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QUEENSLAND NURSES' UNION

Submission to the Health, Communities, Disability Services and Domestic and Family Violence Prevention Committee

Inquiry into the Performance of the Queensland Health Ombudsman's functions pursuant to section 179 of the *Health Ombudsman Act 2013*

August, 2016

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Introduction

The Queensland Nurses' Union (QNU) thanks the Health, Communities, Disability Services and Domestic and Family Violence Prevention Committee (the Committee) for providing the opportunity to comment on the performance of the Queensland Office of the Health Ombudsman (OHO). In carrying out its functions dealing with complaints and other matters relating to the health, conduct or performance of registered and unregistered health practitioners, the OHO has a significant role for all of our members.

The QNU represents all categories of workers that make up the nursing workforce in Queensland including registered nurses, registered midwives, enrolled nurses and assistants in nursing who are employed in the public, private and not-for-profit health sectors including aged care. The QNU also retains specialist lawyers to assist its members in their dealings with the OHO, as well as the Nursing and Midwifery Board of Australia (NMBA) and Australian Health Practitioner Regulation Agency (AHPRA).

Our more than 53,000 financial members work across a variety of settings from single person operations to large health and non-health institutions, and in a full range of classifications from entry level trainees to senior management. The vast majority of nurses in Queensland are members of the QNU and our membership continues to grow.

The QNU supports an effective and efficient health complaints system that provides for protection of the community, and fairness to health practitioners. When the *Health Ombudsman Bill 2013* was introduced into the Queensland parliament, the QNU made an extensive submission and appeared at the public hearing.

We recognise the need for a regulatory body to oversee the health system, however, in our experience many of the matters we raised at that time remain current. The legislation establishing the OHO in effect created another regulator for regulated health practitioners when AHPRA and the NMBA already have the power and resources to operate for this purpose.

The national approach to registration, accreditation and discipline of health practitioners has been a great advance for health practitioners and the public in Australia, when compared with the previous inconsistent state-based schemes. Since its commencement, AHPRA processes and timeframes have generally improved.

However, in our view, the establishment of the OHO:

- has not improved the timeliness or consistency of decisions;
- has led to duplication of effort.;

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- may be a useful regulatory body for unregistered practitioners, but on current performance appears to be an unnecessary additional level of regulation for individual matters affecting registered health practitioners.

The QNU considers that while the OHO has an important role investigating complaints, we have a number of concerns about its viability which we outline in this submission.

Recommendations

The QNU recommends:

- all notifications related to individual registered health professionals should be made directly to AHPRA. Where AHPRA receives a complaint against a number of individual practitioners regarding the same incident or circumstances, it could simultaneously refer the matter to the OHO for investigation into a possible systemic failure. AHPRA should be fully resourced to carry out this function;
- AHPRA undertakes the regulation of all unregistered healthcare workers (however titled). Those who assist registered and enrolled nurses in the provision of nursing care should be registered with the NMBA according to clearly defined NMBA-approved education standards and skill competencies which encapsulate relevant nursing professional standards and accountability;
- the OHO should retain responsibility for investigating systemic health matters.

In the event the above recommendations are not accepted, we recommend:

- a more effective triage or assessment process to ensure matters are dealt with quicker and by the relevant body;
- there is consistency in the type of complaints being referred to AHPRA;
- there is no duplication of resources in making assessments by both AHPRA and OHO;
- the Objects and guiding principles of the Act should include a requirement that the Ombudsman must act in a transparent, accountable, efficient, effective and fair way, and that restrictions on the practice of a practitioner are to be imposed only if it is necessary to ensure health services are provided safely and are of an appropriate quality;
- The OHO should be empowered to grant extensions of time for response;
- The OHO should be more diligent in observing its own timeframes for action;
- The immediate action provisions should require that a practitioner be afforded an opportunity to respond before action is taken in relation to their registration;
- Failing this, the show cause process after taking action (s 61) should make it clear that the OHO must reassess the matter afresh pursuant to the test in s 58, namely, considering whether there is sufficient basis to reasonably believe that because of the practitioner's health conduct or performance they pose a serious risk to persons, and it is necessary to take the action to protect public health or safety;

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- QCAT should be empowered to grant stays of decisions to take immediate action and issue interim prohibition orders;

Summary of Recommended Changes to the *Health Ombudsman Act 2013*

- Amend s 61 to include a new sub-section (4) to read:

  After taking action the health ombudsman must reassess the matter afresh pursuant to the test in s 58, namely, considering whether there is sufficient basis to reasonably believe that because of the practitioner's health conduct or performance they pose a serious risk to persons, and it is necessary to take the action to protect public health or safety.

- Amend s 47 to include a new sub-section (4) to read:

  The health ombudsman may grant extensions beyond 14 days in appropriate circumstances.

- Amend s 4 to include a new sub-section (3) to read:

  The OHO must act in a transparent, accountable, efficient, effective and fair way. Restrictions on the practice of a practitioner are to be imposed only if it is necessary to ensure health services are provided safely and are of an appropriate quality. (These provisions are similar to those contained in the National Law).

- Amend s 58 (2) to read:

  The health ombudsman ~~may take the action at any time, whether or not a complaint has been made in relation to the health practitioner~~ **must give a health practitioner an opportunity to respond to any allegations before taking action even where circumstances require an immediate reply.**

  failing this,

- Amend s 61 to include a new sub-section (4) to read:

  The health ombudsman must reassess the matter afresh pursuant to s 58, namely, considering whether there is sufficient basis to reasonably believe that because of the practitioner's health, conduct or performance they pose a serious risk to persons, and it is necessary to take the action to protect public health or safety.

- Delete s 273(1)(a) which reads:

  immediate action taken under part 7;

- Amend s 100(2) to read:

  QCAT ~~must not~~ **may** grant a stay of the decision **and issue interim prohibition orders.**

- Amend s 279 to read:

  Where a determination has been made, the health ombudsman must give notice of the immediate action or investigation to each person the health ombudsman believes is an employer of the practitioner.

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- Amend s 282 (1) to read:

  This section applies **when a determination has been made in respect to** ~~if the health ombudsman becomes aware (whether by receiving a complaint or otherwise) of~~ a matter concerning a health practitioner.

- Delete ss 162 (3) and 162 (4) which read:

  (3) It is not a reasonable excuse for subsection (2) that giving the information might tend to incriminate the person.

  (4) The following is not admissible in any civil, criminal or administrative proceeding as evidence against an individual who gives information under subsection (2)—

  (a) the information given by the individual under subsection (2) and the fact of that giving (***primary evidence***);

  (b) any information obtained as a direct or indirect result of

  primary evidence (***derived evidence***).

Review of the OHO

Since 1 July 2014, the OHO has received all complaints about Queensland health practitioners and undertaken responsibility for certain complaints handling functions that were previously carried out by AHPRA and the former Health Quality and Complaints Commission (HQCC).

The OHO is responsible for managing serious complaints relating to the health, conduct and performance of health practitioners, and determines which complaints go to AHPRA and the national boards after assessing their severity. The OHO must also report on the performance of AHPRA and the national boards in Queensland.

The OHO can deal with complaints about any public or private organisation or entity providing a health service including those aligned with both registered and unregistered practitioners.

Health service organisations are broadly defined as "an entity, other than an individual, who provides a health service", and examples include:

- a corporation providing a health service at a private health facility under the *Private Health Facilities Act 1999;*
- a Hospital and Health Service established under the *Hospital and Health Boards Act 2011*, section 17;
- an ambulance service;

- a medical, dental, pharmaceutical or physiotherapy practice (Office of the Health Ombudsman, 2016).

The QNU notes the OHO was initially established to strengthen the health complaints management system in Queensland following various inquiries[1] and media reports highlighting what were considered to be fundamental deficiencies in the way the system (primarily the Medical Board of Queensland) protected the public. This included:

- unjustified delays in dealing with serious allegations against health practitioners;
- inadequate responses to these allegations;
- Inadequate communication and explanation of decisions to the public and health practitioners;
- lack of clarity around the roles of the existing health complaints management entities; and
- inadequate transparency and accountability.

Under section 26A of the *Health Practitioner National Law (Queensland) 2009* (National Law), each year the responsible Minister must determine an amount of registrants' funds to be transferred from AHPRA to the OHO. This payment funds the work of the OHO, that would otherwise have been undertaken by AHPRA and the national boards had the *Health Ombudsman Act 2013* (the Act) not been enacted.

In the 2014–15 financial year, the OHO dealt with 2031 matters relating to the health, conduct and/or performance of registered practitioners providing a health service in Queensland (Office of the Health Ombudsman, 2015a). The OHO has three sources of funding:

- the government grant;
- own source revenue;
- and regulatory funding provided by AHPRA.

[1] See Davies, G. (2005) *Queensland Public Hospitals Commission of Inquiry Report,* retrieved from http://www.parliament.qld.gov.au/documents/tableOffice/TabledPapers/2005/5105T5305.pdf (the Davies Inquiry)

Forster, P. (2005) *Queensland Health Systems Review*, Final Report retrieved from http://www.parliament.qld.gov.au/documents/tableoffice/tabledpapers/2005/5105t4447.pdf (the Forster Review)

Chesterman, R. (2012) *Assessment Report into Allegations made by Ms Jo-Anne Barber in a Statement dated 21 April 2012 and a Submission delivered 8 May 2012,* Report to the Legislative Assembly of Queensland, no. 87 retrieved from http://www.parliament.qld.gov.au/documents/tableoffice/tabledpapers/2012/5412t549.pdf (the Chesterman Inquiry)

Forrester, K., Davies, E. & Houston, J. (2013) *Final Report Chesterman Report Recommendation 2 Review Panel* retrieved from http://statements.qld.gov.au/Content/MediaAttachments/2013/pdf/16-4forrester.pdf (the Forrester Review)

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The regulatory funding component is a proportion of the registration fees of Queensland registered health practitioners. The amount reflects the cost of the OHO managing complaints that would otherwise have been conducted by AHPRA and the national boards. It is decided by the Minister for Health after consultation with other Ministers, national boards and AHPRA (OHO, 2015b). We note the OHO also receives a government grant. This appears to be at odds with the initial explanations given to the parliament (Health Ombudsman Bill Explanatory Notes, 2013) that -

> The additional function of taking proceedings to QCAT for unregistered health practitioners will only incur modest additional costs. Savings will accrue from the HQCC discontinuing the standard-setting function and some quality monitoring functions. On this basis, it is intended that the Bill will be cost neutral for government.

The QNU notes in the 2014-2015 financial year funding allocated for nursing resulted in a surplus of $683,730 between the funds provided by AHPRA (based on AHPRA's predicted percentages of overall matters by profession) and actual expenditure by the OHO (Office of the Health Ombudsman, 2015a). The QNU understands the difficulty in accurately estimating cost may be due at least in part to reconciling the different methodologies used by the OHO and AHPRA in counting and dealing with complaints.

Nursing and midwifery registrants may be better served by AHPRA retaining OHO funding and dealing with all nursing and midwifery matters apart from those involving unregistered practitioners and systemic problems. Given registrants provide one source of OHO funding, the OHO is accountable to them for efficiency and accountability in its proper use.

The QNU acknowledges there have been difficulties with timeliness of action and decisions from AHPRA and the NMBA with which QNU members are involved. However, we remain concerned about the following areas of the OHO's operations:

Duplication and Uncertainty of Roles Performed by Agencies

One of the criticisms levelled against the complaints system prior to the Act was the uncertainty in the roles performed by the various regulatory agencies. We believe there has been limited progress in clearly delineating responsibilities between the regulatory agencies. In fact, the problem has arguably worsened, with the OHO and AHPRA often dealing with the one matter.

We have experience of matters being sent from one agency to the other and back again seemingly without regard to timeliness and the adverse impact this can have on the individual involved. An example of this is self-disclosure of a criminal charge by a registered practitioner, which, pursuant to s 130 of the National Law, must be made to the relevant national board.

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AHPRA then refers this disclosure to the OHO. In the vast majority of cases, the OHO will then refer this matter back to AHPRA and the NMBA to deal with.

In some cases a complaint may be 'split' where the OHO decides to keep one aspect of the matter, and refer another aspect of the matter to AHPRA. An example of this may be a criminal charge relating to drug use by a practitioner. The OHO may decided to retain the conduct aspect of the matter, whilst referring the personal health aspect of the matter to AHPRA and the NMBA to manage.

In general, the conduct and health aspects of a matter are related and dependent on each other. A nurse's theft of medication from work is generally entirely related to their own personal health issues – in other words, theft of medication is usually for the practitioner's own use, rather than for resale or other purpose. Treating these sorts of complaints separately as a conduct matter and a distinct health matter is artificial, in our view, and fails to take a holistic perspective of the situation.

Where matters are referred to the Queensland Civil and Administrative Tribunal (QCAT) for disciplinary action, a practitioner's personal health is always considered, where relevant, alongside their conduct. Treating the conduct and health aspects of matters by separate regulators is unnecessary in our view, and these matters should be dealt with in their entirety by a single regulator from start to finish. In an effort to maintain national consistency, and in the absence of demonstrable benefit accruing for registered practitioners from the introduction of the OHO that regulator should be AHPRA.

At present it can be difficult to anticipate which matters the OHO will retain, and which it will choose to refer to AHPRA. We are not aware of any published guidelines providing detailed information regarding matters the OHO retains and those it chooses to refer.

Once a matter is referred to AHPRA, which occurs in the majority of cases involving registered practitioners, AHPRA and the NMBA start their consideration of the matter from the beginning. There is no efficiency at all gained for AHPRA and the NMBA in the OHO considering the matter beforehand. In our view:

- there is a clear duplication of resources in making assessments and conducting investigations by both AHPRA and OHO;
- 'double handling' of matters by the OHO and AHPRA is fundamentally inefficient and creates unnecessary delays;
- there seems to be insufficient clarity regarding which matters will be dealt with by the OHO and which will be referred to AHPRA; and
- splitting of matters between agencies is inefficient, causes unnecessary delay, and potentially inconsistent results.

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The inadequacies in the current triaging function of OHO, the consequent delays and the fact that AHPRA ultimately deals with the majority of matters affecting our members support our recommendation that all notifications related to individual registered health professionals should be made directly to one agency, and dealt with by that agency. To maintain national consistency, and the national registration and accreditation scheme set up by the National Law that agency should be AHPRA. Separate systems of regulation for registered practitioners amongst the states are inefficient and risk the great improvements and advances brought about by a national system of registration introduced with the commencement of AHPRA and the national boards in 2010.

It also seems to us that at times the OHO and AHPRA do not co-ordinate their efforts, and the OHO does not communicate well with AHPRA in relation to its actions or plans. Examples of this will be provided in the case studies below.

Time frames and Decision-making

The Act focuses on timeframes, many of which are quite short. When serious concerns are raised in relation to health practitioners, it is important they be considered promptly, and action taken if required. However, care must be taken to ensure that health practitioners are given an appropriate opportunity to respond to concerns, and that action is only taken when it is necessary to do so. The QNU is concerned that such a focus can abrogate natural justice for practitioners.

Notably, it is practitioners who have been required to meet those short timeframes when the OHO itself often does not meet time limits set for it to make and communicate decisions. The short timeframes contained in the Act can adversely impact on a practitioner's ability to obtain assistance and make considered responses to complaints made against them. No extensions of time for practitioners are permitted in most cases.

For example, s 47(2) of the Act provides that if the OHO is assessing a matter, the period for a practitioner to provide a submission 'must not be more than 14 days after the notice is given'. This is a very short period of time within which practitioners may seek and obtain advice and representation in relation to the matter, seek and obtain relevant supporting or evidentiary material, and provide a considered response to the complaint made against them.

Obtaining an expert report, or a treating practitioner report, for example, would likely take well in excess of the 14 days permitted. Where there are concerns in relation to a practitioner's competence or skill, the view of an expert or supervisor, for example, would meaningfully assist the OHO in its consideration of the matter. Similarly, where the concern is that a practitioner may have an impairment a treating practitioner's report would obviously be relevant and helpful.

The provision of meaningful and relevant supporting or explanatory material benefits both practitioners and regulatory bodies in the prompt and fair resolution of matters. However, relevant material such as expert and treating practitioner reports, for example, can often be

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difficult to obtain within a short period of time. There may also be other factors beyond the control of the practitioner which require a longer time for response including holiday periods.

Regulatory schemes must be fair to practitioners and protect the public. When complaints or notifications are made against practitioners, it is important they are given a fair opportunity to respond to the allegations raised against them. The QNU is concerned that a focus solely on quick processes and decision-making may not provide practitioners the opportunity to make considered responses to complaints made against them. Properly advised and considered responses benefit both the practitioner and regulators in promptly and fairly dealing with matters.

The QNU contends the OHO should be empowered to permit extensions to the statutory timeframes in appropriate circumstances. This would benefit both the OHO and practitioners and help to ensure fair and reasonable decisions are made after receipt of relevant material and considered responses.

We see a striking inconsistency between the short timeframes applying to practitioners to respond to complaints or notifications under the Act and the OHO's inability to keep to reasonable timeframes in carrying out its own functions.

In relation to assessment decisions, the period for a practitioner to provide a submission must not be more than 14 days (s 47). The Act states that the OHO must complete the assessment within 30 days, which may be extended for a further 30 days if necessary because of the size and complexity of the matter or the time taken to obtain information (s 49).

The following case study demonstrates the difficulty in meeting these time limits.

Case Study 1

In a recent matter, our member faced a situation where an anonymous complaint was received by the OHO in December 2015. Our member received a letter from the OHO in late December, requesting a submission by early January 2016 (notably, the 14 day period for a submission continued to run over the Christmas and New Year period, and was not extended to take into account the public holidays and traditional shut down period). A submission was made to the OHO on the member's behalf and relevant material provided by the due date, comprehensively disproving the matters alleged by the anonymous complainant. The OHO did not communicate its decision until mid-May 2016, taking some 140 days to complete the assessment which should have taken a maximum of 60 days. Whilst our member knew that the allegations were completely baseless, and the OHO's decision was to take no further action, that period of five months was very stressful for our member, and unnecessarily so, in our view.

There have also been matters in which the OHO has made a decision, but failed to communicate it to our member.

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Case Study 2

In this case, a decision by the OHO to take no further action in relation to a matter was not communicated to the member until some nine months following the OHO's decision. It was not until the OHO was followed up in relation to this matter that the member was informed of the OHO's decision. The OHO had not been contacted earlier as delays with OHO matters are frequently anticipated. The OHO's failure to communicate its decision was extremely upsetting for our member, who had been understandably anxious and had effectively put much of their life on hold awaiting the outcome.

In relation to investigation matters, we note the latest OHO data for the March 2016 quarter indicates 76% of investigations had been open for more than 6 months and 49% had been open for more than 12 months (OHO, 2016, p. 18). The Act states that investigations must be completed by the OHO within one year, with multiple extensions of three months permitted if the OHO considers that it is necessary in the circumstances (s 85). If the investigation is not completed within two years, the OHO must give notice to the Minster and Parliamentary Committee, explaining why the investigation has not been completed.

Almost half of the investigations currently with the OHO have not been completed within the standard statutory timeframe. We are also aware of a number of investigation matters transferred from AHPRA to the OHO at the OHO's request in 2014 which have still not been completed.

We recognise the OHO must follow a thorough investigative process, however, for the practitioner involved such extensive timeframes can have a debilitating effect on their personal and professional lives. Whilst OHO is required to give investigation updates, these updates, when provided, are generally of a proforma nature, and contain little meaningful information for practitioners.

Given that one of the stated objectives in introducing the OHO was timely and efficient decision-making, the benefit of the OHO must be questioned in light of these extensive delays. In fact, in light of the duplication of functions and splitting of matters described above, the OHO arguably has *increased* inefficiency and delays in dealing with complaints against registered practitioners, rather than reduced it.

We note, too, that one of the driving forces behind the introduction of the OHO was a concern that, in some cases, there had been an inadequate or too lenient response to serious matters raised. In the two years it has been in operation, we are only aware of *one* published disciplinary decision prosecuted by the OHO. Notably, that matter did not involve a registered practitioner. We understand there may be a number of disciplinary matters which the OHO has not as yet filed in QCAT and it may be the case the OHO has requested the relevant national board prosecute

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certain matters instead of itself (and if that is the case, we would further question the benefit of the OHO).

Greater Regulation of Unregistered Health Practitioners

For some years the QNU and our federal body, the Australian Nursing and Midwifery Federation (ANMF) have been campaigning for the regulation of Assistants in Nursing (AINs). While we accept that unregulated nursing and personal carers may be competent at providing a basic range of services and are valued members of the team providing care to consumers, these staff may not be able to recognise more serious issues that require intervention, supervision and support from registered nurses.

The QNU has consistently argued anyone undertaking nursing work whether it is in the home or a facility should be designated as a nurse and operate within a regulated framework. Indeed we recommend AHPRA undertakes the regulation of all unregistered healthcare workers (however titled). Those who assist registered and enrolled nurses in the provision of nursing care should be registered with the NMBA according to clearly defined NMBA-approved education standards and skill competencies which encapsulate relevant nursing professional standards and accountability. Through a registration regime, AINs would require a minimum level of formal education and accountability in their practice. Competency standards for AINs, when developed, should be based on those currently governing the regulated nursing workforce.

The QNU notes the OHO provides greater accountability and professional oversight of all persons providing healthcare services to the community. Whilst greater accountability and oversight of unregulated healthcare workers is a positive step in protecting the public from harm, and is supported by the QNU, it is difficult to envisage how the OHO measures the standards of care provided by unregulated healthcare workers such as AINs when there are no universally accepted and regulated standards to apply as a reference point in an investigation or adjudication of a specific complaint. It is also unfair to expect unregulated healthcare workers to be called to account when professional standards and relevant competencies that apply specifically to this type of healthcare worker do not exist.

Balancing Protection of the Public with Fairness to Practitioners

The QNU notes the Objects of the Act and the guiding principle that "the health and safety of the public are paramount". The QNU agrees that public health and safety are of course of utmost importance, but this must be balanced with the need to ensure fairness to health practitioners.

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We submit that the Objects and guiding principles of the Act should be amended to include a requirement that the OHO must act in a transparent, accountable, efficient, effective and fair way, and that restrictions on the practice of a practitioner are to be imposed only if it is necessary to ensure health services are provided safely and are of an appropriate quality. These provisions are similar to those contained in the National Law.

Immediate Action

The QNU also has concerns in relation to the ability of the OHO to deny a practitioner natural justice by taking immediate action before seeking a response from the practitioner. Under s 58 of the Act, the OHO need not seek a response from a practitioner before taking immediate action in relation to a registered practitioner (eg suspending their registration) or issuing an interim prohibition order in relation to an unregistered practitioner.

The QNU acknowledges the need, in appropriate cases, for regulators to be able to take prompt action in relation to health practitioners. The National Law requires national boards to give practitioners an opportunity to provide written or verbal submissions in response to the proposed immediate action. The time given for a response is often very short (often just a few days, but in practice could be very short indeed – e.g. an hour). If no response is received, the national board can simply take the action. The QNU has no evidence to suggest there are any adverse impacts caused by seeking a response from a practitioner to a proposed immediate action. We question the fairness and necessity of a power permitting immediate action to be taken without first seeking any response at all from the practitioner.

The QNU is aware of proposed immediate action matters where the allegations appeared serious at first reading, but the practitioner's response satisfactorily explained the matter, such that immediate action was not required after all. In one case, the NMBA had proposed to take immediate action to suspend a practitioner's registration after receiving a notification about the practitioner's personal health. Following a submission made on behalf of the practitioner, the NMBA was then able to appreciate that the practitioner was receiving appropriate treatment in relation to their health, and that the practitioner's health was not affecting their nursing practice. The NMBA appropriately determined to take no further action and closed the matter. Had the practitioner not had the opportunity to respond, their registration would have been suspended unnecessarily and unfairly, and likely for a protracted period of time.

The QNU is also aware of another matter where the NMBA proposed to take immediate action in relation to a mental health nurse. The proposed immediate action was a condition prohibiting the nurse from working in mental health. This would have made the nurse unemployable, given their whole working life had been spent in mental health nursing. Following a submission made on behalf of the practitioner, the immediate action was not taken after all, although the matter was referred for appropriate investigation.

Immediate action can have very harsh consequences for practitioners, depriving them of their ability to earn an income. The immediate action taken (e.g. suspension of registration) may also have effect for an extended period of time while an investigation is conducted. The practitioner's employment may be terminated because of the suspension of their registration, and they may not be able to work at all in their profession during that time. The effect of a suspension also flows onto the practitioner's family and their personal life, including their ability to maintain financial responsibilities. It is very important therefore, that practitioners have a chance to respond to allegations made against them before action is taken, and the matter is then dealt with expeditiously.

Affording practitioners an opportunity to respond *after* immediate action is taken is simply not a substitute for allowing practitioners an opportunity to respond *before* action is taken. We expect that, unfairly, a decision once made will be difficult for the practitioner to displace, and that the burden of proof will likely be in effect reversed, with the onus on the practitioner to disprove the need for the action to be taken.

The QNU submits that the immediate action provisions should require that a practitioner be afforded an opportunity to respond *before* action is taken in relation to their registration. Failing this, we submit that the show cause process after taking action (s 61) should be amended to make it clear that the OHO must reassess the matter afresh pursuant to the test in s 58, namely, considering whether there is sufficient basis to reasonably believe that because of the practitioner's health, conduct or performance they pose a serious risk to persons, and it is necessary to take the action to protect public health or safety.

The QNU submits that if the immediate action powers are to continue to permit action to be taken without first seeking a response from the practitioner, that power should not be used except in the most urgent and serious circumstances, and where there is strong and substantiated evidence of serious risk to the public, *and* evidence that seeking a response from the practitioner would result in serious risk to persons.

The QNU is also concerned that details of immediate action decisions are often published by the OHO (s 273) on its website particularly when immediate action can be taken before a practitioner has had an opportunity to respond to the complaint made against them. When immediate action is taken against a practitioner, this is noted against their registration on the AHPRA website. We submit that publication of details of immediate action matters is not required and unfair, particularly when the practitioner may not yet have had an opportunity to respond to the complaint made against them, and a full investigation has not yet been completed.

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Natural Justice and Appeals

As outlined above, the QNU is very concerned sections of the Act have the effect of abrogating natural justice and unfairly shortcutting procedural fairness for practitioners, and enables potentially unfair decisions. Poor decisions lead to more appeals. Section 100 of the Act provides that the Queensland Civil and Administrative Tribunal (QCAT) is not permitted to grant a stay of a decision to take immediate action or issue an interim prohibition order. This means that to overturn unfair decisions, practitioners will likely need to apply to the Supreme Court for a stay in appropriate cases. This is unnecessarily expensive for both practitioners and for the Government. We note, as well, that if decisions on appeal are found to be made without a proper basis, legal costs may be awarded against the OHO. As the OHO is at least partly funded by registrant fees, these costs are ultimately borne by all registered health practitioners.

QCAT does have the power to review decisions, including decisions to take immediate action and interim prohibition orders. However, the QCAT workload is currently such that any appeal lodged generally takes at least six months to come to hearing. This is an unacceptable time for a practitioner to wait to have an unfair decision overturned.

We contend QCAT should be empowered to grant stays of decisions to take immediate action and issue interim prohibition orders, in accordance with established legal criteria for stay applications. QCAT should be appropriately resourced to review immediate action and interim prohibition orders in a process which takes no longer than six months for a decision to be made.

In summary, quick decisions can be very poor decisions, especially when they do not seek a response from the practitioner before the decision is made. Overturning such decisions is time consuming and costly, both for individual practitioners and the Ombudsman. Removing natural justice obligations will likely lead to very harsh and manifestly unfair results for health practitioners.

In the QNU's experience, many notifications are misconceived or lacking in substance. Some are vexatious. Many matters have already been dealt with in other ways. Some employers use notifications as a way to make the regulator manage their employees for them when this is not the regulator's role.

An ultimate decision of 'no further action' in relation to a notification does not mean there has been a failure on the part of a regulator, or that a bad decision has been made. The role of regulators is not to punish practitioners. While regulators have an important role in protecting the public, they must also be fair to practitioners and provide natural justice.

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Investigation

The QNU is also concerned about sections of the Act permitting the Ombudsman to provide information to employers about matters where no determination has yet been made against the practitioner (e.g. ss 279, 282). This could lead to employers holding unjustified concerns in relation to their staff where allegation against the practitioner remain unproven and could lead to serious consequences such as suspension or termination of the practitioner's employment.

Removal of privilege against self-incrimination

The QNU continues to oppose the removal of the privilege against self-incrimination in sections 162 (3) and 164 (3) of the Act in relation to inquiries undertaken by the Ombudsman. The privilege against self-incrimination is a fundamental protection that should not be removed without strong and compelling circumstances.

Further Case Studies

The QNU provides further case studies to demonstrate the points we have made in respect to the OHO and AHPRA.

Case Study 3

This matter involves a member whose registration is subject to a suspension by the OHO and AHPRA is dealing with aspects of the case related to the member's health. The OHO's investigations are ongoing.

The NMBA wishes to impose conditions on the member's registration, if or when the OHO lifts its suspension. It is the NMBA's view that the conditions are necessary to protect the public because it is concerned the OHO may not advise it when the suspension is lifted, thereby enabling the member to gain employment without AHPRA's knowledge.

Setting aside the necessity for the OHO to advise AHPRA pursuant to the legislation that the suspension is to be lifted so that AHPRA can amend the register, in our view, this is an extraordinary statutory overreach. Here, AHPRA is attempting to mitigate poor communication between the co-regulatory bodies by imposing pre-emptive conditions on the member's registration.

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Case Study 4

This matter involves a practitioner who faced criminal charges in relation to misuse of prescriptions. A complaint was made to the OHO, and the OHO referred the matter to AHRPA. The NMBA took immediate action to suspend the practitioner's registration. The NMBA also decided to investigate the matter, and refer the practitioner for a health assessment.

The OHO later decided to deal with the conduct aspect of the matter itself, and leave the NMBA to deal with the health aspect of the matter. Some six months later, it was discovered that AHPRA had been continuing to investigate the conduct aspect of the matter, despite the OHO deciding to deal with these issues itself – a complete duplication of effort, with both agencies investigating the same conduct issues. Despite the OHO informing the practitioner that it would be dealing with the conduct issues, it seems that the OHO had not communicated this to AHPRA.

Case Study 5

This matter involves a practitioner who self notified in relation to convictions for drug offences (cannabis). The OHO decided to conduct an investigation that continued in excess of 12 months. When the practitioner was provided with notice of the decision to investigate, the practitioner was advised that they would be given an opportunity to comment on any adverse findings before a final decision was made.

The OHO refused to provide the practitioner with an opportunity to comment on any adverse findings made by the OHO, on the basis that the OHO considers that a decision of the Director of Proceedings, to refer a practitioner for disciplinary proceedings, is a preliminary decision, and the only stage of proceedings at which a decision may be made that can adversely affect a practitioner's rights is when the matter is before QCAT. In these circumstances, a denial of natural justice may occur on account of a refusal to recognize the affect of a decision to refer a practitioner to QCAT for disciplinary proceedings.

Conclusion

The OHO provides a valuable service, but in our view, its strength lies in the ability to regulate the currently unregulated practitioners and conduct investigations into systemic issues focusing on safety and quality. To uphold professional standards, AHPRA and the relevant professional boards remain the most appropriate agencies for regulating all health care workers.

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