

Executive summary

Review of confidentiality safeguards for people making notifications about health practitioners

In late 2018 the Australian Health Practitioner Regulation Agency (Ahpra) requested that the National Health Practitioner Ombudsman and Privacy Commissioner conduct an independent review of the confidentiality safeguards for people making notifications about registered health practitioners.

The request was made after the conviction of a general practitioner, Dr Brian Holder, for the attempted murder of a pharmacist, Ms Kelly Akehurst. Before the attack, Ahpra informed Dr Holder that Ms Akehurst had made a notification about his prescribing practices and it is thought that the notification was the motive for the crime.¹

The primary issue considered by this review is whether Ahpra's handling of notifications adequately safeguards the confidentiality of notifiers. In particular, the review has examined Ahpra's current management of confidential and anonymous notifications and assessed whether any significant changes are warranted in order to protect notifiers from risks of harm.

Context

Ahpra works with the 15 National Boards to help protect the public by regulating registered health practitioners. Ahpra and the National Boards rely on others (patients, colleagues and employers) to inform them of concerns about the health, conduct or performance of practitioners. Notifications are a key source of information for National Boards when considering whether action needs to be taken to keep the public safe. This system works most effectively when people have confidence that any notification they make in good faith will be treated fairly and that they can control how their personal information will be used during the notifications process.

However, the handling of notifications must also be fair to those practitioners who have had a notification made about them. Practitioners need to know the nature of the allegations raised in a notification so they can respond. In some circumstances, it may be essential for the practitioner to know the identity of the notifier in order to understand the allegations that have been made. Fairness for practitioners is particularly important because any notification has the potential to affect a practitioner's livelihood.

The issue of what information is disclosed to practitioners during the notifications process can therefore be described as a balancing act between protecting the confidentiality of notifiers and ensuring procedural fairness for practitioners.

Current practice

The current practice of Ahpra and the National Boards in most cases is to provide practitioners with a copy of the notification that has been made about them, including information that identifies the notifier. This practice may expose the notifier to the risk (albeit small) of being harmed, threatened, intimidated, harassed or coerced by the practitioner.

The risk of harm to a notifier is reduced if the practitioner is not informed of the notifier's identity. There are existing ways in which a person can make a notification without having their identity disclosed to the practitioner. In a confidential notification, the identity of the notifier is known to Ahpra but is withheld from the practitioner to the greatest extent possible. Alternatively, an anonymous notifier does not identify themselves to Ahpra, which means their identity cannot be shared with the practitioner.

¹ Letter from The Hon. Justice Vanstone of the Supreme Court of South Australia to Martin Fletcher, chief executive officer of Ahpra, dated 26 November 2018.



Comparison with other regulators

In general, Ahpra's current approach is consistent with the practices of other regulators. Every organisation that was considered as part of this review seeks to provide the practitioner with all known information about a complaint that has been made, including the name of the person making the complaint.

Comparative organisations also seek to respect the privacy of complainants by receiving confidential and anonymous complaints. While some entities are guided by the wishes of the complainant, others take the approach that a request for confidentiality is only one consideration when deciding how to handle a matter. Some organisations have a general policy of not accepting anonymous complaints. In reality, however, anonymous complaints are progressed if they raise a high level of concern or it is otherwise thought to be in the public interest to do so.

Importantly, in many other jurisdictions it is an offence to harm or intimidate a person who has made a complaint about a practitioner. There is no such offence under the legislation governing Ahpra and the National Boards.

Conclusions

Sharing the identity of notifiers with practitioners

It is clearly preferable for Ahpra to share with the relevant practitioner all information it holds about a notification, including the identity of the notifier (if known). This means the practitioner is given the best opportunity to understand the notification and to respond, in detail, to the allegations that have been made.

It also simplifies the way Ahpra manages notifications. Anonymous notifications can be difficult for Ahpra to assess and investigate because it is typically unable to contact the notifier to ask clarifying questions about the matter. It is also a challenging task to determine what information should be withheld from the practitioner when managing a confidential notification. Further, even when Ahpra has withheld information from the practitioner, it cannot provide a guarantee to the notifier that their confidentiality will be maintained in the future. The process of reviewing and redacting confidential information from a notification can also be time consuming and may not always be an efficient use of Ahpra's resources.

Confidential and anonymous notifications

While it is ideal if the notifier's identity is disclosed to the practitioner, there are circumstances in which it may not be appropriate or necessary to do so. Ahpra's current practice of accepting confidential and anonymous notifications serves an important purpose. The primary objective of the National Registration and Accreditation Scheme for health practitioners is to protect the public. It is clearly in the public interest for Ahpra and the National Boards to be made aware of concerns about registered health practitioners, regardless of the source of those concerns or whether any additional steps need to be taken to keep the notifier's identity confidential.

There are many valid reasons why it may be necessary to withhold the identity of a notifier from a practitioner, including to:

- mitigate risks to the health and safety of the notifier, or risks of intimidation or harassment
- help preserve the notifier's ongoing relationship with the practitioner (for example, where the notifier and practitioner are colleagues in the same workplace)
- remove perceived barriers to reporting concerns about practitioners because people may be unwilling to make a notification unless confidentiality or anonymity is offered.

Further, the Australian Privacy Principles make it clear that individuals must have the option of not identifying themselves when interacting with entities such as Ahpra and the National Boards.

However, the benefits of confidential and anonymous notifications must be weighed against the potential problems. During this review it was often contended by interviewees that accepting confidential and anonymous notifications is inconsistent with the principle of procedural fairness for practitioners. This was largely due to perceptions that:

- it is difficult to meaningfully respond to confidential and anonymous notifications due to limited information being shared with practitioners about the allegations that have been made
- practitioners are more likely to have a negative experience and feel stressed when responding to confidential and anonymous notifications
- accepting confidential and anonymous notifications will make it easier for people to make vexatious notifications about practitioners.

It is acknowledged that practitioners are put in the best position to respond to a notification if all known information is shared with them. However, relevant case law indicates it is not inconsistent with the principle of procedural fairness for a decision-maker to withhold the identity of the notifier for reasons of confidentiality, so long as the substance of the information is disclosed.²

Many practitioners find the notifications process stressful, and this feeling may be intensified when the identity of the notifier is unknown. However, the small number of interviews conducted with practitioners and defence organisations for health practitioners during this review demonstrated an understanding that Ahpra and the National Boards have a responsibility to deal with all notifications, regardless of the source. Some practitioners were unconcerned with the idea of not knowing the notifier's identity and were more focused on improvements that could be made to Ahpra's timeliness and communication during the notifications process. It is also relevant that recent data shows Ahpra did not record any formal complaints from practitioners between 2017 and 2018 where concerns were specifically raised about the fairness of being asked to respond to a confidential or anonymous notification.³

The available evidence does not support the argument that vexatious notifications about health practitioners are widespread.⁴ It has been said that 'measures intended to prevent vexatious complaints may pose a net risk to public safety, by inadvertently raising the barriers faced by legitimate complainants'.⁵ Caution should therefore be exercised before limiting the use of confidential or anonymous notifications based on concerns about vexatious notifications.

Taking these factors into account, there are sound reasons for accepting confidential and anonymous notifications. On balance, Ahpra's current approach offers reasonable safeguards for notifiers. However, it is recommended that some improvements be made to the handling of notifications in light of the findings of this review.

Overview of recommendations

Implementing a new step in the notifications process to safeguard the confidentiality of notifiers

It is recommended that Ahpra introduces a new step in the notifications process focused on proactively giving consideration to safeguarding the confidentiality of the notifier. The rationale for this recommendation is that Ahpra could mitigate risks of harm to notifiers by assessing on a case-by-case basis how the notifier's personal information will be used and whether it is necessary to disclose the notifier's identity to the practitioner in the first instance.

It is not suggested that Ahpra withholds the notifier's identity from the practitioner in every matter; it would not be possible for practitioners to respond to many allegations made by patients without knowing which patient the matter relates to. However, there may be a small group of notifications where the notifier's identity is not fundamentally linked to the allegations and it is not necessary for the practitioner to know the notifier's identity to effectively respond to the allegations. The situation involving Ms Akehurst, a pharmacist raising concerns about a medical practitioner's prescribing practices, is a perfect example of where this approach might apply.

Improvements to the administrative management of confidential and anonymous notifications

Ahpra's success in safeguarding the confidentiality of notifiers is heavily dependent on the strength of the policies, processes and staff training that support its work in this area. There are gaps in the current framework that should be addressed.

It is recommended that Ahpra develops comprehensive guidance for its staff regarding privacy considerations for notifiers, including the ability to make confidential and anonymous notifications. A review of Ahpra's privacy policy and collection statement relevant to notifications is needed, and these documents should be updated to incorporate clear information about confidential and anonymous notifications.

2 *Coppa v. Medical Board of Australia* [2014] NTSC 48; *Applicant VEAL of 2002 v. Minister for Immigration and Multicultural and Indigenous Affairs* [2005] HCA 72.

3 Data provided by Ahpra in relation to formal complaints made to it between 1 January 2017 and 31 December 2018.

4 Morris J, Canaway R, Bismark M (The University of Melbourne, Melbourne School of Population and Global Health, Centre for Health Policy), *Summary report of a literature review prepared for the Australian Health Practitioner Regulation Agency: Reducing, identifying and managing vexatious complaints*, November 2017.

5 *Ibid.*, p. 5.

Ahpra should also improve how confidential and anonymous notifications are recorded in its electronic case management system (Pivotal). Where possible, Ahpra should automate processes for managing confidential and anonymous notifications, including by introducing system-enabled prompts to remind staff of a notifier's confidential status when working on the file.

Improvements to communication about privacy and confidentiality for notifiers

It is recommended that Ahpra review all existing communications in relation to notifications and make necessary amendments to ensure consistency in messaging about how a notifier's personal information will be used and disclosed during the notifications process. Ideally, these communications should be supported by tailored verbal discussions between Ahpra staff and notifiers (noting this will often be impossible in cases of anonymous notifications).

In recognition of the concern that anonymous notifications sometimes lack adequate information, Ahpra should provide clearer guidance to notifiers about what information they should provide to ensure their notification can be understood and comprehensively assessed. This is necessary because Ahpra is often unable to obtain clarifying information from an anonymous notifier after the notification has been made.

Consequences for practitioners who harm, threaten, intimidate, harass or coerce notifiers

It is highly important that Ahpra and the National Boards take a strong stance in relation to practitioners acting inappropriately towards notifiers. It is recommended that Ahpra develops guidance for staff regarding this serious issue to ensure any incidents are responded to promptly and appropriately.

Ideally, Ahpra should also seek an amendment to the Health Practitioner Regulation National Law (in force in each state and territory of Australia) to make it an offence to harm, threaten, intimidate, harass or coerce a notifier.

Managing the risk of vexatious notifications

While there is evidence that vexatious notifications are rare, it is recommended that Ahpra and the National Boards develop and publish a framework for identifying and dealing with this type of notification. This framework should assist in addressing concerns about the ease of making vexatious notifications on a confidential or anonymous basis.

Recommendations

It is recommended that:

Consideration of confidentiality safeguards for notifiers

1. Ahpra considers possible confidentiality safeguards for the notifier when assessing each new notification it receives. This could include assessing whether it is necessary to disclose the notifier's identity to the practitioner.

Improvements to the administrative management of confidential and anonymous notifications

2. Ahpra reviews its privacy policy and collection statement in relation to notifications to ensure these documents are up to date and contain comprehensive information regarding the use and disclosure of personal information, particularly in cases of confidential and anonymous notifications.
3. Ahpra strengthens guidance for its staff regarding confidentiality safeguards for notifiers. Topics should include:
 - a. what information should be redacted from a confidential notification to protect a notifier's identity
 - b. when Ahpra may be compelled to disclose identifying information about a notifier
 - c. when a practitioner will not be provided with notice of the receipt of a notification, or the commencement of an investigation, due to a reasonable belief about a risk to health and safety, or a risk of intimidation or harassment.
4. Ahpra improves how confidential and anonymous notifications are recorded in its electronic case management system (Pivotal).
5. Where possible, Ahpra automates processes for managing confidential and anonymous notifications, including by introducing system-enabled prompts to remind staff of a notifier's confidential status when working on files.

Improvements to communication about privacy and confidentiality for notifiers

6. Ahpra reviews all existing communications about notifications and makes necessary amendments to ensure consistency in messaging about a notifier's privacy. This messaging should be clear and prominent, and should include:
 - a. clarity about the meaning of personal information using consistent terminology
 - b. pathways for people to make confidential or anonymous notifications and an explanation of how these notifications will be dealt with
 - c. guidance about what information notifiers should include in a notification, particularly anonymous notifications
 - d. warnings about circumstances in which Ahpra may be compelled to disclose identifying information about a notifier.
7. Ahpra requires staff to have a verbal discussion with notifiers about how their personal information will be used and disclosed during the notifications process.

Consequences for practitioners who harm, threaten, intimidate, harass or coerce notifiers

8. Ahpra develops guidance for its staff regarding how to deal with information that suggests a practitioner has sought to harm, threaten, intimidate, harass or coerce a notifier.
9. Ahpra seeks an amendment to the Health Practitioner Regulation National Law to make it an offence for a registered health practitioner to harm, threaten, intimidate, harass or coerce a notifier.

Managing the risk of vexatious notifications

10. Ahpra develops and publishes a framework for identifying and dealing with vexatious notifications.

Acknowledgement of Country

The office of the National Health Practitioner Ombudsman and Privacy Commissioner acknowledges the Wurundjeri people as the traditional custodians of the land on which our office is located. We would also like to acknowledge the Aboriginal and Torres Strait Islander peoples, who are the traditional custodians of the lands where our services extend.

We pay our respects to Elders, past, present and emerging across Australia and to those who may be reading this report. We value and are committed to honouring Aboriginal and Torres Strait Islander peoples' rich contribution and unique and continuing connection to the land, water and community.

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