PROOF VERSION ONLY

STANDING COMMITTEE ON LEGAL AND SOCIAL ISSUES

LEGISLATION COMMITTEE

Inquiry into the performance of the Australian Health Practitioner Regulation Agency

Melbourne — 9 August 2013

Members

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Secretary: Mr R. Willis

Witness

Ms J. Morris.

Necessary corrections to be notified to secretary of committee

The CHAIR — I would like to welcome Ms Jennifer Morris. Thank you for appearing this morning and for the written submission you have provided to the committee. All evidence taken at this hearing is protected by parliamentary privilege, as provided by the Constitution Act 1975, and further subject to the provisions of the Legislative Council standing orders. All evidence is being recorded. You will be provided with proof versions of the transcript within the next week. The transcripts will ultimately be made public and posted on the committee's website. I would now like to invite you to proceed with an opening statement. We have received and read your submission. Then I will ask members of the committee to ask questions relating to both your evidence and your submission. Again, welcome and thank you for being before us.

Ms MORRIS — Thank you. I am here today because I had the misfortune of being a notifier in an AHPRA investigation. It is a role I did not willingly undertake. Rather, it was compelled upon me — by legislation which allowed AHPRA to exploit me, in a time of trauma, under the pretence of public protection.

In 2010 a doctor performed an invasive surgical procedure on me without consent — an act tantamount to criminal assault. I made a complaint to the Office of the Health Services Commissioner, or HSC. HSC tells potential complainants that they offer conciliation, possible outcomes of which include apology, explanation, remedial treatment or compensation. I was lured in by these promises of a cooperative process that emphasises open discussion and the rights of all parties. I was subjected to the exact opposite. Upon receiving my complaint, HSC shared it — including all sensitive material therein — with AHPRA. This was done without my knowledge or consent. Extraordinarily, this breach of my privacy was not only allowed under Victorian law but required by it.

Out of the blue a letter bluntly informed me that AHPRA — a body of which I had never even heard — had decided to requisition my complaint for its own purposes. I had no right to appeal that decision or even know the reason for it. As a result the HSC was legally compelled to close the file and would never deal with the matter again. At that moment all of my rights were forfeited on my behalf without warning and without consent. I had no right to appeal. There was nothing voluntary about my euphemistically named voluntary notification.

Contrary to HSC complainants, AHPRA notifiers, as I had now unwillingly become, are disposable nobodies. We are deemed to be not a party in our own notifications. We have no right to know the evidence collected, no right to know the processes undertaken, no right to participate, no right to seek conciliation or recourse, no right of appeal and no right to know the reasons for any outcome. Indeed we have no right to know more than a person on the street, which is effectively nothing. It was the antithesis of what I had been promised.

Once again this unceremonious stripping of my rights was not only allowed under law but required by it. As a result, I now shoulder the costs of remedial treatment and, appallingly, the unconsented procedure itself — costs I would have sought at conciliation had AHPRA not robbed me of the chance. But under law a complaint may be used up in pursuing remedy for the complainant through the HSC, or it may be used up informing practitioner regulation through AHPRA, but not both. There is no justifiable reason for this false either/or dilemma. Complaints are not perishable commodities that selfdestruct upon first use. We need not, and must not, trample on victims who put themselves on the line for public safety. It would be bad enough if complainants were bullied into choosing between pursuing remedy for our own grievances or contributing to public protection. That this senseless choice is simply made for us without our knowledge or consent is reprehensible.

Extrapolating from the HSC's evidence since 2009 over 1600 Victorians would have had their intimate details shared with AHPRA in this way, and over 400 would have had their rights forfeited at AHPRA's will. The more serious the infraction — wrongful death, negligent amputation, sexual assault — the more likely a notifier will be exploited in this way. That is not to mention the hundreds who complain directly to AHPRA not understanding the devastating implications for their access to due process.

AHPRA and the HSC have told this committee that they believe aggrieved notifiers would be placated if only we better understood our place in the system. On the contrary, I understand my place perfectly. That is exactly why I am disgusted that notifiers are drawn into the complaints system under false pretences, forcibly exploited as informants and then discarded, all with the blessing of this Parliament. AHPRA's regulation model relies upon the goodwill of public notifiers. Continue to treat us in this unconscionable manner and the system will collapse catastrophically.

There may be a skerrick of appeasement if notifiers could be assured that AHPRA conducts diligent investigations. In reality their processes are shambolic, inefficient and farcically incompetent. In my case AHPRA undertook 13 months of so-called investigation before deciding to take no action. The reason offered was lack of evidence. At the outset I informed AHPRA of a plethora of available evidence; it was not collected. Remarkably the following evidence was deemed to be 'not relevant'. It included: an interview with me — the victim; my medical history; statements from another patient against whom the doctor committed the same offence; prior medical evidence recording my opposition to such procedures; evidence from the GP who warned the doctor about this opposition; medical evidence that the procedure was unnecessary; medical evidence from a specialist who chose not to perform the procedure; and I could go on. It is little surprise that AHPRA should cite a lack of evidence given their diligent refusal to collect any.

So with all of this available, what sum total of evidence did AHPRA take over 13 months to collect? It includes letters from me and the accused doctor, records prepared by the accused doctor and a report based only on those documents. That is it. Additionally AHPRA considered entirely the wrong legal and ethical question focusing on whether there was clinical indication for the procedure rather than on whether I consented. Confusing the two is an amateur error of law. Such inept investigations help to explain why overwhelming notifiers are exploited for a contribution to the public good that never eventuates.

In 2012, only 6.2 per cent of Victorian national law notifications even resulted in a hearing, 0.1 per cent resulted in immediate action and 59.1 per cent were closed without so much as an investigation. AHPRA washes its hands of these figures, saying boards make the decisions and AHPRA only investigates. In truth AHPRA investigators do make recommendations to which boards keenly attend.

AHPRA is well served by neglecting its investigative duties. If there is a finding against them, a practitioner can launch a potentially costly appeal through VCAT. But if AHPRA do not investigate, or no action is taken, there is not a whimper, because nobody, including the notifier, can appeal, and the notifier does not even have enough information to go public. Furthermore, AHPRA is funded by the very practitioners it is charged with overseeing and investigating. The conflicts of interest are glaring.

This system has no oversight, no transparency and no accountability. Three times AHPRA ignored my formal complaints, and three times the national health practitioner ombudsman, who is ostensibly charged with overseeing AHPRA, also failed to respond. It is a habit for which that office is infamous.

In endorsing the law as it stands, Victoria surrenders the rights and safety of our citizens to a secretive, hubristic entity riddled with conflicts of interest, accountable to nobody. A crisis in public safety and justice is unfolding as I speak. I have no doubt that an inquiry in Victoria would reach the same damning conclusions seen in Queensland. I recommend that Victoria adopt a model in which all health-care complaints are investigated by the HSC, affording both complainants and practitioners party status, rights and the opportunity for conciliation. At the conclusion of these investigations the HSC would communicate its findings directly to the relevant board, which would then consider whether to take further action to protect the public. This system avoids the AHPRA middlemen, overlaps of jurisdiction and duplicate spending. It encourages conciliation, it ensures public protection and individual recourse are not mutually exclusive options and it removes conflicts of interest and ensures due separation between investigators and decision-makers.

Such a system functions effectively alongside national registration in New South Wales. They had the insight to resist the injustice of AHPRA-based complaint thievery from the outset. Queensland found clarity only in hindsight. We must now have the conviction to demand better for Victorians. I would now be glad to take any questions.

The CHAIR — Thank you very much, Ms Morris, for sharing your experience with us this morning and for the evidence you have provided. You have given a great level of detail. Could I seek some clarification from you in relation to the initial contact you had with the health services commissioner and your experience with that. Could you elaborate a little more to the committee about the position you took. Obviously you wanted to get some advice, and that is initially where you went; is that right? You are nodding, 'Yes'.

Ms MORRIS — Yes. I actually spoke to my GP after the events in question, and he had had some good dealings with the then health services commissioner, Beth Wilson, who has since stepped down. He suggested that I go through their formal complaints process, so I went to the website and read about what they do. As I

said, it outlined the conciliation and cooperative process, and you can see that to this day; the website has not changed since I looked at it. I printed off the form that was made available. I filled out the form as required and included a letter with the details of the events in question. I have the correspondence here. I can check the time if you are interested, but maybe several weeks later I received a letter informing me that AHPRA had become involved and that they were now taking that complaint.

The CHAIR — Just on that point, and this is what I would like to understand, several weeks later you received a letter from the HSC to say that AHPRA was now involved — —

Ms MORRIS — Yes.

The CHAIR — You are saying, firstly, that the HSC had to pass on your information to AHPRA under the current laws?

Ms MORRIS — Yes.

The CHAIR — Can I also ask you: do you believe there is confusion for consumers or notifiers — people in your position — about the dual processes of a complaint system? We have the HSC and we have AHPRA.

Ms MORRIS — Yes, absolutely, and I think that is borne out both in my experience and in those of many clients I have in my professional life. I think a lot of the difficulty is that if you look at HSC publications or if you speak to someone on the phone at HSC, they will list the types of practitioners one can make a complaint about, and doctors, dentists and others who are covered by the national scheme are included in that list. What is not made clear in any of the HSC publications is that if the complaint relates — and these other words in the law — to the conduct, health or performance of that practitioner, so usually individual kinds of things that that practitioner has done, it is required to be passed to AHPRA.

On the other side of the equation, AHPRA, largely in response to complaints such as my own, has now produced some brochures, one for notifiers and one for practitioners, about what happens when you make a notification that was intended to clarify this issue. I have looked at those since, and you would be able to access them on the website yourselves. They are still avoiding admitting to people that once AHPRA requisitions one of these complaints your rights at HSC are stripped. They do say that only one will handle it at a time, but it is still not being made clear that effectively once AHPRA makes the decision for you that it will take it that the rights you have with HSC are permanently lost.

The CHAIR — Before I move on to other members, you referred to your current role. What is your current role?

Ms MORRIS — Professionally I work in disability advocacy, but obviously I am here today representing just myself.

The CHAIR — So you would have had some dealings with the health services commissioner, Beth Wilson, prior to your experience; is that right?

Ms MORRIS — A very small amount, because I have been in that role for only just over a year, and as you know, she finished at the end of last year.

The CHAIR — Yes, and she was very well regarded. I think we understand that.

Ms MORRIS — Yes.

Ms HARTLAND — Your submission is very detailed, and I greatly appreciate that. Can you walk us through this, because it seems that this has been a total shemozzle for you?

Ms MORRIS — Yes.

Ms HARTLAND — As a consumer and a notifier, what would you want to see happen? I think at some stage we will be speaking to work people from AHPRA again, and I think clearly it would be appropriate for the committee to raise your particular case with them. Would that be acceptable to you?

Ms MORRIS — Yes, it would.

Ms HARTLAND — What changes would you want to see made in the way that they handle consumer complaints?

Ms MORRIS — As I said in my opening statement and also in my submission, I think my primary wish would be that in fact AHPRA is stripped of its powers to investigate these in the model that I have outlined. If it were not the case that that would happen and it was to maintain that role, which I think its members are conflicted in, I have listed a quite extensive number of recommendations. But I think the most important thing — and it will be relatively easy to do in the legislation as it stands — is just to remove this either/or situation, so that I can go to HSC and I can have my conciliation.

I can be a party in that process, understand the reasons for whatever decision is made, have the opportunity for the conciliation, and then, if AHPRA also thinks that what has happened to me may have a broader public interest, in this case the medical board — or whatever board — AHPRA can look at that. There is no justifiable reason why I cannot have both, why one should nullify the other. I really believe that that is the most important thing. I think that as a notifier I should have a right to be kept up to date, as the law actually does require but as is not being done at this point.

Ms HARTLAND — I was interested to hear you say that when AHPRA said that the case was closed and they had collected evidence it would appear that there was a great deal of evidence that they did not access. You have presumably raised that with them and asked why they did not access the other evidence?

Ms MORRIS — I did.

Ms HARTLAND — What was the explanation?

Ms MORRIS — First of all, I did on the phone. It took me 14 attempts to contact them before I managed to speak to them, but when I did, I did raise it on the phone. I was told that — and I can quote — the evidence I have just outlined to you was of 'no probative value'. So I did pursue doing so in writing, and that list I have pulled off the written complaint that I made. As I stated, they chose to ignore that twice before they finally responded to it, and I may add that their response came only after I appeared in a major newspaper and effectively shamed them into acting. Had I not had the connections to be able to do that, I am fairly certain that I would never have got a response. The response that I did get said — and the quote in that one was — that it was of no relevance.

Mr ELSBURY — In relation to some of the information that you were providing to AHPRA, it was about previous cases where other patients had had a similar issue with the doctor; is that correct?

Ms MORRIS — I did point out to them in my letter that I was aware, because this doctor operates in my community, that there was another person and that she had provided her details, if they wished to speak to her, but I did not provide a statement from her, so to speak.

Mr ELSBURY — But AHPRA does not take into consideration any of the evidence that is gathered from previous incidents; they do not give it any weighting. Is that you understanding?

Ms MORRIS — I have tried to get to information, a straight answer, from them on this. I know from what I have been told, if I take that as fact, that because she had not previously made a notification herself, they would not take it into account. If she had and had been through that process and there had been no further action, for example, I have yet to get a clear answer on whether they would take that into consideration. I did ask a board member at an event I was at recently in a professional capacity. He stated that they will sometimes get a list of previous actions taken against a practitioner, but as I have outlined, that happens very rarely, so a person can, in theory, have 20 notifications behind them, and they can, again in theory, not be considered as relevant to the one at hand at the time.

Mr ELSBURY — The other person that you have spoken to who has had an issue with this doctor chose not to take any action against the doctor but has told you about their particular issue?

Ms MORRIS — Her event happened within a couple of weeks of my own, and I completely incidentally heard her discussing it at a party that I was at. I went up to her and asked her who the doctor was, and she

named the same one. I went through the process first because the events in question happened to me first, and upon seeing what happened to me, she made what I think is a rather wise decision not to get herself involved, although she would have wished to had the system not been so broken.

Mr O'BRIEN — Thank you, Jennifer, for coming forward, and I appreciate your very detailed submission; it is very helpful. Obviously it has been a very difficult exercise for you, and thank you for taking the courage to do that.

One of the significant issues you raise is your belief — and I am quoting from you — 'The questions of medical necessity aside, without my consent the practitioner's actions amount to criminal trespass against the person and assault'. You then refer at the back end of your submission to a failure to refer cases to criminal justice authorities, and you say you are considering your legal rights. If you cannot comment too much, that is fine, but on a process issue, could you advise us of what advice you received from AHPRA about any rights you had to go to the police in relation to what has happened?

Ms MORRIS — In short, none, largely because I did not receive any advice at all from AHPRA. As I outlined in there, it took me 14 goes to even get the privilege to speak to somebody, and that was only because I had had a meeting with Beth Wilson about an entirely unrelated issue through work. I basically had to take a back door. In fact I would say that throughout the entire process, including HSC, AHPRA and the ombudsman, nobody at any point pointed out to me that I may possibly have that right or that this may possibly have been a criminal act. I know that because I know a lot of lawyers, but that was never put forth to me as an option, and I believe in this case it should have been.

I think that if we look at something else that happened in my community prior to the AHPRA system but which I think is demonstrative — that is, the Croydon day centre and the situation that went on there — the only reason that we discovered this pattern of behaviour, harking back to the idea that patterns of behaviour are not considered relevant, was that obviously what happened to those women, getting hepatitis, the health department noticed. Had what happened to them been something that no-one has a record of, like infectious disease, nobody would have ever noticed. I think there is a real concern for me around that sort of thing.

Mr O'BRIEN — I want to be careful because if you are considering action, I do not want to prejudice that in any way. Would you be amenable, following on from Ms Hartland's questions, to our providing your detailed submission to AHPRA for, in a sense, a detailed response?

Ms MORRIS — Yes, and just to make — —

The CHAIR — I will just interrupt there. I think the committee will want to have AHPRA recalled, so we might take it up at that point rather than submitting your evidence. We will go through the formal process of this inquiry.

Ms MORRIS — Sure. Can I make one comment about the criminal law thing? I think what is really important to realise is that, given the length of time that this went on and the fact that I probably only realised a little bit too late just how farcical this whole process was and how it was going to turn out, it was coming very close to the statute of limitations for a lot of these types of actions. By the time they realise that the system they had faith in is not going to work, people may have overstepped that time line.

Mr O'BRIEN — You have indicated there is potentially civil action as well. All I can do is recommend you get independent legal advice about those matters, particularly with limitations periods, but that is a matter for you. In relation to the further recommendations, you provided some very helpful recommendations into changes to the accountability procedures and transparency measures of AHPRA at paragraphs 14 and 15. They are set out there, but could you just take us through some of them and the reasons why you believe they should be considered by this committee.

Ms MORRIS — To do with accountability?

Mr O'BRIEN — Yes. They are under points 14 and 15, where you talk about transparency and accountability measures in terms of your recommendations.

Ms MORRIS — I do not have a copy in front of me.

Mr O'BRIEN — Mr Willis will get you a copy.

Ms MORRIS — Paragraphs 14 and 15?

Mr O'BRIEN — You can start there and just take us through them. To me they seem to be the key ones.

Ms MORRIS — Sure. With respect to paragraph 14, about publishing aggregate statistics on the direction of notifications, I think the reason for that is fairly obvious. At this point the HSC does provide that information in their report; AHPRA does not. I think it is helpful for them to be able to hide the degree to which these things go on. I have also written that I believe they should be publishing aggregate statistics on the outcomes of complaints. It is a nightmare to pick through that stuff.

A lot of the statistics I have provided today I have had to work out myself by deduction, so I think it is really important that we look at comparisons between equivalent bodies, both overseas and the state-based bodies that we used to have, to see whether or not there is a lower rate of findings against practitioners. I do not know that to be the case, but I would think it would be an interesting comparison to make. I really believe very strongly in paragraph 16 where I talk about needing a system of penalties and sanctions to be put in place if AHPRA does not follow what the law says about providing tri-monthly updates to notifiers, because AHPRA always comes out with the same company line of, 'It's the law', when it comes to not informing notifiers about various things. In fact I have named a section, section 161(3)(b), which requires that, if the notifier is involved, they be provided with information on at least a tri-monthly basis. That is not occurring at this point, and nobody is holding them accountable for that, especially when we have an ombudsman that chooses not to respond to complaints. With respect to the rest of them — —

Mr O'BRIEN — The one that jumps out — —

Ms MORRIS — Yes.

Mr O'BRIEN — They are all well thought through, but — —

Ms MORRIS — I think that the other ones relate to the idea of doing an audit. I know the HSC has recently done a review into their processes, but of course they are separate to AHPRA. I think it is worthwhile, as was done in Queensland. I use the word 'audit'; they use the word 'inquiry' in Queensland. I really think we need to look at what has happened in the last three years, taking a sample of these cases, because mine is obviously only one, to see whether this is a pattern; I suspect that it is. I think that, if such a report is done, the government here will probably react as swiftly and in as much anger as they did in Queensland.

The CHAIR — Ms Hartland has a question, I believe.

Ms HARTLAND — It is probably more of a comment. I understand there will be a national review undertaken quite soon. I wonder if Sean or Richard could give us details of that to pass on to you if you want to submit to that review as well.

The CHAIR — Ms Hartland is absolutely correct. There is going to be a national review; I am not sure if you are aware of that. Are you aware?

Ms MORRIS — Yes.

Ms HARTLAND — The other question is advice to the committee around the issue of the fact that the health services commission gave this complaint to AHPRA. I was not aware that would happen without consent. If we could get some advice on that matter, that would be really helpful.

The CHAIR — The committee can follow that up. I do not believe there are any further questions. On behalf of the committee I thank you very much, Jennifer, for coming before us this morning and for providing the evidence you have, which has been very insightful and useful to the committee. Again, thank you for sharing your experience; we do appreciate it.

Ms MORRIS — Thank you.

Witness withdrew.