Review of Ahpra's Framework for identifying and managing vexatious notifications

August 2024

National Health Practitioner Ombudsman

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Summary

Many of the tensions the review has examined stem from the balancing act Ahpra and the Boards must perform to ensure public safety concerns are received and managed appropriately while also ensuring practitioners who are the subject of a notification are treated fairly and not placed under undue stress. The review's recommendations are therefore intended to ensure the notifications process remains open and accessible while increasing efficiency and minimising potential negative impacts on practitioners.

Notifications are central to the National Registration and Accreditation Scheme's (the National Scheme's) public protection objective. Patients, health practitioners and organisations can make a notification to alert the National Health Practitioner Boards (the Boards) and the Australian Health Practitioner Regulation Agency (Ahpra) to concerns about a registered health practitioner's performance, conduct or health. Notifications are a key source of information for Boards when considering whether action needs to be taken to keep the public safe.

Practitioners and their representatives have raised concerns, however, about the prevalence and management of 'vexatious' notifications. Practitioners generally appear to find the notifications process stressful and distressing. In this context, vexatious notifications have an unnecessary and undue negative impact on practitioners.

In December 2020 Ahpra published a Framework to identify and manage vexatious notifications (the Framework)[1] in response to growing concerns and to recommendations made by both a federal Senate inquiry[2] and the National Health Practitioner Ombudsman (the Ombudsman).[3]

The Framework is the first of its kind in Australia's health regulatory landscape and provides end-to-end guidance for identifying and managing a notification that may be, or is determined to be, vexatious. It defines a vexatious notification as a notification that is both without substance and intended to cause distress, detriment or harassment to the practitioner named in the notification.

Recognising the importance of ensuring the Framework is operating as intended, Ahpra and the Ombudsman agreed that an independent review of the Framework would be undertaken after its implementation. In 2022 the Ombudsman began this review to consider, and where necessary made recommendations on, Ahpra's approach to identifying and managing vexatious notifications. A key consideration for the review has been whether the Framework adequately reflects the findings of an Ahpra-commissioned report from the University of Melbourne in 2017, which set out key principles to effectively prevent and manage vexatious notifications.

1 Ahpra and the National Boards, A framework for identifying and dealing with vexatious notifications, December 2020.
2 The Senate, Community Affairs References Committee, Complaints mechanisms administered under the Health Practitioner Regulation National Law, May 2017.
3 National Health Practitioner Ombudsman, Review of confidentiality safeguards for people making notifications about health practitioners, March 2020.

Improving understanding of vexatious notifications

The review found that the number of vexatious notifications made every year is likely to be low. Ahpra advised the review that it had identified 17 notifications where the Framework had been applied between 1 January 2021 and April 2022. After applying the Framework to the 17 notifications, it appears that the relevant Board decided that the notification was vexatious on 5 occasions (0.04% of notifications closed between 1 January 2021 and 30 April 2022).

The review had expected that the number of instances where the Framework had been applied would be higher than Ahpra reported. On further investigation, the review found that Ahpra has not appropriately recorded all instances where a practitioner alleged that a notification was made vexatiously. This indicates that the number of times the Framework has been applied, or should have been applied, is higher than Ahpra reported. The review therefore recommends that Ahpra should ensure allegations that a notification is vexatious are appropriately documented and managed in line with the Framework, with relevant information about the assessment of the allegations recorded and provided to decision makers for consideration.

The review was, however, satisfied that vexatious notifications are rare based on the available evidence. This suggests there is a disconnect between perceptions of the volume of vexatious notifications and true instances of vexatious notifications. The review found that issues in defining the term may be driving this disconnect. Conflicting views appear to stem from the use of the 'experiential' or 'motivational' definition of the term 'vexatious'. Practitioners often used the 'experiential' definition, which is based on their belief that the notification has been disruptive and inconvenient, without having regard to the motivations of the person who made the notification. The Framework's definition of a vexatious notification, however, reflects the 'motivational' definition.

This definition focuses on the motivation of the person making the notification, rather than only the experience of the practitioner subjected to the notification. While the motivational definition sets a high threshold for determining a notification is vexatious, the review contends that this is reasonable and aligns with the gravity of labelling a notification vexatious.

There is clear evidence that practitioners find the notifications process distressing. This may explain why concerns about the impact of vexatious notifications, and the need to prevent them, continues to be strongly voiced by practitioners. Some practitioners appeared to feel that they had been treated as if they were 'guilty until proven innocent'. The review's consideration of a sample of notifications where the Framework had been applied did not, however, uphold concerns that Ahpra and the Boards are unfairly biased against practitioners.

The review found that sometimes the term 'vexatious' is used to describe any type of sub-optimal notification, including notifications that are lacking in substance. The review also heard from Ahpra staff that it can be challenging to handle notifications where they reasonably believe a notifier intended to harm a practitioner but there is substance to the notification. These circumstances are problematic because the notification does not satisfy the 'vexatious' definition but can still lead to distress and feelings of injustice for the practitioner. The review recommends that Ahpra should clearly outline the different types of notifications that commonly result in a decision to take no further action, including the criteria and approach used to assess whether a notification meets the definition of being sub-optimal rather than vexatious.

The review's consultation revealed a lack of communication and publicly available information about the Framework's application. Consumers and practitioners supported greater transparency about the reasons for decisions to take no further action on notifications more generally. The review suggests that Ahpra should enhance its public reporting on Board decisions to take no further action on notifications, particularly decisions that a notification is vexatious.

Better identifying vexatious notifications

With a vexatious notification, information about the notifier's concerns, relationship to the practitioner and desired outcome from the notifications process is necessary to assess whether the notification was made with an intent to cause harm. The review found that Ahpra could do more to understand a notifier's motivations and, in particular, their connection with the practitioner, particularly at the time of receiving the notification. The review therefore recommends that Ahpra should improve how it receives notifications to ensure it more clearly requests information about what the notifier's concerns are, the notifier's relationship to the practitioner and what the notifier is seeking from making a notification.

Concerns were raised with the review about Ahpra's acceptance of anonymous and confidential notifications. It was sometimes assumed that these types of notifications increased the likelihood of vexatiousness. The review acknowledges that considering allegations of vexatiousness in relation to anonymous notifications is more challenging because the identity of the notifier cannot be determined. However, anonymous and confidential notifications offer an important way for Ahpra and the Boards to be alerted to risks to the public. There are many legitimate reasons a notifier may wish to remain anonymous, or for their identity to be withheld from the practitioner they are making a notification about. It should therefore not be assumed that anonymous or confidential notifications are vexatious as they may raise legitimate concerns requiring Ahpra and the relevant Board's attention. The review recommends that Ahpra should provide extra guidance to staff about how to address concerns that an anonymous or confidential notifier has made a vexatious notification.

In relation to identifying indicators of vexatiousness, the review found that the Framework does not distinguish between 'calculated conduct' and 'unreasonable conduct' by a notifier. However, the indicators and management of unreasonable conduct and calculated conduct are distinct, and often fundamentally different.

Unreasonable conduct is often associated with repeated and escalating complaint-lodging, which may appear obsessive. In comparison, calculated conduct relates to raising concerns in a strategic way with a specific self-serving purpose.

The review found instances of notifications being made in a calculated way in the sample of notifications it considered. Generally, calculated conduct appeared in relation to a breakdown in a professional or personal relationship between the notifier and practitioner. Most troublingly, the review found evidence that notifications had been made in domestic and family violence cases. The review also saw evidence of calculated conduct related to workplace disputes and competitive, retaliatory or politically motivated notifications. The review found that indicators related to the different types of notifications associated with calculated conduct could be further developed and improved by Ahpra. The review therefore recommends that Ahpra should update the Framework to distinguish 'calculated conduct' from 'unreasonable conduct' when considering the characteristics of a notifier. The Framework should also include more specific indicators of calculated conduct including:

- more detailed references to the types of relationship breakdowns that may lead to a vexatious notification, including matters relating to court orders or legal proceedings involving the notifier and the practitioner
- references to the types of workplace disputes that may lead to a vexatious notification, including allegations of bullying and harassment, and guidance on appropriately examining workplace-related issues
- references to making a retaliatory notification as an indicator that a notifier may have intended to harm the practitioner in making the notification.

Ahpra staff informed the review that it can be challenging to determine a notifier's intent in making a notification. The review recommends that Ahpra should provide more guidance on how an intent to cause harm can be shown and the standard of proof required to demonstrate an intent to cause harm in making a vexatious notification.

Improving how potentially vexatious notifications are assessed

The review found that Ahpra staff have an understanding and awareness of the Framework, and largely appreciate the guidance it provides. However, the review found several barriers to using the Framework that appear to have affected its application.

While Ahpra staff generally supported using the Framework, there was a perception that the Framework negatively affects the timeliness of progressing a notification, and that the internal approval process set out in the Framework is burdensome. The review therefore recommends that Ahpra should lower the threshold for approval to consider a 'suspected vexatious' notification.

The review also found that Ahpra provides little detail about how the assessment of indicators of vexatiousness should be undertaken by Ahpra staff. It is therefore not surprising that there was little information available about how this assessment had been undertaken in practice in the notifications analysed by the review. Importantly, it appears that the Framework could be better integrated into Ahpra's risk assessment model. The review also found minimal guidance for Ahpra staff about relevant types and sources of information when assessing vexatiousness. The review recommends that Ahpra should strengthen the assessment of indicators that a notification may be vexatious and the assessment of information gathered about a 'suspected vexatious' notification.

It was also unclear to the review why some notifications where the Framework was applied progressed to an investigation without Ahpra first getting a response from the practitioner who was the subject of the notification. This represented a missed opportunity for the practitioner to outline concerns that the notification was vexatious before an investigation was commenced.

The review therefore suggests that Ahpra should not progress a notification to an investigation without first seeking the practitioner's response to the issues raised (unless there are sound reasons not to do so).

Supporting improved recommendations and decision making about vexatious notifications

The review noted a reluctance or concern among Ahpra staff about calling a notification 'vexatious'. There was sometimes a view that finalising a matter as quickly as possible was preferable to collecting more information to determine vexatiousness. There was also a view that using the label 'vexatious' could inflame the situation with the notifier or make it more challenging to manage the outcome of the notification. Ahpra staff also often raised the importance of ensuring notifiers feel able to raise concerns about practitioners and that they did not want action to address vexatious notifications preventing others with legitimate concerns from coming forward. However, practitioners felt strongly that it was important for Ahpra and the Boards to label a notification vexatious if it satisfies the Framework's definition.

From the sample of notifications considered by the review, it was not always clear whether the Board had decided that a notification was vexatious, or if it was 'frivolous', 'misconceived' or 'lacking in substance'. The review recommends that Health Ministers should consider amending the Health Practitioner Regulation National Law (the National Law) to create a new subsection under s. 151(1) to distinguish a decision by a Board to take no further action because a notification is vexatious from other decisions to take no further action. The review also recommends that consideration should be given to whether 'vexatious' should be a defined term in s. 5 of the National Law.

The review found no recorded definitions of the words 'frivolous', 'misconceived' and 'lacking in substance' in relation to the National Law, or how these terms are applied in practice by Ahpra and the Boards. This has contributed to a lack of clarity in the difference between a vexatious notification and these other types of notifications. It was also unclear to the review how the assessment of risk is linked to making a decision that a notification is frivolous, misconceived or lacking in substance. It could therefore be argued that this terminology is not fit for purpose and does not adequately reflect the basis on which Boards are deciding to take no further action in practice. The review therefore suggests that Health Ministers could consider amending s. 151(1)(a) of the National Law to better reflect the outcomes associated with a risk assessment of notifications.

Practitioners expressed concern that vexatious notifications remain on a practitioner's notifications history with Ahpra, which can lead to unfair outcomes such as increases in professional indemnity insurance premiums. The review found that vexatious notifications are not recorded any differently from other notifications in Ahpra's case management system. There is no obvious flag to alert Ahpra staff that a vexatious notification should be treated differently, or not considered part of the practitioner's notifications history. The review recommends that Ahpra and the Boards should distinguish previously received vexatious notifications from other notifications when undertaking a risk assessment of a new notification. Consideration should also be given to amending s. 151(2) of the National Law so the power to consider previous notifications as part of a pattern of conduct or practice does not extend to previous notifications that were found to be vexatious.

The review found a lack of communication from Ahpra about the Framework's application to those involved in the notification, including the practitioner who was the subject of the notification. The review recommends that Ahpra should be more transparent about how and when it applies the Framework, where appropriate.

The review found that Ahpra's templated reasons for deciding to take no further action on the basis that a notification is vexatious were too brief and did not reference the Framework's application or why the notification met the threshold to be deemed vexatious. When considering the sample of notifications, the review found that the reasons provided for Board decisions generally reflected the template wording and did not provide more information about why each notification was closed. Without a clear explanation for why a decision was made to take no further action, notifiers and practitioners can be left feeling unheard, which may lead to frustration, anger and repetitive notifications. The review therefore recommends that Ahpra should update its library of reasons to ensure clear and appropriate reasons are provided for a decision that a notification is vexatious. Ahpra should also update the associated template notification outcome letters for vexatious notifications.

The review validated concern that the timeliness of managing notifications could be better. The average time taken to finalise the notifications considered by the review where the Framework had been applied was 121 calendar days. Completing notifications faster is likely to lessen the impact of the notifications process on practitioners, including if they believe the notification made about them is vexatious.

The review also noted that concerns about the vexatious nature of a notification were in some cases compounded by Ahpra's lack of updates and communication throughout the notifications process. The review suggests there are opportunities for Ahpra to improve how it communicates with those involved in a notification where the Framework is applied.

Determining appropriate consequences for making a vexatious notification

The review explored the possible consequences of making a vexatious notification for registered health practitioners and non-practitioners. The Framework outlines that:

- notifiers who have made a vexatious notification do not have good-faith protections under the National Law
- the relevant Board will act against a registered health practitioner who has made a vexatious notification about another practitioner.

The review found that Boards have undertaken own motion investigations into practitioners if they believe the practitioner has made a vexatious notification about another practitioner. However, the Boards' processes for managing an own motion investigation in these circumstances are not well-developed. The review recommends that Ahpra and the Boards should clarify processes related to own motion investigations into practitioners who have made vexatious notifications, including by ensuring there are clear guidelines for staff when an own motion investigation is initiated.

While the Framework does not refer to it, the National Law also seeks to prevent dishonest and misleading (and therefore potentially vexatious) notifications by providing that people can be fined up to $5,000 for giving an Ahpra investigator false or misleading information or documents. Ahpra staff advised the review, however, that they were unaware of any examples of notifiers having been fined under this provision. The review recommends that Ahpra and the Boards should form a position on when they would seek to fine a person for providing false or misleading information or documents to an Ahpra investigator.

The review also found an inconsistency in the National Law. It appears to be an offence to provide false or misleading information to Ahpra if a notification is being investigated but not at other stages of the notifications process. The review therefore recommends that Health Ministers should consider amending the National Law to make it an offence to provide false or misleading information to Ahpra when making a notification and at the assessment stage of the notifications process.

The review heard from practitioners that having a notification made about them can have negative consequences, particularly in relation to their mental health. As a result, some practitioners emphasised to the review that there should be significant consequences for notifiers who make a vexatious notification. This sentiment was also sometimes reflected in submissions to the review and by Ahpra staff. While the review recognises these views, it is important that any consequences for making a vexatious notification do not inadvertently create barriers to potential notifiers with legitimate concerns from coming forward.

Strengthening guidance and training for Ahpra staff about vexatious notifications

The review found that Ahpra staff received comprehensive training and guidance about the Framework, and how it should be applied, when it was first introduced. However, little ongoing training has been provided. It is hoped that the review's findings can assist Ahpra to determine priority areas for training because ongoing education is essential to ensuring the Framework is consistently and accurately applied. The review therefore recommends that Ahpra should deliver ongoing training to staff on applying the Framework, including any changes implemented in response to the review's recommendations.

Addressing emerging issues linked to vexatious notifications

The review identified two emerging issues that are linked to vexatious notifications and the application of the Framework: notifications in cases involving domestic and family violence allegations and unreasonably persistent notifier conduct. The report's appendices detail the review's specific findings and recommendations regarding these issues. The review suggests that Ahpra's future work plans should seek to address these issues alongside its work to strengthen the identification and management of vexatious notifications.

Addressing notifications in cases involving domestic and family violence allegations

The review found evidence that the notifications process is sometimes used to cause harm in domestic and family violence matters. In the review's consideration of the 17 notifications where the Framework was applied, it found that 7 involved allegations that the notification was made in the context of domestic or family violence.

Research indicates that systems can be used to perpetuate domestic or family violence, particularly coercive control. This was of particular concern to the review because Ahpra does not have a tailored or specific process to manage notifications of this nature. The review recommends that Ahpra should improve how it manages notifications in cases involving domestic or family violence allegations.

Addressing unreasonably persistent notifier conduct

The review found that Ahpra does not have a comprehensive policy and procedure for identifying and responding to unreasonable notifier conduct. The review also did not find a consistent approach to considering a notifier's history as part of a notification's risk assessment, including to determine a pattern of repetitive notifications. The review therefore recommends that Ahpra should strengthen how it identifies and manages unreasonable conduct and unreasonably persistent notifiers.

The review noted that courts, tribunals and organisations subject to federal freedom of information legislation have mechanisms to decide that a litigant or applicant is vexatious. The review recognises the potential synergies between the current arrangements that allow for the National Health Practitioner Privacy Commissioner to declare a freedom of information applicant vexatious in certain circumstances. It may be that a similar mechanism could be established to manage a notifier's access to the notifications process due to unreasonably persistent conduct.

Recommendations

Improving understanding of vexatious notifications

1. Ahpra should ensure allegations that a notification is vexatious are appropriately documented and managed in line with the Framework, with relevant information about the assessment of the allegations recorded and provided to decision makers for consideration.
2. Ahpra should clearly outline, and publish information about, the different types of notifications that commonly result in a decision to take no further action, including the criteria and approach used to assess whether a notification meets the definition of being 'sub-optimal' rather than vexatious.

Better identifying vexatious notifications

3. Ahpra should improve how it receives notifications to ensure it more clearly requests information about the notifier's concerns, the notifier's relationship to the practitioner and what the notifier is seeking from making the notification.
4. Ahpra should provide extra guidance to staff about how to address concerns that an anonymous or confidential notifier has made a vexatious notification.
5. Ahpra should update the Framework to distinguish 'calculated conduct' from 'unreasonable conduct' when considering the characteristics of a notifier. The Framework should also include more specific indicators of calculated conduct, such as references to the types of relationship breakdowns and workplace disputes that may lead to a vexatious notification and references to making a retaliatory notification as an indicator that a notifier may have intended to harm the practitioner in making the notification.
6. Ahpra should provide more guidance on how a notifier's intent to cause harm to a practitioner can be shown and the standard of proof required to demonstrate an intent to cause harm by making a vexatious notification.

Improving how potentially vexatious notifications are assessed

7. Ahpra should strengthen the assessment of indicators that a notification may be vexatious and the assessment of information gathered about a 'suspected vexatious' notification.
8. Ahpra should reduce the escalation points in the internal approval process for the Framework by lowering the threshold for approval to consider a 'suspected vexatious' notification.

Supporting improved recommendations and decision making about vexatious notifications

9 Health Ministers should consider amending the National Law to create a new subsection under s. 151(1) to distinguish a decision by a Board to take no further action because a notification is vexatious. Consideration should also be given to whether 'vexatious' should be a defined term in s. 5 of the National Law.

10 Ahpra and the Boards should distinguish previously received vexatious notifications from other notifications when undertaking a risk assessment of a new notification. Consideration should be given by Health Ministers to amending s. 151(2) of the National Law so the power to consider previous notifications as part of a pattern of conduct or practice does not extend to previous notifications that were found to be vexatious.

11 Ahpra should be transparent about how and when it applies the Framework, where appropriate. Ahpra should update its library of reasons to ensure clear and appropriate reasons are provided for a decision that a notification is vexatious. Ahpra should also update the associated template notification outcome letters regarding vexatious notifications.

Determining appropriate consequences for making a vexatious notification

12 Ahpra and the Boards should form a position on when they would seek to fine a person for providing false or misleading information or documents to an Ahpra investigator.

13 Health Ministers should consider amending the National Law to make it an offence to provide false or misleading information to Ahpra when making a notification and at the assessment stage of the notifications process.

14 Ahpra and the Boards should clarify processes related to own motion investigations into practitioners who have made vexatious notifications about other practitioners, including by ensuring there are clear guidelines for staff when an own motion investigation is initiated.

Strengthening guidance and training for Ahpra staff about vexatious notifications

15 Ahpra should deliver ongoing training to staff on applying the Framework, including any changes implemented in response to the review's recommendations.

Appendix 1: Addressing notifications in cases involving domestic and family violence allegations

16 Ahpra should improve how it manages notifications in cases involving domestic or family violence allegations.

Appendix 2: Addressing unreasonably persistent notifier conduct

17 Ahpra should strengthen how it identifies and manages unreasonable conduct and unreasonably persistent notifiers.

Background

In December 2020 the Australian Health Practitioner Regulation Agency (Ahpra) published a new framework to help identify and manage potentially vexatious notifications made about registered health practitioners (the Framework).[4]

In 2022 Ahpra invited the National Health Practitioner Ombudsman (the Ombudsman), Ms Richelle McCausland, to undertake an independent review of the Framework's implementation to consider, and where necessary make recommendations about, Ahpra's approach to identifying and managing vexatious notifications.

Context for the review

The Health Practitioner Regulation National Law in effect in each state and territory (the National Law) establishes the National Registration and Accreditation Scheme (the National Scheme). This is the basis for regulating 16 health professions in Australia. Each of these health professions is represented by a National Health Practitioner Board (a Board).[5] The National Law creates Ahpra as the agency that supports the Boards.

The guiding principle of the National Scheme is that protecting the public, and public confidence in the safety of services provided by registered health practitioners and students, is paramount.[6]

One of the main ways Ahpra and the Boards try to protect the public is by managing notifications about the performance, conduct and health of registered health practitioners. The notifications process allows Ahpra and the Boards to be alerted to potential risks to public safety and to respond accordingly by taking regulatory action when necessary.[7]

In 2022–23 Ahpra received 9,706 notifications about registered health practitioners.[8] Of the 10,659 notifications closed in 2022–23, most were finalised with a 'no further action' outcome (6,678 notifications, 63% of notifications).[9] A notification can, however, have serious consequences for a practitioner. These consequences could include the relevant Board deciding to impose conditions on the practitioner's registration, suspending their registration or referring the matter to a tribunal that has the power to cancel their registration.

4 Ahpra and the National Boards, A framework for identifying and dealing with vexatious notifications, December 2020.

5 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.

6 National Law, s. 3A(1).

7 Part 8 of the National Law outlines how notifications can be made and how they must be managed by Ahpra and the Boards.

8 Ahpra, Annual report 2022-23, p. 63.

9 Ibid., p. 75.

By design, anyone can make a notification about a practitioner, though most notifiers are patients or members of the public.[10] A voluntary notification can be made about a registered health practitioner on several grounds including that:

- the practitioner's professional conduct, or their knowledge, skill or judgement, is not of the standard reasonably expected
- the practitioner is not a suitable person to be registered in the profession, or they have contravened the National Law or a condition or undertaking on their registration
- the practitioner has an impairment
- the practitioner improperly obtained their registration.[11]

Registered health practitioners must make a mandatory notification in certain circumstances, including if they have a reasonable belief that a practitioner has:

- practised their profession while intoxicated by alcohol or drugs
- engaged in sexual misconduct in connection with the practice of their profession
- placed the public at a risk of substantial harm because of an impairment
- placed the public at risk of harm by practising the profession in a way that constitutes a significant departure from accepted professional standards.[12]

Importantly, the National Law outlines that a person is not liable civilly, criminally and under an administrative process for making a notification in good faith.[13] However, the National Law does not define the term 'good faith', nor does it specifically refer to the possibility of a person making a 'vexatious notification' or the consequences of doing so.

Concerns about vexatious notifications

Over several years, practitioners and their representative bodies have voiced concern that the notifications process is being 'weaponised' to harm practitioners.[14] A prevalent practitioner view is that Ahpra's consideration of notifications that are without merit has a significant impact on practitioner wellbeing. This sentiment is captured in the below statement made by an Australian Medical Association spokesperson

> "If you want to ruin a doctor's life, all you really have to do is make a complaint against them and walk away … Certainly 90 per cent of the time the doctor will be found to have done nothing wrong, but you will have ensured that that doctor has a year of utter misery.[15]

10 In 2022–23 most notifications managed by Ahpra were made by patients or members of the public (71% of notifications) according to Ahpra's annual report.

11 National Law, s. 144.

12 National Law, s. 141.

13 National Law, s. 237.

14 Payne H, 'It's easy and free to ruin a doctor's life', Medical Republic, 12 January 2023. Accessed January 2023: www.medicalrepublic.com.au/its-easy-and-free-to-ruin-a-doctors-life/83905.

15 Ibid.

These concerns have been explored in system-wide reviews, including inquiries by the Senate Community Affairs References Committee regarding the notifications process.[16] The 2017 Senate inquiry into complaints mechanisms administered under the National Law most comprehensively addressed concerns about the use of the notifications process to cause harm. The inquiry found that these concerns lacked evidence but acknowledged the disproportionate impact vexatious notifications could have on practitioners. The inquiry's report recommended that Ahpra and the Boards develop a framework for identifying and managing vexatious notifications.[17] This was the origin of Ahpra's Framework, which is the subject of this review.

Development of the Framework

University of Melbourne research report

Following the Senate Community Affairs References Committee's recommendation, Ahpra commissioned a report by the University of Melbourne in 2017 (the Research report).[18] The Research report covered several areas in relation to vexatious notifications and set out key principles to effectively prevent and manage vexatious notifications. It explained that available literature suggested vexatious notifications are rare. However, it noted that notifications are commonly found to have 'significant negative impacts on the health and wellbeing of practitioners' and suggested that these negative impacts may be greater in relation to a vexatious notification.[19]

Perhaps most notably, the Research report emphasised that under-reporting of potential risks to patient safety is a larger problem for the National Scheme than concerns about not identifying a small number of vexatious notifications. It suggested that the overall negative impact of incorrectly identifying a notification as vexatious is greater for the National Scheme given its public protection objective.

Ombudsman's review of confidentiality safeguards

After Ahpra published its commissioned Research report, the Ombudsman's 2020 review of confidentiality safeguards for people making notifications about health practitioners (the Confidentiality review)[20] returned to the issue of vexatious notifications. The Confidentiality review explored a concern among practitioners that accepting anonymous and confidential notifications was inconsistent with the principle of procedural fairness. One of the perceptions that seemed to drive this concern was that it is easier for people to make vexatious notifications if they do not have to identify themselves. Some stakeholders therefore argued that Ahpra and the Boards should not accept anonymous or confidential notifications.

However, the Confidentiality review disagreed. It found that Ahpra and the Boards have a responsibility to deal with all notifications, regardless of the source. The Confidentiality review explained that it is not inconsistent with the principle of procedural fairness for a decision maker to withhold the identity of a notifier for reasons of confidentiality, so long as the substance of the information in the notification is disclosed to the practitioner.

16 Refer to, for example: The Senate, Community Affairs References Committee, Medical complaints process in Australia, November 2016; The Senate, Community Affairs References Committee, Administration of registration and notifications by the Australian Health Practitioner Regulation Agency and related entities under the Health Practitioner Regulation National Law, April 2022.

17 The Senate, Community Affairs References Committee, Complaints mechanisms administered under the Health Practitioner Regulation National Law, May 2017.

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

19 Ibid.

20 National Health Practitioner Ombudsman, Review of confidentiality safeguards for people making notifications about health practitioners, March 2020.

It also noted that available evidence suggests vexatious notifications are not widespread, and that it is important to ensure barriers are not inadvertently created that could prevent people speaking up about serious public safety concerns.

The Confidentiality review echoed the 2017 Senate Community Affairs References Committee's recommendation that Ahpra develops a framework for dealing with vexatious notifications. The Confidentiality review suggested that taking this step could help to address ongoing concerns about accepting anonymous or confidential notifications.

The Framework

Following the recommendations of the Senate Community Affairs References Committee and the Ombudsman, Ahpra implemented its Framework in 2020. The Framework defines a vexatious notification as 'a notification without substance, made with an intent to cause distress, detriment or harassment to the practitioner named in the notification'.[21]

The Framework's purpose is to:

- identify the features of a potentially vexatious notification for the purposes of the National Law
- outline how to manage notifications where those features are identified
- ensure the resources of the National Scheme are used appropriately
- reduce the serious impact of vexatious notifications on practitioners
- ensure the process is fair and open for all involved.

In broader terms, it also outlines why the Framework is necessary and that vexatious notifications can adversely affect Ahpra and the Boards' resourcing, and public trust and confidence in regulation.

The review notes that Ahpra appears to be one of the only health practitioner regulatory bodies that has developed, implemented and made a Framework publicly available about managing vexatious notifications (or complaints).

The review

After implementing the Framework in 2020, Ahpra invited the Ombudsman to undertake an independent review of Ahpra's approach to identifying and managing vexatious notifications.

The review has been conducted in 2 parts:

Part 1: The Ombudsman considered the Framework and the internal artefacts produced by Ahpra to explain how and when to apply the Framework. This included considering:

1. Whether the Framework adequately reflects findings of the Research report and issues raised in the Confidentiality review.
2. Whether the internal artefacts adequately describe actions expected of staff to successfully adopt the Framework.
3. Any recommendations about changes to the Framework or artefacts.

Part 2: The Ombudsman considered the way in which the Framework and artefacts are applied in practice. This included considering:

4. Whether the implementation of the Framework and the artefacts has been successful and if there have been any unintended consequences.
5. Whether the Framework is being appropriately and consistently applied by Ahpra notifications staff.
6. Whether any actions taken in response to a notification identified as vexatious have been adequate and in accordance with the National Law.
7. Whether there are any gaps in practice and whether the gaps are due to an inadequacy in the Framework and artefacts or another reason.
8. Any recommendations about further actions to be undertaken by Ahpra to enable more rapid and robust identification and management of potentially vexatious notifications.

21 Ahpra and the National Boards, A framework for identifying and dealing with vexatious notifications, December 2020.

Review process

The review began on 20 June 2022.

The Ombudsman led the review, with support from a small team of staff from the office of the National Health Practitioner Ombudsman (NHPO), including Chris Jensen, Preya McKenzie, Lara Beissbarth, Katrina Howlett and Johnnie Rabba.

The review considered a range of information and documentation relevant to the Framework including:

- the Research report
- the Confidentiality review
- academic research on vexatious notifications and complaints
- previous Senate inquiry reports and related submissions[22]
- the National Law and other relevant legislation, including use of the term 'vexatious' in related legislation
- news articles commenting on the issue of vexatious notifications and complaints.

The review also considered Ahpra's internal artefacts in relation to the Framework including:

- recordings of training webinars on the Framework and associated presentations
- the Work Instruction for managing vexatious notifications (Work instruction)
- a process map for managing vexatious notifications
- the form for submitting a notification
- the Communications management policy[23]
- extracts from the library of reasons for decisions about notifications.

To consider how the Framework and artefacts are applied in practice, the review analysed a sample of notifications and complaints related to the Framework. The review also undertook a targeted consultation process with relevant stakeholders.

Analysis of notifications where the Framework was applied

At the start of the review, Ahpra said it had identified 17 notifications where the Framework had been applied between 1 January 2021 and 30 April 2022.

The review considered all documentation relevant to these 17 notifications including the notification materials, Board papers and attachments, internal notes and correspondence with the notifier and practitioner relevant to the notification. The review also requested information from Ahpra about 2 own motion investigations which had been initiated following the relevant Board's consideration of a potentially vexatious notification.

The review noted that most of the practitioners who were the subject of a notification where the Framework had been applied were nurses (8) and medical practitioners (5) (refer to Table 1).

Table 1: Profession of practitioners who were the subject of a notification where the Framework was applied

Profession of the health practitioner	Number of notifications
Nurse	8
Medical practitioner	5
Dental practitioner	2
Psychologist	2
Chiropractor	1
Pharmacist	1

22 Refer to, for example: The Senate, Community Affairs References Committee, Medical complaints process in Australia, November 2016; The Senate, Community Affairs References Committee, Administration of registration and notifications by the Australian Health Practitioner Regulation Agency and related entities under the Health Practitioner Regulation National Law, April 2022; The Senate, Community Affairs References Committee, Complaints mechanisms administered under the Health Practitioner Regulation National Law, May 2017.

23 Ahpra, Communications management policy, July 2021.

The relevant notifications were made mostly by fellow practitioners (8) and patients or members of the public (7) (refer to Table 2). Confidential and anonymous notifications did not feature heavily in the analysed notifications.

Table 2: Type of notifiers in the notifications where the Framework was applied[24]

Type of notifier	Number of notifications
Health practitioner	8
Patient or member of the public	7
Confidential or anonymous	2

Most notifications where the Framework was applied were finalised with a Board deciding to take no further action under s. 151(1) of the National Law (refer to Table 3). Section 151(1) states:

A National Board may decide to take no further action in relation to a notification if—

(a) the Board reasonably believes the notification is frivolous, vexatious, misconceived or lacking in substance; or

(b) given the amount of time that has elapsed since the matter the subject of the notification occurred, it is not practicable for the Board to investigate or otherwise deal with the notification; or

(c) the person to whom the notification relates has not been, or is no longer, registered in a health profession for which the Board is established and it is not in the public interest for the Board to investigate or otherwise deal with the notification; or

(d) the subject matter of the notification has already been dealt with adequately by the Board; or

(e) the subject matter of the notification—

i. is being dealt with, or has already been dealt with, by another entity; or

ii. has been referred by the Board under section 150 or 150A to another entity to be dealt with by that entity; or

(f) the health practitioner to whom the notification relates has taken appropriate steps to remedy the matter the subject of the notification and the Board reasonably believes no further action is required in relation to the notification.

The relevant Board decided to take no further action under s. 167(a) of the National Law following an investigation in 4 of the notifications that were analysed. Section 167 states:

After considering the investigator's report, the National Board must decide—

(a) to take no further action in relation to the matter; or

(b) to do either or both of the following—

i. take the action the Board considers necessary or appropriate under another Division;

ii. refer the matter to another entity, including, for example, a health complaints entity, for investigation or other action.

Table 3: Outcome of the notifications where the Framework was applied[25]

Outcome of the notification	Number of notifications
No further action under s. 151(1)(a)	8
No further action under s. 167(a)	4
No further action under s. 151(1)(e)(i)	2
No further action under s. 151(1)(d)	1
No further action under s. 151(1)(f)	1

24 Please note that own motion notifications are excluded from this data because they were initiated by a Board, not a notifier.

25 Please note that one notification and 2 own motion investigations remained open at the time of analysis.

Administrative complaints to Ahpra about the Framework

Ahpra advised the review that it had identified 17 administrative complaints where the Framework was relevant between January 2021 and April 2022. The complaints were made mostly by practitioners and raised concern about Ahpra and the relevant Board's handling of a notification.

The review considered all documentation relevant to these 17 complaints including the complaint materials, Ahpra's complaint response, internal notes and any other relevant information about the matter that led to the complaint being made.

Targeted consultation

The review conducted 3 phases of targeted consultation, which included engaging with:

- comparative organisations
- Ahpra staff and Board members
- other relevant parties such as professional indemnity insurers, affected practitioners and consumer groups.

Comparative organisations

The review initially contacted 21 organisations that undertake similar regulatory roles to Ahpra or frequently consider complaints about the conduct or performance of people practising a profession. Following this, the review engaged directly with 16 organisations, including meeting with 8 organisations on a confidential basis.

Ahpra staff and Board members

The review interviewed 12 Ahpra staff who had managed a matter where the Framework had been applied. This included 8 regulatory advisers and 5 state and national managers. The review also interviewed 3 members of 3 Boards.

Other relevant parties

The review undertook targeted consultation with relevant people and organisations.

Submissions were sought from 5 indemnity insurers and consumer and peak health practitioner representative bodies. Four health practitioner representative organisations contacted the review looking to contribute. The review accepted and considered submissions from these organisations.

The review's consultation paper for the targeted consultation outlined that the review was particularly interested in perspectives on the following:

1. Evidence related to:
   - the volume or prevalence of vexatious notifications
   - the common types of vexatious notifications made and the notifier's motivations
   - how vexatious notifications are managed, and how this affects notifiers and practitioners
   - incidences of repeated unreasonably persistent behaviour by a notifier.
2. The application of the Framework including:
   - any changes in Ahpra's approach to identifying and managing vexatious notifications after the Framework's introduction in December 2020
   - whether the definition of a vexatious notification is reasonable or if another definition should be used
   - the aspects of Ahpra's approach to identifying and managing vexatious notifications that are working well, and the aspects that are not working well
   - the experience of notifiers and practitioners involved in a vexatious notification.
3. Any known risks, potential harm or adverse outcomes associated with vexatious notifications and their management.
4. Core principles and/or strategies to reduce, identify and manage vexatious notifications and vexatious behaviour by notifiers.

5. The balance between ensuring notifiers are encouraged to raise patient safety concerns and ensuring procedural fairness for practitioners who are the subject of the notification.
6. Any support and information available to those involved in potentially vexatious or vexatious notifications (or support and information that should be available).
7. The adequacy of the provision in the National Law making it an offence for a person or organisation to knowingly provide false or misleading information or documents to an Ahpra investigator.
8. Any suggestions for improvements regarding how Ahpra identifies or manages vexatious notifications.

The review interviewed 5 practitioners who were the subject of a notification where the Framework may have been applied. These interviews sought to learn more about practitioners' experiences during the notifications process. Twelve practitioners also contacted the review to share their experiences of the notifications process. The review accepted and considered information from these practitioners.

The review also met with Ahpra's Community Advisory Council to learn more about community members' experiences during the notifications process.

After considering the sample of notifications provided to the review, it was clear that further examination of domestic and family violence-related concerns was required. The review therefore met with a small number of organisations that provide tailored services or support to people affected by domestic or family violence.

Emerging issues linked to vexatious notifications

During the review two emerging issues were identified that are linked to vexatious notifications and the application of the Framework: notifications in cases involving domestic and family violence allegations and unreasonably persistent notifier conduct. The report's appendices detail the review's specific findings and recommendations regarding these issues. The appendices are not, however, intended to be read in isolation but should be considered alongside the overarching findings and recommendations found in the main report. The review suggests that Ahpra's future work plans should seek to address these emerging issues alongside its work to strengthen the identification and management of vexatious notifications.

Improving understanding of vexatious notifications

The concept of vexatious notifications has received a great deal of attention over many years. Recent media headlines give an insight into continuing concern surrounding this issue: 'Four in five believe "vexatious" complaint made against them',[26] 'It's easy and free to ruin a doctor's life'[27] and 'RACGP: Vexatious complaints taking toll'.[28]

There appears, however, to be a disconnect between perceptions of the volume of vexatious notifications being made and evidence of the impact of vexatious notifications on the National Scheme. Ahpra's view, based on its commissioned research, is that the number of vexatious notifications is very low – likely less than 1% of notifications. However, practitioners raised concern with the review, and in other forums, about the prevalence of vexatious notifications. Peak health practitioner representative organisations said they had received multiple reports from their members of vexatious notifications.

This disconnect between perceptions of the volume of vexatious notifications may be linked to differing views on the definition of a vexatious notification. Despite the high level of attention on the topic, there is not a consistent understanding of what is meant by the term 'vexatious'. Some commentators have taken a broad definition, suggesting that any notification that is lacking in substance is vexatious. Others have recognised a definition that is more akin to the legal concept of vexatious, where the matter must be lacking in substance and made to cause annoyance or distress.

The review recognises the importance of addressing these foundational issues. Stakeholders continue to raise concerns about vexatious notifications and ongoing negative perceptions of Ahpra's ability to identify and manage these notifications have the potential to undermine confidence in the regulator.

Evidence suggests vexatious notifications are uncommon

The Research report concluded that 'no more than 1% of complaints are vexatious' but that there was a lack of research about the actual incidence of vexatious notifications in the health sector.[29] This finding has frequently been cited by Ahpra and those debating the prevalence and impact of vexatious notifications since the Research report's release.

Ahpra identified that the Framework was applied to 0.1% of the notifications closed between 1 January 2021 and 30 April 2022 (17 of the 13,979 notifications closed during this time). However, this does not mean it was decided that each of these notifications was vexatious.

26 Attwooll J, 'Four in five believe "vexatious" complaint made against them, NewsGP, 2 March 2023. Accessed August 2023: https://www1.racgp.org.au/newsgp/professional/four-in-five-believe-vexatious-complaint-made-agai.

27 Payne H, 'It's easy and free to ruin a doctor's life', Medical Republic, 12 January 2023. Accessed January 2023: www.medicalrepublic.com.au/its-easy-and-free-to-ruin-a-doctors-life/83905.

28 'RACGP: Vexatious complaints taking toll', The Mirage, 9 March 2023. Accessed August 2023: https://www.miragenews.com/racgp-vexatious-complaints-taking-toll-962889/.

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

After applying the Framework to the 17 notifications, it appears that a Board decided that the notification was vexatious on 5 occasions (0.04% of notifications closed between 1 January 2021 and 30 April 2022).

The review found a consensus among interviewed Ahpra staff and Board members that vexatious notifications are rare. Organisations the review consulted with, including professional indemnity insurers, also generally agreed that the number of vexatious notifications is low. Comparative organisations reported that they rarely receive vexatious complaints or had not received any complaints deemed to be vexatious in recent times. However, one comparative organisation noted that it had seen an increase in the frequency of 'unreasonable' complainant conduct. Some comparative organisations said they had seen increases in vexatious complaints driven by specific motivations, particularly in the context of domestic and family violence allegations, though overall instances of vexatious complaints remained uncommon.

The review broadly agrees with the Research report and Ahpra's view that, based on available evidence, the number of vexatious notifications is likely to be low. However, as recognised in the Research report, research into vexatious notifications has mostly focused on complaints by members of the public engaging in unreasonable conduct (generally making obsessive and repetitive complaints). To date, the review is not aware of any further academic research that has been undertaken into the prevalence of vexatious notifications in Australia.

Appropriately recording and responding to allegations of vexatiousness

The Framework states a notification should not be assumed to be vexatious because a practitioner alleges that it is. However, it requires that Ahpra applies the Framework to analyse indicators suggesting the notification may be vexatious. As previously mentioned, the Research report found that the best available estimates suggested no more than 1% of complaints are vexatious.[30] However, Ahpra applied the Framework to analyse indicators of vexatiousness just 17 times (0.1%) and Boards decided that a notification was vexatious only 5 times over a 16-month period (0.04%).

While the review agrees that the number of vexatious notifications made every year is likely to be low, it was expected that the number of instances where the Framework had been applied would be higher than Ahpra reported. This is because the issue of vexatious notifications has received a high level of attention, which logically suggests it is an issue practitioners raise frequently with Ahpra. One Board member in an interview with the review similarly expressed surprise about the low number of notifications where the Framework had been applied.

On further investigation, the review found that Ahpra has not appropriately recorded all instances where a practitioner alleged that a notification was made vexatiously. During the period from 1 December 2020 to 30 June 2022, the NHPO received 49 complaints about Ahpra and a Board's handling of a matter where the complainant raised concerns about a vexatious notification or notifier.

30 Ibid.

This contrasts with the 17 notifications that Ahpra provided to the review where the Framework had been applied from 1 January 2021 to 30 April 2022. Some complaints to the NHPO suggested that Ahpra did not record or manage a practitioner's allegations of vexatiousness in line with the Framework. In one complaint where a practitioner had alleged that a notification was vexatious, Ahpra advised the NHPO that 'the vexatious notification framework was applied as it is to every notification received'. However, the NHPO's assessment of this complaint was that there were no records of analysis against the Framework or any documentation related to the Framework.

This leads the review to believe that there may be other notifications where concerns about vexatiousness were raised, but the Framework was not applied or its application was not recorded. This suggests that the number of times the Framework has been applied, or should have been applied, is higher than Ahpra has reported.

It is acknowledged there could be several reasons why Ahpra might not have recorded a practitioner's allegations of vexatiousness in line with the Framework. Some Ahpra staff, for example, may have a misconception that the Framework should only be applied when a notification or notifier is confirmed to be vexatious. One Ahpra staff member, for example, stated that there is no trigger in the notifications workflow to identify a vexatious notification and it is not a requirement to use the Framework, leaving staff unaware or reluctant to use it. It may also be that Ahpra staff do not agree with the practitioner's allegation that the notification is vexatious and therefore do not see the need to record the allegation. This may be because the staff member is already aware of clear evidence that a practitioner does not appear to be practising to the accepted standard (refer to 'Improving assessments of indicators and evidence of vexatiousness' for further analysis of this issue).

Irrespective of the reasons why allegations of vexatiousness may not have been recorded in the past, the review believes it is vital that Ahpra staff appropriately record and manage allegations of vexatiousness in line with the Framework. Recording this information will ensure that Ahpra staff appropriately and consistently consider practitioner allegations. This will help to build trust in the regulator and ensure all practitioners have access to the same fair process.

In addition, appropriate record keeping is essential for continuously improving processes. Information about the Framework's application could, for example, help Ahpra to better understand why practitioners are alleging that a notification was made vexatiously. It could also help Ahpra to develop appropriate strategies to address these allegations.

Case study

A health practitioner made a complaint to the NHPO about the handling of a confidential notification made to Ahpra about them by another practitioner. The complainant alleged that Ahpra did not recognise the vexatious nature of the notification when they had repeatedly raised concerns.

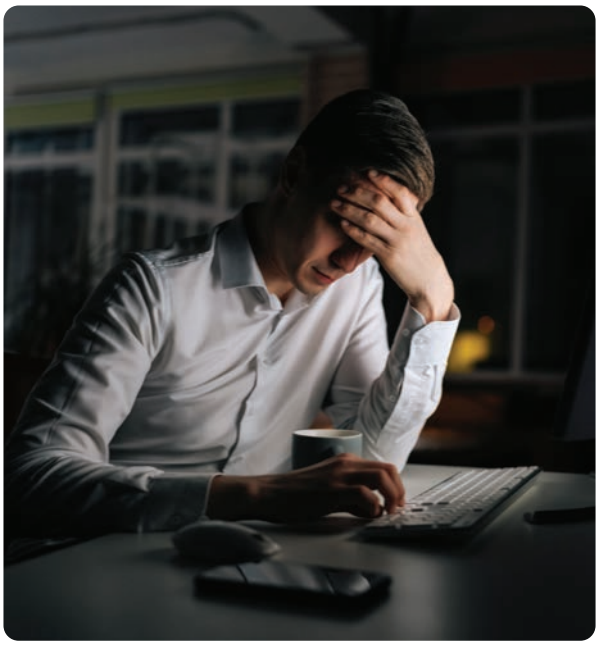
The NHPO made preliminary inquiries into the practitioner's complaint and sought more information about how Ahpra applied the Framework to the confidential notification.

The NHPO found that the Board considered the notification soon after receipt because Ahpra believed the concerns (on face value) were serious and the notification was considered high risk. The Board decided to investigate the notification, and soon after, the practitioner was informed of the notification and investigation into their practice.

During the course of the almost 7-month investigation, the practitioner raised multiple concerns with Ahpra that they believed the notification was not made in good faith. Ultimately, the Board decided to take no further action under s. 167(a) of the National Law because it could not be determined that the practitioner had practised below a reasonable standard.

Ahpra's complaint response to the NHPO said that Ahpra had applied the Framework but that the Board determined no further action was necessary. However, Ahpra could not produce any records to support that the Framework had been applied and informed the NHPO that the Framework's internal escalation points were verbally communicated and not documented.

This matter was therefore not included in the notifications provided to the review for consideration because Ahpra had not recorded that the Framework had been applied.



Improving records of the Framework's application

The review also found that, in circumstances where allegations of vexatiousness were documented by Ahpra, the records of the Framework's application often could have been better. The internal escalation process and required approvals to progress a notification through the Framework are recorded in Ahpra's case management system as 'reminders'. However, the review's analysis of the sample of notifictions found that the information recorded in these reminders was often brief and difficult to follow. Further, it appeared that some meetings and discussions relevant to applying the Framework were not appropriately recorded.

The review is also concerned that Boards are not being made aware that Ahpra has undertaken assessments on whether to treat a notification as 'suspected vexatious'. In particular, it appears that the 'reminders' containing information about applying the Framework are not made available to decision makers. As such, it is not clear that Boards are informed that any allegations of vexatiousness have been raised or assessed.

The review therefore found that the method of record keeping in relation to the application of the Framework is not sufficient and should be improved.

Key findings

- Based on the available evidence, the number of vexatious notifications made every year is likely to be low.
- Ahpra identified that the Framework was applied to 0.1% of the notifications closed between 1 January 2021 and 30 April 2022. After applying the Framework to these notifications, it appears that the relevant Board decided that the notification was vexatious on 5 occasions (0.04%).
- It is likely that the number of instances where the Framework has been, or should have been, applied is higher than Ahpra has reported.
- Ahpra does not appear to have recorded all allegations of vexatiousness in line with the Framework's requirements. Further, in circumstances where allegations of vexatiousness were documented by Ahpra, the records of the Framework's application often could have been better.
- The method of record keeping in relation to the application of the Framework is not sufficient and should be improved.

Recommendations

1. Ahpra should ensure allegations that a notification is vexatious are appropriately documented and managed in line with the Framework, with relevant information about the assessment of the allegations recorded and provided to decision makers for consideration.

The definition of 'vexatious' affects perceptions of prevalence

While Ahpra appears not to have recorded all instances where the Framework was or should have been applied, the review was ultimately satisfied that vexatious notifications are rare based on the available evidence. The review therefore considered why there is a disconnect between perceptions of the volume of vexatious notifications and instances of confirmed vexatious notifications.

The review's findings support the Research report's view that definitional issues may be driving this disconnect. The Research report found that there was widespread confusion about the definition of a vexatious notification and often conflicting views about the meaning of the term 'vexatious'. These conflicting views appear to stem from the use of the 'experiential' or 'motivational' definition. The Research report explains:

> "
>
> …in general English usage, the test for vexatiousness turns on the experience of the person subjected to the event. That is, the person experiences an event (such as being the subject of a complaint) as being annoying, frustrating and/or worrisome (i.e. they are 'vexed' by it). This definition is the 'experiential' definition.
>
> Vexatious is also a term with a specific legal meaning, which differs in a key way from its general English meaning. In legal contexts, 'vexatious' means 'denoting an action or the bringer of an action that is brought without sufficient grounds for winning, purely to cause annoyance to the defendant'. Thus, in legal contexts, the test for vexatiousness turns on the motivation of the person causing an event, rather than the experience of the person subjected to that event. This definition is the 'motivational' definition.[31]

Applying the motivational definition

The Framework employs a motivational definition of 'vexatious'. It requires that 2 factors must be satisfied for a notification to be determined vexatious:

- the notification must have no substance
- the notifier must have intended to cause distress, detriment or harassment to the practitioner they made the notification about.

Ahpra staff and Board members' view of the appropriate definition of a vexatious notification aligned most closely with the 'motivational' definition.

The review also found that the 'motivational' definition is generally consistent with how comparative organisations describe vexatious complaints. A desktop review of publicly available complaints policies found that other organisations use a similar definition. The Parliamentary Workplace Support Service's definition of a vexatious complaint, for example, requires the complaint to be 'groundless' and made 'with the primary intention of causing distress, detriment or harassment to the subject of the complaint'.[32]

The review recognises that the motivational definition sets a high threshold for determining that a notification is vexatious, as 2 elements must be satisfied: the notification has no substance, and the notification was made with an intent to cause distress, detriment or harassment to the practitioner who is the subject of the notification. However, the review is satisfied that this high threshold is reasonable and aligns with the gravity of labelling a notification vexatious.

31 Ibid.

32 Parliamentary Workplace Support Service, Vexatious, frivolous and unreasonable complaint policy. Accessed April 2023: https://pwss.gov.au/sites/default/files/2021-09/vexatious-frivolous-unreasonable-complaint-policy.pdf.

Incorrect application of the experiential definition

The Research report found that practitioners may use the 'experiential' definition when referring to a vexatious notification, which is based on their belief that the notification has been 'disruptive and inconvenient'.[33] The review similarly found that when describing the effect of the notifications process on them, practitioners often incorrectly used the term vexatious to describe concerns that would not meet the threshold for a notification or a notification that lacked substance, without regard for the motivations of the person who made the notification. This is likely affecting perceptions about the prevalence of vexatious notifications.

Practitioners often find having a notification made about them distressing

The notifications process can be stress-inducing for practitioners. Ahpra's Expert Advisory Group's report into identifying and minimising distress for practitioners involved in the regulatory process, for example, found that most interviewed participants 'described the overall experience of going through a notification as having distressing elements'.[34] The Expert Advisory Group's report outlined that practitioners who believed they were the subject of a vexatious or groundless notification often developed 'a sense of injustice', and this view appeared to 'increase the distress felt by practitioners'. For example, practitioners commonly said the notifications about them were 'unnecessary, minor or undeserving of investigation'.[35] The Research report also outlined that the effect of a notification on practitioners can range from self-doubt and thoughts of leaving practice to depression, anxiety and thoughts of self-harm.[36]

Practitioners who were the subject of a notification where vexatiousness was considered expressed similar degrees of distress to the review. One practitioner said they felt they had done something wrong and believed their reputation had been irreparably damaged. Another practitioner similarly said that they felt nervous and embarrassed about receiving a notification and that this affected their interactions with others. These sentiments point to the broader issues practitioners describe experiencing when they are the subject of a notification, which appears to support the Research report's analysis that while it did not identify any evidence of the specific impacts of vexatious notifications on practitioners, the general negative effects of the notifications process may be heightened where a practitioner believes the notification made about them lacks substance.

Negative perceptions of the notifications process are therefore central to understanding why practitioners continue to raise concerns about the disproportionate impact that a vexatious notification can have on them. This may also be causing increased interest in reducing the number of vexatious notifications that Ahpra receives.

The review recognises that Ahpra has accepted all of the Expert Advisory Group's recommendations for identifying and minimising distress for practitioners involved in the regulatory process.[37] Ahpra has committed to implementing the recommendations progressively over 2023 to 2025. It is likely that implementing these recommendations will lead to a more positive experience for practitioners subjected to a notification and may reduce unfounded concerns about vexatiousness.

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

34 Ahpra and the National Boards, Expert Advisory Group, 'Keeping hope: Identifying and minimising distress for practitioners involved in a regulatory process. Findings of the Expert Advisory Group on practitioner distress, October 2022.

35 Ibid.

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

37 The Expert Advisory Group report outlines 15 recommendations to identify and minimise distress for practitioners involved in a regulatory process. The recommendations are categorised into 4 key areas: managing health concerns; being open, transparent and maintaining practitioner hope; supporting practitioners; and learning from practitioner experience. Recommendation 6, for example, outlined the need for realistic, regular and informative updates to help practitioners have accurate expectations of timeframes and outcomes. This in part involves providing relevant information about the progress of investigations including explaining when delays are due to waiting on information from other entities and realistic appraisal of timeframes.

Practitioners often expressed concern that the notifications process is punitive

Practitioners and their representative bodies also often spoke of a broader concern that practitioners who are the subject of a notification believe the process is punitive. Some practitioners said they felt it was 'on them' to prove that an allegation about their performance, conduct or health was not true. This was often expressed as a feeling that practitioners are 'guilty until proven innocent'. Practitioners also shared with the review that they felt it was for them to gather and put forward supporting information to Ahpra to convince it of their allegation that a notification was vexatious. Some practitioners said that a lack of communication from Ahpra, and a reluctance to acknowledge and/or deem a notification as vexatious, left them with less confidence in the regulator.

Practitioners generally said they relied on the advice of relevant professional bodies and those bodies' perceptions of Ahpra and the Boards. Practitioners appeared to find comfort in reaching out to professional indemnity insurers in particular. While these bodies seemed to provide good support to practitioners during the notifications process, some practitioners reported getting an impression from these bodies that the notifications process is not fair. This may reflect professional indemnity insurers' views of Ahpra and the Boards.

The review did not, however, find evidence in the notifications it considered that Ahpra and the Boards were unfairly biased against practitioners who were the subject of a notification. This suggests that Ahpra and the Boards may benefit from better communicating their roles and approach to managing notifications as impartial and risk-based regulators.

Practitioners often use the term 'vexatious' to mean 'groundless'

The Research report found there is generally a limited understanding about what distinguishes a vexatious notification from what it termed 'other types of sub-optimal' notifications.[38] The review similarly found that practitioners often appeared to be concerned that a notification was vexatious if they thought the concerns raised were unfair or without merit. Some submissions to the review outlined examples of vexatious notifications, but an intention to cause harm could not be presumed. For example, one submission from a peak health practitioner body described concerns its members had raised about a notification being vexatious in relation to several different issues. A number of these examples directly related to the care received by a patient, including that a practitioner had:

- refused to provide a mask exemption to a patient during the COVID-19 pandemic
- refused to issue prescriptions for Schedule 8 medications such as opioid prescriptions
- failed to diagnose an extremely rare condition sooner.

The review acknowledges that the specific circumstances of each example may better speak to why a practitioner believed the notification was made to cause harm. However, on receiving concerns such as these, it may reasonably appear to Ahpra that the notifier believed they did not receive appropriate treatment or care. Unless Ahpra received information to the contrary, Ahpra is likely to assume that the notification was not made to cause harm but because the notifier believed that the practitioner was not practising to the accepted standard (regardless of whether that belief is reasonable or not).

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

The review acknowledges that practitioners may conclude that a notification made about these types of concerns was unfounded or that the allegations were not fair. However, it is important to recognise that a notification that relates to a patient's genuine concern that they were not provided with appropriate care would not meet the threshold to be considered vexatious, even if Ahpra and the relevant Board did not agree with the patient's allegations. While these types of notifications may be 'vexing' to the practitioner, they do not meet the definition of a vexatious notification.

The review notes that some organisations submitted that vexatious notifications were often made in the context of legal proceedings, where a notification was made about a practitioner who had prepared an independent opinion report as part of the proceedings (for example, Family Court proceedings). However, a notification of this kind may not necessarily indicate that a notifier intended to harm the practitioner in question. Media reports, for example, have published details of a matter involving a court-appointed psychologist in Family Court proceedings where the allegations in a notification made to Ahpra were substantiated and the psychologist was cautioned.[39] Complaints to the NHPO about notifications of this nature have often highlighted concerns about the practitioner's performance in terms of the quality of their report or the information relied on to reach the report's findings. From the practitioner's perspective, however, it is understandable that this may be seen as unfair or an attempt to discredit them. These types of concerns therefore reflect the difficulty associated with allegations that a notification was made vexatiously when there are differing perceptions about why the notifier made the notification.

Ensuring clarity about the definition and management of notifications which do not result in regulatory action

The Framework outlines the importance of understanding the types of 'sub-optimal notifications' and that vexatious notifications should be distinguished from 'inadequate, incomplete or misconceived notifications'. However, the Framework does not provide clear guidance about what a sub-optimal notification is, and how this relates to a decision to take no further action under the National Law.

The Research report highlights the role of entities in identifying and managing sub-optimal notifications, including notifications that are:

- made in good faith but do not meet the threshold for regulatory action
- not lodged with the most appropriate entity
- made in good faith but the notifier has a different perception of the required standard of performance or conduct.[40]

The review agrees with the Research report's findings that an understanding of how to manage 'sub-optimal' notifications is an important part of a holistic approach to assessing notifications. The review therefore recommends that Ahpra provides more information about the difference between a vexatious notification and other types of notifications that commonly result in a decision to take no further action to help accurately identify vexatious notifications. Other options to clarify the meaning of sub-optimal notifications under s. 151(1)(a) are discussed in 'National Law amendment to better reflect decisions to take no further action'.

39 Robertson J, Clark E, Davoren H, 'Unaccountable', ABC, 14 June 2019. Accessed November 2023: www.abc.net.au/news/2019-06-14/family-court-report-writer-takes-mum-to-wine-bar/11171556.

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

Practitioners may use allegations of vexatiousness as a defence

Adding further complexity to this issue, the Research report outlined that some practitioners may either deliberately or mistakenly use allegations of vexatiousness as a defence, including by:

- deflecting blame or trying to avoid regulatory consideration or action by falsely claiming that a notification is vexatious
- not recognising that a notification is well-founded due to lack of insight about their conduct, performance or health issue(s)
- alleging that the notification was ideologically driven because they do not agree that their actions did not meet accepted standards.

The review bears out the Research report's finding in this regard. The review's consideration of complaints to Ahpra about the Framework found instances of practitioners claiming a notification was vexatious, but it was clear that the notification had substance because regulatory action had been taken. Similarly, some practitioners' submissions to the review outlined their concerns that a notification was vexatious, but the evidence they provided to the review similarly showed that regulatory action had been taken against them to protect the public. Ahpra staff interviews also indicated that there were instances of practitioners claiming that a notification was vexatious when the staff member disagreed due to the circumstances of the matter. In these cases, it appears that practitioners may be attempting to deflect blame or may have a lack of insight about their performance, conduct or health. Scenarios such as this may also be affecting perceptions of the prevalence of vexatious notifications.

Responding to intent to cause harm when the notification has substance

As noted above, the review found that practitioners sometimes reported that a notification was 'vexatious' but the relevant Board had taken regulatory action against them. In these circumstances, the notification would not meet the threshold to be considered 'vexatious' because it could not be said that the notification was lacking in substance. However, it is important to recognise it is possible that a notification does not meet the threshold to be considered vexatious because it has substance, but it was nonetheless made to cause harm to the practitioner.

Ahpra staff mentioned that it was particularly challenging to manage these types of notifications. For example, there were some instances where an allegation was proven about a minor performance issue, such as the quality of a practitioner's record keeping, but it also appeared that the motivation for making the notification was to harm the practitioner. In these cases, practitioners may call the notification 'vexatious' because it was made with ill intent, but it would not meet Ahpra's definition of a vexatious notification. These notifications appeared to be more challenging for Ahpra staff because they felt uncomfortable with acknowledging that the notifier appeared to have made the notification to cause harm but that it did not reach the threshold to be considered a vexatious notification because it was not lacking in substance.

There is no doubt that the Boards must consider whether regulatory action is required in response to a notification that raises allegations that have substance. Ahpra and the Boards have a responsibility to protect the public when risks arise from a practitioner's health, conduct or performance. The Framework states:

> **Some notifications made with an intent to cause distress or detriment nevertheless disclose a genuine patient safety issue or concern and care must be taken to avoid dismissing these as vexatious for that reason alone.**

The review suggests that where a notification has substance but the notifier's intent to cause harm is clear, the notification needs to be handled more sensitively and, at a minimum, prioritised for quick finalisation. This issue is also discussed in the report's section on 'Addressing notifications in cases involving domestic and family violence allegations'.

Addressing misconceptions through better public reporting

Submissions to the review from professional indemnity insurers and peak health practitioner bodies highlighted a lack of transparency about the Framework's application. Some organisations suggested this made it difficult for them to comment on whether the Framework had been successful in managing vexatious notifications. Consumers who the review consulted with also wanted to understand more about the distinction between the types of decisions made by Boards to take no further action under the National Law, including because a notification is vexatious.

The review found there is no public reporting on the Framework or the number of decisions that have been made to take no further action because a notification is vexatious. Instead, in its annual report and other publicly available information, Ahpra generally includes broad information about decisions made by Boards to take no further action on notifications.

A decision to take no further action is the most common outcome of the notifications process. Ahpra's 2022–23 annual report outlines that Boards made a decision to take no further action on 6,678 notifications. This represents 63% of notifications closed in the financial year (10,659 notifications).[41]

Although Ahpra includes general information in its annual report about Board decisions to take no further action, it does not specify which part of the National Law was applied in making the decision and therefore whether it was determined, for example, that the notification was vexatious, misconceived, frivolous or lacking in substance.

Submissions from some professional indemnity insurers, peak health practitioner organisations and practitioners argued that the high percentage of Board decisions to take no further action led them to assume that vexatious notifications were more common than Ahpra or the research suggests. There was a perception that the number of vexatious notifications must be higher, given the frequency of Board decisions to take no further action.

As previously noted, while the review found that Ahpra likely under-reported the number of allegations made to it that a notification is vexatious, it appears that truly vexatious notifications are uncommon. The decisions Boards can make to take no further action under s. 151(1) of the National Law are wide-ranging. They include, for example, if a Board decides that a practitioner has taken appropriate steps to remedy the issue, or if another entity has already dealt with the issue (such as the relevant health service).

The review suggests there would be benefit in Ahpra and the Boards better communicating and reporting on the categories of no further action decisions made about notifications, with a particular emphasis on decisions that a notification is vexatious. This would help to inform practitioners and other relevant stakeholders about the reasons why Boards commonly decide to take no further action. It would also help address misconceptions that the high rate of no further action decisions is due to vexatious notifications. This suggestion is supported by the Research report's finding that it is 'important to communicate clearly, internally and externally, about the various types of sub-optimal complaints, and the potential meanings of "no further action" decisions'.[42]

41 Ahpra annual report 2022–23, p. 75.

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

Further, the review's later recommendation to amend the National Law to distinguish vexatious notifications from other notifications where no further action is taken would simplify reporting on decisions to take no further action (refer to section 'National Law amendment to recognise the uniqueness of a vexatious notification').

Key findings

- The Framework's definition of a vexatious notification reflects the 'motivational' definition outlined in the Research report. Many stakeholders agreed that this approach is appropriate and is generally consistent with how comparative organisations describe vexatious complaints.
- The Framework's use of the 'motivational' definition sets a high threshold for determining that a notification is vexatious. However, this is reasonable and corresponds with the gravity of labelling a notification vexatious.
- Practitioners often used the 'experiential' definition when referring to a vexatious notification, which is based on their belief that the notification has been disruptive and inconvenient, without regard for the motivations of the person who made the notification.
- The notifications process can be stress-inducing for practitioners. The general negative effects of the notifications process on practitioners may be heightened in the case of a vexatious notification.
- Practitioners reported a broader concern that the notifications process is punitive and that the practitioner is 'guilty until proven innocent'. The review did not find evidence in the notifications it considered that Ahpra and the Boards were unfairly biased against practitioners who were the subject of a notification.
- Sometimes the term 'vexatious' is used to describe any type of 'sub-optimal' notification including notifications that lack substance.
- There does not appear to be clear guidance provided to Ahpra staff about other types of sub-optimal notifications and how they should be managed distinctly from vexatious notifications.
- It is possible that a notification does not meet the threshold to be considered vexatious because it has substance, but it was nonetheless made to cause harm to the relevant practitioner.
- Ahpra and the Boards have a responsibility to protect the public from risks that arise in relation to a practitioner's health, conduct or performance, regardless of whether that risk came to their attention because of a notification that was made to cause the practitioner harm.
- Concerns were raised with the review about the lack of publicly available information regarding the Framework's application and the number of notifications that were decided to be vexatious. There was a perception that the number of vexatious notifications must be higher than reported by Ahpra, given the frequency of Board decisions to take no further action.
- Better communication and reporting on decisions to take no further action on notifications could help demystify why Boards decide to take no further action.

Recommendations

2. Ahpra should clearly outline, and publish information about, the different types of notifications that commonly result in a decision to take no further action, including the criteria and approach used to assess whether a notification meets the definition of being 'sub-optimal' rather than vexatious.

Better identifying vexatious notifications

The notifications process allows a notifier to alert Ahpra and the Boards to risks to patient safety. Anyone can make a notification to Ahpra about a registered health practitioner, and Ahpra accepts notifications by phone, an online form, email and post.

Notifiers may have a range of reasons for raising concerns and may also have various types of relationships with the practitioner who is the subject of the notification. The Research report suggests that some notifier characteristics may be indicators of a 'need to consider vexatiousness'.[43] For example, 'calculated conduct' in making a notification during or following a breakdown in a professional or personal relationship between the notifier and the practitioner may suggest that the notification was made with the intent to cause harm or for the notifier's professional or personal gain.

It is important that these issues are thoroughly explored when assessing a notification. The review has therefore focused on how Ahpra could improve the way it collects information about the notifier's relationship to the practitioner and their reasons for making a notification.

Improving understanding of a notifier's relationship to the practitioner and desired outcome

To appropriately assess notifications, it is important that Ahpra understands a notifier's concerns, their relationship to the practitioner and desired outcome from the notifications process. With a vexatious notification, this information is necessary to assess whether the notification was made to cause harm.

Improving the way information is collected when receiving a notification

One of the main ways information about a notification is gathered from a notifier is through Ahpra's notification form (online or paper-based). The review understands that a similar internal form is used when Ahpra receives notifications verbally (for example, by phone). The notification form collects information about the:

- notifier, including their contact details, relationship to the notifier and whether they have raised concerns about the practitioner before
- practitioner who the notification is about
- reason for the notification.

However, information related to these questions is spread throughout the notification form and is often not directly asked.

Collecting information about the relationship between the notifier and practitioner

The relationship between the notifier and the practitioner can provide valuable context about the concerns raised in a notification. The notifier's relationship in some instances, for example, may suggest that a notification requires more immediate consideration. As the Research report emphasised, those who are personally or professionally close to a practitioner may be best placed to make a notification.[44]

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

44 Ibid.

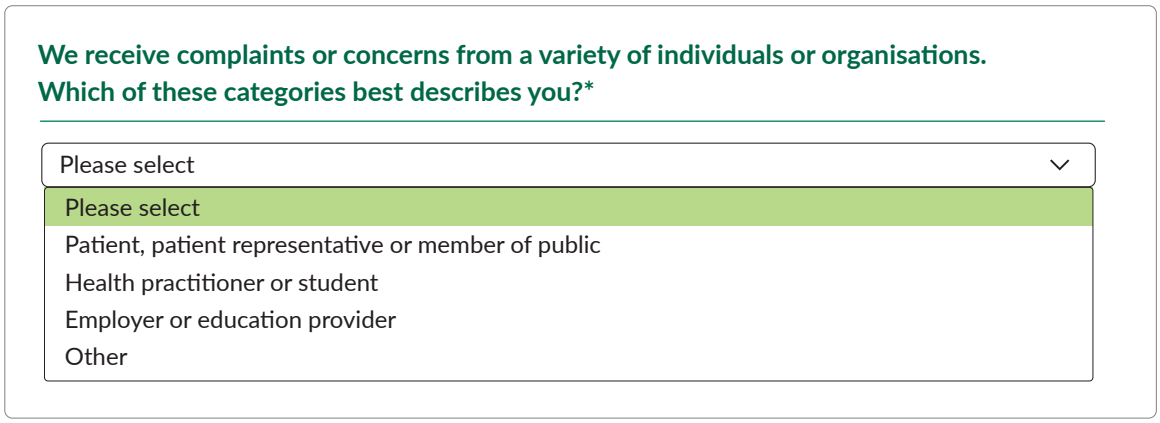
Mandatory notifications made by a health service or practitioner appear to result in a higher rate of regulatory action being taken.[45]

Conversely, notifications made in the context of a breakdown in a personal relationship between the notifier and the practitioner may need to be carefully assessed to identify indicators of vexatiousness.

At a more basic level, the relationship between the notifier and practitioner affects the type of information the notifier can provide, and the types of questions Ahpra can reasonably ask about the concerns being raised.

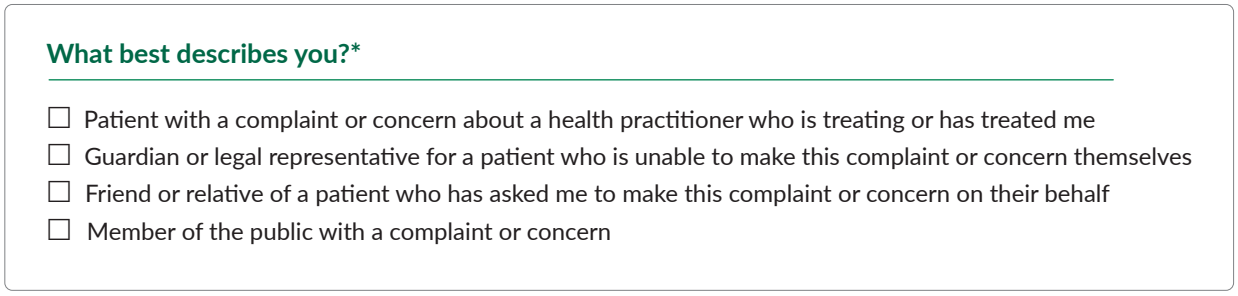
When completing the notification form, the notifier must identify which 'category' of notifier they would describe themselves as (refer to Figure 1).

Figure 1: Reproduction of Ahpra's online notification form regarding the 'category' of notifier



If the notifier selects that they are a 'Patient, patient representative or member of the public', they have to provide more information about how they would describe themselves, including whether they have been treated by the practitioner (refer to Figure 2).

Figure 2: Reproduction of Ahpra's online notification form regarding the 'category' of notifier: 'Patient, patient representative or member of the public'



45 According to Ahpra's annual report, in 2021–22, 29.8% of completed mandatory notifications resulted in regulatory action being taken (compared with 13.4% for all notification categories).

The review suggests that the current approach to gathering information about the relationship between the notifier and the practitioner in the notification form is limited. For example, there is no clear option for notifiers to select if they are a friend or relative of the practitioner, or a colleague of the practitioner who is not themselves a practitioner.

The notifications examined by the review also suggested that some notifiers selected an option in the notification form that did not best describe them. This may be because an appropriate option was not available for selection, the notifier misunderstood the question or made an error, or possibly the notifier was seeking to withhold information about their relationship with the practitioner. The review found that inaccurate information about the notifier's 'category' had further implications for the ongoing management of the notification because the self-reported information appeared to be pre-populated in assessment and investigation reports that were prepared for decision makers.

The review suggests that Ahpra should aim to better understand the relationship between the notifier and the practitioner when it first receives a notification. From this perspective, a better question might be: 'What is your relationship to the health practitioner?'.

It may also be beneficial to provide examples of the types of relationships the notifier may have with the practitioner such as:

- patient or patient advocate
- spouse, friend or family member of a patient
- spouse, friend or family member of the practitioner or student
- fellow health practitioner or student
- supervisor or manager
- employer or business partner
- education provider
- other health service employee or colleague
- member of the public.

The review also suggests that the notifier's response to this question would be more accurate if it was validated by Ahpra. For example, Ahpra staff could ask about the notifier's relationship to the practitioner when contacting the notifier to acknowledge receipt of the notification.

Collecting information about the outcome sought by the notifier

In the 'Your details' section of Ahpra's notification form, it asks the notifier to select from a prescribed list what response they are seeking from making the notification (refer to Figure 3). If a notifier selects an option that is not within Ahpra or the Board's powers, such as an apology or refund from the practitioner, additional information appears on the form to clarify Ahpra's role.

Figure 3: Reproduction of Ahpra's online notification form about what the notifier is seeking

What are the responses you are seeking by making this complaint or raising this concern?*

Select all that apply

- ☐ To amend or access health records
- ☐ An apology from the practitioner
- ☐ An explanation from the practitioner
- ☐ A refund
- ☐ Action to keep the public safe
- ☐ Disciplinary action
- ☐ Confirmation that my concerns will be kept on file
- ☐ Change in policy or practice

Other

The form focuses on what 'response' the notifier is seeking. However, a notifier may not have a clear idea of what response they are looking for. Instead, a notifier may make a notification for a variety of different reasons, some of which may be unrelated to seeking an individual outcome. The review recognises that Ahpra and the Boards do not offer means for individual redress such as an apology or compensation. This suggests that those who make a notification, rather than make a complaint to a health complaints entity or pursue other legal options, are less likely to be motivated by individual resolutions and may instead be focused on finding accountability or ensuring future improvements. It is acknowledged, however, that at times a notifier's motivations may not align with Ahpra and the Boards' role, which requires that regulatory action only be taken to mitigate a risk to the public.

While it is important that notifiers seeking accountability or future improvements are not presumed to have an intent to harm a practitioner, information about what outcome a notifier is seeking may be relevant to the assessment of whether the notification is vexatious.

It is important that notifiers are given the opportunity to explain why they are making a notification, their relationship to the practitioner and what they seek from making a notification. The review therefore recommends that Ahpra improves how it collects this information. The review acknowledges that Ahpra may wish to incorporate this work into the upgrades to its notification form that are planned as part of its ongoing business transformation program.

Key findings

- The relationship between a notifier and the practitioner is relevant to establishing whether there was an intent to cause harm to the practitioner in the case of a vexatious notification.
- The notifier's relationship to the practitioner does not appear to be a focus in Ahpra's collection of information about the notification.
- Notifiers may have a range of reasons for making a notification. Notifiers may be less motivated by individual resolutions such as an apology or compensation because these are not outcomes that can be achieved by Ahpra and the Boards. Instead, notifiers may be focused on seeking accountability or ensuring future improvements to a practitioner's practice.
- It is important that notifiers seeking accountability or future improvements are not presumed to have an intent to harm the practitioner.
- Ahpra's notification form could more clearly ask what a notifier's concerns are, what their relationship is to the practitioner, and what they are seeking from making a notification.

Recommendations

3. Ahpra should improve how it receives notifications to ensure it more clearly requests information about the notifier's concerns, the notifier's relationship to the practitioner and what the notifier is seeking from making the notification.

Addressing concerns that accepting anonymous and confidential notifications makes it easier to make vexatious notifications

Assessing the notifier's relationship to the practitioner can be more challenging in cases of anonymous and confidential notifications. An anonymous notifier does not identify themselves to Ahpra, which means their identity cannot be shared with the practitioner. In a confidential notification, Ahpra knows the notifier's identity but it is withheld from the practitioner (to the greatest extent possible). Generally, anonymous notifications represent a small portion of the total notifications received (3% in 2021–22).[46] Confidential notifications, by comparison, are lodged more frequently (16% in 2021–22).[47]

Some practitioners and professional indemnity insurers raised issues with the review about anonymous and confidential notifications. These concerns included that accepting anonymous and confidential notifications makes it is easier for people to make vexatious notifications and that this leads to an unfair process for practitioners.

Recognising the importance of anonymous and confidential notifications

The Confidentiality review addressed concerns from practitioners about accepting anonymous and confidential notifications. Its finding was that it is preferable for Ahpra to share with the relevant practitioner all information it holds about a notification, including the identity of the notifier (if known).[48] This means the practitioner is given the best opportunity to understand the notification and to respond to the allegations.

However, the Confidentiality review recognised that the Australian Privacy Principles require entities such as Ahpra and the Boards to give people the option of not identifying themselves when engaging with their processes. It also highlighted that Ahpra's practice of accepting confidential and anonymous notifications serves an important purpose. The primary objective of the National Scheme is to protect the public, and it is clearly in the public interest for Ahpra and the Boards to be made aware of concerns about practitioners, regardless of the source of those concerns or whether extra steps need to be taken to keep the notifier's identity confidential.

A notifier may have valid reasons for why they wish to withhold their identity from the practitioner they are making a notification about. This may include concerns about risks to their health, safety or employment, or to help preserve an ongoing relationship with the practitioner. For example, patients may wish to, or may feel compelled to, continue engaging with their treating practitioner for a range of reasons despite making a notification about them. In the professional context, a colleague may not wish to be identified in their workplace as the person who raised a concern. The Confidentiality review found, in particular, that concerns about a practitioner's health were more likely to be raised on a confidential or anonymous basis. In these instances, family and friends may be aware that a practitioner is experiencing health difficulties, but do not want to damage their relationship with the practitioner.

There are many types of power dynamics, or other circumstances, that can lead to a notifier only feeling safe or able to raise concerns anonymously or confidentially. This does not make their concerns any less important for Ahpra to consider. In fact, in some circumstances, the relationship that drove the notification may enable the notifier to have a more intimate or specific knowledge of the practitioner's health, conduct or performance.

46 222 anonymous notifications completed by Ahpra in 2020–21 (compared with 9,812 notifications completed) and 287 anonymous notifications completed in 2021–22 (compared with 9,680 notifications completed).

47 1,465 confidential notifications completed by Ahpra in 2020–21 (compared with 9,812 notifications completed) and 1,556 confidential notifications completed in 2021–22 (compared with 9,680 completed).

48 NHPO, Review of confidentiality safeguards for people making notifications about health practitioners, March 2020.

The Confidentiality review found that while regulatory action was taken less frequently in confidential and anonymous notifications, these types of notifications regularly raised serious concerns that required regulatory action. It outlined that 6.8% of confidential or anonymous notifications resulted in conditions being imposed on a practitioner's registration in 2018–19 (compared with 7.5% for all notifications). In comparison, 5.5% of confidential or anonymous notifications resulted in a practitioner being cautioned (6.6% for all notifications).[49]

More recent data from Ahpra about the outcome of confidential and anonymous notifications confirms this trend (refer to Table 4). In 2021–22, the rate of notifications resulting in conditions being imposed stayed relatively stable (7.0%), and the rate of practitioners being cautioned dropped (from 4.9% to 4.5%). However, the percentage of confidential and anonymous notifications that resulted in conditions being imposed had increased (from 6.0% to 7.4%), as had the percentage of confidential and anonymous notifications that resulted in a caution (from 4.0% to 6.1%). This data gives further support to the Confidentiality review's finding that receiving anonymous and confidential notifications is an important way for Ahpra and the Boards to be alerted to risks to the public.

Table 4: Numbers of notifications completed in 2020–21 and 2021–22 with outcomes[50]

	2020–21			2021–22		
Outcome	**All**	**Confidential**	**Anonymous**	**All**	**Confidential**	**Anonymous**
Undertaking	128	26	2	80	14	0
Caution	478	63	4	433	97	15
Conditions	701	90	12	680	126	11
Other	18	2	2	17	7	2
Panel hearing	6	0	0	5	1	0
Refer to another body/ Health complaints entity	1,360	42	1	2,399	138	3
Surrender registration	1	0	0	1	0	0
Tribunal hearing	167	12	0	330	39	4
No further action	6,953	1,230	201	5,735	1,134	252
Total	**9,812**	**1,465**	**222**	**9,680**	**1,556**	**287**

49 Ibid.

50 Data provided by Ahpra.

Appropriately managing anonymity and confidentiality through the Framework

A common practitioner perspective is that anonymity or confidentiality should be seen as an indicator that a notification is vexatious. The Confidentiality review relevantly described an assumption that allowing a notifier to withhold their identity provided an opportunity for them to make a groundless notification without fear of consequence. The report explained:

> **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.**[51]

The stress practitioners commonly experience when responding to a notification may be intensified when the identity of the notifier is unknown to them. However, the review notes the Confidentiality review's conclusion that 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 notification is disclosed.

After disclosing the substance of a notification, the practitioner's perception that the notification was made vexatiously should be considered carefully given their position as the subject of the concerns raised. However, it is important that assumptions are not made that because a notifier chose to remain anonymous or confidential, they intended to cause the practitioner harm.

The review recognises that considering vexatiousness in relation to anonymous notifications is particularly challenging for Ahpra. This is because it has more limited information and sources on which to determine the notifier's relationship to the practitioner and their motivations.

However, there is an inherent danger in Ahpra staff incorrectly assuming the identity of an anonymous notifier. Misidentification could potentially undermine trust in Ahpra's processes and ultimately would not support the aims of the National Scheme. For example, it could result in a pattern of notifications not being appropriately identified because it was assumed that the same person had made multiple notifications.

Two of the sample of notifications the review examined were anonymous, and 2 involved consideration of anonymous notifications in the context of the practitioner's previous notifications history. It is important to recognise that this represents a small number (within a small sample) of notifications. However, it suggests that Ahpra staff have needed to consider issues associated with anonymity together with allegations of vexatiousness.

The review therefore recommends that Ahpra gives its staff more guidance about how to address concerns that a notification made by an anonymous or confidential notifier is vexatious. This guidance should aim to ensure:

- it is not assumed that an anonymous or confidential notification was made to cause harm simply because the identity of the notifier is unknown or withheld
- practitioners are informed that allegations about the motivations of the notifier will be considered, but that the regulator must consider all notifications it receives
- all evidence is considered in relation to the unique circumstances of each anonymous or confidential notification.

51 NHPO, Review of confidentiality safeguards for people making notifications about health practitioners, March 2020.

Key findings

- Anonymous and confidential notifications make up a small portion of the notifications Ahpra and the Boards consider.
- Notifiers may wish to remain anonymous or confidential for many reasons, including because of concerns about risks to their health, safety or employment, or to help preserve an ongoing relationship with the practitioner.
- Anonymous and confidential notifications are an important way for Ahpra and the Boards to hear about risks to the public.
- It is not inconsistent with the principle of procedural fairness for Ahpra and the Boards to withhold the identity of a notifier for reasons of confidentiality, so long as the substance of the notification is disclosed to the practitioner.
- Considering allegations of vexatiousness in relation to anonymous notifications is more challenging because the identity of the notifier cannot be determined.
- There may be negative consequences if Ahpra staff incorrectly assume the identity of an anonymous notifier.

Recommendations

4. Ahpra should provide extra guidance to staff about how to address concerns that an anonymous or confidential notifier has made a vexatious notification.

Better identifying conduct associated with vexatious notifications

Although the Framework clearly defines a vexatious notification, it does not distinguish between the 2 types of conduct the Research report suggests are generally associated with vexatious notifications: unreasonable conduct and calculated conduct. The Research report describes unreasonable conduct as relating to those who engage in a 'campaign of repeated, escalating and often fervent complaint-lodging, which appears to be obsessive, lacking in strategy, proportionality, restraint or even purpose'. In comparison, calculated conduct relates to raising concerns in a 'strategic and calculated manner, with a specific self-serving goal in mind'.[52]

The Framework details notifier characteristics that may be indicators of a 'need to consider vexatiousness' that include both indicators of calculated and unreasonable conduct.[53] This includes:

- whether a notifier has a historical pattern of making notifications about the same practitioner, the same practice or the same issues about multiple practitioners
- whether a notifier has engaged in organised, strategic or calculated behaviour that appears to want to catch a person (or practitioner) out
- personal gain such as a sense of satisfaction from causing distress to the subject, or exercising power, control or revenge over them (for example, family law dispute)
- where a notifier's claims appear irrational
- professional competitiveness and gain (career advancement of a practitioner, business competition or disputes)
- notifications lodged during legal proceedings or relationship breakdown between the notifier and the practitioner, or 2 entities involving the notifier and the practitioner
- strong criticism of a practitioner's approach to treatment on issues where there is valid disagreement and acceptance of different opinions among the broader profession.

It also outlines several factors related to:

- the notification format, including excessive information, repetition, offensive or dramatic language and unusual formatting
- the notification's content, including that it contains incorrect information, allegations of conspiracy, and seeking specific, unreasonable and unrealistic outcomes
- a notifier's behaviour, including frequent, repetitive and demanding contact, changing concerns being raised, aggressive behaviour and remaining anonymous without a reason being provided
- the relationship between the practitioner and the notifier, including a complete lack of connection with the practitioner or a personal, competitive or historical connection, or a pre-existing motivation to cause damage to the practitioner.[54]

While the review agrees that the indicators outlined above are all relevant when considering vexatiousness, the indicators and management of unreasonable conduct and calculated conduct are distinct and often fundamentally different. Notifiers who engage in calculated conduct, for example, may not raise multiple notifications and may be more targeted in their approach. Recognising this distinction, the review has separated its consideration of these 2 types of conduct (refer to 'Appendix 2: Addressing unreasonably persistent notifier conduct' for findings and recommendations about unreasonable conduct).

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

53 Ahpra and the National Boards, A framework for identifying and dealing with vexatious notifications, December 2020.

54 Ibid.

Appropriately identifying calculated conduct

The Research report found a lack of evidence about the drivers behind calculated conduct in vexatious complaints because the limited available research focuses almost exclusively on unreasonable conduct. However, it outlined that calculated conduct may involve someone raising a notification for their own personal or professional gain.[55]

The review found several instances of notifications being made in a calculated way in the sample of notifications it considered. Generally, calculated conduct appeared in relation to a breakdown in a professional or personal relationship between the notifier and the practitioner. Most troublingly, the review found evidence that notifications had been made in the context of domestic and family violence allegations. The review also found some evidence of calculated conduct in workplace disputes and competitive, retaliatory or politically motivated notifications.

Relationship breakdowns leading to vexatious notifications

The Research report explained that calculated conduct for personal gain typically involves a person 'seeking to gain an advantage in legal proceedings or relationship breakdowns, compensation claims and criminal cases'.[56] However, while the Research report found commentators had suggested that vexatiousness may be more likely if a notification is lodged during the course of legal proceedings or a relationship breakdown, it found no evidence for this view.

A breakdown in a relationship with a practitioner was reported to the review as the most common driver of vexatious notifications. In interviews with Ahpra staff, Board members and practitioners, and in submissions to the review, there was reoccurring reference to vexatious notifications stemming from a breakdown in a relationship between the practitioner and a former domestic partner or someone they were involved in legal proceeding with.

Some professional indemnity insurers and peak health practitioner organisations similarly explained to the review that their members reported concerns that a former partner had made a vexatious notification about them.

The review's analysis of the 17 notifications provided by Ahpra appeared to support concerns that relationship breakdown was a relevant factor when considering whether a notification was vexatious. Historically, concerns about vexatious notifications appear to have been focused on breakdowns in professional or competitive relationships between practitioners. The notifications reviewed, however, suggest that these types of matters may be less common than those driven by personal relationships, such as those involving a former domestic partner. The review found:

- Seven of the 17 notifications appear to have been made by the practitioner's former domestic partner or were alleged to have been made by their ex-partner. In 5 of these matters there were court orders involving the notifier and the practitioner.
- One notification was made in the context of an acrimonious non-professional relationship that involved court orders.
- One notification was made in the context of Family Court orders involving the notifier and the practitioner.

The review notes that court orders, such as intervention orders or Family Court orders, appeared to be a common factor in the notifications considered under the Framework (9 out of the 17 notifications considered). This supports the Framework including information that ongoing legal proceedings may be an indicator of a vexatious notification. However, it may also suggest that Ahpra staff find it easier to identify and raise concerns about vexatiousness if there is independent information (such as court orders) available to support their view.

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

56 Ibid.

Ahpra's notification form asks notifiers whether they have raised a concern about the practitioner to any other organisation. If the notifier indicates they have, they must supply more information about the organisation. The review recognises that this may help Ahpra staff to identify instances where other processes may affect the handling of the notification. The review suggests, however, that it may be helpful to also include reference to whether there are any relevant court or legal proceedings relating to the notifier and the practitioner.

Workplace disputes leading to vexatious notifications

The Research report outlined that while there were anecdotal claims of calculated conduct as a form of inter-collegial bullying or harassment, there was essentially 'no empirical evidence about the incidence of professionals lodging vexatious complaints about each other for personal or professional gain, or as a bullying tactic'.[57]

However, the Framework outlines that professional competitiveness and gain (such as career advancement or business competition) may indicate vexatiousness. The review found that some notifications it considered where the Framework had been applied were made in the context of a workplace dispute between the notifier and the practitioner. Of the 17 notifications considered, 4 involved a workplace dispute. These notifications related to relationship breakdowns between colleagues including manager–employee relationships.

The review's consideration of the sample of notifications found some confusion about Ahpra and the Boards' role in considering these types of concerns. For example, the review found that in its decision about a notification that involved workplace concerns, a Board stated: 'We remind all parties that it is not our role to intervene or take part in any industrial grievances'. The review recognises that workplace disputes involving allegations about workplace conduct issues or bullying may be better dealt with by a body other than Ahpra and the Boards. This could include, for example, the practitioner's employer, the relevant health service or other regulators such as WorkSafe. While it is clear that Ahpra and the Boards are not empowered to consider a broad range of industrial grievances, the review believes they are responsible for appropriately identifying and managing vexatious notifications made in the context of a workplace dispute.

Many of the professions' codes of conduct outline that discrimination, bullying and sexual harassment are not acceptable. The Medical Board of Australia's Good medical practice: a code of conduct for doctors in Australia, for example, outlines that concerns about discrimination, bullying or sexual harassment may require a notification to be made. It specifies that concerns should be referred to the Board if 'there is ongoing and/or serious risk to patients, students, trainees, colleagues or healthcare teams (in addition to mandatory reporting obligations)'.[58] This suggests that Boards do have a role in considering these types of allegations.

In this context, the review recommends that Ahpra clearly guides staff not to presume that allegations of bullying or harassment in the workplace are not within its scope. Ahpra should consider providing more guidance to staff about how it handles workplace-related disputes, including ensuring staff do not assume that a practitioner's seniority necessarily indicates that a more junior practitioner's views about their practice are incorrect. Similarly, it should not be assumed that notifications made at the same time by different employees about the same practitioner indicate vexatiousness or a campaign against the practitioner because this scenario could validly indicate a pattern of problematic behaviour. The review suggests that Ahpra should include more guidance for staff about how they can examine workplace-related issues such as by requesting information or asking questions about internal investigations or issues that have been considered by the employer or relevant health service.

57 Ibid.

58 Medical Board of Australia, Good medical practice: a code of conduct for doctors in Australia, October 2020.

Competitive and retaliatory notifications

The Research report outlines that in comparison to personal gain, calculated conduct for professional gain typically relates to 'advancing one's professional market share, restricting competition, commercial patch protection, or damaging the reputation of somebody who might otherwise raise concerns about oneself'.[59]

The review's consultation heard from Ahpra staff, peak health practitioner bodies and professional indemnity insurers that notifications could be made for competitive advantage. This may include, for example, a practitioner making a notification about a competitor's advertising. The sample of 17 notifications considered by the review only found one instance where the practitioner's allegation of a competitive motive for the notification appeared to be supported by the available information.

Another type of calculated conduct the review received concerns about is that of a retaliatory notification. Some submissions to the review raised the issue of vexatious notifications being made about practitioners who had provided independent opinion reports as part of court proceedings (such as psychological or physiological assessments). As noted previously, such notifications often involve a disagreement with the practitioner's professional opinion, though this may not always be the case. The review, for example, was informed that in a social media forum, a social media user had suggested that one way to 'get back' at a practitioner who had provided an unfavourable assessment was to make a notification about them to Ahpra.

A more common form of retaliatory notification involves a practitioner making a notification about another practitioner because that practitioner had made a notification about them. This type of calculated conduct was not directly considered in the Research report. Concerns about the potential for retaliatory notifications has been raised in previous Senate inquiries[60] and was also raised in submissions to the review.

Several Ahpra staff interviewed by the review mentioned that a vexatious notification could involve a 'tit-for-tat' notification. It appeared to be recognised that this was a potential indicator that the notification may not have been made in good faith. One matter considered by the review involved a notification which fits this description. The NHPO has also received complaints involving similar situations where practitioners appeared to make several notifications about each other in the context of personal or professional disputes.

The review therefore suggests that a retaliatory notification could be an indicator that the relationship between the notifier and practitioner requires further consideration. However, as emphasised in the Research report, colleagues may be best placed to raise concerns about a practitioner and each new notification should therefore be considered based on its unique circumstances.

It is also important that Ahpra ensures it appropriately considers any concerns raised by the original notifier that they are being harassed or intimidated through the making of the retaliatory notification. This is particularly important if there is an ongoing relationship between the notifiers. The Confidentiality review, for example, found that while instances of intimidation, harassment or coercion of notifiers appear to be rare, it is important that Ahpra develops guidance for staff to ensure any such incidents are responded to promptly and appropriately.

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

60 The Community Affairs Reference Committee in its 2016 report on its inquiry into 'Medical complaints process in Australia' found that 'One of the key barriers to reporting instances of bullying and harassment reported by submitters and witnesses was fear of negative repercussions from making a complaint … confidential submitters who have suffered bullying or harassment are also concerned that the retaliation would take the form of a vexatious notification being lodged against them'.

The review notes that Ahpra accepted the Confidentiality review's recommendations in relation to the protection of notifiers in this area, including its support for amending the National Law to make it an offence for a registered health practitioner to harm, threaten, intimidate, harass or coerce a notifier. Legislative change is only one piece of the puzzle however, and it is important that Ahpra proactively identifies and manages any potential risks to notifiers.

Politically or morally motivated vexatious notifications

The Framework outlines that one characteristic that may indicate vexatiousness is the notifier's strong criticism of the practitioner's approach to treatment on issues where there is valid disagreement and acceptance of different opinions among the broader profession.

The review heard some concern from practitioners and their representative organisations that a notification may be made to cause reputational damage to a prominent practitioner or because of unresolved ideological differences. One submission, for example, outlined:

> "Some members have expressed concerns around the influence of the media, and how perceived inaccurate or misleading reports might prompt patients to make a complaint about the GP. Concerns have also been raised about doctors who are politically active or who may hold contentious views on certain topics being at higher risk of vexatious notifications.

Concerns about the impact of vexatious complaints also appear to be raised in the media in relation to politicians and public officials. The review notes that recent media reports on concerns about vexatious complaints have, for example, related to complaints managed by many different regulatory bodies including the Victorian Electoral Commission,[61] the Office of the Independent Assessor[62] and the New South Wales Independent Commission Against Corruption.[63]

The review's consideration of the 17 notifications where Ahpra applied the Framework found one example where a notification had been made about a practitioner who was also a public figure. However, the review notes that for a notification to be considered vexatious, it must be clear that it was made with an intent to cause harm. In many instances, concern driven by ideological difference or mistrust in public officials is unlikely to meet this threshold because it is driven by the notifier's belief that the practitioner's conduct or performance does not meet the required standard (even if this belief is unreasonable). The review suggests that Ahpra should consider how it can ensure procedural fairness for practitioners who are likely to receive more notifications due to their public role.

61 Tamsin R, Kolovos B, 'Liberal claims of Victorian teals acting as a "party" dismissed as "vexatious" by Climate 200', News article, The Guardian, 17 November 2022. Accessed November 2022: www.theguardian.com/australia-news/2022/nov/17/liberal-claims-of-victorian-teals-acting-as-a-party-dismissed-as-vexatious-by-climate-200.

62 Julius D, 'Frivolous and vexatious complaints to the Office of the Independent Assessor wasting time, Queensland councillors claim', News article, ABC News, 21 October 2022: Accessed October 2022: www.abc.net.au/news/2022-10-21/qld-office-of-independent-assessor-council-complaints/101533872.

63 Sibthorpe C, McCallum J, 'Randwick Mayor Dylan Parker rejects complaint made to ICAC over $10m surf club refurbishment', News article, Daily Telegraph, 10 June 2022. Accessed June 2022: www.dailytelegraph.com.au/newslocal/southern-courier/randwick-mayor-dylan-parker-rejects-complaint-made-to-icac-over-10m-surf-club-refurbishment/news-story/850860a3697377cdc8dd804900004e9e.

Key findings

- The Framework does not distinguish between the 2 types of conduct that may lead to a vexatious notification – unreasonable conduct and calculated conduct. However, the indicators and management of unreasonable conduct and calculated conduct are distinct and often fundamentally different.
- The review found several instances of notifications being made in a calculated way. Calculated conduct most often appeared in relation to a breakdown in a professional or personal relationship between the notifier and the practitioner.
- The review found evidence that some notifications had been made in the context of domestic and family violence allegations. Existing court orders, or ongoing court proceedings, relating to the notifier and the practitioner were common in notifications where the Framework had been applied.
- Other motives that may lead to a vexatious notification included workplace disputes and competitive, retaliatory or politically motivated notifications.
- There appeared to be some confusion about Ahpra and the Boards' role in considering concerns related to workplace disputes including those raising bullying or harassment allegations. While many workplace disputes may be more appropriately dealt with by another body, Ahpra and the Boards have a role in ensuring vexatious notifications made in the context of a workplace dispute are appropriately identified and managed.
- Retaliatory notification could be an indicator that the relationship between the notifier and the practitioner needs close consideration.

Recommendations

5. Ahpra should update the Framework to distinguish 'calculated conduct' from 'unreasonable conduct' when considering the characteristics of a notifier. The Framework should also include more specific indicators of calculated conduct, such as references to the types of relationship breakdowns and workplace disputes that may lead to a vexatious notification and references to making a retaliatory notification as an indicator that a notifier may have intended to harm the practitioner in making the notification.

Appropriately identifying intent to cause distress, detriment or harassment

As previously outlined, the Framework's definition requires that 2 components are satisfied for a notification to be vexatious:

- the notification must have no substance
- the notifier must have intended to cause distress, detriment or harassment to the practitioner they made a notification about.

Ahpra staff and comparative organisations highlighted to the review that it was often challenging to assess the second part of this definition because it was difficult to establish a notifier's ill intent.

The Framework's principles similarly acknowledge this challenge:

> **Identifying vexatious notifications is inherently difficult, as classification primarily rests on identifying the motivation of the notifier, and this is often concealed from Ahpra and the National Board.**

Despite acknowledging this complexity, the Framework and its associated guidance do not clearly outline what level of proof is required to determine a notifier's intent to cause harm. This lack of clarity likely compounds the complexity of this task for Ahpra staff.

The review's analysis of the sample of notification files and its interviews with Ahpra staff suggested there was a reluctance to entertain whether a notifier had not made a notification in good faith except in the most obvious cases. It appeared that Ahpra staff were more comfortable if there was a 'smoking gun' to support their identification of potential indicators of vexatiousness. For example, staff considered it more clear-cut if a notifier had overtly lied or tried to mislead them.

The review considers that more guidance on the standard of proof required to demonstrate an intent to cause harm would assist Ahpra staff in appropriately and promptly identifying whether a notification is potentially vexatious. The review notes that the term 'reasonable belief' is sometimes used to describe the level of proof required for other similar tests relating to vexatiousness. The Ombudsman New Zealand's definition for a vexatious request for official information includes terminology associated with what a 'reasonable person' would assume.[64] The Parliamentary Workplace Support Service's guidance, on the other hand, states that it is likely that a complaint can only be determined vexatious after it has been considered independently and all relevant evidence has been tested on the 'balance of probabilities'.[65] Ahpra may therefore wish to consider whether the standard of proof required should be expressed in terms of Ahpra or the relevant Board having formed a 'reasonable belief' that the notification is vexatious.

More broadly, the review acknowledges the challenges associated with appropriately determining an intent to cause distress, detriment or harassment. Ahpra staff expressed, for example, a concern that it was difficult to gather information about a notifier's intent in making a notification, other than their stated reasons for doing so. However, a clearer understanding of how an intent to cause harm can be shown could help to promptly and appropriately identify potentially vexatious notifications. This issue is considered later in this report for notifications that are being treated as 'suspected vexatious' (refer to 'Effectively gathering information about a suspected vexatious notification').

64 Ombudsman New Zealand, Frivolous, vexatious and trivial. A guide to section 18(h) of the OIA and section 17(h) of the LGOIMA, August 2019.

65 Parliamentary Workplace Support Service, Vexatious, Frivolous and unreasonable complaint policy. Accessed April 2023: https://pwss.gov.au/sites/default/files/2021-09/vexatious-frivolous-unreasonable-complaint-policy.pdf.

Key findings

- Determining someone's intentions in making a notification is challenging.
- Ahpra staff appeared reluctant to entertain whether a notifier had not made a notification in good faith except in the most obvious cases.
- A clearer understanding of how an intent to cause harm can be shown could help to promptly and appropriately identify vexatious notifications.
- The Framework and its associated guidance do not clearly outline what level of proof is required to demonstrate a notifier's intent to cause harm.
- Guidance on the standard of proof required to demonstrate whether a notifier intended to cause harm would likely assist Ahpra staff.

Recommendations

6. Ahpra should provide more guidance on how a notifer's intent to cause harm to a practitioner can be shown and the standard of proof required to demonstrate an intent to cause harm by making a vexatious notification.

Improving how potentially vexatious notifications are assessed

Ahpra is unique in having established a Framework that helps assess allegations and evidence of vexatiousness. The Framework outlines processes associated with both considering potential indicators of vexatiousness and also further assessing potentially vexatious notifications (what Ahpra calls 'suspected vexatious' notifications).

Submissions to the review from professional indemnity insurers and practitioners referenced the importance of the Framework and signalled support for its introduction. However, some submissions suggested that nothing had changed in how Ahpra and the Boards manage notifications following the Framework's introduction.

There was clear evidence that the Framework had been applied when managing the 17 relevant notifications Ahpra provided to the review. Generally, Ahpra staff interviews suggested that the Framework had helped inform the assessments of notifications. However, the review found that several barriers to using the Framework appear to have affected its application.

The review's consultation with Ahpra staff also identified a perception that applying the Framework is 'cumbersome'. Some staff suggested it is quicker and easier to recommend to the relevant Board that it take no further action on the basis that the notification lacks substance, rather than to explore whether it is vexatious. Concerns were also expressed about the time required to gather information to support an allegation that a notification is vexatious and to escalate a potentially vexatious notification through the Framework's approval process.

In general, the review found that Ahpra provides little detail about how to assess indicators of vexatiousness. The Framework also does not appear to have been fully integrated with Ahpra's risk assessment process.

Reducing escalation points in the Framework

The Framework and associated guidance set out escalation points for the decisions Ahpra staff must make about whether:

- a notification should be considered and progressed as 'suspected vexatious' (because there are indicators it has been made vexatiously)
- to recommend to the relevant Board that no further action be taken because the notification is vexatious.

The Framework outlines the following escalation points for these key decisions:

- The regulatory adviser raises a reminder in the notification record if they believe there are indicators a notification may be vexatious and it should be treated as 'suspected vexatious' and assigns it to a senior regulatory adviser.
- If the senior regulatory adviser agrees, they discuss this with an operations manager.
- If an operations manager also agrees, it is escalated to a national manager.
- If a national manager agrees, the regulatory adviser schedules a conversation with the notifier to understand and record any indicators of vexatiousness. Any other relevant information is also gathered.

- If the available information confirms the belief that the notification is vexatious, the new information is put to a national manager. If a national manager believes the notification is vexatious, the matter is presented to the relevant Board with a recommendation to take no further action on the notification.

Ahpra staff interviews indicated that some were apprehensive about using the Framework. There is a perception that it is time consuming to follow the required steps in the Framework. This included concerns about it taking longer to assess the notification because it is difficult to gather relevant information about the notifier's intent in making the notification and delays due to the need to internally escalate the notification through the Framework's approval process.

Ensuring efficiency in managing notifications was also raised by Board members, and in an Ahpra staff member's recollection of their experience with a Board when dealing with a potentially vexatious notification. It was said that a different pathway, rather than applying the Framework, may be used to close a vexatious notification more quickly.

In this context, it was sometimes considered quicker and easier to determine that the notification was frivolous, misconceived or lacking in substance, rather than to consider whether it was vexatious.

There was general consensus in Ahpra staff interviews that the number of escalation points outlined in the Framework are not necessary and that reducing escalation points would avoid delay. Although some Ahpra staff acknowledged that it is good to have checks and balances, interviews with most staff revealed that national manager approval was not necessary. In particular, staff believed a national manager should not be required to approve that the regulatory adviser explores whether a notification could be vexatious. Ahpra staff often emphasised that regulatory advisers have the necessary skills and should be empowered to make decisions about whether to explore if there is any available information to support a concern that a notification is vexatious.

The review therefore recommends that Ahpra should reduce the escalation points in the internal approval process for the Framework, particularly in relation to the threshold assessment of whether to explore if a notification is vexatious. This would reduce the burden on more senior staff and empower regulatory advisers to make an initial assessment more quickly and efficiently.

Key findings

- There is a perception within Ahpra that applying the Framework is too burdensome. Some staff believe it is quicker and easier to recommend to the decision maker that it take no further action on the basis that the notification lacks substance, rather than to explore whether it is vexatious.
- Ahpra staff support reducing escalation points in the internal approval process for a notification to be progressed as a suspected vexatious notification. Staff suggest this could reduce the time taken to decide whether a notification is vexatious.

Recommendations

7. Ahpra should reduce the escalation points in the internal approval process for the Framework by lowering the threshold for approval to consider a 'suspected vexatious' notification.

Improving assessments of indicators and evidence of vexatiousness

The Framework outlines that a notification should not be assumed to be vexatious simply because a practitioner alleges that it is. Instead, Ahpra must apply the Framework to analyse indicators that suggest the notification may be vexatious and then decide whether it should be progressed as a 'suspected vexatious' notification.

The review found, however, that Ahpra provides little detail about how to assess indicators of vexatiousness. It is therefore not surprising that there was little information available about how this assessment had been undertaken in the notifications analysed by the review. In some of the sample of notifications, there was documentation of the indicators of vexatiousness that had been identified (for example, that the notification was lodged during a relationship breakdown). However, sometimes there was little information provided.

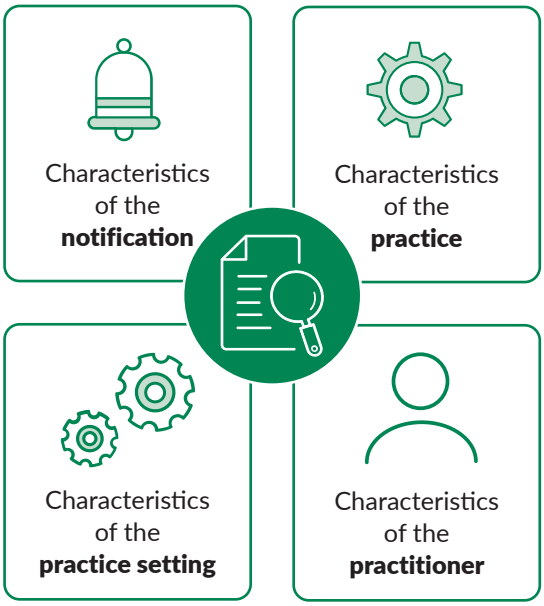
Once more information about a suspected vexatious notification has been gathered, the Framework outlines that another assessment must be conducted to determine whether there is enough information to recommend to the relevant Board that no further action be taken because the notification is vexatious. However, it was unclear to the review what this further assessment involves in practice.

Considering the notifier's relationship to the practitioner when assessing indicators of vexatiousness

As previously described, considering the notifier's relationship to the practitioner is central to identifying a vexatious notification. Ahpra's risk assessment model does not, however, clearly consider the notifier's characteristics, or how they may relate to the risk assessment and risk controls.

Ahpra generally assesses notifications based on 4 quadrants of risk factors that determine the risk posed to the public (refer to Figure 4). The risk factors are then considered alongside individual, organisational and regulatory risk controls to determine whether they are sufficient to manage the identified risk. This assessment results in categorising a notification as either low, medium or high risk.

Figure 4: Quadrants of risk in Ahpra's risk assessment and controls framework



Ahpra's guidance on the quadrants of risk is generally described solely in relation to the practitioner. These include the:

- characteristics of the notification: specific concerns raised about the knowledge, skill or judgement possessed, or whether care exercised by the practitioner is below a reasonable standard
- characteristics of the practice: the type of practice engaged in, including the inherent risk and any relevant standards or guidelines
- characteristics of the practice setting: the practice setting including the vulnerability of the patient group and whether the practitioner has access to professional peers and support
- characteristics of the practitioner: the practitioner themselves, including their regulatory history and the actions they have taken in response to the concern.

The review suggests, however, that information about why the notifier is making a notification, their relationship with the practitioner, and what outcome they are seeking, should be considered by Ahpra when assessing indicators of vexatiousness. The review therefore suggests that Ahpra's risk assessment framework should be updated to include more explicit consideration of the notifier's characteristics, especially their relationship to the practitioner. This information should be integrated in Ahpra's risk assessment model, alongside clear explanations about why certain information may indicate an increased or decreased level of risk.

Effectively gathering information about a 'suspected vexatious' notification

The Framework provides guidance to Ahpra staff on how to gather information to decide whether a suspected vexatious notification can be confirmed as vexatious. The Framework advises that if approval is granted to further consider whether a notification is vexatious:

- a conversation with the notifier is scheduled to understand and record relevant information
- any information that could promptly and independently validate claims is identified and documented. Emphasis is placed on identifying independent sources of information to verify or disprove allegations.

Ahpra's Work instruction for staff about the Framework provides specific guidance on the conversation that should be had with the notifier about a suspected vexatious notification. This includes suggested questions to cover issues such as:

- defining the concerns raised
- expectations of the notification's outcome
- the relationship between the practitioner and the notifier.

The review acknowledges the benefit of Ahpra establishing the notifier's motivations in lodging a notification. However, as previously outlined, it is recommended that Ahpra should take more steps to understand the notifier's characteristics early in the notifications process, particularly at the time of lodging the notification and when Ahpra is first assessing indicators of vexatiousness. The review therefore suggests that at this later stage, when a notification is being treated as 'suspected vexatious', more sophisticated questioning of the notifier may be warranted. For example, consideration could be given to requesting relevant documentation from the notifier and practitioner, including correspondence such emails and text messages exchanged between the notifier and the practitioner.

The review also recommends that more guidance should be provided to help regulatory advisers determine potential independent sources of information to assess allegations of vexatiousness. For example, relevant information could include copies of court orders, police reports, legal decisions and outcomes of investigations undertaken by other relevant bodies. In relation to workplace allegations, for example, it may be beneficial for Ahpra to consider information provided by the employer or internal investigations which have been carried out by the relevant health service.

The review suggests that it would be helpful for the Framework and Work instruction to include more information about getting these types of information.

The review notes that the assessment of vexatiousness in the context of domestic or family violence allegations need more specialised handling. This may include, for example, trying to access relevant police reports or court orders (refer to 'Addressing notifications in cases involving domestic and family violence allegations'). If the information is not publicly available, the notification may need to proceed to the investigation stage to enliven Ahpra and the Boards' powers to compel the relevant third party to produce the information. The Framework and Work instruction should therefore also note this limitation.

Further, the review suggests that Ahpra should provide more guidance to staff about the sensitivities associated with contacting a notifier who may have made a vexatious notification. This is particularly important for notifiers who are the alleged perpetrator of domestic or family violence. Regulatory advisers communicating with these notifiers need specific training to ensure an appropriately tailored and safe approach. Ahpra should also ensure staff managing these matters are given appropriate support (for more information, refer to 'Addressing notifications in cases involving domestic and family violence allegations').

Taking these factors into consideration, the review recommends that Ahpra should strengthen the assessment of indicators that a notification may be vexatious and the assessment of information gathered about a 'suspected vexatious' notification.

Key findings

- Ahpra's assessment of identified indicators of vexatiousness is not well-documented. It is also unclear what the further assessment of information gathered about a suspected vexatious notification involves in practice.
- Considering the relationship between the practitioner and the notifier is an important factor when identifying and assessing vexatious notifications.
- Limited information is provided to Ahpra staff on the information that could be gathered when exploring whether a suspected vexatious notification is vexatious.
- Ahpra staff could be better supported to understand how to source relevant independent information, and how to engage with a notifier who has potentially acted vexatiously.

Recommendations

8. Ahpra should strengthen the assessment of indicators that a notification may be vexatious and the assessment of information gathered about a 'suspected vexatious' notification.

Clarifying the investigation threshold

The National Law generally allows for the Boards to make decisions about notifications after an assessment or an investigation. If a notification progresses to an investigation, Ahpra has greater information-gathering powers including the ability to compel witnesses to provide information. Investigations generally take longer and can increase the stress experienced by practitioners during the notifications process.

It was unclear to the review why some of the sample of notifications had progressed to an investigation without Ahpra first requesting a response from the practitioner. The review acknowledges that the seriousness of the allegations may have given rise to a belief that the practitioner's performance or conduct may be unsatisfactory and hence that an investigation was warranted. However, in some of the notifications considered by the review, it was the practitioner's initial response to the notification that outlined concerns that the notification had been made to cause harm or in a case of domestic and family violence. This information, if gathered as part of assessing the notification, would likely have been an important consideration when deciding whether to investigate.

The review acknowledges that there may be times where it is not appropriate to get a response from a practitioner before proceeding to an investigation. This may be, for example, due to concern that a practitioner may delete or remove evidence that could substantiate the allegations. However, the review suggests that these instances would not be common and that Ahpra should generally get a response from a practitioner before proceeding to an investigation unless there is a clear reason not to do so. This will assist Ahpra to more promptly identify vexatious notifications.

In all cases, however, it is important that the decision not to get a response from a practitioner is documented. In the notifications considered, the review found that the reasons for the decision not to seek a practitioner's response prior to commencing an investigation were not documented. This made it difficult for the review to understand the reasons for the approach taken by Ahpra and the relevant Board. Accurate records are essential to good regulatory decision making practices.

Key findings

- It was unclear to the review why some notifications where the Framework was applied progressed to an investigation without Ahpra first getting a response from the practitioner who was the subject of the notification.
- This represented a missed opportunity for the practitioner to outline concerns that the notification was vexatious before an investigation was commenced.

Supporting improved recommendations and decision making about vexatious notifications

The National Law provides that a Board can take no further action on a notification for several reasons including if it reasonably believes the notification is frivolous, vexatious, misconceived or lacking in substance.[66] The National Law also outlines that if a Board decides to take no further action it must give written notice of the decision to the notifier, with reasons for the decision.

From the sample of notifications considered by the review, it was not always clear on what basis a Board had decided to take no further action, including whether the Board had decided that the notification was vexatious, or if it was frivolous, misconceived or lacking in substance. The reasons for the decision were therefore not well explained to those involved in the notification.

The review found that as well as ensuring appropriately documented decision making, correctly labelling vexatious notifications is important for practitioners who are the subject of these notifications.

Recognising the importance of labelling vexatious notifications

Practitioners made it clear to the review that it was important to them that the relevant Board recognised when a notification had been made vexatiously. As has been widely reported, and acknowledged in the Research report, practitioners can find having a notification made about them distressing. The emotional toll on practitioners was evident to the review, with one practitioner describing the experience as an 'emotional rollercoaster'. Other practitioners used vivid language to share their experience, including describing it as 'mortifying', 'traumatising' or 'the lowest point' of their life. Practitioners appeared to believe it is unjust if a notification is not recognised and recorded as vexatious when it is proven to be. This sense of injustice appears to be founded in concerns that there is otherwise no recognition that the practitioner is not at fault and had instead been unfairly targeted by the notifier. In domestic and family violence cases, labelling the notification as vexatious was also seen to be an important source of evidence for the practitioner in relation to ongoing police or legal matters.

66 Refer to s. 151(1)(a).

The review heard conflicting views from Ahpra staff and Board members about the importance of labelling notifications as vexatious when there was cause to do so. As previously noted, there was sometimes a view that finalising the matter as quickly as possible was better than collecting further information to determine vexatiousness. There was also a view that using the label 'vexatious' could inflame the situation with the notifier or make it more challenging to manage the outcome of the notification. Ahpra staff often highlighted the importance of ensuring notifiers feel able to raise concerns about practitioners and explained that they did not want action to address vexatious notifications preventing others with legitimate concerns from coming forward.

The review found some evidence that Ahpra staff believed the Boards were reluctant to decide that a notification is vexatious. It was suggested that the Boards may not have the appetite to accept a recommendation to decide a notification is vexatious because of the very high threshold for such a decision. Some staff, however, said that Boards had responded to staff recommendations about vexatiousness. Board members interviewed by the review appeared open to deciding that a notification is vexatious, though some Board members similarly said that it may be easier and quicker to decide to take no further action on the basis that the notification lacked substance.

The review highlights the importance of labelling a notification vexatious if there is a reasonable belief that it is vexatious. A finding of vexatiousness should be made clear in the relevant decision and reasons for the decision. This is important in terms of ensuring accuracy, consistency and transparency in decision making. Communicating the decision to the practitioner who is the subject of the vexatious notification is also necessary and would likely be meaningful for these practitioners, particularly in domestic and family violence cases.

National Law amendment to recognise the uniqueness of a vexatious notification

Section 151(1)(a) of the National Law states that a Board may decide to take no further action on a notification if the Board reasonably believes the notification is frivolous, vexatious, misconceived or lacking in substance.

However, the review found there was often a concern about a lack of clarity on the difference between a vexatious notification compared with one that is 'frivolous, misconceived or lacking in substance'. Ahpra's regulatory guide, for example, does not provide a clear description of the unique characteristics of each of these terms. One practitioner summed it up as 'clumped together'. The review notes that comparative organisations with similar legislative provisions similarly do not appear to publicly define these terms or the criteria used when making decisions relevant to these terms.

While the terms 'frivolous', 'misconceived' and 'lacking in substance' all have an element of similarity, the review suggests that the definition of a 'vexatious' notification is fundamentally different. As defined by the Framework, a vexatious notification must satisfy 2 elements: it is lacking in substance and was made to cause harm. The consequences for notifiers and practitioners when a notification is deemed to be vexatious are also different. Practitioners may experience a greater level of distress if a vexatious notification is made about them and the notification is recorded and remains on their notifications history. For a notifier who is a registered health practitioner, making a vexatious notification could result in an own motion investigation and potential regulatory action due to their conduct in making a vexatious notification. These issues are examined in the 'Determining appropriate consequences for making a vexatious notification' section of this report. The National Law does not, however, recognise the uniqueness of this type of notification.

The review therefore recommends that the National Law should be amended to distinguish a decision by a Board to take no further action because a notification is vexatious from other types of decisions to take no further action. The review suggests that removing the word 'vexatious' from s. 151(1)(a) and creating a unique subsection under s. 151(1) about vexatious notifications would ensure greater transparency in decision making. It would also highlight the seriousness of how Ahpra and the Boards view a vexatious notification. This could provide comfort to practitioners because it would ensure this type of decision is clearly identified when Ahpra and the Boards examine the practitioner's notifications history.

For completeness, the review recommends that consideration should also be given to whether there would be benefit in defining the word 'vexatious' within the National Law. Some stakeholders may not know that the Framework exists or what is meant by the term 'vexatious notification'. The term 'vexatious' could, for example, be added to the definitions in s. 5 of the National Law to clarify its meaning.

Addressing impacts on a practitioner's notifications history

Some practitioners raised concerns with the review about the impact a vexatious notification has on their notifications history and, as a consequence, their professional indemnity insurance premiums. Practitioners expressed unease that a vexatious notification would remain on their history with the regulator and felt that this was not fair. Some practitioners said that due to several vexatious notifications being received about them, their professional indemnity insurance premium had increased.

As noted previously, practitioners' concerns about vexatious notifications must be considered with some caution because there is confusion about the definition of a vexatious notification and allegations that a notification does not have substance or has been made vexatiously may not be upheld.

Also, the review did not receive evidence from professional indemnity insurers that a practitioner's insurance premium would increase because of a vexatious notification being made about them. However, the review carefully considered the idea that it is unfair to record a vexatious notification on a practitioner's notifications history.

The National Law outlines that previous notifications can be used to determine a pattern of conduct or practice.[67] This means that Board decisions about notifications under s. 151(1)(a) of the National Law could be considered by the relevant Board in the future. The review is also aware that Ahpra's risk assessment framework for notifications specifically points to the practitioner's regulatory history as a consideration when assessing risk. It is not unreasonable to suggest that a practitioner with an extensive notifications history may represent a higher risk; however, this general idea does not consider vexatious notifications.

The review understands that vexatious notifications are not recorded any differently from other notifications in Ahpra's case management system. This means there is no obvious flag to alert Ahpra staff that a notification should be treated differently or not considered part of the practitioner's notifications history due to its vexatious nature.

The review suggests that it would be better if vexatious notifications were more clearly distinguished from other notifications, particularly in relation to the practitioner's notifications history.

It is likely that the review's recommendation to create a new subsection in s. 151(1) of the National Law to deal specifically with notifications that are vexatious would put Ahpra and the Boards in a better position to separate vexatious notifications from other notifications. The review recommends that this distinction should be reflected in the factors Ahpra considers when undertaking a risk assessment.

67 Refer to s. 151(2).

To bring absolute clarity to this issue, it is recommended that consideration is given to amending s. 151(2) of the National Law so the power to consider previous notifications as part of a pattern of conduct or practice does not extend to previous notifications that were found to be vexatious.

National Law amendment to better reflect decisions to take no further action

As previously noted, there is no publicly available definition of, or associated criteria for, the terms 'frivolous', misconceived' and 'lacking in substance' in s. 151(1)(a) of the National Law or in any Ahpra policies or procedures. Ahpra staff, too, sometimes mentioned it was hard to distinguish whether a notification was 'misconceived' or 'frivolous', with one staff member saying this could sometimes be 'blurred'. A lack of clarity about the basis on which a Board may decide to take no further action may be a relevant factor in the disconnect between perceptions of the volume of vexatious notifications and documented instances of confirmed vexatious notifications.

The review acknowledges that the use of the terms frivolous, misconceived and lacking in substance can also have a negative impact on the experience of notifiers who are trying to raise legitimate concerns about a practitioner. The review is aware of examples where a notifier has become distressed or offended when informed that a Board has deemed the notification they made to be frivolous, misconceived or lacking in substance. The New South Wales Ombudsman's guide to Managing unreasonable conduct similarly outlines that when explaining to a complainant that an organisation will not consider minor or irrelevant issues, it is "never a good idea" to use words such as frivolous as the person will "be insulted or feel disrespected, which may only inflame the situation."[68] One Ahpra staff member interviewed for the review explained that these terms may have the effect of 'belittling' a notifier, and other staff members agreed that they avoid using the words 'frivolous' or 'misconceived' wherever possible.

There are some publicly available examples where regulators have sought to provide more guidance about these terms, and how they are evaluated. For example, the Australian Financial Complaints Authority has published its approach to excluding complaints that outlines information about eligibility requirements for making a complaint and also the complaints it cannot consider.[69] It goes further in outlining its discretion to exclude complaints about other matters, including complaints that are 'frivolous, vexatious, misconceived or lacking in substance'. The authority provides examples of complaints excluded in this category, such as it is:

- obviously untenable that it cannot possibly succeed, manifestly groundless, or discloses a case which the court is satisfied cannot succeed
- made against the wrong party or if there is no remedy that can lawfully be provided
- a claim that presents no more than a remote possibility of merit and that does no more than hint at a just claim.

The review suggests that it is important to define how key legislative terms are applied to avoid confusion. At a minimum, the review suggests that Ahpra and the Boards should clearly outline how the terms 'frivolous', 'misconceived' and 'lacking in substance' are defined, including the criteria and approach used to assess whether a notification meets the definitions.

Ideally, however, the review suggests that consideration should be given to whether s. 151(1)(a) of the National Law should be amended to replace the words frivolous, misconceived and lacking in substance with more meaningful and appropriate terminology. The review notes that the primary purpose of Ahpra and the Boards is to manage risk to protect the public.

68 New South Wales Ombudsman, Managing unreasonable conduct by a complainant, 2021

69 Australian Financial Complaints Authority, The AFCA Approach to excluding complaints, July 2022.

The regulatory principles for the National Scheme state that:

> “
>
> **The primary purpose of our regulatory response is to protect the public and uphold professional standards in the regulated health professions. When we learn about concerns regarding registered health practitioners, we apply the regulatory response necessary to manage the risk, to protect the public.**[70]

This means that, when deciding to take no further action on a notification, the decision is often explained in relation to assessing the risk to the public (for example, the Board did not identify sufficient risk to the public to meet the threshold for taking regulatory action). It is unclear to the review, however, how the assessment of risk is linked to deciding that a notification is frivolous, misconceived or lacking in substance. It could therefore be argued that the terminology used in s. 151(1)(a) of the National Law is not fit for purpose and does not adequately reflect the basis on which Boards are deciding to take no further action in practice.

The review therefore considers that the Boards' approach to taking no further action on notifications could be more accurately reflected in the National Law if the terms 'frivolous', 'misconceived' and 'lacking in substance' are replaced with terminology that focuses instead on the relevant practitioner not presenting a risk to the public that needs to be addressed.

The review acknowledges that consultation with relevant stakeholders would be required to determine the most appropriate terminology for a revised s. 151(1)(a).

70 Ahpra's website, 'Regulatory Principles'. Accessed November 2023: www.ahpra.gov.au/about-ahpra/what-we-do/regulatory-principles.aspx.

Key findings

- Practitioners felt strongly that it is important for Ahpra and the Boards to label a notification vexatious if it satisfied the Framework's definition.
- There was some concern among Ahpra staff that labelling a notification vexatious could have negative consequences, including inflaming the situation or reducing the likelihood of other notifiers coming forward with concerns.
- There appeared to be a perception that the Boards do not have an appetite to decide that a notification is vexatious, preferring to use quicker and easier methods to close notifications.
- Practitioners expressed concern that vexatious notifications remain on a practitioner's notifications history, which can lead to unfair outcomes such as increases in professional indemnity insurance premiums.
- It would be better if vexatious notifications were more clearly distinguished from other notifications, particularly in relation to the practitioner's notifications history. However, vexatious notifications are not recorded any differently from other notifications in Ahpra's case management system. This means there is no obvious flag to alert Ahpra staff that a vexatious notification should be treated differently, or not considered part of the practitioner's notifications history.
- Creating a new subsection in s. 151(1) of the National Law to deal specifically with notifications that are vexatious would put Ahpra and the Boards in a better position to separate these notifications from other notifications.
- There are no recorded definitions of the words 'frivolous', 'misconceived' and 'lacking in substance' in relation to s. 151(1)(a) of the National Law, which has contributed to a lack of clarity in the difference between a vexatious notification and a notification that is frivolous, misconceived or lacking in substance.
- Ahpra and the Boards claim to be a risk-based regulator, but it is unclear how risk assessments are linked to deciding that a notification is frivolous, misconceived or lacking in substance.
- The Boards' approach to taking no further action on notifications could be more accurately reflected in the National Law if the terms 'frivolous', 'misconceived' and 'lacking in substance' are replaced with terminology that focuses instead on the relevant practitioner not presenting a risk to the public that needs to be addressed.

Recommendations

9. Health Ministers should consider amending the National Law to create a new subsection under s. 151(1) to distinguish a decision by a Board to take no further action because a notification is vexatious. Consideration should also be given to whether 'vexatious' should be a defined term in s. 5 of the National Law.

10. Ahpra and the Boards should distinguish previously received vexatious notifications from other notifications when undertaking a risk assessment of a new notification. Consideration should be given to amending s. 151(2) of the National Law so the power to consider previous notifications as part of a pattern of conduct or practice does not extend to previous notifications that were found to be vexatious.

Improving communication on applying the Framework and reasons for decisions

The Framework does not outline any obligations for Ahpra to notify those involved in a relevant notification that the Framework will be, or has been, applied.

Some professional indemnity insurers suggested to the review that Ahpra was reluctant to acknowledge that the Framework had been applied to relevant matters. One insurer went further, saying that they have assisted practitioners with matters where indicators of vexatiousness outlined in the Framework were apparent, but it did not appear that the Framework had been applied consistently, or at all.

In general, many stakeholders sought greater transparency about Ahpra's application of the Framework when managing notifications. It was thought that advising practitioners when and how the Framework had been applied would offer assurance that concerns about vexatiousness are properly and thoroughly considered. Some also felt that practitioners who are the subject of a notification should be provided with quality reasons for a decision that a notification is, or isn't, vexatious.

Improving transparency of applying the Framework

The review's analysis of the sample of notifications confirmed that Ahpra does not inform those involved in a notification if the Framework has been applied. This includes either informing them that indicators of vexatiousness have been identified or that the notification is being treated as a suspected vexatious notification. In one instance, for example, Ahpra had informed a practitioner that the Framework had not been applied when it had been. The review found it particularly concerning that practitioners who alleged that a notification was made in a domestic or family violence case had not been informed that their concerns had been appropriately considered in line with the Framework.

The review's findings therefore support comments that Ahpra staff are reluctant to acknowledge or share information about their use of the Framework.

The review recommends that Ahpra should be more transparent about how it applies the Framework, where appropriate. It is important that allegations of vexatiousness are considered and the outcomes of this consideration documented and explained to the practitioner who is the subject of the notification. As previously outlined, practitioners can make allegations that a notification is vexatious for a variety of reasons including as a defence. To ensure procedural fairness, these allegations should be duly considered and the practitioner informed of Ahpra's decision and the reasons for its decision.

The review acknowledges that using the label 'vexatious' could inflame the situation with the notifier and may therefore make it more challenging to manage the outcome of the notification. This is a relevant consideration for Ahpra when deciding how much information should be shared regarding the application of the Framework. The review suggests, however, that the default position should be that Ahpra is transparent about the application of the Framework, unless it is inappropriate to do so.

The review also acknowledges that there may be circumstances where there are indicators that a notification was made with the intent to cause harm but the notifier's allegations have substance. For example, someone using domestic or family violence may try to harass a practitioner by finding evidence of possible wrongdoing, including through illegal or morally questionable means. This could include evidence of relatively minor infractions. In instances such as this, Ahpra should clearly explain to practitioners that it is obligated to consider the notification while also acknowledging the context in which the notification was made (refer to 'Addressing notifications in cases involving domestic and family violence allegations').

Ensuring quality reasons for decisions

Ahpra's library of reasons assists staff when drafting recommendations for a Board's decision about a notification. The library provides a variety of wording for recommended decisions and associated reasons depending on the relevant section of the National Law under which the decision is being made. For example, the library provides specific templates for when a recommendation is being made for a Board to decide to take no further action under s. 151(1) of the National Law. The library is intended to be used by Ahpra staff to ensure consistent decision making, but wording can be tailored to the circumstances of each specific notification.

The review found that the library's templated reasons for deciding to take no further action under s. 151(1)(a) of the National Law on the basis that the notification is vexatious are too brief. In particular, no reference is made to applying the Framework or how the notification met the threshold for it to be determined vexatious. The template reasons simply state that, after considering relevant information:

> **We have concluded that based on this assessment of risk, it is not necessary to take any regulatory action. We have decided not to take any action in relation to the concerns.**

The review also noted that the library does not include template reasons for a decision to take no further action on the basis that a notification is frivolous, misconceived or lacking in substance in circumstances where the Framework had been applied but it was ultimately concluded that the notification did not meet the threshold for being vexatious.

Most notifications the review considered were finalised under s. 151(1) of the National Law (12 of the 16 closed notifications). Most of these notifications were closed under s. 151(1)(a) (8 notifications). In these 8 cases, the practitioners and notifiers were given reasons for the decision that were consistent with Ahpra's recommendation to the Board.

In 5 of the 8 notifications, these reasons were brief and reflected the template wording found in Ahpra's library of reasons (for example, 'It is not possible to conclude that the practitioner is practising unsafely' and 'The concerns do not present a future risk of harm to patients'). In these instances, the relevant Boards did not provide further information about why each notification was closed. This means that both the practitioner and the notifier were not given tailored reasons for why no further action was taken, providing them little insight into why the relevant Board made the decision and whether the Framework had been applied.

Most notably, however, it was challenging for the review to determine whether the relevant Board had decided to take no further action under s. 151(1)(a) because it believed the notification was vexatious. There was one notification in the sample considered by the review where the relevant Board decided to take no further action under s. 151(1)(a) and it was recorded in the Board's Decisions and Actions paper that the basis for this decision was that the Board believed the notification was vexatious. However, the Board's documented reasons for its decision did not outline that the Framework had been applied and why the notification was considered vexatious.

Also, the Board's belief about the vexatious nature of the notification was not communicated to either the notifier or the practitioner who was the subject of the notification. Rather, Ahpra's notification outcome letter suggested that the practitioner should speak with their indemnity insurer or continuing professional development provider about steps the practitioner could take to reduce the likelihood of further notifications being raised. The review is concerned that the Board's decision about the vexatious nature of the notification was not communicated to the notifier and practitioner, or appropriately documented. Further, the review considers that the suggestion to the practitioner that they take steps to reduce the likelihood of future notifications was inappropriate in the circumstances of a vexatious notification.

Using this language could unfairly put the onus on the practitioner to prevent vexatious notifications. The review highlights that in situations where a notification appears to have been made in a domestic or family violence case, this suggestion could be particularly distressing. Practitioners should not be made to feel responsible for the actions of the perpetrator.

The review found that in another instance, Ahpra recommended to the relevant Board that it should take no further action under s. 151(1)(a) because the notification was vexatious. However, the Board's Decisions and Actions paper and the subsequent outcome letters did not outline whether the Board had decided not to take action because the notification was vexatious. It could be either that the Board did not agree with Ahpra's recommendation that the notification was vexatious, or that it did not clearly decide on which basis it was making its decision. No matter the reason, it is problematic that the Board did not clearly state its reasons for making its decision.

The review similarly found there were gaps in giving high-quality reasons for decisions after investigating notifications. Where a notification proceeds to an investigation, the relevant Board is empowered to finalise the matter by making a decision under s. 167 of the National Law to either:

- decide to take no further action, or
- take regulatory action and/or refer the matter to another entity for investigation or other action.

The review found that Ahpra's library of reasons for deciding to take no further action under s. 167 also did not include reference to the possible application of the Framework or whether the notification met the threshold for it to be deemed vexatious. The template reasons focus instead on whether the practitioner performed to a reasonable standard, whether the practitioner has already taken steps to address the concerns, or whether the concerns have been dealt with by the practitioner's employer.

Five of the 16 closed notifications considered by the review were finalised following an investigation. The review found that the Boards generally provided more satisfactory reasons for decisions on notifications after an investigation. This is perhaps not surprising given investigations generally involve findings based on more comprehensive information. In one instance, the Board acknowledged the practitioner's concerns that the notifier may not have made the notification in good faith. In another notification, the Board explained that the evidence it had obtained showed that the notification was 'vexatious in nature'. This was one of the few instances where a Board chose to clearly label a notification as vexatious. However, there was no specific reference to the 2 elements necessary to satisfy the definition of a vexatious notification (that the notification did not have substance and had been made with the intent to cause distress, detriment or harassment to the practitioner). The review acknowledges the complexities of considering vexatious notifications, which may involve misleading evidence. However, the review's analysis of the sample of notifications suggests there is a need for more guidance on giving reasons for decisions that a notification is vexatious.

Providing clear reasons for decisions helps to promote fairness, transparency and accountability. It is important that tailored reasons for a decision are provided when appropriate so the basis for a decision is clear. As consumers informed the review, without a clear explanation for why a decision was made to take no further action on a notification, notifiers can be left feeling unheard, which may lead to frustration, anger and repetitive notifications. This is similarly true of practitioners who are the subject of a notification.

The Ombudsman has previously provided feedback and formal comments to Ahpra on the importance of ensuring the reasons for a decision are clearly communicated to those involved in a notification. When handling notification-related complaints, often the NHPO does not identify a major error in how Ahpra or the relevant Board handled the complainant's matter. Instead, the NHPO helps the complainant to better understand how their matter has been handled.

For example, in 2022–23 the second most common outcome of complaints to the Ombudsman that the NHPO investigated was the office providing a further explanation to the complainant about the concerns they raised.[71] This is a consistent trend in the NHPO's complaints data and suggests that further detail and explanation could help address concerns about decisions.

The review recommends that Ahpra should update its library of reasons, particularly regarding reasons for a decision that a notification is vexatious under s. 151(1)(a) or s. 167 of the National Law. The review suggests that the templated reasons are updated to reflect the two criteria of the definition for a vexatious notification: that it is lacking in substance and was made with the intent to cause distress, detriment, or harassment. This will ensure those involved in the notification are provided with clear and meaningful reasons for the relevant Board's decision.

Key findings

- The Framework does not outline any obligations for Ahpra to notify those involved in a relevant notification that the Framework will be, or has been, applied. There appears to be a reluctance by Ahpra to acknowledge or share information about its use of the Framework.
- Ahpra's templated reasons for deciding to take no further action on the basis that the notification is vexatious are too brief and do not include reference to the Framework's application or why the notification met the threshold to be deemed vexatious.
- The sample of notifications showed it was challenging to determine whether a Board had decided to take no further action because the notification was vexatious or for another reason.
- Without a clear explanation for why a decision was made to take no further action, notifiers and practitioners can be left feeling unheard, which may lead to frustration, anger and repetitive notifications.
- Sometimes the notification outcome letters that Ahpra sent to practitioners included information that suggested the practitioner could take steps to avoid future notifications. This is not appropriate in the case of vexatious notifications.

Recommendations

11. Ahpra should be more transparent about how and when it applies the framework, where appropriate. Ahpra should update its library of reasons to ensure clear and appropriate reasons are provided for a decision that a notification is vexatious. Ahpra should also update its template notification outcome letters regarding vexatious notifications.

71 National Health Practitioner Ombudsman, Annual report 2022–23, November 2023.

Ensuring timely finalisation of notifications

Ahpra staff interviewed by the review explained that applying the Framework can contribute to delay in finalising notifications. This was mostly due to the Framework requiring several internal escalation points. It was also broadly accepted that one of the reasons the handling of vexatious notifications has become a topical issue is because of the stress and anxiety practitioners feel more generally about Ahpra's handling of, and time taken to finalise, notifications.

The review found that the average time taken to finalise the notifications it analysed where the Framework was applied was 121 calendar days. Most of the notifications considered by the review were closed at the assessment stage. The average time to finalise the 11 notifications that were closed at the assessment stage and were assessed as low risk was 107 days. These results are far from Ahpra's goal of having low-risk notifications submitted to a decision maker within 15 business days of it being allocated to a staff member.[72]

The review also found that the time taken to finalise notifications where an investigation was commenced was considerable. The average time taken to finalise the 5 notifications that were closed following an investigation was 154 days.

The review notes that Ahpra's recent work to promptly triage and 'stream' notifications may help reduce delay. The new model's features of using specialised teams to manage different types of notifications could help ensure notifications reach a decision maker in a reasonable timeframe. In addition, Ahpra has accepted the recommendations of the Expert Advisory Group for identifying and minimising distress for practitioners involved in the regulatory process, including in relation to timeliness. Recommendation 3, for example, looks to address the stress and delays associated with seeking independent information about a practitioner's health.[73]

It is important that Ahpra continues to take steps to improve the timeliness of its notification assessment and investigation processes. Completing notifications faster is likely to lessen the impact on practitioners, including if they believe the notification made about them is vexatious.

Improving communication to reduce concerns about delay

The review observed that concerns about the vexatious nature of a notification were in some cases compounded by delay, together with a lack of updates and communication throughout the notifications process.

Improving timeliness of initial contact

In general, after a notification has been allocated to an Ahpra regulatory adviser for management, they must contact the notifier and practitioner who is the subject of the notification. Ahpra's First 15 days guide outlines timeliness expectations that staff are encouraged to meet in the first 15 business days after a notification is allocated to them. In particular, the guide outlines that Ahpra staff should contact the notifier within the first 5 business days and a practitioner within the first 10 business days.

In the notifications that the review examined, it found the average time to first contact a notifier by phone was 45 calendar days, and 72 calendar days for the practitioner, from the date of receiving the notification. There was significant variation within these notifications between the fastest and slowest timeframes to contact the notifier and practitioner. The fastest timeframe to contact a notifier was 3 calendar days and the slowest was 190 calendar days. The fastest timeframe to contact a practitioner was 15 calendar days and the slowest was 191 calendar days. It is not clear why there was such a significant difference in timeframes. In general, the review suggests that Ahpra should improve the timeliness of its communication about receiving a notification.

72 As outlined in Ahpra's First 15 days guide.

73 Ahpra and the National Boards, Expert Advisory Group, 'Keeping hope: Identifying and minimising distress for practitioners involved in a regulatory process. Findings of the Expert Advisory Group on practitioner distress, October 2022.

The review noted that the regulatory adviser managing the notification first contacted the notifier and practitioner by phone in most notifications. Most practitioners interviewed by the review indicated that the first contact by phone was appreciated. It is noted, however, that some comparative bodies have alternative ways of notifying practitioners about a complaint made about them. One organisation, for example, said that it would not inform a practitioner if it received what it called a 'blatantly vexatious' notification about them, until a decision had been made (under delegation) that it had met the necessary evidential threshold to warrant further enquiry. Another organisation said that if a complaint was going to be investigated, they would not inform the person being complained about until it had progressed to the investigation stage of the process. The review notes that some practitioners may also prefer not to be notified that a notification has been made about them until the outcome is decided.[74] These alternative approaches suggest there may be benefits in Ahpra further considering and consulting with practitioners on their preferred method of engagement.

The review notes, however, that the National Law outlines requirements for Ahpra to notify practitioners about receiving a notification 'as soon as practicable'.[75] The review also acknowledges the benefits of practitioners being given an opportunity to respond to allegations or raise concerns about the vexatious nature of a notification before the outcome of the notification is decided.

Making meaningful improvement in communications throughout the notifications process

The review's consultation found that communication about the progress of notifications was not in line with practitioners' expectations. Practitioners reported that they had:

- tried to contact Ahpra about their matter but did not get a response
- were not regularly contacted by Ahpra with progress updates once they had been notified the notification had been received.

Practitioners suggested to the review that more communication should be provided throughout the management of a notification, including that there could be a 'check-in' once a month.

In particular, the review found that several notifications it considered involved allegations that a notification had been made in the context of domestic or family violence. These matters did not appear to lead to more frequent communication, or progress updates. The review suggests that there is room for improvement in this area.

The Ombudsman has previously reported on systemic issues about communication in the notifications process. The NHPO's 2022–23 annual report, for example, outlined that the office had given Ahpra feedback about the need to improve communication on the notifications process, including by:

- appropriately acknowledging correspondence
- providing regular updates during the handling of a notification
- making sure decisions and reasons for decisions about notifications are consistent and clearly outlined.

A lack of communication during the notifications process is frequently identified in complaints as a key factor leading to increased frustration and stress. For example, one practitioner in a complaint to Ahpra viewed by the review said that Ahpra had alerted them to a notification made about them in January 2020 but by December 2020 it was still being investigated with no clear indication of when it would be finalised. The practitioner was concerned that Ahpra did not identity that many of the allegations made in the notification were vexatious. The practitioner explained that their concern was compounded by Ahpra's lack of updates and communication throughout the investigation process.

74 Refer to, for example: Dr Pam Rachootin's opinion piece in the Medical Observer. 'An AHPRA investigator calls: My story of fear and panic after anonymous patient complaint', January 2023. Accessed November 2023: www.ausdoc.com.au/opinion/an-ahpra-investigator-calls-my-story-of-fear-and-panic-after-anonymous-patient-complaint/.

75 Refer to s. 152 of the National Law.

The review acknowledges that the notifications process is inherently stressful for practitioners. It can also be distressing for notifiers raising serious personal or health-related concerns. Regular communication is therefore not just a requirement of good administration but also necessary to provide a compassionate response.

The Ombudsman has previously acknowledged that Ahpra has updated its Service charter to set timeliness expectations for some of its activities. However, the Service charter does not include any expectations for communication during the notifications process. The Ombudsman has suggested that updates should be provided to notifiers and practitioners during the assessment stage at a minimum of every 3 months, which is the same as is required by the National Law while investigating a notification.

The review notes that this timeframe should ideally be shorter. One comparative organisation the review consulted, for example, noted that it provides monthly updates to practitioners who are the subject of an investigation. This suggests that Ahpra could improve the regularity of its contact with those involved in a notification.

The review suggests that better communication may improve the experience of practitioners who are the subject of a notification. This in turn may reduce practitioner concerns about the perceived prevalence of vexatious notifications and some practitioners' views that Ahpra and the Boards are not managing vexatious notifications efficiently.

Key findings

- Delay is commonly raised as a key driver of concern from practitioners about the notifications process.
- The average time taken to finalise the notifications considered by the review where the Framework had been applied was 121 calendar days. This suggests that Ahpra is not meeting the timeliness benchmarks it has set for finalising notifications.
- Completing notifications faster is likely to lessen the impact on practitioners, including if they believe the notification made about them is vexatious.
- Concerns about the vexatious nature of a notification were in some cases compounded by Ahpra's lack of updates and communication throughout the notifications process.
- The fastest timeframe to contact a notifier was 3 days and the slowest was 190 days. The fastest timeframe to contact a practitioner was 15 days and the slowest was 191 days. It is not clear why such a significant variance was observed.
- Notifiers and practitioners do not always receive regular or timely communication from Ahpra about the progress of a notification.
- Practitioners who raised concerns that a notification had been made in domestic or family violence cases did not appear to receive tailored or more frequent communication.
- There are opportunities for Ahpra to improve how it communicates with those involved in a notification.

Determining appropriate consequences for making a vexatious notification

It is important to consider whether the Framework sets out appropriate consequences for notifiers who have made a vexatious notification. The Framework outlines that:

- notifiers who have made a vexatious notification do not have good-faith protections under the National Law
- the relevant Board will take action against a registered health practitioner who has made a vexatious notification about another practitioner.[76]

While the Framework does not refer to it, the National Law also tries to prevent dishonest and misleading (and therefore potentially vexatious) notifications by enabling people to be fined up to $5,000 for giving false or misleading information to an Ahpra investigator.

The review heard from practitioners that having a notification made about them can have negative consequences, particularly in relation to their mental health. It was also considered unfair that there were not significant consequences for notifiers who made a notification in domestic or family violence cases. As a result, some practitioners emphasised to the review that the consequences for those who make a vexatious notification are not sufficient. This sentiment was also sometimes reflected in submissions to the review and by Ahpra staff.

While the review recognises these views, it is important that any consequences for making a vexatious notification do not inadvertently create barriers to potential notifiers with legitimate concerns from coming forward. The review has therefore sought to consider how appropriate consequences for making a vexatious notification can be achieved without inadvertently deterring people from making a notification in good faith.

Potential civil, criminal or administrative consequences for making a notification in bad faith

The Framework recognises that notifiers who make a vexatious notification 'do not have good faith protections under the National Law'.[77] Section 237 of the National Law provides that a person is not liable civilly, criminally or under an administrative process when making a notification in good faith. This means that if it can be shown that a notification was not made in good faith – including if the notification was vexatious – the notifier may expose themselves to civil, criminal or administrative consequences.

Section 237 of the National Law has been considered in the context of defamation claims made by practitioners against notifiers. A person may sue an individual or organisation for defamation if they believe their reputation has been damaged by publishing material that causes a reasonable person to lower their opinion of that person. In the case of a vexatious notification, it may be open to a practitioner who is the subject of a notification to sue the notifier for defamation if they believe their reputation has been damaged due to a vexatious notification.

76 Ahpra and the National Boards, A framework for identifying and dealing with vexatious notifications, December 2020.
77 Ibid.

The Supreme Court of Queensland recently considered the operation of s. 237 of the National Law in the context of a defamation claim. The court held that a notification made under the National Law does not attract an absolute privilege (that is, a legal privilege so there can be no action for defamation even if the published statement was made with a malicious motive or was false). Instead, the court found that a notification attracts a qualified privilege, meaning that the privilege only applies if the notifier acted without malice:

> **The parliament has seen fit to provide a protection from liability for persons making a notification under the National Law, by enacting s 237. That is a qualified protection only, limited to persons acting in good faith.**[78]

The implication is that a practitioner may be able to sue a notifier for defamation if they have made a vexatious notification. However, it must be acknowledged that pursing this option would likely involve significant investment from the practitioner who is the subject of the vexatious notification, both in terms of time and money. Also, in situations where the vexatious notification has arisen within a complex personal relationship, including domestic or family violence, suing for defamation may be particularly distressing.

The review recognises that some practitioners may consider it unfair that they are left to take action against a person who has caused them harm by abusing the notifications process, rather than the owner of the process (Ahpra and the Boards) taking action. While some practitioners may value the ability to pursue a defamation claim, the review's conclusion is that the consequences for making a vexatious notification should mostly be the responsibility of Ahpra and the Boards, as the owners of the notifications process.

Consequences for providing false or misleading information

An added protection against vexatious notifications outlined in the National Law is that an individual can be fined a maximum of $5,000 for providing an Ahpra investigator with false or misleading information or documents.[79]

Ahpra staff advised the review, however, that they were unaware of any examples of notifiers having been fined for providing false and misleading information to an Ahpra investigator. Similarly, 2 medical indemnity insurers submitted to the review that they were not aware of this provision having been used. This may explain why the Framework does not mention the ability to fine people for providing false or misleading information to an Ahpra investigator in the context of a vexatious notification.

The review acknowledges that fining someone for giving false or misleading information is a significant action for Ahpra to take. However, the review believes there may be occasions where it would be reasonable and appropriate for Ahpra to consider using this provision, especially in the context of a vexatious notification that has caused harm to a practitioner. The review therefore recommends that Ahpra and the Boards form a position on when they would seek to fine a person for giving false or misleading information or documents to an Ahpra investigator.

There is a broader argument to be made, however, that this provision serves as a deterrent. In this respect, the potential to be fined serves an important purpose because it discourages people from providing false or misleading information to Ahpra. One comparative organisation advised the review, for example, that the primary purpose of a similar provision in its legislation was to act as a deterrent.

78 *Akbari v State of Queensland & Anor* [2022] QCA 74 (10 May 2022), [57].

79 National Law, Schedule 5, Part 3, ss. 20 and 21.

The review acknowledges the benefit of this mechanism for deterring people from providing false or misleading information to a regulator.

Strengthening consequences for providing false and misleading information at early stages of the notifications process

In assessing the adequacy of the National Law's existing provision on false and misleading information, the review considered whether legislation governing other health complaints bodies and regulators in Australia included a similar provision.[80] The review found that the legislation of most health complaints entities in Australia included broad provisions related to false or misleading material. For example, s. 264 of the *Health Ombudsman Act 2013* (Qld), which governs the work of the Office of the Health Ombudsman, states:

1. A person must not, in relation to the administration of this Act, give information that the person knows is false or misleading in a material particular to the health ombudsman, a staff member of the Office of the Health Ombudsman or an authorised person.

   Maximum penalty—100 penalty units.

2. Subsection (1) applies whether or not the information was given in response to a specific power under this Act.

3. Subsection (1) does not apply to a document if the person, when giving the document—

   (a) tells the health ombudsman, staff member or authorised person, to the best of the person's ability, how it is false or misleading; and

   (b) if the person has, or can reasonably obtain, the correct information, gives the correct information.

The provision in the National Law on false and misleading information, however, appears to apply only to information provided to Ahpra during an investigation into a practitioner. There is no specific penalty for providing information to Ahpra that is false or misleading when making a notification or during the assessment stage of the notifications process. This is problematic because, as evidenced by the notifications considered by the review, most notifications where the Framework was applied were finalised without Ahpra conducting an investigation. Also, due to a recent National Law amendment, the Boards can now compel some information at the assessment stage. This means that information gathered at this stage may be more substantial and may therefore allow the Boards to make more decisions without deciding to progress a notification to an investigation. The inconsistency in making it an offence to provide false or misleading information at other stages of the notifications process may therefore become more obvious.

The review therefore recommends that Health Ministers consider amending the National Law to make it an offence to provide false or misleading information when making a notification and at the assessment stage of the notifications process, in line with the existing provision relevant to the investigation stage of the notifications process.

Own motion investigations into practitioners who have made a vexatious notification

The Framework makes it clear that vexatious notifications made by registered health practitioners are taken seriously. The Boards' relevant codes of conduct also outline that practitioners should not make vexatious notifications about other practitioners.

80 Refer to, for example: *Health Complaints Act 2016* (Vic), s. 81; *Health Care Complaints Act 1993* (NSW), ss. 97A and 99; *Health Ombudsman Act 2013* (Qld), s. 264; *Health and Disability Services (Complaints) Act 1995* (WA), s. 72; *Health Complaints Act 1995* (Tas), s. 70; *Health and Community Services Complaints Act 1998* (NT), s. 92; *Health and Community Services Complaints Act 2004* (SA), s. 81.

If a Board decides that a notification made by a practitioner is vexatious, the Framework outlines that the Board should initiate an own motion investigation into the conduct of the practitioner.[81] This could result in regulatory action being taken against that practitioner.

The review identified 2 notifications in the sample considered where a Board began an own motion investigation into the practitioner who made a notification. In the first matter the Board ultimately decided to take no further action. In the second matter the Board began an own motion investigation into the practitioner, but this was not due to a concern that the practitioner had made a vexatious notification.

Although the review was not given examples of a Board taking regulatory action against a practitioner due to making a vexatious notification, it is clear that practitioners could ultimately face regulatory action if it is found that a notification they made, or their actions in doing so, constitute professional misconduct. For example, in *Health Ombudsman v Ling (No 2)* [2023] QCAT 260, the Queensland Civil and Administrative Tribunal reprimanded Dr Ling, cancelled his registration, disqualified him from reapplying for registration for 3 years and ordered him to pay costs of $85,000. The finding of professional misconduct was in part based on the belief that Dr Ling had 'deliberately or recklessly provided false and misleading information' in notifications to the Health Ombudsman and Ahpra, and in a sworn affidavit filed in the tribunal.[82] Practitioners who try to mislead by making a notification that is not in good faith can therefore face serious consequences.

Improving processes for own motion investigations into practitioners who have made vexatious notifications

While it is encouraging that Boards are willing to pursue own motion investigations into practitioners who have made a vexatious notification, the review noted procedural elements for handling these matters that could be improved.

For example, throughout the documentation for one of the own motion investigations considered by the review, the language used did not accurately reflect the situation. This included correspondence being sent to the practitioner under investigation that stated Ahpra had received a notification about the practitioner, when in fact a notification had not been received. Instead, the Board had initiated the own motion investigation because it had found a notification the practitioner had made to be vexatious. This suggests that (likely due to its infrequent use) relevant communications have not been adapted to accurately communicate the circumstances created by an own motion investigation into a practitioner who has made a vexatious notification.

Also, the role of the practitioner who was the subject of the vexatious notification is not clearly spelled out. If a Board decides to launch an own motion investigation into a practitioner who made a vexatious notification, it may be able to do so without involving the practitioner who was the subject of the vexatious notification. This may occur in situations where a Board already has enough information about the matter and does not need further input from the practitioner who was the subject of the vexatious notification. However, there also may be times when the practitioner who was the subject of the vexatious notification could play a more significant role in an own motion investigation. They may, for example, be asked to act as a witness for the Board.

81 Refer to s. 160(1)(b).

82 *Health Ombudsman v Ling (No 2)* [2023] QCAT 260.

The review considers that if a Board decides to launch an own motion investigation into a practitioner who has made a vexatious notification, that decision should generally be communicated to the practitioner who was the subject of the vexatious notification. Following this, practitioners may have differing levels of interest in being further involved in the matter. Some practitioners may, for example, like to receive updates about the own motion investigation's progress, and may wish to be added as an interested third-party to the matter. Other practitioners may wish to put the vexatious notification behind them and not want to be involved in any later own motion investigation.

Given the possible risks to the health and wellbeing of people affected by vexatious notifications, including those who may have experienced domestic or family violence, it is recommended that Ahpra should develop processes that respect the wishes of the practitioner who was the subject of a vexatious notification when conducting an own motion investigation. These processes should ideally outline the steps involved in determining the practitioner's willingness to take part in the own motion investigation and any other relevant proceedings. If a practitioner expresses a desire to take part and/or be updated about the own motion investigation, Ahpra should ensure there is regular and meaningful communication, including about the outcome of the investigation.

Consequences for non-practitioners who have made a vexatious notification

Unlike in relation to registered health practitioners, the Framework does not outline any potential consequences for non-practitioner notifiers who have made a vexatious notification. This is due to the specific role Ahpra and the Boards play in regulating registered health practitioners.

Interviews with some Ahpra staff and several submissions to the review highlighted concern that there were not appropriate consequences for non-practitioner notifiers who have been found to have made a vexatious notification. Generally, concerns were underpinned by a sense of injustice that the notifier would not face consequences for their actions when they had caused significant stress for the practitioner who was the subject of the notification. This is particularly relevant in the context of domestic and family violence. It could be argued that unless there are adequate consequences for making a vexatious notification, there would be no reason for a perpetrator to stop the behaviour.

Most feedback submitted to the review, however, voiced concern that toughening the consequences for non-practitioners who make a vexatious notification could inadvertently dissuade others from making a legitimate notification. As noted previously, some Ahpra staff, and submissions received from several organisations, recognised the importance of the Boards receiving notifications to alert them to potential patient safety risks.

The Research report also highlighted that there was a greater risk in regulators not being informed about risks to the public than the consequences of receiving a very small number of potentially vexatious concerns.[83] It is likely, for example, that there is significant under-reporting of sexual misconduct perpetrated by practitioners.[84]

As outlined by independent reviewer Ron Patterson in an Ahpra-commissioned review of the use of chaperones:

> **Patients who are subjected to sexualised remarks, sexual harassment or assault may be reluctant to make an official complaint for the same sorts of reasons reported by victims of sexual abuse in other contexts – including concerns that their word will not be believed in the face of a denial by a respected professional.**[85]

The importance of recognising and addressing the under-reporting of serious patient safety issues cannot be understated. There is a recognised power imbalance between patients and their healthcare providers. It is therefore vital that notifiers have trust and confidence that Ahpra and the Boards will consider all concerns impartially and without fear that their notification will not be fairly and appropriately considered.

The review therefore recognises that a balance must be struck between taking steps to ensure the notifications process is not used to cause harm while ensuring the notifications process is easy for notifiers to access.

On balance, the review does not suggest that there should be any other specific consequences developed for non-practitioner notifiers who make vexatious notifications. Instead, the review highlights that implementing the review's recommendations will likely address some concerns raised about managing vexatious notifications, including ensuring these matters are managed in a more robust, timely and transparent way. This should reduce the level of stress practitioners who are the subject of a vexatious notification experience.

The review suggests that Ahpra and the Boards should, however, continue to monitor relevant information regarding the management of domestic and family violence-related notifications. It may be that information gathered about this type of notification could provide insights into whether further changes or consequences are necessary to adequately protect practitioners who are the subject of a vexatious notification.

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

84 Refer to, for example, Paterson R, Independent Review of the Use of Chaperones to Protect Patients in Australia, Report, February 2017.

85 Paterson R, Independent Review of the Use of Chaperones to Protect Patients in Australia, Report, February 2017.

Key findings

- A notifier may expose themselves to civil, criminal or administrative consequences if they do not make a notification in good faith.
- It may be open to a practitioner who is the subject of a vexatious notification to sue the notifier for defamation if they believe their reputation has been damaged due to the making of the notification. However, this option would likely involve significant investment from the practitioner who is the subject of the vexatious notification in terms of time, money and stress.
- A person who provides false or misleading information to an Ahpra investigator may be subject to a penalty of up to $5000. However, it does not appear that any notifiers have been issued with a fine under this provision of the National Law.
- Boards have undertaken own motion investigations into practitioners who they believe have made a vexatious notification about another practitioner. However, the Boards' processes for managing own motion investigations in these circumstances are not well-developed.
- There are limited consequences for non–health practitioner notifiers who have made a vexatious notification. However, it is vital that efforts to prevent and appropriately address vexatious notifications do not create barriers for notifiers trying to raise legitimate concerns.
- Ahpra and the Boards should monitor the need to strengthen consequences for notifiers making vexatious notifications in domestic and family violence cases.

Recommendations

12. Ahpra and the Boards should form a position on when they would seek to fine a person for providing false or misleading information or documents to an Ahpra investigator.

13. Health Ministers should consider amending the National Law to make it an offence to provide false or misleading information to Ahpra when making a notification and at the assessment stage of the notifications process.

14. Ahpra and the Boards should clarify processes related to own motion investigations into practitioners who have made vexatious notifications about other practitioners, including by ensuring there are clear guidelines for staff when an own motion investigation is initiated.

Strengthening guidance and training for Ahpra staff about vexatious notifications

The review considered the guidance and training for Ahpra staff:

- at the time of the Framework's introduction
- when inducing new staff after the Framework's introduction
- on an ongoing basis to ensure continued consistent and accurate application of the Framework.

The review generally found that when the Framework was introduced, training on its implementation was well-delivered. However, the review has identified opportunities for ongoing learning in appropriately identifying and managing vexatious notifications. In addition, the review's recommendations for improvement could mean further training would be necessary if or when implemented.

Appropriate introduction of the Framework

From interviews with Ahpra staff, it was clear to the review that the Framework had been launched effectively and that there was good awareness of it. Staff informed the review that the Work instruction is good and that its associated resources are easy to find. Staff appreciated the clear documentation around the Framework and found it helpful.

The Work instruction and workflow Ahpra provided to the review were detailed and clear, and included links to other relevant resources. In addition, Ahpra shared recordings of comprehensive training webinars on vexatious notifications and the Framework. The first training webinar viewed by the review related to the initial implementation of the Framework and the second related to the staff induction program.

Staff mentioned that the Framework was covered in induction training. Some staff, however, said that they were not sure that new staff would have received comprehensive training on the Framework.

Ongoing staff training on applying the Framework

The review found that ongoing training on the Framework was not comprehensive. Most Ahpra staff informed the review that no ongoing training was provided outside of the initial launch of the Framework. Generally, staff reported that they had only used the Framework once or twice, and that some of their colleagues had never used it. It was therefore acknowledged that tasks relating to vexatious notifications were not a large part of their work, and this may be why ongoing training was not provided.

The review acknowledges that identifying and managing vexatious notifications represents only a small portion of Ahpra staff's workload. However, the review suggests that without ongoing training on the Framework and its appropriate application, there is a risk that it may not be applied consistently, or may not be used due to lack of awareness or confidence.

Regarding ongoing training, Ahpra staff informed that review that it would be helpful for training to focus on case studies and real examples of how vexatious notifications have been identified and managed, including the threshold to further consider vexatiousness. Staff were also interested to learn more about the differences between the terms in s. 151(1)(a) of the National Law ('frivolous, misconceived or lacking in substance' and 'vexatious'). It was suggested that regular workshops would be good to upskill staff so they feel less apprehensive about identifying or dealing with vexatious notifications.

The Research report similarly outlines that one of the key principles for preventing, identifying and managing vexatious complaints is to give staff specific training, informed by evidence and best practice, on identifying and managing sub-optimal and potentially vexatious complaints and unreasonable complainant conduct.[86] The Research states that staff should be trained to recognise the known signs and risk factors of potential unreasonable complainant conduct. This training should be mirrored in relevant policies.[87]

Focus areas for improving the Framework's implementation

The review's recommendations are linked to the areas Ahpra could prioritise to address through appropriate ongoing training and guidance. In relation to receiving notifications, and identifying suspected vexatious notifications, this includes training and guidance on:

- the process for assessing concerns to determine whether they meet the grounds for a notification
- the definition of the terms 'frivolous', 'misconceived' and 'lacking in substance' and their application to a notification and risk assessment process
- the standard of proof required to determine an intent to cause harm
- when to apply the Framework, including reference to the importance of applying the Framework when a practitioner makes an allegation that a notification is vexatious
- the difference between 'calculated conduct' and 'unreasonable conduct' in vexatious notifications.

Perhaps most significantly, the review also recommends that all Ahpra staff undertake broader training in responding to notifications that arise in domestic or family violence cases, and the use of coercive control (refer to Appendix 1: Addressing notifications in cases involving domestic and family violence allegations). It is important that staff are trained to recognise and respond appropriately should safety risks become apparent or are alleged.

This is especially important because it may be challenging for staff to identify coercive control, or the relevant safety factors that need to be considered. Notifications that involve domestic or family violence are more complex and may require a detailed understanding of court and police proceedings. Regulatory advisers undertaking calls with notifiers or practitioners in these circumstances will require specific training to ensure a nuanced and safe approach.

As previously noted, the lack of communication during the notifications process is frequently identified in complaints as a key factor leading to increased frustration and stress for those involved in a notification. Regular communication is not just a requirement of good administration but also essential to providing a compassionate response. Ongoing training and guidance should therefore be provided to equip Ahpra staff with the necessary communication skills to undertake compassionate conversations, particularly where it appears that a notification was not made in good faith. Training should come with clearly defined expectations for staff about the required level of communication and the timely management of notifications. This should include, for example, a minimum requirement to provide an update to those involved in a notification at least every 3 months.

To support better recommendations to Boards, the review suggests that training and guidance is provided on appropriately tailoring reasons for decisions, with a particular focus on what information should be included in notification outcome letters. In addition, Ahpra staff should be informed of any changes made to the process for managing an own motion investigation into a practitioner who a Board has found to have made a vexatious notification.

The review suggests that extra training and guidance should also be given on managing unreasonable conduct, with a focus on unreasonably persistent notifiers (refer to Appendix 2: Addressing unreasonably persistent notifier conduct). It is important that any new documentation, such as an unreasonable conduct policy and procedure, is clearly communicated to staff.

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

87 Ibid.

In particular, if staff are delegated greater powers to decide to take no further action on the basis that a notification has already been previously considered, there must be sufficient guidance provided to ensure consistent and appropriate decision making.

Finally, the review has recommended legislative amendments that, if they are enacted, would inevitably require further training to ensure Ahpra staff understand and comply with any new requirements.

Key findings

- Ahpra staff received comprehensive information and guidance about the Framework, and how it should be applied, when it was first introduced.
- The Framework's launch appears to have been well-received by staff, and there was a good awareness of the Framework.
- There has been little ongoing training about the Framework.
- Ahpra staff supported further training on the Framework, with a focus on using real examples and case studies to cement understanding of the Framework's concepts.
- Ongoing training is essential to ensuring the Framework is consistently and accurately applied.
- The review's findings can assist Ahpra to determine other priority areas for training.
- Implementing the review's recommendations would require updated training for Ahpra staff on the Framework, including if the recommended legislative amendments are accepted and enacted.

Recommendations

15. Ahpra should deliver ongoing training to staff on applying the Framework, including any changes implemented in response to the review's recommendations.

Appendix 1: Addressing notifications in cases involving domestic and family violence allegations

One of the review's most concerning findings was that the notifications process appeared to be used on some occasions as a form of coercive control in domestic and family violence cases. This appendix to the main report details the review's specific findings and recommendations regarding this issue. The review suggests that Ahpra's future work plans should seek to improve its management of notifications involving allegations of domestic and family violence alongside its work to strengthen the identification and management of vexatious notifications.

The Research report identified that a vexatious notification could be used as a form of intimate partner violence to 'cause distress and exercise power, control or revenge', though it did not find literature to support this.[88] The review, however, can confirm that some notifications appear to have been made to Ahpra under these circumstances.

In the review's consideration of the 17 notifications provided by Ahpra, it found that 7 involved allegations that the notification was made in domestic or family violence cases. Also, one of the complaints made to Ahpra about the handling of a notification alleged that a practitioner was being targeted by their ex-spouse in a notification. One practitioner described Ahpra's notifications process as being used as a tool to 'commit acts of domestic violence'.

Some submissions to the review also directly mentioned concerns related to the use of coercive control in the notifications process.

One submission, for example, explained that its analysis of case studies suggested:

> **Complaints were often submitted where a breakdown of a marriage was occurring or where there was evidence of domestic and family violence … Complaints were at times used as coercive control mechanisms for abusers who wanted to disrupt the process of their partner gaining strength and setting boundaries in the relationship.**

The submission also mentioned examples where parenting orders were in place, or where significant conflict was occurring between co-parenting partners and the notification was used to 'gain control over the ex-spouse/other parent'.

Some comparative organisations reported receiving a small number of matters that appear to have been made in the context of domestic or family violence. One organisation reported seeing an increase in this type of matter, though it was unclear to them why this was occurring. The same organisation also noted that this type of matter often follows a pattern, with the complainant going through several different processes, such as court proceedings, at the same time.

88 Ibid.

Noelle's story

The following case study provides a de-identified description of a notification made in a domestic violence case examined by the review. Pseudonyms have been used to protect the confidentiality of those involved and some details have also been omitted for this reason.

Noelle was a registered health practitioner whose former partner made a notification about her conduct to Ahpra, alleging that Noelle had accessed health records without clinical justification.

Four months after Ahpra received the notification, an Ahpra staff member contacted Noelle to discuss the notification with her. Noelle was distressed about the notification, telling the Ahpra staff member that her former partner had threatened to make a notification about her in the context of ongoing domestic violence. She said that there was an active restraining order against her former partner and that there were ongoing family court issues between them. The Ahpra staff member spoke to Noelle about her safety and the supports available to her. The staff member advised her to contact police if she had fears for her personal safety and to reach out to her professional association or indemnity insurer for support with the notifications process.

Applying the Framework

Following these discussions, the Ahpra staff member raised with their manager the possibility that the notification about Noelle could be vexatious. Initially, it appears that the staff member's manager did not agree that the notification may have been vexatious. However, after the staff member reiterated their concerns about the nature of the relationship between the notifier and Noelle, it appears that these concerns were escalated internally as per the Framework.

It was then agreed that the issue of whether the notification was made vexatiously should be considered further. The Ahpra staff member contacted the notifier to better understand their motivations for making the notification as per the workflow guidance. The notifier provided more detail about why they were concerned about the practitioner's behaviour.

Following this conversation, Ahpra decided that there was not enough information to conclude the notification was vexatious. It appears that Ahpra determined that the notifier may have had genuine concerns and may therefore not have intended to cause distress, detriment or harassment to Noelle.

Assessment report

Ahpra's assessment report recommended that the relevant Board take no further action on the notification under s. 151(1)(a) of the National Law because the notification was misconceived or lacking in substance.

The assessment report acknowledged that the notification had been made in the context of a hostile relationship and family violence. The assessment report said there was no proof that Noelle had engaged in conduct below the standard expected.

Decision to take no further action

Seven months after the notification was made, and 3 months after Noelle was advised of the notification, the relevant Board accepted Ahpra's recommendation and decided under s. 151(1)(a) of the National Law that no further action be taken on the notification. The Board explained that it could not conclude that Noelle was practising unsafely based on the information available. The decision was communicated to Noelle and the notifier the following day.

Noelle and the notifier were not informed that Noelle's allegation about the notification being vexatious was managed under the Framework.

Use of systems to perpetuate coercive control

Research indicates that systems and processes can be manipulated to exert power and control over a victim in the context of domestic and family violence.[89] Victoria's 2015 Royal Commission into Family Violence, for example, highlighted how court processes could be used to 'terrorise, disempower, humiliate and undermine the victim's attempts to protect herself (or himself) and other family members'.[90] The Royal Commission outlined court staff's role in 'shielding applicants from delays or vexatious proceedings'.[91]

Literature similarly suggests that issues associated with vexatious litigants are more pronounced in family violence proceedings.[92] The Family Court, for example, has 3 times the number of vexatious litigants than all other superior courts combined.[93] It has been suggested that domestic violence offenders and vexatious litigants may share similar characteristics, namely 'coercion and control'.[94] This has resulted in recommendations that more be done to prevent using the court system to enable coercive control.

In relation to vexatious litigants and coercive control in family law, there is sometimes a view that vexatious litigants are a cost of democracy that needs to be tolerated to uphold democratic principles. However, it has been argued that this view:

- normalises coercive behaviour and 'implies that the cost of being traumatised in exchange for a democratic system is one that the community is willing to bear'
- removes the accountability and responsibility of perpetrators, 'assuming that taking advantage of another is something inherent to democracy'.[95]

In this context, it is important that the right balance is struck between protecting vulnerable parties and providing access to a system.[96] The review recognises the parallels that can be drawn between ensuring access to the notifications process while also protecting practitioners who are experiencing domestic or family violence.

Responding to coercive control in the notifications process

The review found Ahpra did not have tailored mechanisms or processes for managing notifications made (or alleged to have been made) in domestic and family violence cases. The review's analysis of the relevant notifications where these issues were raised found they were generally handled similarly to other notifications. The review notes, however, that there were some instances where it was clear that Ahpra staff had tried to support a practitioner who had alleged the notification was made in the context of domestic or family violence by encouraging them to contact their professional indemnity insurer or profession-specific support services.

Interviews with Ahpra staff indicated that there was scope for Ahpra to further develop how it manages notifications in cases involving domestic and family violence allegations. Staff raised a range of issues including that:

- there were instances where Ahpra had referred the matter to police because it involved domestic or family violence
- there is scope for Ahpra to connect those in need of support with domestic or family violence support services

89 Refer to, for example: Australia's National Research Organisation for Women's Safety. (2021). Defining and responding to coercive control: Policy brief (ANROWS Insights, 01/2021). ANROWS.

90 Royal Commission into Family Violence, Report and Recommendations Volume 3, March 2016. Accessed April 2023: http://rcfv.archive.royalcommission.vic.gov.au/Report-Recommendations.html.

91 Ibid.

92 Parliament of Victoria, Inquiry into vexatious litigants, Final report of the Victorian Parliament law Reform Committee, December 2008. Accessed April 2023: www.parliament.vic.gov.au/images/stories/committees/lawrefrom/vexatious_litigants/final_report.pdf.

93 Fitch E, Easteal P, 'Vexatious Litigation in Family Law and Coercive Control: Ways to Improve Legal Remedies and Better Protect the Victims', Family Law Review, 7, 2017 pp. 103–115.

94 Ibid.

95 Ibid.

96 Ibid.

- it appears to be important for vexatious notifications to be labelled as such for those who are experiencing domestic or family violence
- Ahpra's process for responding to accusations that a practitioner had perpetrated domestic or family violence are not well-developed.

To better understand how Ahpra may more appropriately respond to notifications involving domestic or family violence allegations, the review sought more information from relevant advocacy and support organisations. The review also considered recent mechanisms introduced by courts to protect those affected by domestic or family violence. The Federal Circuit and Family Court of Australia, for example, has recently implemented its 'Lighthouse' approach to screening and managing risks to improve outcomes for families involved in the family law system.[97] Lighthouse focuses on identifying risk factors and safety through:

- early risk screening – eligible parties are asked to complete a risk screen.
- assessment and triage of cases – a dedicated, specialised team assesses and directs cases into the most appropriate case management pathway based on the level of risk. The team also identifies those who may need extra support and safety measures.
- safe and suitable case management by judicial officers and legal support team members
- referral of high-risk matters to a dedicated specialist list designed to assist those at high risk of family violence and safety concerns.

The review notes that the participating courts directly employ triage counsellors to assist with relevant risk screening, assessment and triage functions. These triage counsellors have specialised qualifications (psychology, social work or a relevant social science degree) and extensive clinical experience working with those likely to access the service. Also, legal practitioners are trained in identifying and managing domestic and family violence.

The review acknowledges that the roles of Ahpra and the relevant courts differ significantly. Nevertheless, the review suggests that lessons from the Lighthouse approach could be used to improve how Ahpra identifies and manages instances where a notification has been made in domestic and family violence cases.

Ensuring appropriate risk screening and safety supports

As a first step, the review suggests Ahpra should focus on ensuring those who may be experiencing domestic or family violence can be supported to remain safe during the notifications process.

The review acknowledges that notifications made to Ahpra that have arisen in the context of domestic or family violence may not be common. However, it is important that Ahpra staff receive appropriate training to ensure they can recognise and respond appropriately if safety risks become apparent or are raised by the practitioner or notifier. In particular, it should not be assumed that all staff involved in managing notifications are aware of how coercive control may present or the relevant safety factors that need to be considered. For example, some practitioners or notifiers may not themselves use established terminology when referring to concerns about their safety. It is important that, at a minimum, all staff involved in responding to notifications understand:

- what domestic and family violence is, and the types of abuses of power it may involve
- why people may not disclose, or may find it difficult to disclose, that they have experienced domestic or family violence
- how to respond to the disclosure of domestic and family violence concerns
- specific support referral options
- how to appropriately escalate matters internally.

97 Federal Circuit and Family Court of Australia, 'Lighthouse', Accessed April 2023: www.fcfcoa.gov.au/fl/fv/lighthouse.

Ensuring appropriate triage and case management

In line with the Lighthouse approach, the review suggests that Ahpra considers how it could more proactively identify matters that are likely to involve safety concerns in domestic and family violence cases.

Managing a notification that involves domestic or family violence allegations is likely to require specialised training, particularly where staff need to consider information from both the person who says they are experiencing violence, and the alleged perpetrator. Also, the review's consideration of relevant notifications indicates that the subject matter of these notifications is likely to be complex and often requires a detailed understanding of police involvement and court proceedings. Assessing these kinds of information requires more specialised skills and training. Also, staff who are exposed to this material need to be provided with tailored, appropriate support. The review therefore recommends that matters involving domestic or family violence allegations are managed by staff with specialised training.

Given the review did not consider a broad sample of notifications, it cannot shed light on the number of notifications where allegations of domestic or family violence are involved. Data on the prevalence of these matters, however, may assist in determining the appropriate approach for Ahpra to take on staff training and managing these matters. This could involve, for example, setting up a dedicated team to manage notifications involving family and domestic violence if warranted by the volume of relevant matters.

Importantly, the review recognises that matters involving domestic or family violence allegations should be managed as expediently as possible. The review therefore suggests that Ahpra ensures there are means for these notifications to be escalated quickly for a Board decision. This should help reduce the ongoing impact of a notification on a practitioner who has been the target of the abuse of the notifications process.

Ensuring the Framework outlines indicators that a notification is being used to perpetrate coercive control

Given the identified possible link between coercive control and vexatious notifications, the review suggests that Ahpra's Framework is updated to include relevant references to, and potential indicators of, coercive control being used as a form of domestic or family violence in the notifications process.

Available evidence suggests that a definitive list of indicators that a notification may have been made in the context of domestic and family violence is not practicable given the diversity of circumstances where it could occur. However, some potential indicators for consideration include:

- the notifier has threatened the practitioner including, for example, threatening to make a notification
- existing intervention or court orders are in place, or the person is known to police in relation to their behaviour
- multiple systems have been used to raise concerns about the same practitioner
- information is presented manipulatively by the notifier, including the apparent deliberate exclusion of key information.

Key findings

- The review found that, while rare, notifications have been made in the context of domestic or family violence.
- Research indicates that systems can be used to perpetuate domestic and family violence, particularly coercive control. This could include a perpetrator making a vexatious notification about a practitioner.
- Effectively managing notifications involving allegations of domestic or family violence requires appropriate training to ensure Ahpra staff can recognise and respond appropriately should safety risks become apparent or are alleged.
- Ahpra should more proactively identify matters that relate to domestic or family violence and promptly escalate these matters for a Board decision.

Recommendations

16. Ahpra should improve how it manages notifications in cases involving domestic or family violence allegations.

Acknowledgement

The review acknowledges the significant distress some practitioners have experienced as a result of a notification designed to perpetrate domestic or family violence. The review extends its deepest thanks to practitioners who shared their experiences to ensure the review could more fully understand how the notifications process had affected them, and what could be done to ensure practitioners remain safe.

Appendix 2: Addressing unreasonably persistent notifier conduct

The review found that the Framework does not distinguish between unreasonable conduct and calculated conduct in making notifications. It is, however, important to clarify how the Framework applies to unreasonable conduct, with a focus on unreasonably persistent notifiers. This appendix to the main report details the review's specific findings and recommendations regarding the management of unreasonably persistent notifier conduct. The review suggests that Ahpra's future work plans should seek to better address this type of conduct alongside its work to strengthen the identification and management of vexatious notifications.

The New South Wales Ombudsman defines unreasonable conduct as any behaviour by a person that, because of its nature or frequency, raises substantial health, safety, resource or equity issues for the people involved in the complaints process.[98] The New South Wales Ombudsman's Managing unreasonable conduct by a complainant guide divides unreasonable conduct into 5 broad categories:

- unreasonable persistence
- unreasonable demands
- unreasonable lack of cooperation
- unreasonable arguments
- unreasonable behaviours.

The Research report's definition of unreasonable conduct aligns with the New South Wales Ombudsman's. It also emphasises the importance of ensuring unreasonable conduct is well-defined by organisations accepting complaints. It highlights evidence that drivers for those whose conduct becomes unreasonable may include:

- the complainant's needs cannot or have not been addressed by the complaint system
- their psychopathology ('querulous' complainants).[99]

While the New South Wales Ombudsman acknowledges that unreasonable conduct is uncommon, it also recognises that this conduct can have significant negative impacts on those involved. For example, it can:

- use up to 30% of an organisation's resources, often including the time and attention of more senior staff
- cause equity problems if resources are diverted away from other organisational responsibilities
- cause significant stress for staff members, including their ability to feel safe at work.[100]

The review's consultation with comparative organisations supports findings that while unreasonable conduct is not common, it can have a significant impact on an organisation's resources. Several had existing unreasonable conduct policies and processes. However, comparative organisations generally recognised that while managing unreasonable conduct is necessary, the organisation continues to have an obligation to appropriately consider and manage the concerns raised.

98 New South Wales Ombudsman, Managing unreasonable conduct by a complainant, 2021.

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

100 New South Wales Ombudsman, Managing unreasonable conduct by a complainant, 2021.

It was also acknowledged that unreasonable conduct in raising a concern does not necessarily mean that the complaint or notification is vexatious. As one organisation succinctly put it, 'annoying does not equal vexatiousness'.

Recognising and responding to unreasonable conduct

The review found limited publicly available information about how Ahpra responds to unreasonable conduct, including the conduct of unreasonably persistent notifiers. Ahpra's Communications management policy provides some information about how Ahpra may restrict or change how it communicates with those who engage in:

- offensive or unsafe communication or behaviour
- unreasonably persistent behaviour such as 'repeatedly raising the same issue several times and despite several explanations/attempts to resolve concerns the person remains unsatisfied and continues contact'
- unreasonable demands.[101]

However, the policy does not define the term 'unreasonable conduct' or 'unreasonable persistence'. Further, its scope is limited to considering ongoing communication with the person who is exhibiting the problematic conduct.

The Framework also does not define the term 'unreasonable conduct'. It does, however, note that an indicator of vexatiousness is 'whether a notifier has a historical pattern of making notifications about the same practitioner, same practice, or the same issues about multiple practitioners'.[102]

It also mentions some behaviours which may indicate a notification is vexatious that align with common indicators of unreasonable conduct. This includes, for example, a notifier:

- including excessive information
- using offensive language
- using unusual formatting
- seeking unreasonable or unrealistic outcomes
- giving forceful and unlikely instructions
- frequent, repetitive, demanding and lengthy contact
- intimidating, confrontational or rude behaviour, including making threats.[103]

In interviews with the review, Ahpra staff did not regularly mention traits related to unreasonable conduct when discussing vexatious notifications. Staff descriptions of the characteristics of notifiers who made vexatious notifications related more to concerns about calculated conduct. For example, one Ahpra staff member said that in cases where unreasonable conduct is exhibited, it is more likely for the notification to be 'misconceived' rather than vexatious. The review's analysis of the sample of notifications similarly found that consideration of the Framework was not based on indicators generally associated with unreasonable conduct, such as repetitive contact or repetitive notifications by the same notifier. This suggests that the Framework's indicators should be reviewed and, ideally, a specific policy on managing unreasonable conduct established to manage matters of this nature.

101 Ahpra, Communications management policy, July 2021.

102 Ahpra and the National Boards, A framework for identifying and dealing with vexatious notifications, December 2020.

103 Ibid.

Effectively identifying and responding to repetitive notifiers

While unreasonable conduct was not a focus for Ahpra staff when discussing vexatious notifications, several Ahpra staff members noted that it was important to identify what one staff member called 'serial notifiers'. Staff members confirmed that Ahpra does not have well-developed mechanisms for identifying and managing repetitive notifiers. Staff also suggested that repetitive anonymous notifications are particularly challenging to manage because the notifier's identity, and therefore history, is not available.

Concerns about Ahpra's ability to manage repetitive notifiers was also raised in some submissions to the review. One submission, for example, said:

> **… a practitioner and their colleague made repeated complaints about other health practitioners who had differing political views over the course of several days. These individuals were not picked up by the system as vexatious complainants and dealing with the complaints took a considerable amount of time.**

Similarly, a professional indemnity insurer suggested that it had assisted members with matters where a notifier had a 'historical pattern of making notifications about the same practitioner, same practice, or the same issues about multiple practitioners', but Ahpra did not notice this pattern. The insurer suggested that Ahpra should maintain a list of notifiers who have a history of making vexatious notifications that can be referenced when assessing a notification.

Based on available data, it is unclear to the review how often notifiers repeatedly make notifications about the same issue or the same practitioner. Ahpra staff suggested repetitive notifiers are not frequent. In the sample of 17 notifications considered by the review, it appeared that in 4 cases the notification was not the first one raised by the notifier about the practitioner.

In another 2 notifications it was unclear whether the notifier had previously raised a notification about the practitioner.

Due to the sample size, it is not possible to determine the likely volume of repetitive notifiers. More research or targeted measurement would be needed to determine how often notifiers make repeated notifications.

This notwithstanding, it is important to acknowledge that there may be some circumstances where notifiers may repetitively make groundless notifications or make multiple notifications intended to cause harm. There are examples where complaints processes have been used to repeatedly make complaints about health practitioners in Australia. For example, in *Tofler v Kitson*, the respondent had been the complainant against 3 specialist medical practitioners in at least 29 complaints lodged with the Health Complaints Commission.[104] In several instances, the Health Complaints Commission had determined that the complaints were vexatious. The respondent actioned 14 proceedings (with multiple ancillary interlocutory applications) in the Victorian Civil and Administrative Tribunal. These applications were refused, or where a technical breach had been identified, no further action was taken. Previously, the same complainant had pursued similar avenues against a different set of practitioners. Justice Quigley stated:

> **The pattern of behaviour … cannot be categorised as anything less than vexatious, threatening and vindictive. No citizen should be subject to this behaviour in the manner and frequency with which the respondent has pursued the applicants, as he did the other medical practitioners before them. The language, tone and the content of his communications with them, the Tribunal, the lawyers acting for the applicants and others associated with them is scandalous and cannot be permitted to continue. The course of conduct falls far short of the expectations of the proper use of the law and the resources of the Tribunal and the parties who are on the receiving end of the respondent's litigious action.**[105]

104 Tofler v Kitson *(Human Rights)* [2021] VCAT 994 (27 August 2021).
105 Ibid.

This matter bears particular importance in terms of understanding the potential impact of groundless, repetitive notifications on Ahpra's resources and staff and, perhaps most importantly, practitioners who are the subject of the notifications.

The National Law clearly establishes the right of people to raise concerns about the health, performance or conduct of registered health practitioners. The notifications process is vital to Ahpra and the Boards being able to identify risks to the public and take regulatory action where necessary. However, it is also important that this right is not abused by conduct that harasses or intimidates practitioners or Ahpra staff, or unreasonably interferes with the Ahpra's ability to receive and manage notifications and undertake its other regulatory functions. In particular, the review recognises that repeated, groundless notifications about a practitioner by the same notifier could have serious negative impacts on that practitioner.

In this context, the review recommends that Ahpra should give consideration to how it identifies and manages unreasonable conduct and unreasonably persistent notifiers. The review understands that Ahpra's current case management system may restrain how information about a notifier's history is made available. However, the review suggests that these technical issues should be addressed, as information about the notifier provides necessary context for Ahpra's management of each notification.

Ensuring more efficient decision making on repeated notifications

If Ahpra staff confirm a pattern of a notifier making the same notification about the same issues or the same practitioner, it is important that these concerns are managed effectively and efficiently.

The National Law requires that all notifications are considered by a Board (which is the relevant decision maker). Section 151(1)(d) of the National Law enables a Board to decide that a notification can be finalised without further action if 'the subject matter of the notification has already been dealt with adequately by the Board'. Ahpra staff are not empowered to decide to take no further action after considering a notification, including under s. 151(1)(d), unless that power has been formally delegated to Ahpra by the relevant Board. The result is that the process to close a notification where the issue has already been dealt with can be administratively burdensome and time consuming, with Ahpra having to prepare a paper and schedule the matter to be heard at a Board meeting.

The Research report stressed the importance of regulators empowering staff to exercise their judgement in identifying potentially vexatious notifications. It found that comparative regulators had said that:

> "…careful consideration and judgement from experienced staff – paired with appropriate levels of staff discretion and autonomy – is an effective and appropriate means of identifying and 'filtering out' vexatious complaints.[106]

Importantly, the Research report said that staff should be empowered to dismiss a complaint without always seeking formal approval. The Research report said it had examined only one international organisation where, due to legislative requirements, a committee was required to assess all complaints.

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

The review sees benefit in Ahpra and the Boards examining the powers currently held by, or delegated to, Ahpra staff to decide that a notification which raises the same issue(s), and is about the same practitioner, will not be considered further. Providing Ahpra staff with this power would allow Ahpra to quickly decide to take no further action on a new notification if the same allegation is alleged about the same practitioner. A swift decision would likely deter the notifier from continuing to raise the same issue again. It would also likely reduce the administrative burden of managing such notifications, and the associated stressors for practitioners.

However, the decision making process would need to consider appropriate quality assurance of such decisions.

Alternatively, the review suggests that Ahpra and the Boards could consider whether there are opportunities to streamline the consideration of matters that raise near identical issues about the same practitioner to ensure a prompt outcome.

Key findings

- The Framework addresses the issue of a 'vexatious notification' but does not consider the issue of a notifier repeatedly making the same or multiple notifications.
- Most of the Framework's indicators that a notification may be vexatious relate to 'unreasonable conduct'. However, the available evidence suggests that Ahpra more frequently identifies 'calculated conduct' as being related to vexatious notifications.
- It is unclear how regularly Ahpra deals with unreasonably persistent notifiers. Ahpra does not have a comprehensive published policy about how it identifies and manages unreasonable conduct, including unreasonable persistence.
- It would be helpful for Ahpra to consider how best to identify and manage unreasonable conduct and unreasonably persistent notifiers.
- Ahpra staff are not empowered to decide that no further action be taken on a notification that raises issues which have already been dealt with by a Board. The result is that the process to close a notification in these circumstances can be administratively burdensome and time consuming.

Recommendations

17. Ahpra should strengthen how it identifies and manages unreasonable conduct and unreasonably persistent notifiers.

Considering ways to reduce or prevent access to the notifications process

Australian courts generally have ways to prevent someone from continuously bringing legal proceedings without grounds. It is widely acknowledged that provisions to declare someone a 'vexatious litigant' have a high threshold test to prevent an unfair restriction on someone's right to access the justice system.

Victorian law defines a 'vexatious litigant' as someone who has 'habitually', 'persistently' and 'without any reasonable ground' brought vexatious legal proceedings.[107] Victorian legislation allows the Supreme Court to declare a person a vexatious litigant on the Attorney-General's application. If a person is declared a 'vexatious litigant', they cannot bring further legal proceedings without permission from the court. Similarly, in New South Wales, anyone who 'frequently and persistently takes legal action without reasonable grounds or for improper purposes can be subjected to a vexatious proceedings order'.[108]

There has been some criticism about the difficulty in declaring an applicant vexatious. The Victorian Parliament Law Reform Committee recommended, for example, that Victoria 'move away from the traditional approach to vexatious litigants, where orders are made only as a last resort in the most extreme cases, to a system of "graduated orders" like those used in civil cases in the United Kingdom'.[109]

These graduated orders would be based on responding to the seriousness of the vexatious litigant's behaviour. In summary, they could:

- restrain someone from continuing or bringing further interlocutory applications in existing litigation without permission
- restrain someone from continuing or bringing proceedings against particular people, organisations or about particular issues without permission
- restrain someone from continuing or bringing proceedings without permission.[110]

Considering the mechanism to declare vexatious applicants under Freedom of Information legislation

The *Freedom of Information Act 1982* (Cth) (FOI Act) includes provisions to manage what it terms a 'vexatious applicant'.[111] The FOI Act empowers the Australian Information Commissioner to declare a person to be a vexatious applicant in certain limited circumstances, including following repeated FOI access actions involving an abuse of process. To make this declaration, the Commissioner must be satisfied that:

- the person has repeatedly engaged in access actions that involve an abuse of process
- the person is engaging in a particular access action that would involve an abuse of process, or
- a particular access action by the person would be manifestly unreasonable.

107 Parliament of Victoria, Inquiry into vexatious litigants, Final report of the Victorian Parliament Law Reform Committee, December 2008. Accessed April 2023: www.parliament.vic.gov.au/images/stories/committees/lawrefrom/vexatious_litigants/final_report.pdf.

108 Supreme Court of New South Wales, Vexatious proceedings, May 2023. Accessed August 2023: www.supremecourt.justice.nsw.gov.au/Pages/sco2_practiceprocedure/SCO2_vexatiousproceedings.aspx.

109 Parliament of Victoria, Inquiry into vexatious litigants, Final report of the Victorian Parliament Law Reform Committee, December 2008. Accessed April 2023: www.parliament.vic.gov.au/images/stories/committees/lawrefrom/vexatious_litigants/final_report.pdf.

110 Ibid.

111 Refer to s. 89K(1).

An 'abuse of process' in this context includes, but is not limited to:

- harassing or intimidating an individual or an agency employee
- unreasonably interfering with an agency's operations
- trying to use the FOI Act to bypass access restrictions imposed by a court.[112]

In relation to determining whether a person has engaged in behaviour that is 'harassing or intimidating', the Commissioner must find evidence that the person's behaviour 'could reasonably be expected on at least some occasions to have the effect of, for example, tormenting, threatening or disturbing agency employees'.[113] The Commissioner suggests that evidence may include any workplace health and safety measures the agency has taken, police involvement or that a workplace protection order has been sought.

In relation to determining when a person has 'repeatedly engaged' in access actions involving an abuse of process, there is no fixed number to establish a pattern of repeated engagement and it is determined based on the individual circumstances of the matter:

> **... if it is asserted that a person is repeating a request that has earlier been processed and decided by an agency, or is harassing agency employees, a small number of requests may establish a pattern. On the other hand, if it is asserted that a person has repeatedly made different requests that in combination unreasonably interfere with an agency's operations, a higher number of requests may be required to establish a pattern of repeated requests.**

As noted in relation to courts and tribunals, given the seriousness of restricting access, vexatious applicant declarations are not frequent, or made lightly. Importantly, the Commissioner considers both the applicant and the agency's conduct when deciding whether to declare an applicant vexatious. In relation to agency conduct, the Commissioner may consider, for example, whether:

- deficiencies in agency administration impaired its processing of the person's requests
- actions taken by the agency contributed to or might explain the person's access actions
- the agency consulted with the person about their access actions before applying to the Commissioner for a declaration
- deficiencies in agency FOI administration should be addressed by the agency before further consideration is given to making a declaration.[114]

A declaration can only be based on one access action that involves either an abuse of process or is manifestly unreasonable.[115] However, the declaration may include terms and conditions beyond this, such as an agency not being required to consider further requests from the person unless the person has the Commissioner's written permission.[116]

The Commissioner generally publishes reasons for making a declaration, and it can also be revoked or varied by the Commissioner and appealed.[117]

While the notifications process is notably different from both the court and FOI contexts, the issues to be decided are remarkably similar.

112 OAIC website, 'Part 12: Vexatious applicant declarations', Version 1.5, October 2021. Accessed April 2023: www.oaic.gov.au/freedom-of-information/freedom-of-information-guidance-for-government-agencies/foi-guidelines/part-12-vexatious-applicant-declarations.

113 Ibid.

114 Ibid.

115 Refer to ss. 89L(1)(b) and 89L(1)(c).

116 OAIC website, 'Part 12: Vexatious applicant declarations', Version 1.5, October 2021. Accessed April 2023: www.oaic.gov.au/freedom-of-information/freedom-of-information-guidance-for-government-agencies/foi-guidelines/part-12-vexatious-applicant-declarations.

117 Ibid.

Managing unreasonably persistent notifiers

The National Law does not provide a means of restricting a notifier's access to the notifications process. However, if evidence suggests a high number of notifiers repeatedly make groundless notifications, or repeatedly make notifications intended to cause harm, further consideration could be given to whether an independent mechanism to address this behaviour is necessary.

Currently, the National Law gives the National Health Practitioner Privacy Commissioner jurisdiction for dealing with applications to declare an FOI applicant vexatious in the context of the National Scheme. It is noted that the Ombudsman and Commissioner roles are undertaken together within the NHPO. In practice, this means that the NHPO can declare a person to be a vexatious applicant in relation to Ahpra's FOI process.

The review can see benefit in establishing a system similar to that used under the FOI Act to address notifiers who repeatedly make groundless notifications, or repeatedly make notifications intended to cause harm. For example, the NHPO or another independent body could be empowered to declare a notifier to be a 'vexatious notifier' or an 'unreasonably persistent notifier'. The powers to make such a declaration could mirror the FOI Act's provisions to ensure there is a high threshold for making such a determination. Also, the relevant provision could provide for a range of different declarations based on the type and severity of the notifier's conduct. Declarations could range, for example, from limiting the number of notifications a notifier could make in a specified timeframe (for example, one per month) to requiring a notifier to get permission from the NHPO or other independent body before making another notification about a specific issue or specific practitioner.

The review suggests that legislative change could be considered by Health Ministers to establish an independent means of deciding whether a notifier's access to the notifications process should be limited due to unreasonably persistent conduct.

Key findings

- Australian courts generally have ways to prevent someone from continuously bringing legal proceedings without grounds. It is widely acknowledged that provisions to declare someone a 'vexatious litigant' have a high threshold to prevent the unfair restriction on someone's right to access the justice system.
- The FOI Act also includes provisions to manage what it terms a 'vexatious applicant'. As noted in relation to courts, given the seriousness of restricting access, vexatious applicant declarations are not frequent, or made lightly.
- The National Law does not provide a way to limit a notifier's access to the notifications process due to the notifier being vexatious or unreasonably persistent.
- There may be benefit in establishing a system similar to that under the FOI Act to empower the NHPO or another independent body to declare a notifier to be a 'vexatious notifier' or an 'unreasonably persistent notifier'.