

## Report summary

---

29 August 2019

# Review of interface between the National Health Practitioner Ombudsman and Privacy Commissioner and the Australian Health Practitioner Regulation Agency

### Introduction

In February 2019, the National Health Practitioner Ombudsman and Privacy Commissioner (NHPOPC) and the Australian Health Practitioner Regulation Agency (AHPRA) jointly commissioned Rae Lamb<sup>1</sup> (the reviewer) to independently review the interface between the two agencies. This followed a significant increase in complaints to the NHPOPC. A final report was handed down in March 2019. This document provides a summary of the report, the recommendations and the agreed joint response from the NHPOPC and AHPRA.

### Executive summary

The importance of having an independent ombudsman able to assess complaints and make judgements about the fairness and effectiveness of the processes followed by a decision-making agency, cannot be overstated. It enhances public trust in the decision-making processes, particularly those of government agencies and regulators.

The Australian Health Practitioner Regulation Agency (AHPRA) recognises this and is working with its independent Ombudsman, the National Health Practitioner Ombudsman and Privacy Commissioner (NHPOPC) to ensure complaints about it are valued and responded to as quickly and appropriately as possible.

Both agencies have been working to improve their internal processes and procedures to strengthen the handling and response to such complaints. During this review it was clear that staff from both agencies have a tremendous amount of professional respect for each other and support changes made to date. Where criticisms were raised, it was in the interests of identifying areas for further improvement.

There are issues with the interface between the two agencies which, in the face of ongoing heavy and increasing workloads, are causing delays and a disproportionate and less efficient approach to some complaints. Formal notifications and investigations are being used more than should be necessary. Appropriate outcomes for complainants are sometimes taking too long and unnecessarily formal processes to achieve.

NHPOPC and AHPRA need to engage together earlier in the assessment of complaints with a focus on what AHPRA can do to assist early resolution. There needs to be more flexibility in the ways NHPOPC can engage with AHPRA on complaints, with an escalated approach to formality. NHPOPC needs written guidance for staff in deciding how to handle complaints, in the interests of consistency and transparency.

---

<sup>1</sup> Former Australian Aged Care Complaints Commissioner (2016–2019), Aged Care Commissioner (2011–2016) and New Zealand Deputy Health and Disability Commissioner (2005–2010).

For this to be successful, AHPRA will need to actively commit to ensuring it has the capacity to work with NHPOPC earlier and less formally on complaints, as it rolls out its new administrative complaints process and policy. Culture change is also needed within AHPRA and better arrangements for information sharing.

## Background

In February 2019, the NHPOPC and AHPRA jointly commissioned the reviewer to independently review the interface between the two agencies.

There has been a significant increase in complaints to the NHPOPC, particularly about AHPRA and the various national health practitioner boards' (National Boards) handling of registrations and notifications about registered health practitioners. In the first six months of 2018–19, approaches to NHPOPC were tracking at 34 per cent up on the same period in 2017–18. It received 47 per cent more complaints in the first half of 2017–18 compared with the same period the previous year.

The NHPOPC conservatively estimates its complaints and enquiries workload in 2018–19 will increase by around 22 per cent (based on the average number received each month). The office is also taking on significant additional functions as a result of legislative amendments which will increase its workload.

Increased complaints to NHPOPC also mean additional work for AHPRA in providing information and responding to these matters. It too has been receiving a growing number of complaints directly to it about its process and service delivery (administrative complaints). Last year it commissioned an external audit of its administrative complaints handling. This found inconsistencies in complaints processes and practices across AHPRA state offices. The audit identified the need for stronger governance, and better process and technology, as well as the need for an overarching internal complaints framework with clearly defined accountabilities and improved reporting.

In response, AHPRA has developed a comprehensive new administrative complaints policy and procedure and appointed a national complaints manager to lead this work. It has recruited two dedicated staff to assist with complex matters and NHPOPC work. It is also planning training and greater support for frontline AHPRA registration and notifications staff to empower and enable them to more successfully deal with simple concerns early and directly.

In light of these developments, NHPOPC and AHPRA decided the time is right for fresh eyes to review the interface between them. The reviewer was asked to look for opportunities to improve the efficiency and effectiveness of dealing with Ombudsman complaints, with particular focus on complaints about notifications. This is to ensure the work is sustainable and achieves the best possible outcomes for complainants.

## Scope

In reviewing the interface between the two agencies in dealing with complaints about AHPRA and the National Boards, the reviewer was asked to consider:

1. Opportunities to streamline the interface and achieve earlier and quicker triage and assessment of complaints to NHPOPC, to facilitate earlier resolution wherever possible.
2. Thresholds and criteria for different approaches to complaint resolution by NHPOPC in areas such as investigation, transfer (including warm transfer<sup>2</sup>), and assisted referral of complaints.
3. New models and ways of working which respond to common themes and achieve outcomes for complainants e.g. the need for better explanation of regulatory processes and outcomes, and the potential role of 'audit' of AHPRA's response to complaints
4. Opportunities to make the sharing of information and documents more efficient during NHPOPC investigations.
5. Lessons learned from experience to date and from other Ombudsman and complaints handling bodies.

---

<sup>2</sup> In her report, the reviewer refers to the 'warm transfer' process that exists between NHPOPC and AHPRA. The warm transfer process was set up between the two agencies so that the NHPOPC can (with the complainant's consent) refer a complaint to AHPRA for management in circumstances where the NHPOPC believes AHPRA has the ability to resolve the concern (for example, if the complainant has not yet made a formal complaint directly to AHPRA). Under this arrangement, the NHPOPC sends the complaint to AHPRA with the complainant's contact details.

The reviewer was asked to make recommendations for improvements to optimise the interface and support better ways of working which streamline processes wherever possible and build on the new administrative complaints process within AHPRA.

Resourcing levels were out of the scope of this review.

## Method

The reviewer:

1. Reviewed all relevant information provided by NHPOPC and AHPRA and identified and/or requested by the reviewer.
2. Undertook telephone interviews with key staff at NHPOPC and AHPRA.
3. Obtained and considered information about complaints handling models in other Ombudsmen, including interviewing key staff.
4. A draft report was provided to both agencies for consideration and comment/questions, and this feedback was taken into account by the reviewer prior to finalisation.

A meeting/workshop with key NHPOPC and AHPRA staff was held on Tuesday 14 May 2019 with the reviewer to discuss key findings and work through the proposed joint response to the recommendations.

## Findings

There is significant opportunity for more complaints to NHPOPC about AHPRA's notification and registration processes to be resolved earlier and less formally in the interests of better, more timely outcomes for complainants, and reducing the administrative burden on both agencies.

The success of this will depend on active commitment by both NHPOPC and AHPRA to build on existing good relationships at senior levels and support and empower relevant staff. In particular, AHPRA will need to ensure its new administrative complaints policy and associated changes improve its capacity to work less formally and more quickly and responsively with NHPOPC as well as directly with complainants.

NHPOPC appears to be investigating a greater proportion of complaints and notifying investigations more quickly than other models looked at. Even the Commonwealth Ombudsman, its benchmark agency, is moving to greater use of early resolution and fewer investigations in the interests of all parties.

NHPOPC does this because, while still time consuming for both agencies and delay prone, it considers investigation and the associated formal process is often quicker than trying other approaches first. This is based on its past experience of delays, negative feedback regarding use of preliminary inquiry powers, and modelling on previous Commonwealth Ombudsman approach.

While understandable, it is not the best use of resources for either agency when in many cases similar outcomes may be achieved more quickly for complainants with greater early communication and co-operation between NHPOPC and AHPRA. The most common outcome from an NHPOPC investigation is an explanation or the provision of better information. The same outcome may be achieved without formal investigation if AHPRA is prepared and able to respond appropriately either directly to the complainant or with NHPOPC assistance. It needs the capacity to do so.

NHPOPC does not routinely engage with AHPRA early and informally in the process in ways that could enhance its complaints assessment and facilitate early resolution, other than through the relatively new warm transfers process. Other ombudsmen are doing so with some success, particularly in telephoning and emailing agencies early to seek initial information and asking if they are open to trying to resolve the matter and discussing resolution options.

Although NHPOPC staff appear to have common understanding based on experience regarding which complaints should be warm transferred, which should be investigated and when to use preliminary inquiries, written guidelines would help to ensure that decisions are consistent, proportionate to the issues and make the process more transparent. There are good criteria and guidelines used by other ombudsmen, some of which could be used. The starting point for every in-scope complaint should be whether early resolution is an appropriate option.

In particular the approach of the Victorian Ombudsman should be carefully considered.

Even where preliminary inquiries powers are used by NHPOPC they are generally enacted formally, through written requests. There have been tensions relating to the extent to which NHPOPC can seek

information and make enquiries under these powers to resolve matters. As a result, it is not using the power as widely or flexibly as some other ombudsmen who will inquire informally to begin with and become more formal only when escalation is needed.

The documents that guide the interface between the two agencies are outdated and promote formal and prescribed processes that don't encourage early, less formal engagement. These need review and updating.

The warm transfer process is not working as well for complaints about notifications as it is for registrations. NHPOPC then moves to investigate. However, given that people come back to NHPOPC largely because they are not happy with the AHPRA response, working with AHPRA to improve the response may be just as successful as an investigation when the most likely outcome is a better explanation of the decision and/or process. If AHPRA is falling short of the mark in responding to some of the notification complaints through the warm transfer process, using NHPOPC expertise to help it respond better has the added benefit of showing AHPRA staff how to improve responses more generally.

Similarly, when someone has already tried to resolve their concerns directly with AHPRA and been unsuccessful, a warm transfer may be inappropriate but going back to AHPRA and getting it to respond again, with NHPOPC input and oversight, could be as effective as investigating.

There needs to be an agreed additional option for handling complaints where AHPRA will respond to a complaint, but unlike warm transfer, there is more ongoing involvement by NHPOPC. It may be helpful to introduce a process along the lines of that of the New Zealand Ombudsman (but also similar to processes used by the New Zealand Health and Disability Commissioner and the former Australian Aged Care Complaints Commissioner) whereby after mutual discussion, the complaint is essentially referred to AHPRA. It agrees to respond to the complaint within an agreed timeframe and copy in or report back to NHPOPC on actions taken. NHPOPC subsequently touches base with the complainant as necessary and can close the case on the basis an investigation isn't warranted because the matter has been resolved (either to the satisfaction of the complainant, or the Ombudsman or both) or no better outcome is likely to be achieved.

The 14-day timeframe for AHPRA to provide information to NHPOPC is clearly unrealistic. Once a more realistic timeframe is agreed, priority has to be given by AHPRA to meeting it wherever possible and formally seeking and complying with extensions of time where necessary. The response times in AHPRA's new administrative complaints policy are also likely to be difficult to meet and set up the agency for failure.

AHPRA staff need educating more widely about the importance of administrative complaints, the role of NHPOPC and how it and the complaints add value to the way they serve the public and other stakeholders. Greater feedback and sharing of complaint outcomes across AHPRA is needed.

NHPOPC staff would benefit too from having presentations or training that enhances their working knowledge and understanding of AHPRA processes and practices when they are dealing with complaints.

The information sharing arrangements are technically cumbersome, time consuming and difficult for both agencies. There are potential solutions in the way some others do this such as access to intranets, giving electronic access to certain staff in limited and controlled ways and the recent experience where NHPOPC staff went to AHPRA to access information. Some of these solutions can be adopted more quickly than others.

## Recommendations

1. The Memorandum of Understanding (MOU) and Administrative Arrangements Agreement between NHPOPC and AHPRA need urgent review and updating. In doing this, consideration should be given to reflecting the following recommendations:
  - Once jurisdiction is established, NHPOPC complaints assessment should start with consideration of whether early resolution can be achieved unless a complaint issue is so serious that on its merits it meets the threshold for investigation.
  - Unless there is good reason not to, AHPRA should be contacted informally by telephone or email when complaints are assessed. Basic information should be sought and discussion had regarding AHPRA's willingness and capacity to try to resolve the matter itself and the extent of NHPOPC involvement. This contact needs to be soon after receiving a complaint, with AHPRA's response provided within just a few days. This will inform NHPOPC's decision on how to proceed and could be modelled on the Victorian Ombudsman approach.

- NHPOPC and AHPRA should consider introducing a second option to warm transfer, whereby AHPRA is given an opportunity to resolve the matter but the case remains open with NHPOPC and there is a report back. NHPOPC can provide some guidance to AHPRA as to what steps are needed and it retains the right to take the matter further if it is not satisfied the matter has been sufficiently addressed. This will have to be an agreed process between the agencies with consideration given to how it works under NHPOPC's existing powers. There are various versions of its in use by other ombudsmen and complaints bodies.

**Joint response:**

The MoU and associated administrative arrangements will be reviewed in the light of these recommendations and finalised by December 2019.

The NHPOPC and AHPRA agree that it is in the interest of complainants as well as both agencies that complaints are dealt with as quickly as possible and with a focus on the best outcome achievable for the person making a complaint. It is agreed that the best outcome for a complainant is not always achieved by investigating a complaint and that consideration should be given, where it is appropriate, to whether a less formal option is available to respond to a complaint.

The NHPOPC and AHPRA agree that the two agencies will work together to implement an 'Early Resolution' mechanism to efficiently and effectively resolve/respond to complaints brought to the NHPOPC. This will include:

- establishing a regular meeting during which complaints received by the NHPOPC can be jointly discussed, background information sought and consideration be given to if there are opportunities to resolve the complaint less formally
- trialing a process through which the NHPOPC will keep the complaint open while AHPRA provides further information or takes some action in an attempt to resolve the complaint informally and/or satisfy the NHPOPC that the matter has been appropriately dealt with.

The established warm transfer process will continue to be used to transfer complaints that the NHPOPC considers should be appropriately dealt with by AHPRA. The NHPOPC will continue to investigate matters that it considers are more appropriately dealt with via that method, including when the NHPOPC considers that it will not be possible or appropriate to resolve a complaint less formally at any point in time.

The NHPOPC and AHPRA will establish a working group populated with representatives from both agencies to implement a trial of the early resolution mechanism outlined above, and develop appropriate guidelines.

2. NHPOPC should develop written guidelines setting out for staff the criteria to consider when deciding which complaints are suitable for early resolution or warm transfer, which should be investigated and when not to investigate. Many of the criteria used by other ombudsmen looked at in this review will be applicable, but some will need to be subject and jurisdiction specific. AHPRA should be consulted on this.

**Joint response:**

The NHPOPC will develop guidelines setting out the criteria for:

- early resolutions (possibly using preliminary inquiry power)
- warm transfers
- assisted referrals
- investigations
- decisions not to investigate.

These guidelines will be formalised following the agreed trial of the new early resolution mechanisms and consultation with AHPRA.



3. Agreed timeframes for information responses need to be renegotiated by the two agencies so that they are realistic and will be routinely met by AHPRA. Where more time is needed this should be raised with NHPOPC by AHPRA and extensions sought and met. Realistic but prompt timeframes for responses during complaints assessment and action during early resolution should also be discussed, agreed and honoured. (AHPRA needs to relook at the response timeframes in its new policy as well.)

**Joint response:**

Timeframes for AHPRA responding to queries for the NHPOPC will be agreed and monitored. These timeframes will be included as a schedule to the MoU and subject to periodic reviews.

AHPRA has also revised the response timeframes in its new Administrative Complaints Policy which will be reviewed after one year as follows:

- change from 1 business day to acknowledge to 2 business days to acknowledge all complaints,
- change from 2 business days to respond to 5 business days to respond to Stage 1 complaints.

The timeframes to respond to Stage 2 complaints will remain as originally approved.

The Ombudsman has confirmed that she is comfortable with these timeframes and considered that this would assist to ensure consistent delivery of promised timeframes.

4. NHPOPC should make greater use of its preliminary inquiries power to resolve matters without investigation. It needs to reach agreement with AHPRA regarding boundaries for this and when it needs to be done with a formal notification that section 7A of the *Ombudsman Act 1976* (Cwlth) is being used. The process should be as informal as possible to avoid delays. AHPRA staff will need to know and understand the process and parameters that have been agreed. It may assist NHPOPC staff to have guidelines and supervision along the lines of the Commonwealth Ombudsman's policy (adjusted to reflect the boundary discussion with AHPRA) and some practical examples of the types of information that can be sought and questions that can be asked.

**Joint response:**

The NHPOPC and AHPRA agree that the two agencies will work together to implement an early resolution mechanism to efficiently and effectively respond to complaints brought to the NHPOPC. This mechanism may involve use of the NHPOPC's preliminary inquiries power.

The NHPOPC and AHPRA will establish a working group populated with representatives from both agencies to implement a trial of the early resolution mechanism and develop appropriate guidelines.

The NHPOPC will also develop specific guidelines for its staff setting out the criteria for early resolutions using the preliminary inquiry power.

5. NHPOPC should invite AHPRA staff to visit annually and provide a training session on relevant AHPRA practices and procedures.

**Joint response:**

These training sessions will be scheduled on at least an annual basis.

6. In rolling out its new administrative complaints policy, AHPRA should ensure staff are educated about the importance of the independent Ombudsman's role and the way that NHPOPC oversight and input adds value to AHPRA's customer services. This messaging needs to be reinforced by more widespread sharing of de-identified outcomes from NHPOHC investigations and other complaints work. The findings and outcomes from specific cases should be sent to relevant AHPRA managers for feeding back to the individual staff concerned in an appropriate, non-punitive way. Having administrative and NHPOPC complaints as a standing agenda item at the Regulatory Management Committee meeting should be part of this as it sends a powerful message and strengthens governance. The Ombudsman could be invited to attend these meetings quarterly and provide feedback on how the interface and, in particular, early resolution, is working.

**Joint response:**

Information about the role of the NHPOPC will be integrated into the AHPRA staff induction program.

Feedback loops to AHPRA staff will be strengthened by improved communication on the outcomes of NHPOPC review.

Regular data on complaints will be included on the agenda of the AHPRA Regulatory Performance Committee.

The Ombudsman will be invited to meet with the Agency Management Committee and the NRAS Forum of Chairs at least annually to provide feedback on the interface with AHPRA and National Boards.

7. Current arrangements for sharing documents and other information should be reviewed and advice sought from the relevant AHPRA business unit about technical ways to simplify access for NHPOPC and reduce the impost on AHPRA staff where a large amount of sensitive information<sup>3</sup> is involved. Particular consideration should be given to:
- Including in the current intranet improvement project, access for NHPOPC staff to AHPRA policies and procedures (once they are all in the same place).
  - Different ways in which NHPOPC can have electronic access to case related information depending on the amount of documentation needed, such as NHPOPC officers attending AHPRA in Melbourne and being given access through a computer there; certain NHPOPC staff having remote access with various controls and limitations placed on it.
  - Training requirements so that NHPOPC staff know how to use the system and what relevant information is available to them.

**Joint response:**

Options for streamlining information exchange protocols and arrangements will be further considered as part of the MoU review.

## Other matters

The reviewer also considered whether to make recommendations regarding the matters outlined below and decided instead to simply draw these to the attention of both agencies for consideration.

---

<sup>3</sup> Wherever possible the least formal means of information sharing should be considered – with most ombudsmen this is use of email despite the privacy and security risks it entails.

## **Information about complaints process in AHPRA decision letters**

AHPRA staff say it has moved away from telling people how to complain in its decision letters, opting instead to encourage them to contact the case officer in the first instance if they have 'questions'. The words 'concerns' and 'complaints' are no longer commonly used. If any 'questions' can't be resolved this way, the person is told about the internal administrative complaints process and/or NHPOPC.

While the reviewer acknowledged this is in the interests of resolving matters at the lowest possible level in line with good practice, at the very least people need clear upfront information about where to go if they are unhappy. Such letters should tell them how to raise complaints or concerns. Further, NHPOPC staff say they have some difficulty exercising the discretion to decline a complaint on the basis the matter is more than 12 months old because people don't find out about them early enough.

The reviewer acknowledges responsibility rests with both agencies to raise the profile of NHPOPC. However, if AHPRA provides early written information about both its internal process and NHPOPC either with its decision letters or subsequent to any unresolved follow up concern, this could reduce the number of old matters accepted by NHPOPC. Such cases are very difficult for both agencies to investigate and address. One solution would be a one-page flyer or fact sheet that is emailed or sent to people after the case officer has been unable to address any concerns.

## **Internal review of administrative complaints handling**

AHPRA CEO Martin Fletcher raised whether AHPRA should have an internal review process for its administrative complaints. While this is an option, the reviewer considers it unnecessary. The administrative complaints process is, in effect, an internal review process and following that the best place for people to go is the independent Ombudsman. Offering to internally review the complaints process would add another lengthy and administratively burdensome step, particularly when NHPOPC can work with AHPRA to better address the complaint and fix any complaints process issues that are identified. It would potentially draw out the process further for complainants and staff.

## **Sharing NHPOPC letters to complainants with AHPRA**

The reviewer also considered whether there is merit in NHPOPC routinely sharing its outcome letters to complainants with AHPRA. One option would be to do as some other agencies do, and write just one letter at the end of a complaint - addressed to the complainant and copied to AHPRA (with a covering note drawing attention to any relevant specifics). This should be done after taking the natural justice steps of seeking responses from AHPRA to proposed comments or findings at the preliminary findings stage. While the reviewer was persuaded by both agencies that this will not necessarily be more efficient or save time, it is worth considering whether sending AHPRA a copy of NHPOPC's final letter to the complainant will help improve its understanding of NHPOPC work and improve its complaints handling.

## **Trends and systemic issues**

During this review, the reviewer did not see particular issues with the identification of trends and systemic issues, or the follow up with AHPRA by NHPOPC. As a small agency, it is easier than in a larger one to appropriately monitor, identify and act on matters where a particular complaint trend or systemic issue is exposed or emerges. NHPOPC practices seem in line with those of other ombudsmen the reviewer looked at. The monthly meetings and other regular engagement at senior levels along with more formal correspondence provide appropriate opportunity to raise these matters and seek action by AHPRA.