C O R R E C T E D V E R S I O N

STANDING COMMITTEE ON LEGAL AND SOCIAL ISSUES

LEGISLATION COMMITTEE

Inquiry into the performance of the Australian Health Practitioner Regulation Agency

Melbourne — 9 August 2013

Members

Ms G. Crozier	Ms J. Mikakos
Mr N. Elasmar	Mr D. O'Brien
Ms C. Hartland	Mrs I. Peulich
Mr A. Elsbury	Mr M. Viney

Participating members

Mr S. Leane	Mr S. Ramsay

Chair: Ms G. Crozier
Deputy Chair: Mr M. Viney

Staff

Secretary: Mr R. Willis

Witnesses

Ms G. Haysom, head of advocacy,

Mr J. Arranga, head of claims (Victoria, Tasmania), and

Ms K. Hughes, head of practice (Victoria, Tasmania), Avant Law, Avant Mutual Group Limited.

The CHAIR — Good afternoon. I would like to welcome Ms Georgie Haysom, head of advocacy, Ms Kate Hughes, head of practice, and Mr John Arranga, head of claims, from Avant Mutual Group. Welcome to all of you, and thank you very much for being before us this afternoon. All evidence taken at this hearing is protected by parliamentary privilege as provided by the Constitution Act 1975 and further subject to the provisions of the Legislative Council standing orders. All evidence is being recorded and you will be provided with proof versions of the transcript within the next week. Transcripts will ultimately be made public and posted on the committee website. I now invite you to proceed with a brief opening statement, which will be followed by questions from committee members. Thank you for being before us this afternoon and for providing a written submission.

Ms HAYSOM — Thank you to the committee for the opportunity to give some evidence today. Just by way of introduction, Avant is the largest medical indemnity organisation in Australia. We represent medical practitioners, allied health practitioners and students around Australia, and we have a significant presence in Victoria. Our Victorian office provides assistance to our members in complaints handling of matters that are dealt with by AHPRA, the health services commission and the Victorian board of the Medical Board of Australia. We bring the perspective of a national organisation that deals with complaints around the country, but with a strong local presence in Victoria.

Avant supports national registration and the national registration scheme primarily for the reasons of mobility of the workforce and national consistency. As you would be aware from other people's evidence, this is a world-leading scheme in the health regulatory field. We would not support Victoria withdrawing from the national scheme. In our view a national scheme provides better support to practitioners and also better protection for the public, with a consistency of approach in all aspects, including registration, accreditation and complaints handling.

The focus of our submissions is squarely on bringing to the attention of the committee matters that we see as concerns in the way in which complaints are handled. Complaints have a significant impact on health practitioners, even if they are dealt with in a quick, timely and fair manner but particularly where there are delays, administrative difficulties, lack of procedural fairness and lack of transparency that creates further anxiety and distress on the part of the practitioners we represent. Just on that issue, we welcome the announcement that the medical board will be funding external health programs in the future; we are very supportive of that.

We also agree with the concerns expressed by some of the other people who have given evidence and made submissions to the committee about the requirement that treating doctors report health practitioner patients under a mandatory reporting obligation. That can seriously inhibit health practitioners obtaining the care they need. We agree with the position that has been expressed by others here — that Victoria adopt an exemption from mandatory reporting requirements for treating health practitioners, as occurs in the Western Australian legislation.

In relation to complaints handling, as a national organisation that provides legal assistance to our members around the country we are really concerned about ensuring national consistency in complaints handling, transparency of complaints handling, procedural fairness and a timely investigation of complaints. It is important to emphasise that the majority of complaints that AHPRA deals with are dealt with in a fair way, but we think that further improvements can be made. We think that better processes will aid in the efficiency of AHPRA and the timely and fair dealing of complaints, and that will be better for practitioners and also for notifiers.

We have a good working relationship with AHPRA and the Medical Board of Australia. We have had some productive discussions with them about how some of the issues we have raised in our submissions can be dealt with in a better way in the future. We are really keen to continue working productively with them to try to solve some of these problems.

The CHAIR — Thank you very much. Do Ms Hughes or Mr Arranga have any comments they would like to make to the committee?

Mr ARRANGA — Not at this stage.

The CHAIR — Okay. Thank you. You raised an issue in relation to the complaints process. In your written submission you talk about the delays in administrative errors that your members are experiencing and the denial of natural justice. Obviously complaints in the area of health can be very complex. Not every complaint can be resolved within a short period of time. We have been hearing that there are very long and unreasonable delays in enabling practitioners and notifiers to have their complaints heard. From the perspective of your membership, which is a very large base, you are obviously hearing about a lot of these issues. Do you have a view about a reasonable length of time? Is there some process? You talk about a timely process. What is a timely process?

Ms HAYSOM — Yes. Of course it will depend upon the complexity of the complaint. Clearly matters that are more complex will require more time. We would say that six months to a year would be the outside limit for complaints. Some of the examples we gave in our submission, where it took two years or more to deal with complaints, were unfair to everybody. John or Kate, do you have any views about timing?

Mr ARRANGA — I think it is very difficult to put either a lower or outer limit on this. We talk about timeliness in the context of handling what can be complex complaints sometimes involving multiple parties, where every party is interested in protecting its interests as well as providing information. Personally I do not believe, nor is it Avant's view, that everything should be done in 24 or 28 days or in six months. What is important is that where there are delays, if there are complexities in obtaining relevant information to make a decision, people be informed about that. If people understand that the decision is waiting for further information and where that information is coming from, then steps can be taken to alleviate the concerns the member might have and also to perhaps facilitate that information.

We are concerned about the extreme delays we have seen — one would hope that any investigation could be completed within 12 months — but more importantly about where there is just a lack of knowledge as to why something has taken longer. I would not want to put a specific date — everything must be done in 60 days — because not everything can be done in 60 days.

The CHAIR — Thank you very much for that answer. The committee appreciates the complexities involved with some of these cases, but there is a consistent theme in the evidence we have received about unreasonable time. Is it because there are inefficiencies within the AHPRA scheme itself? Many of the witnesses before us have seen an increase in their fees for which they are not seeing a benefit. One of those benefits is reasonable natural justice, as you describe. I understand that you cannot put a figure on it, but you have a number of members who are dissatisfied. Is that fair to say?

Ms HAYSOM — Yes, that is right.

The CHAIR — Thank you.

Mr ELSBURY — In relation to the gathering of evidence to provide people with an opportunity to seek out the information that is required for the investigation to be fulsome, we heard evidence today from somebody who has made a complaint and felt that information was excluded and ignored and that they had more to provide to AHPRA in that investigation. Even though it took a considerable amount of time, there was only contact between the doctor involved and AHPRA. Would you see it being normal practice for AHPRA to undertake a full and fulsome investigation?

Mr ARRANGA — It is a bit difficult for us to talk about what AHPRA should do, but in any investigation, if you look at the AHPRA process or the medical board process, we are often unaware of the initial investigation. We get notified that a complaint has been made within the statutory limit and we are then told that AHPRA will investigate and determine what the issues are. The point in time at which we generally become involved is once AHPRA has identified that there are issues that a member is required to address.

We would assume that by that point AHPRA has obtained what information it requires from the complainant, or the notifier — I will use the right language; the notifier — and from that information has determined what are the issues, remembering that, obviously, in any health treatment there may be various issues of concern, not all of which will fall under AHPRA's purview. Not everything that a patient may be unhappy about constitutes either a conduct or performance issue; some of them are things that might be better dealt with in another statutory body or in a different way. AHPRA, I think, in fairness, is attempting to address the issues that it is required to address. As to whether or not it has sufficient contact with the notifier, that is not really something we can comment on.

Mr ELSBURY — Conversely, then, from the point of view of your members, once there had been a complaint made against them, have there been instances where they have felt that insufficient investigation has been undertaken and a decision made — even though extended in time frame — prematurely, before all evidence could be provided?

Ms HUGHES — Yes, and a consistent complaint that we have as lawyers is about not having sufficient access to documentation. Perhaps to give an example, when a matter comes to a panel, an informal hearing, we are provided with the brief — the briefing papers that are provided to the panel members — and it may refer to material that is not contained within those briefing papers, so we have to go and ask for it. We will be told, 'Well, we've given you what we think is relevant', but we do not know if it is relevant until we actually get to see it. That is — —

Mr ELSBURY — Being a legal practitioner, that would be very frustrating.

Ms HUGHES — It is, yes.

Mr O'BRIEN — I was just going to explore the issue of the timeliness. I have read your submission, in which you have set out various examples, and thank you for that. Is it something that could perhaps be assisted by a form of streamlined management and notification of different types of complaints? I recall that, in another area, VCAT had backlogs. I used to work in that area, and one of the presidents brought in a thing called Operation Jaguar, where he streamlined various different types of complaints. It was six months for your average VCAT referral — short cases for urgencies and longer cases for more complex matters, depending on the nature of the thing.

I note on page 4 of your submission that you refer to problems with doctors being expected to provide material within a 21 to 28-day response. I presume you mean there is no countervailing time limit on that. Is that something that we should look at, in terms of breaking down the types of time lines and providing some expectation based on different types of complaints? Or is that something not useful? Because if you just say, 'Everything is complicated and everything is on its merits', the danger is that you will get exponential blow-outs that we all know are unreasonable but we have no way of bringing them in.

Ms HAYSOM — Yes. It is a hard thing to deal with because you may have something that is ostensibly simple to begin with and on further investigation becomes more complex, so that might then have to move into a different stream, I suppose.

Mr ARRANGA — I do not think there is anything wrong in principle with the idea. We certainly do see complaints where we think, 'Well, that's relatively straightforward'. If the issue was that the consultation progressed in a way which was unsatisfactory and the complainant felt the doctor was rude and did not give them proper respect, one would have thought that those ones might on the face of them be subject to the sort of expedited management that you have addressed. Although, as Ms Haysom says, once you look into them sometimes there are significantly complex issues as to why the behaviour may have been the way it was. Without wanting to sound too much like lawyer, it depends — —

Mr ELSBURY — But you are. Come on!

Mr ARRANGA — Yes.

Mr O'BRIEN — Whichever streamlining process, things can always move in and some people avoid targets et cetera. It is a question of whether we need to get a better handle on the whole turnaround time.

The CHAIR — And efficiency.

Mr O'BRIEN — And efficiencies.

Mr ARRANGA — It requires someone to make a decision at an early stage that this is a matter, and I guess from our point of view the concern any doctor has when a complaint is made to AHPRA is, 'What is it going to mean in terms of my future?'. Were there to be the sort of streamlining approach taken and were parties to agree to it — subject to, obviously, what the issue is — if it were clear that matters to be expedited were unlikely to be matters that would result in risks to registration or risks to livelihood, then I suspect practitioners would be more inclined to agree to comply with really short or shorter time frames.

At any point in time you have to advise your doctor, your client, what the risks are. People tend to be cautious where there are serious risks. If we had an expedited process where there was no significant chance that a person was going to be deregistered, I think that would certainly make people feel more comfortable, dealing with things in a perhaps less formal way.

Mr O'BRIEN — So if that deregistration outcome is clearly identified, everything has to move around. Perhaps if you could take that on notice and have a think about it, particularly in the context of the complaints you make about the time that practitioners — —

The CHAIR — What are you asking Avant to take on notice? Could you clarify that?

Mr O'BRIEN — Thank you, Chair. Yes, I will. What sorts of recommendations, specifically when you say the investigation should be streamlined wherever possible — do not let me direct you; it is for you to come back to us — and what sort of precise streamlining would you envisage there?

The CHAIR — Thank you for that.

Mrs PEULICH — Could you explain to me, in brief dot points, how you calculate insurance for your members? Obviously there have to be elements of risk. What types of claims do you pay out for? What is the range of dispositions that you have to deal with, from dismissal to some of the most serious claims that you have to pay out for? Just in a few dot points, without compromising anything that might be commercial-in-confidence.

Ms HAYSOM — I am not in a position, unfortunately, to be able to explain to you how the premiums are determined and we can — —

Mrs PEULICH — But obviously an element of risk has to be calculated in the insurance that you offer your members.

Ms HAYSOM — Yes. In terms of the types of matters that we deal with, though, we deal with a range of matters, but I suppose they can be fairly easily categorised as civil claims for compensation and then what we would call disciplinary or professional conduct claims, which are the types of matters that we are dealing with here, as well as some add-ons, I suppose. For example, we will assist members in Medicare complaints and employment disputes, hospital disputes — what are the other ones?

Ms HUGHES — Coronial.

Ms HAYSOM — Coronial inquests — yes, we assist doctors in coronial inquests.

Ms HUGHES — Some criminal matters.

Ms HAYSOM — Yes, some criminal matters. So there is quite a broad spectrum of matters.

Mrs PEULICH — So in terms of your payouts or claims that are made against the insurance of your clients, which category means the greatest to your bottom line?

Ms HAYSOM — It is an interesting question. With all the tort law reforms that came in in around about 2000 or 2001, after those tort reforms came in we have seen a large reduction in the number of civil claims and a large increase in the number of disciplinary and professional conduct matters. So certainly in terms of volume the disciplinary matters are ones that are taking up most of our time.

Mrs PEULICH — Without casting any aspersions — please do not misinterpret this — therefore a national system that is clear and streamlined suits your business purposes the most?

Ms HAYSOM — We have to focus on the members, too. It also suits our members, and we are very much focused on doing the best we can for our members because we are a mutual organisation and they own us, essentially; our organisation is owned by our members. We are keen to have national consistency, because we can give proper advice to our members. If they are moving around the country then we are able to say, 'This is how they deal with a complaint in the Northern Territory', and, 'This is how they deal with a complaint in Victoria', and it is essentially the same. So we are very much focused on members and we are very much

focused on making sure that the systems — complaints-handling systems and other systems — are fair and reasonable and consistent for our members around the country.

Mrs PEULICH — What we have also heard of — setting aside, obviously, that expectation; I think that was everyone's expectation when the new body came into being — is an enormous amount of delay, inconsistency and basically sluggishness as a result of a national approach, where at the top level you have a group of ministers who sit around a table where ultimately not a single one has the responsibility for actually making a decision for that body. As an organisation representing your clients, that ultimately also has financial implications, and justice delayed may be justice denied, but for you it would probably be a better outcome. I am being a bit provocative.

Ms HAYSOM — No, we would not agree with that at all.

Mrs PEULICH — You would not agree with that?

Ms HAYSOM — No, it is to the benefit of our members to have these matters dealt with in a timely way. No doctor or health professional wants to have a complaint hanging over their heads, because it has significant implications for their personal wellbeing.

Mrs PEULICH — So is that all categories that you alluded to from the civil complaints to those that deal with registration and serious things such as coronial inquests?

Mr ARRANGA — Perhaps also just slightly on the financial side, in any claim of any nature, as an insurer what you have to do is anticipate what the costs are likely to be going forward, and you then have to make a reserve — an allowance for that. We have obligations to APRA and ASIC to make sure we have sufficient capital to deal with our contingent liabilities. The longer a claim takes to resolve, the longer we have to hold money on the book, so in fact it is in our interest for everything to be resolved as quickly as possible within the confines of a reasonable resolution. So it is in the organisation's interest for things to be done quickly rather than for them to drag on.

Mrs PEULICH — I am glad you clarified that point. So jumping then to the outcome, we have heard a number of witnesses raising some serious complaints about the national model, not because of the outcomes they want to see but because of the machinery and the sluggish nature of the decision making from the top down. Can the national consistency, the national registration, be achieved through any other hybrid model rather than the fully fledged national approach that would satisfy the needs of the organisation?

Ms HAYSOM — There is a hybrid model in New South Wales that I am sure you are aware of that we act in, and I think Queensland is now going to move towards that sort of model. We are in favour of the national model, but we accept, obviously, that there are other models in the country.

Ms MIKAKOS — Just following on from some of those questions as well that I am interested in, your comments were very interesting to me that the largest concern that practitioners would have these days would be deregistration rather than a civil claim. I do not expect you to know categorically given that there are other players in the market as well, but in your organisation's experience what proportion of adverse findings by AHPRA would then lead to a civil claim or some disciplinary proceeding and then an order that there be disciplinary action be taken against a medical practitioner that would then lead to a civil claim?

Ms HAYSOM — We would have to take that one on notice. I do not have the statistics, but there is some overlap, yes. I am not sure of the proportion. John?

Mr ARRANGA — No, I think I looked at the AHPRA submission, and it noted the number of practitioners for whom notifications had come in and the number for whom there had been deregistration, and it was a relatively small number, so obviously there are a lot of notifications and very few practitioners have their registration cancelled or suspended. There is a slightly different issue as to the number — that might be subject to a further proceeding in terms of a civil matter if that was what you were getting at. I do not necessarily think we have any data on that.

Ms MIKAKOS — Thank you. I would appreciate it if we could get some additional information on those issues. In a civil claim, would there always be a deregistration, or could there be some lesser disciplinary action taken before someone then was to proceed with a civil claim? Would that be a common occurrence?

Mr ARRANGA — I would not even say that there is any relationship between the two events. A civil claim can arise in a context where there is no disciplinary or notification matter either because someone chose not to do it or because the conduct that may have led to the claim would not necessarily be considered unprofessional conduct. Ultimately in any professional life there are circumstances where you will make a decision which may or may not be correct in retrospect. That is not necessarily in and of itself evidence of unprofessional conduct or a failing of a practitioner. It is inherent in the nature of health care that some patients do not do as well as you would hope, and those patients obviously have a right to seek redress if that is what they choose to do.

That does not necessarily mean that the doctor has been a bad doctor in the context that people might consider in terms of a complaint to AHPRA; it simply means that there has been a failure in the care provided. It may not be one individual's responsibility. It may be a systemic issue, so there is no real link between a civil claim necessarily and a disciplinary matter, which is not to say that some doctors who are subject to disciplinary matters are not also subject to civil claims. The two things can overlap. They are not related in any causal way.

Ms HAYSOM — And the converse can apply of course too. You can have a civil claim where there is no suggestion at all of any professional misconduct or a complaint or anything like that, because they are different legal tests and the like.

Ms MIKAKOS — Thank you. It is just useful to get a bigger picture in terms of how the two things might intersect and how people might have particular interests in how things progress. I have a further question if I may, and that relates to one of the case studies you gave. The first one is Dr X on page 2 of your submission. You have described a scenario there in relation to this particular Dr X. You say at the end there that after about a year's worth of investigation the matter is continuing. The thing that I was interested in in the submission says, 'Almost a year later, we have heard nothing further'. So what I wanted to understand is: where there has been an investigation and there is no request for a disciplinary hearing to occur, will the practitioner always be informed that the matter is concluded? Do they effectively get told that the matter is concluded, or are there a number of cases where the case is best left open, the file is left open and the practitioner could well be contacted again in two years time or sometime in the future?

Ms HUGHES — I think it would be the exception rather than the rule that the practitioner would not hear. But also if the practitioner had lawyers acting, we are constantly contacting AHPRA for updates.

Ms MIKAKOS — Thank you.

Mr O'BRIEN — There is one issue with the national scheme that some of the boards have raised in comparison to the system that existed beforehand. It goes to the heart of the matter for us in relation to the protection of the public, and I think Queensland is an example. If there is allegedly a failure in the regulator to properly regulate or supervise a section of the medical profession, if that failure is in a national scheme, arguably, and it is not picked up for some years, it has national implications a lot bigger from an insurance point of view and a public point of view than it would have if it was, say, quarantined to one state. Is that a disadvantage you would except with the national system?

The CHAIR — Would you like clarification on that?

Mr ARRANGA — Yes.

Ms HAYSOM — Yes.

The CHAIR — I think the point is — —

Mr O'BRIEN — I will go again. Where there might be efficiency gains in a national regulatory system and a national harmonisation, could there also be protection-of-the-public problems in that if there is a fault in a national regulator as opposed to a state regulator in fulfilling its regulatory function, and the fault is obviously not picked up for some period of time, would you have the whole of the country affected by that fault rather than just one state, as was the case with Queensland? We are just looking at benefits and disbenefits.

Mr ARRANGA — If what you are suggesting is that there is some systemic issue within the processes of the national regulator that allows a particular risk to go unidentified, be that a risky person or a risky group, I suppose that is theoretically the case, although one would have imagined that if there was a systemic issue that allowed risky behaviour to occur, and it was not picked up in some way, it would be identified within the context of complaints about injury. So what we are saying is there is a risk in the process because it allows a group of practitioners who are not properly trained or educated to perform procedures, and if it were state-based you would only affect one state and if it were national you would affect all states.

I think as a hypothetical that is not unreasonable, but I am not clear that it would necessarily manifest in a way that would allow it to continue indefinitely, because presumably at the end of all that there are patients who are harmed, and the patients would then be complaining, which should highlight the issue. Obviously it is better to catch it at the top of the cliff rather than the bottom. While I can understand the theoretical basis, I am not clear that it is actually a practical risk.

Mr O'BRIEN — I am just wondering if you have assessed that from an insurance perspective. You might not have, and that is fine if you have not at this stage.

Mr ARRANGA — No.

Ms HAYSOM — I suppose it depends on the accountability mechanisms you have in place, too, for the body, doesn't it? We need to have accountability for the statutory bodies, and they need to be sufficiently independent but also accountable. One would hope that the accountability mechanisms that are in place would be able to deal with those sorts of things as a general rule.

Mr O'BRIEN — Here's hoping.

The CHAIR — Thank you very much for providing that additional answer and clarification, because it was a theoretical question, obviously — —

Mr O'BRIEN — It arises that we have the Queensland example.

The CHAIR — Exactly, so we have issues that are arising in other states that we are obviously well aware of. I do not believe there are any further questions, so on behalf of the committee I thank you all very much for being before us this afternoon and providing the evidence that you have. It has been most helpful. Thank you very much indeed.

Ms HAYSOM — Thank you.

Witnesses withdrew.