AN ANALYSIS OF THE AHPRA FRAMEWORK FOR DEALING WITH VEXATIOUS COMPLAINTS

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Background

Since the inception of the COVID pandemic situation, medical defence organisations, insurers and regulatory bodies (such as AHPRA) have been dealing with an increased number of enquiries from health care practitioners and complaints from health care consumers relating to access to health care and quality of health care services.

As those of us working in the health care arena will appreciate, many complaints lack merit, are misconceived, misunderstood, or are merely the way in which an unhappy client chooses to voice their concerns. Whilst these complaints may be easily dealt with or ultimately dismissed by a regulator, they are usually genuine complaints about concerns held by the health care recipient.

A different and less common type of complaint is a **vexatious complaint** where the complainant has a different (and more sinister) motivation for making the complaint.

AHPRA vexatious complaint framework

When managing and responding to AHPRA complaints on behalf of practitioners, it is worth bearing in mind that a regime exists within AHPRA for dealing with vexatious complaints.

AHPRA developed the framework for its claims managers and investigating officers to use when attempting to identify and deal with vexatious notifications (view framework). This framework was borne out of a 2017 study conducted by the Centre for Health Policy within the Melbourne School of Population and Global Health at the University of Melbourne.

The Centre for Health Policy study (view report) looked at a broad range of industry regulators—from telecommunications regulators to crime stoppers to health and medical regulators. In brief, the study found that there was a large proportion of complaints that were alleged to be vexatious (generally by the respondent or their solicitors). However, the number of genuinely vexatious complaints was concluded to be around 1% of all complaints received.

Whilst low in number, vexatious complaints have a significant impact that is demonstrated by the disproportionate amount of time required for agencies to handle those complaints and the adverse impact upon the practitioners who are subject to those complaints.

The study concluded that it was inherently difficult to identify vexatious complaints and the process involved to determine:

- the veracity of the complaint, and
- the intent of the complainant.

When trying to define what it considered to be a vexatious complaint, the study authors referenced the legal meaning of a vexatious complaint that relates to the motivation of the person causing an event. The study went on to determine various factors that may contribute to vexatious complaints and AHPRA has adopted these factors into its framework to assist its managers to identify potential vexatious complaints.

The study noted that the most serious of vexatious complaints were those commenced by a professional complainant in the same industry as the practitioner target of the complaint, wherein those complaints were calculated and were likely to be driven by the desire for professional gain in a competitive professional environment. Conversely, vexatious complaints by lay complainants are more likely to be driven by unmet needs in a flawed complaints system.

The findings of the study concluded that such complaints are not made in good faith and should not receive the benefit of good faith provisions as found in s 237 of the National Law.

The framework adopted by AHPRA reflects a number of findings from the Centre for Health Policy study.

AHPRA have elected not to adopt a definitive meaning for a vexatious notification but describe it within the framework document as: a vexatious notification is a notification without substance, made with an intent to cause distress, detriment or harassment to the practitioner named in the notification.

AHPRA acknowledges the balance that must be struck between the extreme impact a vexatious complaint can have on a recipient practitioner whilst being mindful of not deterring genuine complaints by readily labelling such complaints as vexatious.

AHPRA advises its employees of the following indications to look out for when assessing a potentially vexatious notification:

- whether a notifier has an historical pattern of making notifications about the same practitioner
- whether the notifier has engaged in organised, strategic, calculated behaviour
- if personal gain or revenge appears to be involved
- the notification format and content
- a notifier's behaviour when interacting with AHPRA, and
- relationship between practitioner and the notifier.

Vexatious complaint consequences

If AHPRA considers a complaint made by one practitioner against another practitioner and qualifies as vexatious, they will ask the relevant Board to initiate an own-motion investigation into the conduct of the practitioner that made the complaint. If vexatious behaviour is determined by the Board, regulatory action will very likely be taken against the practitioner complainant.

AHPRA also refer to the codes of conduct that apply for the various National Boards, making it clear that health practitioners should not make vexatious complaints about other health practitioners. Therefore, a practitioner would be found to be in breach of the relevant code of conduct if it was determined they had made a vexatious complaint. The National Law contains good faith provisions (see s 237) that protect people who make a notification in good faith from being held liable in civil action or defamation. The AHPRA framework confirms that these provisions should not be applied to afford protection to those persons (including practitioner complainants) found to be making a vexatious complaint.

If AHPRA or a Board elected to investigate a practitioner complainant for an alleged vexatious complaint, that practitioner may seek cover under their medical negligence professional indemnity policy for assistance to defend the regulatory action.

Insurers would need to consider whether such a claim would come within the scope of the insuring clause or any "inquiries" extension or endorsement in circumstances where the inquiry may not arise out of health care services provided by the insured. Further, exclusion clauses (such as a "Dishonest or Wilful Act" exclusion) may also impact the extent of any cover available. It is also feasible that defamation proceedings may be launched by one practitioner against another in response to a vexatious complaint or, potentially, by a practitioner against the regulator if allegations of a vexatious complaint are raised within the AHPRA framework. Once again, such a complaint or claim may result in a practitioner seeking cover under any relevant insurance policy.

Takeaways

Whilst vexatious complaints are rare, AHPRA has recognised the significant impact these can have on practitioners and regulator resources more broadly and have adopted a framework to identify and manage such complaints.

Insurers, claims managers and appointed lawyers acting for practitioners in response to complaints should refer to the framework when assessing whether a complaint might be vexatious and should be reported to AHPRA. The framework may also be relevant for insurers if a practitioner insured seeks cover in response to an allegation that the practitioner has made a vexatious complaint.