Submission No 023
Received 5 August 2016

Queensland Government

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File Ref: DG080774

- 5 AUG 2016

Ms Leanne Linard MP
Chair
Health, Communities, Disability Services and
Domestic and Family Violence Prevention Committee
Parliament House
BRISBANE QLD 4000

Dear Ms Linard

Thank you for the letter received on 29 June 2016, inviting a submission from the Department of Health to the Health, Communities, Disability Services and Domestic and Family Violence Prevention Committee (the Committee), to be considered as part of its Inquiry into the performance of the Queensland Health Ombudsman's functions pursuant to section 179 of the *Health Ombudsman Act 2013*.

I attach a submission from the Department of Health for the Committee's consideration.

I look forward to reviewing the Committee's report after it is submitted to the Legislative Assembly, which I note is due by 28 October 2016.

Should you require further information, the Department of Health's contact is Mr Mark Tuohy, Director, Office of Health Statutory Agencies, Office of the Director-General, on telephone [redacted]

Yours sincerely

[redacted]

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Department of Health Submission to the Health, Communities, Disability Services and Domestic and Family Violence Prevention Parliamentary Committee Inquiry into the performance of the Queensland Health Ombudsman's functions pursuant to section 179 of the *Health Ombudsman Act 2013*

Introduction

The Office of the Health Ombudsman (OHO) was established under the provisions of the *Health Ombudsman Act 2013* (the Act) on 1 July 2014, to provide a health complaints management system which would be 'transparent and accountable and that effectively and expeditiously deals with health service complaints'.

As a new health statutory agency, OHO was intended to address issues identified in a number of reviews and subsequent reports of Mr Richard Chesterman AO RFD QC, Dr Kim Forrester, and Mr Jeffrey Hunter SC, about the way serious allegations against medical practitioners were being managed in Queensland.

Prior to 1 July 2014, health services complaints handling in Queensland was divided between two organisations:

- Australian Health Practitioner Regulation Agency (AHPRA) and 14 National Boards of registered professions, responsible for all complaints regarding registered health practitioners;
- the Health Quality and Complaints Commission (HQCC), responsible for responding to complaints regarding health service organisations and complaints regarding individual health service providers.

Neither entity had powers to take action in relation to complaints regarding unregistered health practitioners to prohibit or set limitations on practice. The creation of OHO resulted in the abolition of the HQCC, however AHPRA's role continues under a co-regulatory arrangement.

OHO provides a single contact point for complaints regarding:

- Registered health practitioners;
- Unregistered health practitioners; and
- Health services organisations which include public, private and non-profit healthcare facilities, ambulance services, hospitals, health education services, pharmacies, and community health services.

New South Wales (NSW) is the only other Australian jurisdiction which operates a co-regulatory health complaints system. It is noted that the arrangements in NSW differ from Queensland in that all health complaints management is undertaken by the NSW Health Care Complaints Commission and the NSW Health Professional Councils. In NSW, AHPRA and the National Boards manage practitioner registration only.

The current Queensland model changed AHPRA's responsibility in relation to complaint handling. For instance, while in the past AHPRA was responsible for responding to all complaints regarding registered health practitioners in Queensland, under section 91(1) of the Act, serious matters regarding registered health practitioners must be retained by OHO. All other matters regarding these practitioners may be referred to AHPRA where they are relevant to the jurisdiction of AHPRA and the National Boards as specified in Part 8 of the *Health Practitioner Regulation National Law 2009 (Qld)* (the National Law).

Section 91(1) of the Act provides for OHO to refer a complaint regarding a registered health practitioner to AHPRA, unless the matter indicated that:

- a registered health practitioner may have engaged in a way that constitutes professional misconduct; or
- another ground may exist for the suspension or cancellation of the registered health practitioner's registration (e.g. multiple non-serious matters which when considered together may be considered by OHO as a serious matter, and therefore falls within their area of responsibility).

It is separately noted that, under section 30 of the Act, the Health Ombudsman must consult and cooperate with other public entities with functions that are relevant to, or may impact on, the Health Ombudsman's functions. Section 30(g) specifically lists the National Agency (i.e. AHPRA) and National Boards.

Stakeholder concerns about the establishment of OHO

The Federal Australian Medical Association (AMA), in their submission in response to the Health Ombudsman Bill 2013 (the Bill), expressed concern that the Bill provided for the Minister to direct the Health Ombudsman to undertake investigations and hold inquiries. The AMA's view was that it was inappropriate for such a Ministerial power to be a feature of any health complaints handling process and that it was critical that any complaints handling system was seen to be independent of Government, both from the complainant's and the health practitioner's points of view.

The Federal AMA also expressed reservations that OHO would be adequately resourced to fulfil the legislated functions in the absence of additional funding from the Queensland Government, and concern that it may put upward pressure on registrant's fees. Similarly, the President of AMA Queensland (AMAQ) told the public hearing on the Bill, that the AMAQ strongly supports that investigations and decisions are completed in a timely manner, but that "it will not be possible for the Health Ombudsman to complete investigations within those time limits unless adequate resourcing is allocated to the Ombudsman".

The Queensland Nurses Union (QNU), in their response to the Bill, noted the focus on timeframes in the legislation, "many of which are quite short", and the need to provide for prompt responses and action in relation to serious concerns about health practitioners, while also ensuring practitioners are given an appropriate opportunity to respond. The QNU also expressed concern at the potential costs required to "properly staff and operate OHO, and whether this will lead to increased fees for registered health practitioners".

In a joint submission response on the Bill, AHPRA and the National Boards stated that the success of the co-regulatory model in Queensland would require the cooperation of all parties involved to avoid any intended increased costs, fragmentation or delays in how complaints are managed in Queensland and to support national consistency in dealing with issues about the health, conduct or performance of health practitioners. Their submission recommended a "more rigorous administrative approach within current arrangements would have...better maintained national consistency in complaints and notifications handling under the national scheme".

A subsequent report released by the AMAQ in 2016: *'Office of the Health Ombudsman, AMA Queensland's Vision for an Effective Medical Regulator'*, has stemmed from perceptions that OHO has a 'persecutory' approach to managing complaints in relation to medical practitioners, applies standards that are unclear, or diverge from the Medical Board of Australia policy and takes a prolonged time to complete matters. The report highlights five

areas of concern which in AMAQ's view should be addressed to ensure Queensland has an effective medical complaints regulator:

- the absence of medical practitioner leadership and guidance;
- structural conflicts that inhibit procedural fairness in investigations;
- suspension of natural justice and procedural fairness in investigations;
- unreasonable prolonged complaints resolution time; and
- Health Ombudsman weakening the national system (under the national registration and accreditation scheme administered by AHPRA).

The report includes eight recommendations, six of which would require amendment to the Act and one which seeks increased Government funding for OHO.

Funding arrangements

OHO is funded by the Queensland State Government and, for matters relating to the health, conduct and/or performance of registered practitioners providing a health service in Queensland, by AHPRA with funds from registration fees paid by health practitioners across 14 professions.

Queensland Government funding is provided to OHO for the purposes of its functions in section 25 of the Act, to:

- receive and take action regarding health service complaints;
- identify and report on systemic health service issues including matters affecting the quality of health services; and
- to monitor and report on the performance of AHPRA and 14 National Boards of regulated health professions in relation to their role in Queensland.

The Health Ombudsman is also responsible, under section 25 of the Act, for receiving health service complaints in relation to healthcare practitioners and taking relevant action in response in accordance with the Act.

The funding arrangements between OHO and AHPRA are defined under section 26A of the National Law. In particular:

- the Minister must decide, for each registered health profession, the amount of the complaints component of registration fees payable by Queensland health practitioners registered in the profession, for the financial year;
- the Minister is required to consult with the Australian Health Workforce Ministerial Council, AHPRA and the National Boards before making a decision on this amount;
- The decision amount must reflect the reasonable costs of OHO performing their functions relating to the health, conduct and performance of registered health practitioners that would otherwise be performed by AHPRA and the National Boards, if the Act had not been enacted.

As soon as practicable after being notified of the final determination, AHPRA must publish the Minister's decision. In 2014-2015[1], OHO received a total of $9.995 million from the Queensland Government, and $4.5 million from AHPRA and the National Boards.

Consistent with legislative requirements, a determination for 2014-2015 was made by the Minister for Health and Minister for Ambulance Services following consultation with the Australian Health Workforce Ministerial Council, the AHPRA and the National Boards. .

A second determination was made by the Minister for the 2015-2016 financial year.

[1] Tabling in the Legislative Assembly of the 2015/16 financial statements of OHO are anticipated by 30 September 2016

The Department of Health is currently considering options for future costing methodologies to be applied to the legislative requirement for an annual funding transfer between AHPRA and OHO, following issues raised by AHPRA about the methodology applied the first two years since OHO was established. For example, the process of determining the quantum of funds to be transferred from AHPRA to OHO has highlighted the different definitions and methodologies used by OHO and nationally by AHPRA regarding complaints management processes and costs.

OHO performance of legislative requirements

The Act provides timeframes for the resolution of complaints by OHO, as well as performance reporting. Legislative timeframes have been established for the acceptance of a complaint (7 days); the assessment process (30 days with another 30 days in extenuating circumstances); resolution (30 days with another 30 days in extenuating circumstances); and investigation (12 months with 3 month extensions contingent on size or complexity of the complaint matter).

OHO publishes monthly and quarterly reports in relation to performance within these timeframes.

The 2016-17 Queensland State Budget – Service Delivery Statements show that OHO is not meeting the timeframes as provided in the legislation:

Office of the Health Ombudsman	Notes	2015-16 Target/est.	2015-16 Est. actual	2016-17 Target/est.
Service standards *Effectiveness measures* Percentage of complaints received and accepted within 7 days	1	100%	51%	100%
Percentage of complaints assessed within timeframes	2	100%	34%	100%
Percentage of complaints resolved within timeframes	3	100%	92%	100%
Percentage of investigations finalised within 12 months	4	100%	65%	100%
Efficiency measures	5			

Notes:

1. The high volume of contacts impacted on the office's ability to process matters within the seven calendar day timeframe. Steps are being taken to recruit additional staff, in conjunction with the continued review and improvement of business systems and processes.
2. The complexity of matters, and delays in receiving information from parties and in sourcing independent clinical advice required to appropriately assess the matters has impacted on timeframes.
3. Resolution timeframes continue to improve and it is anticipated that the target will be met in 2016-17.
4. Approximately 25% of investigation matters have been referred to either the Queensland Police Service while criminal proceedings take place, or to the Coroner if the matter relates to reportable deaths and are listed as "on hold". Completion of these investigations cannot proceed until the QPS and the Coroner have dealt with the matter. A number of investigations transferred to the office by AHPRA have also required re-investigation prior to completion.
5. An efficiency measure is being investigated and will be included in a future Service Delivery Statement.

The inability of OHO to meet legislated timeframes regarding the percentage of complaints received and accepted within seven days; percentage of complaints assessed within

timeframes and percentage of investigations finalised within 12 months, has been reported despite an increase from 94 to 121 of full time equivalent staff in 2015-2016.

The reasons for this may include:

- an increase in the number of complaints received by OHO; and/or
- the assessment and investigation processes undertaken by OHO still being developed and optimally refined.

Total numbers of complaints retained by OHO for further consideration has increased by 20.5% in comparison with the 2014-2015 financial year.

OHO is implementing process improvements and has recruited additional staff to address the gaps in performance.

The then Parliamentary Committee, in considering the Bill, welcomed the introduction of timeframes to ensure timely decision making but noted concerns that the proposed timeframes were too short. It was acknowledged that a balance was required to ensure timeliness and satisfactory resolution of matters.

It is difficult to determine if there has been a decline in complaint resolution times since the commencement of OHO. The National Law, as it applied in Queensland prior to amendments made under the Act, only set timeframes for the assessment of a notification to determine if it related to a registered health practitioner or student and met grounds as a notification (60 days).

The repealed *Health Quality Complaints Commission Act 2006* previously included a timeframe for assessment by the Commission of 60 days, with another 30 days in extenuating circumstances, at which time a decision would be made to either accept a complaint or take no action.

However, the Forrester review of the previous operations of the Queensland Board of the Medical Board of Australia demonstrated significant delays in the management of notifications, with many cases spanning several years.

Following a three year review of the National Registration and Accreditation Scheme, Commonwealth, State and Territorial Health Ministers endorsed a recommendation on 7 August 2015 (recommendation 9) that AHPRA undertake work to benchmark timeframes for completion of key aspects of the notification management process. The work will be the subject of policy papers developed by Victoria and AHPRA for jurisdictional consultation during 2016.

Information Sharing

Under the National Law as it applies in other jurisdictions, there are legislative requirements that AHPRA, National Boards and relevant local health complaints entities consult on each complaint to determine the most appropriate course of action. The Act did not include this provision on the basis that the prior consultation processes would result in duplication and delays in dealing with complaints.

AHPRA has previously advised the Department of Health that it received information from OHO only in relation to the complaints referred to it, under sections 91(2) and 91(3) of the Act, and not those matters relating to registered health practitioners which are retained by the Health Ombudsman.

There is a lack of alignment in data terminology between AHPRA and OHO which means that it is not possible to compare Queensland data with other States and Territories, or a comparison to the previous year's activity in Queensland.

Acknowledging the statutory nature of both entities, on 23 October 2015, the Director-General met with the Chief Executive Officer of AHPRA and the Health Ombudsman to discuss issues relation to information sharing, including clarification of the Health Ombudsman's thresholds for regulatory decision-making. It was agreed that both agencies would continue to work collaboratively to address these issues.

Referrals between AHPRA and OHO

Where a matter is referred between entities – from OHO to AHPRA or vice versa – a degree of replication may occur in relation to activities across each organisation. For instance, where a matter is referred from OHO to AHPRA after OHO has conducted an assessment, AHPRA would also need to perform its own assessment of the complaint.

While OHO will share the information collected as part of its assessment, and this may minimise the work that AHPRA needs to undertake as part of its assessment, there could be additional resources associated with understanding the matters pertaining to the complaint.

Where OHO refers a matter late in its complaint management process (such as after it has performed an investigation), there might currently be duplication where AHPRA is also required to initiate an investigation as well as its assessment process.

Conversely, if AHPRA refers a matter back to OHO following its assessment phase, or another relevant action, OHO may still be required to undertake its own assessment to ensure it has sufficient information to manage the complaint and determine a reasonable action in accordance with the Act.

OHO and AHPRA may also need to share information, such as case files, submissions, and other research, where this informs their assessments and/or investigations where cases have been referred. Both entities are likely to expend resources associated with facilitating any information sharing.

Analysis by an independent consultation commissioned by the Department of Health, of matters referred by OHO to AHPRA between July 2014 and June 2015 showed that approximately 80% of referrals to AHPRA followed an assessment by OHO.

However, from July 2015 to March 2016, OHO began referring a higher proportion (around 60%) of complaints to AHPRA earlier in their complaint management process (following the initial intake stage). It was also noted that very few referrals from OHO to AHPRA occur at other points of the process (such as following immediate action, conciliation, local resolution or investigation).

This suggests that while there may be a degree of duplication, this is most likely to occur at the early stages of the process; that is, where a complaint is referred between agencies, the 'assessment' and the activities associated with this task are likely to be duplicated.

APHRA has previously advised the Minister of a significant increase of 29% in notification referrals from the OHO, in the December 2015 quarter.

The Queensland Board of the Medical Board of Australia (QBMBA) remains concerned about the numbers of serious matters where immediate registration action has not taken by OHO and the matter is not referred expeditiously to the QBMBA.

Under the Act, OHO performs functions relating to the health, conduct and performance of health practitioners, but not in relation to requiring health professionals to undergo a health or performance assessment. The QMBMA is concerned that this may lead to 'split' matters, where in relation to the same practitioner, OHO retains the serious conduct issue/s and the health issue is referred to AHPRA, precluding a comprehensive response.

The QBMBA is also concerned that some serious complaints within the meaning of the Act, continue to be referred to it, and not managed by OHO.

Health Ombudsman's non-complaints related role

The Queensland Government made an election commitment in 2015 to review the Health Ombudsman's role in ensuring system-wide patient safety, quality improvement in both clinical care and health service management, and for the dissemination of health system performance data.

In this context, the Department of Health has examined the role of the Health Ombudsman in relation to patient safety and quality improvement, and concluded that current functions, when complemented by the functions of other entities, provide sufficient systems level powers to assure patient safety and quality improvement.

The key objects of the Act are to protect the health and safety of the public and to promote professional, safe and competent practice by health practitioners and high standards of service delivery by health service organisations.

Both the Health Ombudsman and Queensland Health operate in a comprehensive system for patient safety and quality where a number of entities play a role, including AHPRA and the National Boards.

However, the national and statewide context in relation to health system patient safety and quality has rapidly evolved since the establishment of the HQCC in 2006, including the development and mandating of National Safety and Quality Health Service Standards, and the introduction of independent Hospital and Health Services, established under the Hospital and Health Boards Act 2011, with legislated accountability to monitor and improve quality of care.

The role of the Health Ombudsman was examined with regard to these contemporary frameworks and related State Government commitments. The Department identified that no single entity has exclusive responsibility for assuring quality and safety in the healthcare system and that no changes were required to the Health Ombudsman's legislated functions.

The Health Ombudsman's role in auditing and reporting on public hospital performance was also considered in the context of the proposal contained in the Private Members Bill introduced by Mr Mark McArdle MP, Member for Caloundra, on 19 May 2015. However, the Health Legislation (Wait List Integrity) Amendment Bill 2015 did not progress past second reading stage on 16 March 2016.

The Department concluded that the Bill's proposed audit and reporting function would duplicate the legislative functions of the Department of Health, Hospital and Health Services and the Queensland Audit Office, at considerable cost to government.

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Summary

In summary, there are a number of issues which have been brought to the attention of the Department of Health which the Committee may wish to consider in their review of OHO. These include:

- the different legislative requirements for AHPRA and OHO, and how these translate into differences in the approach to, assessment of, and costs associated with managing complaints relating to health practitioners in Queensland;
- whether the existing legislated timeframes are realistic in terms of the time required to undertake thorough assessment and investigation of complaints; and
- the increasing demand (number of complaints received by OHO) and the appropriate level of resources required to meet the demand into the future.