



National Health Practitioner  
**Ombudsman and  
Privacy Commissioner**

## Review of confidentiality safeguards for people making notifications about health practitioners



## 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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# Review of confidentiality safeguards for people making notifications about health practitioners

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# Executive summary

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.<sup>1</sup>

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.

## 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

<sup>1</sup> 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.

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.<sup>2</sup>

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.<sup>3</sup>

The available evidence does not support the argument that vexatious notifications about health practitioners are widespread.<sup>4</sup> 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'.<sup>5</sup> 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.

# Part A: Background

On 21 December 2018 the chief executive officer of the Australian Health Practitioner Regulation Agency (Ahpra) invited the National Health Practitioner Ombudsman and Privacy Commissioner (NHPOPC) to begin an independent review into the confidentiality safeguards for people making notifications about registered health practitioners.

## Context for the review

### The role of notifications in protecting the public

The Health Practitioner Regulation National Law, in effect in each state and territory of Australia ('the National Law'), establishes the National Registration and Accreditation Scheme ('the National Scheme'). This is the framework for the regulation of 16 health professions in Australia. Each of these health professions is represented by a National Board.<sup>6</sup> The National Law creates Ahpra as the agency that supports the National Boards.

The objectives of the National Scheme are clearly focused on public protection:

*... to provide for the protection of the public by ensuring that only health practitioners who are suitably trained and qualified to practise in a competent and ethical manner are registered.<sup>7</sup>*

The theme of public protection also features heavily in the Regulatory Principles for the National Scheme:

*While we balance all the objectives of the National Registration and Accreditation Scheme, **our primary consideration is to protect the public.**<sup>8</sup>*

One of the primary ways that Ahpra and the National Boards seek to protect the public is by handling notifications about registered health practitioners. Ahpra and the National Boards rely on others (members of the public, practitioners and employers) to report concerns about health practitioners. Reports can be made about the health, conduct or performance of practitioners. The relevant National Board then determines if any action needs to be taken to protect the public.

This reliance on others to raise concerns means it is critically important that any barriers to making legitimate notifications are removed. People should have confidence that any notification they make in good faith will be treated fairly and that they will be safe from acts of retaliation.

### *R v. Holder*

In November 2018 Dr Brian Holder, a general practitioner, was convicted for the attempted murder of a pharmacist, Ms Kelly Akehurst. Ms Akehurst had made a notification to Ahpra about Dr Holder's prescribing practices and it is thought that the notification was the motive for the crime.

Dr Holder's conviction brought into the spotlight the question of whether there are adequate safeguards for notifiers.

According to the judgment of the Hon. Justice Ann Vanstone of the Supreme Court of South Australia, the events leading up to the act of violence against Ms Akehurst were that:

- Ms Akehurst had concerns about eight prescriptions written by Dr Holder that she dispensed in April 2017. The prescriptions were for high doses of diazepam, oxazepam and Panadeine Forte.
- Ms Akehurst made a notification to Ahpra regarding these prescriptions. While the original report to Ahpra was verbal, she claims she was told it would be best to put the report in writing. There was some discussion about whether her identity would be disclosed to Dr Holder, and she was allegedly told that revealing her identity would expedite the matter and it would 'carry more weight'. Ms Akehurst authorised the release of her name.

6 The National Boards are the Aboriginal and Torres Strait Islander Health Practice Board of Australia, the Chinese Medicine Board of Australia, the Chiropractic Board of Australia, the Dental Board of Australia, the Medical Board of Australia, the Medical Radiation Board of Australia, the Nursing and Midwifery Board of Australia, the Occupational Therapy Board of Australia, the Optometry Board of Australia, the Osteopathy Board of Australia, the Paramedicine Board of Australia, the Pharmacy Board of Australia, the Physiotherapy Board of Australia, the Podiatry Board of Australia, and the Psychology Board of Australia.

7 Health Practitioner Regulation National Law, s. 3(2)(a).

8 Ahpra, *Regulatory principles for the National Scheme*, undated. Accessed at: <https://www.Ahpra.gov.au/about-Ahpra/regulatory-principles.aspx>, June 2019.

- In late June 2017 Ahpra wrote to Dr Holder to advise that the Medical Board of Australia had decided to conduct an investigation. Ahpra enclosed a copy of the notification, which included Ms Akehurst's name.
- Later, the name of the pharmacy at which Ms Akehurst worked was also revealed to Dr Holder in the course of Ahpra providing information about the notification.
- In late September 2017 Ahpra concluded its investigation into Dr Holder. On 6 October 2017 Dr Holder was advised that the Medical Board of Australia had decided to impose conditions on his registration relating to his ability to prescribe certain medicines.
- On Monday 9 October 2017 Dr Holder travelled to the area where Ms Akehurst worked. Based on the information provided by Ahpra, he knew Ms Akehurst's name and at least one of the pharmacies at which she worked. He also knew Ms Akehurst's home address because he had paid a private investigator to ascertain that information.
- On Tuesday 10 October 2017 Dr Holder attended Ms Akehurst's workplace. He carried a bouquet of carnations and concealed a filleting knife with a blade of about six inches under his suit coat. When Ms Akehurst approached him, he told her he had flowers for her. He then pulled out the knife. A struggle occurred, and Ms Akehurst sustained three lacerations, bruising and swelling to her left arm and hand. After a witness intervened, Dr Holder ran out of the pharmacy and drove away.<sup>9</sup>

Dr Holder was found guilty of attempted murder and sentenced to 15 years in prison with a non-parole period of 10 years.

Following the trial Justice Vanstone wrote to Ahpra's chief executive officer. Justice Vanstone expressed the view that the crime would not have taken place if Ms Akehurst's name, and the name of the pharmacy at which she worked, were not disclosed to Dr Holder. She highlighted that Dr Holder and Ms Akehurst were totally unconnected apart from the fact that Ms Akehurst had made a notification to Ahpra about Dr Holder. Justice Vanstone believed this was the motive for the crime. While Justice Vanstone acknowledged that Ahpra staff were no doubt acting in good faith, she explained that it is difficult to see a justification for releasing Ms Akehurst's name to Dr Holder, as the prescriptions spoke for themselves and the investigation into Dr Holder would have not been advanced by disclosing her name.

Justice Vanstone opined that:

*It should not be assumed that professional people are of good character and are to be entrusted with information which would not be provided more widely.<sup>10</sup>*

During this review, Ms Akehurst provided the following recollection of events and made suggestions regarding how Ahpra's notifications process could be improved:

9 *R v. Holder* [2018] SASC 169.

10 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.

## Ms Akehurst's story

'In my 15 years as a pharmacist I had never before made a notification to Ahpra, so I was unsure of the process and of what to expect. I called Ahpra and assumed the phone conversation would result in Ahpra taking down the practitioner's name and making its own inquiries before deciding on their course of action. I had no knowledge of Ahpra's approach to privacy or the option of making a confidential or anonymous notification.

During the first telephone conversation with Ahpra, I briefly described my concerns. The Ahpra staff member directed me to Ahpra's website so I could make an online notification. I got the impression that notifications are only accepted in writing via the website. The Ahpra staff member explained that I would need to tick two boxes on the online form for the notification to proceed – one box was consent for Ahpra to have access to my personal information, and the other box was consent for Ahpra to release my name to the practitioner. The Ahpra staff member recommended that I release my name to the practitioner, as it demonstrates transparency, the allegations would carry more weight, and it makes the investigation of the notification more expedient. I subsequently ticked both boxes and lodged the notification via Ahpra's website.

After I lodged the notification, I received an acknowledgement email containing a reference number for the notification. Soon after, I received a phone call from Ahpra to clarify the details of my notification and to request further documentation. At this point, there was no discussion about what would be disclosed to Dr Holder. A few weeks after lodging the notification I received a letter which included a standardised 10-page guide for people raising a concern. This provided information on the process but no specific details regarding my notification.

I was unaware of what was happening in the background at Ahpra regarding the investigation, but I now know that Ahpra disclosed my identity to Dr Holder in the first letter he received. He was provided with a copy of the notification, which included my full name. The letter also contained the supporting documents I had provided to Ahpra, which included the name and address of the pharmacy where I worked and where I was subsequently attacked.

The attack is ever present in my thoughts and it is something I continue to deal with, both physically and mentally, on a daily basis. I feel the notifications process and Ahpra's procedures are flawed, and this must be changed to protect future notifiers and prevent something like this occurring again.

I believe the decision about whether to release a notifier's identity should take into account the unique circumstances of the matter. There shouldn't be a blanket rule that Ahpra tells the practitioner who made the notification about them. It may be appropriate in many cases to disclose the identity of a patient if they are raising specific concerns about a practitioner, as it would be relevant for the practitioner to know which patient the concerns relate to. However, my notification should have been de-identified because my name was irrelevant to the allegations. I accept that my role as a pharmacist was relevant and it may have added weight to the allegations, but my actual identity was irrelevant to the notification and associated investigation. I understand the benefit in Ahpra accessing my personal information, to enable follow-up conversations and to improve transparency, however, I question whether there is a need to release the name of a professional notifier at all.

I would like the current process and policies to be changed so that future notifiers are safe and feel supported in their difficult decision to lodge a notification.<sup>11</sup>

11 Interview with Kelly Akehurst.

The Medical Board of Australia, Pharmacy Board of Australia and Ahpra expressed shock at this violent incident.<sup>12</sup> While violence against notifiers is rare, they agreed to consider whether there are any steps that can be taken to reduce the risk of reoccurrence.

## Terms of reference

The terms of reference of this review included consideration of the literature and external environment, including but not limited to:

1. relevant research and information from other regulatory bodies, complaints entities and/or government entities on the applied processes and policies in managing confidential and anonymous notifications/complaints
2. recommendations from The Hon. Justice Vanstone of the Supreme Court of South Australia following her decision in the matter of *R v. Holder*
3. Ahpra policies, processes and relevant documents relating to the management of notifications, including but not limited to:
  - a. any current policies or processes implemented by Ahpra in relation to how the confidentiality of notifications is to be managed, including from notifiers who request confidentiality or anonymity
  - b. a review of a sample of circumstances (including interviews with relevant parties where required) where:
    - i. a notifier requested to remain either confidential or anonymous, including people who were dissatisfied that their identity was not adequately protected, or recorded incidents where a notifier had requested that their details remain confidential but for whatever reason this didn't occur
    - ii. a practitioner was the subject of a notification where the notifier remained anonymous or confidential
- iii. a 'post-notification' complaint was made (by a notifier or a practitioner) where that complaint related to anonymity or confidentiality issues connected to the notifier
- iv. an individual complained that their privacy has been breached, or where the complaint suggests they were unable or unaware that they were able to remain anonymous or confidential
- c. consideration of what notifiers expect will happen when making an anonymous or confidential notification, as well as the factors that lead to such a decision
- d. challenges practitioners face when responding to anonymous or confidential notifications, as well as whether they think the process is fair and reasonable
- e. interviews with Ahpra notifications staff on their understanding of confidential and anonymous notifications and related policies and processes, specifically staff from the Notifications Program and Intake and Assessment teams
4. interviews with defence organisations for practitioners in the pharmacy and medicine professions,<sup>13</sup> and consumer stakeholders through Ahpra's Community Reference Group and other stakeholders as required
5. legislative provisions that may relate to, or influence, the management of confidential or anonymous notifications.

<sup>12</sup> Ahpra, Media statement: *We want people to be safe when making a complaint*, 23 November 2018.

<sup>13</sup> Registered health practitioners are required to have professional indemnity insurance. Defence organisations for health practitioners offer this insurance to their members, as well as general advice and support. Defence organisations for health practitioners also play a role in representing and advocating for the interests of their members.



## Reviewer

This review was undertaken by Richelle McCausland in her capacity as the National Health Practitioner Ombudsman. Ms McCausland was supported by staff from her office, particularly Chris Jensen, team leader of the Investigation Unit.

The National Health Practitioner Ombudsman and Privacy Commissioner is an independent statutory officer appointed by the Council of Australian Governments' Health Council. In general, the role provides ombudsman, privacy and freedom of information oversight of the National Scheme, particularly in relation to the actions of Ahpra and the National Boards. In order to fulfil these functions, the National Law confers specified jurisdiction on the National Health Practitioner Ombudsman and Privacy Commissioner that is derived from the *Ombudsman Act 1976* (Cwlth), the *Privacy Act 1988* (Cwlth) and the *Freedom of Information Act 1982* (Cwlth).

## Review process

Using 'own motion' investigation powers found in the Ombudsman Act,<sup>14</sup> the review formally began on 24 December 2018.

### Information gathering

The first stage of the review involved gathering information from Ahpra about existing policies and processes relevant to the privacy of notifiers. This included face-to-face meetings with Ahpra staff. In order to understand how Ahpra's policies and processes apply in practice, a sample of 20 files involving confidential or anonymous notifications was reviewed. Relevant internal complaints and serious incident reports were also analysed.

### Stakeholder consultation

The second stage of the review involved meeting with relevant stakeholders to hear different points of view. These stakeholders included defence organisations for practitioners in pharmacy and medicine, and Ahpra's Community Reference Group. Ms Akehurst, the victim of the crime that led to this review, was interviewed. Three practitioners who had been the subject of either a confidential or anonymous notification were also interviewed.

It is noted that, while an extensive number of practitioners and notifiers were contacted regarding a possible interview, the number of people who agreed to participate in the review was small. In particular, Ms Akehurst was the only notifier who was open to participating.

### Comparative analysis

The third stage of the review looked at the policies and processes of other comparable organisations in relation to safeguarding the confidentiality of complainants. This included organisations within Australia and overseas.

### Targeted queries

During the final stage of the review, more detailed information was gathered from Ahpra regarding issues or concerns that became apparent during the review process. This included reviewing Ahpra's available data on confidential and anonymous notifications and clarifying specific steps in the notifications process. A workshop was also conducted with key Ahpra staff and the chairs of the Medical Board of Australia, Pharmacy Board of Australia and Psychology Board of Australia.

The recommendations from this review have been formed after giving careful consideration to all information gathered during the review process.

## Ahpra's response

It was agreed that a report of the findings and recommendations would be presented to Ahpra on completion of the review. It was also agreed that the key observations, recommendations and Ahpra's responses to those recommendations would be published simultaneously.

14 *Ombudsman Act 1976* (Cwlth), s. 5(b).

# Part B: Legal framework for managing notifications

It is important to take into consideration the existing legal frameworks that guide the actions of Ahpra and the National Boards when disclosing information about notifications.

The three sources of law that are particularly relevant are the:

- National Law
- Australian Privacy Principles (APPs)
- common law principle of procedural fairness.

## Health Practitioner Regulation National Law

The National Law establishes the notifications process administered by Ahpra and the National Boards.

In practice, concerns about practitioners are lodged with Ahpra. Ahpra then gathers information about the notification and presents the matter to the relevant National Board<sup>15</sup> for consideration. The National Board decides what action, if any, should be taken to protect the public.

### Characteristics of a notification

The National Law does not require that the identity of the notifier be provided to Ahpra (and subsequently, to the relevant practitioner) for the notification to be valid.

Section 146 of the National Law states that a notification 'must include particulars of the basis on which it is made'.<sup>16</sup> There is no explicit requirement for the notifier to provide their name or any other identifying information when making a notification.

It is arguably impossible to make an anonymous mandatory notification about a health practitioner. While anyone can make a voluntary notification, only registered health practitioners, employers and health education providers are required to report 'notifiable conduct' by making a mandatory notification.<sup>17</sup> If Ahpra is unable to establish the identity of the notifier, it may not be able to characterise the concern as a mandatory notification. However, the Supreme Court of the Australian Capital Territory has said that a National Board may take action on a mandatory

notification that is anonymous or that has not been made in accordance with the legislative requirements:

*Once the Board receives a notification, the means by which it reached the Board become irrelevant. There is no obligation upon the Board to investigate the circumstances in which a notification is made, either initially or at a later stage in the investigation of a complaint. The Board is not required to determine whether a notification in validly made or involves any breach of the law affecting the maker of the notification.*<sup>18</sup>

Hence, confidential and anonymous notifications are allowable under the National Law, so long as the notifier provides sufficient particulars regarding the basis of the notification.

### Requirements to inform practitioners about a notification

The National Law directs that information must be provided to the relevant practitioner at key stages of the notifications process.

#### Receipt of a notification

Section 152 of the National Law provides that a National Board must, as soon as practicable after receiving a notification about a registered health practitioner, give written notice of the notification to the practitioner. This notice must advise the practitioner of 'the nature of the notification',<sup>19</sup> which is generally taken to mean that the practitioner must be informed of the allegations that have been made about them.

While it is not specified in the National Law that the practitioner must be informed of the identity of the notifier, Ahpra's standard practice is to provide this information to the practitioner. Exceptions are made in situations where the notifier has asked for their identity to be kept confidential or where the identity of the notifier is unknown.

<sup>15</sup> It is noted that many decisions regarding notifications are made by delegates of the National Boards – for example, a board notifications committee. For ease of reference in this report, the term 'National Board' is taken to include these committees.

<sup>16</sup> Health Practitioner Regulation National Law, s. 146(2).

<sup>17</sup> Ibid., Part 2.

<sup>18</sup> *Hocking v. Medical Board of Australia* [2014] ACTSC 48, para 157.

<sup>19</sup> Health Practitioner Regulation National Law, s. 152(2).

Section 152(3) of the National Law provides National Boards with discretion not to provide a practitioner with notice of the notification if the board reasonably believes doing so would prejudice an investigation, place a person's health or safety at risk, or place a person at risk of intimidation or harassment. Ahpra advised that it is unable to report on the number of instances where this discretion has been exercised due to limitations in retrieving this information from its current electronic database. However, it does not appear that this is a commonly applied section of the National Law.

### ***Beginning an investigation***

If a National Board decides to investigate a practitioner, s. 161 of the National Law directs that the practitioner must be given written notice of the investigation as soon as practicable after that decision is made. Section 161(2) states that this notice must advise the practitioner of 'the nature of the matter being investigated'.

In the same way that a National Board may decide not to give a practitioner notice of the receipt of a notification, the National Board may also decide not to give the practitioner notice of an investigation if it reasonably believes doing so may seriously prejudice the investigation, place a person's health or safety at risk, or place a person at risk of harassment or intimidation.<sup>20</sup> While Ahpra advised there is no available data regarding how often this provision is used, it appears it is infrequent.

### ***'Show cause' process if a National Board is proposing to take action***

If a National Board is proposing to take action against a practitioner under the National Law, the board must give the practitioner written notice of the proposed action and invite the practitioner to make a written or verbal submission about the proposed action.<sup>21</sup>

As part of this process, Ahpra provides the practitioner with detailed reasons for proposing to take action, which includes all information the board relied on when coming to its proposed decision.

### ***Decision regarding notification***

If a National Board decides to take action against a practitioner, the practitioner would be aware of the allegations that have been made about them as a result of the notice requirements under the National Law. Section 180 of the National Law also requires the National Board to give the practitioner written notice of the decision.

In cases where the National Board decides to take no further action against the practitioner,<sup>22</sup> the practitioner is informed of this decision and the board's reasons.

Taking the above provisions into consideration, it is clear the National Law envisages that information about notifications is provided to practitioners.

### **Confidentiality obligations**

Section 216 of the National Law imposes a duty of confidentiality on Ahpra staff. Specifically, a person who is, or has been, a person exercising functions under the National Law must not disclose to another person 'protected information'. Protected information means 'information that comes to a person's knowledge in the course of, or because of, the person exercising functions' under the National Law.<sup>23</sup>

This is an important part of the National Law because it limits what information Ahpra and the National Boards can share with others.

There are, however, exceptions to this duty of confidentiality, including where:

- the information is disclosed in the exercise of a function under, or for the purposes of, the National Law
- the disclosure is required or permitted by another law
- the disclosure is with the agreement of the person to whom the information relates
- the disclosure is in a form that does not identify the person
- the information relates to public tribunal proceedings.<sup>24</sup>

20 Ibid., s. 161(4).

21 Ibid., s. 179(1).

22 Ibid., s. 151 or s. 179(2)(a).

23 Ibid., s. 214.

24 Ibid., s. 216(2).

There are also specific provisions in the National Law regarding the disclosure of information:

- for workforce planning
- for information management and communication purposes
- to other Commonwealth, state and territory entities
- to protect the health or safety of patients or other people.<sup>25</sup>

This means that, while Ahpra has a general duty of confidentiality in relation to its work, it can disclose protected information in certain situations. For example, disclosing details about a notification that has been made about a practitioner to that practitioner is allowable because it is in the exercise of a function under the National Law. Further, in most cases, the notifier agrees that information about the notification and their identity can be disclosed to the practitioner. Hence, the duty of confidentiality in the National Law does not mean that the identity of the notifier must always be kept confidential.

There are specific situations where Ahpra may be compelled to share information about notifications with others, despite the duty of confidentiality. This means it is impossible for Ahpra to guarantee it can keep a notifier's identity confidential. While Ahpra advised it does not have written guidance regarding this issue, it highlighted four common scenarios:

- sharing information with other regulatory or law enforcement organisations
- tribunal proceedings
- legal proceedings
- freedom of information (FOI) applications.

### ***Information sharing with other organisations***

Ahpra has non-binding agreements with several government organisations regarding information sharing.

For example, in 2018 Ahpra entered into a memorandum of understanding (MOU) with Victoria Police to formalise procedures for information sharing where Ahpra or Victoria Police discover certain information in the course of their investigations.<sup>26</sup>

Specifically, the MOU provides a mechanism for Ahpra to release information to Victoria Police about criminal offences such as physical harm, sexual offending and drug offences. This could include information that identifies a notifier. The MOU makes it clear, however, that any disclosure of information must be in accordance with law, including the duty of confidentiality under the National Law.

### ***Tribunal proceedings***

If a National Board decides to refer a matter to a tribunal, disclosure and discovery rules under the tribunal's guiding legislation generally require unredacted copies of evidentiary documents to be disclosed to the parties to the proceedings. This can include identifying details of a confidential notifier.

Ahpra has advised that it generally applies for a suppression order relating to the notifier's identity in cases of confidential notifications. It would then be open to the tribunal to decide whether to grant a suppression order. If Ahpra's application was unsuccessful, it would be required to provide all evidentiary documents to the parties to the proceedings. This would result in the notifier's identity being disclosed to the practitioner.

### ***Legal proceedings***

Ahpra can also be compelled to release full copies of documents in response to notices to produce, subpoenas and warrants in the context of legal proceedings. This could include coronial inquests or civil or criminal proceedings.

In these cases, any person – including a confidential notifier or an anonymous notifier (if their identity can be deduced) – could be called to give evidence by any party to the proceeding. As part of this review, Ahpra cited recent examples where it was compelled to disclose records containing identifying details of confidential and anonymous notifiers.

25 Ibid., ss. 217–220.

26 Ahpra, Website materials: 'True partnership recognised through MOU', dated 12 July 2018.

Accessed at: <https://www.Ahpra.gov.au/News/2018-07-12-true-partnership-recognised-through-MOU.aspx>, June 2019.

### *Freedom of information applications*

Under the National Law, the Commonwealth's *Freedom of Information Act 1982* (FOI Act) applies to Ahpra and the National Boards as modified by the Health Practitioner Regulation National Law Regulation 2018. In general, the FOI Act gives any person the legal right to access documents in the possession of Ahpra and the National Boards unless an exemption or conditional exemption applies.

In particular, s. 47F of the FOI Act conditionally exempts a document from release in circumstances where it would involve the unreasonable disclosure of personal information of any person. This exemption is designed to prevent the unreasonable invasion of a person's privacy by a third party. However, as personal privacy is a conditional exemption under the FOI Act, the public interest factors for and against disclosure must be weighed to determine where the public interest lies. Hence, when Ahpra receives an application for access to documents under the FOI Act, it must analyse where the public interest lies based on the unique facts of the matter at that point in time. If Ahpra concludes that the disclosure of the document is contrary to the public interest, it has formed the view that the public benefit resulting from disclosure is outweighed by the public benefit associated with withholding the information.

Each application under the FOI Act is decided on its merits, based on the circumstances of the matter. It is therefore possible that identifying information about a confidential notifier could be disclosed under the FOI Act.

It is not uncommon for practitioners to seek more information about a confidential notification that has been made about them through the FOI process, as demonstrated by the following case study.

### CASE STUDY: Samir's FOI application<sup>27</sup>

The relevant National Board decided to take no further action in relation to a confidential notification that had been made about Samir.

After the notifications process had concluded, Samir remained curious about the identity of the notifier. He had previously been provided with a redacted version of the notification (with identifying information about the notifier removed), but he wanted more information. He made an FOI application to Ahpra requesting access to an unredacted copy of the notification.

Ahpra decided that the requested document was exempt from release on the basis of two conditional exemptions: disclosure could have a substantial adverse effect on the proper and efficient conduct of the operations of Ahpra, and disclosure would involve the unreasonable disclosure of personal information about the notifier. Taking into account the factors for and against disclosure, Ahpra considered that the disclosure of an unredacted version of the notification would, on balance, be contrary to the public interest.

27 Please note that the names of individuals in case studies throughout this report have been changed to protect their privacy.

## Protections for notifiers

Section 237 of the National Law outlines the protections that a person making a notification can expect; they are not liable civilly, criminally or under an administrative process for making a notification. The National Law clarifies that making a notification, or otherwise providing information to Ahpra or a National Board, does not constitute a breach of professional etiquette or ethics or a departure from accepted standards of professional conduct, nor is a person liable for defamation because of making a notification or giving information.<sup>28</sup>

It is noted that it is an offence under the National Law for a person to obstruct an investigator (with the maximum penalty being \$5,000 for an individual and \$10,000 for a body corporate).<sup>29</sup> While this offence may be relevant to some inappropriate behaviour by practitioners during the course of an Ahpra investigation, it is not a protection against the harms a notifier could be exposed to as a result of making a notification. Specifically, it is not an offence under the National Law for a practitioner to harm, threaten, intimidate or concern a notifier.

## Australian Privacy Principles

The APPs are relevant to how Ahpra and the National Boards deal with notifications, especially APPs 1, 2 and 5.<sup>30</sup>

### Australian Privacy Principle 1

APP 1 relates to the open and transparent management of personal information. In summary, APP 1 requires that Ahpra and the National Boards:

- take reasonable steps to implement practices, procedures and systems that will ensure compliance with the APPs
- have a clearly expressed and up-to-date privacy policy about managing personal information.<sup>31</sup>

Ahpra has a privacy policy (dated March 2014), which is published on its website.<sup>32</sup> Further discussion about Ahpra's practices, procedures and systems in relation to the management of personal information is included in *Part C: Current practices of Ahpra and the National Boards*.

### Australian Privacy Principle 2

APP 2 states that: 'Individuals must have the option of not identifying themselves, or of using a pseudonym, when dealing with an APP entity in relation to a particular matter'.<sup>33</sup> The rationale for APP 2 is that individuals should be able to exercise control over their personal information and how much is disclosed to others.

Using a pseudonym means using a name, term or descriptor that is different from the individual's actual name. It is noted that, while it is possible to restrict what personal information is linked to a pseudonym, it does not always mean that the identity of the person using the pseudonym cannot be established by the APP entity or others.

APP 2 does not apply if:

- the APP entity is required or authorised by or under an Australian law, or a court/tribunal order, to deal with individuals who have identified themselves, or
- it is impracticable for the APP entity to deal with individuals who have not identified themselves or who have used a pseudonym.<sup>34</sup>

Ahpra currently complies with APP 2 by providing notifiers with the option to make a notification anonymously.

Ahpra has not explored in any detail the option of using a pseudonym when making a notification. Ahpra staff advised that it may be impracticable for Ahpra to deal with notifiers who use pseudonyms. In particular, Ahpra staff expressed concern that the processes and policies required to deal with pseudonyms may be difficult to implement and manage across a large national organisation that deals with several thousand notifications each year.

28 Health Practitioner Regulation National Law, s. 237.

29 Ibid., s. 22.

30 Section 213 of the National Law provides that the Commonwealth's *Privacy Act 1988* applies as a law of a participating jurisdiction for the purposes of the National Scheme. This means the *Privacy Act* (including the APPs contained in Schedule 1 of the Act) regulates the use of personal information by Ahpra and the National Boards (thereby making Ahpra and the National Boards an 'APP entity' within the meaning of the *Privacy Act*).

31 *Privacy Act 1988* (Cwlth), Schedule 1, Clause 1.

32 Ahpra, Website materials: 'Privacy', undated. Accessed at: <https://www.Ahpra.gov.au/About-Ahpra/Privacy.aspx>, June 2019.

33 *Privacy Act 1988* (Cwlth), Schedule 1, Clause 2.

34 Ibid., Clause 2.2.



## Australian Privacy Principle 5

APP 5 requires that, if an APP entity collects personal information about an individual, it must take steps that are reasonable in the circumstances to notify the individual about collecting their personal information.<sup>35</sup>

Common ways to notify individuals include publishing collection statements and privacy policies – both of which Ahpra has developed. Further discussion of these documents is found in *Part C: Current practices of Ahpra and the National Boards*.

## Common law principle of procedural fairness

Courts and tribunals have extensively explored the legal principle of procedural fairness in administrative law cases. Procedural fairness relates to the fairness of the process by which a decision is made, rather than the merits of the decision itself.<sup>36</sup> In general terms, administrative bodies and regulators have a common law duty to act fairly in making decisions that may affect the rights, interests and legitimate expectations of individuals. As a notification potentially puts a practitioner's livelihood at stake, Ahpra and the National Boards must afford procedural fairness to practitioners when dealing with notifications.

The content of the duty of procedural fairness is flexible, depending on the circumstances of the case and the relevant legislation. In simple terms, it includes the right to a fair hearing (including the opportunity to respond to allegations) and unbiased decision making.<sup>37</sup> In the context of this review, an important question for consideration is how much information should be shared with a practitioner about a notification in order to act consistently with the principle of procedural fairness.

## Requirement to make a practitioner aware of a notification made about them

Case law relevant to disciplinary decisions consistently provides that the person must be made aware of the precise nature of the allegations made against them and the material facts.<sup>38</sup>

The relevant test is that a decision-maker must disclose information that is adverse to the interests of a person who will be affected by a decision only if it is 'credible, relevant and significant' to the decision.<sup>39</sup> 'Credible, relevant and significant' refers to information that cannot be dismissed from further consideration by the decision-maker before making the decision.<sup>40</sup>

## Confidential and anonymous notifications

Depending on the circumstances of the case and the enabling legislation, it is consistent with procedural fairness for a decision-maker to withhold the identity of the complainant for reasons of confidentiality, so long as the substance of the information available to the decision-maker is disclosed.<sup>41</sup> In dealing with confidential information, decision-makers must focus on the fairness of their decision. A decision-maker must therefore ensure a person knows the particulars of the case to be met and has the opportunity to meet it.<sup>42</sup>

The High Court of Australia addressed the approach that a decision-maker should take when receiving confidential information in the following case:

35 Ibid., Clause 5.

36 *Re: Minister for Immigration and Multicultural Affairs, ex parte Lam* (2003) 195 ALR 502.

37 *Kioa v. West* (1985) 159 CLR 550.

38 For example: *Psychology Board of Australia v. Fox* [2013] ACAT 75, para 56.

39 *Applicant VEAL of 2002 v. Minister for Immigration and Multicultural and Indigenous Affairs* [2005] HCA 72, para 15.

40 Ibid.

41 *Coppa v. Medical Board of Australia* [2014] NTSC 48, para 61 and 62.

42 *R v. Gaming Board for Great Britain: ex parte Benaim and Khaida* [1970] 2 QB 417.

## *Applicant VEAL of 2002 v. Minister for Immigration and Multicultural and Indigenous Affairs [2005] HCA 72*

In this case, a delegate of the Minister for Immigration and Multicultural and Indigenous Affairs refused the appellant's application for a protection visa. The appellant subsequently applied to the Refugee Review Tribunal for a review of the refusal decision. After the application had been made, but before the tribunal had completed its review, the Department of Immigration and Multicultural and Indigenous Affairs received an unsolicited letter about the appellant. The author of the letter made serious allegations against the appellant and concluded the letter by advising the department 'to keep [this] information secret'.

When an application for review is made to the tribunal, the department is required to give the tribunal all documents in its possession relevant to the review. The department therefore sent the letter to the tribunal.

When conducting its review, the tribunal did not tell the appellant that it had received the letter or advise them of the allegations that had been made in the letter. Further, the tribunal did not ask the appellant about the substance of any of the allegations made in the letter. Ultimately, the tribunal affirmed the decision not to grant a protection visa to the appellant. At the end of its reasons, the tribunal said that in reaching its findings it 'gives no weight' to the letter. The tribunal went on to say that, because the letter had been provided in confidence to the department and the tribunal considered that it was in the public interest that the content of the letter be regarded as non-disclosable information, the content of the letter should not be published or disclosed.

The appellant applied to the Federal Court of Australia for relief. He alleged, among other things, that he had been denied procedural fairness. He succeeded at first instance, but then the minister appealed to the Full Court of the Federal Court.

That court allowed the minister's appeal, and so the appellant then appealed to the High Court.

The High Court unanimously held that the tribunal should have told the appellant of the substance of the allegations made in the letter before reaching its decision. However, the court made it clear that it was right for the tribunal not to have provided a copy of the letter to the appellant and not to have disclosed to the appellant any information that may have revealed the identity of its author.

In response to the appellant's submissions that procedural fairness required that he be given the letter (because he could not attack the credibility of the informer unless he knew who the informer was), the court stated that doing so 'would give no significance to the public interest in the proper administration of the Act which ... required that those entitled to a visa be granted one and those not entitled be refused'. However, the court said that it is 'in aid of that important public interest that, so far as possible, there should be no impediment to the giving of information to authorities about claims that are made for visas'.

The court went on to explain that the public interest and the need to afford procedural fairness to the appellant could be accommodated:

... by the tribunal telling the appellant what was the substance of the allegations made in the letter and asking him to respond to those allegations. How the allegations had been given to the tribunal was not important. No doubt the appellant's response to the allegations would then have had to be considered by the tribunal in light of the fact that the credibility of the person who made the allegations could not be tested. And that may well leave the tribunal in a position where it could not decide whether the allegations made had substance. But the procedure outlined would be fair to the appellant ...

In the context of notifications, the disclosure of the substance of the information to the practitioner may therefore be enough to meet the obligation of procedural fairness without disclosing the identity of the notifier. However, care must be taken to convey an accurate account of the allegations to the practitioner.

## Conclusions about the legal framework for managing notifications

The National Law, the APPs and the common law principle of procedural fairness guide the actions of Ahpra and the National Boards when dealing with notifications.

While the National Law imposes a general duty of confidentiality on Ahpra and the National Boards, the National Law requires that information be provided to practitioners at key stages of the notifications process – this includes information that may identify the notifier. There are also specific situations where Ahpra may be compelled to share information about a notification with others, even if the notifier does not provide consent. Common scenarios include where unredacted copies of evidentiary documents need to be disclosed during tribunal or legal proceedings, and where an application to release notification-related documents is made under the FOI Act. As a result, confidentiality cannot be guaranteed.

Ahpra and the National Boards must act consistently with the APPs when dealing with notifications. This means Ahpra should have an up-to-date privacy policy that clarifies how it manages personal information and it must take steps that are reasonable in the circumstances to notify individuals about when it collects personal information. Importantly in this context, the APPs generally provide that individuals must have the option of not identifying themselves when dealing with entities such as Ahpra and the National Board. Ahpra and the National Boards comply with this requirement by accepting anonymous notifications.

Finally, the principle of procedural fairness requires that Ahpra must act fairly in making decisions that may affect the interests of individuals. Case law relevant to disciplinary decisions provide that it is not inconsistent with procedural fairness for a decision-maker to disclose the substance of information available to it but withhold the identity of the complainant for reasons of confidentiality. This supports the existing approach to confidential notifications.

It is against this backdrop that Ahpra and the National Boards currently manage notifications.

# Part C: Current practices of Ahpra and the National Boards

Ahpra and the National Boards have existing processes for managing the privacy of notifiers based on applicable legal frameworks.

These practices can be understood through the review of Ahpra's:

- policy framework for managing a notifier's privacy
- general approach to handling notifications and identifying notifiers
- public-facing communications about the notifications process.

## Policy framework for managing a notifier's privacy

Ahpra has two key policies that outline how it manages the privacy of notifiers:

- privacy policy
- operational guidance for staff.

### Privacy policy

In many of Ahpra's written communications regarding the notifications process, reference is made to Ahpra's privacy policy. The current version of Ahpra's privacy policy was published more than five years ago, in March 2014.

Within the privacy policy, a section is dedicated to 'Dealing with a notification or complaint about a registered health practitioner'. It explains that:

*In dealing with a notification or complaint about the health, performance and conduct of a registered health practitioner or student, a national law entity may be required to disclose information received in the notification and during the course of an investigation to another agency, body or individual in order to carry out its functions under the National Law.<sup>43</sup>*

The policy does not specifically explain what information could be disclosed, nor who it would likely be disclosed to.

The policy briefly outlines that individuals have the option of remaining anonymous or using a pseudonym, and mentions the possible limitations of interacting with Ahpra in these ways:

*If you choose to deal with us anonymously or using a pseudonym, this may affect our ability to deal with the issue you have raised. For example, if you lodge an anonymous notification about a health practitioner, this may limit our ability to effectively and efficiently investigate that notification. While Ahpra will not demand that a notifier identify themselves, a refusal to give your name and contact details may mean that:*

- *an investigation cannot be commenced or completed*
- *any claims you make may be less easy to establish, and*
- *it may be impracticable for the relevant national law entity to continue to deal with or contact an anonymous notifier.<sup>44</sup>*

The privacy policy does not explain that individuals can request that Ahpra keep their identity confidential when making a notification about a practitioner. This policy is therefore unlikely to be helpful to people seeking information about Ahpra's confidentiality safeguards for notifiers.

### RECOMMENDATION: Improvements to the administrative management of confidential and anonymous notifications

Ahpra's privacy policy should be reviewed to ensure it is up to date and contains comprehensive information regarding the use and disclosure of personal information, particularly in cases of confidential and anonymous notifications.<sup>45</sup>

43 Ahpra, *Privacy policy*, 20 March 2014, p. 12.

44 Ibid.

45 Recommendation 2.

### Collection statements

The privacy policy states that Ahpra will take reasonable steps to ensure that an individual is aware of:

- the purposes for which their information is being collected
- the types of bodies, agencies or organisations to which Ahpra usually discloses information of that kind.<sup>46</sup>

Ahpra has a collection statement that sets out the way Ahpra and the National Boards may collect, use and disclose personal information in relation to notifications. Ahpra advises notifiers that this collection statement should be read when completing the notification form.

The collection statement explains that individuals can choose to remain anonymous or use a pseudonym (except if making a mandatory notification), though 'this might limit the effectiveness of any investigation or subsequent action'.<sup>47</sup>

The collection statement sets out that Ahpra:

*... may disclose the information you provide to the health practitioner the subject of that information, but not if (in the Board or Ahpra's reasonable belief) this would prejudice an investigation, place at risk a person's health or safety or place them at risk of intimidation or harassment.*<sup>48</sup>

However, there is no mention in the collection statement of the option to make a confidential notification or how personal information will be collected, used and disclosed where an individual has asked that their identity remain confidential.

### RECOMMENDATION: Improvements to the administrative management of confidential and anonymous notifications

Ahpra's collection statement in relation to notifications should be reviewed to ensure it is up to date and contains comprehensive information regarding the use and disclosure of personal information, particularly in cases of confidential and anonymous notifications.<sup>49</sup>

### Operational guidance

Ahpra staff are generally guided by Ahpra's *Regulatory operations procedural documentation* (available on Ahpra's intranet) when managing notifications.

In relation to the specific issue of a notifier's privacy during the notifications process, the document outlines how confidential and anonymous notifications should be recorded in Pivotal. It also includes the following brief instructions about confidential notifications:

*As soon as possible, advise the notifier that Ahpra is unable to guarantee that their identity will be kept anonymous throughout the notification process, as circumstances may arise that are out of Ahpra's control; however, our processes endeavour to comply with their request to remain anonymous to the best of our ability. Processes outside of Ahpra's control may include any FOI process, tribunal proceedings or if the matter is referred to another entity.*<sup>50</sup>

This is the extent of the written operational guidance provided to Ahpra staff in relation to all issues associated with protecting the identity of notifiers. It is also noted that there is some confusion in this document between 'confidential' notifications and 'anonymous' notifications, which is likely to be unhelpful to staff.

46 Ahpra, *Privacy policy*, 20 March 2014, p. 8.

47 Ahpra, Website materials: 'Collection statement for form NOT-00 – Notification (complaint)', page reviewed 31 July 2015. Accessed at <https://www.ahpra.gov.au/About-AHPRA/Privacy/Collection-statement-for-form-NOTF00--Notification-complaint.aspx>, June 2019.

48 Ibid.

49 Recommendation 2.

50 Document provided by Ahpra, *Regulatory operations procedural documentation*, undated.

While Ahpra’s formal operational guidance about managing a notifier’s privacy is limited, detailed information about the practices of Ahpra staff was gathered during the review (these practices will be discussed further in ‘Handling notifications about registered health practitioners’ in the pages that follow). It appears that Ahpra’s processes for managing a notifier’s privacy are still evolving as the number of confidential and anonymous notifications being made each year increases.

#### **Data about notifications received by Ahpra and the National Boards**

In general, there has been an upward trend in the number of notifications made to Ahpra in recent years (see Figure 1).

Ahpra’s available data demonstrates that the number of confidential and anonymous notifications being made each year is also increasing at a significant rate (see Table 1). In 2016–17 4.6 per cent of all notifications made to Ahpra and the National Boards were either confidential or anonymous. This figure increased to 12.2 per cent in 2018–19.

This data suggests that managing confidential and anonymous notifications is becoming a significant portion of Ahpra’s work, when it had previously been much smaller. This may be a reason why some of the policies and processes relevant to confidential and anonymous notifications are still in development.

Figure 1: Notifications made to Ahpra, from 2010–2018<sup>51</sup>

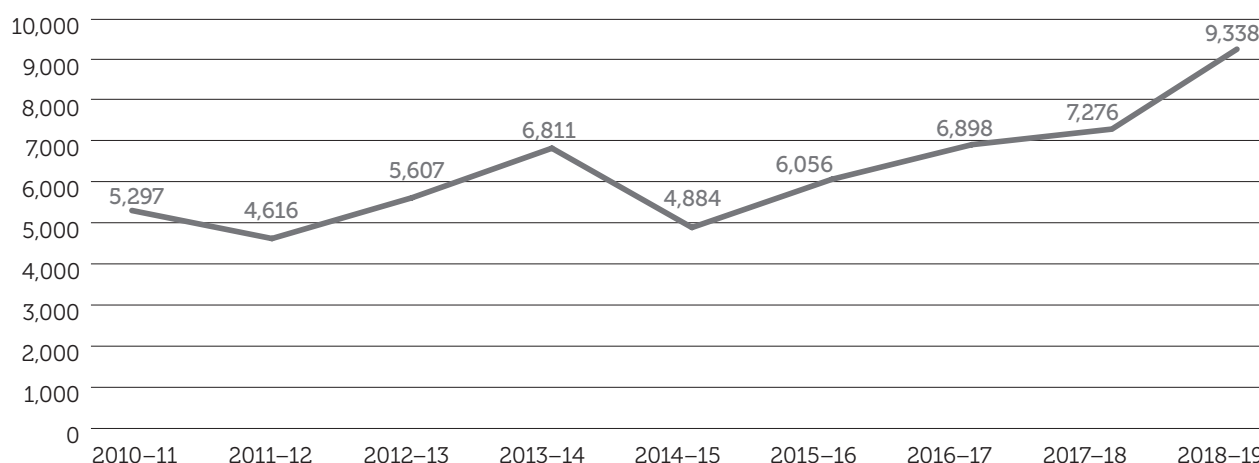


Table 1: Comparison of confidential and anonymous notifications and all notifications received by Ahpra, 2016–2019<sup>52</sup>

Period	Confidential and anonymous notifications received (n)	All notifications received (n)	Percentage of all notifications that are confidential or anonymous (%)
2016–17	318	6,898	4.6
2017–18	646	7,276	8.8
2018–19	1,135	9,338	12.2

<sup>51</sup> Data provided by Ahpra.

<sup>52</sup> Ibid.



## Handling notifications about registered health practitioners

Most relevant to this review are Ahpra's practices in relation to:

- informing practitioners that a notification has been made about them
- the handling of confidential notifications
- the handling of anonymous notifications.

### Informing practitioners that a notification has been made about them

After receiving a notification, Ahpra generally informs the relevant practitioner that a notification has been made about them, which is followed by an invitation to submit a response.<sup>53</sup> Ahpra's standard practice is to provide the practitioner with a copy of the notification (the notification form completed by the notifier or the record of an Ahpra staff member's conversation with the notifier if the notification is made verbally). For most notifications, notifiers agree to be identified in the information Ahpra provides to the practitioner. This means the notifier's name is disclosed, but contact details such as the notifier's postal address, email address and telephone number are withheld.

There appear to be several different ways that the notifier's 'agreement' to be identified is evidenced. The notifier may sign a 'Consent authorisation form', which authorises Ahpra to 'provide [their] health records and other relevant information to the practitioner who is the subject of the notification in order to obtain a response'.<sup>54</sup> If the notification is made in hardcopy form or via the online portal, the notifier is prompted to acknowledge that Ahpra may send the notification to the practitioner.<sup>55</sup>

The telephone script for receiving a verbal notification is a little different because it requires the Ahpra staff member to ask, 'Do you consent to your name being provided to the health practitioner or student named in this complaint, to assist them to respond to the complaint you are raising?'.<sup>56</sup> In cases where verbal consent is provided, it is Ahpra's standard practice to also request that a 'Consent authorisation form' be signed and returned.

While it appears there is not one standard approach, Ahpra staff consistently demonstrated that they take steps at the beginning of the notifications process to obtain written evidence of the notifier's consent to be identified.

### Confidential notifications

A notifier may be willing to identify themselves to Ahpra but may request that Ahpra does not disclose their identity to the practitioner who is the subject of the notification.

Ahpra may become aware of the notifier's desire to remain confidential because the notifier:

- does not sign the relevant declarations and consent forms
- writes to Ahpra to explain that they would like their identity to remain confidential
- discusses the issue verbally with a member of Ahpra's staff.

Importantly, Ahpra's online portal does not clearly allow a person to make a confidential notification. Where a person does not provide consent for Ahpra to share information about the notification with other relevant parties, the person is instructed to call Ahpra 'as we might not be able to progress our enquiries in relation to [the notification]' without such consent.<sup>57</sup>

53 There are slight variations to this general principle based on current National Board processes. For medical matters, an Ahpra notifications officer and a clinical advisor determine whether a response is required from the practitioner and, if so, that response is sought before the matter is presented to the Notifications Committee (Assessment), a delegate of the Medical Board of Australia, for assessment purposes. There are, and will continue to be, deviations from this general process, including when:

- the matter has been flagged as potentially high risk (the practitioner will be informed of the notification once the matter has proceeded to an investigation)
- informing the practitioner could prejudice Ahpra's ability to undertake an investigation or could pose a risk to the safety of others (the practitioner will be informed of the notification when it is considered safe to do so)
- the matter has been flagged as very low risk (the matter may be closed without receiving a response from the practitioner and the practitioner will be informed of the notification only after a decision has been made to take no further action).

54 Ahpra, Website: Consent authorisation form A, dated effective from 4 December 2018. Accessed at: <https://www.ahpra.gov.au/Notifications/Raise-a-concern.aspx>, June 2019

55 Ahpra, Website: NOTF-00 'Complaint or concern (notification) form, dated effective from 4 December 2018. Accessed at: <https://www.ahpra.gov.au/Notifications/Raise-a-concern.aspx>, June 2019

56 Document provided by Ahpra, *New notification received via phone template*, undated

57 Ahpra, Website materials: 'Online notification portal: notification, 2016'. Accessed at: <https://Ahpraorg.secure.force.com/notification>, June 2019.

In general, it appears Ahpra respects the wishes of a confidential notifier. However, perhaps as a result of the limited operational guidance currently in place, Ahpra staff seem to be taking inconsistent approaches to the issue of whether they are required to disclose a notifier's identity. For example, one Ahpra staff member who was interviewed during this review explained that it is for the relevant National Board to decide whether a notifier's identity should be withheld, after weighing up the practicality of withholding the notifier's identity alongside the principle of natural justice.<sup>58</sup> This approach suggests that, even in circumstances where the notifier requests confidentiality, the National Board will decide whether to disclose a notifier's identity to the practitioner. This is not the commonly accepted view of Ahpra's approach to confidentiality. This inconsistency indicates that staff need more clarity.

#### *Process for dealing with confidential notifications*

Once it has been established that a notifier wishes for their identity to remain confidential, Ahpra records the identity of the notifier in its internal systems but notes that it is confidential and should not be disclosed to others.

There are two main ways in which the practitioner is then made aware of the concerns raised in the notification: either a redacted version of the notification is provided to the practitioner (with details such as the notifier's name redacted), or a summary of the notification is provided to the practitioner that omits identifying details about the notifier (generally drafted by Ahpra staff, sometimes with the approval of the notifier).

The sample of notification files analysed during this review showed there were many instances where a matter could proceed to finalisation without Ahpra having to disclose the identity of the notifier to the practitioner, as shown in the following case study.

#### **CASE STUDY:** John's notification about Laura

John notified Ahpra of his concerns about Laura over-prescribing certain medication to a patient. John advised Ahpra that he did not want his name to be provided to Laura because John and Laura were colleagues who were both involved in the patient's care.

Ahpra redacted parts of the notification form completed by John, including the 'notifier details' section and other parts of the notification that could allow Laura to identify John.

Laura provided a detailed response to the notification without knowing the identity of the notifier.

The relevant board decided to take no further action in relation to Laura and the matter was closed. Laura was never advised of the notifier's identity.

Ahpra has advised that it does not have a nationally consistent position on the issue of what information should be withheld from a practitioner in the case of a confidential notification.

Generally, Ahpra staff described a multi-step process for redacting information from a notification form. A notifications support officer redacts information such as the notifier's address, email and telephone number from the notification form, even when the notifier agrees to be identified. Any other information in the notification that could possibly lead to identifying the notifier is considered on a case-by-case basis by a notifications officer, who then provides further direction to a notifications support officer.

Some Ahpra teams have created their own principles to guide administrative staff when redacting notifications. For example, Ahpra's Victorian office developed a 'Redacting notification summary' guide. This guide is brief, stating only that the notifier's email address, mobile phone number and postal address details should be redacted and, further, that if patients are listed on the notification, the postal address, email and phone number of the patient should also be

.....  
<sup>58</sup> Interview with Ahpra staff [de-identified].

redacted.<sup>59</sup> This guide therefore appears to apply more generally to redacting contact details from notifications, rather than the more complex process of redacting other information that may identify the notifier.

There is a lack of consistency internally regarding how Ahpra's administrative staff are advised of which information needs to be withheld when preparing correspondence to a practitioner. In some instances, the relevant text is highlighted, other times a box is marked up around the text or staff italicise the text. These inconsistent practices have led to confusion and errors.

In addition, there appears to be a lack of clarity regarding approval points for Ahpra's communications with practitioners in cases of confidential notifications. In some instances, a team leader or a manager approves redactions before the correspondence is sent to the practitioner. However, interviews with Ahpra staff revealed that in practice this step is not always followed.

The case study below highlights the need to pay careful consideration to aspects of a notification that may identify a notifier:

### CASE STUDY: Tamara's notification about Marty

Tamara contacted Ahpra to advise she had concerns about Marty. Tamara explained she didn't want Ahpra to disclose her identity to Marty because she was living in a small community and needed to maintain an ongoing treating relationship with Marty.

Ahpra provided Marty with notice of the notification, including a document that contained a photograph of a prescription he had written.

In his response to the notification, Marty advised he was able to determine the identity of the notifier by reviewing the date of birth that was visible in the photograph of the prescription.

In general, this review has uncovered some gaps in the current administrative practices of Ahpra staff when handling confidential notifications. These gaps can lead to errors and variations in approach, which can be detrimental to the public's confidence in Ahpra's ability to handle personal information consistently with a notifier's wishes.

### RECOMMENDATION: Improvements to the administrative management of confidential and anonymous notifications

Ahpra should strengthen guidance for staff regarding confidentiality safeguards for notifiers. This guidance should express clear directions regarding what information should be redacted from a confidential notification to protect a notifier's identity.<sup>60</sup>

### *Challenges associated with confidential notifications*

While Ahpra is willing to accept confidential notifications, it acknowledges that there are unique challenges associated with managing these matters. Once Ahpra has in its possession information about a notifier, it can be difficult to effectively handle the notification in a way that continues to keep the notifier's identity confidential.

There are three key challenges:

- incidental identification of a confidential notifier because of the nature of the allegations
- legal requirements to disclose identifying information about a confidential notifier
- unintentional disclosures of identifying information about a confidential notifier due to administrative errors.

<sup>59</sup> Ahpra (Victorian Assessment team), *Redating notification summary*, 14 May 2015.

<sup>60</sup> Recommendation 3(a).

### *Incidental identification of a confidential notifier*

Even if Ahpra does not disclose the notifier's name to the practitioner, the notifier may still be identifiable because of the nature of the concerns being raised or the supporting information.

Practitioners who were interviewed as part of this review often explained that they could ascertain who the notifier was because contextual information about the notification was sufficient to make assumptions.<sup>61</sup> Defence organisations for practitioners agreed this was sometimes the case but stated that they caution against practitioners making assumptions regarding the identity of the notifier.<sup>62</sup> Ahpra staff also noted that they refuse to confirm or deny the identity of a confidential notifier even where a practitioner has correctly guessed.

It is a known risk that a practitioner may be able to guess the identity of a confidential notifier, as the following case study demonstrates:

#### **CASE STUDY:** Joel's notification about Tori

Joel notified Ahpra of concerns he developed after helping Tori to perform a procedure on a patient. In particular, Joel believed Tori had not obtained informed consent from the patient.

In Joel's notification form, he indicated he did not consent to his name being provided to Tori. Ahpra did not attempt to contact Joel to discuss his wish to be a confidential notifier or the difficulties that could arise as a result of Ahpra attempting to keep his identity confidential.

Although Ahpra did not explicitly identify Joel as the notifier when providing Tori with notice of the notification, the information within the notification allowed Tori to identify Joel as the notifier.

While it would be impossible to completely eliminate this risk when dealing with confidential notifications, providing clearer guidance for Ahpra staff about what information they should withhold from the practitioner should assist in addressing this issue.

### ***Legal requirements to disclose identifying information about a confidential notifier***

While Ahpra is willing to make reasonable attempts to keep the identity of a notifier confidential, there are known circumstances where Ahpra may be compelled to disclose a notifier's identity to others. This includes:

- where the matter proceeds to be heard by a court or tribunal, or
- if an FOI request has been made in relation to the notification.

These situations are discussed in more detail in *Part B: Legal framework for managing notifications*. Importantly, interviews with Ahpra staff revealed there is some confusion about these scenarios and to what extent they should be informing notifiers about the possibility that Ahpra may be compelled to disclose their identity to others in the future.

#### **RECOMMENDATION:** Improvements to the administrative management of confidential and anonymous notifications

Ahpra should strengthen guidance for staff regarding confidentiality safeguards for notifiers. This guidance should express clear directions regarding when Ahpra may be compelled to disclose identifying information about a notifier.<sup>63</sup>

### ***Unintentional disclosures of identifying information about a confidential notifier***

A sample of Ahpra's serious incident reports were analysed as part of this review. The sample indicated that administrative errors sometimes result in the unintentional disclosure of personal information about confidential notifiers. Examples include:

61 Interview with a practitioner [de-identified].

62 Interview with a defence organisation [de-identified].

63 Recommendation 3(b).

- attaching the incorrect notification material to correspondence sent to a practitioner by post<sup>64</sup>
- confusing the names of the notifier and practitioner when sending correspondence about the outcome of a notification<sup>65</sup>
- referring to the notifier by name in correspondence to the practitioner because the notifier was not correctly recorded as a confidential notifier in Pivotal<sup>66</sup>
- sharing confidential information with a practitioner because an Ahpra staff member failed to omit the relevant information when copying text from an assessment report during the preparation of correspondence to a practitioner.<sup>67</sup>

The following case study provides an example of an error:

#### CASE STUDY: Mario's notification about Josh

Mario notified Ahpra of concerns that his colleague Josh had acted inappropriately during consultations with patients. Mario was able to provide detailed information about the allegations based on what patients had told him about Josh's conduct. Mario advised Ahpra that he would like his identity to remain confidential.

The relevant board proposed to take action against Josh. In correspondence advising Josh of the proposed decision, Ahpra accidentally disclosed Mario's identity to Josh.

This error occurred because Ahpra did not correctly record Mario as a confidential notifier when the notification file was created in Pivotal. This resulted in Mario's name being automatically pre-populated into the letter sent to Josh.

Ahpra staff who were interviewed for this review highlighted other weaknesses in the administrative management of confidential and anonymous notifications. For example, the transfer of files from the Intake and Assessment team to an investigator can be a point where errors occur because it is easy to overlook what information is confidential in Ahpra's internal systems.

#### RECOMMENDATION: Improvements to the administrative management of confidential and anonymous notifications

Ahpra should improve how confidential and anonymous notifications are recorded in Pivotal.<sup>68</sup>

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 a file.<sup>69</sup>

#### Anonymous notifications

Ahpra receives anonymous notifications. This means the notifier does not identify themselves to Ahpra and it is therefore impossible for Ahpra to inform the practitioner of the notifier's identity.

Ahpra generally receives these notifications in writing (for example, the 'Your details' section of the hardcopy notification form is left blank) or via telephone (where a person declines to identify themselves during the phone conversation).

#### *Process for dealing with anonymous notifications*

The process for making a practitioner aware of an anonymous notification is simpler than the process for confidential notifications. The practitioner is generally provided with a full copy of the notification (or the record of the relevant verbal discussion) and is advised that the notification was made anonymously.

64 Ahpra Serious Incident Report [de-identified].

65 Ibid.

66 Ahpra internal complaint [de-identified].

67 Ahpra serious incident report [de-identified].

68 Recommendation 4.

69 Recommendation 5.

### **Challenges associated with anonymous notifications**

During the course of this review, it was often said that anonymous notifications are easier to handle in comparison with confidential notifications. This is because Ahpra does not need to decide what personal information should be redacted from the notification.

However, anonymous notifications can be difficult for Ahpra and the relevant National Board to assess. The notifier is generally not able to be contacted for further information or clarification after they have made the notification because anonymous notifiers typically do not provide contact details. The ability of Ahpra and the relevant National Board to effectively manage the notification therefore depends on the quality of the information provided by the notifier in the first instance. The amount of information provided varies greatly from notification to notification, but anonymous notifiers often provide small amounts of information, perhaps due to a fear that detailed allegations will expose their identity.

This is a significant challenge when dealing with anonymous notifications. While improvements can certainly be made to the handling of anonymous notifications, it would be difficult to completely eliminate the problems associated with Ahpra being unable to contact anonymous notifiers to request further information.

### **Notifications referred to Ahpra from other entities**

It is important to highlight that in certain circumstances the processes of the Office of the Health Ombudsman (OHO) in Queensland and the Health Complaints Entities (HCEs) in the other states and territories may affect Ahpra's handling of confidential or anonymous notifications.

The OHO receives all notifications about registered health practitioners that arise in Queensland but may choose to refer the matter to Ahpra and the relevant National Board if it is satisfied that the matter is not serious. Similarly, notifications about registered health practitioners that HCEs receive are generally referred to Ahpra. This means that when a matter is referred to Ahpra and a National Board from the OHO or an HCE, Ahpra plays no role in how the notification is made in

the first instance. Any initial discussions about making a confidential or anonymous notification will occur between the notifier and the OHO or an HCE.

If a person chooses to make a confidential notification to the OHO or an HCE, Ahpra can discuss privacy considerations with this person once the matter has been referred to it. However, initial discussions about this issue are important and are likely to be highly influential for individuals when deciding what information they want to disclose when first making a notification.

Based on the sample of notification files considered as part of this review, it appears Ahpra does not always initiate a discussion with a notifier about its process for handling confidential notifications after it has received a confidential notification from the OHO or an HCE. In some instances, all discussions regarding confidentiality occurred between the notifier and OHO or an HCE, without input from Ahpra.

It is therefore noted that Ahpra may wish to explore if consistency in messaging about privacy (and the ability to make confidential and anonymous notifications) could be achieved with entities that refer matters to Ahpra and the National Boards.

## **Public-facing communications about the notifications process**

There are many different sources of information available to the public regarding how individuals can make notifications to Ahpra and the National Boards, particularly in relation to what it means to make a confidential or anonymous notification. The key sources include:

- the notification form
- the online notifications portal
- Ahpra staff (via verbal conversations)
- Ahpra's website
- guides and factsheets published by Ahpra.

### **Notification form**

Information about privacy and confidentiality matters relevant to making a notification are positioned prominently on the first page of the notification form. It is explained that:



- 'We will not share your contact details with the practitioner or student named in your complaint or concern...'<sup>70</sup> (where, presumably, 'contact details' means the address, email and telephone number of the notifier)
- 'Importantly, we will share the details of your complaint or concern with the health practitioner or student named in your complaint or concern.'

As a final step, the notifier is asked to sign a declaration that they are aware that Ahpra may send the notification form (and any attachments) to the practitioner concerned and that they have read the privacy and confidentiality statement for the form. A series of consent forms, including the 'Consent authorisation form', are attached to the notification form.

The notification form does not, however, refer to the ability to make a confidential or anonymous notification.

## Online notifications portal

People can choose to make a notification using Ahpra's online notification portal, which is accessed via Ahpra's website.<sup>71</sup>

One of the first steps in lodging a notification using this method is to acknowledge that the collection statement has been read and is understood. This statement is similar to the privacy and confidentiality statement in the hardcopy notification form. It explains that:

- 'We will not share your contact details with the practitioner or student named in your complaint or concern ...'
- 'Importantly, we will share the details of your complaint or concern with the health practitioner or student named in your complaint or concern.'

However, it goes on to ask, 'Do you consent to us sharing your information with relevant parties for the purpose of managing your complaint or concern?'. This is not a question asked in the hardcopy notification form and it is somewhat confusing because it is not explained what 'your information' means.

If a person answers 'No' to this question, they are unable to complete the remainder of the electronic form and are therefore unable to lodge the notification. They are presented with a message that reads:

*If you are not prepared to give consent for us to share the details of your complaint or concerns with these parties, we may not be able to progress our enquiries in relation to it. We suggest you contact us on 1300 419 495 to speak to a staff member about your concerns before you complete this form.*

Similarly, if a person consents to sharing their information but does not provide their first name, family name, gender, date of birth, email or telephone number, then they are also unable to submit a notification.

If a person completes the fields relating to personal details, they will be presented with a question regarding whether they consent to Ahpra sharing their name and date of birth with the health practitioner or student named in the complaint or concern. If the person answers 'No', they are advised that:

*Sharing your name with the health practitioner or student might help them recall the care or treatment they provided to you. You can ask us not to share your name with the health practitioner or student, however this might make the process of managing your complaint or concern more difficult and potentially take longer.*

Following this, notifiers are asked to complete a 'Patient consent' section. If the notifier does not consent to providing their 'health records and other relevant information to the practitioner who is the subject of the notification in order to obtain a response', then they are unable to complete the notification. If, however, the notifier is not a patient, they are not required to answer this question and may be able to complete the online form.

In general, it does not appear that the online notification portal is well equipped to accept confidential and anonymous complaints.

<sup>70</sup> Document provided by Ahpra, NOTF-00 'Complaint or concern (notification) form', dated effective from 4 December 2018.

<sup>71</sup> Ahpra, Website materials: 'Online notification portal: notification', 2016. Accessed at: <https://Ahpraorg.secure.force.com/notification>, June 2019.



## Verbal notifications

People can make verbal notifications to Ahpra over the telephone or by presenting at an Ahpra office.

When accepting notifications verbally, Ahpra staff either complete the online notification form on behalf of the notifier or complete the 'New notification received via phone' template.<sup>72</sup>

The 'New notification received via phone' template is similar to the online notification form, as it prompts the Ahpra staff member to ask:

- 'Do you understand the Ahpra privacy statement?'
- 'Do you consent to us sharing your information with relevant parties for the purpose of managing your complaint or concern?'
- 'Do you consent to your name being provided to the health practitioner or student named in this complaint, to assist them to respond to the complaint you are raising?'

There is no script regarding the ability to make a confidential or anonymous notification.

## Ahpra's website

Ahpra's website provides clear and accessible information to the public regarding how to make a notification about a practitioner, as well as a general explanation of the notifications process.

The website also sets out specific information about how Ahpra may use personal information and who needs to provide consent for the collection, use or disclosure of personal information. It states:

*Generally, we will inform the practitioner or student that a concern has been made about them and may disclose your personal information with the practitioner or student if you consent to this or, if it is required by the law, provide them with your personal information. This is because the practitioner or student has the right to respond to the concerns raised and assists them to provide their response.*

*Examples of exceptions to informing the practitioner or student about the concern or providing them your personal information may include where we believe it would:*

- *prejudice an investigation*
- *place a person's safety at risk*
- *place a person at risk of intimidation.*

*You can elect to remain anonymous or confidential when you raise your concerns to us, but this may limit our ability to effectively investigate your concern, and there may be limitations on the information we can provide to you ...<sup>73</sup>*

However, there is no definition of 'personal information' or an explanation of the kinds of information that are commonly shared with practitioners.

## Confidential notifications

Regarding confidential notifications, Ahpra's website states:

*We respect your right to raise your concerns with us and when you do, we ask for your consent for Ahpra to share details (such as name and date of birth, if you are the patient) with the practitioner. If you do not wish for your name to be given to the practitioner, please let us know.*

*For full details of how Ahpra and the National Boards collect, hold, use and disclose personally identifiable information, you should see our Privacy Policy. We summarise some key points from the Policy below, but this is only provided as a general guide. To avoid any misunderstanding we recommend that you should always refer to the Privacy Policy.*

*Even though Ahpra and the National Board will endeavour not to provide your details to the practitioner if you do not consent to this, the practitioner will be provided with the details of the notification and this might be enough information for the practitioner to identify you.*

<sup>72</sup> Document provided by Ahpra, 'New notification received via phone template', undated.

<sup>73</sup> Ahpra, Website materials: 'How are notifications managed', undated. Accessed at: <https://www.Ahpra.gov.au/Notifications/How-are-notifications-managed.aspx>, June 2019.

*We are also unable to guarantee absolute confidentiality as there are situations when we may be legally obliged to provide identifying information to the practitioner or another person. For example, if a concern about a practitioner was to be heard in front of a panel or tribunal, the practitioner must be provided with enough information about the notification to enable them to respond to it. We may also be required by law to disclose information in certain circumstances.*<sup>74</sup>

While the website directs people to read Ahpra's privacy policy, it is noted that the policy does not specifically mention confidential notifications.

Further, in a context where it is not always possible to make a confidential notification via Ahpra's online portal, Ahpra's website does not provide practical guidance to notifiers about the possible methods to make a confidential notification.

### **Anonymous notifications**

Regarding anonymous notifications, Ahpra's website states that:

*We respect your right to withhold your name and contact details when you make a notification.*

*Remaining anonymous means that you do not provide any identifying information when you submit your notification to us (such as your name, address or contact details).*

*If you wish to remain anonymous you should be aware that your notification can usually only be assessed on the information you provide when you contact Ahpra. If you remain anonymous, we will be unable to seek clarification or additional information from you. This means it might be difficult for us to assess your concerns or progress the matter. Also, we will not be able to advise you of any outcome or actions taken.*<sup>75</sup>

There are no instructions regarding how a person can make an anonymous notification. Such instructions may be helpful to notifiers given Ahpra's online portal does not accept anonymous notifications.

In addition, while Ahpra acknowledges the potential difficulty of limited information being provided in an anonymous notification, Ahpra does not appear to have taken specific steps to address this challenge.

During this review, Ahpra staff suggested that it is better to receive anonymous notifications by phone because Ahpra then has an opportunity to ask clarifying questions about the issues raised in the notification. This preference is not expressly communicated in any of Ahpra's public-facing materials about anonymous notifications. Notifiers are therefore unlikely to be aware that Ahpra would prefer to talk to people who wish to remain anonymous.

Further, Ahpra does not outline what specific information anonymous notifiers should try to include in a written notification. Better communications about these preferences could assist in addressing some of the challenges Ahpra faces when dealing with anonymous notifications. As an example, the OHO explains in its public-facing materials that it is preferable if anonymous complaints include information about:

- when the incident occurred (dates and times)
- where the incident occurred
- the patient's name
- the patient's date of birth
- the name of the health practitioner
- details of the incident.<sup>76</sup>

### **RECOMMENDATION: Improvements to communication about privacy and confidentiality for notifiers**

Ahpra should review all existing communications about notifications and make necessary amendments to ensure consistency in messaging about a notifier's privacy. This messaging should include guidance about what information notifiers should include in a notification, particularly anonymous notifications.<sup>77</sup>

74 Ibid.

75 Ibid.

76 OHO, Website materials: 'Health consumers FAQs', undated. Accessed at: <https://www.oho.qld.gov.au/health-consumers/faqs/>, June 2019.

77 Recommendation 6(c).

As part of this review, consideration was given to whether Ahpra could actively encourage anonymous notifiers to maintain contact during the notifications process. The New South Wales Ombudsman outlines the following ways to 'maximise the usefulness of anonymous reports':

*If the report is received over the phone, asking the caller for a pseudonym or codeword and obtaining a private number or email address via which they can be contacted – possibly at a designated time – in order to gain additional information if needed throughout the course of the investigation.*

*Explaining to the reporter the benefits of having ongoing contact with the authority, such as being able to prevent reprisal, and provide updates about how their report is being investigated or advice about the outcome at the conclusion of any investigation.*

*Encouraging callers who do not wish to leave any details or assume a pseudonym or use a codeword to call back at certain times for the same purposes as outlined above.<sup>78</sup>*

Ahpra has indicated that using pseudonyms and codewords may be hard to successfully implement and is therefore impractical. While encouraging anonymous notifiers to keep in contact with Ahpra may address some of the difficulties staff experience when dealing with anonymous notifications, the NHPOPC decided against making a recommendation about using pseudonyms and codewords.

## Guides and factsheets

On its website, Ahpra shares links to several different guides and factsheets about the notifications process.

The guide entitled *Raising a concern with Ahpra – a guide to raising a concern with Ahpra* explains that Ahpra 'must provide a copy of your notification to the practitioner you are concerned about, unless there is a risk to your safety if we do that'.<sup>79</sup> This is incorrect advice based on Ahpra's current approach to confidential and anonymous notifications. It is also noted that there is no description of the ability to make a confidential or anonymous notification.

Similarly, in the guide entitled, *Having a concern has been raised about you – a guide for registered health practitioners*, there is no reference to scenarios in which the practitioner will not be provided with information about the identity of the notifier.<sup>80</sup>

## Inconsistent understanding of available measures to safeguard the confidentiality of notifiers

As has been explored throughout this section, there is a lack of clarity in Ahpra's public-facing materials about the privacy of notifiers, particularly in relation to confidential and anonymous notifications. This is significant because the sample of notification files reveals notifiers were sometimes confused about what information was provided to the practitioner about their notification.

Some notifiers expressed surprise about the amount of information that had been shared, as demonstrated in the following case study:

78 New South Wales Ombudsman, *Anonymous reporting*, March 2015.

79 Ahpra, Website materials: 'Raising a concern with Ahpra – a guide to raising a concern with Ahpra', June 2013. Accessed at <https://www.ahpra.gov.au/Notifications/Further-information/Guides-and-fact-sheets.aspx>, June 2019.

80 Ahpra, Website form: *Having a concern has been raised about you – a guide for registered health practitioners*, March 2016. Accessed at <https://www.ahpra.gov.au/Notifications/Further-information/Guides-and-fact-sheets.aspx>, June 2019.

## CASE STUDY: Adeline's complaint about the handling of her notification

Adeline made a confidential notification about her colleague, Anton, because she believed Anton may have been suffering from a health impairment. After the notification file had been closed, Adeline made a complaint to Ahpra about the amount of information it had shared with Anton about the notification. She claimed the release of information breached her confidentiality and also placed her at risk of intimidation and harassment by Anton.

In response to the complaint, Ahpra explained it was required to give written notice of the notification to Anton. In order to meet this requirement, it had provided a copy of the notification form to Anton; however, it had withheld the first two pages, which contained the notifier details sections. Ahpra advised it had also redacted sections of information from the remainder of the notification form in an attempt to maintain Adeline's confidentiality.

Although Adeline was of the opinion that she had been placed a risk of intimidation or harassment as a result of Ahpra providing this written notice to Anton, Ahpra explained that it had no reason to form the reasonable belief that such a risk existed.

Ahpra also pointed to the fact that Adeline had ticked the 'privacy collection statement' box on the notification form, which indicated an acknowledgement that Ahpra 'will share the details of your complaint or concern with the health practitioner or student named in your complaint or concern'.

Adeline remained dissatisfied with this explanation and suggested that the notification form be updated to allow notifiers to specifically identify any information that they do not believe should be released to the practitioner.

This confusion about the amount of information being shared with practitioners may be the result of Ahpra not proactively discussing with notifiers how their personal information will be used and disclosed. Interviews with Ahpra staff indicated that once a notification has been received and it is noted that the relevant box has been ticked to acknowledge that Ahpra may send the notification to the practitioner, Ahpra staff do not further discuss issues concerning privacy or confidentiality with the notifier. It is assumed that the notifier understands the consequences of agreeing to certain things in the notification form; however, the review of a sample of notification files suggests that not all notifiers are clear about these consequences.

Further, even when notifiers signal to Ahpra that they want their identity to be kept confidential, it does not appear that the consequences of this choice are always brought to the notifier's attention. During this review, Ahpra staff consistently explained that they discuss the challenges of maintaining confidentiality with notifiers. The sample of notification files reveals, however, that this conversation does not always occur.

## RECOMMENDATION: Improvements to communication about privacy and confidentiality for notifiers

Ahpra should introduce a requirement for staff to have a verbal discussion with notifiers about how their personal information will be used and disclosed during the notifications process.<sup>81</sup>

81 Recommendation 7.

Ahpra's inconsistent use of language regarding personal information is also particularly unhelpful. The following are examples of terminology that is used interchangeably or without a description of how they are different throughout Ahpra's public-facing materials:

- 'your information'
- 'your details'
- 'your contact details'
- 'your personal information'
- 'identifying information'
- 'personally identifiable information'.

In particular, the reference to 'your contact details' in the privacy and confidentiality statement of the notification form is potentially confusing ('We will not share your contact details with the practitioner or student named in your complaint or concern ...'<sup>82</sup>). Presumably, this means the notifier's address, email and telephone number will not be shared with the practitioner. However, the term 'contact details' is not defined. This could potentially lead some notifiers to believe that 'contact details' include their name, with the result that Ahpra will not share their name with the relevant practitioner (and therefore, they do not need to request confidentiality).

Clear communication is essential in managing expectations about how personal information will be used and disclosed. The APP guidelines also outline possible measures that an agency can take to make people aware of how they can interact without sharing personal information including:

- stating prominently on its website that an individual may use facilities for online communication without providing personal information
- using an automated message to inform callers that they are not required to provide personal information
- stating on any online or printed forms that personal information boxes (as such name and address) are not mandatory fields
- informing individuals at the beginning of a matter that they may interact anonymously (or use a pseudonym).<sup>83</sup>

In the context of the National Scheme, all guidance needs to be carefully worded, in recognition of the difficult balancing act between encouraging notifiers to come forward and managing expectations about how information will be shared (including that Ahpra may be compelled to disclose identifying information about a notifier in the future). It is also noted that guidance must be available before a person formally lodges a notification because a notifier is unable to withdraw a notification if they subsequently raise concerns about how their personal information is being used or disclosed during the notifications process.

### RECOMMENDATION: Improvements to communication about privacy and confidentiality for notifiers

Ahpra should review all existing communications about notifications and make necessary amendments to ensure consistency in messaging about a notifier's privacy, including the ability to make confidential and anonymous notifications.

This messaging should include clarity about the meaning of personal information using consistent terminology.<sup>84</sup>

Ahpra should also specify the option for notifiers to make a confidential or anonymous notification and explain how these notifications will be handled.<sup>85</sup>

Warnings should be provided about the circumstances in which Ahpra may be compelled to disclose identifying information about a notifier to others.<sup>86</sup>

82 Ahpra, Website form: 'NOTF-00 Complaint or concern (notification) form', dated effective from 4 December 2018. Accessed at <https://ahpraorg.secure.force.com/notification>, June 2019.

83 Office of the Australian Information Commissioner, *APP guidelines*, February 2014, Chapter 2, p. 4.

84 Recommendation 6(a).

85 Recommendation 6(b).

86 Recommendation 6(d).

## Conclusions about the current practices of Ahpra and the National Boards

While Ahpra has little formal guidance for its staff regarding confidentiality safeguards for notifiers, staff have developed some processes to safeguard a notifier's privacy during the notifications process.

In particular, Ahpra staff consistently demonstrated that they seek written consent from notifiers about sharing personal information with the practitioner they have notified about. In most cases, this consent is forthcoming.

While Ahpra's preference is to share the notifier's identity with the practitioner, Ahpra also accepts confidential and anonymous notifications. The available data indicates that the number of confidential and anonymous notifications being made to Ahpra each year is increasing.

Ahpra staff reported challenges in dealing with these types of notifications. In the case of confidential notifications, they advised it is impossible to guarantee that a notifier's personal information will be kept confidential because:

- practitioners are sometimes able to guess the identity of confidential notifiers due to the background information provided in the notification
- Ahpra is sometimes compelled to disclose identifying information about a notifier to others, including where a matter proceeds to be heard by a court or tribunal, or if an FOI request has been made in relation to the notification
- administrative errors sometimes result in the unintentional disclosure of the notifier's identity.

Anonymous notifications can also be problematic because Ahpra is unable to ask clarifying questions of the notifier. This can impede the assessment of the concerns being raised.

While it would be impossible to eliminate these challenges completely, Ahpra could seek to reduce their impact by improving its policies and processes for handling confidential and anonymous notifications. It is therefore 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 making confidential and anonymous notifications.

Further, it is recommended that Ahpra improves how confidential and anonymous notifications are recorded in 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 files.

Better communication about confidential and anonymous notifications would also be helpful. It is recommended that Ahpra reviews 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.



# Part D: Australian and international comparisons

The question of how to appropriately safeguard the confidentiality of people who raise concerns is not unique to Ahpra and the National Boards. Several comparative organisations from both inside and outside of Australia were considered as part of this review, and many similarities were observed.

## Queensland

In Queensland, complaints about health practitioners (also referred to as 'health service providers') are handled initially by the OHO.<sup>87</sup>

In general, the OHO's approach is very similar to Ahpra's. The OHO prefers to provide the full complaint to the practitioner (including the name of the complainant), but it also accepts confidential and anonymous complaints.

### Confidential and anonymous complaints

The OHO highlighted challenges associated with handling confidential and anonymous matters.<sup>88</sup>

In its public-facing materials, the OHO cautions that it can be more difficult to investigate a complaint without all the necessary information:

*To assess the issues raised in your complaint, the OHO usually seeks a response from the health service provider and is required to notify them of the nature of the complaint and who made it.*

*The OHO will only be able to request relevant records and information if the consumer's name and date of birth are disclosed.*

*Remaining anonymous may make it difficult to obtain a relevant response to the specific issues you have raised. The OHO will not be able to clarify any information you have provided, or ask for further information that may be needed to assess the complaint, and may have to close your complaint.*

*If you choose to make an anonymous complaint, the decision made by the OHO will not be provided to you.*

*When making an anonymous complaint, you must provide sufficient information for the OHO to determine:*

- *when the incident occurred i.e. dates, times*
- *where the incident occurred*
- *the patient's name*
- *the patient's date of birth*
- *the name of the health service provider i.e. doctor, facility*
- *details of the incident.*<sup>89</sup>

The OHO makes clear that a complainant can request that their personal details be withheld:

*This is different to remaining anonymous, as the OHO will retain your personal information and will not provide it to the health service provider involved in your complaint. However, there may be some circumstances where this is not possible. Contact us to discuss your circumstances.*

*Withholding your identity still allows the OHO to contact you throughout the process and provide a formal outcome to your complaint.*

*The OHO respects your right to privacy, however due to the nature of your complaint, it is possible a service provider could unintentionally identify who is making the complaint.*<sup>90</sup>

The legislation governing the OHO, the *Health Ombudsman Act 2013* (Qld), has a significant difference when compared with the National Law. Section 34(2) of the *Health Ombudsman Act* provides that the OHO may ask the complainant for their name, address and any other identifying information.<sup>91</sup> The OHO is not required to deal with a complaint until the complainant complies with this request

87 As explained previously in this report, the OHO receives all notifications about registered health practitioners that arise in Queensland but may choose to refer the matter to Ahpra and the relevant National Board if satisfied that the matter is not serious. This section of the report focuses only on how the OHO handles matters that it decides to progress (those matters that are not referred to Ahpra and the relevant National Board for management).

88 Information provided by the OHO.

89 OHO, Website materials: 'Health consumers FAQs', undated. Accessed at: <https://www.oho.qld.gov.au/health-consumers/faqs/>, June 2019.

90 Ibid.

91 *Health Ombudsman Act 2013* (Qld), s. 34(2).



(to the extent the complainant is reasonably able to comply).<sup>92</sup> Noncompliance with such a request may be grounds for the OHO to take no further action.<sup>93</sup> Although the operation of these provisions mean the OHO could decline to deal with complaints where the complainant does not provide identifying information, in practice the OHO accepts both confidential and anonymous complaints.

## Protections for complainants

As in the National Law, the Health Ombudsman Act provides that the OHO is not required to provide notice of a matter to a practitioner if doing so would:

- put a person's health or safety at serious risk
- put a complainant or other person at risk of being harassed or intimidated, or
- prejudice an investigation or inquiry.<sup>94</sup>

However, the Health Ombudsman Act goes one step further than the National Law. Section 261 provides protections for any person who makes a complaint about a practitioner:

### **261 Reprisal and grounds for reprisals**

*(1) A person must not cause, or attempt or conspire to cause, detriment to another person because, or in the belief that, any person –*

*(a) has made or may make a health service complaint; or*

*(b) has provided or may provide information or other assistance to the health ombudsman, a staff member of the Office of the Health Ombudsman or an authorised person.*<sup>95</sup>

A person who takes a reprisal commits an offence with a maximum penalty of 200 penalty units or two years imprisonment.<sup>96</sup>

## Public interest disclosures

The OHO advised that, in some circumstances, it also takes the provisions of the *Public Interest Disclosure Act 2010* (Qld) (PID Act) into consideration when dealing with a confidential or anonymous complaint.<sup>97</sup> For the purposes of the PID Act, a 'public interest disclosure' is a disclosure about suspected wrongdoing in the public sector, and the OHO has the power to accept public interest disclosures made about the conduct of agencies or employees of agencies that are within the OHO's jurisdiction. These matters generally arise in the public health service setting, such as a hospital.

The PID Act has strict rules for confidentiality, and it can be an offence to not follow these rules. The OHO explains that it attempts to preserve confidentiality in relation to information about who made the disclosure and the subject of the disclosure, as well as information about the disclosure that may cause detriment, if known.<sup>98</sup> However, the OHO also acknowledges that the discloser's identity might become known through applying the principles of natural justice, through a court or tribunal action, or if authorised to be disclosed under a regulation or another Act.<sup>99</sup> Importantly, reprisal against a person who has made a disclosure is an offence under the PID Act.

Theoretically, there is the potential for overlap between public interest disclosures and complaints about practitioners under the Health Ombudsman Act, because a concern about a practitioner might satisfy the criteria for both. Matters that are a health service complaint and also satisfy the definition of a public interest disclosure are treated as a public interest disclosure.

92 Ibid., s. 34(5).

93 Ibid., s. 44(1)(b)(i).

94 Ibid., s. 284.

95 Ibid., s. 261.

96 Ibid., s. 262.

97 Information provided by the OHO.

98 OHO, *Public interest disclosure policy*, July 2018.

99 Ibid.

## New South Wales

In New South Wales, complaints about health practitioners are handled by the Health Care Complaints Commission (HCCC) in partnership with the Health Professionals Council Authority (HPCA).

The legislation that establishes the HCCC has a significant difference when compared with the National Law. The *Health Care Complaints Act 1993* (NSW) (HCC Act) specifically requires that notice of the complaint must identify the complainant and, except in limited circumstances, a copy of the complaint must be provided to the person against whom the complaint is made:

### **16 Person against whom complaint made to be notified of complaint**

(1) *The Commission must give written notice of the making of a complaint, the nature of the complaint and the identity of the complainant to the person against whom the complaint is made...*

(3) *The Commission may give a copy of the complaint to the person against whom the complaint is made.*

(4) *This section does not require the Commission to give notice under this section if it appears to the Commission, on reasonable grounds, that the giving of the notice will or is likely to:*

- (a) prejudice the investigation of the complaint, or*
- (b) place the health or safety of a client at risk, or*
- (c) place the complainant or another person at risk of intimidation or harassment.*

(5) *Despite subsection (4), the Commission must give the notice if the Commission considers on reasonable grounds that:*

- (a) it is essential, having regard to the principles of natural justice, that the notice be given, or*
- (b) the giving of the notice is necessary to investigate the matter effectively or it is otherwise in the public interest to do so.*

(6) *If the Commission decides that subsection (4) applies to a complaint but that some form of notice could be given of the complaint without affecting the health or safety of a client or putting any person at risk of intimidation or harassment, the Commission may give such a form of notice.*

(7) *On the expiration of each consecutive period of 60 days after the complaint is assessed, the Commission must undertake a review of a decision not to give notice under this section (or to give notice in some other form as referred to in subsection (6)) unless notice under this section has already been given or the Commission has discontinued dealing with the complaint.<sup>100</sup>*

Hence, the identity of the complainant must be disclosed unless the HCCC is satisfied that the giving of notice would prejudice the investigation, place the health or safety of a client at risk, or place a person at risk of intimidation or harassment.

In its publicly available information, the HCCC explains that it is usually required to notify a practitioner of who made the complaint about them.<sup>101</sup> It highlights that, in fairness to the practitioner, it may disclose information if it is necessary to properly investigate the matter.<sup>102</sup>

100 *Health Care Complaints Act 1993* (NSW), s. 16.

101 HCCC, Website materials: 'FAQs – I am thinking of making a complaint', last updated May 2015.

Accessed at: <https://www.hccc.nsw.gov.au/Information/Frequently-Asked-Questions/I-am--thinking-of-making-a-complaint/default.aspx>, June 2019.

102 HCCC, Website materials: 'Your privacy', last updated January 2014. Accessed at: <http://www.hccc.nsw.gov.au/Complaints/Your-Privacy>, June 2019.

## Confidential and anonymous complaints

In relation to anonymous complaints, the HCCC explains that:

*By remaining anonymous it may make it difficult to obtain a relevant response to the specific issues and the Commission will not be able to clarify any information you provided or ask for further information that it may need to assess the complaint. If this is the case, the Commission may have to discontinue dealing with a complaint.*<sup>103</sup>

However, the HCCC has confirmed that it does receive and progress confidential and anonymous complaints in some situations. The factors the HCCC will consider when making the decision to discontinue or progress these types of complaints are:

- the nature and seriousness of the matter
- whether there is sufficient information to progress the complaint
- whether there is consent to access relevant subject records.

In practice, if the HCCC decides to progress an anonymous complaint, the legislative requirement to identify the complainant is met by simply advising the practitioner that the complainant is anonymous. If a complainant requests that their identity be kept confidential, the HCCC can apply s. 16(4) or s. 16(6) of the HCC Act (as outlined above) so it is not required to provide notice of the complaint or can provide notice of the complaint in any form it wishes.

In general, this means that while the HCCC usually identifies the complainant, it also accepts confidential and anonymous notifications. This approach is generally consistent with that adopted by Ahpra.

## Protections for complainants

The HCC Act makes it an offence for a person who, by threat, intimidation or inducement, persuades or attempts to persuade another person not to continue to make a complaint.<sup>104</sup> This is a notable difference compared with the National Law, which does not include such an offence.

## United Kingdom

### Health and Care Professions Council

The Health and Care Professions Council (HCPC) is the regulator of 15 professions that provide health and care services in the United Kingdom. The professions with the largest number of registrants are social work, physiotherapy and occupational therapy.<sup>105</sup>

Anyone can raise a concern about a registered practitioner's fitness to practise. However, the HCPC's threshold policy states that it will not normally take forward a concern that is raised anonymously or where the complainant wishes to be anonymous to the practitioner (a 'confidential' complaint).<sup>106</sup> The rationale for this position is that the practitioner needs to know the source of the complaint in order to provide a full response to the concerns.<sup>107</sup>

Complainants are made aware of the general requirement to identify themselves when making a complaint. The HCPC's website states that, to raise a concern, 'We will need your name, correspondence address, phone number and email address'.<sup>108</sup>

103 HCCC, Website materials: 'FAQs – I am thinking of making a complaint', last updated May 2015. Accessed at: <https://www.hccc.nsw.gov.au/Information/Frequently-Asked-Questions/I-am-thinking-of-making-a-complaint/default.aspx>, June 2019.

104 *Health Care Complaints Act 1993* (NSW), s. 98.

105 HCPC, Website materials: 'Registrants by profession and route and gender', dated 1 May 2019. Accessed at: <https://www.hcpc-uk.org/globalassets/resources/data/2019/registrant-snapshot---april-2019.pdf>, June 2019.

106 HCPC, *Threshold policy for fitness to practise investigations*, dated 14 January 2019, p. 4.

107 *Ibid.*

108 HCPC, Website materials: 'Raise a concern', undated. Accessed at: <https://www.hcpc-uk.org/concerns/raising-concerns/public/StepFour>, June 2019.

### Confidential and anonymous complaints

The HCPC's threshold policy outlines exceptions to the general rule that a practitioner will be informed of the complainant's identity. If the complaint is serious, the HCPC may decide it is in the public interest to investigate even if the complainant is anonymous or wishes to keep their identity confidential.<sup>109</sup> In such circumstances, the HCPC will share the substance of the complaint without disclosing the personal details of the complainant. However, the HCPC highlights that this practice can raise evidential difficulties in terms of obtaining patient records and being able to test the credibility of the evidence.<sup>110</sup>

There are clear similarities between the approaches adopted by the HCPC and Ahpra. In particular, both entities prefer to inform the practitioner of the identity of the complainant/notifier but can also progress confidential and anonymous concerns without doing so.

### Public interest disclosures

The HCPC is a 'prescribed person' under the United Kingdom's Public Interest Disclosure Act 1998. In effect, this means that if a person reports a wrongdoing to the HCPC that they believe to be true and relates to the HCPC's statutory functions, they are legally protected. The HCPC has guidance for whistleblowers, which refers to concerns being raised anonymously, as well as the option for whistleblowers to request that their personal details be kept confidential.<sup>111</sup>

### General Medical Council

The GMC regulates medical practitioners in the United Kingdom.

In its brochure, *How we use your information when considering concerns*, the GMC outlines how a complainant's information is used and what steps the GMC routinely takes to protect confidentiality.<sup>112</sup> The GMC highlights that it has an obligation to share details of concerns with relevant people:

*We have to share details of your concern to make preliminary enquiries or investigate. Because we're required by law to look into serious concerns about doctors, we don't need your permission to do this.*<sup>113</sup>

This is slightly different from the approach taken by Ahpra and the National Boards, which routinely seek a notifier's consent to share details about the notification with the relevant practitioner.

### Confidential and anonymous complaints

The GMC takes any requests for confidentiality into consideration when managing complaints:

*... it's important that you tell us if you have any concerns or specific requests about how your information will be used so we can take them into account. Because we're committed to protecting your privacy, we won't share any personal information about you unless it's essential that we do so.*<sup>114</sup>

This means the GMC accepts confidential complaints. The GMC also accepts anonymous complaints but acknowledges the difficulties associated with investigation if the patient wishes to remain anonymous.<sup>115</sup>

Overall, the approach taken by the GMC and Ahpra in relation to sharing personal information is similar.

109 HCPC, *Threshold policy for fitness to practise investigations*, dated 14 January 2019, p. 4.

110 Information provided by the HCPC, June 2019.

111 HCPC, Website materials: 'Raising a concern – guidance for whistleblowers', webpage published February 2019, p. 2. Accessed at <https://www.hcpc-uk.org/resources/policy/whistleblowing-policy/>, June 2019.

112 GMC, *How we use your information when considering concerns*, July 2014.

113 Ibid.

114 Ibid.

115 GMC, Website materials: 'The GMC process for handling complaints', undated.

Accessed at: [https://www.gmc-uk.org/-/media/documents/DC6521\\_Handling\\_complaints.pdf\\_58086479.pdf](https://www.gmc-uk.org/-/media/documents/DC6521_Handling_complaints.pdf_58086479.pdf), June 2019.

## New Zealand

### Medical Council of New Zealand

The Medical Council of New Zealand (MCNZ) accepts notifications about registered medical practitioners, but it must refer notifications about a medical practitioner's competence or conduct affecting health consumers to the Health and Disability Commissioner (HDC).

In general, the MCNZ does not accept anonymous notifications.<sup>116</sup> The rationale for this position is that in the interests of natural justice, the practitioner must know who has made the notification in order to have a reasonable opportunity to respond to it.<sup>117</sup> The MCNZ's approach to notifications involves allowing the practitioner in question to respond to the notification, which is presented to the practitioner in the form that it is provided to the MCNZ. On its website, the MCNZ explains that:

*It is important to know that information provided in your written referral, including your name, will be given to the doctor so they can respond. This ensures the Council is acting in accordance with the principles of natural justice and fulfilling our obligations under the Privacy Act 1993.*<sup>118</sup>

However, the MCNZ recognises that situations may arise where serious issues about a practitioner are brought to its attention by a person who does not wish to participate in the formal notifications process. In such cases, the MCNZ may require the registrar to make a third-party formal notification with the HDC. This process could involve the MCNZ liaising with the notifier to determine what information may be used in the third-party notification to the HDC. However, the MCNZ highlights that this approach does not expressly guarantee confidentiality and only relates to situations where the nature of the notification raises a high level of concern.<sup>119</sup>

While the MCNZ's approach is slightly different from Ahpra's, there are clear similarities in the way both entities prefer to share the identity of the notifier with the relevant practitioner.

## Conclusions about Australian and international comparisons

In general, Ahpra's current approach to safeguarding the privacy of notifiers is consistent with the practices of other health regulators in Australia and some other jurisdictions. All organisations that were considered seek to provide the relevant practitioner with all known information about a complaint, including the name of the complainant.

All organisations that were considered also handle confidential or 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. In cases of anonymous complaints, some entities have a general policy of not accepting these types of complaints. However, anonymous complaints are generally progressed by the entities if they raise a high level of concern or it is otherwise thought to be in the public interest to do so. This indicates that Ahpra's acceptance of these types of notifications is also generally consistent with other comparative regulators.

A significant difference, however, is that the governing legislation of many comparative organisations makes it an offence to cause harm or detriment to a person who has made a complaint. The National Law does not include such an offence.

116 Information provided by the MCNZ.

117 Ibid.

118 MCNZ, Website materials: 'Conduct and competence concerns', undated.

Accessed at: <https://www.mcnz.org.nz/our-standards/fitness-to-practise/conduct-and-competence-concerns/>, June 2019.

119 Information provided by the MCNZ.

# Part E: Key considerations

There are clearly existing ways that Ahpra and the National Boards seek to safeguard the confidentiality of notifiers. In particular, Ahpra offers notifiers the opportunity to make either confidential or anonymous notifications. This approach is consistent with the requirements of the National Law, the APPs and the common law principle of procedural fairness. Importantly, Ahpra's approach to maintaining the privacy of notifiers is also similar to comparative regulators, both domestically and internationally.

However, Ahpra staff consistently reported that it is more challenging to deal with confidential and anonymous notifications than notifications where the notifier's identity is freely shared with the practitioner who is the subject of the notification.<sup>120</sup> While it would be impossible to completely eliminate these challenges, addressing some of the gaps in Ahpra's existing processes may reduce their impact. This review has identified key areas for improving Ahpra's management of confidential and anonymous notifications, particularly in relation to communicating with notifiers about how their personal information may be used and shared. There are also gaps in Ahpra's policy framework for dealing with these types of notifications that should be addressed.

The key question requiring further consideration is whether the option to make confidential or anonymous notifications represents reasonable safeguards for notifiers in the current environment, or whether anything further should be done to protect notifiers from harm as a result of making a notification. In particular, the balancing act between protecting the confidentiality of notifiers and ensuring procedural fairness for practitioners needs to be explored further to determine if any significant changes to Ahpra's current practices are warranted.

## Safeguarding the confidentiality of notifiers

Taking into consideration the information gathered during this review, there are three broad reasons why it may be necessary to safeguard the confidentiality of notifiers:

- to mitigate risks to health and safety, and risks of intimidation or harassment
- to assist in preserving the notifier's ongoing relationship with the practitioner
- to remove barriers to reporting concerns about practitioners.

Each of these scenarios has been considered with a view to determining if Ahpra's current practices adequately safeguard the confidentiality of notifiers.

## Mitigating risks to health or safety, and risks of intimidation or harassment

While certainly not a common occurrence,<sup>121</sup> the incident that led to this review is clear evidence that practitioners may commit violent acts against a person who has made a notification about them. On account of this, it is critical that Ahpra and the National Boards take reasonable steps to safeguard the confidentiality of notifiers where there is a known risk of harm. While it is impossible for Ahpra and the National Boards to accurately predict future events, in some cases there may be 'red flags' that could alert Ahpra to the possibility that a notifier may be at risk of harm. Examples of 'red flags' include that the practitioner has previously threatened to harm the notifier, or the practitioner has a history of violence towards the notifier.

<sup>120</sup> Interviews with Ahpra staff [de-identified].

<sup>121</sup> Other than the case against Dr Holder, there are no other known instances of violent acts being committed by practitioners against notifiers in retaliation for making a notification under the National Law.



The National Law already envisages that it may be necessary to protect a notifier in certain situations. As described in *Part B: Legal framework for managing notifications*, ss. 152(3) and 161(4) of the National Law give National Boards discretion to not provide a practitioner with notice of a notification or an investigation if the board reasonably believes doing so would place at risk a person's health or safety, or place a person at risk of intimidation or harassment.

Ahpra does not, however, have guidance for its staff regarding how these provisions should be applied. While this lack of guidance may be an indication that such situations are rare, it is important that staff have a framework that they can turn to if there are concerns about risks to a person's health or safety, or risks of intimidation or harassment.

### RECOMMENDATION: Improvements to the administrative management of confidential and anonymous notifications

Ahpra should strengthen guidance for staff regarding confidentiality safeguards for notifiers. This should include guidance regarding 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 or safety, or a risk of intimidate or harassment.<sup>122</sup>

Importantly, the National Law does not explicitly allow Ahpra and the National Boards to withhold the identity of the notifier for the entirety of the notifications process (for example, during the 'show cause' process). These provisions also do not apply in circumstances where Ahpra and a National Board have not been provided with enough information to form a 'reasonable belief' that there is a risk to a person's health or safety, or a risk of intimidation or harassment. Something more than these provisions is therefore required to ensure there are adequate confidentiality safeguards for notifiers at all stages of the notifications process.

### *Confidential and anonymous notifications*

The most obvious mechanism to safeguard the confidentiality of notifiers in circumstances where there are concerns about their safety is to allow notifiers to control what personal information is disclosed to the practitioner they have notified about. If a notifier is concerned about the repercussions of making a notification, they should be able to choose whether they advise Ahpra of their identity, and if they do, whether they agree to Ahpra releasing their identity to the practitioner.

While not a perfect system, the option of making confidential and anonymous notifications is currently available to notifiers who contact Ahpra. In general, this is consistent with the approach taken by comparative regulators. Ahpra and the National Boards generally respect a notifier's request for confidentiality, even if not reasonably satisfied there is a risk to a person's health or safety, or that a person is at risk of intimidation or harassment. This is slightly different from some of the comparative organisations looked at as part of this review, as some only take requests for confidentiality into consideration when handling complaints, and the decision-maker decides what information is shared with the relevant practitioner.

It is also important to note that providing a mechanism to make an anonymous notification is consistent with the APPs, which require that individuals must have the option of not identifying themselves.<sup>123</sup>

Taking these factors into account, the current approach to accepting confidential and anonymous notifications is a reasonable way to mitigate the possible risk of harm to notifiers.

122 Recommendation 3(c).

123 *Privacy Act 1988* (Cwlth), Schedule 1, Clause 2.



### *Assessing the relevance of the notifier's identity to the allegations being raised*

Another available mechanism to protect notifiers from possible risks of harm is to undertake a case-by-case assessment of whether it is necessary to disclose the notifier's identity to the practitioner.

The reason this issue is important is because Ahpra staff described that there were no 'red flags' that Dr Holder was planning an act of violence against Ms Akehurst,<sup>124</sup> nor did Ms Akehurst herself have any specific fears about her personal safety when she initially made the notification about Dr Holder.<sup>125</sup> This means there was no trigger to consider if Ms Akehurst's identity should be withheld.

Many interviewees for this review explained that they do not believe it was necessary for Ahpra to have shared Ms Akehurst's identity with Dr Holder.<sup>126</sup> This is also the view of Ms Akehurst and Justice Vanstone.<sup>127</sup> Valid arguments have been made that practitioners can sometimes respond to allegations (such as those involving prescribing practices) without being informed of the identity of the person who made the notification.

This raises the question of whether Ahpra could mitigate the risk of harm to notifiers by assessing on a case-by-case basis whether it is necessary to disclose the notifier's identity to the practitioner. 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, Ahpra staff, practitioners and defence organisations for practitioners agreed that, in principle, 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. During this review, it was suggested that it may be enough in some circumstances to refer to a notifier by their role only – for example, the relevant

practitioner could be advised that 'a pharmacist' had made a notification about them rather than providing the name of the pharmacist.<sup>128</sup>

It is acknowledged that this approach could add an additional step to the notifications process because Ahpra staff would be required to assess the relevance of the notifier's identity to the allegations being made. However, it is unlikely that the notifier's identity would be irrelevant in a significant proportion of matters. It is in the public interest for Ahpra and the National Boards to consider how they can possibly mitigate risks of harm to notifiers and, in this context, any additional time spent considering this issue would be justified.

### **RECOMMENDATION:** Consideration of confidentiality safeguards for notifiers

Ahpra should consider possible confidentiality safeguards for the notifier when assessing each new notification. This could include assessing whether it is necessary to disclose the notifier's identity to the practitioner.<sup>129</sup>

124 Interviews with Ahpra staff [de-identified].

125 Interview with Kelly Akehurst.

126 Interviews with various Ahpra staff and practitioners [de-identified].

127 Interview with Kelly Akehurst; 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.

128 Interview with Ahpra staff [de-identified].

129 Recommendation 1.

### *Consequences for practitioners acting inappropriately towards notifiers*

Ahpra generally explains to practitioners in its initial correspondence about a notification that they should not contact the notifier. Presumably this is because of fears that practitioners could act inappropriately towards notifiers in retaliation for making a notification. If Ahpra later becomes aware that a practitioner has sought to intimidate, harass or coerce a notifier during the notifications process, that information is provided to the relevant National Board and may generate a new issue for the board's consideration when deciding whether to take action against the practitioner.

Some Ahpra staff raised concerns that this messaging is problematic because it does not encourage practitioners to conciliate with the notifier (where appropriate) and can also obstruct practitioners from maintaining an ongoing professional relationship with the notifier. On balance, the idea that a practitioner should not have any contact with the notifier may not always be in the best interests of the individuals involved in the notification. With this in mind, Ahpra highlighted that it must think carefully about what it communicates to practitioners about future contact with notifiers.

As part of this review, consideration was given to the idea that, at the time of receiving a new notification about a practitioner, Ahpra could proactively explain to the practitioner that any attempt to harm the notifier will be taken seriously and could be dealt with by the relevant National Board as a conduct issue. The NHPOPC decided against making such a recommendation because it may have the unintended consequence of stopping practitioners from maintaining necessary professional relationships with notifiers.

However, Ahpra and the National Boards should take a strong stance on the issue of practitioners acting inappropriately towards notifiers. It is important that the public has confidence that Ahpra and the National Boards take notifier safety seriously and that any attempts by a practitioner to harm or intimidate a notifier are promptly dealt with.

### **RECOMMENDATION:** Consequences for practitioners who harm, threaten, intimidate, harass or coerce notifiers

Ahpra should develop 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.<sup>130</sup>

Unlike in other similar jurisdictions, it is not an offence under the National Law to threaten, intimidate or cause detriment to a person who provides information to Ahpra or the National Boards. While it is acknowledged that some of this conduct could be dealt with by police as a criminal matter, it is a gap in the National Law.

Discussions with other regulators during this review highlighted the importance of such an offence in their legislation. While examples of prosecutions could not be identified, other regulators explained that they often refer to the relevant offence in correspondence to practitioners when they have concerns about the practitioner's behaviour during the complaints process. The existence of the offence therefore seems to play an important role in setting expectations for behaviour and deterring individuals from acting in a way that may cause harm to a notifier.

### **RECOMMENDATION:** Consequences for practitioners who harm, threaten, intimidate, harass or coerce notifiers

Ahpra should seek an amendment to the National Law to make it an offence for a registered health practitioner to harm, threaten, intimidate, harass or coerce a notifier.<sup>131</sup>

.....  
<sup>130</sup> Recommendation 8.  
<sup>131</sup> Recommendation 9.

## Preserving the notifier’s ongoing relationship with the practitioner

It is also important to safeguard the confidentiality of notifiers to help preserve any ongoing relationship that the notifier may have with the relevant practitioner.

This is not a recognised reason for withholding the notifier’s identity from the practitioner under the National Law. Currently, if a notifier is concerned about the impact that making a notification could have on their relationship with the practitioner, it would instead be open to the notifier to choose to make a confidential or anonymous notification.

While the relationship of the notifier to the practitioner is not a mandatory field in Ahpra’s notification form or Pivotal, Ahpra makes some attempts to gather information about the source of notifications. The available data from Ahpra suggests that confidential and anonymous notifications are less often made by patients, compared with all notifications (see Table 2).

Importantly, there is a significant difference between the rate at which confidential and anonymous notifications are made by other practitioners (30.5 per cent) and the rate at which other practitioners generally make notifications (10.4 per cent). The rate at which treating practitioners make confidential and anonymous notifications is also higher (2.3 per cent compared with 1.1 per cent for all notifications).

The sample of notification files analysed during this review supports the idea that confidential and anonymous notifications are commonly made by colleagues or other practitioners. There were also instances where friends and family of a practitioner notified Ahpra of concerns about the practitioner’s health.

This is an important observation because it indicates that notifiers are currently more likely to want to withhold their identity from the practitioner if a relationship exists between them that may need to continue in the future. Colleagues and friends and family of the practitioner will most likely need to continue to interact with the practitioner. This situation may lead the notifier to fear that disclosing their identity will place a strain on that relationship and is therefore something to be avoided.

**Table 2: Percentage comparison between the sources of confidential and anonymous notifications and the sources of all notifications, 2016–2019<sup>132</sup>**

Notification source	Notifications completed 2016–17		Notifications completed 2017–18		Notifications completed 2018–19	
	All notifications (%)	Confidential and anonymous notifications (%)	All notifications (%)	Confidential and anonymous notifications (%)	All notifications (%)	Confidential and anonymous notifications (%)
Patient, patient’s relative or member of the public	50.3	37.1	54.5	43.8	52.3	46.2
Other practitioner	12.7	30.8	12.6	34.5	10.4	30.5
Anonymous or unclassified	5.5	26.1	2.5	11.0	1.8	9.1
Employer	8.5	3.1	8.1	4.6	8.0	4.6
HCE	6.3	0.0	6.1	0.3	16.4	3.9
Treating practitioner	0.8	0.3	1.3	2.8	1.1	2.3
Other	15.8	2.5	14.8	2.9	9.9	3.5

<sup>132</sup> Data provided by Ahpra.

### Notifications by colleagues

Interviews with defence organisations for practitioners indicate that practitioners often seek advice about whether they need to be named when making a notification about a colleague. There was some suggestion that practitioners are generally advised by defence organisations that they ought to be prepared to put their name to any allegations they make.<sup>133</sup> However, practitioners – particularly those in situations where they have concerns about a more senior practitioner – were sometimes concerned about the possible ramifications of making a notification.<sup>134</sup> It was explained that practitioners saw making a notification about a colleague as a ‘career-limiting move’, with the potential to detrimentally affect relationships when working in a team environment.<sup>135</sup> Further, it is noteworthy that there is significant evidence that bullying and harassment are a problem across healthcare professions in Australia.<sup>136</sup> In this context, the ability to make a confidential or anonymous notification about a colleague is seen as a safer option for some practitioners.<sup>137</sup>

Different points of view have been expressed about this issue. Some interviewees opined that making notifications about colleagues is a professional responsibility and practitioners should therefore accept that they may be required to put their name to allegations about a colleague in the course of their duties.<sup>138</sup> However, others suggested that this was an idealistic view that does not take into account the reality of working in teams or the culture of many healthcare professions.<sup>139</sup>

The review of a sample of notification files revealed that fears about the impact that a notification may have on professional relationships is a relevant consideration for some notifiers. The following case study demonstrates this scenario:

### CASE STUDY: Boris’ notification about Stephanie

Boris called Ahpra to make a notification about his colleague, Stephanie. Boris claimed Stephanie was displaying the effects of alcohol abuse. Boris stated Stephanie had become unreliable and he had overheard patients making complaints about her behaviour.

Boris stated he did not want Stephanie to know that he had made the notification about her. Ahpra kept Boris’s identity confidential.

The relevant board decided to require Stephanie to attend a health assessment with an addiction specialist.

This is a strong reason for continuing to accept confidential and anonymous notifications.

Concerns about preserving professional relationships with colleagues is also a further reason in support of the recommendation that Ahpra assesses on a case-by-case basis whether it is necessary to release the notifier’s name to the practitioner. As previously discussed, it may be enough in some circumstances to refer to a notifier by their role only; for example, the practitioner could be advised that ‘a colleague’ had made a notification about them rather than providing the name of the notifier.

### Notifications by family and friends

It also appears that a significant number of confidential and anonymous notifications are made by family and friends of practitioners who are concerned about a practitioner’s health or conduct. Defence organisations for practitioners also indicated that confidential and anonymous notifications are more likely in rural areas, where notifiers may be more concerned about ongoing relationships in small communities.<sup>140</sup> These examples represent other valid scenarios where Ahpra and the National Boards should accept confidential and anonymous notifications.

133 Interview with defence organisation [de-identified].

134 Ibid.

135 Ibid.

136 Senate Community Affairs References Committee, *Medical complaints process in Australia*, November 2016, Chapter 3.

137 Interview with a defence organisation [de-identified].

138 Interview with a practitioner [de-identified].

139 Interview with a defence organisation [de-identified].

140 Ibid.

In particular, family and friends of a practitioner may be aware of the practitioner experiencing health difficulties that may not be easily recognised in a professional setting. The following case study provides an example of such a scenario:

### CASE STUDY: Anna's notification about Tony

Anna called Ahpra to advise she had concerns about the mental health of her friend, Tony, who was a registered health practitioner. Anna stated Tony had stopped seeing his psychiatrist and his health had noticeably deteriorated. During the telephone conversation with the Ahpra staff member, Anna advised she was concerned Tony would get angry at her for contacting Ahpra.

The following day, Ahpra called Anna to have a conversation about what information she was comfortable with Ahpra disclosing to Tony about her notification. Anna advised she did not want Ahpra to identify her as the notifier, but she came to an agreement with Ahpra about what specific parts of the notification Ahpra could be communicated to Tony.

Ahpra provided Tony with notice of the notification and communicated the allegations in the form that had been agreed with Anna. Anna's identity was withheld.

The matter proceeded to the relevant tribunal, where it was found that Tony had an impairment. Anna's identity was not revealed during the tribunal proceedings.

## Removing barriers to reporting

There are several potential barriers to reporting concerns about practitioners. Relevant to this review, it is probable that public knowledge of a notifier being subjected to a violent attack as a result of making a notification may deter others from coming forward with their own concerns. Further, if a notifier's identity is not protected (as they wished), it can lead to feelings of distrust about the regulator and an unwillingness to participate further.

If notifiers have confidence that their identities will be protected to the greatest extent possible, or that it is open to them to remain anonymous, they may be more likely to make a notification.

### *Risks to public safety resulting from under-reporting of concerns about practitioners*

Research indicates that the perceived barriers to lodging complaints and associated under-reporting pose a greater risk to public safety than vexatious complaints.<sup>141</sup>

Importantly, Ahpra's data demonstrates that confidential and anonymous notifications often raise serious concerns. Data provided by Ahpra indicates that the issues being raised confidentially or anonymously are different compared with all notifications Ahpra receives (see Table 3).

During 2018–19, 27.8 per cent of confidential and anonymous notifications involved concerns about clinical care. This is a significantly lower proportion than the total number of all notifications involving clinical care (46.3 per cent). This indicates that people are more willing to allow their identity to be shared with the relevant practitioner if they are raising clinical concerns.

However, the trend is different in relation to concerns about a practitioner's behaviour, a possible health impairment affecting a practitioner, or a boundary violation. The available data from Ahpra demonstrates that it is more likely for these types of concerns to be raised on a confidential or anonymous basis. This is an important observation because it suggests that notifiers may be more cautious about sharing their identity with a practitioner when raising concerns about their behaviour or health. This is unsurprising, as these types of concerns often raise sensitive issues that can be challenging to confront, particularly when there is a power imbalance in the relationship between the practitioner and the notifier.

141 Thomas L, Bismark M 2017, 'Vexatious, misconceived and avoidable reports by peers to medical regulators: a qualitative study of health practitioners in Australia', *Journal of Law and Medicine* 24(3): 579–589.

Table 3: Notification issues for notifications received in 2018–19<sup>142</sup>

Notification issue	All notifications (%)	Confidential and anonymous notifications (%)
Clinical care	46.3	27.8
Medication	10.7	9.9
Behaviour	6.8	8.6
Health impairment	6.5	11.5
Communication	5.4	4.2
Documentation	4.6	3.0
Boundary violation	4.0	8.6
Offence against other law	3.2	4.6
Confidentiality	2.8	4.1
National Law breach	2.2	1.8
Other	7.5	11.5

It is essential that notifiers feel comfortable to raise any concerns that they may have about a practitioner's behaviour or health. This data therefore demonstrates the important role confidential and anonymous notifications can play in protecting the public.

#### **Barriers to patients making notifications**

The sample of notification files analysed during this review indicates it is less likely for patients to make confidential or anonymous notifications.

However, some qualitative studies show that patients may not make complaints out of concern for the impact that reporting may have on their continued access to services. In a survey of people using mental health services in the United Kingdom, a fear that complaining will have repercussions for future treatment was a reason some patients cited for not complaining about services.<sup>143</sup> Similarly, a Swedish survey found that under-reporting also occurred because of fear of reprimand, and that those who did not trust the health system reported less often than those who did.<sup>144</sup> Although not considered in these studies, maintaining confidentiality when handling notifications or accepting anonymous notifications may reduce these fears.

#### **Barriers to practitioners making notifications**

Practitioners, employers and education providers who make notifications may fear professional reprisal if their confidentiality is not maintained. This is in addition to the fear of a notification affecting professional relationships.

Research shows that health practitioners may support mandatory reporting in principle but are reluctant to make reports in practice because of fear of retaliation and loyalty to colleagues.<sup>145</sup> Defence organisations for practitioners confirmed that pressure to put a person's name to a notification serves as a deterrent for practitioners who are considering raising a concern about a colleague.<sup>146</sup>

This means Ahpra and the National Boards may not be made aware of significant concerns, perhaps even concerns that meet the threshold for a mandatory notification. Removing barriers to reporting is a strong reason for continuing to accept confidential and anonymous notifications.

142 Data provided by Ahpra.

143 Sbaraini S, Carpenter J 1996. 'Barriers to complaints: a survey of mental health service users', *Journal of Management in Medicine* 10(6): 36–41.

144 Wessel M, Lynøe N, Juth N, et al. 2012, 'The tip of an iceberg? A cross-sectional study of the general public's experiences of reporting healthcare complaints in Stockholm, Sweden', *BMJ Open* 2:e000489. doi:10.1136/bmjopen-2011-000489.

145 Baldisseri M 2007, 'Impaired healthcare professional', *Critical Care Medicine* 35(2) (Suppl), S111; DesRoches C, Rao S, Fromson J, et al. 2010, 'Physicians' perceptions, preparedness for reporting, and experiences related to impaired and incompetent colleagues', *Journal of the American Medical Association* 304(2): 187–193.

146 Interview with defence organisation [de-identified].

## Procedural fairness for practitioners

As discussed above, there are valid reasons why it is necessary to put in place confidentiality safeguards for notifiers. However, these reasons need to be carefully balanced against the need to ensure procedural fairness for practitioners.

The reality is that responding to a confidential or anonymous notification can pose challenges for practitioners. It is clearly preferable for Ahpra to share with the relevant practitioner all information it holds about a notification. During this review, many interviewees argued that this ensures the practitioner is afforded procedural fairness. Indeed, several other regulators described their rationale for not always accepting confidential or anonymous complaints as being that these kinds of complaints do not always give rise to a fair process for practitioners.

Key concerns related to confidential and anonymous notifications are that:

- practitioners are often provided with insufficient information to allow them to respond meaningfully to notifications
- practitioners are more likely to have a negative experience when responding to confidential and anonymous notifications
- accepting confidential and anonymous notifications will open the door to vexatious notifications being made about practitioners.

The key question is whether these challenges are so significant that they warrant changes being made to Ahpra's current practices in relation to confidentiality safeguards.

## Insufficient detail to allow practitioners to respond meaningfully to notifications

The small number of practitioners who were interviewed as part of this review made it clear that it can be challenging to respond to a notification if it is lacking in detail. One interviewee described a confidential notification made about them as being 'general accusations – no dates and no times'.<sup>147</sup>

Defence organisations for practitioners also reported that it can be difficult for practitioners to respond to confidential or anonymous notifications if the context for the allegations is unclear.<sup>148</sup> It was said that not knowing the identity of the notifier could 'impede the quality' of the response to the notification in some circumstances.<sup>149</sup> However, it was acknowledged that some notifications are easier to respond to than others. For example, it can be difficult to respond to allegations about a practitioner's conduct without knowing the identity of the notifier, while concerns made by colleagues that are clearly clinical in nature can be less problematic provided enough context is given about the relevant patient or incident.<sup>150</sup>

Defence organisations for practitioners explained that they have at times advised practitioners not to respond to a notification if they believe there is not enough information about the allegations to inform a meaningful response.<sup>151</sup> Ahpra staff also noted that practitioners often choose not to respond to a confidential or anonymous notification if allegations had not been clearly set out by the notifier.

In general, it appears that the lack of specific information in confidential and anonymous notifications can be problematic. It can make it difficult for practitioners to respond and may also contribute to the high rate of decisions to take no further action (which is arguably not the most efficient use of Ahpra's resources).

147 Interview with a practitioner [de-identified].

148 Interview with a defence organisation [de-identified].

149 Ibid.

150 Ibid.

151 Ibid.



### *Data regarding the outcomes of confidential and anonymous notifications*

Ahpra staff consistently explained that notifications that are lacking in detail generally result in a decision to take no further action. This is because there is not enough information for the relevant board to form a view about the matter and the board could not justify taking action against the practitioner.

Data from Ahpra confirms that most confidential and anonymous notifications end in a decision to take no further action. During 2018–19, 78.6 per cent of confidential and anonymous notifications resulted in this outcome. While this figure seems high, it is somewhat similar to the rate of ‘no further action’ decisions for all notifications received by Ahpra and the National Boards (68.2 per cent).

However, the relative percentage of no further action decisions has changed over time (see Table 4). In 2016–17 66.2 per cent of all notifications resulted in a decision to take no further action, while the percentage of confidential and anonymous notifications with this outcome during the same period was significantly higher, at 80.3 per cent. This change could indicate that Ahpra and the National Boards have become more effective in handling confidential and anonymous notifications over time.

#### *Regulatory action*

It is also important to highlight that regulatory action has been taken against practitioners in relation to confidential and anonymous notifications. It is most likely that the form of regulatory action in these cases is either imposing conditions on the practitioner’s registration or cautioning the practitioner. This is generally consistent with the overall trend for all notifications. However, the rate at which action is taken in relation to confidential or anonymous notifications is lower (see Table 4).

Ahpra’s available data demonstrates that in 2018–19:

- 6.8 per cent of confidential and anonymous notifications resulted in conditions being imposed on the practitioner’s registration, in comparison with 7.5 per cent for all notifications
- 5.5 per cent of confidential and anonymous notifications resulted in the practitioner being cautioned, in comparison with 6.6 per cent for all notifications.

These differences could be because the issues raised in confidential and anonymous notifications are less serious than those raised in other notifications and National Boards are therefore less inclined to take regulatory action. The review of a sample of notification files does not appear to support this, as it was observed that serious concerns about the health, conduct and/or performance of practitioners were commonly raised. It is more likely that the difficulties in gathering and sharing information in relation to some confidential and anonymous notifications (particularly anonymous notifications) means it is difficult for the National Boards to be presented with enough evidence to justify taking regulatory action.

Importantly, confidential or anonymous notifications do sometimes result in serious outcomes. Data from Ahpra indicates that in 2018–19, 2.2 per cent of confidential and anonymous notifications resulted in a tribunal hearing, compared with the slightly lower rate of 2.1 per cent for all notifications. Under s. 193 of the National Law, a National Board must refer a matter to a tribunal if the board reasonably believes the practitioner has behaved in a way that constitutes professional misconduct.

Further, 1.6 per cent of confidential and anonymous notifications resulted in the relevant National Board accepting an undertaking from the practitioner, compared with 1.2 per cent for all notifications. Examples of common undertakings accepted by the National Boards include an undertaking not to practise, to be supervised by another practitioner or to undertake further education.

In addition, 0.2 per cent of confidential and anonymous notifications resulted in the practitioner surrendering their registration, compared with the slightly lower rate of 0.1 per cent for all notifications.

Evidence that serious outcomes are occurring in relation to confidential and anonymous notifications highlights the important role these notifications can play in keeping the public safe, notwithstanding the difficulties that are sometimes associated with gathering and sharing information in these matters.

**Table 4: Percentage comparison between confidential and anonymous notification outcomes and all notification outcomes, 2016–2019<sup>152</sup>**

Notification outcome	Notifications completed 2016–17		Notifications completed 2017–18		Notifications completed 2018–19	
	All notifications (%)	Confidential and anonymous notifications (%)	All notifications (%)	Confidential and anonymous notifications (%)	All notifications (%)	Confidential and anonymous notifications (%)
Undertaking	2.2	1.6	2.2	1.5	1.2	1.6
Caution	13.4	10.6	10.7	6.6	6.6	5.4
Conditions	9.3	6.3	9.0	5.1	7.5	6.8
Other	2.0	0.0	0.9	0.0	1.0	0.0
Panel hearing	1.2	0.8	0.5	0.4	0.5	0.4
Refer to another body/HCE	3.2	0.0	3.1	0.9	12.8	4.8
Surrender registration	0.1	0.0	0.1	0.0	0.1	0.2
Tribunal hearing	2.4	0.4	3.1	1.9	2.1	2.2
No further action	66.2	80.3	70.4	83.6	68.2	78.6

### *Difficulties responding to confidential notifications*

It is clear that balancing the need to share specific information with a practitioner can be difficult when simultaneously seeking to protect the identity of a confidential notifier. This balancing act may affect the practitioner’s ability to fully understand the concerns raised in a notification.

The relevant case law states that a decision-maker must disclose the substance of the information available to it.<sup>153</sup> This means that Ahpra should be sharing enough information to allow a practitioner to understand the allegations made in a notification. The goal should always be to share as much information about the notification as possible, taking into account the unique circumstances of the matter.

Interviews with Ahpra staff highlighted that there is a lack of clarity regarding what information should be withheld from a practitioner in cases of confidential notifications. As explored in *Part C: Current practices*

of Ahpra and the National Boards, Ahpra should provide better guidance to its staff about what constitutes confidential information. This may reduce some of the concerns about insufficient information being provided to practitioners regarding confidential notifications.

### *Difficulties responding to anonymous notifications*

On its website Ahpra highlights the difficulties in managing anonymous notifications due to a lack of detailed information being provided and the inability to clarify information with the notifier.

During interviews with Ahpra staff, it was often claimed that anonymous notifications (as opposed to confidential notifications) are more likely to end in a decision to take no further action because of these difficulties. As demonstrated in Table 5, available data from Ahpra demonstrates that this has been a consistent trend over a three-year period.

<sup>152</sup> Data provided by Ahpra.

<sup>153</sup> Applicant *VEAL of 2002 v. Minister for Immigration and Multicultural and Indigenous Affairs* [2005] HCA 72.

Table 5: Percentage of confidential and anonymous notifications completed by Ahpra, 2016–19<sup>154</sup>

Notification outcome	Notifications completed 2016–17		Notifications completed 2017–18		Notifications completed 2018–19	
	Confidential notifications (%)	Anonymous notifications (%)	Confidential notifications (%)	Anonymous notifications (%)	Confidential notifications (%)	Anonymous notifications (%)
No further action	72.5	76.4	81.9	85.2	75.5	77.0

Ahpra does not, however, provide any guidance regarding what information an anonymous notifier should provide to overcome this problem. As explored in *Part C: Current practices of Ahpra and the National Boards*, better communication from Ahpra could assist in addressing this issue.

**Experience of practitioners when responding to confidential and anonymous notifications**

It is important that all individuals involved in a notification believe the process for managing the notification is fair. It could be assumed that practitioners would find the idea of responding to a confidential or anonymous notification as being a particularly negative experience, perhaps because practitioners feel that important information about their health, conduct or professional performance is being withheld from them. Ahpra staff anecdotally reported being told this by practitioners.<sup>155</sup>

All three practitioners who were interviewed for this review acknowledged that responding to a confidential or anonymous notification is stressful, with one interviewee commenting that the experience made them ‘suspicious of everyone’.<sup>156</sup>

However, the interviewees expressed insightful responses to the question of whether it was fair to be asked to respond to a notification without knowing the identity of the notifier. One interviewee commented that they did not care who made the notification about them and that people should

not have to put their name to a notification.<sup>157</sup> Another practitioner explained that they ‘hold no malice’ against the person who made the notification about them (but noted that they ‘did not do me the professional courtesy of speaking to me’ about it).<sup>158</sup> One practitioner explained that, although they would personally speak to a practitioner who they had concerns about before making a notification, they could understand why it may be necessary to withhold a notifier’s identity in some cases and it should make no difference from Ahpra’s perspective.<sup>159</sup> There was also a general acknowledgement that Ahpra and the National Boards have a responsibility to respond to all notifications, even if received from a confidential or anonymous source.<sup>160</sup>

Each practitioner clearly highlighted that other aspects of the notifications process were problematic for them. Practitioners appeared to focus on these elements rather than the fairness of being asked to respond to a confidential or anonymous notification. One interviewee explained that being the subject of a notification was ‘the worst thing that has happened in my career’.<sup>161</sup> All three practitioners pointed to the lack of timeliness in finalising the assessment or investigation of a notification as being a significant cause of stress during the notifications process.<sup>162</sup> Additionally, all interviewees highlighted that Ahpra’s communication could have been better. These concerns were not specifically related to the fact that the practitioner was not informed of the identity of the notifier.

154 Data provided by Ahpra.

155 Interviews with Ahpra staff [de-identified].

156 Interviews with practitioners [de-identified].

157 Interview with a practitioner [de-identified].

158 Ibid.

159 Ibid.

160 Ibid.

161 Ibid.

162 Ibid.

It is also relevant to note that over a recent two-year period between 2017 and 2018, Ahpra did not record any formal complaints from practitioners where concerns were specifically raised about the fairness of being asked to respond to a confidential or anonymous notification.<sup>163</sup>

Based on this information, it does not appear that practitioners are always opposed to the idea of confidential or anonymous notifications. There is not strong enough evidence regarding this issue to warrant a change in the current approach to accepting confidential and anonymous notifications.

It is also acknowledged that Ahpra has made recent improvements in relation to the time taken to deal with notifications and is focusing on generally improving the experience of practitioners during the notifications process. These steps should assist in addressing some of the concerns expressed by practitioners during this review about Ahpra's timeliness and communication.

## Concerns about vexatious notifications

Interviews with practitioners, defence organisations for practitioners and Ahpra staff highlighted a concern that allowing confidential and anonymous notifications may make it easier for people to make vexatious notifications.<sup>164</sup> The idea is that, if people know they can make a notification without having to identify themselves, this may encourage people to make groundless notifications without fear of being questioned or suffering any consequences. Indeed, one of the practitioners interviewed for this review believed that they had been 'falsely accused' and that the notification made about them was vexatious.<sup>165</sup>

It may be that the perception of allegations possibly being vexatious is heightened when the identity of the notifier is withheld from the practitioner. Not knowing who made the notification can leave important

questions unanswered, such the motivations of the notifier or their relationship to the people involved. This may then lead the practitioner to conclude that the notification was groundless.

It is important to note that s. 237 of the National Law only provides protection against liability for people making notifications 'in good faith'.<sup>166</sup> Notwithstanding this, the idea of vexatious notifications has been a contentious issue in recent years.

In 2017 the Senate Community Affairs References Committee's report *Complaints mechanism administered under the National Law* recommended that Ahpra and the National Boards develop and publish a framework for identifying and dealing with vexatious complaints.<sup>167</sup> Following this, Ahpra commissioned a literature review into the issue of vexatious complaints about health practitioners.<sup>168</sup>

The findings of this literature review were that there is a limited understanding about the defining features of a vexatious complaint.<sup>169</sup> While many sources defined a complaint as vexatious based on its outcome (if it did not result in regulatory action) or the effect on the subject of the complaint (that it caused an unpleasant experience), a truly vexatious complaint is 'a groundless complaint made with an adverse primary intent to cause distress, detriment or harassment to the subject'.<sup>170</sup> Based on this definition, there was found to be 'a major disconnect between the volume and fervour of anecdotal and editorial claims regarding the alleged extent of vexatious complaints in the Australian health sector, and the available evidence'.<sup>171</sup> It was suggested that no more than one per cent of complaints are vexatious<sup>172</sup> and that 'measures intended to prevent vexatious complaints may pose a net risk to public safety, by inadvertently raising the barriers faced by legitimate complainants'.<sup>173</sup>

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

164 Interviews practitioners, defence organisations and Ahpra staff [de-identified].

165 Interview with a practitioner [de-identified].

166 Health Practitioner Regulation National Law, s. 237.

167 Senate Community Affairs References Committee, *Complaints mechanism administered under the Health Practitioner Regulation National Law*, May 2017, Recommendation 10.

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

169 Ibid, p. 4.

170 Ibid.

171 Ibid.

172 Ibid.

173 Ibid, p. 5.

Based on this analysis, caution should be exercised before limiting the use of confidential and anonymous notifications based on concerns about vexatious notifications.

Nevertheless, key principles for preventing and managing vexatious complaints were identified in the literature review, including:

- establishing and enacting overarching principles for complaint management (setting out operating principles, legal powers and legal and ethical principles)
- defining a threshold for unreasonable complainant conduct
- training staff in identifying and managing vexatious complaints.<sup>174</sup>

Ahpra has advised that consideration of vexatious notifications forms part of training provided to its staff on assessing regulatory risk. However, a standalone framework for managing vexatious notifications has not yet been developed. Instead, the assessment of vexatious notifications is said to be currently based on the legal provisions that guide Ahpra in managing notifications.<sup>175</sup> Given the widespread fears about vexatious notifications, it would be better if Ahpra developed and published a framework for dealing with this type of notification.

## RECOMMENDATION: Managing the risk of vexatious notifications

Ahpra should develop and publish a framework for identifying and dealing with vexatious complaints.<sup>176</sup>

174 Ibid, pp 19–21.

175 Information provided by Ahpra.

176 Recommendation 10.

# Part F: Conclusions

The current practice of Ahpra and the National Boards is generally to provide practitioners with notice that a notification has been made about them, including information that identifies the notifier. However, there are existing ways in which a person can make a notification without having their identity disclosed to the practitioner: a notifier can ask that Ahpra keep their identity confidential or, alternatively, a notifier can lodge an anonymous notification. This approach is generally consistent with other comparable regulators.

This review considered whether there are any possible improvements that could be made to Ahpra's current practices to better safeguard the confidentiality of notifiers. Based on the information obtained, it is clearly preferable if Ahpra is able to share with a practitioner all information it holds about a notification, including the identity of the notifier. This puts the practitioner in the best position to respond to the allegations that have been made. It also makes AHRPA's work easier because it does not need to dedicate time and effort to the challenging task of determining what information needs to be withheld from the practitioner to protect the notifier's identity.

However, there are many valid reasons in support of withholding the identity of a notifier from a practitioner, including to:

- mitigate risks to the health and safety of a notifier, or risks of intimidation or harassment
- help preserve the notifier's ongoing relationship with the practitioner
- more generally, remove any perceived barriers to reporting concerns about practitioners.

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.

Taking these factors into consideration, providing notifiers with options to make confidential and anonymous notifications is reasonable. Generally speaking, Ahpra's current practices adequately safeguard the confidentiality of notifiers in a complex legal environment.

However, there are gaps that should be addressed. Ahpra's success in safeguarding the confidentiality of notifiers is heavily dependent on the policies, procedures and staff training that support its work in this area. The following recommendations seek to ensure that the balancing act between confidentiality for notifiers and procedural fairness for practitioners is adequately maintained.

## 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 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.

# Acknowledgements

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The NHPOPC is also grateful for the assistance provided by the Office of the Health Ombudsman in Queensland and the Health Care Complaints Commission in New South Wales. These organisations operate under a slightly different framework from Ahpra and the National Boards but experience many similar challenges when handling concerns about health practitioners in Australia.

The NHPOPC acknowledges the generous assistance provided by the Health and Care Professions Council in the United Kingdom and the Medical Council of New Zealand. Comparing the policies and practices of international regulators has played an important role in identifying opportunities to improve the way Ahpra and the National Boards manage the privacy of notifiers.

The NHPOPC appreciates the thoughtful contributions provided to the review by Ahpra's Community Reference Group and the practitioners who agreed to be interviewed. The NHPOPC is also grateful for the suggestions offered by representatives from defence organisations for practitioners.

Finally, the NHPOPC acknowledges Ms Kelly Akehurst. Acting consistently with her professional obligation to make a notification resulted in what has no doubt been a frightening and highly distressing experience. It is appalling that Ms Akehurst has suffered harm at the hands of a fellow health practitioner. The NHPOPC hopes this incident has thrown a spotlight on the importance of confidentiality safeguards for notifiers.

# Summary of information considered

## R v. Holder matter

- Ahpra media statement, We want people to be safe when making a complaint, 23 November 2018
- Letter from The Hon. Justice Ann Vanstone of the Supreme Court of South Australia to Martin Fletcher, chief executive officer of Ahpra, dated 26 November 2018
- *R v. Holder* [2018] SASC 169

## Legislation

- *Freedom of Information Act 1982* (Cwlth)
- Health Practitioner Regulation National Law, as in force in all states and territories of Australia
- Health Practitioner Regulation National Law Regulation 2018
- *Privacy Act 1988* (Cwlth), in particular Schedule 1 (the Australian Privacy Principles)

## Privacy-related materials

- Ahpra, *Collection statement for form NOT-00 – Notification (complaint)*, undated
- Ahpra, *Privacy policy*, 20 March 2014
- Ahpra, *Procedure to respond to a breach of privacy*, undated
- New South Wales Ombudsman, *Anonymous reporting*, March 2015
- Office of the Australian Information Commissioner, *APP guidelines*, February 2014
- Office of the Information Commissioner website materials

## Notification-related materials

- Ahpra, *Consent authorisation form A*, dated effective from 4 December 2018
- Ahpra, *Having a concern has been raised about you – a guide for registered health practitioners*, March 2016
- Ahpra, *New notification received via phone template*, undated
- Ahpra, *NOTF-00 'Complaint or concern (notification)' form*, dated effective from 4 December 2018
- Ahpra, *Notifications data*, various dates
- Ahpra, *Online notification portal*: <https://Ahpraorg.secure.force.com/notification>
- Ahpra, *Raising a concern with Ahpra – a guide to raising a concern with Ahpra*, June 2013
- Ahpra, *Regulatory operations procedural documentation*, undated
- Ahpra, *Regulatory principles for the National Scheme*, undated
- Ahpra (Victorian Assessment team), *Redacting notification summary*, 14 May 2015
- Ahpra website materials

## Case studies

- Ahpra internal complaints [de-identified]
- Ahpra notification files [de-identified]
- Ahpra serious incident reports [de-identified]

## Interviewees

- Ahpra's Community Reference Group
- Ahpra staff [de-identified]
- Defence organisations for practitioners [de-identified]
- Ms Kelly Akehurst
- Practitioners who have been the subject of a confidential or anonymous notification [de-identified]

## Comparative regulators

- General Medical Council, United Kingdom
  - General Medical Council, *How we use your information when considering concerns*, July 2014
  - General Medical Council, *The GMC process for handling complaints*, undated
  - General Medical Council website materials
- Health and Care Professions Council, United Kingdom
  - Health and Care Professions Council, *Guidance for whistle blowers*, undated
  - Health and Care Professions Council, *Threshold policy for fitness to practise investigations*, 14 January 2019
  - Health and Care Professions Council website materials
  - Information provided by the Health and Care Professions Council
- Health Care Complaints Commission, Australia (New South Wales)
  - *Health Care Complaints Act 1993* (NSW)
  - Health Care Complaints Commission website materials
  - Information provided by the Health Care Complaints Commission
- Medical Council of New Zealand, New Zealand
  - Information provided by the Medical Council of New Zealand
  - Medical Council of New Zealand website materials
- Office of the Health Ombudsman, Australia (Queensland)
  - *Health Ombudsman Act 2013* (Qld)
  - Information provided by the Office of the Health Ombudsman
  - Office of the Health Ombudsman, *Public interest disclosure policy*, July 2018
  - Office of the Health Ombudsman website materials

## Case law

- *Applicant VEAL of 2002 v. Minister for Immigration and Multicultural and Indigenous Affairs* [2005] HCA 72
- *Coppa v. Medical Board of Australia* [2014] NTSC 48
- *Hocking v. Medical Board of Australia* [2014] ACTSC 48
- *Kioa v. West* (1985) 159 CLR 550
- *Psychology Board of Australia v. Fox* [2013] ACAT 75
- *Re Minister for Immigration and Multicultural Affairs, ex parte Lam* (2003) 195 ALR 502
- *R v. Gaming Board for Great Britain: ex parte Benaim and Khaida* [1970] 2 QB 417

## Research

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