



## Report on outcomes of targeted consultation on how Ahpra and the National Boards propose to use the new power to issue public statements (warnings)

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Australian Health Practitioner Regulation Agency  
National Boards

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Ahpra and the National Boards regulate these registered health professions: Aboriginal and Torres Strait Islander health practice, Chinese medicine, chiropractic, dental, medical, medical radiation practice, midwifery, nursing, occupational therapy, optometry, osteopathy, paramedicine, pharmacy, physiotherapy, podiatry and psychology.

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# 1. Background

## Changes to the Health Practitioner Regulation National Law

The Health Practitioner Regulation National Law and Other Legislation Amendment Bill 2022 was debated and passed by the Queensland Parliament in 2022. As Queensland is the host jurisdiction for the *Health Practitioner Regulation National Law* (the National Law), amendments must be introduced into the Queensland Parliament for review, debate and passage.<sup>1</sup>

The first group of changes to the National Law started on assent on 21 October 2022, with the other changes (including the power to issue public statements (warnings)) starting on specific dates to be decided by Governments.

The changes to the National Law strengthen public protection and increase public confidence in health services provided by practitioners registered under the National Scheme. They also implement reforms to improve governance and promote the efficient and effective operation of the National Scheme.

This change introduces a new power for Ahpra and the National Boards to issue public statements to warn the public about serious risks posed by registered health practitioners or unregistered people, who are the subject of investigations or disciplinary proceedings.

It is not a broad power to enable Ahpra or the National Boards to 'name and shame' registered health practitioners or other people that are being investigated before there is a tribunal outcome.

It is a specific power that will help us to protect the public by publicly explaining what the serious risk is and to warn the public while continuing investigations or disciplinary proceedings. The power can only be used when a high threshold is met and it is necessary to do so. While we expect to use this power judiciously and in rare circumstances, we will use this power when it is necessary to protect the public from serious risk posed by unregistered persons or registered practitioners.

The threshold for issuing a public statement (warning) is set at a high level and requires Ahpra or a National Board to **form a reasonable belief**:

- that the person has contravened a relevant provision<sup>2</sup> of the National Law; **or** is the subject of an assessment, investigation or other proceeding under Part 8 of the National Law; **and**
- that because of the conduct, performance or health, the person poses **a serious risk** to persons; **and**
- **it is necessary** to issue a public statement warning to protect public health or safety.

There are other safeguards built into the legislation:

- A 'show cause' process is part of the process before deciding to issue a public statement (warning).
- After the show cause process is completed and a decision is made to issue a public statement warning, we must then wait **at least one business day** before we can publish the statement.
- A decision to issue a public statement (warning) will be subject to appeal to a relevant tribunal.
- The public statement (warning) may be revised or revoked.

The amendment to the National Law to provide Ahpra and the National Boards with the power to issue a public statement (warning) is in new Part 8, Division 7B of the National Law. The amendment can be accessed directly using this link to the [Health Practitioner Regulation National Law and Other Legislation Amendment Act 2022](#).

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<sup>1</sup> Designating Queensland as host jurisdiction for the National Law is set out in the *Intergovernmental Agreement for a National Registration and Accreditation Scheme for the Health Professions* (April 2008); accessible from the [Ahpra website](#).

<sup>2</sup> **Relevant provision** means any of the following provisions— (a) section 113 – restriction on use of protected title; (b) sections 115 to 119 – holding out and restrictions on use of specialist titles; (c) sections 121 to 123 – restricted acts; (d) section 133 - advertising; (e) section 136 – directing/inciting offence.

## How we consulted

Targeted consultation on how Ahpra and the National Boards propose to use the new power to issue public statement warnings started on 19 January 2023 and closed on 22 February 2023. Extensions were granted on request up to 3 March 2023. The total consultation period was six weeks.

Targeted consultation allowed Ahpra to take a focused approach to test and refine our proposed implementation with stakeholders that have a significant interest in how we are proposing to use this new power and the safeguards that will be in place to ensure they are used lawfully and appropriately. The process provided an opportunity to provide feedback that will help us improve clarity and workability.

The targeted consultation paper was emailed to more than 100 key stakeholders, including peak consumer groups, health practitioner professional peaks, medical colleges, jurisdictions, indemnity insurers, and peak Aboriginal and Torres Strait Islander health groups.

In addition, the consultation paper and response form were publicly available on [Ahpra's dedicated webpage](#) for our implementation of the National Law amendments.

The targeted consultation paper asked open-ended questions about the proposed process, our explanation of key elements of the change including the decision maker, thresholds, and making, revising and revoking a statement.

Feedback was also sought on draft wording of the new chapter for the *Regulatory Guide*.

Material included:

- **Attachment A** – a table that sets out the proposed approach to the use of the new power to issue a public statement. The approach is designed to ensure that the use of the powers by Ahpra and the National Boards is lawful, proportionate to the relevant risk posed to the public, and is procedurally fair.
- **Attachment B** – the draft wording for a new chapter (based on the approach above) to be included in the published *Regulatory Guide* about public statements (warnings). The guide sets out how Ahpra and the National Boards manage notifications about the health, performance and conduct of practitioners under Part 8 of the National Law.

As we did targeted consultation, we advised stakeholders that all responses would be treated as confidential and feedback would not be published. If Ahpra receives a request for access to a submission, it will be determined in accordance with the *Freedom of Information Act 1982* (Cth), which has provisions designed to protect personal information and information given in confidence.

Our targeted consultation material stated that we were not revisiting policy decisions made by Health Ministers about public statements that led to the change to the National Law. The package of reforms was subject to multiple rounds of consultation, led by jurisdictions, over a number of years before the legislative bill of amendments was finalised and introduced into Queensland Parliament and ultimately passed following parliamentary debate.

## Purpose of the report on consultation

This report describes the consultation process, summarises responses received from stakeholders, and how these responses were considered in the finalisation of the new chapter for the *Regulatory Guide*. Our approach to targeted consultation was to respect confidentiality of submissions, while wanting to be transparent about the feedback we received and the changes that were agreed as a result.

## 2. Overview of consultation responses

### Submissions summary

Forty-one written responses were received to the targeted consultation, showing strong engagement and interest in how Ahpra and the National Boards propose to use this new power.

A breakdown is provided below:

**Table 1:**

Peak consumer organisation	1
Peak professional body	22
Government or statutory entity	11
Insurer/professional indemnity insurer	5
Other – community advisory group to the National Scheme	1
Other - professions advisory group within Ahpra	1
<b>Total</b>	<b>41</b>

**Table 2:**



### 3. Analysis of responses

#### Summary of responses

All responses to the targeted consultation were considered as part of our work to finalise changes to our regulatory policies and procedures and adding a new chapter to the published *Regulatory Guide* about issuing public statements. Many stakeholders chose to answer all questions posed in the consultation paper. Most of the feedback related to proposed use in matters involving registered health practitioners rather than unregistered persons. The new power applies to both.

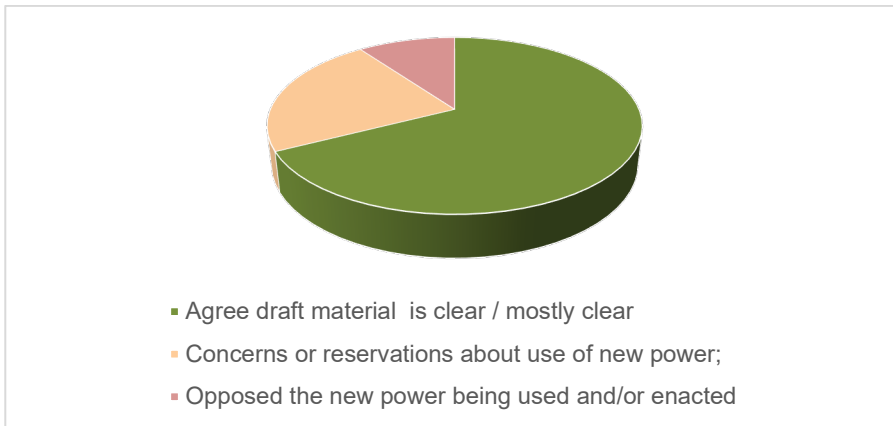
We thank all respondents for taking the time to respond and to share their thoughts on how we can improve the new chapter for the *Regulatory Guide*, strengthen the information we provide about our processes and decision-making consistent with our statutory obligations, and other ways that we can communicate the changes to practitioners and consumers and the public.

Responses can be categorised per below:

**Table 3:**

<b>Agree</b> draft material is clear / mostly clear with feedback to improve clarity and/or workability	<b>Concerns or reservations</b> about use of new power; with feedback to improve clarity and strengthen processes	<b>Opposed</b> the new power being used and/or enacted; asked that feedback not be considered as an indication of support
28	9	4

**Table 4:**



Most stakeholder responses considered the process and the draft chapter to be accurate and clear in many or all respects. Generally, stakeholders in this group:

- Acknowledged the link between this new power and the paramount principle of the National Registration and Accreditation Scheme to protect the public.
- Noted that this was a power to warn the public about serious risks posed by unregistered persons and registered health practitioners.
- Considered that issuing public statements should be highly effective in informing and providing protection to the public about serious risk.
- Welcomed the new commitment to protecting the public and enhancing the public's confidence in the delivery of health services.
- Noted that reassurance could be given about use of this power, so while there may be concerns about the negative impact on the reputation, health and wellbeing of practitioners, use of the power could be monitored for any unintended consequences or inappropriate use.

When detailed feedback was provided, it focussed on ways to clarify some aspects of the proposed processes including more clarity about the decision maker, thresholds, and interaction with other state and territory legislation and improvements in the wording used in the draft new chapter.

Many stakeholders in this group also had suggestions on ways that this new power could be communicated to practitioners and the public (in addition to the *Regulatory Guide*) – including developing FAQs specific to public statements, providing a visual diagram, and including information in the National Boards' newsletters.

We acknowledge that the prospect of Ahpra and the National Boards having the ability to issue public statements (warnings) in relation to registered health practitioners when the threshold is met continues to be of concern to some peak professional bodies and professional insurers/indemnity insurers. Four peak professional bodies expressed their continuing opposition to the new power and called for enactment of the change and/or implementation to cease. One stakeholder with strong concerns about the impacts the new power may have on practitioners recommended that implementation and enactment be further delayed so that acceptable guidelines for the use of the new powers can be developed in consultation with practitioners and consumers.

Common reasons for this positioning included:

- the current suite of regulatory levers and powers (including being able to take immediate action) achieves the aim of protecting public safety and this new power is not needed or justified
- the change to the National Law is too broad in scope, and lacks necessary detail
- the power disregards the principles of natural justice
- use of the power risks causing irreparable damage to practitioners' reputations, careers, and lives and their mental health

- the power may act as a deterrent to those interested in working in certain fields within the healthcare industry and may drive many to reconsider their careers as health professionals in a time of critical workforce shortages
- there is potential for overuse or misuse or inconsistent use of the new power
- Ahpra and National Boards' focus should be on improving existing processes and impacts that notifications have on practitioners.

We acknowledge that the views expressed by stakeholders in this group are consistent with feedback that was provided (to Governments) during policy development and drafting of this legislative provision. Many of these stakeholders also stated they did not support Ahpra and the National Boards having this power during Parliamentary debate. The role for Ahpra and the National Boards is to implement the changes to the National Law. Part of our work is to ensure that we have the processes, procedures, delegations, and systems in place to support our efficient, effective, fair and transparent use of any new powers in accordance with the National Law. Governments decide when the change will be enacted, and we must be ready for when this happens.

### Thematic analysis

A thematic analysis was carried out on feedback received – per below.

Theme	Feedback
Interaction between the National Law and other state and territory laws	<p>Some stakeholders recommended that there be greater clarity about, and recognition of, how the new power:</p> <ol style="list-style-type: none"> <li>will work in the co-regulatory jurisdictions of Queensland and New South Wales, including if a practitioner is based in one of these jurisdictions but the incident occurred elsewhere</li> <li>will work in states and territories that have implemented the National Code of Conduct for Health Care Workers and have statutory bodies (such as a health complaints body) that is able to issue public statements about unregistered persons.</li> </ol> <p>It was also recommended that there be recognition of the interface with the other statutory bodies that have the power to issue public statements – including how this may impact decision-making by Ahpra and the National Boards.</p>
Expected frequency of use of new power	<p>There were mixed views about our statement that we expect the new power would more likely be used for serious matters involving unregistered people as opposed to currently registered practitioners.</p> <p>Some stakeholders found this statement to be helpful and reassuring that the new power would not be used to name and shame practitioners and cause reputational damage.</p> <p>Others objected to the statement and asked on what basis Ahpra and the National Boards reached this conclusion; or viewed the statement as an effort to address health practitioner concerns but considered the statement needed to align more closely with public comments given at the time of Parliamentary debate about only using in exceptional cases.</p> <p>Others were concerned the statement gave health practitioners an inaccurate impression about the new power's scope as it applies to registered practitioners and unregistered persons; or expressed an expectation that the new power would be used as often as is needed for matters involving both registered practitioners and unregistered persons to protect the public from serious risk. These stakeholders suggested the emphasis be on the new power to protect the public and not how often we anticipate needing to use it.</p>
Draft new chapter for issuing public statements	<p>While most stakeholders found the draft guidance to be accurate, aligned with the change to the National Law and clear or mostly clear, a small number found that the draft guidance did not provide enough clarity and/or safeguards in key areas including the decision maker, the threshold test, and the process for making, revising and revoking public statements.</p>
Decision maker	<p>Most stakeholders found the decision maker and the circumstances to be clear; but some sought greater clarity about:</p> <ol style="list-style-type: none"> <li>who would make the decision if the matter involved a former registered health practitioner</li> </ol>

Theme	Feedback
	<ul style="list-style-type: none"> <li>b. who would make the decision if the matter involved actions being considered or taken by another statutory body</li> <li>c. what would happen if the practitioner is registered across two professions</li> <li>d. whether National Boards should delegate the decision to a committee (eg a special committee of the board)</li> <li>e. all decisions being informed by legal advice (not only those made by the Ahpra CEO)</li> </ul>
Threshold for use of power	<p>Overall, most submissions considered the guidance on the thresholds were reasonably clear and logical. However, some suggested that improvements could be made to improve both clarity and workability. Key areas included:</p> <ul style="list-style-type: none"> <li>a. more clarity about how a 'reasonable belief' is formed and suggestions on how this should be worded in the guide</li> <li>b. greater clarity about the meaning of 'serious risk' and examples could help illustrate this</li> <li>c. the guide being clearer about 'findings of fact'; so that the threshold could be seen as being subjective and not based in any fact</li> <li>d. 'necessity' should include whether the risk has been addressed through using other means</li> <li>e. providing caselaw that should be considered to inform threshold tests.</li> </ul> <p>A few submissions suggested that the guidance did not sufficiently stress the high threshold for the exercise of the power and/or proposed additional tests (eg the threshold be serious and imminent or grave public risk); or proposed an alternative threshold that did not align with the statutory threshold.</p> <p>A few submissions suggested that saying that the power would not be used commonly was not sufficient and that the guidance should instead say that the power will only be used rarely or in exceptional circumstances and/or when all other avenues have been exhausted.</p>
Procedure for making a public statement	<p>Overall, most submissions considered the guidance on the procedure was reasonably clear. There were some suggestions to improve clarity and workability including:</p> <ul style="list-style-type: none"> <li>a. greater clarity about how this power may be used if a 'Part 8' action – such as a Board taking immediate action to protect the public from risk – has already been taken</li> <li>b. the procedure could recognise the potential impacts on registered practitioners from use of this power</li> <li>c. the procedure needs to take account of other statutory bodies who have power to issue a public statement.</li> </ul> <p>Feedback on use of social media as a supplementary way of alerting the public that a public statement has been made and the serious risk ranged from support (including a suggestion that social media should be the default) to significant concerns that using social media would place the registered practitioner at risk of community backlash and cause irreparable damage.</p> <p>There were a few submissions that opposed this power being used and therefore opposed public statements being made or issued.</p>
Show cause process / giving notice	<p>While many stakeholders found the process to be clear and aligned with the change to the National Law, there were concerns:</p> <ul style="list-style-type: none"> <li>a. that providing notice in writing via email was inadequate and that other means of direct contact – including text message – needed to be used especially given the urgency involved and the impacts on the registered practitioner</li> <li>b. that a practitioner would not have a reasonable amount of time to lodge an appeal before a decision was made to issue a public statement and that was unreasonable</li> <li>c. about when a notice would be issued and that the timing must take account of business days and any public holidays</li> <li>d. more information should be provided about the appeals process for affected practitioners.</li> </ul>
Content of the statements	<p>Some stakeholders recommended that the <i>Regulatory Guide</i> include specific wording for the content of the public statement.</p>
Procedure for revoking or revising a public statement	<p>While many stakeholders found the process to be clear and aligned with the change to the National Law, some suggested that:</p>



Theme	Feedback
	<p>a. a further relevant factor to consider is whether the statement was made in circumstances where grounds did not exist; and it would be inadequate to just remove the public statement; and there should be consultation with the affected practitioner if the statement was being revoked because of these circumstances</p> <p>b. more information needs to be given about how the statement may be revised or revoked – including that there be a further media release if the original statement was promoted via media release and/or social media (with concerns about use of social media being restated) and a public apology if grounds never existed</p> <p>c. guidance could be strengthened by explicitly stating that the need for the public statement (once issued) would be actively monitored/reviewed for relevance and/or accuracy.</p> <p>A few submissions restated their opposition to public statements being issued and the harm caused to the practitioner’s reputation and life including because statements on the public record cannot be effectively or practically removed.</p>
Timeframes	Some stakeholders recommended that specific timeframes should be added to the guide to ensure procedural fairness for the affected registered practitioner.
Ways to explain how this new power will be used	There was strong support for use of examples and case studies in the <i>Regulatory Guide</i> . However, some stakeholders wanted more or different examples to be used. Some stakeholders suggested inserting examples about when a matter may not reach the threshold for using the power.
Review of <i>Regulatory Guide</i>	Some stakeholders noted that the <i>Regulatory Guide</i> is reviewed regularly and recommended that the next review occur in six to 12 months’ time.
Other information or material	Many stakeholders highlighted the need for other communication approaches to ensure the new power is understood. This included plain English information being developed to help practitioner and consumer understanding; creating a visual diagram; fact sheets and/or FAQs; flyers; including material in National Board newsletters; and considering access for people who do not have ready access to internet and translating guidance.

## 4. Summary of changes

### Changes made

Below is a high-level summary of the changes that have been made to the new chapter in the *Regulatory Guide* and to our procedures.

1. **Decision maker.** We clarified who the decision- maker is if conduct occurred while a health practitioner is not registered.
2. **Grounds for making a public statement.** We provided high level clarity about the content of a public statement and that it will take into account any submission made by the relevant person about the content and the fact that the person may not yet have had the issues considered by an external tribunal or court.
3. **Grounds for making a public statement.** We added reference to potential impact that the issuing of a public statement may have for the affected person (ie a registered health practitioner or unregistered person) to explain why the threshold for its use is high and that we do not expect to need to be commonly using the power.
4. **Serious risk.** We revised reference to the extent to which a decision maker must be satisfied about facts. Clarified the interface with Part 8 when immediate action has already been taken and sufficiently addresses the risk. Added reference to caselaw – *Loney v Nursing and Midwifery Board of Australia* [2020] QCAT 486, [10].
5. **Necessity.** We strengthened our reference to the impact on persons of the making of a public statement while ensuring that the protection of the public is paramount. We also added that the decision-maker will consult with the relevant health complaints entity if it believes that relevant action is being considered in respect of the person. If a state or territory health complaints entity has issued a public warning about the person, this will also be a relevant factor to consider in determining whether it is also necessary for the Board or Ahpra to issue a public statement.

6. **Making a public statement.** We clarified that in addition to providing the written notice of the decision to make a public statement via email; a text message will also be sent whenever possible, to help ensure the person is aware that the notice has been issued.
7. **Appeal.** We clarified that the timing will allow the person to appeal as well as consider any other urgent action. We revised the wording to explain that if an appeal is filed with a stay application, then the circumstances of the matter will be considered, especially taking into account the nature of the risk and the urgency in addressing the risk.
8. **Social media and other means.** We clarified that the purpose for making a public statement is to draw the general public's attention to the serious risk and this is why the decision maker can use social media or issue a media release and may also provide the notice to known affected parties.
9. **Revision.** We revised wording to clarify that the decision-maker can revise the statement on the application of the relevant person, another person or on their own motion and that any application will be considered as soon as is reasonably practical. We clarified that if the statement is revised in a material way, this will be brought to the public's attention in the same way as the original statement was made.
10. **Revocation.** We clarified that the decision maker will consider revocation either on the application of the relevant person, another person or on their own motion. The revised chapter states that the decision maker will do so as soon as is reasonably practical and will consult with the relevant person before deciding to remove a revocation statement. We expanded the relevant factors to be considered to include whether the statement is being revoked because the decision maker is satisfied that the reasons for making the public statement did not exist at the time the statement was made.
11. **Use of examples.** In response to feedback requesting more, different, or hypothetical examples of how this new power may be used, we will include more detailed examples in the FAQs that we will publish about public statements. We have kept the de-identified examples that were included in the consultation draft chapter that are drawn from real matters and have a commitment to adding further de-identified examples and case studies based on our use of the new power over time.

### Changes not made

There are changes that some stakeholders wanted to see that we have not been able to accommodate or if made, would duplicate information that is already available (including in other chapters of the *Regulatory Guide*):

1. **Raising the threshold for issuing a public statement.** The threshold is set in the legislation. However, we have made changes to make the explanation of these thresholds in the guide clearer, while remaining aligned with the change to the National Law.
2. **Details about how National Boards make decisions when concerns about registered practitioners are raised.** Detailed information about the notifications process is published on our website including FAQs which can be accessed at [www.ahpra.gov.au/Notifications/Further-information](http://www.ahpra.gov.au/Notifications/Further-information). Also, the introductory chapters of the Regulatory Guide provide guidance about the role of Ahpra and the National Boards, a framework for decision making, the notifications process and jurisdictional considerations.
3. **Involving professional associations, colleges, or asking an independent body to review the matter before a decision is made to issue a public statement.** Ahpra and the National Boards recognise that being subject to a notification can be distressing. We encourage registered practitioners to contact their insurer and to consider the other support that is available to them. We have not included involvement by professional associations or colleges in the process as to do so would delay the issuing of a statement when there is a serious risk to the public; to seek external review is not part of this process.
4. **Not proceeding with the change.** Ahpra and the National Boards cannot decide to cease implementation activities for changes to the National Law that have been passed by Parliament.

## 5. Conclusion

Ahpra and the National Boards have carefully considered stakeholder feedback, agreed the changes to be made, and will publish the new chapter in the *Regulatory Guide* to coincide with the start of this change (we expect in May 2023). The revised new chapter is provided in the **appendix** to this report.

## 6. Next steps

We recognise that the National Scheme can be complex to navigate and understand, and there are things we can do in addition to the new chapter in the *Regulatory Guide* to help explain how we propose to use this new power and respond to frequently asked questions and concerns.

Based on stakeholder feedback, Ahpra will publish additional explanatory material to help 'de-mystify' the process and help practitioners and the public understand the power and how and when we are likely to need to use it.

The *Regulatory Guide* is usually reviewed annually to ensure it stays current, relevant and effective. We have scheduled a review for 12 months after the new power starts.

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## Appendix: Revised new chapter for the *Regulatory Guide*

### 13. Public Statement (Warning)

#### 13.1 Power to issue a public statement (public warning)

##### Context

A public statement may be made about a person under section 159Q of the National Law if the decision maker reasonably believes that:

- the person has contravened a relevant provision<sup>3</sup> or is the subject of an assessment, investigation or other proceedings under Part 8 of the National Law; and
- because of the person's conduct, performance or health, the person poses a serious risk to other persons; and
- it is necessary to issue a public statement to protect public health or safety.

A public statement may identify and give warnings or information about a person and/or about the health services provided by a person.

#### 13.2 Who will be the decision maker?

A public statement may be made by Ahpra or by the National Board for the profession in which the person is or was registered. This Guide uses the term 'decision maker' to cover both Ahpra, the National Boards, and their delegates.

Generally, when the person that is the subject of the proposed statement is a registered practitioner, or if the conduct giving rise to the need for the public statement occurred when the person was a registered practitioner, the relevant National Board (through its delegated decision-making committees) will be the decision maker in relation to any proposal to make a public statement for the person.

In most other cases, such as when the relevant conduct occurs while the person is unregistered, Ahpra will be the decision maker. When Ahpra is the decision maker, the decision to propose a public statement or to issue a public statement will be made by the Ahpra Chief Executive Officer on advice from the Executive Director of Regulatory Operations and General Counsel.

Public statements are not a form of disciplinary action, determination, sanction, or penalty. Their purpose is to protect the public in cases when the decision maker considers it is necessary to do so.

#### 13.3 Grounds for making a public statement

A decision maker may only make a public statement if the decision maker reasonably believes that:

- the person has contravened a relevant provision, or the person is the subject of an assessment, investigation or other proceeding under Part 8 of the National Law; and
- because of the person's conduct, performance or health, the person poses a serious risk to other persons;
- it is necessary to issue a public statement to protect public health or safety.

A public statement may identify and give warnings or information about a person and/or about the health services provided by a person. The content of a public statement will vary from case to case, determined largely by reference to the identified serious risk and the level of information required to be provided to effectively address that risk. In determining the content of a public statement the decision maker will also take into account any submission made by the relevant person about the content and the fact that the person may not yet have had the issues considered by an external tribunal or court.

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<sup>3</sup> **Relevant provision** means any of the following provisions— (a) section 113 – restriction on use of protected title; (b) sections 115 to 119 – holding out and restrictions on use of specialist titles; (c) sections 121 to 123 – restricted acts; (d) section 133 - advertising; (e) section 136 – directing/inciting offence.

The making of a public statement potentially has a very significant impact upon the person the subject of the statement. Even the subsequent revocation of the public statement may not entirely address the impact upon a person and accordingly, the statutory provision sets a high threshold for the exercise of the power which will be used rarely.

In the context of a public statement:

- reasonable belief 'requires the existence of a factual matrix sufficient to induce the belief in a reasonable person'; and
- belief has been found to be 'an inclination of the mind toward assenting to, rather than rejecting, a proposition'.

### Contravention of relevant provisions

Relevant provisions for the purposes of section 159Q are sections 113, 115 to 119, 121 to 123, 133 and 136 of the National Law. A contravention of these provisions is a criminal offence.

In considering whether a person has contravened a relevant provision, there must be more than a suspicion that a contravention has occurred. There must be sufficient factual information available to the decision maker which gives rise to a reasonable belief that one or more contraventions have occurred, but the decision maker is not required to make factual findings about any particular alleged contravention.

### Serious risk

In considering whether, because of a person's conduct, performance or health, they pose a serious risk to the public, the decision maker will consider:

- the facts relating to the person's conduct, performance or health; and
- whether by virtue of the person's conduct, performance or health, the person poses a serious risk to persons.

The fact of, and serious nature of, allegations about a person may itself be sufficient to support a reasonable belief as to the existence of the serious risk.

In the context of immediate action, it has been said that "in assessing whether a person poses a serious risk to persons it is helpful to consider the nature of the risk, the likelihood of its eventuating and the seriousness of the consequences if the risk does eventuate."<sup>4</sup>

In considering the nature of the risk, the decision maker will assess who may be at risk (that is, the risk may be to the public in general, or to a specific population, such as female patients, or patients with a particular medical condition).

In circumstances where an objective of the national registration and accreditation scheme is to provide for the protection of the public by ensuring that only health practitioners who are suitably trained and qualified to practise in a competent and ethical manner are registered, there can be significant risk posed by persons purportedly practising in a health profession when they are not registered.

Examples of situations likely to pose a serious risk include:

- an unregistered person holding themselves out as a dentist who performs irreversible procedures on patients' teeth in a home 'clinic.' Such conduct exposes patients to risk of ongoing and long-term serious harm;
- a psychologist whose registration has been cancelled by a tribunal who continues to provide psychology services to patients. In such a case, patients are being exposed to risk that a tribunal has deemed so serious as to warrant the person providing services being excluded from the profession;
- a person with overseas medical qualifications who does not hold registration in Australia but provides cosmetic treatments using medications that only a registered practitioner may prescribe and administer. A person who has not met the requirements for registration in Australia exposes the person seeking cosmetic treatment to very serious risk with treatment that uses scheduled medication.

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<sup>4</sup> *Loney v Nursing and Midwifery Board of Australia* [2020] QCAT 486, [10].

- a registered practitioner who has been found to have seriously deficient infection control procedures and who has failed to provide details of any patients that may be at serious and immediate risk as a result.

## Necessity

Having formed a reasonable belief that because of the person's conduct, performance or health, they pose a 'serious risk' to people (as set out above), before proposing to issue a public statement the decision maker must also form a reasonable belief that the public statement is necessary to protect public health and safety. The decision maker will consider the impact on the person of the making of the public statement but the protection of the public will be paramount.

Whilst a decision to issue a public statement is in some respects similar to a decision to take immediate action against a registered practitioner under section 156, it is not the same. Immediate action restricts a person from undertaking activity which would, but for the immediate action, be lawful. A public statement does not restrict any person's activities, but merely gives information to the public.

Given that a public statement can be issued in respect of a person who may or may not be registered under the National Law, it might address activities that are unlawful under the National Law. For example, it is an offence to use a protected title, or carry out a restricted act, whilst unregistered. If by so doing a person poses a serious risk, it may be necessary to issue a public statement.

Public statements may also refer to health services that are not otherwise regulated under the National Law and activities that are not necessarily unlawful under the National Law. For example, the National Law does not regulate counselling or massage services, but a decision maker may reasonably believe that it is necessary to make a public statement about the counselling or massage services that have been or are being provided by a person who has contravened a relevant provision or is the subject of Part 8 proceedings.

It is in this context that the nature and seriousness of the person's conduct, performance or health which gave rise to the consideration of a public statement and the person's reaction to any warning in respect of the conduct will be relevant to deciding whether a public statement is necessary and the form it will take. The statements made about otherwise lawful activities referenced in a public statement will reflect the minimum regulatory response the decision maker considers is necessary to protect public health or safety.

In determining whether it is necessary to issue a public statement, the decision maker will also take into account whether any state or territory health complaints entity or any other relevant entity has already issued a public warning about the person or health services provided by the person. The decision maker will also consult with relevant health complaint entities if it believes that relevant action is being considered by that health complaints entity in respect of the relevant person.

## Health services

The decision maker may give warnings or information about a person or the health services provided by a person. 'Health services' is defined in section 5 of the National Law and extends beyond the services provided by registered health practitioners within the scope of their profession. It also includes:

- hospital services;
- mental health services;
- pharmaceutical services;
- ambulance services;
- community health services;
- health education services;
- welfare services necessary to implement any of the above services;
- services provided by dietitians, masseurs, naturopaths, social workers, speech pathologists, audiologists or audiometrists; exercise physiologists; and
- pathology services.

This list is not exhaustive.

## Person subject to Part 8 proceeding

The grounds for taking immediate action under section 156(1)(a) are identical to the grounds for issuing a public statement under section 159Q. If a Board has decided to take immediate action in respect of a practitioner, the Board will need to be satisfied that the serious risk identified is not sufficiently addressed by that immediate action before issuing a public statement. Having done so, a Board may decide that it is necessary and appropriate to issue a public statement in addition to the immediate action that has been taken. For example, the Board may consider it necessary to warn the public that the practitioner has been suspended and may not lawfully practice the profession if there is information to suggest the practitioner may not abide by the suspension. However, a public statement will not be used in every case of immediate action suspension – a public statement would only be issued in conjunction with immediate action if the immediate action would not be sufficient in itself to protect public health or safety.

The Board may also want to warn the public about the provision of related health services, which could otherwise be lawfully provided by someone who is unregistered, by a practitioner whose registration is or is proposed to be suspended or is subject to conditions imposed under section 156. For example, if a physiotherapist is suspended by way of immediate action for sexual assaults of a number of patients but continues to provide massage services, the Board may decide it is necessary to issue a public statement about the continuing risk.

## 13.4 Procedure and show cause process

### Show cause process

Before issuing a public statement about a person, the decision maker will:

- give the person:
  - a copy of the proposed public statement;
  - information about the way in which it is proposed to make the public statement; and
- invite the person to make a submission to the decision maker, within the time stated in the notice.

Generally, the notice will:

- explain that the decision maker is proposing to issue a public statement and provide a copy of the proposed statement;
- set out the reasons for the proposed public statement;
- include copies of, or summarise, the information the decision maker considered before proposing to issue the public statement; and
- invite the person to make a submission and/or to attend before the decision maker to make a verbal submission.

Upon receipt of the notice, the person may choose to provide a submission or to make no submission. The person may provide submissions in writing and/or verbally to the decision maker.

Ahpra and National Boards are committed to ensuring that the process is procedurally fair and that the relevant person has a reasonable opportunity to make submissions. However, the time permitted for a person to provide a submission may be limited, due to the nature of the decision maker's obligation to protect public health or safety.

Verbal submissions will be made to the National Board's delegated decision making committee or, in the case of an Ahpra decision, to a person or persons nominated by the Chief Executive Officer who will provide a report of those submissions to the Chief Executive Officer.

Before deciding whether to issue a public statement, the decision maker will consider the person's submissions.

### Decision to make public statement

The decision maker will decide whether to make the public statement, or make the statement in a different way or with different content, after it considers any submissions from the person. In making this decision, the decision maker will weigh up the reasons for making the public statement against the impact on the practitioner and any other relevant factors raised by the practitioner, recognising that protection of the



public and public confidence in the safety of services provided by registered health practitioners are paramount.

As soon as practicable after making the decision, the decision maker will give written notice of the decision to the person. The written notice will include the reasons for the decision and if the decision is to make a public statement, will explain that the person may appeal against the decision, how an application for an appeal may be made and the period within which such an appeal must be made.

If the decision is to make the public statement, the written notice must be given at least one business day before the statement is to be made. Such notice will be given in such a way as to ensure it is brought to the attention of the affected party; usually that notice will be provided by email with text message (whenever possible) alerting the relevant person to the fact of the emailed notice but if necessary, other forms of communication will be used to make contact with the affected party. Whether a notice period longer than one business day is provided will depend on the circumstances of the matter. However, the paramount concern in determining the period of notice will be the protection of the public.

Allowing such time before the statement is made provides the person with an opportunity to appeal and to consider any urgent action to prevent the statement being made such as by seeking a stay of the decision or an injunction.

Where an appeal is filed with no application for a stay of the decision to make the statement, the statement will proceed to be issued in the normal course.

If an appeal is filed with a stay application, then the circumstances of the matter will be considered, especially taking into account the nature of the risk and the urgency in addressing it. While the circumstances of each matter will be considered carefully, generally, in the absence of a stay of the decision or an (interim) injunction being granted, Ahpra will proceed to issue the public statement even if the person affected indicates that an appeal will be lodged.

The public statement may be made in a way that Ahpra or the National Board considers appropriate. The statement will be made by posting the public statement on a dedicated webpage that is accessible from the Ahpra and National Boards websites. When the statement relates to a registered practitioner, the statement will also be included against that person's registration on the national register.

The purpose of making a public statement is to draw the public's attention to a serious risk. Ahpra and the National Boards can therefore also bring the making of the notice to the attention of the broader public by posting on social media or by media release and may supplement that with notice to known affected parties by targeted correspondence.

When determining the content of the public statement, the decision maker will ensure that the privacy and confidentiality of notifiers, patients and members of the public is respected.

### Revision of public statement

The decision maker may revise a public statement if it reasonably believes it is necessary in the circumstances on the application of the relevant person, another person or on their own motion. When an application for revision is made by the relevant person or another person, the decision maker that made the original decision will consider the application as soon as is reasonably practical.

If the proposed revision changes the public statement in a material way, the decision maker will follow the same show cause process as applied to the making of the statement the first time.

Any public statement that is revised in a material way will be brought to the attention of the public in the same way as the original public statement was including by media release and social media posting.

### Revocation

The decision maker must revoke the public statement if the decision maker is satisfied the grounds on which the statement was made no longer exist in relation to the person, or the grounds did not exist at the time the statement was made.

For example, the decision maker may revoke the public statement if:

- it related to the use of protected titles or carrying out of restricted acts when the person was unregistered, but the person has since become registered;
- the person is no longer the subject of an assessment, investigation or other proceeding under Part 8 of the National Law and is not believed to have contravened a relevant provision;



- Ahpra’s criminal investigation has determined that no offences were committed;
- reliable information obtained during Ahpra’s investigation indicates that the person has ceased the behaviour that gave rise to the decision maker’s reasonable belief that the person posed a serious risk to persons and the decision maker no longer believes it is necessary that the public statement be maintained to protect public health or safety – for example if the person has retired and no longer provides any health service.

As soon as practicable after deciding to revoke a public statement the decision maker will:

- give the person a written notice stating the date on which the public statement will be revoked; and
- make a public statement revoking the original public statement in the same way, or a similar way, to the way in which the original public statement was made.

Ahpra or National Board will consider revocation of the public statement either on the application of the relevant person, another person or on their own motion and will do so as soon as is reasonably practical. Revocation will take place in the same way as the statement was made, namely by removing the statement from the dedicated webpage. If an entry about the public statement has been made on the national register, that entry will be removed upon revocation as will any reference to the public statement accessible from our websites.

The National Law requires a public statement to be made revoking the original public statement. That statement will be made by publishing it on the dedicated webpage of the Ahpra website and may itself be removed once the National Board or Ahpra considers that the revocation statement no longer serves a useful purpose. That is, the revocation statement serves a purpose of advising that the serious risk has been addressed or no longer exists but as the content of the revoked public statement fades from public memory over time, there will no longer be any purpose to a statement indicating that it has been revoked. The decision maker will consult with the relevant person before deciding to remove a revocation statement.

If the person the subject of the public statement requests that Ahpra or the National Board take additional steps in respect of the revocation (for example by issuing a media release or posting on social media about the revocation), the full circumstances of the matter will be considered in determining whether to do so. A relevant factor in making this decision will be whether Ahpra or the National Board issued a media release or posted on social media about the public statement at the time it was made. Another relevant factor that the decision maker will consider is whether the public statement is being revoked because the decision maker is satisfied at the time of revocation that the reasons for making the public statement did not exist at the time the statement is made.

A decision to revise or revoke a public statement does not limit Ahpra’s ability to prosecute the person for any offences alleged to have been committed by the person. Decisions about whether to prosecute an offence under the National Law are made in accordance with Ahpra’s Prosecution Guidelines<sup>62</sup> and include an assessment of whether there is a reasonable prospect of a conviction and whether a prosecution is in the public interest. Similarly, a decision to revoke a public statement about a person the subject of an assessment, investigation or other proceeding under Part 8 of the National Law does not limit the Board’s ability to take further action under Part 8 in relation to the health, performance or conduct of the person or affect the validity of any action previously taken.

### 13.5 Conclusion

Public health and safety is paramount in considering the application of this new power. While it is anticipated to be a power that will be used rarely, and there is a potential for negative effects on relevant persons, protection of the public will always be the paramount consideration when considering the power to issue a public statement (warning).