



Ahpra
& National
Boards

Ahpra's *Regulatory Guide*

June 2020

Overview of the *Regulatory Guide*

The purpose of the *Regulatory Guide* is to set out how the National Board for each health profession manages notifications about the health, performance and conduct of practitioners under Part 8 of the National Law. It aims to:

- clearly and transparently convey how the health, performance and conduct schemes are administered by Ahpra and the Boards; and
- provide general regulatory information to relevant tribunals and other decision-makers (such as panel members).

The *Regulatory Guide* provides a detailed explanation of the areas mentioned here. This document provides a brief overview of, and operate as a signpost to, the *Regulatory Guide*.

1. Introduction

Background to the National Law

The *Health Practitioner Regulation National Law* (National Law) came into operation in each state and territory in 2010.

The National Law is not Commonwealth legislation. It is uniform legislation that has been passed by each state and territory, giving it a 'national' character.

There are 15 National Boards, that regulate the 16 health professions that fall under the auspices of the National Law.

National Boards and the Australian Health Practitioner Regulation Agency (Ahpra) were established under the National Law.

2. Notifications

Part 8 of the National Law sets out the processes by which notifications may be made about a registered health practitioner. A 'notification' is a complaint about a health practitioner or a notification of certain circumstances to Ahpra or a Board by a health practitioner or employer. A person who makes a notification is called a 'notifier'.

The notification process is designed to be accessible, informative, responsive and independent.

A person who, in good faith, makes a notification or gives information in the course of an investigation by a Board or Ahpra, is not liable civilly, criminally or under an administrative process for giving the information. Good faith is not defined in the National Law so it adopts its ordinary meaning of 'well-intentioned or without malice'.

There are certain circumstances in which a registered health practitioner, employer or education provider must make a notification about another registered health practitioner. These notifications are called mandatory notifications.

Voluntary notifications may be made by anyone, including patients and members of the public.

Conduct while unregistered

Practitioners may be subject to regulatory action for conduct occurring while unregistered.

Personal and professional conduct

Notifications may be made, and subsequent regulatory action taken by a Board, about a registered practitioner about their personal conduct, in some circumstances.

Preliminary assessment

Upon receipt of a notification about a health practitioner or a student, Ahpra must refer the notification to the applicable Board(s) for preliminary assessment.

In some circumstances, Ahpra may refer notifications to the police and/or other national or state-based regulatory bodies.

A Board must, within 60 days after receiving a notification, conduct a preliminary assessment and decide:

- whether or not the notification is about a person who is a health practitioner or a student registered in a health profession for which the Board is established;
- whether or not the notification relates to a matter that is a ground for notification; and
- whether or not it is a notification that could also be made to a health complaints entity.

A Board may decide, at the preliminary assessment stage, to take no further action notification if:

- the notification is frivolous or vexatious,
- it is not practicable for the Board to investigate
- the person to whom the notification relates has not been, or is no longer, registered in a health profession
- the subject matter of the notification has already been dealt with adequately by the Board
- the subject matter of the notification is being dealt with, or has already been dealt with, by another entity, or
- the health practitioner to whom the notification relates has taken appropriate steps to remedy the subject matter of the notification and the Board reasonably believes no further action is required about the notification.

If a Board believes that it is necessary to take further action about the notification it may:

- start an investigation into the practitioner;
- consider taking immediate action about the practitioner
- consider cautioning the practitioner, which is a warning to a practitioner about their conduct or the way they practise
- consider imposing conditions (or accepting an undertaking) from a practitioner that requires the practitioner to do something or stop doing something
- require the practitioner to undergo a health or performance assessment
- refer the practitioner to a hearing by a panel, or
- refer the practitioner to a responsible tribunal.

3. Immediate action

Immediate action is interim action that a Board can take to restrict or suspend a practitioner's ability to practise. A Board will do so if it reasonably believes that interim regulatory action is necessary to protect the public from a serious risk, or is otherwise in the public interest. Immediate action may be taken at any time, although it is usually considered upon receipt of a notification about a practitioner.

Immediate action is defined in the National Law to mean:

- the suspension of, or imposition of a condition on, the health practitioner's registration
- accepting an undertaking from the health practitioner
- accepting the surrender of the health practitioner's registration;
- if immediate action has previously been taken by suspending a health practitioner's registration, the revocation of the suspension and the imposition of a condition on the registration, and
- if immediate action has previously taken by imposing a condition on a health practitioner's registration, the suspension of the registration instead of the condition.

Examples of conduct in respect of which immediate action may be taken include:

- alleged serious criminal conduct (including where charges have been laid but before any conviction)
- conduct unconnected to practice that may diminish the public's confidence in the profession
- serious performance issues
- sexual misconduct
- serious substance abuse, and
- breaches of conditions on registration.

Examples of other circumstances in which immediate action might be taken include where:

- a practitioner has, or may have, an impairment
- a practitioner's registration was improperly obtained because the practitioner or someone else gave the relevant Board information or a document that was false or misleading in a material particular, and
- a practitioner's registration has been cancelled or suspended in a non-participating jurisdiction (whether in Australia or elsewhere).

4. Health and performance assessments

In some circumstances, a Board may require a registered health practitioner to undergo a health assessment and/or a performance assessment. The Board is responsible for paying for the assessment.

5. Investigations

Decision to investigate: relevant considerations

A Board may investigate a registered health practitioner if it decides it is necessary or appropriate to do so:

- because the Board has received a notification about the practitioner
- because the Board for any other reason believes
 - the practitioner has or may have an impairment,
 - the way the practitioner practises the profession is or may be unsatisfactory, or
 - the practitioner's conduct is or may be unsatisfactory
- to ensure the practitioner is complying with:
 - the conditions imposed on the practitioner's registration, or
 - an undertaking given by the practitioner to the Board.

Powers of an investigator

Investigators appointed under the National Law have various statutory powers to obtain evidence and information relevant to an investigation, including:

- powers requiring a person to provide information, answer questions or produce documents, and
- powers permitting the investigator to search places (such as a practitioner's residence, or place of practice) and seize objects or documents.

Potential outcomes of investigation

At the conclusion of an investigation, the investigator must provide the relevant Board with a written report (which includes the investigator's findings and their recommendations about any action to be taken).

The Board will then consider the investigator's report and decide whether or not to take further action about the matter.

Further action might include:

- referring the matter to another entity (such as a health complaints entity)
- taking immediate action
- directing the practitioner to undergo a health or performance assessment
- taking relevant action under section 178 of the National Law
- referring the matter to a panel, or
- referring the matter to a responsible tribunal.

6. Relevant action under section 178 of the National Law

Division 10 of Part 8 of the National Law sets out the process by which a Board may take relevant action about a registered health practitioner. Action of this kind may be taken where a matter does not have to be referred to a responsible tribunal or panel.

Relevant action may include one or more of the following:

- cautioning the practitioner
- accepting an undertaking from the practitioner
- imposing conditions on the practitioner's registration, or
- referring the matter to another entity.

A Board may take such action if it reasonably believes that:

- the practitioner's performance or conduct is or may be unsatisfactory, or
- the practitioner has or may have an impairment.

The practitioner will be provided with the opportunity to make written or verbal submissions about the proposed relevant action.

7. Health panels and performance and professional standards panels

Division 11 of Part 8 of the National Law establishes a process by which certain matters about a health practitioner may be heard by a health panel or a performance and professional standards panel (PPSP).

The role of panels is to hear and determine matters about practitioners where a Board forms a reasonable belief that a practitioner:

- has an impairment
- practises the profession in a manner that is unsatisfactory, or
- has engaged in professional conduct that is unsatisfactory.

8. Referral to the responsible tribunal

A Board must refer a matter to a responsible tribunal if it forms a reasonable belief that:

- a practitioner has behaved in a way that constitutes professional misconduct, or
- a practitioner's registration was improperly obtained because the practitioner or someone else gave the Board information or a document that was false or misleading in a material particular.

After a decision has been made to refer a matter to a responsible tribunal, the Board will start a disciplinary proceeding against the practitioner. This is done by filing a document with the responsible tribunal, which is then served on the practitioner.

The responsible tribunal is responsible for managing the proceeding, and will generally order the parties attend a compulsory conference to see if the matter is capable of resolution.

A final hearing may be required to determine any issues the parties were not able to resolve, or depending on the jurisdiction, to approve any agreed outcome.

Final hearings are open to the public.

9. Available findings under the National Law

Decisions that may be made by a PPSP

Once it has made findings of fact, a PPSP can decide:

- the practitioner has no case to answer and no further action is to be taken in relation to the matter, or
- one or more of the following:
 - the practitioner has behaved in a way that constitutes unsatisfactory professional performance
 - the practitioner has behaved in a way that constitutes unprofessional conduct, or
 - the practitioner must be referred to a responsible tribunal.

Decisions that may be made by a responsible tribunal

Once it has made findings of fact, a responsible tribunal can decide:

- the practitioner has no case to answer and no further action is to be taken about the matter, or
- one or more of the following:
 - the practitioner has behaved in a way that constitutes unsatisfactory professional performance
 - the practitioner has behaved in a way that constitutes unprofessional conduct
 - the practitioner has behaved in a way that constitutes professional misconduct;
 - the practitioner has an impairment, or
 - the practitioner's registration was improperly obtained because the practitioner or someone else gave the National Board established for the practitioner's health profession information or a document that was false or misleading in a material particular.

10. Determinations under the National Law

'Determinations', 'sanctions' or 'penalties' refer to the actions available to a decision-maker under the National Law once a finding has been made about a practitioner.

The primary purpose of determinations under the National Law is to protect the public. Despite this, determinations may cause a practitioner to feel like they have been 'punished'.

'Protection of the public' means protecting the public from, among other things:

- practitioners who engage in unethical, or unlawful, conduct
- practitioners who practise in an unsafe or incompetent manner, and
- a culture of sub-standard practice from which harm may flow.

11. General principles relating to determinations under the National Law

Decision-makers, when considering the form of determinations that are appropriate in a particular case, will consider factors including:

- Specific deterrence
- General deterrence
- Protection of / confidence in the profession
- Maintenance of professional standards
- Rehabilitation
- Insight
- Remorse
- Evidence of good character
- Level of experience
- Delay
- Personal circumstances
- Disciplinary history
- Impact on complainant/victim
- Impact on patient community.

Some of these principles or factors will be given more or less weight than others (or not considered at all), depending on the facts and circumstances of the matter.