distrust in the health complaints system

Despite concerns raised by health profession representative bodies, of the negative impacts that the Health Ombudsman Bill 2013 (Qld) would have on health care in Queensland it was passed into law on 20 August 2013.[11] On 1 July 2014 the Office of the Health Ombudsman came into existence.

The OHO, through the Health Ombudsman Act 2013 (Qld), is empowered with an unparalleled jurisdiction to hear complaints relating to a 'health service'. This can include business, clinical and corporate support provided to a health practitioner.[12] In 2014-15 the OHO accepted 3109 complaints of which 40% related to professional performance, 14% related to communication, and 13% related to professional conduct, with the remainder being listed as relating to medications or other matters.[13] Nearly half of these complaints relate to public hospitals.[14]

Causes for Concern

AMA Queensland is concerned that the current system of medical complaints management and regulation is ineffective and not meeting the needs of the public and health practitioners

1. Absence of Medical Practitioner Leadership and Guidance

We believe leadership and guidance from medical practitioners is absolutely fundamental to an effective medical regulator. For complaints to be resolved fairly it is essential clinical advice is sought and received at every stage of the complaint, from initial contact, through to assessment and investigation. This is needed to determine what is appropriate medical treatment and conduct. AMA Queensland, in its original submission to the Health Ombudsman Bill 2013 (Qld), stressed the importance of strong medical leadership and advice.[15]

Section 29 of the *Health Ombudsman Act* 2013 (Qld) provides that:

> *To support the performance of the health ombudsman's functions, the health ombudsman may establish committees and panels of appropriately qualified persons to advise the health ombudsman about clinical matters or health consumer issues.*

The Health Ombudsman, Mr Atkinson-MacEwen, noted in his public meeting with the Health and Ambulance Services Committee that he has access to a range of expert clinical advice in his assessments and investigations.[16] While it is encouraging that the Health Ombudsman has access to, and utilises expert clinical advice, this is significantly different to the requirement to establish expert clinical advisory panels. This is in stark contrast to the Medical Board, which is, by its very nature, populated by members of the profession. This reliance on single opinions by the OHO lacks patency and has the potential to deny natural justice to the subject of the complaint. Criteria of practice currency and stature applied in choosing medical advisors lack a clear standard that can be reproducibly applied and understood.

AMA Queensland raised significant concerns, in our original submission to the Health Ombudsman Bill 2013 (Qld) that budgetary pressures would reduce clinical input into decisions of the Health Ombudsman. To obtain expert clinical advice can be a necessarily expensive process given the high level of skill and qualifications of these individuals. The fear expressed by AMA Queensland remains current, given the budgetary imperatives of all government bodies. AMA Queensland believes, both then and now, that the only way to ensure appropriate clinical input and benchmarking was to establish legislative requirements to do so.

These concerns were echoed by the then Shadow Minister for Health, the Honourable Jo-Ann Miller, in her response to the bill (emphasis added):[17]

> *"Further, under the New South Wales co-regulatory model the HCCC is* ***required to notify and consult with the relevant professional council before proceeding to investigate or conduct an inquiry into a health professional.*** *This requirement, absent in the Health Ombudsman Bill, promotes procedural fairness in decision making and assists in expeditious resolution of complaints. There is no obligation for the Health Ombudsman to consult with expert clinicians before taking a decision... honourable members should think about the fact that there is no obligation for the Health Ombudsman, whoever that person may be, to consult with expert clinicians before taking a decision"*

She also highlighted the ability for the minister to prescribe codes of conduct that would allow the minister, not practitioners, to determine appropriate clinical conduct:[18]

> *"The proposition that codes of conduct may be determined by regulation under the minister's direction rather than by the relevant professional bodies in clause 288 was of particular concern to a number of organisations providing submissions on this bill. As Queensland participates in a national registration system, standards are – and should be – set at a national level to avoid confusion for patients and practitioners as well as duplication of services. In addition, professional standards should be set by clinicians in consultation with the community, not by politicians, not by the minister and not by bureaucrats"*

These concerns are as relevant today as they were when they were raised by Ms Miller in 2013. AMA Queensland believes it is incumbent on the current Queensland Government to act on the concerns they expressed in Opposition now that they are in Government.

2. Structural Conflicts That Inhibit Fairness and Impartiality

The public, and the profession, expects a fair and unbiased medical regulator. Not only must justice be done; it must also be seen to be done.[19]

Under the *Health Ombudsman Act* 2013 (Qld) the Health Ombudsman is purportedly independent, impartial and required to act in the public interest in the discharge of all its functions.[20] Regardless, the Health Minister retains control over the hiring, suspension, and dismissal of the Health Ombudsman.[21] It was considered, in the original parliamentary report into the legislation, that the provision requiring the Ombudsman to be independent, impartial and acting in the public interest would provide a level of independence necessary for it to fulfil its responsibilities with the full confidence of relevant stakeholders.[22] It was also considered that the move to Hospital and Health Services provided the level of abstraction necessary for the Health Minister to be responsible for both the OHO and the broader public health sector.

This line of reasoning causes considerable tension with the prevailing convention of individual ministerial responsibility. The Health Minister is ultimately responsible for all the actions of the public health sector, including Queensland Health, the Hospital and Health Services, and OHO. It is difficult to reconcile the OHO pursuing frank and fearless investigations of systematic public health issues with their ultimate reporting responsibility being to the same minister who administers the system.

The independence of the Health Ombudsman was highlighted by the Honourable Jo-Ann Miller, who noted:

> *"... the minister can direct the Ombudsman to undertake investigations and hold inquiries into areas of their portfolio, the minister does not require legislation to exercise this power.... It is entirely inappropriate for such a ministerial power to be a feature in any health complaints-handling process"*

Ms Miller contrasted this to the position under the Health Care Complaints Act (NSW):

> *"In NSW under section 81 of the Health Care Complaints Act, the Health Care Complaints Commission is not subject to ministerial control and direction in respect of the following matters: firstly, the assessment of a complaint; secondly, the investigation of a complaint; thirdly, prosecution of disciplinary action against a person; fourthly, the terms of any recommendation of the commission; and, fifthly, the contents of a report of the commission including the annual report."*

While the parliamentary Health and Ambulance Services committee does have a list of designated functions, including the responsibility to conduct reviews of the Health Ombudsman they are not sufficient, in our opinion, to provide an appropriate check on the functions of the OHO.[23]

These concerns are exemplified by the provisions in the Health Ombudsman Act 2013 (Qld) that allow the Health Minister to request information, and reports, from the Health Ombudsman.[24] Given the broad drafting of the legislative provisions there are relatively few limits on the information that can be requested. These provisions allow the Minister to effectively reach into the day-to-day functioning of the OHO and request information on individual matters and complaints.

The worrying ability for the Health Minister to view information relating to investigations, and the resultant concerns, were summed up by the Honourable Jo-Ann Miller as:

> *"These provisions, as they are currently drafted, go well beyond the realms of an independent health complaints handling system and could have the effect of very personal information being viewed by the health minister, by the health minister's staff and for no particular purpose... This is a huge privacy issue and I think many people in Queensland will be very concerned about it. Certainly there will be many people who will not want the health minister seeing their particular records in relation to their health matters"*

Additionally, the position of Director of Proceedings, who decides whether or not to refer health service complaints and other matters to QCAT on the Health Ombudsman's behalf and to prosecute these matters, is a staff member of the OHO.[25] This provides a direct reporting link between the Minister and the individual legal practitioner whose responsibility it is to prosecute medical professionals. While there is a provision that indicates the director is not subject to direction in the performance of their duties, their employment relationship with the Health Ombudsman substantively undermines any protection provided by the section.[26]

This entirely contrasts to a system where an independent legal practitioner is able to examine a matter and provide an impartial opinion on prospects and on whether the prosecution should continue.

3. Suspension of Natural Justice and Procedural Fairness in Investigations

AMA Queensland members have raised serious concerns about the manner and timeliness of OHO assessments and investigations. In conducting research for this submission, numerous members noted a perception that OHO was unnecessarily aggressive and accusatory in its investigations. It is imperative that the medical regulator upholds the principles of natural justice for all stakeholders, both patients and practitioners. A need to ensure high quality health care for patients should not equate to an asymmetric investigation of complaints against doctors.

For complainants to the OHO, it is important they know their concern has been addressed and any risk mitigated. For the subjects of complaints, it is equally important that procedural fairness establishes trust that the system is fair and any censure is proportional.

Uphold the principles of natural justice for all stakeholders

The concepts of natural justice and procedural fairness are fundamental concepts to the exercise of administrative power. These rules will vary depending on the facts and circumstances of individual matters. However, there are several core tenets that must be discussed:

- **The hearing rule:**

The hearing rule requires the regulatory body to provide an opportunity to the person whose interests may be adversely affected by the decision the opportunity to be heard. This can include the provision of appropriately detailed information about the complaint, the factual basis of the allegation and be provided with the ability to respond. This information must be provided to the complainee in sufficient time so as to allow them to respond.[27]

AMA Queensland has also heard from notable members of the legal and medical communities who have indicated significant difficulties in obtaining information relied upon in OHO investigations.

- **The bias rule:**

The bias rule requires that the decision maker should be disinterested and/or unbiased in the matter to be decided.

As discussed above, the very fact that the Health Ombudsman reports to the Health Minister creates a clear conflict in the investigation of systematic issues by the OHO. AMA Queensland makes absolutely no allegation that the Health Ombudsman has exercised bias in the exercise of his powers, however, the structural conflict must be acknowledged and addressed.

- **The no evidence rule:**

The no evidence rule requires that the decision that is made must be based on logical evidence proven on the balance of probabilities.

The Health Ombudsman, under the *Health Ombudsman Act* 2013 (Qld),[28] has the power to take immediate registration action against a health practitioner if:

(a) the Health Ombudsman reasonably believes that –

i) because of the practitioner's health, conduct or performance, the practitioner poses a serious risk to persons; and

ii) it is necessary to take the action to protect public health or safety

We appreciate and accept the necessity of immediate action being taken against a practitioner's registration where they pose a serious risk to the public. However, after such an action is taken there must be appropriate accountability as to the decision making process so as to ensure that natural justice is being met.

The importance of the Health Ombudsman's decisions is emphasised when the significant delays in bringing disciplinary matters before the Queensland Civil and Administrative Tribunal is recognised. This effectively places the practitioner in prolonged legal limbo, unable to provide an income for their family, or contribute to their profession.

The concept of the application of natural justice and procedural fairness is vital as it attaches to the core question of what the medical regulator is designed to accomplish. If the sole objective is to bring its regulatory weight down on individuals who are seen to have fallen below a standard, and ensure they never practice again, then an adherence to procedural fairness is a simple afterthought. However, if the medical regulator is supposed to look past the individual to the system that caused the incident, and constructively engage with the practitioner to remediate any failings, then procedural fairness is an absolute necessity for all involved parties.

4. Unreasonably Prolonged Complaints Resolution Time

One of the major aspects of the *Health Ombudsman Act* 2013 (Qld) championed by the previous Health Minister, the Honourable Lawrence Springborg, upon its introduction to parliament was the establishment of legislated timeframes for the acceptance, assessment and investigation of complaints.

Upon receiving a complaint, the OHO has seven calendar days to decide whether to accept or refuse the complaint. The Health Ombudsman must then complete an assessment of a complaint within 30 days of deciding to carry out the assessment.[29] The Health Ombudsman may extend the period for assessing the complaint to 60 days if the case is large or complex, or there is a delay in receiving submissions or information.[30] The Health Ombudsman is then required to complete any investigation as quickly as is reasonable in all the circumstances and, in any case, within a year.[31]

The drafting of the legislation frequently refers to calendar days as opposed to business days. The difficulties this places on acceptance and assessment has been noted by both AMA Queensland and the Health Ombudsman himself.[32] A 30 day assessment process can be as little as 22 business days during a normal month, or even as little as 20 during December.

The legislation also provides that the OHO has the ability to invite submissions, from both the complainant and the health service provider, and to require information relevant to the complaint.[33] These individuals have 14 calendar days, from the giving of notice, to provide submissions or provide the requested information.

AMA Queensland has heard from medical practitioners, hospitals, health organisations and their legal counsel who have all indicated that this is too short a time frame to produce the information. Given the low level of ICT readiness in Queensland Health facilities, and the fact that in many cases medical professionals have moved onto new workplaces, such a short time frame limits the ability of the complainee to prepare a comprehensive defence to the complaint.

OHO commenced 2446 assessments in the 2014-15 financial year.[34] Within this same period it completed the sum total of 1886 assessments. Only 1030 (54.61%) were completed within a further 30 days. 379 (20.09%) were completed within 60 days. Of those 379, 114 matters were eligible for, and received, an extension, while 265 matters ran past the 30 day period. 477 (25.30%) assessments took greater than 60 days.

In total, 742 (39.34%) assessments ran over the legislatively mandated period for completing assessments.

The introduction of strict timeframes in a resource-limited environment raises the possibility of inappropriate refusals of complaints so as to meet timeframes. It also increases the possibility of referrals to AHPRA and the Medical Board at the last minute, when the OHO's timeframe is to be exceeded, and where no progress has been made by OHO in resolving the matter.

AMA Queensland was, and still is, supportive of the introduction of legislated time frames for complaints to be accepted, assessed and investigated. While AMA Queensland appreciates the considerable workload that the OHO has faced we believe that, from a doctors' health and operational perspective, there is an absolute necessity to complete the assessment process promptly.

A 1984 survey by Charles et al found that, after medico-legal proceedings,[35]

- 96% of medical practitioners acknowledged an emotional reaction for at least a limited period of time,
- 39% experienced depression, including symptoms such as depressed mood, insomnia, loss of appetite and loss of energy,
- 20% experienced danger, accompanied by feelings such as frustration, inability to concentrate, irritability and insomnia,
- 16% described the onset or exacerbation of a previously diagnoses physical illness,
- 2% of medical practitioners engaged in excessive alcohol consumption, and
- 2% experienced feelings of suicidal ideation.

Louise Nash et al found, similarly, that doctors who had experienced a medico-legal matter had significantly higher psychiatric morbidity than doctors who had never experienced a matter.[36] It has also been noted that the very nature of a complaint, even vexatious or spurious matters, can dramatically and detrimentally change how medical practitioners interact with patients.

AMA Queensland has consistently argued that long, drawn out assessment processes as a result of inadequate resourcing or expertise is both unfair and unacceptable. Such a process places additional strain on the medical practitioner and simply delays an appropriate conciliation process for the complainee.

5. Compatibility with a National System

While all states and territories have implemented the legislation required under the national scheme two, Queensland and New South Wales, have implemented co-regulatory regimes. New South Wales has a Health Care Complaints Commission (HCCC) that receives, investigates and pursues all complaints about health practitioners. In doing so, it handles all notifications within New South Wales.

Queensland has also implemented a 'co-regulatory' scheme that involves the OHO being the first port of call for all complaints. OHO then has the discretion to refer complaints to the Boards via AHPRA as it sees fit.

AHPRA is unclear on the triggers by which OHO decides to refer or retain matters. Where matters are referred to AHPRA, they generally occur at the very end of the assessment window before the legislated timeframes are exceeded. Once a matter is referred to AHPRA the acceptance, assessment and investigation process begins anew, further adding to delays in timely resolution.

OHO, in 2014-15 had an estimated budget of $14.745 million. Of this, $4.5 million was provided by AHPRA upon the request of the Queensland Government. This figure was determined by reference to what AHPRA would have likely expended had the Ombudsman not existed.[37] The $4.5 million is provided by registration fees collected from every health practitioner in Australia. The remaining $10.245 million was provided by the Queensland Government.

As raised by Martin Fletcher, CEO of AHPRA, there are some elements of the co-regulatory regime that must be further refined to ensure an effective working relationship.[38] These relate, broadly, to:

Standardisation of Regulatory Thresholds

OHO has the ability to set its own regulatory thresholds for the decisions that it accepts, assesses and investigates, or conversely decline to accept, assess or investigate. This effectively creates a *black spot* in the national regulatory regime as matters can, and have been, assessed differently by the OHO as compared to the nationally consistent standards and processes of the MBA. It is vitally important that there is a consistency of medical regulatory decision across all Australian jurisdictions. A matter, with the same factual matrix, should yield the same outcome in Sydney, Brisbane or Melbourne.

AHPRA has expressed a clear desire for the establishment and understanding of the Health Ombudsman's thresholds as to what constitutes a serious mater, what constitutes a matter held by the OHO, what constitutes a matter that the Health Ombudsman takes no action on and what constitutes a matter that is not accepted. Our members have also raised concerns as to the opaqueness of the differing classifications of what constitutes a serious matter being a subjective evaluation, as opposed to an objective, evidence-based decision.

Triage Decisions

Our members have consistently raised the double-handling of complaints between the OHO and AHPRA as a key cause of the delay in the resolution of trivial or vexatious matters.

From receipt through to referral the OHO may take up to 67 days and still be considered to be within its legislated timeframes. AHPRA, upon receipt of the referral, has 60 days to consider the matter and conduct a preliminary assessment.[39] Given the OHO is required to retain all serious matters the medical practitioners who are referred to the MBA are, by definition, the less serious matters yet may have dual assessments hanging over their head for 127 days. In the last quarter of released data the Medical Board of Australia only referred 35% of matters, referred by the OHO, for further regulatory action and investigation.

If these matters were immediately referred to AHPRA, and the MBA, where the right indicia were present then this double handling could be avoided.

AHPRA and the MBA have expressed a desire to be more involved in the early triage process so as to have an understanding of matters that are referred to them are done so early and promptly in the process.

Early triage would help reduce the double handling of matters by both the OHO and the MBA by effectively placing responsibility for the matter with one body or the other to help reduce unnecessary delays. It is important that there be significant medical input into this triage process so that minor or vexatious complaints can be more quickly identified and diverted to local solutions or conciliation without requiring in-depth investigation and assessment.

Data Sharing

AHPRA also expressed a clear desire for the OHO to ensure the use of similar counting methods and complete data sharing to ensure AHPRA can effectively capture trend data across Australia. This trend data is vitally important in ensuring that professional education and risk mitigation strategies can be developed and implemented across Australia. It is also important to use this data to reassure Queenslanders that their healthcare system is functioning well, and comparable to other states and territories.

AMA Queensland Recommendations

AMA Queensland is supportive of the development of a single point of contact for health consumer complaints in Queensland to improve consumer accountability. However, their internal processes must be further refined to ensure that there is an effective management of healthcare complaints that, in turn, provides Queenslanders with the healthcare that they deserve. We offer the following practical suggestions on how the Office of the Health Ombudsman can improve:

1. Remedy the Absence of Medical Practitioner Leadership and Guidance

AMA Queensland considers that clinical guidance and oversight is absolutely essential. We have concerns that there are no legislated requirements for medical guidance and advice in the notifications process and that it is possible, in theory, for a serious matter to be resolved without any clinical input whatsoever.

AMA Queensland advocates for the establishment of permanent health professional councils established within the structure of the Health Ombudsman. A requirement should be simultaneously inserted in the legislation that the Health Ombudsman must have regard to the advice of this council where it proceeds from the assessment to the investigation stage of a complaint. This change will ensure that there is appropriate, mandatory, clinical oversight at the most critical stage of the complaints process. The health professional councils should have access to appropriate legal advice, provided by an independent experienced legal practitioner, as to the requirements for natural justice and procedural fairness in the handling of complaints.

AMA Queensland would also like the Queensland Government to engage in a consultative process as to the appointment of the next Health Ombudsman. This should include practitioner representatives on selection panels and genuine engagement with peak representative bodies.

AMA Queensland believes that Mr Leon Atkinson-MacEwen has proven himself an adept administrator in the establishment of the Office of the Health Ombudsman in a complex regulatory environment. However, going forward, as the Office of the Health Ombudsman becomes increasingly quasi-judicial there is necessity that an individual with a proven track record of public service, and noted skills in collaboration and best-practice governance, is appointed. AMA Queensland believes that the legislation and guidelines that govern this very important position should be sufficiently patent, clear and well developed so that good and effective administration is autonomous of the personality of the individual holding the statutory position

2. Address the Structural Conflicts That Inhibit Fairness and Impartiality

We have significant concerns over the structure of the OHO and its capacity to truly act independently and fairly given it ultimately reports to, and can be required to investigate by, the Queensland Health Minister. This structure creates the situation where the director of proceedings, who is substantively independent in other jurisdictions, reports directly to the Health Minister.

AMA Queensland believes that the best manner in which to alleviate the structural conflicts inherent in the design of the Office of the Health Ombudsman is to have it, and the Director of Proceedings report to the parliamentary committee, namely the Health and Ambulance Services Committee.[40] The legislation should also be amended to provide that the Health Ombudsman is not subject to direction to ensure that the office does not become a political tool of the committee. The Health Minister is still suitably empowered to conduct investigations through the employment of specialist consultancies or in-house investigators.

We would also suggest the Queensland Government consider amending the *Health Ombudsman Act* 2013 (Qld) to mirror the provisions of s590(3) of the *Legal Profession Act 2007* (Qld). The legal and medical professions both practice within complex regulatory and disciplinary environments that share considerable similarities. Analogously to the Health Ombudsman, the Legal Services Commissioner is appointed by the Governor in Council upon the advice of the Attorney-General.

However, the Attorney-General does not have a mechanism to refer matters to the Legal Services Commissioner. Instead, the Attorney-General may ask the commissioner to provide a report at any time about the system or an aspect of the system, or set the conditions upon which the commissioner holds office.[41] This provides the Attorney-General with oversight of system integrity, but removes any possibility of conflict in individual matters.

AMA Queensland would urge the Queensland Government to examine the feasibility of these amendments to ensure that the public and the profession have faith in the independent operation of the Health Ombudsman.

3. Suspension of Natural Justice and Procedural Fairness in Investigations

Our members have repeatedly indicated that they have had negative experiences with the conduct of the OHO in how it undertakes investigations. An effective medical regulatory system must maintain procedural fairness to both complainant and the subject of the complaint.

We believe that the measures outlined in this document, namely the establishment of health professional councils supported by legal practitioners, would help address these concerns and develop a culture that prominently places natural justice and procedural fairness in investigations.

AMA Queensland strongly urges the Health Minister to engage a respected external group of experts to examine the investigatory culture of the Office of the Health Ombudsman. Such a review would not be unusual or inclement given the organisation has existed for only 18 months. This point in time would represent a prime opportunity to resolve any quirks or maladjustments before they become entrenched cultural issues. The experts should be commissioned to examine the adherence to principles of natural justice, the procedural fairness experienced by both the complainant and the subject of the complaint, and comparisons to other jurisdictions. The expert panel should also consider whether an alternate mechanism to QCAT for appeals against

orders of the Health Ombudsman would be justified given the volume of matters before QCAT.

With the report as a base, any deficiencies should be addressed and appropriate protocols authored by suitably experienced senior legal practitioners.

4. Unreasonably Prolonged Complaints Resolution Time

Our members have consistently raised the considerable delays in OHO making decisions, even where the matter is simply trivial or vexatious. Given the mandated time frames were a key feature of the Health Ombudsman Bill 2013 (Qld) they should be strictly followed and, if not, appropriate explanations must be given as to why not.

In this context, AMA Queensland would request the Queensland Government to examine the resourcing of the Office of the Health Ombudsman. Given the 2015-16 budget for the organisation was $14.75 million is miniscule against the broader Queensland Health budget , of $14.183 billion, there should be scope for a discussion on whether further resourcing is needed.[42] The timeframes, as outlined in the Health Ombudsman Act 2013 (Qld), are an important development and should be regarded as sacrosanct. Fair allocation of resources to support the workloads of both AHPRA and the OHO to work collaboratively to resolve complaints effectively and efficiently in the public interest is paramount.

In ensuring there are sufficient resources to meet the statutory obligations of the Office of the Health Ombudsman special attention must be applied to resourcing at the triage stage. AMA Queensland acknowledges the improvements made in this area over the last year but more can be done.

Effective triage with appropriate medical advice, and prompt referral to the Medical Board of Australia, has the potential to alleviate many of the timeliness concerns raised by members.

5. Health Ombudsman Undermining the National System

We have major concerns over how OHO, as it currently operates, undermines the national regulatory system through the creation of differing standards and thresholds between itself and the Medical Board of Australia. This, in turn, reduces the consistency of decisions and the ability of both medical practitioners and patients to have confidence in the decisions of both bodies. The Ombudsman's differing thresholds and unique data collection/reporting systems further exclude Queensland from national data sets diminishing our ability to drive a robust evidence informed regulatory system in our state..

AMA Queensland believes one of the best mechanisms to improve the functioning of the Office of the Health Ombudsman is to fully integrate its triage functions with AHPRA and the Medical Board of Australia. From a resourcing perspective, it would ensure that only one triage centre is required to be operated. From an operational perspective, it would guarantee common triggers and thresholds for referral. It would also leverage off the benefits of a single point of contact to ensure no notifications are unnecessarily double handled or lost between the organisations.

AMA Queensland believes that the simplest way to reduce the double-handling inherent in the co-regulatory regime is the automatic referral of certain matters immediately after triage by the Office of the Health Ombudsman.

In the fourth quarter of 2014-15 265 referrals were made by the Health Ombudsman to AHPRA. Due to differing reporting standards, whereby the OHO records matters as opposed to referrals, there were 372 matters referred to AHPRA in the period. The predominant issues referred to AHPRA were issues relating to communication and information, professional performance and professional conduct.

There is a strong argument that these matters should be immediately referred to AHPRA at the conclusion of the assessment stage. The OHO has sufficient powers, under s193 of the National Law to request serious matters be referred to it. By immediately referring these, generally less serious matters it would liberate the Ombudsman to pursue serious systematic problems. The national regulartory system through the medical board would still provide protection to Queenslanders.

AMA Queensland's Vision for the Office of the Health Ombudsman:

AMA Queensland still supports the position in our submission to the Health Ombudsman Bill 2013 (Qld) that:

> *"Any health practitioner regulating officer or body must be in a position to fearlessly address systematic issues including, but extending beyond, complaints about individual practitioners including, but extending beyond, complaints about individual practitioners."*[43]

We also refer to the Institute of Medicine Report – To Err is Human: Building a Safer Health System, in that:

> *"The biggest challenge to moving towards a safer health system is changing the culture from one of blaming individuals for errors to one in which errors are treated not as personal failures, but as opportunities to improve the system and prevent harm."*

These two statements underpin AMA Queensland's view on what the medical regulatory regime in Queensland should represent and achieve. We believe that an appropriately reformed Office of the Health Ombudsman is an evolutionary step in this process.

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