The Medical Board & W/C Complainants

Dr Michael Epstein October 2013

This paper discusses two Medical Board investigations of IMEs notified by W/C claimants:

- These have been costly to the IME
    - emotionally
    - financially
    - time wasted
- These raise the issue of abuse of the process.

Issues Raised

- Recent inappropriate and vexatious notifications to the Medical Board
    - To punish the IME?
    - To overturn the opinion of the IME?
- The powers of the Medical Board of Australia
- Concern re response of the Medical Board
    - costly to both Medical Board and IME
    - not to notifier
- Only notifications regarding psychiatrists IMEs
- Issue for RANZCP

The Medical Board of Australia website states its role is to:

- register medical practitioners and medical students
- develop standards, codes and guidelines for the medical profession
- investigate notifications and complaints
- where necessary, conduct panel hearings and refer serious matters to Tribunal hearings
- assess International Medical Graduates who wish to practise in Australia
- approve accreditation standards and accredited courses of study

Investigate notifications and complaints

The Board states that it protects the community by investigating notifications and, when necessary, subsequently managing medical practitioners when:

- they have been found to have engaged in unprofessional conduct or professional misconduct or
- they have been found to have engaged in unsatisfactory professional performance or
- when their health is impaired and their practice may place the public at risk.

The Board is ‘notified‟ of an issue. The word “notification‟ is deliberate and reflects that the Board is not a complaints resolution agency. It is a protective jurisdiction and its role is to protect the public by dealing with medical practitioners who may be putting the public at risk as a result of their conduct, professional performance or health.

Anyone can make a notification to the Australian Health Practitioner Regulation Agency (AHPRA), which receives it on behalf of the Board. While registered health practitioners, employers and education providers may have mandatory reporting obligations imposed by the National Law, the majority of reports are voluntary.
Typically, notifications are made by patients or their families, other health practitioners, employers and representatives of statutory bodies.
The National Law provides protection from civil, criminal and administrative liability for persons who make a notification in good faith.

Grounds for voluntary notifications about medical practitioners include that:
the practitioner‟s professional conduct is or may be of a lesser standard than that expected by the public or the practitioner‟s professional peers

- the knowledge, skill or judgement possessed, or care exercised by the practitioner is or may be below the standard reasonably expected
- the practitioner is not, or may not be, a suitable person to hold registration
- the practitioner has, or may have, an impairment
- the practitioner has, or may have, contravened the National Law
- the practitioner has, or may have, contravened a condition of his or her registration or an undertaking given to the Board and/or
- the practitioner‟s registration was, or may have been, obtained improperly.

In deciding that a matter is grounds for a notification, the Board can consider a single notification or a number of notifications that suggest a pattern of conduct. The Board can also consider complaints made to a health complaints entity.

The Board may decide to take no further action in relation to a notification if:

- the Board believes the notification is frivolous, vexatious, misconceived or lacking in substance or
- it is not practicable for the Board to investigate or deal with the notification, given the amount of time that has elapsed since the matter that is the subject of the notification occurred or
- the person to whom the notification relates has not been, or is no longer, registered and it is not in the public interest to investigate or deal with the notification or
- the subject matter of the notification has already been dealt with adequately by the Board or

- the subject matter of the notification is being dealt with, or has already been dealt with adequately by another entity.

The decision to take no further action can be made at any time during the assessment or investigation of a notification, but only after careful consideration of the issues raised.

A decision by the Board to take no further action in relation to a notification does not prevent the Board or a Tribunal (the independent authority in the courts

system in each state and territory) taking the notification into consideration at a later time, as part of a pattern of conduct or practice by the medical practitioner.

The Board may decide to investigate a registered medical practitioner if it believes that:

1. the practitioner has or may have an impairment or
2. the way the practitioner practises is or may be unsatisfactory or
3. the practitioner‟s conduct is or may be unsatisfactory.

The Board may also investigate to ensure that a practitioner is complying with conditions imposed on their registration or an undertaking they have given to the Board.
The investigation is conducted by an investigator appointed by the Board.
How the investigation is conducted depends on the facts of the case. It will usually involve the investigator seeking extra information to inform the Board‟s decision. This may include obtaining:

- further information from the notifier
- responses and explanations from the practitioner about whom the notification was made
- information
- data from other sources such as pharmacy records, Medicare Australia data and so on.

In almost every case, medical practitioners and students who are being investigated will know about the investigation. They are given notice of the investigation and information about what is being investigated. The only exception is when the Board believes that giving notice may seriously prejudice the investigation, or may place someone‟s health or safety at risk or may place someone at risk of harassment or intimidation.

After analysing the facts of the case, the investigator prepares a report for the Board‟s consideration.

Performance assessment

The Board may require a medical practitioner to undergo a performance assessment if it believes that the way the practitioner practises the profession is or may be unsatisfactory.
Performance assessments are usually conducted by two (or more) independent medical practitioners who have the expertise to assess a practitioner in a particular field of practice.
Much of the assessment is usually conducted in the practitioner‟s place of practice and may include observation of consultations and/ or procedures, medical record reviews and case-based discussion. In some cases, the assessment may include simulation.

The Board pays for the assessment and the assessors write a report for the Board. After receiving the report, the practitioner who was assessed must discuss

the report, and ways of dealing with any adverse findings, with a person nominated by the Board. The person nominated to discuss the report will be a registered medical practitioner.

Actions the Board can take

The Board has the power to take a range of actions at any time after receiving a notification or after an investigation or a health or performance assessment. These actions include:

- a decision to take no further action
- referral to another entity such as a health complaints entity or
- the Board can take immediate action if this is necessary to protect the health and safety of the public. More detail on this power is published in an information sheet at www.medicalboard.gov.au

If the Board believes that a practitioner‟s conduct or performance was unsatisfactory or his or her health was impaired, it can:

- caution the medical practitioner and/or
- accept an undertaking from them and/or
- impose conditions on the practitioner‟s registration.

Alternatively, the Board may decide to refer a matter to a:

1. Panel:
    a. Health Panel or
    b. Performance and Professional Standards Panel
2. Tribunal.

The Particular Cases

The First Case – Dr L – an experienced forensic psychiatrist

The Charge:

- *The practitioner prepared and provided a report which included a possible diagnosis, without having met or performed a clinical assessment of the complainant*.
- (note, this was not the complaint made by the notifier)

What Happened?

- The notifier WS came for a medicolegal assessment by Dr L, a psychiatrist
- WS refused to sign the full disclosure document
- the psychiatrist did not meet WS but overheard him dealing with office staff

- Dr L thought WS sounded aggressive and angry.
- Dr L was told WS telephoned his lawyer and was told what WS had said.
- Documentation - described WS as a difficult employee and "paranoid".
- Dr L wrote a briefing note to the insurance company
    - He was unable to do the examination and expressed .
        - *concern about WS's behaviour*
        - *" file note that I have read from his manager which refers to his "paranoid behaviour" all raise the possibility that he does have a significant psychiatric illness. "*
        - *"may have a paranoid disorder".*
        - *urged the insurance company to warn future assessors that WS may be difficult and may make complaints about them although there was no indication of any physical threat.*
    - Dr L noted "*I had an enormous sense of relief when he left the premises. At that point it was important for me to ensure that he did not return."*

The Response

- The insurance company contacted Dr L and asked if they could use his letter to deny the claim as WS had failed to co-operate with a medical examination.
- Dr L agreed to this.
- A copy was sent to WS.
- WS complained to the Medical Board claiming
    - Breach of confidentiality
    - Provision of a psychiatric report when WS had not been interviewed or assessed by Dr L

Details of the complaint to the Medical Board

- In the open reception area, the Office Manager then contacted CCS via telephone who then contacted my Workers Compensation Lawyer, Ms E Y who then contacted me via telephone while I was still in the reception area. I

expected that the confidentiality of my discussion with my lawyer would be respected. However, I find a reference to it in Dr M's Report.
- Dr L had no authority (express or implied) to send in a report to CCS as I did not give consent in any form nor did he visit or meet with me."

Actions by the Medical Board

An independent report was sought from another psychiatrist who did not interview the complainant.

The independent psychiatrist Dr T (with little, if any civil forensic experience) came to certain conclusions.

- *The document to the referring solicitor is a psychiatric report offering diagnoses and recommendations.*
- *Dr L should not have used or referred to the information/data that he additionally received through his observations of the behaviour of the patient, without the consent of the patient and Dr L knowingly breached patient confidentiality*

The Medical Board complaint was re-defined;

Dr L provided a report which included a possible diagnosis, without having met or performed a clinical assessment of the complainant.

The issue of breach of confidentiality was excluded. The complaint lead to the establishment of a Performance and Professional Standards Panel. These are established if:

- the way a registered medical practitioner practises is or may be regarded as unsatisfactory or
- if the registered medical practitioner‟s professional conduct is or may be regarded as unsatisfactory.

A performance and professional standards panel consists of at least three members, selected from a list of approved persons. At least half, but no more than two-thirds of the members of the panel must be registered medical practitioners and at least one person must represent the community.

The matter was heard by a Performance and Professional Standards Panel on 25 February 2013.

Dr L was described as an impressive witness and the matter was thrown out within an hour.

(WS later made a complaint about the judge hearing his WC claim.)

Subsequently WS has appealed the decision of the Panel, this will be heard in a Civil Tribunal in Dec 2013.

<u>Commentary</u>

- The issue of confidentiality cannot apply in this context :

- All that was said by WS was said in the waiting room of a generic consulting room and overheard by others.
- The conversation with his solicitor was overhead by office staff.

- It is not uncommon to prepare reports about a claimant in the absence of the claimant, if this is stated openly, as it was, there can be no cause for concern.

- The briefing note prepared by Dr L was not a report. Dr L did not make a diagnosis and did not use terms that are part of any recognised diagnostic system.

- It may have been wiser for Dr L to use non clinical terms e.g. to refer to WS as a rude, unpleasant frightening man whom he did not want to see again, rather than use terms like ‘paranoid’..

- Dr L should have edited his report before it was disseminated to “ WS refused to co-operate and the interview could not proceed”.

The Cost to Dr L

- The time from the incident to the hearing - nearly 3 years - now the case is the subject of an appeal to the the Administrative Tribunal and is due to be heard in December 2013 so that will be 4 years
- Personal cost to Dr L so far has been about $25 000 in time to prepare, deal with lawyers etc.
- The matter has not finished.

The Second Case – Dr S another experienced forensic psychiatrist

The Medical Board of Australia alleged that a consultant psychiatrist, Dr S, was guilty of gross carelessness by making three incorrect statements in a medical report about KR.

There was no complaint as to the ultimate diagnosis reached by Dr S.

The medical report was prepared in December 2006 at the request of KR's former employer Australia Post for use in legal proceedings between it and KR.
Dr S was represented by senior counsel.

The WA State Administrative Tribunal heard the matter on 16 October 2012, almost 6 years after the report!

The Tribunal consisted of a Judge, and 3 members, 2 of whom are medical practitioners.

Dr S's report was 10 pages long of which the 1st seven pages contained all three of the allegedly incorrect statements. This section contained the history obtained and Dr S's opinion.

There was no complaint as to the ultimate diagnosis reached by Dr S.

The First Complaint

- *1. [KR] admitted that his depression settled somewhat in 1998.*

- In cross-examination, KR ultimately accepted that, if the statement had said that 'his depression settled somewhat in 1998 as a result of taking Zoloft', then he would agree with that statement.

The Second Complaint

Dr S wrote *'He was somewhat vague whether he remained on medication,* this was written in reference to the years between 1998 and 2004. KR worked as a self employed Bobcat driver between 1998 and 2004.

During that time he made twelve applications for employment and four applications for income protection and workers cover.

He stopped taking Zoloft every time he completed an Application because he thought that each Application was more likely to succeed if he could say that he was not taking any medication. He then resumed taking Zoloft within approximately three days.

When questioned, KR agreed that he stopped taking Zoloft so he could deny that he was currently taking any medication.

He acknowledged that he told Dr S that there were times when he went off his medication.

The Third Complaint

Dr S wrote '*He has now ceased his Zoloft (sertraline) although it is not clear when and his current medication is ...'*.

The tribunal was satisfied that KR did somehow convey to Dr S that, at the time of the consultation, he was not taking Zoloft.

The Tribunal have concerns as to the reliability of the evidence of both KR and JR (his wife).

Judge's reprimand of Dr S

The judge reprimanded Dr S for his indignant letter to the Board when he was informed of the complaints. Dr S described KR's complaint as "*vexatious, malicious, inappropriate and incorrect*". He wrote "*This man is currently behaving as he behaved on a number of fronts for many years and I don't imagine any response would reassure him*."

The judge stated: *No matter how unjustified a complaint might be thought to be, members of the public are entitled to bring their grievances to the appropriate authority, and to have them investigated. <u>They are entitled to be treated with respect</u>*.(my emphasis, I think the word respect should have been courtesy)

The Decision of the Tribunal

The complaints of gross carelessness are not made out and the application should be dismissed.

Counsel for Dr S foreshadowed an application for costs. The matter will be listed for directions on the question of costs.

Commentary

Both cases should never have come to a hearing and appeared demonstrably frivolous and vexatious. Why could they not have been heard by the Court with regard to the Claim?

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Dr S's case took almost 6 years to resolve and Dr L's is still not finalised some 4 years later.

Both were traumatic for the psychiatrists involved. The cost to Dr L was at least $25 000.

The Board website states that it may decide to take no further action in relation to a notification if:

- the Board believes the notification is frivolous, vexatious, misconceived or lacking in substance or

- the subject matter of the notification is being dealt with, or has already been dealt with adequately by another entity.

Both those situations apply in these cases.

Vexatious and frivolous complaints are being taken seriously by the Medical Board and there is considerable likelihood such notifications occurring more frequently in the future.

It appears that unhappy WorkCover Claimants seek to circumvent or to diminish the effect of opinions expressed by IMEs by making notifications to the Medical Board and this appears to be an abuse of process. There are no sanctions against the

complainant, the National Law provides protection from civil, criminal and administrative liability for persons who make a notification in good faith!

Defensive Actions

Both the cases discussed involved letters that, in retrospect, should not have been written on may well have escalated the situation. It would be wise to contact your medical defence organisation before responding intemperately.

If any potential problem arises with a person you have interviewed it is important to get in first and notify the referral source of the problem and document it but without using psychiatric terminology. For example “I saw Mr Smith who arrived late, was rude, swearing, abusive and uncooperative. He refused to answer questions and his manner was frightening. I terminated the interview”.

It may be that these types of vexatious and frivolous complaints go with the territory and that we will have to learn to accept this situation. I have a colleague working in Washington DC as part of a large psychiatric practice. He does not do medico legal work. Half the cost of the practice is to provide legal advice as members of the practice are sued frequently. He has come to learn to accept this situation. He said however that it was a bit much when someone who was suing him subsequently contacted him two or three months later requesting advice on treatment!

Further data is required to clarify the scope of the situation. If it appears that this is becoming a trend then the RANZCP executive should meet with the Medical Board of Australia to highlight these concerns. Frivolous and vexatious complaints are being taken seriously at enormous cost, both in time and money to the medical practitioners and the Board.