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Inquiry into the performance of the Queensland Health Ombudsman's function pursuant to section 197 of the Health Ombudsman Act 2013

Avant welcomes the opportunity to provide input into this inquiry.

Our submissions commenting on the inquiry's terms of reference are attached.

Please contact me on the details below if you require any further information or clarification of the matters raised in this letter.

Yours sincerely

[redacted]

Georgie Haysom
Head of Advocacy

[redacted]

About Avant

Avant Mutual Group Limited ("Avant") is Australia's largest medical defence organisation, and offers a range of insurance products and expert legal advice and assistance to over 68,000 medical and allied health practitioners and students in Australia. Our insurance products include medical indemnity insurance for individuals and practices, as well as private health insurance, which is offered through our subsidiary The Doctors' Health Fund Pty Limited.

Our members have access to medico-legal assistance via our Medico Legal Advisory Service. We have offices throughout Australia, and provide extensive risk advisory and education services to our members with the aim of reducing medico-legal risk.

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AVANT SUBMISSIONS ON THE INQUIRY INTO THE PERFORMANCE OF THE QUEENSLAND HEALTH OMBUDSMAN'S FUNCTION PURSUANT TO SECTION 197 OF THE HEALTH OMBUDSMAN ACT 2013

INTRODUCTION

Avant is a medical defence organisation that offers a range of insurance products and expert legal advice to over 68,000 medical and allied health practitioners and students in Australia. We have in excess of 16,000 members (including the majority of mature doctors) in Queensland.

We provide these submissions from our perspective as a national organisation that assists and represents individual doctors in professional conduct complaints and disciplinary proceedings in jurisdictions where AHPRA and the Medical Board of Australia deal with complaints, as well as the co-regulatory jurisdictions of Queensland and New South Wales.

KEY POINTS

1. Avant believes that the introduction of the Office of the Health Ombudsman ("OHO") has not significantly improved the management of health complaints in Queensland. We are not confident that the objectives of the *Health Ombudsman Act 2013* are yet being achieved.

2. There is duplication of processes between AHPRA and the OHO.

3. Overall, timeliness of complaints processes, particularly of investigations, has not improved since the establishment of the OHO.

4. There is limited, if any, clinical input into complaints at an early stage at the OHO which can reduce timeliness and lead to duplication.

5. Delays and extended timeframes can have an adverse personal and professional impact not only on complainants, but also on practitioners who are respondents to complaints. This has a flow-on effect on the communities those practitioners serve and ultimately on patient safety.

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6. Based on our experience in representing members in Queensland and in other jurisdictions, we suggest the following improvements:

   a. Timeliness of complaints handling could be improved by adopting processes that ensure compliance with KPIs and legislated timeframes.

   b. There should be better integration of OHO and AHPRA processes to improve efficiency and reduce duplication.

   c. The OHO should obtain early clinical input into complaints and make better use of its power to dismiss matters at an early stage.

   d. There should be early joint consultation between the OHO and AHPRA (and/or other relevant regulatory bodies where appropriate) about complaints to decide next steps and which organisation should deal with the matter.

   e. Greater transparency with key stakeholders about the regulatory process.

COMMENTS ON THE TERMS OF REFERENCE

Terms of reference 1 and 2: Operation of the health service complaints management system and ways to improve the system

The Hon LJ Springborg, in his speech introducing the *Health Ombudsman Bill*, referred to problems of the previous system as including "[r]ole confusion, delays in complaints handling and investigations and inadequate communication and transparency".[1] The legislation aims to protect the health and safety of the public, to promote professional, safe and competent practice by health practitioners, and to maintain public confidence in the management of complaints by:

> *establishing a transparent, accountable and fair system for effectively and expeditiously dealing with complaints and other matters relating to the provision of health services…*[2]

and by:

> *providing for the effective and efficient interaction of this Act and the National Law; and*
>
> *providing for the system to be effectively monitored by the Minister and parliamentary committee.*[3]

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[1] *Health Ombudsman Bill* Explanatory Speech, 4 June 2013, http://www.parliament.qld.gov.au/documents/tableOffice/BillMaterial/130604/Health.pdf at 1900

[2] *Health Ombudsman Act 2013* (Qld) section 3(2)

Based on our experience representing medical practitioners in professional conduct matters in Queensland, we are not confident that the introduction of the OHO is achieving the legislative objectives noted above.

While we acknowledge that there can be delays when transitioning to a new system, we would have expected to be seeing benefits two years after its introduction.

Overall, while there has been more reporting by the OHO, there does not appear to have been a significant improvement in outcomes.

We continue to see role confusion leading to duplication, and delays and lack of transparency in complaints handling, as well as limited clinical input at an early stage at the OHO. These problems can add to the significant impact that a complaint can have, not only on the complainant, but also on a practitioner, and this can ultimately affect the practitioner's ability to care for patients.

Duplication

The structure of the health complaints management system in Queensland results in duplication. This inhibits the effective interaction between the health ombudsman legislation and the National Law, and is costly.

The legislative framework is as follows. Complaints are received by the OHO, assessed (a 60 day timeframe) and in some cases investigated (12 month timeframe with 3 month extensions), and at the end of the assessment or investigation, the OHO can refer the matter to AHPRA. The OHO's quarter 3 2015-2016 performance report[4] (Q3 report) indicates that 35% of matters assessed by the OHO were referred to AHPRA. The AHPRA process then starts, which can also involve assessment (another 60 day timeframe) and investigation (no legislated timeframe). This can result in duplication and longer duration of complaints. This is not a streamlined process for handling complaints.

Initially we experienced duplication and longer timeframes in the management of complaints in Queensland. In the last few months, we have noticed some improvement: generally, the OHO is dealing with matters more efficiently including referring them to AHPRA more quickly (see further below in relation to timeliness).

However there still remain some cases where the OHO undertakes an assessment, then refers the complaint to AHPRA, and the AHPRA process commences. We have also experienced cases where the OHO carries out an investigation, then decides at the end of the investigation to refer the matter to AHPRA, and the AHPRA process commences.

We understand that AHPRA has recently changed its processes with a view to reducing duplication and improving timeliness, so that some matters sent to AHPRA by the OHO are referred for investigation, but without requesting an initial response from the respondent.

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[3] *Health Ombudsman Act 2013* (Qld) section 3(2)(b) and (c)
[4] Office of the Health Ombudsman Quarterly performance report – Quarter three 2015-6, April 2016

We agree with the need to reduce duplication and improve timeliness. However this new trend can lead to a missed opportunity to resolve a matter quickly particularly where the respondent doctor has not been asked to provide an initial response to the OHO.

It appears to us that the OHO could make better use of its power to dismiss matters with no further action at an early stage. This would reduce the potential for duplication and the need for the matter to go through an AHPRA process to achieve the same outcome.

In addition, we believe that duplication could be reduced by implementing a system whereby the OHO and AHPRA consult about each notification and determine whether it should be retained by the OHO, referred to AHPRA, closed or managed through conciliation or local resolution. This is similar to the co-regulatory process in NSW.[5] Together with early clinical input (see further below), we believe that this would go a long way to improving the timeliness of the process and reducing duplication.

The OHO has jurisdiction over serious matters.[6] In our experience, there are different approaches by different regulators (not only AHPRA but also the Medicines Regulation and Quality division of the Department of Health) and different views about what is a serious matter. Any inconsistencies could be resolved by early consultation about complaints between the OHO and other regulators, or consideration by a joint committee.

Legislative reporting requirements lead to duplication and role confusion. AHPRA is required to report to the OHO, and the OHO is required to report to the Minister and Parliamentary Committee on AHPRA's performance, as well as on its own performance. AHPRA also prepares a jurisdiction-specific quarterly report for Queensland as it does for the other states and territories. It is not clear that this reporting has improved outcomes or oversight.

Timeliness

As noted above, we had initial concerns about the increased time that the OHO was taking to deal with complaints. While we acknowledge recent improvements at the OHO to refer matters early to AHPRA, overall our view is that the timeliness of complaints processes has not improved since the establishment of the OHO.

Assessments are required to be completed within 60 days, yet the OHO's Q3 report indicates that it took longer than 60 days to complete the assessment in almost 50% of assessment matters.

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[5] Under sections 12 and 13 of the *Health Care Complaints Act 1993*, after the Health Care Complaints Commission has assessed a matter it must consult with the Medical Council to determine whether to investigate the matter, discontinue it, refer it to the Council or refer it for conciliation or local resolution.

[6] *Health Ombudsman Act 2013* (Qld) section 91 – matters involving professional misconduct or where there are grounds for suspension or cancellation of a practitioner's registration.

Overall investigations are taking too long.

The Act states that investigations must generally be completed within 1 year (with the option of 3 month extensions).[7] The OHO's public register currently lists 136 investigations open for more than 12 months.[8] The OHO's Q3 report indicates that just under 50% of open investigations have been open for more than 12 months.

One of the main reasons for establishing the OHO was the need for expedited timeframes, especially for investigations.[9] Too many investigations have been on foot for more than 12 months. In our portfolio, we have several matters, transferred from AHPRA and the former Health Quality and Complaints Commission when the OHO was established, where investigations have now been on foot for more than 2 years.

The courts have frequently commented upon the adverse impact of delay in bringing forward complaints, and the unfairness that follows where memories have faded and evidence has been lost:

> *"Nevertheless, while the Act contains no time limitation for lodging a complaint it does not follow that a complainant, with knowledge of the facts, can stand by and allow time to pass. The public interest requires that complaints be lodged and dealt with as expeditiously as possible: see* Birkett v James *at 324. A person with reasonable ground for complaint, therefore, should pursue it with reasonable diligence. Memories fade. Relevant evidence becomes lost. Even where written records are kept, long delay will frequently create prejudice which can never be proved affirmatively. As the United States Supreme Court said in* Wingo v Barker *(at 532) "what has been forgotten can rarely be shown". In some cases delay makes it simply impossible for justice to be done".*[10]

Our experience of assisting members in investigations in other arenas (such as criminal investigations) is that those investigations are generally concluded within a much shorter period of time. Decisions to lay charges and/or to investigate a doctor for a criminal matter are often made within weeks. It is unusual for criminal investigations to take more than a few months, and only in complex cases does the investigation take longer. Investigations are generally completed within 12 months, if not 6 months.

Despite increased reporting and parliamentary oversight, we are concerned about the practice of the OHO to grant itself 3 month extensions for investigations. There is limited information about the basis on which these extensions are granted, and as far as we are aware limited if any challenge to requests and decisions to extend time.

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[7] *Health Ombudsman Act 2013* (Qld) section 15.
[8] Office of the Health Ombudsman Investigation Register http://www.oho.qld.gov.au/news-updates/investigations-register/ accessed 8 August 2016
[9] *Health Ombudsman Bill* Explanatory Speech, 4 June 2013, http://www.parliament.qld.gov.au/documents/tableOffice/BillMaterial/130604/Health.pdf at 1900
[10] *Herron v McGregor* (1986) 6 NSWLR 246 per McHugh JA.

We believe that there should be a more rigorous examination of the reasons that investigations go beyond the 12 month timeframe, by a body external to the OHO. This could be the Parliamentary Committee, the Queensland Civil and Administrative Tribunal or the Queensland Ombudsman.

Clinical input into complaints

Complaints raising clinical matters require input from clinicians. In our experience, early clinical input is vital to improving timeliness of the complaints handling process and reducing duplication.

The Hon LJ Springborg, in his speech introducing the *Health Ombudsman Bill*, noted that the Health Ombudsman would be supported by "clinical advisory committees and panels comprising appropriate qualified persons to advise [him] about clinical matters". We have not been able to locate any information about whether any clinical advisory committees or panels have been established by the health ombudsman.

We understand that the OHO does not include internal review by a clinician as part of its assessment process, but instead relies on obtaining independent clinical opinion. This is supported by the OHO's Q3 report which notes that "difficulties associated with sourcing the necessary independent clinical advice required to appropriately assess matters" led to delays in completing assessments.

By contrast, AHPRA has successfully trialled a triage process in South Australia that involves early clinical input by clinicians employed by AHPRA or by the Board and this has led to improvement in timeliness of the assessment process. We understand that this triage process is now being used by AHPRA in Queensland and that this is improving timeframes. We also understand that AHPRA is considering ways to improve clinical input into its processes. We have certainly seen an improvement in jurisdictions other than Queensland in the timelines for dealing with low level, less complicated matters, particularly matters where a decision is made to take no further action.

We believe that early clinical input combined with a joint consideration process (as noted above) would improve timeliness and reduce duplication of processes, leading to improvements in the health complaints management system in Queensland overall.

Impact of complaints and the complaints process

In our experience, delays and long timeframes not only cause significant stress and disruption to the health practitioner concerned, but also to consumers of health services: a practitioner who is stressed is at risk of providing substandard care to patients. Delays also reduce public confidence in the complaints handling system. Improved timeliness may lessen the adverse impact of the process on the practitioner involved, and would increase public confidence in the regulator.

Long investigation times have an impact on practitioners and the public. In our experience even minor matters can have a devastating impact on the professional and personal lives of practitioners. This impact may occur regardless of the outcome of a complaint, and can be compounded by delays and inefficiencies in the complaint-handling process. Health practitioners are at risk of becoming the "second victim" in the regulatory process. This has a flow-on effect on the communities the practitioners serve and ultimately on patient safety.[11] Improvements in timeliness can help to reduce this impact.

Term of reference 3: Performance of health ombudsman of functions under the Act

Avant has had useful and productive meetings with OHO staff including the directors of notifications, assessment and investigations, to discuss individual matters. However, unfortunately we have not been able to engage directly with the Health Ombudsman himself with a view to working collaboratively to improve complaints handling processes for the benefit of complainants and respondents. This is despite comments in the OHO's Annual report for 2014-2015 that suggests a commitment to stakeholder engagement "to engage ideas and align processes … to enable the best outcomes for the office, its stakeholders and the Queensland public".

In our experience a collaborative approach to improving the complaints handling system assists in transparency and the efficiency of dealing with individual matters, and can improve practitioners' confidence in the system.

We would welcome the opportunity to meet with the Health Ombudsman himself to discuss ways to improve the management of complaints in Queensland.

Term of reference 4: Performance of National Board and National Agency

We understand that the introduction of the OHO had a significant impact on resourcing at AHPRA, and in this regard we refer the Committee to the reports from AHPRA to the OHO and the OHO's reports on the performance of AHPRA.

While initially it was considered that AHPRA's workload would be reduced (and resources allocated accordingly), referral of matters from the OHO to AHPRA led to a large backlog of matters within AHPRA, leading to extended timeframes. We understand that AHPRA has been working to clear the backlog by calling on the assistance of staff from interstate offices, as well as implementing a triage system.

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[11] See further Bourne T, Wynants L, Peters M et al The impact of complaints procedures on the welfare, health and clinical practice of 7962 doctors in the UK: a cross- sectional survey BMJ Open 2015; 4:e006687. doi:10.1136/bmjopen-2014-006687, Bourne T, Vanderhaegen J, Vranken R, et al Doctors' experiences and their perception of the most stressful aspects of complaints processes in the UK: an analysis of quantitative survey data. *BMJ* Open 2016;6:e011711. Doi:10.1136/bmjopen-2016-011711 and Avant Mutual Group Position Paper *The impact of claims and complaints on doctors' health and wellbeing* June 2015 http://www.avant.org.au/impact-of-complaints/

This appears to have helped in the efficient handling of these matters and we have seen some improvements, particularly on those matters where a decision is made to take no further action.

Nevertheless, we still have concerns about some aspects of AHPRA and the Medical Board's management of complaints under the National Law. Some of our concerns are as follows:

- Investigations are still taking too long in some cases.
- The approach taken to single clinical errors can seem unreasonably harsh in some cases.
- The approach taken to some doctors facing disciplinary action who have proactively undertaken education programs to address concerns can seem punitive.
- There is a lack of transparency, including a lack of provision of information (for example medical records, investigation reports, details of decision-making committees and committee members etc) to respondents in a timely way or at all.
- We have had cases where the Board imposes conditions on a doctor's registration which appear to ignore AHPRA's independent expert opinion.
- Inconsistency where there are different outcomes in similar matters in different states.

We have a good working relationship with AHPRA and we are able raise concerns about individual matters and systems issues, with a view to improving the complaints handling processes overall.

Term of Reference 5: Other Matters

The introduction of the OHO has led to fragmentation of the national scheme for handling complaints against health practitioners. Because of different reporting requirements, it is sometimes difficult to compare complaints handling data between the OHO and AHPRA within Queensland, and also between Queensland and the rest of Australia.

One of the advantages of the National Scheme for complaints handling is the ability to introduce and trial innovations in different jurisdictions based on the national experience, with a view to improving the complaints handling system as a whole.

We are aware that AHPRA has implemented several pilot programs with this aim, including a triage pilot program in South Australia (now rolled out in Queensland) and a national pilot program that aims to improve access to and the quality of independent expert opinion. We understand that the triage pilot has been successful in improving the timeliness of assessments, and that the expert opinion pilot is improving timeframes for obtaining expert opinion in investigations.

We believe that the OHO can learn from AHPRA's experiences and should collaborate not only with AHPRA but also with other key stakeholders to improve the system.

Suggested improvements

Based on our experience in representing members in Queensland and in other jurisdictions, we suggest the following improvements:

1. Timeliness of complaints handling could be improved by adopting processes that ensure compliance with KPIs and legislated timeframes.
2. There should be better integration of OHO and AHPRA processes to improve efficiency and reduce duplication.
3. The OHO should obtain early clinical input into complaints and make better use of its power to dismiss matters at an early stage.
4. There should be early joint consultation between the OHO and AHPRA (and/or other relevant regulatory bodies where appropriate) about complaints to decide next steps and which organisation should deal with the matter.
5. Greater transparency with key stakeholders about the regulatory process.

Avant contact details

Should you have any further queries in relation to this submission, please contact:

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