



Aboriginal and Torres Strait
Islander Health Practice
Chinese Medicine
Chiropractic
Dental
Medical
Medical Radiation Practice
Nursing and Midwifery
Occupational Therapy
Optometry
Osteopathy
Pharmacy
Physiotherapy
Podiatry
Psychology

Australian Health Practitioner Regulation Agency

Prosecution Guidelines

July 2019

Introduction

The Health Practitioner Regulation National Law, as in force in each state and territory (the National Law) commenced on 1 July 2010. This document sets out guidelines for prosecutions of criminal offences under the National Law. The main aim of prosecuting offences under the National Law is to protect the public and to deter individuals and others from noncompliance with the National Law.

On 1 July 2019, a number of offences under the National Law were amended to make the offences indictable offences and to increase penalties with the introduction of a maximum imprisonment term of three (3) years for the most serious offences. These amendments apply in all states and territories except Western Australia¹. However, the amendments provide flexibility for the offences to be dealt with either on indictment or summarily, depending on the circumstances of the case and the law of the relevant jurisdiction.

The Criminal Offences Unit (COU) within the Australian Health Practitioner Regulation Agency (AHPRA) is responsible for following these guidelines in the case of each possible criminal prosecution. The guidelines have been prepared by the COU and endorsed by the National Executive Committee and will be updated from time to time as required.

The guidelines have been drafted in accordance with AHPRA's Regulatory Philosophy and model litigant principles² and ensures that all prosecutions are in the public interest with a reasonable prospect of a conviction.

Offences under the National Law

The National Law creates a number of offences. These include:

- a) restrictions on use of protected and specialist titles under sections 113-115
- b) title protection and 'holding out' offences, as set out in sections 116 – 119. These provisions include prohibitions against unregistered persons claiming to be a registered health practitioner (or a specialist health practitioner). These provisions also outline that it is an offence for a person to hold another person out as a registered health practitioner or authorised or qualified to practice in a health profession, when they are not
- c) restrictions on advertising regulated health services, as set out in section 133
- d) restricted acts, as set out in sections 121-123, and
- e) directing or inciting a registered health practitioner to do anything that amounts to unprofessional conduct or professional misconduct, as set out in section 136.

¹ The *Health Practitioner Regulation National Law and other Legislation Amendment Bill 2018* (Qld) has not been adopted in Western Australia.

² The Attorney General of each state and territory has approved Model Litigant Guidelines which apply to the relevant state or territory's departments, agencies and officeholders in litigation.

The following offences under the National Law are indictable offences:

- a) taking or using a protected title (sections 113 and 115)
- b) holding out offences (sections 116 to 119)
- c) carrying out a 'restricted dental act' (section 121)
- d) restrictions on prescribing an 'optical appliance' (section 122)
- e) restrictions on performing spinal manipulation (section 123), and
- f) contravening a prohibition order (section 196A).

All other offences are summary offences and will proceed by way of a summary proceeding before a court of summary jurisdiction.

In Western Australia, there are no indictable offences and all offences against the National Law are summary offences.

Offence complaints management

All offence complaints lodged with AHPRA are managed by the COU (except low and moderate risk advertising complaints about registered health practitioners³). Offence complaints are risk assessed and based on that risk assessment, allocated within the COU for action.

Low and moderate risk matters are dealt with through administrative management. This may include sending a 'Check Correct Comply' letter regarding alleged unlawful advertising or a First Opportunity to Respond Letter regarding other alleged offences under the National Law. The aim of this approach is to achieve compliance quickly.

Major and critical risk matters are allocated to an Inspector appointed under section 239 of the National Law within the COU for investigation. Major and critical risk matters often relate to allegations of alleged holding out and/or performance of restricted acts and pose a high risk to the public.

At the conclusion of an investigation, the matter may then be submitted to the Criminal Offences Governance Committee (COGC) to consider whether it is suitable for prosecution. The COGC is a subcommittee formed within AHPRA, that is responsible for assessing each possible criminal prosecution and deciding whether or not it meets the requirements of these guidelines. Before any prosecution is commenced, approval must be obtained from the COGC.

Information provided to the COGC may include, but is not limited to:

- the time to bring the proceeding (keeping in mind relevant time limits for the prosecution of summary offences)
- the recency of the offending
- the extent and nature of the offending
- a summary of the available evidence
- any prospects for the collection of further evidence,
- a chronology of events, and
- any responses received from the suspect/s to any cease and desist demands or record of interview with the suspect/s.

³ These are managed by the Advertising Compliance team pursuant to the [Advertising compliance and enforcement strategy](#).

Prosecutorial discretion

Having regard to the information provided, the COGC conduct a review of the matter and assess whether it is suitable for prosecution and meets the requirements of these guidelines.

Prosecution agencies are generally not required to prosecute every offence, or suspected offence, known to them. This is known as the 'prosecutorial discretion'. AHPRA will commence a prosecution only where:

- a) there is a reasonable prospect of a conviction, and
- b) the prosecution is in the public interest.

In determining whether there is a reasonable prospect of a conviction, regard must be had to:

- a) all admissible evidence
- b) the reliability and credibility of the evidence
- c) the possibility of evidence being excluded
- d) any possible defence
- e) whether the prosecution witnesses are available, competent and compellable
- f) any conflict between eye-witnesses
- g) whether there is any reason to suspect that evidence may have been concocted
- h) how the witnesses are likely to present in court
- i) any possible contamination of evidence, and
- j) any other matter relevant to whether a magistrate would find the person guilty.

Consideration must then be given to whether the prosecution is in the public interest. These considerations may include the following:

- a) the seriousness of the alleged offending
- b) the offender's culpability
- c) mitigating or aggravating circumstances of the offending impacting on the appropriateness of the prosecution
- d) the age, health or wellbeing of the alleged offender (and/or any witness or victims)
- e) the recency and/or period of alleged offending
- f) any insight or remorse shown by the suspect to the alleged offending
- g) the precedent value of a prosecution, and
- h) the attitude of the victim.

This is not an exhaustive list of considerations. Other considerations will include the need for specific or general deterrence, reducing the likelihood that the individual or others will commit similar offences.

A decision whether or not to prosecute must not and will not be influenced by:

- a) the race, religion, sex, national origin, political associations, activities or beliefs of the alleged offender or any other person involved
- b) personal feelings concerning the offence, the offender or a victim
- c) possible political advantage or disadvantage to Government or any political group or party, or
- d) the possible effect of the decision on the personal or professional circumstances of those responsible for the prosecution decision.

A prosecution should only proceed in accordance with this policy. If a matter is approved for prosecution by the COGC, it must also be approved by the Executive Director, Regulatory Operations (EDRO) and the Chief Executive Officer (CEO) of AHPRA.

The relevant health profession National Board is informed of any prosecution relating to their profession.

Where it is determined that a criminal prosecution does not meet these guidelines or is otherwise not appropriate, where possible, consideration will be given to:

- a) taking action under Part 8 of the National Law (for registered health practitioners only) including in the case of NSW, referral to the Health Care Complaints Commissions (HCCC) or the Health Professions Council Authority (HPCA) and in Queensland, the Office of the Health Ombudsman (OHO)
- b) for unregistered persons, referring the matter to the relevant Health Complaints Entity in the jurisdiction, and
- c) referring the matter to another law enforcement or regulation agency (such as the Therapeutic Goods Administration or Australian Competition and Consumer Commission or relevant police force).

Publication of prosecution outcomes

Publishing the outcomes of prosecutions draws attention to the consequences of breaching the National Law. It is a valuable tool for both promoting education about the National Scheme and deterring non-compliance.

AHPRA will publish information as to the nature and outcome of prosecutions, where it is in the public interest to do so and consistent with its obligation to protect the public under the National Law and in accordance with other applicable legislation.