

Australian Society of Orthopaedic Surgeons

PO Box 12, Arncliffe NSW 2205 Ph: 02 9567 1064 Fax: 02 9567 4681

ASOS Submission - Health Ombudsman Bill 2013

The Australian Society of Orthopaedic Surgeons (ASOS) has reviewed the draft Bill and makes the following points with specific reference to medical practitioners in the State of Queensland.

1. ASOS maintains that the public interest is best served when health regulation, including complaints and disciplinary proceedings, enjoy the confidence of both the public (patients) and the medical profession.
2. ASOS supports effective complaints and disciplinary bodies designed to ensure public safety and confidence in the delivery of efficacious medical treatment and health care. When properly designed and justly administered, such a system will have the confidence of both the public and the medical profession.
3. ASOS notes that the overwhelming majority of Queensland based medical practitioners practise in the best interest of their patients and that complaints against medical practitioners are a small proportion of the millions of transactions that take place between doctors and their patients each year. Notwithstanding this, the maintenance of high standards of medical care requires sound regulation, which will include provision for disciplinary action and redress against those who are properly judged to have breached acceptable standards of care.
4. ASOS acknowledges that the Health Minister has stated that the current system of complaints regulation by AHPRA and the Queensland Medical Board (a sub-committee of AHPRA) is defective and needs remediation. He proposes this Bill as a remedy.
5. ASOS notes that potential problems in the current AHPRA model were foretold by the Hon Mark McArdle in his speech to the Queensland Parliament of 28 October 2009 when referring to 'The constitutional systems of the Australian states and territories' by Professor Gerard Carney who wrote "*A risk of many Commonwealth and State cooperative schemes is 'executive federalism'; that is, the executive branches formulate and manage these schemes to the exclusion of the legislatures. While many schemes require legislative approval, the opportunity for adequate legislative scrutiny is often lacking, with considerable executive pressure to merely ratify the scheme without question. Thereafter, in an extreme case, the power to amend the scheme may even rest entirely with a joint executive authority. Other instances of concern include, for example, where a government lacks the authority to respond to or the capacity to distance itself from the actions of a joint Commonwealth and State regulatory authority. Public scrutiny is also hampered when the details of such schemes are not made publicly available. For these reasons, a recurring criticism, at least since the Report of the Coombs Royal Commission in 1977, is the tendency of cooperative arrangements to undermine the principle of responsible government.*"¹
6. ASOS notes that despite the above, the current government (then opposition) supported the National Law which setup the AHPRA scheme.
7. ASOS notes the intention of the Queensland government through this Bill to return the complaints and disciplinary functions previously granted to AHPRA back to its control. However, the Bill sees fit to leave the registration of medical practitioners (and other health professionals) under the control of AHPRA. This effectively creates a hybrid regulation model for medical practitioners in Queensland.
8. ASOS maintains that it is not within the public interest to have a complaints system that is problematic for unintended consequences, particularly potential breaches of the accepted principles of Administrative Law. These principles can be summarised as principles of procedural fairness and judicial objectivity. ASOS notes with alarm, the concerns of senior legal officers of the Avant medical indemnity organisation. These concerns include

¹ Mark McArdle, Health And Other Legislation Amendment Bill; Health Practitioner Regulation National Law Bill, Hansard, Wednesday, 28 October 2009.

a lack of transparency and natural justice, “*Nor does the Bill provide sufficient direction about the need to observe procedural fairness in the investigation process.*”²

9. ASOS maintains that the proposed office of Health Ombudsman appears to be an amalgamation of the role of Health Complaints Commissioner and the traditional role of an ombudsman. In Australian Administrative Law the ombudsman is “independent and impartial, and works to improve public administration generally” with specific functions (remedies), namely “recommendations to departments, specific reports to government, or broader reports making recommendations to government about systemic problems.”³
10. ASOS asserts that in combining the traditional roles of a complaints commissioner (executive authority within a narrow scope) and ombudsman (wide discretionary scope with no executive authority) into one new role called a Health Ombudsman, the Bill creates an office with both wide discretionary scope and broad executive authority. It grants virtual Ministerial powers to a public servant who is not directly accountable to the Parliament or the electorate.
11. ASOS notes that the Health Ombudsman has executive authority over a wide catchment area of complaints. The Office can intervene into any aspect of a health service transaction with or without a complaint, against anyone providing a service that “is, or purports to be, a service for maintaining, improving, restoring or managing people’s health and wellbeing.”⁴ The expectation is that these complaints will all be dealt with expeditiously and given the volume of complaints that such a model may attract, there is a substantial risk of the system becoming overloaded system with subsequent potential to miss more serious threats to public safety.
12. ASOS maintains that a major threat to procedural justice in the Queensland complaints and discipline process is trial by media. ASOS sees nothing in the Bill which would act against sensationalising complaints before there is a proper understanding of the facts and an opportunity for a response from those accused. Having a professional reputation trashed unjustly can lead to tragedy for those falsely accused and their families. This hazard has not been addressed in the Bill.

Recommendations

1. That the defects of blending the traditional roles of complaints commissioner and ombudsman be rectified.
2. That the functions of registration of medical practitioners, now under the control of AHPRA, be returned to Queensland. This would remove the hazards of a hybrid model of registration / disciplinary regulation in the state of Queensland and create one unified model. There is no reason why doctors registering under this scheme could not be given simultaneous national registration.
3. That the Queensland Medical Board be re-established and reformed with the resources and capability to assist an appropriately authorised Healthcare Complaints Commissioner to maintain public safety and confidence in the provision of medical treatment and hospital care in the state of Queensland.

Dr Gary Speck
Chairman, ASOS

Dr Kelly Macgroarty
Queensland Chairman, ASOS

Stephen Milgate
National Coordinator, ASOS

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² Avant, Avant concerned about QLD Health Ombudsman Bill, 7 June 2013, <<http://www.avant.org.au/News/20130607-avant-concerned-about-qld-health-ombudsman-bill/>>

³ Australian Administrative Law Policy Guide, Attorney-General’s Department, <www.ag.gov.au/LegalSystem/AdministrativeLaw/Documents/Australian%20Administrative%20Law%20Policy%20Guide.pdf>

⁴ Health Ombudsman Bill 2013, meaning of ‘health service’, page 20.