

# **External Review – Complaints Discrimination, bullying and sexual harassment**

## **2020 Report to CEO**

### **2020 Report to the CEO of the Royal Australasian College of Surgeons**

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# External Review – Complaints Discrimination, bullying and sexual harassment

## 2020 Report to CEO

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## 1. Introduction

In March 2015, the College established an Expert Advisory Group (**EAG**) to make recommendations to address issues of discrimination, bullying and sexual harassment (**DBSH**) in the surgical profession.

In November 2015, the College released its *Building Respect, Improving Patient Safety: RACS Action Plan on Discrimination, Bullying and Sexual Harassment in the Practice of Surgery*, which outlined the College's responses to the EAG Report.

As part of the Action Plan, the role of the External Reviewer - Complaints (DBSH) was established, to periodically review and report to Council on the College's DBSH complaints processes.

The first External Reviewer Report was provided to Council in October 2018 ('**First Review Report**'). This is the second Review Report to Council by the External Reviewer Complaints (DBSH), for the two-year period since the First Review Report, being October 2018 to 30 June 2020 ('**Review Period**').

## 2. Executive summary - Recommendations

Area	Recommendation
<p><b>Revised Approach</b></p>	<ol style="list-style-type: none"> <li>1. The Revised Approach for DBSH complaint handling is endorsed as appropriate and adapted to the limits on the College's powers and the environment in which it operates.</li> <li>2. The College should consider whether, and if so how, it wishes to address serious DBSH complaints and complaints by trainees about the alleged conduct of Fellows representing the College in the delivery of training services, including by adapting existing PCC Code of Conduct breach processes.</li> <li>3. The College can continue to undertake audit functions in respect of DBSH complaints that identify potential DBSH and safety risks in training environments. However, such audits should be conducted within strictly defined parameters (no investigation/findings of wrongdoing) and consistent with key guiding principles of confidentiality, impartiality and neutrality.</li> </ol>
<p><b>Visibility and Accessibility</b></p>	<ol style="list-style-type: none"> <li>1. Restructure the 'Feedback and Complaints' section of the website as detailed in this Report, clarify in the text of the website and collateral material the constraints on what the College will and will not do due to the limits on its powers, and review and update the <i>Complaints Handling Policy</i> to explain how the College will specifically address DBSH complaints. This is subject to any change in the role of the PCC, to hear and determine breaches of the Code of Conduct in respect of DBSH matters.</li> </ol>

	<ol style="list-style-type: none"> <li>2. Standardise the data and information categories relating to DBSH Complaints contained in the Building Respect Improving Patient Safety Progress Reports, undertake a comparison year on year across each category in future Building Respect Improving Patient Safety Progress Reports and also include the summary results in the Annual Report.</li> </ol>
<b>Responsiveness</b>	<ol style="list-style-type: none"> <li>1. Continue the current approach of initial email acknowledgment of complaint receipt within 24 hours and formal reply by the College within 24 – 48 hours within a business week.</li> <li>2. Gather data on actual timeframes from complaint receipt to outcome/close resulting from the application of the Revised Approach to DBSH complaints, and amend the <i>Complaints Handling Policy</i> current goal of 30 business days if necessary.</li> </ol>
<b>Restorative approaches to resolution of disputes</b>	<ol style="list-style-type: none"> <li>1. Ensure that all verbal and written communications with participants as part of the Revised Approach are strictly neutral, emphasising that no investigation or findings have or will be made by the College.</li> <li>2. The nature of the College’s complaint handling role under the Revised Approach and its restriction to informal resolution options, should be clearly communicated in all collateral relating to the complaints process.</li> <li>3. Expand the range of informal resolution options considered at the triage stage by the Triage Group. Create a ‘menu’ of options for reference that outlines the relevant inhouse and external resources available to provide specialist expertise to carry out these options.</li> </ol>
<b>Independence and Objectivity</b>	<ol style="list-style-type: none"> <li>1. In order to capture all relevant data, and promote consistency and transparency of treatment of DBSH complaints within the complaint handling model, refinements to the Triage Group and its processes are recommended as set out in this Report. This includes nominating a delegated decision-maker (eg. COO) and reducing the core Triage Group size, aligned to the key skills and perspectives required to inform the decision-maker –surgeon (EDSA); legal/risk; complaints handling (Complaints Lead); grievance resolution methods (People and Culture); and Professional Standards. Other College staff will be required to attend from time to time, where particular complaints involve specialist considerations (eg. Trainees).</li> <li>2. Include steps in the DBSH complaint handling process to facilitate the provision of information and access to support to respondents</li> </ol>

	<p>to complaints, as well as complainants.</p> <p>3. If a peer support model for respondents is proposed, conduct a formal risk assessment to identify different models and the individual and organizational risks and control measures associated with each.</p>
<b>Confidentiality</b>	<p>1. Continue to seek information sharing protocols with hospitals/employers containing appropriate provisions that facilitate the process of obtaining findings of investigations conducted by those external bodies.</p> <p>2. If the practice of checking College awards, appointments and other benefits with the Complaints Lead (and Resolve database) is to be continued, refine the check to ensure that withholding of any benefit only occurs where there is admission or acknowledgement of the alleged wrongdoing by the respondent/recipient or findings of wrongdoing have been communicated by the hospital/employer arising from their investigation.</p>
<b>Establish a framework of accountability</b>	<p>1. Develop standard template letters to the complainant (to be sent after the Complaint Lead initial intake discussion), the respondent (after the EDSA phone conversation advising of the complaint) and to both parties confirming the outcome of the complaint upon resolution/closure. These letters should reflect the principles underlying the Revised Approach of neutrality, making no findings and the role of the College in complaint handling.</p>
<b>Monitoring of complaint issues/trends</b>	<p>1. Develop and administer an ongoing user satisfaction feedback survey that can be completed verbally over the phone with the Complaints lead or on-line. This activity should be completed with complainants and respondents. The questions in the survey should be used as a script in direct phone calls to participants, to promote consistency of communication and information capture.</p> <p>2. Include the results of the user satisfaction feedback surveys in the Building Respect Improving Patient Safety Annual Progress Reports as an item, to monitor the effectiveness of the Revised Approach, identify trends and inform continuous improvement.</p>
<b>Centralised, anonymous, accessible and detailed information about complaints</b>	<p>1. Create 'DBSH Ready Reckoner' for users of Resolve and the Triage Group, listing the standard labels for each category of complaint, the relevant definitions/legal tests for each category and College-specific examples.</p>

<b>Protection for those who make complaints</b>	<ol style="list-style-type: none"> <li>1. Include the Victimisation Fact Sheet in the complaints information/collateral (as well as in the DBSH section).</li> <li>2. Include in the user satisfaction feedback survey a standard question to elicit information about the complainant's post-complaint experience in their work environment, as well as their experience of the College's complaint handling process and outcome.</li> </ol>
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### 3. Methodology

This Review consulted multiple sources of information to obtain a full picture of the College's approach to DBSH complaint handling over the Review Period, including an audit of randomly selected complaint files, interviews with key personnel, attendance at a Triage Group meeting and document review.

#### File Audit

Nine (9) DBSH complaint files closed during the Review Period (between 1 November 2018 to 30 June 2020) were randomly selected by me from a list provided of all such files opened in the Resolve electronic complaints management system.

In the initial random selection of nine (9) files:

- A. two files selected were out of scope, as being DBSH complaints by College employees. The scope of the Review was clarified to exclude such complaints by direct employees, which are handled by the College's People and Culture unit; and
- B. two files selected were reviewed, but determined to have been incorrectly categorised and entered into the Resolve system as DBSH complaints. One file related to a complaint about adverse professional comments between surgeons/fellows and the other file categorised as 'bullying' was a patient complaint against a surgeon about fees, outcomes and communication.

Accordingly, these four (4) files were deleted and replaced with four (4) additional files (randomly selected) to make a final total of nine (9) files (approximately 7% of the total closed files in the Review Period). This audited file included a cross-section of complaint subject matters, outcomes and locations (Australia and New Zealand).

#### Documents

I considered the most recent/currently applicable College policies and process documents located on the College website under the heading 'Feedback and Complaints' and 'Policies', including:

- Code of Conduct;
- Discrimination, Bullying and Sexual Harassment Policy;
- Discrimination, Bullying and Sexual Harassment Fact Sheet;
- Complaints Handling Policy;
- Complaints Form;
- Feedback and Complaints – Frequently Asked Questions; and
- Feedback and Complaints – Information for Trainees (draft only).

I was also provided with:

- material presented by College management to the Council in June 2019 and June 2020, regarding changes to the College’s approach to DBSH complaint handling; and
- ‘DBSH Complaints Revised Approach’ update presented to the Training Boards in August 2020.

### Interviews

I attended a weekly Triage Meeting (as an observer) and conducted interviews with key personnel as follows:

1. Complaints Lead – Loretta Drago
2. Deputy CEO and Chief Operating Officer – Emily Wooden
3. Executive Director Surgical Affairs Australia – Dr John Quinn
4. Executive Director Surgical Affairs New Zealand – Dr Richard Lander
5. Governance and Risk Manager – Dina Shehata
6. RACS External Lawyer – Michael Gorton (Partner, Russell Kennedy Lawyers)
7. Executive Project Lead, Building Respect Improving Patient Safety– Judy Finn
8. Manager Professional Standards – Rebecca Clancy
9. Head of Training Services – Veronica Vele
10. Chair, Board of Surgical Education and Training – Adrian Anthony

## **4. Structure of this Report**

As with the First Review Report, I have used the best practice complaints management principles recommended by the EAG as a framework for this Second Review Report:

- Visibility and Accessibility
- Independence and Objectivity
- Responsiveness
- Use of restorative approaches
- Confidentiality
- Accountability
- Monitoring and reporting

- Protection for complainants and prevention of victimisation

The First Report made Recommendations in each of these areas. This 2020 Review Report:

- A. considers the status of implementation of the First Report Recommendations;
- B. conducts a fresh assessment of the College's current complaint handling practices against the EAG Report best practice principles; and
- C. makes further Recommendations where appropriate, by way of ongoing continuous improvement.

## 5. Background – Revised Approach to DBSH Complaint Handling

### Informal and formal resolution options

When a complaint about potential DBSH is received, the initial step is to ‘triage’ or assess the complaint to determine:

1. what it is about and its level of seriousness;
2. what body/agency should deal with the complaint; and
3. the appropriate method/approach to handle the complaint.

There are two resolution pathways – ‘informal’ and ‘formal’. Characteristics of an ‘informal’ complaint resolution pathway are as follows:

- no determination is made by the College about whether there is substance to the complaint (in part or in whole);
- there are no ‘findings’ about what occurred as a matter of fact, or whether what occurred constitutes discrimination, bullying, harassment or sexual harassment, as defined at law and in the College’s policies;
- the process is neutral, seeking only to identify and communicate the respective perceptions and positions of the complainant and respondent, and explore the prospect of them resolving any differences/conflict and reaching a mutually acceptable resolution; and
- as there are no findings about what occurred, there is no basis for taking any actions against the respondent. The allegations are just that – allegations.

The EDSA ‘cup of coffee’ conversation (also referred to as a ‘profession led conversation’) that is now commonly used by the College is an informal alternative dispute resolution option. Other examples are a neutral person conducting ‘shuttle’ back and forth private discussions between the parties, facilitating a face to face discussion or engaging a third party to mediate.

Characteristics of a ‘formal’ complaint resolution pathway, being an investigation, are as follows:

- a determination is made about whether there is substance to the complaint (in part or in whole);
- there are ‘findings’ about what occurred as a matter of fact on the balance of probabilities and to an identified evidentiary standard, and whether what occurred constitutes discrimination, bullying, harassment or sexual harassment as defined at law and in the College’s policies; and
- in order to provide a sound basis for making such findings and determinations, a person (the investigator) must gather then evaluate relevant information. Where the consequences of the findings are potentially adverse to an individual in terms of disciplinary or other action or professional reputation, they should be provided with procedural fairness. This maximises

the prospect of reaching 'correct' findings as to what did and did not occur and mitigate the risk of legal claims. The process should be free from bias/presumption and provide full opportunity for anyone 'accused' of wrongdoing to understand and respond to the allegations against them.

Evidence on some files prior to the Revised Approach demonstrate that at times, the distinction between informal and formal processes within the College has been blurred. The limits on the College's powers and lack of clarity about its role resulted in 'quasi' investigations that extended beyond a neutral informal resolution process, but which were not able to meet minimum standards of procedural fairness or the expectations of participants.

Complainants and respondents were confused and dissatisfied with the process and outcomes. This resulted in legal representatives becoming involved and created risks to the College. Some communications were not always entirely neutral and respondents focussed on defending themselves, rather than being receptive to feedback about how their behaviour was perceived (rightly or wrongly) by others.

The College does not have adequate powers to effectively and efficiently conduct investigations of complaints, other than in respect of its own employees and contractors. This is acknowledged by the fact that the College's People and Culture department handles DBSH complaints involving its own staff. However, where the College is not the employer and does not control the workplace of the complainant, respondent and/or witnesses, it faces significant hurdles in seeking to conduct a sound, defensible and prompt fact finding investigation. For these reasons, any formal investigation is more appropriately conducted by the employer/principal, which has the primary legal liability and greater powers to require participation, not the College.

#### Continuous review and improvement

The First Review Report noted that the College's DBSH complaints process operates in a complex environment of professional and employment relationships, and external complaint and investigation processes by hospitals, employers and the Human Rights Commission. Further, the First Review Report observed that achieving best practice requires ongoing reflection and continuous improvement.

The College undertook that reflection against the recommendations of the First Review Report and its own direct learnings in carrying out its DBSH complaint handling functions, particularly with respect to investigations. This has resulted in a significant change in approach to DBSH complaint handling, referred to in this Review Report as the '**Revised Approach**'. The College has ceased conducting investigations of complaints and restricted its direct complaint handling activities to the following:

- a) triaging then directing complaints to the appropriate body/agency;
- b) exploring neutral, informal resolution options within the College where

- appropriate; and
- c) providing participant information and support during the externally-referred or internally-conducted process.

### Revised Approach

The Revised Approach can be understood as follows:

1. *Filter* – the College makes an initial determination from the information provided by/gathered from the complainant, as to whether the complaint is able and appropriate to be handled by the College internally, or directed externally to another body/agency ('filtered' out);
2. *Funnel* – if it is appropriate for the College to handle a complaint internally, the complaint is then addressed via an appropriate process adapted to the nature and seriousness of the complaint. This is limited to neutral, informal resolution options, such as the EDSA 'cup of coffee' conversation, facilitated or 'shuttle' discussions between impacted parties and mediation ('funneled' through the appropriate internal pathway);
3. *Facilitate* – the College stays in touch with the parties and facilitates the provision of information about the process and access to available support services during the complaints process, whether internal or external ('facilitate'); and
4. *No Findings* – at no stage does the College make determinations or 'findings' about the truth or otherwise of the allegations that are the subject of the complaint, or whether they constitute DBSH or other inappropriate conduct. This requires an investigation process, which is no longer undertaken by the College.

The Revised Approach was approved by the Council in June 2019 and implemented on a trial basis between January and June 2020.

The updated *Frequently Asked Questions* Fact Sheet on the College website states that the College's approach is to provide:

...timely, non-judgmental feedback to a surgeon whose behaviour has caused concern or distress to someone else. Simply letting them know that someone was adversely affected by their behaviour or conduct, without judging it or trying to work out who is right, triggers reflection and positive change. [Underline emphasis added]

As set out in the Fact Sheet and stated elsewhere on the website, this necessarily means that the College's functions under the Revised Approach are limited to 'advisory, feedback and support' that is 'informal and non-judgmental...'. This means the College's DBSH complaint handling role incorporates the following:

- providing information to complainants about the College complaint process

- (and its now-limited scope) and potentially available external processes;
- if appropriate, based on the nature and seriousness of the complaint, and with the necessary consents from the complainant, exploring internal informal resolution options (primarily profession-led conversations);
  - if not appropriate to handle internally, helping complainants navigate external complaints processes; and
  - in all cases, providing information and encouragement to complainants to access EAP or other support services.

I endorse the above-described change in approach, as being appropriate and adapted to the realities of the environment within which the College operates, subject to further comments about serious DBSH allegations (below). The Revised Approach assists the College to address DBSH in the practice of surgery in Australia and New Zealand, while acknowledging the legal and operational constraints that exist.

The EAG itself acknowledged in its 2015 Report that the College has limited powers (see EAG best practice principle *Protection for those who make complaints*). This fundamental change materially impacts the implementation of many of the EAG best practice principles and recommendations in the First Review Report, as identified in this Report.

### Serious DBSH allegations

DBSH complaints exist on a spectrum of seriousness. When the allegations in the complaint are at the less serious end of the spectrum, it is appropriate to explore informal resolution options. However, when the allegations are serious, it can be inappropriate to put them to a respondent in an informal way in order to explore resolution between the parties.

Serious DBSH behaviour may constitute a breach of the College's Code of Conduct, with the consequences of a proven breach outlined in the Code, as for other breaches. Unless the allegations are admitted by the respondent, it is necessary to make findings about whether they are substantiated or not, in order to have a proper basis for disciplinary or other action by the College that could be adverse to the interests of a Fellow, Trainee or SIMG.

However, under the Revised Approach the College no longer has an investigation 'lever' to make findings about serious DBSH allegations. It was noted in material distributed about the Revised Approach that 'serious and repeated' incidents of DBSH would be referred to the Professional Conduct Committee ('PCC'). However, there is a lack of clarity about whether and how the PCC would handle such matters. Currently, it appears that for a DBSH matter to be dealt with by the PCC, admissions by the respondent or findings by a third party agency/body disclosed to the College are required.

Accordingly, there is a 'gap' in whether and how the College addresses serious

DBSH complaints, that are assessed as inappropriate for informal resolution within the College, yet may constitute a breach of the Code of Conduct. It appears there are two options:

- a. refer externally for investigation/handling by the hospital/employer, and/or police if the alleged conduct also potentially constitutes a criminal offence. The College then 'vacates the field', and advises the participants it can take no further action, unless/until the College is advised by a third party of proven findings or convictions sufficient to found a breach of the Code of Conduct; or
- b. consider utilising/adapting existing PCC processes to permit hearing and determination of serious DBSH complaints. The PCC could conduct some form of objective, impartial process that provides procedural fairness to both complainant and respondent. It would then need to make sound, defensible findings about whether the alleged DBSH conduct occurred, if so, identify how it constitutes a breach of the Code of Conduct and apply appropriate sanctions (within the powers of the College).

I understand DBSH complaint matters have not historically been dealt with by the PCC. I note that DBSH complaints involve interpersonal grievances about individuals' subjective perceptions, feelings and 'grey' areas. This is particularly in bullying complaints, which involve a consideration of the defence of 'reasonable management action'. These issues do not arise in more straightforward matters involving clearer 'offences' that are resolved through direct, objective evidence - for example, excessive fees or surgical outcomes. A fair DBSH complaint investigation process needs to obtain information or 'testimony' from complainants, respondents and witnesses, as well as documents, records and other corroborative evidence.

I have not reviewed the current processes followed by the PCC to investigate and make determinations about Code of Conduct breaches. If the College wishes to explore this option, a review should be conducted of the possibility, and desirability, of adapting PCC processes to investigate/determine serious DBSH complaints, taking into account the unique nature of DBSH matters.

### Complaints by Trainees and the STBs

DBSH complaints by trainees are handled in the same way as complaints by other types of complainants, consistently with the Revised Approach. However, there is an additional consideration in respect of the College's stated obligation to provide a safe environment for the delivery of training, education, assessment and accreditation services to trainees. Further, as the College provides an education service to the trainees, persons acting on behalf of the College in delivering that service must not engage in conduct that discriminates against, harasses or bullies these training recipients.

The training environment is the workplace controlled by the hospital/ employer and the Fellows supervising and conducting the assessments are not employees of the College. It is worthwhile noting that the 2018 Building Respect Improving Patient Safety Progress Report data showed that 32% of all DBSH complaints were anonymous, 30% were by Trainees, and only 15% by Fellows. The 2019 Building Respect Improving Patient Safety Progress Report did not report the percentages of different complainant types. However, in both the 2018 and 2019 Progress Reports, the vast majority of complaints were about bullying (77% and 78% respectively). Bullying is a risk to health and safety that must be addressed. Unfortunately, it involves significant 'grey areas', particularly in the intersection between unacceptable behaviour and reasonable management action.

Given these considerations, the College has utilised another 'lever' to seek to manage risks of DBSH matters specifically in the training context. If there is a complaint of DBSH involving a trainee of sufficient seriousness, and/or a pattern or 'cluster' of less serious but similar complaints about a training environment, the College will conduct an audit as part of its usual accreditation functions. The audit will consider, amongst other things, the safety of the training environment (including psychological/mental wellbeing), suitability of personnel involved in delivering the education program and the policies and procedures of the hospital in respect of DBSH matters.

The audit does not, and should not, involve identifying or putting allegations against any individual. It is not an investigation and should not therefore make any findings. It is akin to a 'culture review' that gathers information more broadly from a range of sources and participants. It provides advice about systemic risks and recommends controls and strategies to address such risks. Ultimately, if those recommendations are not accepted, training accreditation will be removed.

An audit should never recommend disciplinary or other action against individuals. If disciplinary action or sanctions were to be imposed, a different process must be followed, of putting specific allegations of misconduct or behaviour to individual respondents, providing them an opportunity to respond, gathering other relevant information then making findings. This could be pursued through the PCC as outlined above, if the conduct of an individual Fellow providing the training service on behalf of the College was of sufficient seriousness and constituted a breach of the Code of Conduct.

The audit approach, which I understand is carried out by the STBs of the College, is an appropriate strategy provided audits are carried out within strictly defined parameters. A DBSH complaint against an individual is not proven, unless and until there is an admission of the conduct or an investigation finding. The mere fact that an allegation has been made against a person is insufficient to justify action against them by the College, as part of an audit process or otherwise. They should be treated as untested and unverified allegations.

Those persons undertaking the audit on behalf of the College, and any STB

members who are made aware of the DBSH complaint that has triggered the audit, should apply the following guiding principles:

- A. observe strict confidentiality of the identity of the alleged respondent and restrict the disclosure of any information to those with a demonstrated need to know, to minimise risks of defamation and other legal claims against individuals and the College;
- B. where necessary to communicate the nature of the DBSH concerns in order to assess the risk, describe them as 'allegations' that are unproven;
- C. maintain impartiality, neutrality and not proceed on any basis of presumption of truth to the allegations; and
- D. act within the constraints of an audit function, to identify risks and controls, not overreach by conducting 'fact finding' activities or drawing any conclusions about individuals.

## 2020 Recommendations – Revised Approach

1. The Revised Approach for DBSH complaint handling is endorsed as appropriate and adapted to the limits on the College's powers and the environment in which it operates.
2. The College should consider whether, and if so how, it wishes to address serious DBSH complaints and complaints by trainees about the alleged conduct of Fellows representing the College in the delivery of training services, including by adapting existing PCC Code of Conduct breach processes.
3. The College can continue to undertake audit functions in respect of DBSH complaints that identify potential DBSH and safety risks in training environments. However, such audits should be conducted within strictly defined parameters (no investigation/findings of wrongdoing) and consistent with key guiding principles of confidentiality, impartiality and neutrality.

## 6. Visibility and Accessibility

**EAG recommendation:** *Processes should be well-publicised and information made available about avenues for making complaints and options for resolutions.*

### 2020 Reviewer Comments

The College website has a section entitled 'Feedback and Complaints' which outlines the Revised Approach to complaint handling. This explains what the College can and cannot do and what other agencies/bodies do, within the new parameters.

The 'Feedback and Complaints' webpage is the entry point for all types of complaints, including outcomes from surgery, surgical fees, patient safety, professional performance and behaviour that could constitute DBSH. It also applies to all types of *complainants*, being:

- a) a member of the public, who is a recipient of surgery 'services' from a Fellow of the College; and
- b) a College Fellow, Trainee, SIMG or other person working with a Fellow, Trainee or SIMG, such as a non-surgical health professional.

The subsection 'What you can do' gives directions on how to make a complaint about the behaviour of a Council Fellow, Trainee or SIMG. This can be done by phone, or completing a Complaint Form (link provided) and emailing it to a dedicated email address or mail to a physical address.

The Complaint Form requires a complainant to complete and download the form and then email it to a complaints email address in order to lodge the complaint. There are two supporting fact sheets, 'Frequently Asked Questions' and 'Discrimination, bullying and sexual harassment', which provide further details.

All complaints received by the College, from whatever type of complainant, are handled through the one administrative process, broadly described as follows:

- the Complaints Lead receives/is provided with details of the complaint;
- the complaint is entered into the Resolve electronic database, given an appropriate category/subject title and number;
- the subject matter of the complaint is triaged/assessed, either by the Complaints Lead in consultation with the EDSAs or at the weekly Triage Meeting, to determine the most appropriate complaint handling approach; and
- the resolution of the complaint is monitored by the Complaint Lead through to matter close, with appropriate

information/support provided to the complainant during the process.

There is a subsection with details of the College's Support Program that is available to Fellows, Trainees and SIMGs. The supporting Fact Sheets are directed to the situation where the complainant is a Fellow or Trainee raising a complaint about the inappropriate behaviour of someone they work with. There is a separate 'Frequently Asked Questions' fact sheet specifically for Trainees, which is in draft/under development.

## Review of 2018 Recommendations – Visibility and accessibility

1. *Separate the documents and policies relating to the DBSH complaints process from other complaints information.*
2. *Rationalise the documents and policies relating to the DBSH complaints process, with the goal of providing concise and easy to follow information about the process.*
3. *Develop a short DBSH complaints process document/brochure, with an easy to follow process map using a user's journey approach. This document should be the standard information provided to all users of the complaints process.*

Complainants in DBSH complaint matters (properly categorised) are generally Fellows, Trainees or SIMGs, not members of the public. Their concerns predominantly relate to the conduct of colleagues towards them in their workplace, which is not directly controlled by the College.

It is acceptable to receive and handle all complaints through the same website page, Resolve database and subsequent complaint handling process. However, it would improve the clarity of the College's role with respect to DBSH complaints for Fellows, Trainees and SIMGs, if the College website and documents more clearly distinguished on the basis of *complainant* type ie. between 'patient' matters/complaints and 'worker' matters/complaints.

For example, the section '*What you can do*' could specifically address what a Fellow, Trainee, SIMG or other individual should do if their concern is about the conduct of a colleague towards them in a work context. There could be two specific subsections: '*What you can do...if you are a patient*' and '*What you can do...if you are a Fellow, Trainee or SIMG (or work with them)*'. Tailored Complaint Forms seeking more complaint-specific information and directly relevant guidance material (eg. Fact Sheets) could appear as pop-up screens/hyperlinks, once the appropriate complainant type was selected.

Creating complaint sub-pathways based on complainant type would assist complainants to more easily navigate the College website and access the information they need to assess whether to make a complaint and how it will be handled. They would be directed down the correct path from the outset, thus avoiding creating expectations that the process may not be able to meet. This approach would also promote more efficient and consistent categorisation and triage/assessment of complaints by the College.

A link could be created from the Trainee section of the College website back to the section '*What you can do...if you are a Fellow, Trainee or SIMG of the College (or work with them)*' in 'Feedback and Complaints'. This would clearly communicate to Trainees how they should raise a concern about the behaviour of a colleague that they believe constitutes DBSH, without them having to find different relevant parts of the website, or the College having to duplicate information about complaints in the Trainee section.

The *Frequently Asked Questions* Fact Sheet has been developed to provide standard information to users of the complaints process and goes some way to addressing the First Review recommendation. However, as also recommended in the First Review, a simple process map in the form of a flow chart would be useful. This map would set out, in pictorial form, the steps the College will (and will not) take in handling DBSH complaints, reflecting the Revised Approach of 'Filter, Funnel and Facilitate, with no Findings (from investigation)'. While it is inherent in the information on the website and policies, the Revised Approach could be more explicitly and clearly stated. This will prevent complainants misconstruing the College's role and being dissatisfied with the process and outcomes.

A *Complaints Handling Policy* is located in the 'Policies' section of the website (under 'About'). It is not referenced in the website section 'Feedback and Complaints'. It would be easier for complainants if the applicable *Complaints Handling Policy* for DBSH matters was referenced and hyperlinked within the 'Feedback and Complaints' section, consistent with the hyperlinks to the *Privacy Policy*, *Code of Conduct* and *Discrimination, Bullying and Sexual Harassment Policy*. For example, a hyperlink could appear under the subsection 'What we do' as follows: 'Our [Complaints Handling Policy](#) sets out our approach to addressing, managing and resolving complaints about the conduct of Fellows, Trainees and International Medical Graduates'.

It is noted that the current version of the *Complaints Handling Policy* applies to all types of complaints and all types of complainants, whether patients or Fellows, Trainees, SIMG and other workplace

participants. It is recommended that the *Complaints Handling Policy* be reviewed and updated to align with the Revised Approach now being taken in respect of DBSH complaints, as some aspects of the current policy are no longer applicable/appropriate.

4. *Redevelop the Complaints Form as an online smartform, with dynamic sections for links to definitions and relevant information.*

The College website notes that the current Complaint Form process is 'a bit cumbersome' and notes that a Smartform is under development. The Review was informed this would be implemented through future software releases. This should be pursued, potentially with two variations of the Complaint Form based on complainant type, as suggested above.

5. *Publish information about the DBSH complaints process, complaints statistics and outcomes, in the College's Annual Report.*

While not included in the College's Annual Report, the Review was informed that the information has instead been included in the Building Respect Improving Patient Safety Progress Reports for 2018 and 2019. The Complaints Data and Outcomes included in the Building Respect Improving Patient Safety Progress Reports is different across the two Building Respect Improving Patient Safety Progress Reports and should be standardised to facilitate (and include) a comparison in each Progress Report year on year. Recommended standard categories should include the following:

- Number of complaints by category – discrimination, harassment, bullying, sexual harassment;
- Type of complainant – Trainees, Fellows, non-surgical health professionals, SIMGs, public;
- Mode of resolution – external referral (and agency type), internal resolution (EDSA, facilitated discussion, mediation etc), unable to be addressed (and reason eg. anonymous, withdrawn/no consent to disclose, insufficient details); and
- Outcome – apology, acknowledgement, mediation agreement, sanctions etc.

Once a meaningful comparison is able to be made year on year for each of the identified measures, the results should be included in the College's Annual Report as a standard item. This will facilitate oversight by the Board of the College's overall position in key performance areas and complaint trends.

## 2020 Recommendations – Visibility and Accessibility

1. Restructure the 'Feedback and Complaints' section of the website to:
  - a. create two complaint pathways based on complainant type – '*What you can do...if you are a patient*' and '*What you can do...if you are a Fellow, Trainee or SIMG (or work with them)*';
  - b. create tailored Complaint Forms for each complainant type and reference directly relevant guidance material such as Frequently Asked Questions and policies (with hyperlinks) and complete development of the Complaint Form as a Smartform;
  - c. create a flow chart that simply and clearly sets out the Revised Approach to complaints that disclose potential DBSH – Filter, Funnel, Facilitate, and no Findings;
  - d. clarify in the text of the website and collateral material the constraints on what the College will and will not do, due to the limits on its powers ie. no investigations and informal resolution options only; and
  - e. review and update the *Complaints Handling Policy* to explain how the College will specifically address DBSH complaints, and reference the *Complaints Handling Policy* in the Feedback and Complaints section<sup>1</sup>.
2. Standardise the data and information categories relating to DBSH Complaints contained in the Building Respect Improving Patient Safety Progress Reports, undertake a comparison year on year across each category in future Building Respect Improving Patient Safety Progress Reports and also include the summary results in the Annual Report.

<sup>1</sup> These recommendations 1(a) to (e), relating to statements that the process involves making 'no findings', are subject to any change in the role of the PCC, to hear and determine breaches of the Code of Conduct in respect of DBSH matters. Such a process would result in findings being made by the College in those matters.

## 7. Responsiveness

**EAG recommendation:** A focus on early intervention requiring an immediate acknowledgement of complaints and prompt responsiveness in addressing them, relative to their seriousness and impact.

### Review of 2018 Recommendations - Responsiveness

#### 1. Set standard time frames for responses by parties.

##### Responses by parties involved in complaint

In terms of time frames for 'responses by parties' involved in a complaint, the Revised Approach no longer includes the College conducting investigations, or 'quasi'-investigations involving factual assessments that necessitate obtaining responses from parties<sup>2</sup>.

It was evident from the file review and interviews that when the College has attempted to investigate a complaint (as opposed to neutral resolution options), there could be significant delay due to the various constraints and challenges identified. One such difficulty was obtaining timely responses from parties over whom the College has no direction or control, as employer or otherwise.

The Revised Approach to DBSH complaints envisages only informal resolution methods. These are set out in the *Complaints Handling Policy*<sup>3</sup>. Essentially, they are neutral options that do not involve the College making any assessment of alleged facts by either party, nor any determination about whether there is substance to the complaint or a 'case to answer' by the respondent<sup>4</sup>. Accordingly, it is unnecessary to set standard time frames for 'responses by parties', as recommended in the First Review.

##### Responses/communications by the College

In terms of other timeframes involving responses and communications

<sup>2</sup> However, note that the current *Complaints Handling Policy* envisages that 'any Fellow, Trainee or SIMG against whom a complaint is made is entitled to receive sufficient details of the nature and circumstances of the allegations to allow them to fully respond to the allegations' – Page 2, 'Procedural Fairness'.

<sup>3</sup> See section 3.6 - page 6 of the *Complaints Handling Policy*.

<sup>4</sup> Note however section 3.5(c) – page 5 of the *Complaints Handling Policy*, which envisages that the person handling the complaint will 'establish the facts and gather the relevant information' and 'if, as a result, it is felt there is a case to answer, then the appropriate disciplinary and other organisational policies and procedures will be followed'. This is not appropriate/applicable to DBSH complaint handling under the Revised Approach, unless it is determined that the PCC will undertake hearing and determination of DBSH complaints that may constitute a breach of the Code of Conduct.

by the College with participants involved in a complaint, the *Complaints Handling Policy* provides as follows:

All complaints will be acknowledged as soon as possible, ideally within one business day.

All complainants will receive a response giving the outcome of their complaint as soon as possible and ideally within thirty business days of receipt. If the matter is more complex further acknowledgment will be sent explaining what further action is required to resolve the complaint and the likely timeframe.

The College appears to be meeting these timeframes for complaint receipt, acknowledgement and initial action, being assessment/triage. An acknowledgement email is sent by the Complaints Lead to a complainant as soon as a complaint is received, advising that contact will be made shortly and providing details of support services that are available. A formal reply is made within 24 – 48 hours in a business week. This continues the responsive and timely approach commended by the First Review.

The Complaints Lead continues to liaise with the complainant while the process is ongoing, from the assessment of the complaint at the Triage Meeting, through to complaint close.

The sample of 2020 files was not large enough to draw reliable conclusions about whether resolutions/file closures are occurring within the '30 business day' timeframe or not. However, it appears from the interviews conducted that under the Revised Approach there is clarity about the more limited range of neutral options that are available to implement for DBSH complaints. If an alternative dispute resolution option is considered appropriate and explored - most commonly an EDSA 'cup of coffee' conversation - this is facilitated by the Complaints Lead and the relevant EDSA and the matter is brought to closure without undue delay.

Data should be gathered on the timeframes from complaint receipt to close since implementation of the Revised Approach. The indicative timeframe/goal stated in the Complaints Handling Policy of 30 business days should be reviewed and if necessary revised in light of this analysis.

*2. Any timeframes set should be reflected in all DBSH complaints information.*

Currently, the College's receipt acknowledgement, formal reply and outcome response timeframes are not separately stated in the 'Feedback and Complaints' section. Rather, under the Revised

Approach, the section states under the headings 'What we do' and 'Profession led conversations':

We are committed to assessing and managing all concerns to ensure they are treated promptly and fairly. Each complaint is unique and is handled individually, based on the information provided.

It is considered that this statement/commitment is appropriate in the circumstances of the Revised Approach. Provided the detail of the indicative timeframes is included in the *Complaints Handling Policy*, and those timeframes are able to be adhered to in a practical sense to facilitate prompt treatment of complaints, it is not essential to repeat the timeframes in all of the complaint collateral.

## 2020 Recommendations – Responsiveness

1. Continue the current approach of initial email acknowledgment of complaint receipt within 24 hours and formal reply by the College within 24 – 48 hours within a business week.
2. Gather data on actual timeframes from complaint receipt to outcome/close resulting from the application of the Revised Approach to DBSH complaints, and amend the *Complaints Handling Policy* current goal of 30 business days if necessary<sup>5</sup>.

<sup>5</sup> Note the recommendation to generally review and update the Complaints Handling Policy in the *2020 Recommendations – Visibility and Accessibility*

## 8. Restorative approach to resolution of disputes

**EAG recommendation:** *Focus on the impact of behaviours in the workplace and on others (such as colleagues and patients), aim at improving insight of participants and behaviour change.*

### 2020 Reviewer Comments

The 2018 Review Report highlighted the challenges faced by the College in conducting investigations into DBSH complaints. The majority of the 2018 Recommendations under this category of 'Restorative approach to resolution of disputes' sought to address the consequent problems that arose - establish clear triaging and decision-making criteria for initiating an investigation and develop standard terms of reference and a work flow map for investigations.

However, the 2018 Review Recommendations did not address the underlying causes of the identified problem, which are twofold:

1. lack of clarity in maintaining the necessary distinction between informal and formal resolution options to resolve DBSH complaints; and
2. the College's lack of 'jurisdiction' and consequent powers to effectively initiate and conduct formal investigations of DBSH complaints.

The decision to discontinue formal investigations by the College and strictly confine the College's DBSH complaint handling role to neutral, informal options under the Revised Approach addresses the various problems previously identified with the College trying to conduct investigations and addresses the 2018 Recommendations relating to investigations.

The Revised Approach also improves the prospect of achieving behaviour change, as recommended by the EAG. When individuals are accused of wrongdoing, either directly in an investigation process or indirectly in an informal process that is not perceived to be neutral, their focus will naturally be to defend themselves. They are less likely to develop insight about the impact of their behaviour on others and embrace the opportunity to change. Formal investigations, even those conducted fairly and efficiently, are difficult for all participants and are destructive, not restorative, of professional and personal relationships.

#### Expanding the 'menu' of restorative approaches

There is considerable reliance upon the EDSAs in implementing informal alternative resolution options. The 'cup of coffee' conversation appears to now be the primary resolution method utilised. These are referred to as 'profession led conversations' on the College website and collateral material.

The EDSAs indicated they did not find the burden of carrying out this function

onerous. It appears that the direct peer-provided feedback by senior respected Fellows is of significant benefit in promoting greater insight and behaviour change. It should be continued as primary informal resolution option where appropriate, given the nature and seriousness of the allegations comprising the complaint.

Nevertheless, it is recommended that the College expand the range of informal options considered at the triage stage by the Triage Group. This can include shuttle discussions, facilitated discussions and mediation (internal depending on in-house capabilities and/or by an external third party). A 'menu' could be created, of potential informal options for consideration and implementation in the circumstances of each particular complaint. This may assist in improving the prospects of the parties reaching a mutually acceptable resolution, behaviour change and restoration of relationships.

Alternative dispute and conflict resolution is a particular skill. In some organisations, members of the People and Culture/HR function possess the necessary qualifications, training and experience in this area. However, if appropriate resources are not available (which is often the case in smaller organisations), specialist consulting services are available to provide the 'menu' of potential options – facilitated discussions between impacted parties, restorative processes and structured mediation.<sup>6</sup> If a matter has sought to be resolved by an EDSA without success, or the triage assessment is that another process could be more appropriate, the consultant can consider, advise on and implement different alternative resolution options.

### Communications

The changes to the nature of the College's DBSH complaint handling role under the Revised Approach, namely its restriction to informal resolution options, should be clearly communicated in all collateral about the complaints process. This can be seen in the 'Feedback and Concerns' section of the website and *Frequently Asked Questions* Fact Sheet. However, the *Complaints Handling Policy* should be amended (as previously recommended) to reflect the specific approach to DBSH complaints.

It is essential that complainants and respondents are clear about the nature and scope of the College's role, and what it is able (and unable) to do in respect of DBSH matters. This will avoid creating expectations that the College cannot meet, causing participant distress, dissatisfaction and potential additional complaints about the College. As noted above in the *2020 Recommendations – Visibility and Accessibility*, this could be made more explicit on the website and complaint collateral.

<sup>6</sup> For example: <https://www.worklogic.com.au/services/facilitated-discussions/>; <https://proactive-resolutions.com/>; <https://www.segalmediationgroup.com.au/>

## 2018 Recommendations – Restorative approach

1. *Continue to encourage a restorative approach and early resolution for less serious complaints.*

The EDSA ‘cup of coffee’ conversation as an informal, neutral resolution option has been implemented as part of the Revised Approach with positive effect. This should be continued.

2. *Establish clear triaging and decision making criteria for the initiation of an investigation.*
3. *Develop standard terms of reference which can be adapted to each situation.*
4. *Finalise a concise workflow map for the investigation process.*

The College no longer conducts investigations of DBSH complaints. The College’s role is restricted to informal options involving neutral alternative dispute resolution (‘no findings’). The Revised Approach implemented from January 2020 is endorsed<sup>7</sup>.

Where informal options have been unsuccessful, or the nature of the DBSH complaint requires formal investigation because of its nature and seriousness, such investigation should be conducted by the employer/principal who controls the workplace in which the alleged DBSH has occurred.

The above 2018 Recommendations 2, 3 and 4 are therefore no longer applicable.

## 2020 Recommendations - Restorative approach

1. Ensure that all verbal and written communications with participants as part of the Revised Approach are strictly neutral, emphasising that no investigation or findings have or will be made by the College.
2. The nature of the College’s complaint handling role under the Revised Approach and its restriction to informal resolution options, should be clearly communicated in all collateral relating to the complaints process.

<sup>7</sup> Subject to the consideration of a potential change in the role of the PCC to address the ‘gap’ in respect of serious DBSH complaints, in which the PCC would hear and determine breaches of the Code of Conduct in respect of such matters. If such a process were implemented, it would result in findings being made by the College in those matters.

3. Expand the range of informal resolution options considered at the triage stage by the Triage Group. Create a 'menu' of options for reference that outlines the relevant inhouse and external resources available to provide specialist expertise to carry out these options.

## 9. Independence and Objectivity

**EAG recommendation:** *Build confidence and integrity and ensure complaints are addressed in an equitable, objective and unbiased manner.*

### 2020 Reviewer Comments

The 2018 Review recommended a more formalised and structured approach to the triage of complaints by establishing a Triage Group, consisting of a small number of permanent members who meet regularly to discuss all the DBSH complaints and decide on their management. The stated purpose was ‘to broaden the scrutiny and independent oversight of the complaints processes and decrease the structural risk and burden of complaints management devolving to just one or two people or positions’.

#### Triage Group

The Triage Group meets weekly. It has a large number of attendees<sup>8</sup>. The meeting Agenda covers New Complaints, Items for Actioning, Legal/Other, Issues referred to Professional Standards, Issues Closed and Pending – Awaiting Further Information. It appears from the Minutes and Agenda reviewed that the Triage Meeting addresses a range of complaints not limited to DBSH complaints (for example, a complaint by a patient about surgery outcomes and surgeon communication).

The Triage Meeting attended by the 2020 Reviewer did not have any New Complaints that needed to be triaged. However, interviews suggested that the appropriate course of action for each complaint is determined through general discussion and a consensus position reached.

#### Respondent information and support

Complainants should be given support and encouragement to make and progress complaints about behaviour that may constitute DBSH. In a neutral resolution process/pathway, no view is formed by the College about the allegations that are the subject of the complaint. The focus is on exploring whether there is potential for the parties to resolve the complainant’s grievance, without resort to formal investigation or other processes.

The prospect of success of informal resolution processes is enhanced if the respondent clearly understands what the process entails and the College’s role. It is appropriate within the framework of the Revised Approach that respondents be given information and access to support, appropriately tailored but generally consistent with that provided to the complainant at all stages of the process. If a respondent

<sup>8</sup> For example, 13 attendees at the 1 September 2020 meeting, with three apologies; 15 attendees at the 8 September 2020 meeting with one apology

feels they have been treated equitably by the College as part of the neutral resolution process, there is greater potential for behaviour change and restoring relationships.

With respect to complainants and respondents, preservation of confidentiality in DBSH matters is of critical importance. Only those persons with a demonstrated 'need to know' about the fact and subject matter of the complaint should be made aware. Disseminating sensitive information contained in DBSH allegations to any wider audience creates risks of defamation and other legal claims. It can also adversely impact the confidence of participants in the complaint handling process and diminish the prospect of restoring relationships.

As noted above, it is preferable for complainants and respondents to be provided with the same neutral information about the complaints handling process and available support services (such as EAP) if they require additional personal support.

For these reasons, professional peer support models carry risks to the individuals who provide such support, as well as the College. There are also real challenges for peer supporters in maintaining appropriate professional boundaries and striking a safe balance between providing advice in what is a difficult specialist area, and neutral support.

If there is a strong desire to explore peer-support for respondents, it is recommended that the College undertake a formal risk assessment to identify different models and the individual and organizational risks and control measures associated with each. As part of the assessment, consideration can be given to whether peer support should be limited to respondents or extended to all participants in DBSH complaint matters.

## 2018 Recommendations – Independence and objectivity

1. *Establish a Triage Group to meet regularly to make decisions in relation to the most appropriate way to address and ideally resolve complaints.*
2. *Ensure this structural arrangement is reflected in all DBSH complaints information.*

These Recommendations were implemented. The Triage Group meets weekly. Reference is made in the DBSH collateral to triaging complaints (eg. *Frequently Asked Questions* Fact Sheet).

## 2020 Recommendations – Independence and objectivity

1. In order to capture all relevant data, and promote consistency and transparency of treatment of DBSH complaints within the complaint handling model, the following refinements to the Triage Group and its processes are

recommended:

- a) all complaints received should be tabled as New Complaints at the Triage Meeting. None should be addressed by separate discussion outside the Triage Group, even if apparently straightforward. For such straightforward matters, the Complaints Lead may put a recommendation to the Triage Group for endorsement that the complaint be handled in a particular way with brief reasons eg. 'referral to HCC, relates to patient complaint about surgery outcome';
- b) one person/position (for example, the Chief Operating Officer) should be given delegated decision-making accountability for the three key decisions involved in triaging complaints within the Revised Approach:
  - i. the decision to 'filter' out to an external body/agency or handle internally via an informal resolution pathway within the College; and
  - ii. if internal, the decision about the appropriate informal resolution option to be explored, the steps to be taken in implementing that option and by whom ('funnel' to a profession-led conversation, facilitated discussion, mediation etc); and
  - iii. identifying and managing specific legal risks to the College arising from particular complaint scenarios and any steps required to manage such risks, including potential referral to the PCC<sup>9</sup>;
- c) the Triage Group permanent core group be reduced and aligned to the key skills and perspectives required to inform the decision-maker –surgeon (EDSA); legal/risk; complaints handling (Complaints Lead); grievance resolution methods (People and Culture); and Professional Standards. Other College staff will be required from time to time, where particular complaints involve specialist considerations (eg. Trainees). They will be invited to attend the Triage meeting to obtain their targeted input and advice on those matters. Actions/outcomes determined at the Triage Group meeting can be separately communicated to those whose areas are consequently impacted; and
- d) create a decision-tree flow chart to assist the Triage Group (and delegated decision-maker) in its decision-making on how to address complaints, based on the Revised Approach and underlying principle of neutrality in the College's handling of all DBSH complaints ('no findings')<sup>10</sup>.

<sup>9</sup> Subject to the consideration of a potential change in the role of the PCC to address the 'gap' in respect of serious DBSH complaints, in which the PCC would hear and determine breaches of the Code of Conduct in respect of such matters. If such a process were implemented, it would result in findings being made by the College in those matters.

<sup>10</sup> The Triage Group should also be provided with the 'DBSH ready reckoner' setting out the relevant legal tests and considerations for determining discrimination, bullying, sexual harassment and victimisation, referred to in *2020 Recommendations – Information Systems* – see further below

2. Include steps in the DBSH complaint handling process to facilitate the provision of information and access to support to respondents to complaints, as well as complainants<sup>11</sup>.
3. If a peer support model for respondents is proposed, conduct a formal risk assessment to identify different models and the individual and organizational risks and control measures associated with each.

<sup>11</sup> See also recommendations in relation to standard template letters to complainants and respondents – *2020 Recommendations – Framework of Accountability*

## 10. Confidentiality

**EAG recommendation:** *Confidentiality of the process is essential and should be guaranteed.*

*Confidentiality of complainants should be respected where possible, while investigations focused on the nature of the allegations with specific identifiable information only provided when needed.*

*Confidentiality should not be treated as secrecy, and complaint outcomes should be appropriately communicated to participants in the process.*

### 2020 Reviewer Comments

As noted by the 2018 Review, evidence on the files indicates confidentiality in the handling of DBSH complaints is given the highest priority by the College and those involved in the process. The complainant's consent to identify them to other parties is discussed at the outset and obtaining consent is a key criterion for determining the appropriate pathway to handle the complaint. This 2020 Review makes the same observations and endorses the College's approach to preserving confidentiality in this regard.

The 2018 Review further noted the challenge presented by parallel complaints processes, namely, investigations undertaken by hospitals and other employers of complainants/respondents. In some circumstances in the past, the College's complaints process was suspended because a similar process was already underway in a hospital. However, in some matters, the hospital/employer would not disclose the findings of their investigation due to confidentiality concerns, and/or a participant may withhold consent to disclose that information to the College as a third party.

Under the Revised Approach, the College will only explore options for resolution that do not involve findings about the substance of the allegations in a complaint. There will be no 'parallel' investigations by the College, or the College deferring its own investigation pending the hospital/employer's investigation. The College no longer conducts investigations. The hospital/employer will be the relevant body (if any) investigating allegations of DBSH by its employee(s) or contractor(s).

In some circumstances, the Triage Group may consider it appropriate to explore informal resolution options through the auspices of the College, regardless of the actions taken by the hospital/employer. This may be open, depending on the nature and seriousness of the allegations and the attitude of the parties (complainant and respondent). This would be a matter for assessment by the Triage Group consistent with usual principles (discussed above).

Information sharing protocols negotiated between the College and hospitals/employers may allow for the findings of an investigation to be disclosed to

the College, subject to the consent of the participants (or otherwise redacting details where consent is not obtained). I understand the College has recently adopted such an information sharing protocol, which it aims to include as a requirement of hospital accreditation. This initiative will be implemented progressively over the next 12 months. Without being provided with such findings by the relevant third party, the College is unable to fairly and properly take adverse action against a Fellow, Trainee or SIMG.

The EAG recommendation notes that *'investigations focused on the nature of the allegations with specific identifiable information [should] only [be] provided when needed.'* When a formal investigation is conducted, procedural fairness requires that the respondent be provided with sufficient information about the allegations to fully understand what is being put against them, to enable them to respond. Accordingly, if an investigation takes place, confidentiality cannot be 'guaranteed' as it may be necessary to disclose details provided by participants in the proper and fair conduct of the investigation.

The College no longer conducts investigations and accordingly confidentiality concerns do not arise specifically in that context. Nevertheless, if the College seeks to resolve a matter informally, for example by a 'cup of coffee' peer to peer conversation, sufficient details of the concerns (allegations) need to be put to enable the respondent to understand and have any prospect of gaining insight and altering their behaviour. This necessarily requires provision of some details. The prudent approach is to continue the practice of obtaining consent to disclose the identity of the complainant and details of the complaint.

## 2018 Recommendations - Confidentiality

1. *Continue to ensure confidentiality is a cornerstone of the complaints process.*

Implemented.

2. *Establish a process whereby the College can ensure its actions are consistent. This could be done by consulting members or a member of the Triage Group on potential awards and appointments.*

The 2018 Review recommended that the identity of parties (when given) and outcomes of complaints should be held (in confidence) by the College, to 'ensure consistent approaches to issues and to the parties involved'. The example given was if the College facilitated an outcome to a complaint which involved an apology, an acknowledgement of wrong doing and a sanction; but contemporaneously another area of the College appointed or awarded the same individual. A recommendation was made to 'consult members or a member of the Triage Group on potential awards and appointments'.

This has been implemented by the College, as staff members responsible for managing awards and appointments of Fellows check with the Complaints Lead before such decisions are implemented to see if there are complaints against the individual concerned.

The College has implemented this recommendation in good faith. However, in my view, such a check carries risk if an award, appointment or other benefit is withheld other than in the limited circumstances noted in the 2018 Recommendation, namely, 'an acknowledgement of wrongdoing'. Unless there is an admission of the alleged behaviour by the respondent, in the absence of findings made by an investigation there is no objective, sound basis for any detrimental action by the College. The complaint is simply that – a complaint containing allegations that have not been proven or disproven. The other situation in which detrimental action may safely be taken by the College is if the hospital/employer conducted an investigation and provided the findings of wrongdoing to the College.

*3. Review MOUs to ensure external complaint outcomes can be appropriately shared with the College.*

The College should continue to seek information sharing protocols between the College and employers/hospitals, with appropriate provisions to facilitate hospitals/employers advising the College of the findings of investigations conducted by them, subject to the necessary privacy consents to such disclosure and use by the participants.

## **2020 Recommendations - Confidentiality**

1. Continue to seek information sharing protocols with hospitals/employers containing appropriate provisions that facilitate the process of obtaining findings of investigations conducted by those external bodies.
2. If the practice of checking College awards, appointments and other benefits with the Complaints Lead (and Resolve database) is to be continued, refine the check to ensure that withholding of any benefit only occurs:
  - a. where there is admission or acknowledgement of the alleged wrongdoing by the respondent/recipient – noting that this does not automatically extend to an apology, which may not involve any admission of the alleged conduct and be limited to an expression of regret for how the complainant felt; or
  - b. findings of wrongdoing have been communicated by the hospital/employer arising from their investigation.

## 11. Establish a framework of accountability

**EAG recommendation:** *Establish a framework of accountability for taking, and reporting on, the actions and outcomes arising from complaints to participants in the process.*

### 2020 Reviewer Comments

Evidence on the files indicates that the Manager Complaints Resolution, and now Complaints Lead, regularly updates parties on the progress and outcomes of the complaints handling process.

As noted above in respect of 'Independence and Objectivity', the accountability framework would be further enhanced by nominating a delegated decision-maker in the Triage Group with ultimate responsibility for determining, on advice from key stakeholders, the applicable complaint handling approach. The Triage Group meetings then operate as the forum to oversight administrating and progressing all of the actions to implement those decisions, through to closure.

### 2018 Recommendations – Framework of accountability

1. *Develop a standard complaints acknowledgement letter, which includes or attaches standard information about the complaints process, to be used on all complaints files.*

The College has developed a standard Acknowledgement email that is sent to the complainant, providing details of support services available. It does not attach standard information about the complaints process.

It would be of assistance for the Acknowledgement email to provide a <https://> reference/link to the relevant pages on the College website 'Feedback and Complaints'. This would provide all of the up to date, relevant information relating to complaints and ensure complainants understand the College's role in complaint handling and restrictions on the scope of actions it may take under the Revised Approach.

After the Complaints Lead has communicated with the complainant, a follow-up letter should be sent, confirming the conversation and summarising key steps in the process, such as the determination of the appropriate pathway by the Triage Group. A template letter in this regard may assist in ensuring consistency in written communications with complainants.

2. *Develop a standard respondent letter, informing the respondent of the complaint, which includes or attaches standard information about the complaints process, to be used on all complaints files.*

There is a standard Respondent letter, however it appears that this is not generally used for DBSH complaints, but for patient communication/care matters. For DBSH complaints, the EDSA usually contacts the respondent by phone to organise a meeting to discuss the matter, rather than proceed by a letter. These steps are recorded in Resolve.

The initial phone call approach to a respondent, advising them of a concern that has been raised, is less formal and confrontational than a letter. It is suited to the Revised Approach, where the College's role is to seek to explore informal resolution options.

However, a follow-up letter to the respondent should then be sent, drafted consistently with the neutral tone of the Revised Approach and providing the same information about the College's approach to DBSH complaint handling and available supports that is provided to the complainant – see *2020 Recommendation – Independence and Objectivity*. A template letter of this kind assists in ensuring consistency in written communications with respondents, and as between complainants and respondents.

3. *Develop a standard complaints outcome letter, to be used when a matter is finalised.*

It would similarly be useful to develop a template letter to both parties when a complaint is closed, with different options depending on the pathway, for example:

- external or internal – if 'filtered' to an external body, brief reasons as to when and why this was done, offering any ongoing support; and
- if internal, what option was explored, whether it was successful or not, if successful the outcome/resolution between the parties, acknowledging the parties' participation, reiterating access to support services etc.

Template letters of this kind promote consistency of treatment and communication in complaint handling. They are a useful adjunct to the facilitation of information and support provided to all participants by the Complaints Lead, whether the pathway selected is external or internal.

## 2020 Recommendations – Framework of accountability

1. Develop standard template letters to the complainant (to be sent after the Complaint Lead initial intake discussion), the respondent (after the EDSA phone conversation advising of the complaint) and to both

parties confirming the outcome of the complaint upon resolution/closure. These letters should reflect the principles underlying the Revised Approach of neutrality, making no findings and the role of the College in complaint handling.

## 12. Monitoring of complaint issues/trends

**EAG recommendation:** *Resolution rates and user satisfaction should be a feature and used to inform continuous improvement and assess the quality and effectiveness of complaint mechanisms and further investigations.*

### 2020 Reviewer Comments

As noted above, the Building Respect Improving Patient Safety Annual Progress Reports for 2018 and 2019 contain statistical analysis of DBSH complaints and outcomes, including resolution rates. Recommendations have been made to standardise these measures and compare year on year to identify trends (see above: '2020 Recommendations - Visibility and Accessibility').

As noted in the 2018 Review, it is challenging to seek feedback from complainants and respondents in DBSH matters about the complaint handling process, which can be impacted by dissatisfaction with the outcomes. Improved clarity about the changed, limited role of the College under the Revised Approach will assist in addressing one potential source of participant dissatisfaction.

Despite these difficulties, if the effectiveness of the College's DBSH complaint process generally, and the Revised Approach specifically, is to be assessed, a more formal and consistent approach to gathering information about user experience is recommended.

### 2018 Recommendations – Monitoring complaint issues and trends

1. *Develop and administer ongoing user satisfaction feedback surveys.*
2. *Report on the results of the user satisfaction surveys to inform continuous improvement and assess the quality and effectiveness of the complaint mechanisms.*

The College has recently implemented a system of obtaining feedback by way of a phone call from the Complaints Lead to the complainant, 3 months after closure of the complaint in the Resolve system. The fact of the call, and any feedback obtained, is recorded in Resolve. The Review was informed that early anecdotal feedback from complainants on the Revised Approach is being used to inform continuous improvement to the complaints process.

This approach should be supplemented with a simple but formal user

feedback survey that can be completed on-line by all participants in the complaints handling process, both complainants and respondents. The survey can be sent at the time that the Complaints Lead contacts the participant, providing an alternative or additional avenue to provide feedback. Some participants may be more comfortable and willing to provide feedback in writing, rather than over the phone. The questions asked by the Complaints Lead in the phone call should be consistent with the online survey questions so that the same information is gathered and recorded.

The results captured from both avenues can be analysed to identify trends, progress (particularly in relation to the success rate of restorative outcomes) and areas for improvement in the process.

## **2020 Recommendations – Monitoring complaint issues and trends**

1. Develop and administer an ongoing user satisfaction feedback survey that can be completed verbally over the phone with the Complaints lead or on-line. This activity should be completed with complainants and respondents. The questions in the survey should be used as a script in direct phone calls to participants, to promote consistency of communication and information capture.
2. Include the results of the user satisfaction feedback surveys in the Building Respect Improving Patient Safety annual Progress Reports as an item, to monitor the effectiveness of the Revised Approach, identify trends and inform continuous improvement.

### 13. Centralised, anonymous, accessible and detailed information about complaints

**EAG recommendation:** *Centralised, anonymous, accessible and detailed information about making complaints e.g. clarity of enquiry, registering, lodgment, progressing and ongoing reporting of all complaints, applying to all types of complaints; formal and informal, options, requirements.*

#### 2020 Reviewer Comments

The Resolve electronic case management system used by the College has been implemented and is used (primarily by the Complaints Lead and the EDSAs) to enter relevant documents and updates on all steps taken in each complaint matter. Resolve is remotely accessible by authorised users, which facilitates consistent and comprehensive use. I was able to remotely access the Resolve system to review files ('read only' access). This was enabled after appropriate IT security measures were implemented, to appropriately preserve complaint file integrity and the privacy and confidentiality of individuals.

The Review understands that all current complaints are now within Resolve. Historical complaints (pre-2018) are being transferred onto the electronic platform. Covid-19 lockdowns have interrupted this migration of hard copy files. This will be finalised now the Melbourne office is accessible.

Resolve is an 'off the shelf' complaint management software product. It is used by the College for all complaints received, whether by a patient or by a Fellow, Trainee or SIMG, and about any subject matter, not only discrimination, bullying and sexual harassment. Resolve has standard labels to describe the subject matter of the complaint eg. Bullying, Discrimination, Harassment, Sexual Harassment, Victimisation.

It is important for best practice complaint triage, data collection and analysis that the description of the complaint is accurate and reflects applicable legal tests. For example:

- a) in the initial tranche of files randomly selected for audit, a number of complaints were entered as 'Vilification'. Vilification has a particular meaning in anti-discrimination law, involving a public act that could incite hatred, serious contempt or ridicule towards a group of people who have a particular characteristic, namely race, homosexuality, transgender status or HIV/AIDS status. However, in Resolve the file labelled 'vilification' involved a Fellow making adverse public comment about another Fellow that did not involve any DBSH matters. This is the everyday meaning of 'vilification', meaning abusively disparaging speech or writing. It may be a breach of the Code of Conduct. However, it does not relate to DBSH;
- b) in one file reviewed (complaint received June 2018), the description of the

complaint in Resolve was 'bullying'. The legal test for bullying is 'conduct directed towards workers that creates a risk to health and safety in the workplace, that a reasonable person would consider could undermine, intimidate, humiliate or threaten'. However, the complaint was by a patient about outcomes of surgery and surgeon communication. A patient is not a 'worker' and the hospital is not the patient's 'workplace'. Again, it may be a breach of the Code of Conduct, however it is not properly within the definition of 'bullying'; and

- c) in one file reviewed (complaint received October 2018), the description in Resolve was 'victimisation'. 'Victimisation' has a particular meaning in anti-discrimination law, involving detrimental action against a person because they have made a complaint of discrimination, harassment or sexual harassment, and constitutes a separate unlawful act. However, in Resolve the file labelled 'victimisation' actually involved a Fellow making allegations that more appropriately fall within the legal definition of 'bullying'.

A 'DBSH ready reckoner' for users of Resolve listing the standard labels for each category of complaint, the relevant definitions/legal tests for each category and some College-specific examples of each type of behaviour could be created. The Ready Reckoner could also be used as a reference tool by the Triage Group in assessing the appropriate pathway to handle a complaint and confirm the appropriate categorisation of a complaint within Resolve. This would promote accuracy and consistency of entry of complaints about DBSH behaviours in and improve the quality, accessibility and searchability of information collected.

## 2018 Recommendations – Information Systems

1. *Consider 100% migration to an electronic file management system and eliminate hard copy files.*

Implemented for complaints made post-2018. Migration of historic files in progress.

## 2020 Recommendations – Information Systems

1. Create 'DBSH Ready Reckoner' for users of Resolve and the Triage Group, listing the standard labels for each category of complaint, the relevant definitions/legal tests for each category and College-specific examples.

## 14. Protection for those who make complaints

**EAG recommendation:** *Protection of those who make complaints (within the limited powers of the College), and prevention of victimisation.*

### 2020 Reviewer Comments

Victimisation is subjecting a complainant to a detriment because they have made a complaint of discrimination, harassment or sexual harassment. It constitutes a separate ground of unlawful conduct under anti-discrimination laws. Further, victimising someone because they have made a complaint of bullying may itself constitute bullying and form part of a pattern of conduct.

Fundamental to protecting complainants is protecting their confidentiality, in terms of the decision to remain anonymous and disclose details of their complaint/concern to the respondent. As noted above in the discussion about Confidentiality, preserving anonymity and confidentiality and obtaining the necessary privacy consents are matters that are well handled within the College's complaint handling process.

The 2018 Review noted that protecting those who make complaints about victimisation (ie. because they have made a complaint) 'is often a challenge to complaints/investigation services, especially those with limited powers'. The College has experienced the impact of the limitations on its powers in seeking to conduct formal investigations and make findings sufficient to support detrimental actions or sanctions against a Fellow, Trainee or SIMG. These difficulties and challenges have, quite appropriately in my view, resulted in the Revised Approach.

The College's limited powers similarly make it impossible for the College to make unequivocal representations to complainants that they will not be 'victimised', in the relevant legal sense of the word, as a result of making a complaint to the College. This is because the College does not control the environment in which the Fellow, Trainee or SIMG works and therefore cannot promise that third parties who do control or operate within that environment will not take detrimental action against them when they become aware of the complaint.

The 2018 Review recommended that the College make 'a clear and strong statement in the DBSH complaints process information, about the prohibition against, and consequences of, victimising a complainant'. A statement, being a 'Victimisation Fact Sheet', has now been included on the College's website in the section dealing with DBSH. I could not locate the Fact Sheet without assistance and it was separately provided. The Victimisation Fact Sheet should also appear with the other complaints collateral under 'Feedback and Complaints', or in the Complaints Handling Policy.

Given the constraints on its powers and within the context of the Revised Approach, the College can only properly make statements about victimisation as follows:

- a) the College itself will not victimise a complainant because they have made a complaint about discrimination, bullying or sexual harassment. This only extends to benefits or detriments controlled by the College, which are relatively limited in nature and in many cases likely not the primary focus of the complainant's concern about victimisation; and
- b) if a third party victimises the complainant because they have made a DBSH complaint to the College, this may constitute a breach of the College's *Code of Conduct and/or Discrimination, Bullying and Sexual Harassment Policy* – if that third party is a Fellow, Trainee or SIMG. However, difficulties arise in respect of specifying the consequences of such a breach. Action could only be taken against the alleged victimiser by the College for breach of the Code of Conduct (such as disciplinary sanctions) if there are findings they did engage in the alleged victimising conduct. This would require admissions or acknowledgement by that person of the wrongdoing, or findings of a formal investigation (which the College no longer conducts)<sup>12</sup>.

The Victimisation Fact Sheet makes general statements that victimisation for making a complaint of DBSH is prohibited, constitutes a breach of the Code of Conduct and may be the subject of a separate complaint. If a complaint of victimisation is made, it would therefore be dealt with in the same way as other DBSH complaints, namely, through the Revised Approach. The Fact Sheet does not outline the consequences of such a breach and is appropriately limited in its scope, although it does not convey the limitations on the College's power to prevent victimisation by persons/bodies other than the College itself.

The 2018 External Reviewer also noted there is no formalised process to follow up with complainants after a complaint is finalised, to enquire about post-complaint victimisation. It is considered that this information would be elicited through the user satisfaction survey recommended above (see *2020 Recommendations - Monitoring Complaint Issues and Trends*).

## 2018 Recommendations – Protection for complainants

1. *Draft a clear and unambiguous statement in relation to the prohibition against, and consequence of, victimising a complainant. This statement should be included in all the DBSH complaints information.*
2. *Formalise a follow-up protocol for all finalised complaints to monitor and report on victimisation*

Not yet implemented.

<sup>12</sup> This is subject to the potential role of the PCC in hearing and determining Code of Conduct breaches, including victimisation for making a complaint of DBSH, discussed above.

## **2020 Recommendations – Protection for complainants**

1. Include the Victimisation Fact Sheet in the complaints information/collateral (as well as in the DBSH section).
2. Include in the user satisfaction feedback survey a standard question to elicit information about the complainant's post-complaint experience in their work environment, as well as their experience of the College's complaint handling process and outcome.