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Committee Secretary
Senate Standing Committees on Community Affairs
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Dear Secretary

Inquiry into the Complaints mechanism administered under the Health Practitioner Regulation National Law

Avant welcomes the opportunity to provide input into this Inquiry.

Our submission is attached.

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

We would welcome the opportunity to elaborate on our submission if that would be of assistance to the Committee.

Yours sincerely

A handwritten signature in blue ink, appearing to read "Georgie", followed by a long horizontal flourish.

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About Avant

Avant Mutual Group Limited ("Avant") is Australia's leading medical defence organisation. It is a mutual organisation, owed by its members, and offers a range of insurance products and expert legal advice and assistance to over 70,000 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.



Avant submission on the Inquiry into the Complaints mechanism administered under the Health Practitioner Regulation National Law

Avant Mutual Group Limited (“Avant”) is Australia’s largest medical defence organisation and medical indemnity insurance provider. Avant assists and represents individual doctors in professional conduct complaints and disciplinary investigations where the Australian Health Practitioner Regulation Agency (“AHPRA”) and the National Boards have jurisdiction (the “national scheme”) under the Health Practitioner Regulation National Law (the “National Law”), as well as in the co-regulatory jurisdictions of Queensland and New South Wales. Avant also assists practitioners with complaints made and managed within the hospital and health service system, in both public and private hospitals.

Avant welcomes the opportunity to provide input into this Inquiry. In addition to representing members in individual notifications, Avant has participated in numerous reviews and inquiries into complaints systems within the national scheme and co-regulatory jurisdictions, and the operation of the national scheme more broadly.¹ We invite the Committee to refer to Avant’s submissions to previous inquiries.²

Key points

1. Avant supports the national scheme and a nationally consistent regulatory framework so that the public and the profession can be confident that there is consistency in their experience and outcomes wherever they are in Australia.
2. Avant does not support any further fragmentation of the national scheme. In our experience the establishment of the co-regulatory scheme in Queensland has not significantly improved the management of health complaints in that state.

¹ Senate Finance and Public Administration References Committee: *The administration of health practitioner registration by the Australian Health Practitioners Regulation Agency* 3 June 2011: http://www.aph.gov.au/Parliamentary_Business/Committees/Senate/Finance_and_Public_Administration/Completed_inquiries/2010-13/healthpractitionerregistration/report/index

Victorian Legislative Council, Legal and Social Issues Legislation Committee: *Inquiry into the Performance of the Australian Health Practitioner Regulation Agency* March 2014:

http://www.parliament.vic.gov.au/file_uploads/Final_version_AHPRA_report_30314_nnVxPmWJ.pdf; Australian

Health Ministers Advisory Council: *Independent Review of the National Registration and Accreditation Scheme for health professions* December 2014

<http://www.coaghealthcouncil.gov.au/DesktopModules/EasyDNNNews/DocumentDownload.ashx?>; NSW Ministry of Health “Report on the Statutory Review of the Health Practitioner Regulation National Law (NSW)”

<https://www.parliament.nsw.gov.au/lc/papers/DBAssets/tabledpaper/WebAttachments/10598/Final%20Report%20on%20the%20Statutory%20Review%20of%20the%20Health%20Practitioner%20Regulati.pdf>; Health, Communities, Disability Services and Domestic and Family Violence Prevention Committee “Inquiry into the performance of the Health Ombudsman’s functions pursuant to section 179 of the *Health Ombudsman Act 2013*”

http://www.aph.gov.au/Parliamentary_Business/Committees/Senate/Community_Affairs/MedicalComplaints45/Report

² Submission on Queensland Parliament Inquiry into the Health Ombudsman function 8 August 2016 available at <http://www.avant.org.au/WorkArea/DownloadAsset.aspx?id=>; Submission on NSW Health’s discussion paper on the Statutory Review of the Health Practitioner Regulation National Law (NSW) 17 August 2015 available at <http://www.avant.org.au/WorkArea/DownloadAsset.aspx?id=25769806232>; Submission to the Independent Review of the National Registration and Accreditation Scheme for Health Professions 10 October 2014 available at <http://www.avant.org.au/WorkArea/DownloadAsset.aspx?id=25769806248>

Submission to Victorian Legal and Social Issues Legislation Committee: *Inquiry into the Performance of the Australian Health Practitioner Regulation Agency* 4 March 2013 <http://www.avant.org.au/WorkArea/DownloadAsset.aspx?id=25769806266>.

3. Although there have been many improvements in the management of complaints since the national scheme was established and following various reviews and inquiries, there remains a perception by many in the profession that regulatory bodies take a punitive and adversarial approach to regulation of the profession.
4. Complaints processes can and do have a significant impact on the health and wellbeing of practitioners. This has a flow-on effect on the communities the practitioners serve and ultimately on patient safety.
5. Complaints can be made for improper and inappropriate purposes, without good intent and for personal reasons, rather than disclosing a risk to patient safety.
6. Avant believes that further improvements are needed to ensure that complaints handling processes are timely, fair and transparent. In an environment where complaints are increasing, this will be a significant issue in the future for regulators and other organisations that handle complaints against practitioners.

Avant's response to the terms of reference

a) the implementation of the current complaints system under the National Law, including the role of the Australian Health Practitioner Regulation Agency (AHPRA) and the National Boards

The history and structure of the national scheme is outlined in the Senate Community Affairs References Committee's November 2016 report on the medical complaints process in Australia.³

Avant supports the national scheme and supports a national regulatory framework as the best way of providing a consistent approach and efficient and fair processes in managing medical complaints. Overcoming the previously fragmented approach to regulating practitioners is a key benefit of the national scheme.

The national scheme has been the subject of several reviews since its establishment in 2010.⁴ In NSW, the complaints handling provisions of the NSW version of National Law have been the subject of a statutory review, and in Queensland the performance of the Office of the Health Ombudsman ("OHO") has recently been reviewed by a parliamentary committee.⁵ Avant made submissions to these reviews.⁶

Avant does not support further fragmentation of the complaints handling system by the adoption of additional co-regulatory models in Australia. This is particularly in light of our experience following the introduction of the OHO in Queensland in 2013, which has resulted in duplication of processes, and delays and extended timeframes in the management of complaints in that jurisdiction. The key points from Avant's submission to the Queensland parliamentary committee Inquiry in 2016 are attached at appendix A.

³ Community Affairs References Committee: *Medical complaints process in Australia* November 2016 pp 4-8
http://www.aph.gov.au/Parliamentary_Business/Committees/Senate/Community_Affairs/MedicalComplaints45/Report

⁴ See footnote 1 above.

⁵ See footnote 1 above.

⁶ See footnote 2 above.

Since the enactment of the National Law and following the reviews referred to above, Avant has seen improvements in the way in which AHPRA and the Medical Board of Australia handle complaints and notifications against doctors. These improvements include:

- Better triaging and more timely resolution of less serious matters
- Improved consistency through AHPRA's restrictions library (standard wording for conditions)
- Improved correspondence to respondents that recognises the stress associated with being the respondent to a complaint
- Review of performance assessment processes.

The NSW co-regulatory system is more mature than the national scheme, and has well-defined processes and procedures for managing health, conduct and performance complaints against doctors. Over the years, we have seen the Health Care Complaints Commission and Medical Council of NSW take steps to improve their complaints handling and other regulatory processes.

Nevertheless, Avant believes that there remain areas for ongoing improvement for all medical regulators. Overall we are seeing an increasing number of complaints and the challenge for regulators will be how to manage these complaints in a fair and transparent matter while maintaining the confidence of the public and the profession.

The impact of the complaints process on practitioners can be significant. This impact may occur regardless of the outcome of a complaint and can be compounded by delays and inefficiencies in the complaint handling process. In our experience, even minor matters can have a devastating effect on the practitioners involved, their professional reputation, their practice and their families. If a complaint is made by a peer or a colleague, the shame and humiliation associated with the complaint is magnified.⁷ The adverse effects of complaints processes cannot and must not be underestimated.

In a welcome development, the Medical Board of Australia is funding doctors health advisory services to provide services to assist doctors with personal and health problems including where they relate to a complaint.

b) whether the existing regulatory framework, established by the National Law, contains adequate provision for addressing medical complaints

The answer to this question largely depends upon the perspective of the party to the notification. This submission is from the perspective of our members and despite the process improvements noted above, many continue to express dissatisfaction with the handling of complaints.

⁷ See further Georgie Haysom "Vexed problem of improper complaints" *Medical Journal of Australia Insight* 13 February 2017 <http://www.doctorportal.com.au/mjainsight/2017/5/vexed-problem-of-improper-complaints/> and 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

In our experience, many of our members feel the approach of medical regulators is too adversarial with the doctor presumed to be at fault and often subject to an outcome which they feel is unreasonable, unduly restrictive and disproportionate to the risk to be averted. The investigation process is often too lengthy, taking our members away from their primary role, caring for their patients, and causing them additional stress and health problems. Many in the profession feel that a more punitive approach is adopted where the issue has attracted adverse media interest.

Ongoing areas for improvement are:

- long time frames for some investigations
- timely provision of all relevant information to doctors in relation to their complaints
- consistency of processes and outcomes
- parity in timeframes.

Many of these concerns with the system were raised in Avant's submission to the 2014 independent review of the national scheme. Rather than repeat the contents of that submission, an extract outlining Avant's particular concerns and suggested solutions is attached at appendix B.

c) the roles of AHPRA, the National Boards and professional organisations, such as the various Colleges, in addressing concerns within the medical profession with the complaints process

Overall, regulators are willing to engage with stakeholders such as Avant to discuss our members' experience of the complaints process and to consider changes to improve systems and processes for handling complaints.⁸

AHPRA is undertaking a number of pilots, some with Avant's involvement, that aim to improve aspects of the complaints handling process. Avant has regular discussions with AHPRA offices in each state, and with the Health Care Complaints Commission and NSW Medical Council.

AHPRA, the National Boards and complaints entities are not the only organisations that deal with medical complaints. Organisations that engage doctors, such as **hospitals and health services**, play a key role in dealing with complaints against doctors. In our experience, many of the concerns that have been levelled at regulators' management of complaints apply equally to the way in which hospitals and health services manage complaints against doctors.

Concerns about the way in which hospitals and health services deal with medical complaints relate primarily to denial of natural justice and procedural fairness, including:

⁸ Although our experience in Queensland has been slightly different: see further our submission to the Queensland inquiry at footnote 2 above.

- use of experts who are not independent or where there is an apprehension of bias
- failure to provide relevant information
- suspension of clinical privileges without a proper investigation
- refusing to lift a suspension despite supportive expert opinion.

Often the only avenue for a doctor to remedy these defects in process is to bring legal action against the organisation.⁹

d) the adequacy of the relationships between those bodies responsible for handling complaints

Avant refers the Committee to its submission regarding the performance of the OHO in Queensland noted above. Avant does not believe the co-regulatory scheme operating in Queensland has improved the management of health complaints in that state. There is duplication of processes between AHPRA and the OHO, timeliness issues, and a lack of clinical input into complaints (see key points at appendix A).

We understand that in the AHPRA jurisdictions, AHPRA/the National Boards have agreements with health complaints entities about how to manage complaints.

e) whether amendments to the National Law, in relation to the complaints handling process, are required

Several amendments to the National Law were recommended following the 2014 independent review of the national scheme. These amendments are currently being worked on as part of the NRAS Review Implementation Project under the auspices of the COAG Health Council. We understand that the first round of amendments are due to be introduced into the Queensland parliament later this year.

A second round of legislative reforms is also about to commence. In our view further amendments are required to improve complaints handling processes including:

- a right of review from an immediate action decision without the need to lodge an appeal in a tribunal
- allowing an appeal from a caution
- allowing regulators a discretion to decline to deal with a complaint or to take no further action where a notifier has not raised it with the respondent or an appropriate entity such as the respondent's employer
- the national adoption of the West Australian health practitioner exemption from mandatory reporting
- a statutory requirement that investigations be completed within 12 months, and that if the regulator requires an extension of time it must make an application for an extension to a tribunal.

⁹ See for example *Vega Vega v Hoyle* [2015] QSC 111 (5 May 2015) and *Wirth v Mackay Hospital and Health Service & Anor* [2016] QSC 39 (7 March 2016)

f) other improvements that could assist in a fairer, quicker and more effective medical complaints process.

One of the six key objectives of the national scheme is the protection of the public. Patients, the health workforce, including professional Colleges, hospitals and health services and medical regulators all play a vital role in ensuring public safety.

Medical complaints systems are important tools in ensuring patient safety. The future challenge for regulators is dealing with medical complaints fairly in an environment of high patient expectations, high media interest in medical incidents and an increasing number of complaints.

All parties, in particular patients, benefit from a complaints system which is effective and sustainable and, in order to facilitate such a system, all parties should be encouraged to play a role and work collaboratively to improve the system so that the confidence of the public and health practitioners can be maintained.

Avant recommends that:

1. there be no further fragmentation of the national scheme
2. regulators continue to engage with stakeholders and explore ways to improve their complaints handling processes at an operational level, particularly in the areas noted in section (b) above
3. the National Law be amended as outlined in section (e) above
4. hospitals and health services improve the way in which they manage complaints against practitioners to ensure that the rules of procedural fairness and natural justice are followed.

Avant contact details

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

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APPENDIX A

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 DATED 8 AUGUST 2016

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.
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.

APPENDIX B

Extract from Avant's submission to the Review of the National Registration and Accreditation Scheme for Health Professions dated 10 October 2014

Key concerns and proposed solutions

Issue	Comment	Proposed solution
Lack of timely notice to practitioner of notification	It is not uncommon for a practitioner to be advised of a notification and invited to provide a response a number of weeks after the notification was first received by AHPRA.	Notice of the complaint and a copy of the notification should be provided to the practitioner within 14 days of receipt by AHPRA.
Lack of parity in timeframes	We have been involved in cases where AHPRA has had months to obtain expert opinion and undertake their investigation but the practitioner is only given 30 days to respond.	AHPRA and the practitioner should be given equal time to prepare their material – if AHPRA has 30 days, the practitioner should have 30 days. This should be included within the timeliness KPIs.
Delays in completing investigations	In states such as Queensland a significant proportion of investigations are still taking an inordinate period of time to be completed. The worst period of time was 12 years from receipt of the notification to closure of the file. That case was exceptional. Nevertheless it is not uncommon to have 2 to 3 years or more from the start to the end of a matter.	The majority of investigations should be completed within 6 months, and more complex matters within 12 months, there may be some exceptional cases where further time is required. There should be a legislative requirement for investigations to be completed within 12 months

	<p>Current financial year reporting in AHPRA's annual report means that it is difficult to assess the performance of AHPRA over the life of a notification.</p> <p>Avant agrees with AHPRA's KPI that 80% of investigations be completed within 6 months. (See further question 1 above)</p>	<p>with the possibility of an extension for 3 months by consent and a further 3 months with approval of the tribunal.</p> <p>There should be an accompanying KPI that 80% of investigations be completed within 6 months.</p> <p>Avant agrees that AHPRA and the National Boards should be required to regularly report on compliance with KPIs and statutory timeframes. We recommend monthly reporting.</p>
<p>Failure to provide progress updates as required by the National Law, including timely notice to respondents of decisions that have been made</p>	<p>The statutory requirement to provide progress updates is routinely not adhered to. On occasions where notice is given it is given by AHPRA in the form of short correspondence which typically says:</p> <p>'The investigation is continuing. The investigation will continue to be conducted in a timely way, guided by the nature and complexity of the issues being investigated'.</p>	<p>Notices should provide more substantive information about the progress of an investigation and should be provided at regular intervals.</p> <p>Notice of decisions made by the National Board and/or AHPRA (whether assessment, investigation, health assessment or performance assessment etc) should be provided within 7 days of the decision being made.</p>
<p>No provision in the National Law for the practitioner to have a right of review (as</p>	<p>There have been cases where new evidence or information has arisen that is</p>	<p>Practitioners should have a right to review a National Board's decision, to be</p>

<p>opposed to a right of appeal) once a National Board has made a decision following receipt of an investigation report</p>	<p>relevant to a National Board's decision, especially a decision to prosecute in a tribunal or to proceed to a panel hearing. There is currently no statutory right of review so a National Board has no power to reconsider its decision in light of new material. Permitting a right of review has the potential to save the costs of proceeding to a tribunal or panel.</p>	<p>exercised within 14 days of receipt of the National Board's decision.</p> <p>The National Board should then have 30 days to consider and make a further decision on the respondent's request for review.</p> <p>The National Board should notify the respondent of the outcome of the review within 7 days of its decision.</p>
<p>Delay between time a National Board decides to prosecute a matter in the tribunal and lodging the application</p>	<p>In one instance the gap was 3 days short of 12 months. In another matter the delay was just under 15 months.</p>	<p>The period between a decision to prosecute and papers being filed in the tribunal should be no more than 30 days.</p>
<p>Delays in tribunal/panel process</p>	<p>Avant agrees with AHPRA's KPIs regarding panel hearings and tribunal hearings (100% completed within 6 and 12 months respectively)</p>	<p>In addition to these KPIs, Avant recommends a KPI requiring 80% of matters compliance with a tribunal's directions. The National Board should formally adopt model litigant principles when litigating disciplinary matters.</p>