



**Ahpra**  
**& National**  
**Boards**

# Regulatory Guide

July 2024

## **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 operates 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.

The Boards and Ahpra adopt a risk-based approach to the regulation of health practitioners with a focus on protecting the public and ensuring public confidence in the safety of services provided by registered health practitioners.

## 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 behaviour occurring while unregistered.

### Personal and professional conduct

Notifications may be made, and subsequent regulatory action taken by a Board in response to behaviour of a registered practitioner occurring in a setting unrelated to the practitioner's practice of the profession, 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 been 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.

The Board has a very limited discretion to not refer if it decides there is no public interest in the matter being heard by a responsible tribunal.

A Board may also refer a matter to a Tribunal if it forms a reasonable belief that a practitioner's registration was improperly obtained.

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 to 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 be considered at all), depending on the facts and circumstances of the matter.

## 12. Procedural Fairness

Procedural Fairness is a legal principle which requires fairness in the process that is used in making decisions that may affect a person's rights or interests.

Procedural fairness is relevant to the steps that national law bodies take in approaching regulatory decision-making and traditionally involves two requirements:

- the fair hearing rule; and
- the rule against bias.

In many decision-making processes under the National Law, specific procedures are required to be followed, which often have the effect of ensuring that procedural fairness has been provided. However the obligation for decision makers to follow any relevant procedures under the National Law is separate to the obligation to afford procedural fairness to an affected person.

Ahpra has processes in place to ensure that all Board and panel decisions are impartial and free from bias. The separation of Ahpra's administrative and compliance functions from the Board's decision-making functions ensures that Board decisions are independent.

## 13. Public Statement

There are times when Ahpra and the Boards need a way of warning the public about a serious risk from an individual – either a registered health practitioner or a person who does not hold registration but is providing a health service.

If the risk is unable to be managed using other regulatory tools, Ahpra or the Boards may decide to issue a public statement. This is done by publishing the name of the practitioner on the Ahpra website and giving warnings or information to inform the public including about what action they should take.

The threshold for issuing a public statement is set at a high level in the National Law. The decision to issue a public statement may only be made when Ahpra or the National Board forms a reasonable belief that the practitioner or person poses a serious risk and it is necessary to protect public health or safety.

Examples of this are a person who continues to practise despite their registration being suspended, situations where patients may have been misdiagnosed or exposed to blood borne viruses or in the case of an unregistered practitioner, alerting the public to a 'fake' dentist.

## 14. Interim Prohibition Orders

From time to time, Ahpra and National Boards need to protect the public from an unregistered practitioner while other regulatory action is being finalised.

Unregistered practitioners include health practitioners whose registration has lapsed or been suspended.

Where there is a serious risk, Ahpra and National Boards can issue an interim prohibition order.

Interim prohibition orders prohibit or restrict an unregistered person from providing a specified health service or all health services and prohibit a person from using protected titles.

An interim prohibition order is not a form of disciplinary action, determination, sanction, penalty or punishment. Its purpose is to protect the public while a full investigation is being completed.

Examples of serious risk that may lead to an interim prohibition order:

- a physiotherapist who was suspended after allegedly sexually assaulting patients continues to provide massage services,
- an unregistered person is claiming to be a chiropractor and performing spinal manipulations on infants.

Before issuing an interim prohibition order, the unregistered person will be told about the proposed order and invited to make a submission explaining why they should not be given an interim prohibition order.

Only in extraordinary situations of particularly high risk and when time is of the essence would an interim prohibition order be issued without informing the person and inviting them to make a submission. An example may be an unregistered person offering discounted dental procedures to be performed the following day.