Submission by the National Health Practitioner Ombudsman and Privacy Commissioner

Independent Review of Accreditation Systems within the National Registration and Accreditation Scheme for health professions

April 2017
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Background

In 2008, the Council of Australian Governments (the COAG) agreed to establish a single national registration and accreditation scheme for registered health practitioners and students undertaking programs of study that provide a qualification for registration in a health profession or clinical training in a health profession (the National Scheme).

The National Scheme is governed by the Health Practitioner Regulation National Law, as in force in all states and territories (the National Law), which came into effect 1 July 2010 (except in Western Australia, where it came into effect on 18 October 2010).

The objectives and guiding principles of the National Scheme include:

- protecting the public by ensuring that only health practitioners who are suitably trained and qualified to practice in a competent and ethical manner are registered
- facilitating the provision of high quality education and training of health practitioners
- facilitating the rigorous and responsive assessment of overseas-trained health practitioners.¹

The Australian Health Practitioner Regulation Agency (AHPRA) is the national agency responsible for administering the National Scheme. AHPRA supports the 14 National Health Practitioner Boards (the National Boards) in exercising their functions.

The National Law also establishes the National Health Practitioner Ombudsman and Privacy Commissioner (the NHPOPC). The main purpose of the NHPOPC is to provide ombudsman, privacy and freedom of information oversight of the National Scheme, particularly in relation to the administrative actions of AHPRA and the National Boards.

The NHPOPC is an independent statutory officer appointed by the Australian Health Workforce Ministerial Council (AHWMC). The current NHPOPC is Samantha Gavel. Ms Gavel is assisted by a small staffing complement, which includes staff who have expertise in investigations and complaints handling.

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¹ National Law, s 3.
Introduction

In 2014, the AHWMC commissioned an independent review of the national registration and accreditation system for health practitioners (the NRAS Review). This review made several recommendations regarding accreditation, including that the National Law be amended to provide that the NHPOPC has jurisdiction over accreditation functions within the National Scheme. Health Ministers accepted in principle the recommendations relating to accreditation, however, the Australian Health Ministers’ Advisory Council (AHMAC) was asked to commission a comprehensive review of accreditation functions. Subsequently, the Independent Review of Accreditation Systems within the National Registration and Accreditations Scheme for health professions (the Review) was announced. The Review is seeking to address a broad range of issues relating to accreditation, including:

- Does the AHPRA/HPACF [Health Professions Accreditation Councils’ Forum] guidance document on the management of accreditation-related complaints resolve the perceived need for an external grievance/appeal mechanism?

- If an external grievance appeal process is to be considered:
  - Is the National Health Practitioner Ombudsman the appropriate entity or are there alternatives?
  - Should the scope of complaints encompass all accreditations functions as defined under the National Law, as well as fees and charges?

This submission is intended to inform the Reviewer’s understanding of the role of the NHPOPC in relation to the National Scheme and responds only to the Review’s consolidated list of issues where it is appropriate for the NHPOPC to provide comment (based on its complaints statistics and experience in dealing with complaints about the administrative actions of AHPRA and the National Boards).

In summary, the NHPOPC submits that:

- The NHPOPC does not currently have jurisdiction to handle complaints regarding accreditation-related matters (except where the complaint concerns the administrative actions of AHPRA, the National Boards and/or internal accreditation committees established by the National Boards).
- The office of the NHPOPC has received a small number of approaches about accreditation-related matters since its inception.
  - Typically, these approaches are from overseas trained practitioners who are seeking registration in Australia and must complete an assessment by the relevant accreditation authority in order to meet the eligibility requirements for registration. Concerns raised with the NHPOPC include delays in the assessment process, unfair outcomes, and the high cost of the assessment process.
  - The office of the NHPOPC has also received a small number of complaints from education providers regarding concerns about the accreditation of programs of study. A small number of approaches have also been made by students wishing to make complaints about education providers that deliver approved programs of study.
- In general, NHPOPC staff refer persons wishing to make complaints about accreditation authorities back to the relevant accreditation authority’s internal complaint handling process. In general, however, there are limited options available to people wishing to make complaints about accreditation...
authorities, which has been a source of frustration to a number of people who have contacted the office of the NHPOPC.

- The NHPOPC does not consider that the ‘Management of complaints relating to accreditation functions under the National Law – a guidance document’ sufficiently resolves the need for an external mechanism for the management of accreditation-related complaints. The NHPOPC’s reasons include that:
  - The Guidance Document tends to focus on complaints made to accreditation authorities about accredited programs of study or an education provider, and it does not comprehensively address all situations where complaints about accreditation-related matters may arise, particularly in relation to complaints about accreditation authorities themselves.
  - The Guidance Document refers to the requirement for each individual accreditation authority to publish information about its complaints process. A review of a sample of the websites of accreditation authorities reveals that the complaints policy of some authorities has either not been published or is difficult to locate. There does not seem to be a clear explanation of the complaints pathways available to persons wishing to raise concerns about specific actions of an accreditation authority.
  - Even if all accreditation authorities clearly communicated the process for the internal management of accreditation-related complaints, this would not address concerns about the independence and transparency of these complaints mechanisms.
  - Another concern associated with the internal management of concerns by accreditation authorities is cost. The NHPOPC’s experience in dealing with people who have a complaint about an accreditation process demonstrates that the cost involved in progressing a complaint is a source of frustration, or alternatively, can be a barrier to proceeding.

- The NHPOPC is of the view that complaints about the administrative actions of accreditation authorities should be dealt with by the NHPOPC, for reasons including:
  - It is a more efficient use of resources to extend the NHPOPC’s remit, rather than establish a new external complaint handling mechanism.
  - As people are already approaching the NHPOPC with concerns about accreditation authorities, it suggests there is some feeling that the NHPOPC is the appropriate entity to handle these complaints.
  - Accreditation is closely connected with practitioner registration and it therefore seems natural that the body that handles complaints about administrative actions associated with practitioner registration, should also handle complaints about administrative actions associated with accreditation.
  - As the NHPOPC currently has jurisdiction to investigate complaints about the administrative actions of the internal accreditation committees established by three of the National Boards, it creates a level of inconsistency if the NHPOPC does not have jurisdiction to investigate complaints about the administrative actions of the external accreditation authorities.
  - The NHPOPC has experience in identifying systemic issues arising from the administrative actions of AHPRA and the National Boards, and has the skills to expand this role to include consideration of processes undertaken by accreditation authorities.
  - There is existing public respect for the independence, integrity and impartiality of Ombudsman offices in Australia. There are high levels of trust in the ‘Ombudsman’ brand and the NHPOPC is already recognised an as important accountability mechanism within the National Scheme.
Part 1: Role of the National Health Practitioner Ombudsman and Privacy Commissioner

The office of the NHPOPC is an independent, statutory agency established under the National Law to provide ombudsman, privacy and freedom of information oversight of the national agencies that have a role in the National Scheme, namely:

- AHPRA
- the National Boards, including
  - Aboriginal and Torres Strait Islander Health Practice Board of Australia
  - Chinese Medicine Board of Australia
  - Chiropractic Board of Australia
  - Dental Board of Australia
  - Medical Board of Australia
  - Medical Radiation Practice Board of Australia
  - Nursing and Midwifery Board of Australia
  - Occupational Therapy Board of Australia
  - Optometry Board of Australia
  - Osteopathy Board of Australia
  - Pharmacy Board of Australia
  - Physiotherapy Board of Australia
  - Podiatry Board of Australia
  - Psychology Board of Australia
- AHPRA's Management Committee
- the Australian Health Workforce Advisory Council.

In general, the role of the NHPOPC is to handle complaints and, where appropriate, conduct investigations into the administrative actions of AHPRA and the National Boards in order to assist people who are dissatisfied with the way a matter has been handled in the context of the National Scheme.

History of the office of the NHPOPC

The separate roles of the National Health Practitioner Ombudsman and National Health Practitioner Privacy Commissioner were established on 1 July 2010. For efficiency, these roles were combined to form the single office of the National Health Practitioner Ombudsman and Privacy Commissioner.

Ms Gavel was appointed to the role of NHPOPC in November 2014 for a term of three years (noting that Ms Gavel's contract will be renewed in November 2017 for an additional three years). The office of the NHPOPC has achieved significant progress since Ms Gavel's appointment, including:

- completion of work on a complaints backlog which had accumulated between 2010 and 2014
- recruitment of suitably qualified and experienced staff
- launch of a redeveloped website, including an animated video explaining the role of the NHPOPC
- production of the office’s first annual report publication
• implementation of Memorandums of Understanding between the NHPOPC and AHPRA, and the NHPOPC and the Victorian Department of Health and Human Services (the host jurisdiction of the NHPOPC).

As the complaints backlog has now been addressed and office resourcing concerns have been resolved, the office intends to move into a new phase of development. The current focus of the NHPOPC is to raise the public profile of the office, as it appears that many people are currently unaware of the free and independent complaint handling service that the office provides. The NHPOPC will achieve this goal through the development of a comprehensive stakeholder engagement framework and by publishing information resources for the general public and health practitioners.

**Powers of the NHPOPC**

The NHPOPC’s complaint-handling powers are derived from:

- *Health Practitioner Regulation National Law, as in force in all states and territories*
- Health Practitioner Regulation National Law Regulation (No. 42/2010)
- *Ombudsman Act 1976 (Cwlth), as modified by the National Law Regulation*
- *Privacy Act 1988 (Cwlth), as modified by the National Law Regulation*
- *Freedom of Information Act 1982 (Cwlth), as modified by the National Law Regulation.*

The NHPOPC can only deal with complaints about the administrative actions of the agencies established under the National Scheme. Generally, this means that a complaint is from one of the following:

- a registered health practitioner
- an individual who has applied to AHPRA for registration as a health practitioner
- an individual who has made a notification or a complaint to AHPRA about a registered health practitioner
- the nominated representative of an individual in one of the above categories.

An administrative action is any action taken by an agency in relation to carrying out its duties and functions, or in exercising its powers or discretion in doing so. Administrative actions that may be the subject of a complaint include:

- the actions taken by AHPRA to assess and investigate notifications or complaints made under the National Law
- the actions of a National Board when making a decision in relation to matters raised in a notification or complaint
- the actions taken by AHPRA in handling an application for registration
- the actions of a National Board when making a decision to refuse registration or place conditions on the registration of a health practitioner.

The NHPOPC also investigates complaints about how AHPRA has handled personal information or a freedom of information request.

Consistent with the Commonwealth Ombudsman and most Ombudsman bodies, the NHPOPC has the power to make formal recommendations at the conclusion of an investigation and to publish investigation reports. Another important part of the NHPOPC’s work is to provide feedback to AHPRA and the National Boards to assist them to continuously improve their processes and policies. Complaints can provide
valuable insights for process improvements to prevent similar problems in future, particularly in relation to systemic issues.

In summary, the NHPOPC can:

- investigate the administrative actions of AHPRA and the National Boards
- determine whether AHPRA and the National Boards have complied with relevant legislation, acted consistently with applicable policies and procedures, and have taken into account all relevant considerations when making a decision
- formally recommend, or make comments or suggestions, to AHPRA and the National Boards that it:
  - reconsider a decision
  - review or change a policy or procedure
  - offer an apology to an affected person
  - expedite a delayed action
  - provide a better explanation to a person affected by a decision.

The NHPOPC cannot:

- overturn a decision of AHPRA or a National Board, or force AHPRA or a National Board to review or change a decision
- provide legal advice or act as an advocate for anyone aggrieved by a decision or action taken by AHPRA or a National Board
- recommend that AHPRA or a National Board pay compensation to an affected person (except if the complaint is about an interference with privacy, in which case a declaration may be made that the affected person is entitled to compensation for any loss or damage suffered)
- force AHPRA or a National Board to release a document determined to be exempt under the Freedom of Information Act
- recommend that AHPRA or a National Board take an action that is not available to them under the National Law.

**Number of complaints received by the NHPOPC**

The NHPOPC’s jurisdiction focuses on the administrative actions of AHPRA and the National Boards. The office also has jurisdiction to investigate complaints about privacy and freedom of information complaints relating to AHPRA (and the National Boards), however, these complaints currently form a small portion of the total complaint caseload.

During 2015-16, the total number of approaches to the office increased significantly compared to the previous year. This increase coincided with the launch of the office’s new website, which suggests that the increase may be partly attributable to new initiatives aimed at lifting the public profile of the office. In addition, issues relating to health practitioner regulation have received regular attention in the media as a result of high-profile investigations in a number of states. This is likely to have resulted in an increased awareness of the role of AHPRA and the NHPOPC, which also could have contributed to the increased workload.
Approaches to the NHPOPC regarding accreditation matters

The office of the NHPOPC has received a small number of approaches about accreditation-related matters since its inception.

For clarity, it should be noted that the NHPOPC currently has some jurisdiction in relation to accreditation-related matters. This is because the National Law provides each of the 14 National Boards with the power to decide whether their accreditation functions are to be exercised by an external accreditation entity or by an internal committee established by the National Board. Eleven of the National Boards have formed agreements with external accreditation entities, leaving three National Boards with internal committees that exercise accreditation functions (the Aboriginal and Torres Strait Islander Health Practice Accreditation Committee, the Chinese Medicine Accreditation Committee, and the Medical Radiation Practice Accreditation Committee). As the NHPOPC has jurisdiction to investigate the administrative actions of the National Boards, the NHPOPC could investigate accreditation-related complaints made about the three accreditation committees. It is noted, however, that the NHPOPC has not received any complaints about these committees to date.

The NHPOPC has, however, received communication from persons wishing to make complaints about external accreditation entities. As these complaints are outside the jurisdiction of the NHPOPC, limited information has been retained by the office about these matters, which makes it difficult to produce accurate data about the number of approaches received each year. It is estimated, however, that 6 accreditation-related complaints have been received by the office of the NHPOPC so far this financial year (to April 2017).

Typically, the approaches to the office are from overseas trained practitioners who are seeking registration in Australia and must complete an assessment by the relevant accreditation authority in order to meet the eligibility requirements for registration. Concerns raised with the NHPOPC include delays in the assessment process, unfair outcomes, and the high cost of the assessment process.

The office of the NHPOPC has also received a small number of complaints from education providers regarding concerns about the accreditation of programs of study. A small number of approaches have also been made by students wishing to make complaints about education providers that deliver approved programs of study.
In general, NHPOPC staff refer persons wishing to make complaints about accreditation authorities back to the relevant accreditation authority’s internal complaint handling process. Depending on the particular circumstances of the complaint, the person may also be advised to contact the relevant National Board to raise their concerns. In general, however, there are limited options available to people wishing to make complaints about accreditation authorities, which has been a source of frustration to a number of people who have contacted the office of the NHPOPC.
Part 2: Response to Review’s consolidated list of issues

A wide range of important matters are raised in the Review’s consolidated list of issues. This submission will respond only to these issues where it is appropriate for the NHPOPC to do so, based on its experience in dealing with complaints about the administrative actions of AHPRA and the National Boards.

Response to issue (36)

Does the AHPRA/HPACF guidance document on the management of accreditation-related complaints resolve the perceived need for an external grievance/appeal mechanism?

Following the NRAS Review, AHPRA and the HPACF released a guidance document to clarify the roles, responsibilities and processes of the accreditation authorities in the management of complaints regarding accreditation functions, entitled ‘Management of complaints relating to accreditation functions under the National Law – a guidance document’ (the Guidance Document). In summary, this document provides that:

- Under the Quality Framework for the Accreditation Framework, an accreditation authority is required to have a published complaints process for managing issues about its work.
- The accreditation authority is required to report to the relevant National Board on any complaints, reviews and appeals received.
- The Guidance Document addresses ‘systemic complaints’ only (noting that the document envisages complaints generally fall into two categories, being:
  - A personal complaint (which could include concerns about a person’s interaction with an education provider, such as selection, recognition of prior learning, assessment outcomes)
  - A systemic complaint (which could signify a failure of a program or provider to meet accreditation standards)).
- Where a complaint directly relates to an accreditation function under the National Law, and/or is an issue that should be considered in the accreditation entity’s monitoring processes under the National Law, and/or relates to compliance with the Quality Framework, the accreditation authority will consider the complaint and respond to the complaint.
- It is also acknowledged, that an individual or organisation may wish to make a complaint about an accreditation process, and these complaints should be addressed to the accreditation authority (to be dealt with in accordance with the accreditation authority’s published complaints process).
- Where a complaint is made to a National Board or AHPRA about an accreditation process, the complaint will be referred to the accreditation authority and managed through the authority’s complaints, review and appeals processes.

While the Guidance Document provides some explanation of the processes applicable to accreditation-relation complaints, it tends to focus on situations where complaints are made to accreditation authorities about accredited programs of study or an education provider. The Guidance Document does not
comprehensively address all situations where complaints about accreditation-related matters may arise, particularly in relation to complaints about accreditation authorities themselves (for example, complaints about the process for assessment of overseas trained health practitioners seeking registration in Australia). In this regard, there is a lack of clarity about the management of the full range of accreditation-related complaints.

The Guidance Document does, however, refer to the published complaints process of each individual accreditation authority. A review of a sample of the websites of accreditation authorities reveals that the complaints policy of some authorities has either not been published or is difficult to locate. Where it is possible to locate an authority's complaints policy, in many cases this policy appears to apply only to the handling of systemic complaints regarding accredited education programs and/or an education provider. Again, there does not seem to be a clear explanation of the complaints pathways available to persons wishing to raise concerns about specific actions of an accreditation authority.

Putting this issue to one side, even if all accreditation authorities clearly communicated the process for the internal management of all accreditation-related complaints, this would not address concerns about the independence and transparency of these complaint mechanisms. On this point, it is noted that people who contact the NHPOPC with accreditation-related concerns regularly express frustration that there is not an external complaints entity with jurisdiction to investigate their concerns; the general feeling is that the involvement of an independent body, such as an Ombudsman, will ensure that their concerns are taken seriously and are investigated fairly.

Another concern associated with the internal management of concerns by accreditation authorities is cost. The NHPOPC’s experience in dealing with people who have a complaint about an accreditation process demonstrates that the cost involved in progressing a concern is a source of frustration, or alternatively, can be a barrier to proceeding. The following are two examples of the costs associated with current complaint/review/appeal processes offered by accreditation authorities:

1. The Australian Dental Council has an appeals procedure in place for those who believe that their performance in a practical examination has been adversely affected by the administrative process used. An application for review against procedures costs $950; and

2. An internal review by Australian Physiotherapy Council on grounds that the procedural requirements as specified by the Australian Physiotherapy Council were not followed in a significant manner or to a significant extent costs $550 (but is fully refunded if the complaint is upheld).

Based on these reasons, the NHPOPC does not consider that the Guidance Document sufficiently resolves the need for an external mechanism for the management of accreditation-related complaints.

It is noted, however, that a broad range of issues fall under the umbrella of ‘accreditation-related complaints’ and it is important that the process for the management of each category of complaint appropriately deals with the underlying concern being raised.

Based on the NHPOPC’s experience in dealing with complaints about the administrative actions of AHPRA and the National Boards, it does not appear that there is a clear and consistent mechanism to deal with complaints about the administrative actions of the accreditation authorities. The NHPOPC considers that the most appropriate complaint mechanism for these complaints has the following features:

- a clearly defined scope
• is independent from the accreditation authorities, AHPRA and the National Boards
• is clearly communicated to complainants (and information about the process is publicly available)
• is accessible to complainants (for example, cost-free).

Response to issue (37)

If an external grievance appeal process is to be considered:

• Is the National Health Practitioner Ombudsman the appropriate entity or are there alternatives?

• Should the scope of complaints encompass all accreditation functions as defined under the National Law, as well as fees and charges?

In general, the NHPOPC supports the idea of developing an external complaints process for managing accreditation-related complaints.

It is noted, however, the grievances associated with 'accreditation' may involve a range of issues, including:

• complaints about the conduct of an education provider (in delivering an accredited program of study)
• complaints about an accredited program of study (for example, the failure of a program to meet accreditation standards)
• complaints from education providers about the process for seeking accreditation of a program of study
• complaints about the development and review of accreditation standards
• complaints about the actions of an accreditation authority when monitoring of accredited programs of study
• complaints about the actions of an accreditation authority when assessing overseas trained health practitioners seeking registration in Australia.

The most appropriate way to manage each of these categories of complaints should be given individual consideration.

Based on the NHPOPC’s experience in dealing with complaints about the administrative actions of AHPRA and the National Boards, the NHPOPC considers that complaints about the administrative actions of accreditation authorities should be dealt with by the NHPOPC. Consistent with the work of Ombudsman offices globally, it would not be appropriate for the NHPOPC to conduct merits-based reviews of decisions of accreditation authorities (that is, to investigate the merits of a decision made by an accreditation authority regarding the accreditation of a program of study); other external grievance mechanisms should be considered for this role. It would, however, be appropriate for the NHPOPC to conduct investigations into the administrative actions of accreditation authorities (for example, investigating complaints about the administrative actions of accreditation authorities when assessing overseas trained health practitioners, including the administrative processes involved in conducting assessment examinations, and the reasonableness of communication with applicants).
In regards to complaints about fees and charges, it would only be appropriate for the NHPOPC to consider these complaints from the perspective of whether the administrative actions of the relevant accreditation authority in setting the relevant fee/charge was reasonable in all the circumstances, not the merits of the decision to set the fee/charge at a certain level.

There would be many benefits to widening the scope of the NHPOPC’s jurisdiction to include complaints concerning the administrative actions of the accreditation authorities, including:

- It is a more efficient use of resources to extend the NHPOPC’s remit, rather than establish a new external complaint handling mechanism.
- As people are already approaching the NHPOPC with concerns about accreditation authorities, it suggests that there is some feeling that the NHPOPC is the appropriate entity to handle these complaints.
- Accreditation is closely connected with practitioner registration and it therefore seems natural that the body that handles complaints about the administrative actions associated with practitioner registration, should also handle complaints about administrative actions associated with accreditation.
- As the NHPOPC currently has jurisdiction to investigate complaints about the administrative actions of the internal accreditation committees established by three of the National Boards, it creates a level of inconsistency if the NHPOPC does not have jurisdiction to investigate complaints about the administrative actions of the external accreditation authorities.
- The NHPOPC has experience in identifying systemic issues arising from the administrative actions of AHPRA and the National Boards, and has the skills to expand this role to include consideration of processes undertaken by accreditation authorities.

There is existing public respect for the independence, integrity and impartiality of Ombudsman offices in Australia. There are high levels of trust in the ‘Ombudsman’ brand and the NHPOPC is already recognised as an important accountability mechanism within the National Scheme.

It is also important to note that in the event that the NHPOPC was able to receive and consider accreditation-related complaints, the scope of the NHPOPC’s jurisdiction would be expanded and consideration would need to be given to the appropriate level of funding required for this role.