Submission to the review of the national registration and accreditation scheme for health professions

This submission addresses questions 9, 11 and 13 of the consolidated list of questions in the consultation paper prepared by the independent reviewer.

Executive summary

1. The current process of consultation between national Boards and Health Complaints Entities (HCEs) appears to breach sections 150(3)(b) and 150(4) of the Health Practitioner Regulation National Law. Consultation between the Board and the HCE ends at the point of agreeing which body will deal with a matter. There is no agreement or discussion about the action the Board is to take at the end of the investigation.

2. In practice, matters are not referred back to HCEs at the conclusion of Board investigations under sections 167(b)(ii) or health or performance assessments under section 177(b).

3. This contributes to the system failing to meet the expectations of complainants/notifiers.

4. The Memorandum of Understanding between AHPRA and the HCEs should be amended to make it clear that for example:
   a. an agreement under section 150(3)(a) that a Board is to investigate a matter should not be the end of consultations; and
   b. at the end of the investigation there should be a further consultation under sections 150(3)(b) and 150(4) about what action is proposed by each.

5. Boards should actively consider whether to refer matters back to HCEs at the conclusion of Board investigations under sections 167(b)(ii) or health or performance assessments under section 177(b) where it is apparent that a consumer grievance needs to be addressed.

6. This will improve the complainant/notifier experience without requiring legislative change.

Discussion

Under the national scheme HCEs operate a complaints service and are able to facilitate resolution of complaints by consumers about practitioners by facilitating conciliation meetings, apologies and compensation.

National Boards do not operate a complaints resolution service for individuals. Where the ongoing protection of the public does not require any action to be taken, no action can be taken by a Board.

The role of the Boards is to protect the public in the interests of the public generally, not in the interests of any individual. A person who makes a notification is in the role of a witness, not a party nor a client. They are not entitled to be heard when decisions are taken, nor to receive reasons for decisions, nor to appeal. As their rights are not being determined and no service is being provided to them, they are not entitled to receive natural justice.
It is not uncommon that a complainant continues to feel legitimately aggrieved by the events that have occurred in the past, anxious for some form of acknowledgement, and dissatisfied by a decision by a Board to take no further action. This grievance can be compounded by the inability of the Board to release much information under sections 161(3)(b) or 180(2).

**Legislation**

Section 150 of the National Law includes the following:

(3) The National Board and the health complaints entity must attempt to reach agreement about how the notification or complaint is to be dealt with, including—
(a) whether the Board is to deal with the notification or complaint, or part of the notification or complaint, or to decide to take no further action in relation to it; and
(b) if the Board is to deal with the notification or complaint or part of the notification or complaint, the action the Board is to take.

(4) If the National Board and the health complaints entity are not able to reach agreement on how the notification or complaint, or part of the notification or complaint, is to be dealt with, the most serious action proposed by either must be taken.

**Memorandum of understanding**

Clause 5.5.2 of the MOU between the Boards and the HCEs states:

"the most serious action to which section 150(4) refers is the most serious action proposed by either the National Agency or the HCE which is open, at that point in time, to the National Board in the case of a notification, and to the HCE in the case of a complaint; (b) the actions which will be open to a National Board at that point in time, listed in order of least serious action to most serious, are to -
(i) take no further action in relation to the notification (section 151);
(ii) refer the notification to the HCE (section 150(6));
(iii) investigate the notification (Part 8, Division 8); and
(iv) take immediate action (Part 8, Division 7)."

The MOU doesn’t explain why investigation is an “action”, or why consultation about the action to be taken would stop before a matter has been investigated. The consultation is really just agreeing about who will manage the matter, rather than agreeing about what action will be taken. Yet 150 (3) pretty clearly provides that agreement must be reached about both ‘dealing with’ the matter and about ‘action’. The two concepts are treated separately.

AHPRA staff have been expressly instructed that once it is agreed that AHPRA will investigate, the HCE is not consulted further. The HCE will be told what action is taken by the Board at the end of the matter, but the HCE is not consulted further and is not able to agree or disagree with the action taken or to propose a different action.

So whether the HCE agrees or not, post-investigation, is irrelevant. They are not consulted.

This interpretation of reaching agreement about ‘action’ appears difficult to sustain.

**Referral**

Under section 167 of the National Law, after considering an investigator's report a Board must decide either to take no further action in relation to the matter or:

(b) to do either or both of the following—

(i) take the action the Board considers necessary or appropriate under another Division;

(ii) refer the matter to another entity, including, for example, a health complaints entity, for investigation or other action.
In practice this does not occur. National Boards that decide to take action (or no action) against a practitioner following an investigation do not refer matters to HCEs for other action such as conciliation of remaining grievances.

Similarly under section 179(2) of the National Law after considering a health assessment report or a performance assessment report and the practitioner's submissions a Board must decide either to take no further action in relation to the matter or to:

(b) do either or both of the following—

(i) take the proposed relevant action or other relevant action;

(ii) refer the matter to another entity, including, for example, a health complaints entity, for investigation or other action.

Again, in practice this does not occur. National Boards that decide to take action (or no action) against a practitioner following a health or performance assessment do not refer matters to HCEs for other action such as conciliation of remaining grievances.

Summary

The consumer experience would be improved if HCEs remained in the loop when national Boards are investigating a matter. They should have the option to continue to facilitate resolution of consumer issue separately from the Board's resolution of public interest issues.

Boards should recognise the existence of continuing consumer issues that are separate from the public interest issues entrusted to the Boards, and should refer these back to HCEs when such issues exist.

This would not require any legislative change.

Yours faithfully,

DA Symons