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Nursing and Midwifery	Psychology

Australian Health Practitioner Regulation Agency

Regulatory Operations Guideline: Managing risk to public safety via relevant action

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Regulatory Operations Guideline – Managing risk to public safety via relevant action

Purpose and scope

This guideline is intended to support the effective and consistent application of the relevant action provisions contained within Division 10 of Part 8 of the Health Practitioner Regulation National Law (National Law).

The scope of the document is limited to providing information to support the interpretation and application of Division 10 of Part 8 of the National Law. The document does not set out to provide guidance about decisions that fall outside the relevant action provisions contained within sections 178 and 179 of the National Law^{1,2}.

Relevant action under the National Law

Division 10 of Part 8 of the National Law empowers National Boards to make decisions to take relevant action³ in relation to a practitioner or student in response to a notification (complaint) or another regulatory concern, such as a breach of a registration restriction.

Relevant action includes one or more of the following:

- cautioning a practitioner or student
- accepting an undertaking offered by a practitioner or student
- imposing conditions on a practitioner's or student's registration
- referring a matter to another entity for investigation or other action

Relevant action enables National Boards to protect the public from any current or future risk that has been highlighted by the behaviour, medical condition or disability of a registered practitioner or student that has been the subject of a notification or has come to the attention of the Board through another regulatory process. Relevant action must not be used to discipline a registrant in circumstances where no risk to current or future patients or other members of the public has been identified or where appropriate strategies have already been established to mitigate identified risk.⁴

This guideline sets out a methodology to determine whether it is appropriate to use relevant action as a regulatory response to a notification or another concern.

Decision Making Methodology

STEP 1: Determine the allegation

Part 8 of the National Law deals with complaints and other concerns about a practitioner's health, conduct and/or performance. These concerns arise as a result of behaviour that the practitioner is alleged to have engaged in. This behaviour may relate to a medical condition / disability or specific acts (something that a person did) or omissions (something a person didn't do). Behaviours can occur both within, and outside,

¹ Division 10 of Part 8 of the Health Practitioner Regulation National Law deals with the concept of 'relevant action' and contains sections 178 and 179

² For example, this guideline does not set out to provide detailed guidance about the:

- interim protection of the public through immediate action;
- collection of further information through investigations, performance assessments and health assessments;
- the rules of natural justice and the steps that must be taken in the administration of a notification or regulatory concern to ensure that a registrant is afforded procedural fairness;
- circumstances in which it may be appropriate to establish a Performance and Professional Standards Panel to hear a matter; and the
- assessment of a person's suitability to hold registration under Part 7 of the National Law.

³ Health Practitioner Regulation National Law, s178

⁴ Ibid, ss3(2)(a) & 3A; Regulatory Principles for the National Scheme, Principle 6. Accessed on 5 May 2017 at <<http://www.ahpra.gov.au/About-AHPRA/Regulatory-principles.aspx>>

practice of a health profession.

Issues

Before a decision can be made about whether an allegation is substantiated or unsubstantiated it is first necessary to define the specific behaviour(s) that may give rise to a concern about a registrant's health, performance and/or conduct. These are generally referred to as the 'issues' and are stated as propositions. For example:

Whether the practitioner removed medication from the drugs cabinet at ACME Medical Practice, Someplace, on 1 January 2017.

It is important to remember that practitioners must be advised of each issue and afforded an opportunity to make submissions in response. Where new issues are identified, particularly in relation to an existing investigation, it is necessary to advise practitioners of the new, or revised, issues and to invite them to make further submissions before proceeding to make a determinative, or final, decision. This is important to ensure that we meet our obligations to provide a procedurally fair process to registrants.

Step 2: Determine whether each issue occurred

The next step of the decision making process is to determine whether the behaviour that constitutes each of the issues occurred. This involves weighing up the available information to determine whether there is a sufficient basis to form a reasonable belief that each of the defined issues is substantiated.

Reasonable belief

In the context of responding to a notification under the National Law, forming a reasonable belief requires a close examination of the information available to determine whether there is a sufficient evidentiary basis to induce a reasonable person to believe that it is more likely than not that an alleged behaviour occurred.⁵

There must be sufficient evidence on which to base a decision. It is not appropriate to reach a decision that an alleged behaviour occurred in the absence of sufficient evidence to support that proposition. This means that it is not appropriate to speculate that an act or omission did, or didn't, occur unless there is sufficient evidence to support such a conclusion.

The decision maker must consider the seriousness of the allegation, the likelihood of events occurring as described and the gravity of the consequences that may flow from the decision in weighing up the evidence and determining that there is sufficient information to conclude that a registrant engaged in the behaviour alleged.⁶

In other words, cases that may result in serious consequences for practitioners⁷ require National Boards and their delegates to be comprehensive in gathering evidence and to closely examine and weigh up that information in order to be comfortably satisfied that a past behaviour did, in fact, occur.

In deliberating about whether there is a sufficient basis to form a reasonable belief, it is important to consider:

- i. Is there agreement or dispute about whether the alleged behaviour occurred?
- ii. Is objective evidence available that supports either the notifier's or the practitioner's version of events?
- iii. Is any of the evidence available contradicted by other information?
- iv. If there is conflicting evidence then is there any further information that suggests one piece of evidence is more credible and/or reliable?

⁵ *George v Rockett* (1990) 170 CLR 104; *Nitschke v Medical Board of Australia* [2015] NTSC 39; *Shahinper v Psychology Board of Australia* [2013] QCAT 593; *Coppa v Medical Board of Australia* (2014) 291 FLR 1; *Bernadt v Medical Board of Australia* [2013] WASCA 259

⁶ *Briginshaw v Briginshaw* [1938] HCA 34; (1938) 60 CLR 336; *Solomon v Australian Health Practitioner Regulation Agency* [2015] WASC 203; *Dekker v Medical Board of Australia* [2014] WASCA 216

⁷ Taking relevant action can have a serious impact on practitioners. For example, relevant action may lead to financial, opportunity and reputation consequences.

- v. What is the inherent likelihood of a registrant engaging in the behaviour of concern as described in the complaint?
- vi. How serious is the allegation?
- vii. Is there sufficient information available, taking into account the seriousness of the potential consequences that the allegation may result in for the practitioner?

Taking into account the opinions of Board or Committee members

National Boards and their delegate boards and committees are comprised of both practitioner and community members who are brought together for the purpose of making administrative decisions under the National Law. The decision-maker benefits from the individual knowledge and expertise that each member contributes to the deliberative process.

It is important that members of decision making bodies and AHPRA employees⁸ do not become witnesses in a matter by introducing their own professional opinions as expert evidence. It is preferable to seek an independent clinical opinion from a professional who is external to the Board and AHPRA in situations where insufficient information is available to reach a satisfactory conclusion in the absence of expert evidence.

The individual expertise of Board / Committee members and AHPRA employees is not a substitute for a sufficient body of evidence. National Boards and delegates should not rely on the opinions of individual members to contradict or displace evidence (such as expert evidence provided by a practitioner) where no other information is available to support such a conclusion.

However, the individual expertise of people sitting on a decision making body is helpful in weighing up evidence and deciding how much weight should be placed on it. Individual expertise can assist in identifying gaps in evidence and discrepancies that may indicate that further information needs to be obtained. Individual expertise is also of great benefit in interpreting technical information and deciding whether weight should be given to one particular account in circumstances where conflicting evidence is being considered.

Unsubstantiated allegations

No action should be taken in relation to a registrant where it has been determined that the evidence available does not support a reasonable belief as described earlier in Step 2. This may be because there is not enough information available to the decision maker or because the evidence does not support a conclusion that a practitioner engaged in the inappropriate behaviour alleged.

Substantiated allegations

Where a reasonable belief has been formed that it is more likely than not that a registrant engaged in one or more of the alleged behaviours then the decision maker should proceed to step 3 below.

STEP 3: Determine whether the behaviour indicates that the person has an impairment, has practised the profession in an unsatisfactory way and/or engaged in professional conduct that is unsatisfactory

Section 178(1) of the National Law sets out the circumstances in which a National Board may take relevant action in response to a notification or a concern. It is necessary for a National Board or delegate to determine that a registrant's substantiated behaviour (see step 1 and 2 above) meets the requirements of section 178(1) before considering the nature of the relevant action that may be appropriate in the circumstances.

A National Board may take relevant action in relation to a registrant if a reasonable belief has been formed that the person:

- i. Is a registered health practitioner and has practised the health profession in a way, or engaged in professional conduct, that is, or may be, unsatisfactory;
- ii. Is a registered health practitioner or student and has, or may have, an impairment of their ability to

⁸ Such as Clinical Advisors & Professional Officers.

AHPRA's role is to support National Boards to exercise their functions. It is important that AHPRA employees remain objective, impartial and without bias throughout the administration of a notification.

practise the health profession;

- iii. Is a student who has been charged, convicted or found guilty of an offence punishable by twelve months or more imprisonment; or
- iv. Is a student who has contravened a registration condition or undertaking.

The requirements of each of these categories are explored further under the headings below.

Unsatisfactory professional practice and/or conduct

A National Board may take relevant action against a registered health practitioner if a reasonable belief is held that the way the person practises the health profession, or the person's professional conduct, is or may be unsatisfactory.

Understanding the interpretation and application of the phrase 'is or may be' is important in making effective and appropriate relevant action decisions.

As a general rule, proposing or taking relevant action requires a decision maker to form a reasonable belief that the way a registrant practises the health profession, or their professional conduct, 'is' unsatisfactory.⁹

In very rare and narrow circumstances¹⁰ it may be permissible to take relevant action on the basis that a registrant 'may' have engaged in professional conduct or practised the profession in a way that is unsatisfactory. For example, it may be permissible to take relevant action on this basis where a registrant submits that taking relevant action is an appropriate regulatory response but has not made any specific admissions that they engaged in the behaviour alleged.

While section 178 of the National Law does not expressly refer to any statutory definitions, section 5 contains two definitions, 'unprofessional conduct' and 'unsatisfactory professional performance', that establish concepts and tests that are relevant to determining whether a practitioner has engaged in the unsatisfactory practice or conduct described by the provision. Section 5 of the National Law states:

Unprofessional Conduct

Unprofessional conduct, of a registered health practitioner, means professional conduct that is of a lesser standard than that which might reasonably be expected of the health practitioner by the public or the practitioner's professional peers, and includes:

- a) a contravention by the practitioner of [the National Law], whether or not the practitioner has been prosecuted for, or convicted of, an offence in relation to the contravention; and
- b) a contravention by the practitioner of:
 - i) a condition to which the practitioner's registration was subject; or
 - ii) an undertaking given by the practitioner to the National Board that registers the practitioner; and
- c) the conviction of the practitioner for an offence under another Act, the nature of which may affect the practitioner's suitability to continue to practise the profession; and
- d) providing a person with health services of a kind that are excessive, unnecessary or otherwise not reasonably required for the person's well-being; and
- e) influencing, or attempting to influence, the conduct of another registered health practitioner in a way that may compromise patient care; and
- f) accepting a benefit as inducement, consideration or reward for referring another person to a health service provider or recommending another person use or consult with a health service provider; and
- g) offering or giving a person a benefit, consideration or reward in return for the person referring another person to the practitioner or recommending to another person that the person use a health service provided by the practitioner; and

⁹ Records of decisions and reasons relating to relevant action should generally use the phrase 'is unsatisfactory' rather than the phrase 'is, or may be, unsatisfactory' when describing the nature of the reasonable belief formed.

¹⁰ Obtaining legal advice is recommended in any circumstance where relevant action is being considered on the basis that a practitioner 'may' have engaged in professional conduct or practice that is unsatisfactory.

- h) referring a person to, or recommending that a person use or consult, another health service provider, health service or health product if the practitioner has a pecuniary interest in giving that referral or recommendation, unless the practitioner discloses the nature of that interest to the person before or at the time of giving the referral or recommendation.

Unsatisfactory Professional Performance

Unsatisfactory professional performance, of a registered health practitioner, means the knowledge, skill or judgment possessed, or care exercised by, the practitioner in the practice of the health profession in which the practitioner is registered is below the standard reasonably expected of a health practitioner of an equivalent level of training or experience.

The tests established within the definitions of unprofessional conduct and unsatisfactory professional performance should be applied in determining whether the requirements of section 178(1)(a)(i) have been met.

Unsatisfactory professional performance has been authoritatively described as a subset of unprofessional conduct.¹¹ If a practitioner engages in unsatisfactory professional performance then it is likely that it could be argued that the person has also engaged in unprofessional conduct.¹² 'Performance' refers to the aspect of a practitioner's conduct that is derived from their professional knowledge, skill or judgment.

Determining whether a practitioner's behaviour meets the definition of unsatisfactory professional performance

Establishing that a registered health practitioner has engaged in unsatisfactory professional performance requires consideration of three elements:¹³

1. Having found that a practitioner behaved a certain way, the decision maker must determine whether that behaviour reflects:
 - i. the level of knowledge, skill or judgment possessed by the practitioner; and/or
 - ii. the level of care exercised by the practitioner.
2. Was the level of care and/or the knowledge, skill or ability reflected by the practitioner through their behaviour in the context of the practice of the health profession in which the practitioner is registered?
3. Was the level of care and/or knowledge, skill or ability reflected by the practitioner through their behaviour below the standard reasonably expected of a health practitioner of an equivalent level of training and experience? Reaching a conclusion about this element involves answering three questions:
 - i. What level of training and experience is possessed by the practitioner?
 - ii. What level of care and/or standard of knowledge, skill or judgment would be expected of a health practitioner with that level of training and experience?
 - iii. Was the level of care and/or standard of knowledge, skill or judgment reflected in the practitioner's behaviour below the standard reasonably expected of another health practitioner with that level of training and experience?

If each of the above elements have been considered and met then it is open to a National Board to form a reasonable belief that a registered health practitioner engaged in unsatisfactory professional performance. If the elements are not met, or the answers to the questions are not clear, then the decision maker should consider ordering further investigation of the matter (if appropriate) or taking no regulatory action in response to the issue under examination.

Determining whether a practitioner has engaged in unprofessional conduct

Similarly, establishing that a practitioner has engaged in unprofessional conduct requires:

1. Defining the behaviour(s) of concern (this may be something that the practitioner did or something that they did not do);

¹¹ *Solomon v Australian Health Practitioner Regulation Agency* [2015] WASC 203 at [126]

¹² *Ibid.*

¹³ *Solomon v Australian Health Practitioner Regulation Agency* [2015] WASC 203 at [133] to [136]

2. Determining the relationship between the behaviour and the practice of the health profession, including:
 - i. Did the behaviour occur in the practice of the profession?
 - ii. If the behaviour occurred outside the practice of the profession then was it of a nature that may affect the practitioner's suitability to continue to practise?
3. Determining the standard of behaviour that might reasonably be expected of a health practitioner by the broader community or other practitioners registered in the same health profession; and
4. Determining whether the practitioner's conduct was of the standard reasonably expected of a health practitioner.

If it is not possible to address the issues set out above on the information currently available then the decision maker should consider ordering that further information be obtained. If further information is unlikely to be available then a decision to take no regulatory action in relation to the issue of concern should be made.

If a National Board or delegate considers that a practitioner has engaged in behaviour that is connected with the practice of their health profession, or may affect the person's suitability to continue practising, and the behaviour is below the standard that could reasonably be expected of another health practitioner registered in the same profession then it is open to the decision maker to take relevant action.

Impairment

A National Board may take relevant action in relation to a registered health practitioner or student if a reasonable belief has been formed that the person has, or may have, an impairment.

The term 'impairment' is defined in section 5 of the National Law as:

Impairment

Impairment, in relation to a person, means the person has a physical or mental impairment, disability, condition or disorder (including substance abuse or dependence) that detrimentally affects or is likely to detrimentally affect:

- a) For a registered health practitioner or an applicant for registration in a health profession, the person's capacity to practise the profession; or
- b) For a student, the student's capacity to undertake clinical training:
 - i. as part of the approved program of study in which the student is enrolled; or
 - ii. arranged by an education provider.

In order to determine whether a registered practitioner or student has an impairment as defined by the National Law it is important to establish:

1. Whether the person has a medical condition and/or disability and, if so, the nature of that condition.
2. The nature and extent to which the medical condition and/or disability impacts, or is likely to impact, on the person including, but not limited to, the effect on:
 - i. Cognition;
 - ii. Memory;
 - iii. Communication;
 - iv. Psychological and social functioning; and/or
 - v. Physical functioning, including mobility, dexterity, stamina or sensory acuity.
3. Whether the condition is acute or chronic.
4. Whether the condition is episodic.
5. Whether the medical condition and/or disability results in a functional limitation of the person's ability to independently carry on his or her occupation.
6. The severity of any identified functional limitation on the person's ability to independently complete tasks and actions reasonably necessary to perform their occupation as a registered health practitioner or to engage in the educational activities required to become a registered health

practitioner in the future.

7. Whether any functional limitation in relation to occupation has been overcome through accommodations¹⁴.

It is important to remember that demonstrating that a person has a medical condition or disability does not establish that the person has an impairment under the National Law. Rather, impairment is the detrimental impact that a person's condition has on their ability to independently complete the tasks and actions reasonably necessary to pursue the occupational requirements of their health profession.¹⁵

Many people with chronic health conditions and / or disabilities may not be able to independently complete occupational tasks or activities without assistance. However, workplace accommodations such as job redesign, environmental design, aids and equipment may assist people to overcome impairment related barriers to occupational participation.

National Boards and Committees should take into consideration the accommodations and strategies that a practitioner or student has implemented to assist them to overcome impairment related barriers in determining whether a person experiences an impairment and, if so, to what extent regulatory action needs to be taken to protect the public.

Student charged, convicted or found guilty of an offence punishable by more than 12 months imprisonment

A National Board or delegate decision maker may take relevant action in relation to a registered student who has been charged or convicted of an offence punishable by more than 12 months imprisonment.

In considering such a matter it is important to establish:

1. Whether the person is a registered student under the National Law;
2. The nature and circumstances of the alleged or proven behaviour that led to the charge, conviction or finding of guilt;
3. Whether the behaviour occurred in connection with the health profession or the delivery of a health service; and
4. The details of the offence with which the person has been charged, convicted or found guilty, including the maximum sentence that may be imposed for such an offence.

If a student has been charged, convicted or found guilty of an offence that carries a maximum penalty of 12 months or more of imprisonment then it is important that the relevant National Board considers whether the alleged or proven behaviour results in public safety risks relating to the person's engagement in a program of study that may lead to registration in a health profession.

Student contravening a condition or undertaking given to a National Board

Relevant action may also be considered in relation to a student who has contravened a registration condition or undertaking that restricts his or her registration under the National Law.

In considering whether to take relevant action in relation to a student in these circumstances it is important to establish:

1. Whether the person is a registered student under the National Law;
2. That the person's registration under the National Law is, or was, subject to restrictions imposed through a condition or undertaking at material times;
3. The nature of the obligations imposed on the person through the condition or undertaking;
4. Whether the person acted in a manner that was inconsistent with an obligation arising from a condition or undertaking; and
5. The factors which may have caused, or led to, any breach of a condition or undertaking.

Registration restrictions are intended to protect the public from identified risk. Intentional, or willful,

¹⁴ In this context the word '*accommodations*' refers to strategies that a person may have introduced to assist them to overcome a functional limitation arising as a result of a medical condition and/or disability. Common '*accommodations*' include medical aids and equipment, treatment plans, return to work programs, environmental modifications and job redesign.

¹⁵ World Health Organisation, *Towards a Common Language for Functioning, Disability and Health: The International Classification of Functioning, Disability and Health*, UN Doc WHO/EIP/GPE/CAS/01/3 (2002)

breaches of conditions or undertakings are serious matters.

Where the terms of a condition or undertaking have not been complied with, National Boards need to consider whether the matter needs to be referred for formal disciplinary proceedings before a performance and professional standards panel or tribunal or whether the public requires protection in the form of relevant action.

In some cases, the cause of a breach of condition or undertaking may be unintentional, accidental or due to a factor outside of a person's control. In these cases, the existing conditions or undertakings should be reviewed to ensure that they are appropriate, capable of being complied with and are enforceable. However, it may be appropriate to take no action in response to the breach.

STEP 4: Conduct an assessment of the current and future public safety risk(s) that may arise if the registrant further engages in similar behaviour

If the behavior constituting one or more of the regulatory issues arising from a notification or regulatory concern is substantiated and the behaviour meets one of the tests set out in section 178(1)(a) of the National Law, then a National Board may take relevant action.

However, it is an important principle of regulation under the National Law that any action taken to restrict a person's registration protects the public from an identified current and/or future risk of harm in the manner that has the least restrictive impact on the practitioner's ability to pursue his or her occupation.¹⁶

It is necessary to conduct a risk assessment in order to determine the nature of the least restrictive regulatory response that is appropriate in the circumstances. Risk assessments identify the consequences that may arise in the future should certain events occur and the likelihood of those events occurring. In assessing risk it is important to define:

1. Each specific risk;
2. The severity of the consequences that may flow from the realization of a risk; and
3. The likelihood of each identified risk being realized, taking into consideration any factors that may be exacerbating or mitigating.

In the context of health regulation this means that it is necessary to identify the nature of the harm (if any) that may be experienced by members of the public should the registrant engage in the same or similar behaviour in the future. It is important to assess how serious any potential harm may be and to assess the likelihood of harm occurring. In assessing likelihood it is important to take into consideration any factors that may increase or decrease the likelihood of a risk being realized. This includes any action voluntarily taken by a registrant to address risk factors. For example, by seeking treatment or engaging in further education or training.

A balance must be struck between severity and likelihood. If the severity of a current or future potential risk to a member of the public is very high (for example death or permanent disability) then it may be appropriate to take relevant action even if the likelihood of the risk being realized is low. Similarly, if the severity of a potential consequence is relatively low it may be appropriate to take relevant action if the likelihood of the risk being realized is high or almost certain. Where the severity of potential consequences is assessed as low and the likelihood of the risk being realized is also low then it may not be appropriate to impose restrictions on a practitioner's registration even if a National Board reasonably believes that the person has an impairment or has engaged in professional conduct or performance that is unsatisfactory. In these circumstances the Board should consider whether the matter could be effectively resolved through the imposition of a caution or a decision to take no further action.

Any relevant action taken by a National Board must be designed to reduce the severity and/or likelihood of potential harm in the manner that has the least restrictive impact on the registrant.

If no risk to current or future patients has been identified then it is not appropriate to take relevant action. While a National Board may still maintain a reasonable belief that a practitioner's performance or conduct was unsatisfactory, or that s/he was impaired, if there is no risk to current or future public safety then the appropriate regulatory outcome is no further action. This is because the process is intended to be

¹⁶ Regulatory principles for the National Scheme. Principle 6: *When we take action about practitioners, we use the minimum regulatory force appropriate to manage the risk posed by their practice, to protect the public. Our actions are designed to protect the public and not to punish practitioners. While our actions are not intended to punish, we acknowledge that practitioners will sometimes feel that our actions are punitive.* Accessed on 5 May 2017 at < <http://www.ahpra.gov.au/About-AHPRA/Regulatory-principles.aspx>>

protective rather than punitive.¹⁷

It is accepted that health regulation involves maintaining proper ethical and professional standards.¹⁸ This is primarily for the protection of the public but is also for the protection of the profession.¹⁹ Breaches of professional and ethical standards generally pose either a direct²⁰ and / or indirect²¹ risk to public safety.

In circumstances where substantiated breaches of ethical or professional standards do not involve a clear risk to public safety it is open to a Board to seek to protect the profession by referring the practitioner for disciplinary proceedings before a Performance and Professional Standards Panel or a Tribunal.²²

STEP 5: Determine whether the matter is required, or should be, referred for disciplinary proceedings before a panel or tribunal

A National Board may only take relevant action under section 178 of the National Law if the matter is not required to be referred to a responsible tribunal and it is not necessary or appropriate to refer the matter to a performance and professional standards or health panel.

Tribunals and panels are separate decision makers who may consider the allegations against practitioners, make findings of fact and impose protective orders. Where allegations are being referred to another decision maker it is not appropriate, and is legally precluded, for a National Board to make a determinative decision.

Referrals to a responsible tribunal

With the exception of legislation in force within Queensland²³, the National Law provides²⁴ that a matter *must* be referred to a responsible tribunal if:

- i. a Board reasonably believes that a registered health practitioner has behaved in a way that constitutes professional misconduct;
- ii. a practitioner's registration was improperly obtained because the practitioner or someone else gave a Board information or a document that was false or misleading in material particular; or
- iii. a panel hearing a matter requires the relevant Board to refer the matter to a responsible tribunal.

Professional misconduct is defined by section 5 of the National Law as:

Professional misconduct, of a registered health practitioner, includes:

- a) unprofessional conduct by the practitioner that amounts to conduct that is *substantially below* (emphasis added) the standard reasonably expected of a registered health practitioner of an equivalent level of training or experience; and
- b) more than one instance of unprofessional conduct that, when considered together, amounts to conduct that is substantially below the standard reasonably expected of a registered health practitioner of an equivalent level of training or experience; and
- c) conduct of the practitioner, whether occurring in connection with the practice of the health practitioner's profession or not, that is inconsistent with the practitioner being a fit and proper person to hold registration in the profession.

Referrals to a panel

¹⁷ Ibid.

¹⁸ *Health Care Complaints Commission v Litchfield* [1997] NSWSC 297

¹⁹ Ibid.

²⁰ A direct risk to public safety relates to the potential for a practitioner could harm a person through their behaviour.

²¹ An indirect risk to public safety includes behaviour that would tend to undermine public confidence in the profession.

²² Above, n 16

Note: It is important that referrals to a Performance and Professional Standards Panel or Tribunal meet relevant legal tests under the National Law. It is recommended that legal advice be obtained if referral for disciplinary proceedings is being considered.

²³ The Health Practitioner Regulation National Law as in force in Queensland provides that the National Board must advise the Health Ombudsman of any reasonable belief that a practitioner has, or may have, engaged in professional misconduct. The Health Ombudsman must then decide whether to require that the matter be transferred to his office or to direct the responsible National Board to continue to deal with the matter. If the Health Ombudsman directs a National Board to continue to deal with the matter then the matter must be referred to the Queensland Civil and Administrative Tribunal.

²⁴ Health Practitioner Regulation National Law, s193

Section 181 of the National Law establishes that a National Board may establish a health panel to consider and make a decision in response to a matter if the Board reasonably believes that a registered health practitioner or student has, or may, have an impairment.

Similarly, section 182 provides that a National Board may establish a Performance and Professional Standards Panel to consider and make a decision in response to a matter if the Board reasonably believes that a registered health practitioner's performance and/or conduct is, or may be, unsatisfactory.

Where a matter is referred to another decision maker it is inappropriate for a National Board to make a separate determinative decision in relation to the same subject matter as jurisdiction for making decisions shifts to the panel or the tribunal. This precludes the Board from making a decision to take relevant action in relation to a matter that has been referred for disciplinary proceedings.

The show cause process

Section 179 of the National Law provides that practitioners must be afforded an opportunity to make a submission in relation to a proposal to take relevant action at the assessment stage. There is no statutory requirement to provide a show cause opportunity following an investigation or health/performance assessment. However, it is the policy of AHPRA and the National Boards to provide a show cause opportunity to practitioners prior to taking relevant action at all stages of the decision making process.

Show cause opportunities provide practitioners with the opportunity to receive, understand and to respond to a National Board's reasons, assessment of risk and proposed action. Show cause processes are important in ensuring that practitioners are afforded procedural fairness but also serve as a final opportunity for practitioners to provide further information that may be important in reaching an appropriate decision and which the Board may not have had a previous opportunity to consider.

The show cause process is achieved by a board first *proposing* an action (such as imposing conditions upon the practitioner's registration) and inviting the practitioner to make submissions, verbally or in writing, to the Board about the proposal. The Board must then consider that submission before deciding on the appropriate action to take.

Submissions

A practitioner has the ability to nominate whether to provide written and / or verbal submissions to a Board.

A practitioner may also elect to provide no submission. If a practitioner elects not to make a submission then this should not be taken as an admission of fault.

Written submissions are the most common option chosen by practitioners. Written submissions allow the practitioner to take time to prepare and reflect upon the information that they would like the Board to consider.

A practitioner may make a verbal submission directly to the Board at its meeting. A practitioner should be provided with a reasonable, uninterrupted, opportunity to make their submissions. All aspects of the submission that may be relevant to the Board in its decision should be recorded as accurately as possible. A verbal submission is not an interview and provides only a limited opportunity to seek further information from the practitioner by seeking to clarify the decision maker's understanding of the submission.

A verbal submission need not be recorded in its entirety or transcribed perfectly. After the practitioner has made their submission, participants at the meeting generally convene in the absence of the practitioner to briefly review their understanding of the material relevant within the submission, and summarise their understanding of that material for the record.

Taking Relevant Action

If, after considering any submissions from a practitioner, the Board forms a reasonable belief that forms a basis for taking relevant action, the Board should consider the regulatory force appropriate to protect public health and safety.²⁵ If the minimum regulatory force needed to protect the public is less than the action proposed, then the final decision should be made accordingly.

Decisions to take relevant action that involve the imposition of conditions may be appealed under section

²⁵ If the Board believes that the action required is more onerous than that proposed, or is for substantially different reasons, then the practitioner should be afforded another show cause opportunity.

199 of the National Law. It is important that Board decisions and reasons are consistent with this guideline and are well documented.

Issuing a caution

A caution is issued when a Board has formed a reasonable belief that a practitioner's conduct or performance is unsatisfactory or below the standard reasonably required, but decides that restrictions are not necessary or appropriate. A caution does not bind the Board to take action that is more serious should the practitioner be subject to future notifications, but can be considered as part of any subsequent notifications, particularly if similar concerns are raised.

A caution puts a practitioner on notice that their conduct or performance was of a lesser standard than that which may reasonably be expected and is intended to encourage practitioner's to reflect on their practice in order to avoid engaging in similar behaviour in the future. This form of relevant action is generally used when the risk to current or future patients has been assessed as low and the Board does not consider that it is necessary or appropriate to impose restrictions or obligations on the practitioner through registration conditions.

As a general rule, the fact that a caution has been issued is not published to the national register of health practitioners.²⁶

A caution is not a suitable determination where the Board suspects that the practitioner has or may have an impairment that is affecting their ability to practise safely and competently.

Like other forms of relevant action, a caution should not be proposed or imposed in circumstances where substantiated past behaviour has not been assessed as posing a current or future risk to members of the public.

Wording of Cautions

The wording of a caution should be:

"The practitioner is cautioned in relation to [list allegations for which the practitioner is cautioned]".

The caution should be expressed in the third person rather than second person, that is, "the practitioner is..." rather than "you are".

References to

- specific sections of a documents that set out an appropriate standard, such as a code of conduct or the framework regulating prescribing and dispensing drugs and poisons
- what constitutes good practice
- suggestions about how the practitioner might modify their behaviour and/or
- the intention to deter the issue arising again

should be set out in the reasons and not included in the wording of the caution itself. This removes the potential for there to be any confusion between the decision and reasons and/or new matters being introduced in the caution.

Imposing conditions

A Board may impose conditions that it considers are appropriate to mitigate identified risk to public safety.

Conditions should be drafted in a manner consistent with the National Restrictions Library.

If the Board decides to impose conditions upon the practitioner's registration, the practitioner has the right to seek review of the decision before the responsible administrative tribunal.

Accepting Undertakings

A practitioner may offer an undertaking to the Board at any time. Unlike a decision to impose conditions, the practitioner may not appeal a decision by the Board to accept an undertaking they have freely offered. There is no power in the National Law to accept an undertaking other than within Division 7 (immediate action) or Division 10 (Relevant Action) of Part 8.

²⁶ See Health Practitioner Regulation National Law, s225

A Board cannot accept undertakings offered without first forming a reasonable belief that the registrant has an impairment or has engaged in professional conduct and/or performance that is unsatisfactory.

Before accepting an undertaking a Board must be satisfied that the restrictions would adequately protect the public from the identified public safety risks.

Form of restrictions

Where a decision is made to restrict a practitioner's registration by requiring them to do, or refrain from doing, something it is necessary to propose the restriction in the form of a condition.

It is not appropriate to seek to propose to impose or accept an undertaking from a practitioner. By nature, an undertaking is not something that can be imposed. An undertaking is a form of restriction that a practitioner offers of their own free will. An undertaking must be offered before it can be accepted by a Board.

This does not preclude a statement in the proposal letter indicating that an undertaking may be accepted in the same or similar terms as the proposed conditions.

The practitioner may choose to offer an alternate set of undertakings, however consideration should be given to:

- whether these undertakings address the risk the practitioner's conduct, impairment, or performance presents to the public, and
- whether the restrictions are monitorable.

If the Board is not satisfied with undertakings offered by the practitioner but had previously proposed to impose conditions, it can proceed to impose the conditions.

An undertaking, once accepted, has the same effect as conditions imposed upon a practitioner's registration. AHPRA and the Board take on a responsibility to monitor the practitioner's adherence to those restrictions. Unless the Board identifies a risk to public health and safety, it should not place restrictions on a practitioner's registration.

Staff should refer to the National Restrictions Library (NRL) when drafting possible restrictions to ensure consistency.

Referral to another entity

Referring a matter to another entity is appropriate if a Board believes the other entity ought to deal with the same or similar concerns that have been considered by the Board. The decision is not mutually exclusive and can be made in addition to a decision to caution, impose conditions or accept an undertaking.

Publishing the outcome of relevant action

Ordinarily, if a condition has been imposed on, or undertakings accepted in relation to, a practitioner's registration, then those conditions or undertakings are published to the national register.

Section 226(1) enables the national board to decide not to list the details of a condition or undertaking on the national register because the practitioner has an impairment. There is a two-part test to this

- It is necessary to protect the practitioner's privacy; and
- There is no overriding public interest for the condition or the details of the undertaking to be recorded.

In all cases, the fact that a condition or undertaking applies to the registration will be published. The contents of the conditions or undertakings may be suppressed if section 226(1) applies.

Cautions

Section 225 of the National Law does not require cautions to be published on the national register.

Interaction between Notifications, Legal, and Monitoring

The wording of restrictions should be drafted in accordance with policies supporting the introduction of the National Restrictions Library.

Division/s

This guideline applies to AHPRA staff working within Regulatory Operations.

Monitoring, evaluation and review

This guideline will be reviewed upon amendments being made to the National Law, at intervals of not more than five years or as directed by a document sponsor.

Document Sponsor/s

National Director, Notifications

National Director, Legal Services

National Director, Monitoring and Compliance

Approved by

Executive Director, Regulatory Operations

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