AOA SUBMISSION

NRAS consultation - Regulation of Australia's health professions: keeping the National Law up to date and fit for purpose

7 November 2018

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"It is unreasonable to expect an ordinary NSW citizen to know or understand the levels of training and accreditation required for a surgeon. That is why the definition of 'surgeon' is so important."

The Hon Kate Washington, LLB, MLA, Member for Port Stephens NSW

"The proposals confirm our belief that there is a real risk that the new scheme will erode the medical board's ability to protect patient safety."

Joint submission on the proposed registration arrangements for NRA by the Australian Medical Association (the AMA), the Australian Society of Otolaryngology Head & Neck Surgery, the Australian Society of Anesthetist, the Urological Society of Australia and New Zealand, the Australian Society of Ophthalmologists, the National Association of Practicing Psychiatrists, the Australian Association of Surgeons, the National Association of Specialist Obstetricians and Gynecologists, the Council Of Procedural Specialists, the Australian Society of Orthopaedic Surgeons, the Royal Australian College of General Practitioners, the Rural Doctors Association of Australia and the Australian Orthopaedic Association (the co-signatories), 20/11/2008

Introduction and purpose

The Australian Orthopaedic Association (AOA) welcomes the opportunity to submit a response regarding the NRAS consultation - Regulation of Australia's health professions: keeping the National Law up to date and fit for purpose.

The Australian Orthopaedic Association is the peak professional body for orthopaedic surgeons in Australia. AOA provides high quality specialist education, training and continuing professional development. AOA is committed to ensuring the highest possible standard of orthopaedic care and is the leading authority in the provision of orthopaedic information to the community.

The Australian Orthopaedic Foot and Ankle Society (AOFAS) is a subspecialty of the Australian Orthopaedic Association (AOA) and is the accepted peak body in foot and ankle surgery. AOA has in excess of 80 years' experience in specialist orthopaedic education and training.

This submission is directed to Section 1.2 of the Consultation Paper namely, ***"Findings and recommendations from other inquiries regarding the National Scheme, with a view to improving the National Scheme for consumers and practitioners."***

Also Section 6.1, of the Consultation Paper, namely, *Title protection surgeons and cosmetic surgeons:*

41. Should the National Law be amended to restrict the use of the title 'cosmetic surgeon'? if not, why? If so, why and which practitioners should be able to use this title?

42. Should the National Law be amended to restrict the use of the title 'surgeon'? If not, why? If so, why and which practitioners should be able to use such titles?"

Objects of National Registration and Accreditation Scheme (NRAS)

Under the National Law, the objects of NRAS are to:

- *Provide for the protection of the public by ensuring that only health practitioners who are suitably trained and qualified to practice in a competent and ethical manner are registered*
- *Facilitate workforce mobility across Australia and reduce red tape for practitioners*

NRAS COAG Health Council - www.coaghealthcouncil.gov.au

Early identification of design flaws in NRAS

In its joint submission of 2008 the AMA/medical colleges and medical associations and societies warned the NRAS implementation taskforce of the threats to public safety that were inherent in the design of the NRAS scheme, specifically stating: *"The underlying architecture of the scheme and the proposed registration arrangements provide a framework for the lowering of medical standards and the expansion of roles for other health professions. The proposed scheme will allow this to occur without parliamentary, public or professional scrutiny."* (AMA/medical colleges/medical societies, joint submission, 20/11/2008)

No hierarchy of national boards or single jurisdictional accountability

Inherent in the NRAS architecture is the autonomy of all national boards and their ability to make decisions concerning the clinical scope of practice of their members. Hence, decisions by national boards which involve medical clinical interventions, or which have serious implications for patient health, are not required to have the consent of the Medical Board of Australia (MBA). Furthermore, since NRAS/AHPRA does not answer to any single jurisdiction, responsibility for its actions (or the actions of an individual, national board) is distributed across 9 health ministers and their departments. Hence, any organisation or individual with specific concerns for patient safety has no single forum to have their concerns raised and dealt with. They must make effective representations to 9 health ministers and their departments (or the overwhelming majority of them) in order to have the matter considered.

Fast tracking of specialist recognition for podiatric surgeons

The ability of any board to advance the scope of practice of its members without having to meet appropriate standards of Medical Board scrutiny is exemplified by the history of specialists' recognition of podiatric surgeons under the NRAS scheme.

When NRAS legislation was passed on 03/11/2009, it did not permit specialists' recognition of podiatric surgery. This lack of recognition triggered a substantial lobbying effort, on behalf of the Australian College of Podiatric Surgeons, represented by the then President and podiatric surgeon, Dr Mark Gilheany.

Dr Gilheany stated, "podiatric surgeons have been performing reconstructive surgery on bones and joints of the foot and ankle for over 30 years". Podiatric surgeons and the ACPS "are recognised through several instruments of Federal legislation and also instruments of State legislation, and there is full legislative recognition of specialist status within South Australia and Western Australia existing already". He also argued that "the draft legislation should be amended to list podiatry as the third profession with specialisation, podiatric surgery, effective immediately.

Dr Gilheany claimed that the ACPS had not been informed as to why they were not being formally recognised as specialists, indicating it was due to "perceptions" that it (the ACPS) did not have a fully functioning AMC [Australian Medical Council] style accreditation, and

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"you might argue that it is not strongly accredited as the AMC style of accreditation, but I would suggest to you that it is a long way there and rather than pulling apart what is already there, let us build on it, let us improve on it…Do not throw out what is there. Leave it in place and improve on what is there, because the bottom line is protection of the public". *[Senate Hansard, 13/07/09]*

Dr Gilheany explained "we [podiatric surgeons] are not looking to be seen as medical specialists, we are looking to be seen as podiatric specialists".

Dr Gilheany further stated to the Senate "We also have a robust program of ongoing accreditation in addition to a role in surgical education. This has been acknowledged by all of the above bodies, including international peer groups such as the American College of Foot and Ankle Surgeons."

However, communications with this college led its Executive Director J.C Mahaffey to state "ACFAS international affiliate status (ACPS members standing within the ACFAS) does not, in any way, endorse or designate surgical competency of the physician".

The Podiatry Board of Australia was able to receive approval from the AMWHC for podiatric surgeons to be entered on the specialists' register by April 2010 without meeting the requirement for consultation with other stakeholders. This effectively bypassed any contrary views to specialist recognition of podiatric surgeons based on patient safety grounds. It was not until 12 months after specialist recognition was granted that the podiatric accreditation agency ANZPAC lodged a submission outlining its podiatric surgeon training program. [*Annual Report 2011* - ANZPAC].

NRAS has created a double standard in Australian foot and ankle surgery

The AOFAS and AOA draw the NRAS Consultation Committee's attention to a double standard currently permitted in the performance of surgical procedures on bone and tendon in the foot and ankle.

With the advent of National Registration in 2009/10, NRAS has approved non-medically-qualified health practitioners performing surgical services on bone and tendon. Furthermore, these practitioners have now been given the protected title of "Podiatric Surgeons".

The Australian public are largely unaware that a person without a medical surgical fellowship could undertake a significant surgical intervention on their foot or ankle.

Protecting the public by protecting the title surgeon

The AOFAS and AOA present evidence in this submission to support our recommendation that:

- the title 'Surgeon' not be permitted in any way for use by any health practitioner who does not have a medical or dental surgical fellowship; or that, alternatively,
- the accepted standard of performing surgical services on bone and tendon for medical practitioners, namely a medical or dental surgical fellowship, be applied to all.

AOFAS and AOA contend that it is a central principle of the National Registration Scheme, that **all providers of surgical services are held to the same standards**

AOFAS warns that this double standard of foot and ankle surgery is contrary to the public interest and calls on the Australian Health Council to return the protection of the title of surgeon to be used exclusively in its accepted role as pertaining to a person who has successfully reached the standards of a medical or dental surgical fellowship

Nothing in this submission would prohibit the ability of non-medical specialists to perform less invasive forms of intervention into the body. However, when such interventions are performed, it should be made clear to the public that they are being performed by non-medically-trained health professionals who do not hold a medical surgical fellowship.

Deficiencies in accreditation functions acknowledged by the Australian Health Ministers' Advisory Council (AHMAC)

AOFAS notes the AHMAC report of 2014 (p.49)

- 'the delivery of these [accreditation] functions was expensive and **subject to little or no scrutiny'**
- The different approaches to accreditation across the respective bodies were 'confusing for educators and left little capacity to streamline processes between professions.'

AOFAS maintains that it is not sufficient to acknowledge that accreditation processes have not been subject to scrutiny. There needs to be a full and transparent analysis of how accreditation pathways of any health practitioner who has been given permission to perform surgical procedures on bone and tendon have arisen, and whether these pathways have been subject to full medical oversight.

Current requirements for medical practitioners who perform surgical services on bone and tendon

The current Australian standard for performing surgical services on bone and tendon for Australian medical practitioners is a medical surgical fellowship [sometimes expressed as advanced training in a recognized surgical specialty]. The FRACS is awarded by the Royal Australasian College of Surgeons (RACS) and the FAOrthA by the Australian Orthopaedic Association (AOA). The RACS may also award an FRACS(Orth) where appropriate.

Accreditation by the AMC

The standards and training methods of the RACS and AOA are subject to accreditation requirements set by the Australian Medical Council (AMC) in accordance with international best practice standards. Hence Australian orthopaedic surgeons, including those who specialise in foot and ankle surgery, are internationally recognised.

A potential hazard in any accreditation or verification system is 'circular referencing'. This occurs when the accreditation agency and the organisation being accredited have a joint interest in the successful outcome of the accreditation.

The AMC accreditation process works against this by maintaining complete separation and independence between those being accredited and those doing the accreditation. The AMC has a proud history of independence and adherence to the highest medical standards.

Current requirements for non-medical practitioners who perform surgical services on bone and tendon

Currently podiatrists practicing in Australia as podiatric surgeons are accredited by the Australian and New Zealand Podiatric Council. This Board was established by podiatrists in Australia. The standards required for podiatric surgeons to be accredited were developed by Dr Susan Owen, 'a community member on the Board of the Podiatry Council and a Doctor of Education from the University of South Australia'. Australian podiatric surgeons are not subject to accreditation by the Australian Medical Council.

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Specialist registration

In 2010, the Australian Health Workforce Ministerial Council established the "Register of Specialists in Podiatric Surgery" and protected the title "Podiatric Surgeon". Hence, the only group of non- medically trained health professionals to have access to the title 'Surgeon' are podiatric surgeons.

Significant differences in training pathways

The AOFAS and AOA attach a comparison between the qualifications and training of Australian orthopaedic surgeons, Australian podiatric surgeons and US podiatric surgeons, which clearly demonstrates the significant differences between medical and non-medical training pathways. (See Appendix A.)

Findings of the NSW Civil and Administrative Tribunal Hearing Health Care Complaints Commission

An insight into the attitude of one podiatric surgeon to orthopaedic surgeons has been revealed in the decision of the NSW Civil and Administrative Tribunal hearings Health Care Complaints Commission vs Bours (No1) [2014] NSWCATOD113. Dr Bours is a non-medically-qualified podiatric surgeon currently registered with AHPRA as non-practicing. According to the Tribunal Report, Dr Bours met the requirements for fellowship to the Australian College of Podiatrists in 2007. He was a Board member of the Australian Podiatry Council between 2003-2005 and between 2007-2010 he was on the Board of the Australasian College of Podiatric Surgeons.

The Tribunal upheld 4 complaints alleged against the practitioner to be proved, making findings of unsatisfactory professional conduct and professional misconduct within the meaning of Sections 139B and 139E of the National Law respectively. At point 31 the Tribunal states, *"The respondent's objections to the evidence of orthopaedic surgeons could be summarised as twofold - firstly, that orthopaedic surgeons don't regard themselves as peers of podiatric surgeons and are not well placed to give evidence as to "the standard reasonably expected of a practitioner of an equivalent level of training or experience", and secondly, to speak plainly, that there is a degree of professional snobbery from orthopaedic surgeons towards podiatric surgeons. The respondent submitted that there are procedures performed by podiatric surgeons that are not done in the same way by the orthopaedic surgeons. This, he claimed, rendered the evidence of the orthopaedic surgeons irrelevant and unhelpful."*

In summary, Dr Bours contends that he should not be subject to the standards advocated by medically-qualified orthopaedic surgeons. AOFAS respects Dr Bours's right to hold this opinion.

The Position of US-trained podiatric surgeons is not comparable to Australian podiatric surgeons

Podiatric surgeons in the US who have achieved accreditation by the US Council of Podiatric Medical Education (CPME) would be considered 'well trained foot and ankle surgeons' and the AOFAS and AOA would support a separate register for these appropriately qualified surgeons, and the use of the title 'surgeon'. This endorsement would also apply to any Australian podiatrists who successfully completed the US CPME training program. The AOFAS and AOA consider the US CPME training pathway to be of international standard, when completed in its entirety and successfully with the appropriate recognised qualifications.

Controversy over cosmetic surgery without a medical surgical fellowship

Whilst it is currently possible for a medical practitioner to undertake 'cosmetic surgery' without a medical surgical fellowship, this practice has led to public controversy and the subsequent development of guidelines by the Medical Board of Australia (MBA) on 01/10/2016[1] concerning cosmetic surgery.

Leading the debate for protection of the title 'surgeon' has been Prof Anand Deva, Head of Plastic and Reconstructive Surgery at Macquarie University who states, ***"The process of ensuring that an individual has the necessary skills to perform procedures on the general public is thus a mixture of recognised medical training, selection into surgical apprenticeship and a final certification by a recognised training body as a specialist surgeon."***

AOFAS supports the position adopted by Professor Deva. Medical practitioners who perform significant interventions into the body requiring anaesthesia should be required to have a medical surgical fellowship, and those without such a fellowship should not be entitled to call themselves 'surgeon'. It is recognised that some general practitioners will undertake some procedures for which they have been appropriately accredited, but do not hold themselves out to be medically-qualified surgeons.

Legislative attempts to protect the public

"The Health Practitioner Regulation (Adoption of National Law) Amendment (Unqualified Surgeons) Bill 2015 was released by Shadow Health Minister Walt Secord and Labor MP for Port Stephens, Kate Washington, who is also a national lawyer specializing in medical matters."

In support of the Bill, Ms Washington states, ***"It is unreasonable to expect an ordinary NSW citizen to know or understand the levels of training and accreditation required for a surgeon. That is why the definition of 'surgeon' is so important."*** Had this legislation been agreed to, it is likely that, in NSW, podiatric surgeons would not have been able to use the term unless they had achieved a medical surgical fellowship.

Slogans, slurs and messenger shooting

A major inhibiting factor to the expression of concern by any medical specialist organisation or individuals into the standards or outcomes of procedures undertaken by non-medically qualified health professions are the allegations and potential allegations of 'closed shop', and turf protection.

Such allegations conveniently ignore the fact that Australian procedural medicine, and Australian orthopaedics in particular, has a proud history of critical examination of all orthopaedic procedures, including their efficacy, safety and longevity. Ongoing debates over treatment modalities is an integral part of medical science and is central to the work of AOA and AOFAS.

Australian podiatrists respected and valued

Australian orthopaedics has always valued the work of Australian podiatrists (formerly known as chiropodists) who make a significant contribution to the health and wellbeing of patients with foot and ankle conditions. The majority of work podiatrists undertake involves older patients experiencing difficulty with mobility as a result of injury, structural problems or the effects of chronic disease. A large proportion of patients needing podiatric care will be diabetic and also have a range of co-morbidities including cardiovascular disease.

1 Guidelines for registered medical practitioners who perform cosmetic medical and surgical procedures

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Should these patients be referred for surgery which does not meet appropriate standards of care, the results can be catastrophic, as these patients have a higher risk of infection which increases the complexity of care and the potential for complications. As noted by the RACS, "*operations on the bones, ligaments and tendons of the foot carry significant risk of complications which at worst can lead to the loss of limb or be life-threatening*". (RACS submission to NSW Health concerning the performance of podiatric surgery in NSW, 30/08/2005)

Australian dental standards highly regarded

Interventions into the jaw and face often involve complex dental surgery. Australian dentistry has a proud history of rigorous and comprehensive whole-body system education, followed by recognised specialist training. In 1996 all Australian-trained oral and maxillofacial surgeons were required to have both medical and dental degrees and a surgical fellowship [FRACSOMS]. The Royal Australasian College of Dental Surgeons (RACDS) is the AMC and ADC accredited provider through the board of studies. It accredits training posts, runs basic surgical science and fellowship [end-of-training exams], paralleling the RACS training pathways. It is understood that some dentists who do minor oral surgery procedures without the above qualifications, call themselves surgical dentists.

Health legislation amendment (Podiatric Surgery and Other Matters Act 2004)

This Act was assented to on 13/07/2004 after a result of a lobbying campaign by Australian podiatrists. The Act 'amended the Health Insurance Act 1973 to enable private health insurance funds to provide benefits under an applicable benefits arrangement (hospital cover only) for the hospital treatment costs (the accommodation and nursing care costs), associated with foot surgery performed on admitted patients by accredited podiatrists. The amendments do not permit private health insurance funds to provide benefits under any applicable benefits arrangements for fees charged for accredited podiatrists for their services.' No clinical evidence is cited in the Explanatory Memorandum of the Act concerning surgery performed by Australian podiatrists, as the purpose of the Act is to allow for hospital benefits rebates to be paid to patients for procedures performed by podiatric surgeons who were permitted to perform procedures by state governments.

The Act gives the Federal Minister for Health the power to accredit a podiatrist and determine the guidelines for making the decision about who to accredit or not accredit as a podiatrist. This authority was revoked by legislation in 2011. (Authority of the Minister for Health and Ageing, Private Health Insurance Act 2007, Private Health Insurance (Accreditation) rules 2011).

The legislation cites the Australian College of Podiatrists as the *'national organisation that trains podiatric surgeons'* and says that *'it develops, implements and monitors guidelines for the practice of podiatric surgery and provides national standards and clinical practice protocols.'* Furthermore, that '*the College is affiliated with the Australian Podiatric Council, the national organisation and umbrella group of Australian Podiatric Associations in each state'*.

The legislation states that podiatric surgeons have been allowed to perform foot surgery 'since the 1970s' under current state and territory jurisdictions (except the Northern Territory which currently does not have legislation permitting podiatric surgeons to perform surgery).

'The Department of Health and Ageing's consideration of the proposal to change the definition of professional attention has always been on the understanding that adding new items to the Medicare Benefits Schedule would not be considered, and the Australian Podiatry Council has acknowledged this. Extending Medicare benefits coverage to a wider range of allied health care providers (which includes podiatrists) has been considered on

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other occasions and each time it has been decided that it is not possible to extend these arrangements given the economic climate. This is still the case.'[2]

The Memorandum describes the objections by the medical profession to the potential impact of the Act to be considered a de facto licence for surgery as follows:

'During early consultations about the proposal to amend the legislation, concerns about safety, quality and training regarding podiatric surgeons were raised with the Department for the first time by certain medical groups. These groups were encouraged to raise their concerns with the relevant authorities in the various States and Territories. Whilst the comments are noted, the proposed amendment is solely to allow funds to pay benefits for accommodation from their hospital tables and does not change the current foot surgery practices.'[3]

History of concerns

AOA has raised serious concerns over the process that has resulted in the current double standard for performing surgical services on bone and tendon in the foot and ankle, and the implications for permitting this situation to continue. These concerns are outlined in AOA 2012 submission, attached to this submission. ***See Appendix B.***

The matter has also been brought to the attention of the current Minister for Health on two separate occasions in 2018 during meetings with AOA representatives.

Australian Council of Podiatric Surgery (ACPS) and the Medical Services Advisory Committee

In 2014 and 2015, the ACPS made applications to MSAC for access by Podiatric surgeons to a set of existing 39-foot related MBS-listed orthopaedic surgery foot and ankle services.

On both occasions, the application was not supported by the MSAC which stated, '*After considering the available evidence in relation to safety, clinical effectiveness and cost-effectiveness, MSAC did not support public funding of Podiatric Surgeons to access a range of MBS numbers for surgery of the foot and ankle. MSAC found that there was a lack of evidence for comparative safety and effectiveness in relation to comparable services, and the clinical need remained uncertain.*'[4]

'MSAC considered evidence regarding the clinical effectiveness of podiatric surgeons' services, as provided in the initial application, and noted that direct comparisons with orthopaedic surgeons could not be made given that, with one exception, none of the included studies were conducted in the same setting. MSAC noted that indirect comparisons were also difficult as most studies reported on disparate outcomes and no single outcome measure is preferred in the wider literature on ankle and foot clinical research.'[5]

ACPS and the Australian Competition and Consumer Commission

The ACPS wrote to the Australian Competition and Consumer Commission (ACCC) on 27 March 2017, after the two failed applications before the MSAC.

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[2] RACS submission to NSW Health concerning performance of podiatric surgery in NSW, undated
[3] Explanatory Memorandum – Health Legislation Amendment (Podiatric Surgery & Other Matters) Bill 2004
[4] MSAC Public Summary Document – Application No. 1344.1 Podiatric surgeons for access to a range of MBS numbers for surgery of the foot and ankle. MSAC meeting 30-31/03/2016
[5] MSAC Public Summary Document – Application No. 1344, 1-2/04/2015 and 1344.1, 30-31/03/2016

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The ACPS complained that there were private health insurers (PHIs) not funding podiatric surgeons to the same level as orthopaedic surgeons. The author, Mr Peter Manuel, FACPS, President of the ACPS, said that the majority of private health insurers continued to provide "misinformation" to consumers regarding the training and recognition of podiatric surgeons.

Podiatric surgery conclusions and recommendations

Serious surgical interventions into the body create extreme risk for patients and any decision by a patient to consent to treatment must be based on the assurance that the patient is fully aware of the training and competence of the person they allow to operate on them.

The title 'doctor' is not protected and is able to be used by health practitioners who do not have a medical or dental qualification. The public should not be intentionally or unintentionally deceived, misinformed or misled or confused by titles in relation to the delivery of health and medical care and surgery. Standards of surgery required for operating on bone and tendon in the arm and the jaw and the hip, should be no different for those required for surgery on the foot and ankle.

Australian standards for the performance of surgical procedures on bone and tendon in the foot and ankle should be not only transparent and obvious to anyone seeking the services of a practitioner who holds out expertise in this area, they should be internationally recognised and independently verified. Failures in bone and tendon surgery can result in serious disfigurement and even amputation and permanent disability.

AOFAS and AOA strongly recommend that the National Law be changed to protect the title of 'surgeon' to those practitioners who have achieved a medical/dental surgical fellowship and hence the public can differentiate clearly between those practitioners who are medically trained and those who are trained outside the established medical system. The AOFAS and AOA call on the COAG Health Council to implement this change as a matter of urgency.

Other General Comments

- AOA has concerns regarding surgeons using letterhead and digital media titles such as "complex spine surgeon" or "advanced spine surgeon" as there is no qualification or accreditation related to this statement, and thus its usage is inferring superiority and is potentially deceptive to the general public. AOA believes it would seem more reasonable to limit the title to "spine surgeon"' possibly with "adult" or "paediatric" as a descriptor;
- Item 3.2 AOA supports Option 1 - that the Chair of a National board should remain a practitioner. Community member can be directors and therefore provide good governance;
- Item 4.1 AOA supports that the National Law should be amended to enable a National Board to withdraw a practitioner's registration where it has been improperly obtained, without having to commence disciplinary proceedings against them under Part 8;
- Item 4.5 AOA supports that National Law should be amended to require a practitioner to notify their National Board if they have been charged with or convicted of an offence under drugs and poisons legislation in any jurisdiction;
- Item 4.6 Strongly agree that National Boards should be provided with discretion to deal with practitioners whose registration has lapsed;
- 6.1 AOA strongly agrees the National Law should be amended to restrict the use of the titles 'cosmetic surgeon' and 'surgeon', and, if the proposal is supported, consideration to be given to which practitioners should be able to use these titles.

- 6.3.1 AOA believes the status quo ie: prohibit all testimonials should remain but acknowledges that that option 2 is not unreasonable and almost inevitable;
- 6.3.2 AOA believes there should be an increase in penalties for advertising offences; and
- Item 7.2 Agree that recording previous or alternate names is in the benefit of the Australian general public.

We would be happy to meet to discuss the issues raised within this submission at any time.

David Martin

President AOA

Alison Taylor

President AOFAS