

**THE SENATE OF AUSTRALIAN PARLIAMENT**

**INQUIRY 2016-17**

The Complaints mechanism administered under the  
Health Practitioner Regulation National Law

A Submission

by

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This submission is complimentary to the submissions I made to the 2015-16 Senate Inquiry this topic. I refer to those submissions as background as to the basis of my opinions.

I recommend Senators read those prior submissions as they are a distillation of my 50 years of experience in the Health industry - and of 10 years as a victim the Complaints industry.

I am a victim of the system introduced gradually since the Whitlam era (presumably with good intentions) but now have sound reasons to be aggrieved by the system, how it operates and those operatives within the system.

Over the past ten years I have gained considerable insight into how it works- and why it fails Registrants and the citizens of Australia, most Australians would be horrified if they knew just what can happen to their Health Registrants by means of dysfunctional legislative provisions - albeit for seemingly good intentions.

## **Introduction.**

The National Law as it stands is fundamentally flawed ,and is :

- (a) repugnant to the Australian Constitution in the manner that it violates the human rights of Health Registrants
- (b) operates contrary to the Doctrine of Separation of Powers
- (c) breaches the Constitutional right of Registrant victims to natural justice , due process and procedural fairness
- (d) locks ALL Registrants into an unfair system and an inevitable hostile and dangerous pathway of conflict if they ever suffer a complaint against themselves- and even if found innocent the recorded “complaint” stain is transmittable to most foreign health jurisdictions.
- (e) hands enormous powers and dangerous bias to the Regulator without the necessary checks and balances
- (f) any Registrant is constantly at risk of being unconstitutionally deprived of part or all of his hard earned property rights –and accordingly a Registrants economic future is constantly under threat from such,
- (g) puts a “fault” focus immediately on the individual Registrant rather than the spectrum of many other

facets of Health Care mostly the Government directed and controlled systems, pathways and practices as a whole,

- (h) has helped created a massive and un-wieldy medico-legal industry that has spawned numerous dependent vested interests on maintaining its on-going and destructive momentum,
- (i) each vested interest now dependent on the system being continually exercised at maximum capacity ,
- (j) is inherently self-sustaining with growth factors that financially reward all participants other than the increasing number of victims of the flawed concept ,
- (k) sets Registrant against Registrant in a perpetual medico-legal competition, not always evident but inherently gambling for extremely high stakes of present and future status, credibility, employment and livelihood
- (l) is adversarial, punitive and hostile in concept and operation rather than and being inquisitorial educational and paternal
- (m) mandatory reporting is Machiavellian in its concepts and repugnant to Western Democracy in its Kafkaesque modus operandi
- (n) incredibly after 30 years of nationwide operation of the system there are no concrete universal or local standards to refer and to which a Registrant can aspire or to which he/she might refer as a defence.
- (o) Such “standards” are literally sucked from the Regulators thumb for the occasion on an “as required “ basis – such creates a lawyers picnic on both sides of the equation and gross unfairness for an accused Registrant. ie retrospective determination of standards on a case by case basis
- (p) The Regulator consistently attempts to generate/impose “respect” for itself by brutalizing Registrants- in the same manner that the Gestapo earned respect from citizens of Germany 90 years ago ie similar to that of the Australian Human Rights Commission methods of gaining respect from university students. In Queensland

(o) Tribunals , which are often the final arbitrator in these issues “have lost touch with the traditional standards and values of the legal profession and the judiciary “according to Heydon J in his judgment in Kirk v Industrial Relations Commission of NSW ( 2010) HCA1., “and Tribunals set up for a specific purpose tend to exalt that purpose above all other considerations”

and accordingly

until ALL the above faults are recognised and corrected Nationally there will be enduring contempt by any Registrant who learns how the National Law operates. Such learning is usually from the School of Hard Knocks whilst on the pathway to martyrdom.

The numbers of such dis-affected Registrant are increasing in an exponential manner .

Predictably when the critical number of martyrs are reached the entire Health system will implode and the fallout will be serious for patients and Politicians . The scandals will be exposed , and the voters will not stand for such mendacious treatment of Health Registrants which will have destroyed more Registrants and many more patients by then.

Do Australians want the performance of the Doctor or Nurse treating them at any one time to be already degraded by these constant pressures to perform to inexact standards, when they need a steady hand and clear and steady mind when they or their loved ones present for life saving interventions?

Do you , when your turn comes ,want a bold and fearless Surgeon who will do and try everything and anything that just might improve your chances- or do you want a timid , nervous and brow-beaten under-confident “ team” follower who will do nothing extra nor go the further mile to try make a difference to the outcome ?

Best the Senate grasp this opportunity now before the inevitable Royal Commission publicly exposes the unvarnished truth -and broadcast how Politicians fiddled as the politically and social-engineer idealist inspired Regulatory health empires literally have been allowed if not encouraged put the torch to the health industry and thereby destroy it for everyone- patients and health workers. alike.

### **Terms of Reference ( TOR)**

The answer to almost all of the TOR’s will depend on the fortitude of the Government to do what is needed to correct the faults inherent in this clearly failing social engineering experiment .

Similar experiments have been tried or are being tried elsewhere in the Free World whilst being touted as advances in Social Policy. Predictably most of these have failed or are failing leaving numerous health Registrant victims in their wakes- as well as shattered patients ( voters)

The UK National Health System is a prime example . Currently propped up by EU methods and foreign staff the General Medical Council has found that strict regulatory compliance creates more casualties of medical staff than were created in the UK Armed Forces in the same period in the entire Afghan and Iraq wars. This is absolutely true- a Australia is following suite by using the same failed model and failed practices

USA under Abama-care are increasingly seeing the same regulatory issues as here in Australia and UK. Doctors in USA are reporting more and more the adverse effects on both patients and Health workers.

The short-term winners in these failed schemes are the legions of non-medical workers – particularly the many grades of “managers” ie clerical staff with exalted titles.

### **TOR (a) and TOR (b)**

AHPRA and the National Boards cannot continue function in a sustainable fashion without drastic changes to the legislative base in which they operate ie a complete Regulatory re-write of the National Law or broad-brush amendments are urgently necessary.

There have been a number of State sponsored inquiries which have said much the same...but nothing has changed... so far.

There needs to be:

(i) A stricter adherence to the principles and application of the Doctrine of Separation of Powers.

(ii) A stricter adherence to the constitutional guarantees of “property” and the practices of unfair deprivation of Registrants property by governments ie ( AHPRA and the Panel-Tribunal system) acting unfairly

(iii) Universal adoption of model-litigant policies of State and Federal Governments ( at least in Health matters)

(v) Established and published “clinical standards” which are updated frequently , and the acknowledgement of the variations of such “standards “depending on location and current facilities available at the time to a Registrant.

- (v) An inquisitorial approach and not adversarial to each and every complaint.
- (vi) Investigators must be both trained and experienced and armed with relevant medical experience and knowledge and administratively separate and independent from the Regulator
- (vii) Strict selection of “experts” to provide expert reports and act as expert witness. Those selected must be independent of the Regulator and any Investigator. - given the serious incidence of Sham Peer Reviews ( SPR) the use of experts has to be particularly well controlled and monitored, preferably directly by Courts and Tribunals
- (viii) Stricter monitoring and auditing of the Regulator and Boards operations for compliance with matters of evidence and of due process and procedural fairness.
- (ix) Full disclosure must be made to the Registrant at each stage of investigation, evidence gathering, expert reporting, complaint resolution –and disciplinary procedures only as a very last resort.
- (x) Focus needs to be on conservation of valuable resources re-education, re-skilling and rehabilitation rather than punishment of Registrants.
- (xi) Mandatory reporting to be replaced by Confidential reporting and sanctions against a reporter if proper inquisitorial investigation reveals the report was malicious
- (xii) Special Health Courts rather than Civil Tribunals as the end point for unresolved disputes between Regulator and Registrant – the Courts operating on strict evidentiary rules at Supreme or Federal Court level and on a true Briginshaw Standard.
- (xiii) Defined rights and routes of redress for an aggrieved Registrant at each stage-including final Appeal by right if necessary to the High Court.
- (xiv) Recognition that the transmission of an adverse Regulatory history created by Machiavellian and Kafkaesque methods to overseas jurisdictions serves to permanently damage a Registrant – and limit his ensuing practice and development opportunities. There must be a better balance to protect the Registrant from the fall-out which in many cases are ruinous.

### **TOR (c)**

Given the Colleges and Boards mostly consist of an incestuous, patronized and a self-centered academic networking elite, seemingly based on Party political patronage rather than insight experience and

ability they seem to many to be “Jobs for the boys and girls “.Most ( but not all) Boards and Committees seem remote from day to day practice and many Panel and Board Members are retired and only retain Registration in order to serve on boards and panels as sinecures . The method of selection needs not just overhaul but be made more public and reflect the serious and consequences of too many bad determinations of Panels, Boards and Tribunals.

Administrative and executive Staff of Boards and Regulators are in the main, career public Servants mostly with little or no relevant clinical experience or background . In AHPRA ( for example) the majority are from a military logistics background –not Medical . Accordingly few are really fit or equipped to serve on investigations or Boards determining alleged clinical faults and errors of Registrants . Boards, review panels and Tribunal-like adjudication need to be filled by genuine peers of the Registrant – and should be selected on a case by case basis.

The Colleges largely ignore their Constitutions , ethics and codes of conduct. Currently Colleges are focused on administration and “trainees” issues because of ACCC interest in “competition” rather than rank and file Clinician’s issues and accordingly Colleges universally fail to deal with the aberrant functioning of out of control Regulators.

There are sometimes glaring conflicts of interest – such as the RACS Solicitor who sits on the AHPRA Board in Victoria! The RACS also sponsored a AHPRA World conference! . The college offers no explanation or apology for such because they do not possess the insight or integrity to recognise such are issues.

College appointments right up to President follow a predictable hierarchical line. For example, the real power in RACS is the CEO who is a non-surgeon!

The workings of Colleges and Boards from Registrants perspective fit well with “Yes Minister” scenarios and reinforce the present dysfunctional system by not offering critiques or alternative approaches.

Indemnity Insurers are caught up in conflict of interest scenario’s frequently. Indemnity insurers put profit before service for Registrants and literally beguile a Registrant to retire permanently from practice so that Federal Government “tail cover” comes into force. Registrants and Australia at large are not being served well by the insurers.

## **TOR (d)**

Any Registrant serving on College executive or Board seems pretty much immune from Regulator attention. Hence to the perspective of retired Judge Geoff Davies ( late of Bundaberg/Patel Inquiry and many public

addresses on these issues) he makes the point about Sham Reviews (SPR) in reverse – where there are a protected species of surgeon or physician who are members of an “old boy’s club” and whose substandard work is repeatedly fudged by reverse SPR.

Accordingly the relationship between Boards and Colleges does not help the rank and file Fellow or member of that college . Often quite the reverse-and patients suffer accordingly..

### **TOR (e)**

This question is answered by the responses to TOR (a) and TOR (b)

### **TOR (f)**

The reader should read my submissions to the First Senate Inquiry 2016 for a detailed answer . Briefly the answer is the same as for TOR (a) (b) and (e)

### **Summary**

- 1. The National Law based Regulatory system in Australia is fundamentally flawed and needs a complete shake up and re-design.**
- 2. Fiddling and fine tuning will only put-off the inevitable collapse of the entire system.**
- 3. Meantime many more Registrants will be permanently and seriously damaged by the system and full recovery could take decades.**
- 4. Some Registrants already are known to have suicided as a consequence of the dysfunction.. Others will also suicide. This loss of valuable resources will continue until the faults are all fixed.**

### **Reference:**

See my previous submission to the Senate this subject

Read also about *Howard Becker, Sociologist* ( Google him) and his work on “deviance and deviants”. Much applies to this National Law situation where “rules have been made” and in an environment where not all people can , able or wiling to obey them.



Such otherwise normal Health Practitioners ( Registrants) are labeled “deviants” and – the National Law provides for officials tasked to “deal with the demonized “deviants” ”

Much of th officials time is spent in co-ercing respect from those perceived as the “deviant class” ie otherwise good Health Registrants, by means of the methods referred to above- made easier of course by the manner in which legislation had been drafted.

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