Ahpra & National Boards

Regulatory Guide

April 2021

Preface

This guide has been prepared by Ahpra in consultation with the National Boards (the **Boards**). It is intended to provide a decision-making framework for:

- Decision-makers under the National Law;
- health practitioners subject to a regulatory process, and their legal representatives;
- notifiers and third parties that may become involved in the regulatory process (because they are a witness, or hold relevant information); and
- the general public.

This guide does not constitute a code or guideline within the meaning of section 39 of the National Law and is intended to provide general information only. It does not constitute legal advice.

Purpose and aims

The purpose of this guide is to set out how the Boards manage notifications about the health, performance and conduct of practitioners under Part 8 of the National Law. It aims to:

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

General limitations

This guide provides general guidance about key parts of Part 8 of the National Law as it applies uniformly in each jurisdiction (with the exception of New South Wales [NSW]). Accordingly, it does not address each difference in the application of the National Law in each state and territory, although it does consider some material differences.

References to a 'practitioner' are, except where specified, intended to refer to a registered health practitioner in one of the 16 regulated health professions prescribed under the National Law.

This guide does not provide information about students registered under the National Law.

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1. Introduction

1.1 Background to the National Law

The *Health Practitioner Regulation National Law* (**National Law**) came into operation in each state and territory in 2010. Before this, each state and territory individually regulated health practitioners, including managing complaints through their own statutory schemes. There were over 85 boards for health professions nationwide.

In 2008 the states and territories agreed, at a Council of Australian Governments (**COAG**) meeting, to establish a National Registration and Accreditation Scheme (NRAS). This culminated in the development and implementation of the National Law.

The National Registration and Accreditation Scheme (NRAS) was implemented through enacting the National Law in each state and territory, using an 'adoption of laws' model. The Commonwealth did not need to pass legislation for the scheme to be established.

Today there are 15 National Boards that regulate the 16 health professions that fall under the auspices of the National Law:

- Eleven professions – chiropractic, dental, medical, nursing, midwifery, optometry, osteopathy, pharmacy, physiotherapy, podiatry and psychology – were originally included for regulation in 2010.
- Four professions – Aboriginal and Torres Strait Islander health practice, Chinese medicine. medical radiation practice and occupational therapy – were added in 2012.
- An additional profession, paramedicine, was added from 1 December 2018.

The National Law established the National Boards and the Australian Health Practitioner Regulation Agency (**Ahpra**). Their distinct roles are set out below.

1.2 Objectives and operation of the National Law

The objectives and guiding principles of the National Law are set out in section 3 of the National Law.

The object of the National Law is to establish a national registration and accreditation scheme for the regulation of health practitioners and, where relevant, students. The specific objectives are:

- 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;
- to facilitate workforce mobility across Australia by reducing the administrative burden for health practitioners wishing to move between participating jurisdictions or to practise in more than one participating jurisdiction;
- to facilitate the provision of high-quality education and training of health practitioners;
- to facilitate the rigorous and responsive assessment of overseas-trained health practitioners;
- to facilitate access to services provided by health practitioners in accordance with the public interest; and
- to enable the continuous development of a flexible, responsive and sustainable Australian health workforce and to enable innovation in the education of, and service delivery by, health practitioners.

The guiding principles of the scheme are that:

- the scheme is to operate in a transparent, accountable, efficient, effective and fair way;
- fees required to be paid under the scheme are to be reasonable having regard to the efficient and effective operation of the scheme; and
- restrictions on the practice of a health profession are to be imposed under the scheme only if it is necessary to ensure health services are provided safely and are of an appropriate quality.

1.3 Role of Ahpra and the National Boards

Role of Ahpra and National Boards

Ahpra is established by Part 4 of the National Law. Its primary function is to provide administrative assistance and support to the Boards, and the Boards' committees, in exercising their functions.

The Boards are established by Part 5 of the National Law and Part 2 of the National Law Regulation. The functions of the Boards are set out in section 35 of the National Law. Relevant to this guide, and the operation of Part 8 of the National Law, the functions of the Boards include:

- to oversee the receipt, assessment and investigation of notifications about people who:
  - are or were registered as health practitioners in the health profession under this Law or a corresponding prior Act; or
  - are students in the health profession;
- to establish panels to conduct hearings about—
  - health and performance and professional standards matters about people who are or were registered in the health profession under this Law or a corresponding prior Act; and
  - health matters about students registered by the Board;
- to refer matters about health practitioners who are or were registered under this Law or a corresponding prior Act to responsible tribunals for participating jurisdictions; and
- to oversee the management of health practitioners and students registered in the health profession, including monitoring conditions, undertaking and suspensions imposed on the registration of the practitioners or students.

The Boards and Ahpra adopt a risk-based approach to the regulation of health practitioners. When performing their duties, the Boards (and their committees) and Ahpra identify the risks posed by the health, conduct and performance of health practitioners, consider the possible consequences of those risks and respond accordingly.

Delegation by a National Board

Under section 36 of the National Law, a Board may establish a state or territory board (or regional board) for a participating jurisdiction (that is, state or territory). A state, territory or regional board operates as a committee of a Board. A Board may also establish other committees under clause 11 of Schedule 4 of the National Law. This enables the Board to exercise its functions in the jurisdiction to provide an effective and timely, and in the case of state /territory boards, a local response to health practitioners and other people in the jurisdiction.

Under section 37 of the National Law, a Board may delegate any of its functions to:

- a committee (including a state, territory or regional board);
- Ahpra;
- an Ahpra employee; or
- a person engaged by Ahpra as a contractor.

Regulatory decisions are commonly made by a State / Territory Board or a committee of a Board (in the name of the Board itself). For example, at the time of publishing this guide in 2020 the committees of a large Board like the Medical Board of Australia include:

- State/Territory Boards in each jurisdiction;
- the Sexual Boundaries Notifications Committee (that operates nationally);
- the Notifications Committee Assessment (that operates nationally);
- at least one Notifications Committee in each jurisdiction (except NSW);
- a Registration Committee in each jurisdiction; and
- an Immediate Action Committee in each jurisdiction.

The various Boards and their committees can be found in Appendix 1 of Ahpra annual report.

Co-regulatory jurisdictions

The National Law has been adopted by the parliament of each state and territory through adopting legislation. There are some differences between jurisdictions as to the extent to which the National Law has been adopted. This affects what Ahpra or a Board can do in specific jurisdictions.

For example, the jurisdictions of NSW and Queensland have declared that they are not participating in the health, performance and conduct process provided by Part 8, Divisions 2–12 of the National Law. By making this declaration and amending the National Law, each of those jurisdictions is known as a 'co-regulatory jurisdiction':

- NSW decided not to adopt Part 8 of the National Law in its entirety. Rather, the relevant health professionals councils work with the Health Professional Councils Authority and the Health Care Complaints Commission to manage concerns about conduct, health and performance of practitioners.
- Queensland decided to vary the operation of Part 8 of the National Law, specifically in respect of matters that relate to professional misconduct. These matters must be referred to the Office of the Health Ombudsman (**OHO**) who has power to retain such matters.

1.4 Council of Australian Governments (COAG) Policy Directions

COAG Policy Directions

The COAG Health Council oversees the National Scheme under the National Law. Health Ministers from each state and territory and the Commonwealth are members of the Ministerial Council. Under section 11 of the National Law, the Ministerial Council may issue Ahpra and National Boards with policy directions.

Currently, there are two policy directions:

- Policy Direction 2019-01, which deals with the paramountcy of public protection when administering the National Scheme; and
- Policy Direction 2019-02, which deals with requirements to consult with patient safety bodies and health care consumer bodies on every new and revised registration standard, code and guidelines.

Relevance of Policy Directions to tribunal proceedings under the National Law

The question of whether a responsible tribunal is bound by the Policy Direction has been considered in various recent tribunal decisions, predominantly in the context of decisions involving a review of a Board decision. A responsible tribunal recently held that it was not bound to follow the Policy Direction (being a direction given by the Ministerial Council to a Board) in the absence of a clear statement in the National Law that it should be bound.[1]

However, any COAG Policy Directions will apply to all decisions made by Ahpra and the Boards (outside of a tribunal proceeding). The Policy Directions may also assist a responsible tribunal in interpreting relevant portions of the National Law, or placing certain aspects of the National Law in context.

[1] *Gerstman v Medical Board of Australia* [2020] VCAT 1367.

2. Notifications

2.1 Introduction

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

Notifications may be made to Ahpra:

- verbally, including by telephone; or
- in writing, including by email or other electronic means.

If a notification is made verbally, Ahpra must make a record of the notification.

The notification process is designed to be accessible, informative, responsive and independent. Ahpra will provide notifiers assistance in making a notification – for example, if access to an interpreter or translator is required, arrangements will be made through the Translating and Interpreting Service (TIS National). Ahpra is also conscious of the impact that being involved in a notification process can have on notifiers, practitioners and other people. Ahpra and other bodies provide support throughout the notifications process.

A person who, in good faith, makes a notification or gives information in the course of an investigation by the Board or Ahpra, is not liable civilly, criminally or under an administrative process for giving the information.[2] Good faith is not defined in the National Law so it adopts its ordinary meaning of 'well-intentioned or without malice'.[3]

2.2 Information and privacy

KEY POINTS

- Ahpra (rather than the Boards) holds all information under the National Law.
- Information obtained in the course of exercising functions under the National Law is kept confidential (except where disclosure of the information is permitted by law).
- While notifications may be made confidentially or anonymously, there can be limitations in progressing investigations of anonymous notifications.
- Further details about Ahpra's use of information is contained in its Privacy Policy.

Protected information

Information that comes to a person's knowledge in the course of exercising functions under the National Law is known as 'protected information'. This includes details of notifications or notifiers.

Under section 216 of the National Law, protected information must be kept confidential and not be disclosed to another person. However, this is subject to some exceptions including:

- if the information is disclosed in the exercise of a function under the National Law (for example, information provided to Ahpra may be shared with other Ahpra employees and provided to a relevant Board);
- if the information is disclosed to a co-regulatory authority (such as in Queensland or NSW – see1.3);
- if the disclosure is otherwise required or permitted by law; or
- if the information is already in the public domain (such as if it relates to tribunal proceedings which are or were open to the public).

Sections 217 to 221 of the National Law provide several further exceptions from the general requirement to keep protected information confidential, including allowing disclosure to certain Commonwealth and state entities, if certain preconditions are met.

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[2] National Law, s 237.

[3] See, for example, Ahpra and National Boards, Guidelines: Mandatory notifications about registered health practitioners, March 2020, 6.

Application of privacy and freedom of information legislation

Part 10 of the National Law provides for the application of the *Australian Information Commissioner Act 2010* (Cth), the *Privacy Act 1988* (Cth) (**Privacy Act**) and the *Freedom of Information Act 1982* (Cth). Further information about the use of information by Ahpra and the Boards is contained in Ahpra's Privacy Policy.

Interaction between privacy legislation and the National Law

Some matters or processes occurring under Part 8 of the National Law may raise questions as to the interaction between the Privacy Act and the National Law.

The Australian Privacy Principles (**APPs**) are a set of 13 principles contained within Schedule 1 of the Privacy Act. The APPs govern the standards, rights and obligations in relation to:

- the collection, use and disclosure of personal information;
- the quality and security of the personal and sensitive information that the agency holds;
- an organisation's or agency's governance accountability;
- integrity and correction of personal information;
- the rights of individuals to access and correct their personal information.

Health practitioners and Boards are likely to be subject to the APPs in terms of their collection, use and disclosure of health information relating to a practitioner's patients. The APPs which are likely to be relevant in health practitioner matters include:

- APP 3, which deals with the collection of information, including health information that is regarded as sensitive information; and
- APP 6, which deals with the secondary use or disclosure of personal information collected for a particular purpose.

It is common for practitioners, in connection with regulatory action taken by the relevant Board under the National Law, to be required to produce copies of relevant clinical records. For example. this may be required in response to a request issued under Schedule 5 of the National Law (for more information, see 5.2) or in order to comply with a condition on a practitioner's registration. APP 6.2(b) creates an exception to APP 6 where the 'use or disclosure of the information is required or authorised by or under an Australian law or a court/tribunal order', which is defined in section 6 of the Privacy Act to include an Act of the Commonwealth or a State or Territory.

A recent decision of a responsible tribunal has confirmed that, even in circumstances where the relevant patients have not consented to the disclosure, APP 6 will not operate to prevent a practitioner complying with a condition on their registration requiring them to submit to an audit of their clinical records. The Tribunal noted that the monitoring of conditions is a function of the relevant Board and so the conduct of any audit and supervision can be seen to be required or authorised by the National Law.[4]

Limitations on confidentiality in the notifications process

While Ahpra will assess notifications which have been made anonymously or confidentially, there are limitations in progressing investigations of anonymous notifications (as further information cannot be obtained from the notifier).

Ahpra will request the notifier's consent to disclosing their identifying details (such as name and sometimes date of birth) to the practitioner who is the subject of the notification. Even where the identity of a notifier is not provided to the practitioner, it may be possible for the practitioner to identify the notifier based on the information that they are provided. Practitioners have professional obligations to cooperate with Board investigations. They may be subject to further disciplinary action if they try to interfere with this process in any way, including by, for example, contacting or attempting to contact a notifier or witness.

The practitioner must be provided with enough information about the conduct, health or performance concerns raised in the notification so as to enable them to respond. In many cases, it will not be possible to progress a matter without the notifier being a witness in any resulting panel, section 178 or tribunal proceedings. Ahpra therefore cannot guarantee anonymity or complete confidentiality.

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[4] *Psychology Board of Australia v Wilkinson* [2020] VCAT 961.

While the identity of the notifier may be apparent to the practitioner, protections remain in place to ensure that the notifiers are not publicly identified, even where a matter is heard publicly.

For more information about the confidentiality of notifiers in the tribunal process, see 8.2.

2.3 Types of notifications

KEY POINTS

- There are certain circumstances in which a registered health practitioner must make a notification about another registered health practitioner (mandatory notification).
- Regulatory action may be taken about a practitioner who fails to make a mandatory notification when required to do so.
- In some circumstances, mandatory notifications must also be made by employers and education providers.
- Voluntary notifications may be made by anyone, including patients and members of the public.

Mandatory notifications

What is a mandatory notification?

The National Law (under section 141) requires health practitioners to make a notification to Ahpra about a registered health practitioner in certain circumstances. This is known as a **mandatory notification.**

A mandatory notification must be made as soon as practicable after a practitioner forms a reasonable belief that:

- another registered health practitioner has behaved in a way that constitutes **notifiable conduct**; or
- a student has an impairment that, in the course of the student undertaking clinical training, may place the public at risk of harm.[5]

Mandatory notifications must also be made by employers, if the employer reasonably believes that its employee health practitioner has behaved in a way that constitutes notifiable conduct.[6]

'**Notifiable conduct**' occurs when a practitioner has:

- practised while intoxicated by alcohol or drugs;
- engaged in sexual misconduct in connection with the practice of their profession;
- placed the public at risk of substantial harm in their practice of the profession because they have an impairment; or
- placed the public at risk of harm because they have practised the profession in a way that constitutes a significant departure from accepted professional standards.[7]

'Treating practitioners'

Section 141 does not apply when the health practitioner who can form a reasonable belief of 'notifiable conduct', forms the reasonable belief in the course of providing a health service to a health practitioner (ie – they are a 'treating practitioner').[8]

A treating practitioner's obligation to mandatorily notify Ahpra is different. It operates if, in the course of providing a health service to a registered health practitioner, the treating practitioner:

- forms a reasonable belief that the health practitioner has engaged, is engaging, or is at risk of engaging, in sexual misconduct in connection with the practice of the practitioner's profession;[9] or
- forms a reasonable belief that the health practitioner is placing the public at substantial risk of harm by practising the profession—
    - while the practitioner has an impairment; or

[5] National Law, s 141.
[6] National Law, s 142.
[7] National Law, s 140. See 9.2 for a discussion about the meaning of 'professional standards'.
[8] National Law, s 141(2A)
[9] National Law, s 141B.

- while intoxicated by alcohol or drugs; or
- in a way that constitutes a significant departure from accepted professional standards.[10]

When considering whether a health practitioner is placing the public at substantial risk of harm by practising while the practitioner has an impairment, the National Law provides criteria to which treating practitioners may have regard. These are:

- the nature, extent and severity of the impairment;
- the extent to which the second health practitioner or student is taking, or is willing to take, steps to manage the impairment;
- the extent to which the impairment can be managed with appropriate treatment;
- any other matter the treating practitioner considers is relevant to the risk of harm the impairment poses to the public.[11]

NB: Practitioners in Western Australia are not required to make a mandatory notification about another practitioner if their reasonable belief (about misconduct or impairment) is formed while providing health services to that person.[12]

Further information about mandatory notifications

If a practitioner fails to make a mandatory notification when they have formed a reasonable belief that notifiable conduct has occurred, this may constitute behaviour for which regulatory action may be taken.[13] Mandatory notifications must be made about any other registered health practitioner, regardless of whether they are registered in the same, or different, profession as the practitioner who becomes aware of the conduct.

Each National Board publishes guidelines regarding mandatory notifications, which are available online. The guidelines contain detailed information about the mandatory notifications scheme, including the concept of 'reasonable belief' in this context. The guidelines also contain 'decision guides' to assist practitioners or employers who might be uncertain whether a mandatory notification should be made.

There are some exceptions to the requirement for practitioners to make a mandatory notification, including where the practitioner reasonably believes that Ahpra is already aware of the notifiable conduct; [14] or whether the registered health practitioner has become aware of the conduct while working in a specified role or capacity.[15]

Voluntary notifications

Voluntary notifications may be made by any entity or person, including patients and members of the public.

Under section 144 of the National Law, a voluntary notification about a registered health practitioner may be made to Ahpra on any of the following grounds:

- that the practitioner's professional conduct is, or may be, of a lesser standard than that which might reasonably be expected of them by the public or their professional peers;
- that the knowledge, skill or judgment possessed, or care exercised by, the practitioner in the practice of their health profession is, or may be, below the standard reasonably expected;
- that the practitioner is not, or may not be, a suitable person to hold registration in the health profession, including, for example, that the practitioner is not a fit and proper person to be registered in the profession;
- that the practitioner has, or may have, an impairment;
- that the practitioner has, or may have, contravened the National Law;
- that the practitioner has, or may have, contravened a condition of the practitioner's registration or an undertaking given by the practitioner to a National Board; or

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[10] National Law, s 141C. See 9.2 for a discussion about the meaning of 'professional standards'.

[11] National Law, s 141C(5).

[12] National Law (Western Australia), s 141(4)(ca).

[13] National Law, s 141(3).

[14] See, for example, National Law, s 141(4)(3).

[15] For further detail see: National Law, s 141C; National Law (WA), s 141(4).

- that the practitioner's registration was, or may have been, improperly obtained because the practitioner or someone else gave the National Board information or a document that was false or misleading in a material particular.

NSW adopts a slightly different approach about voluntary notifications.[16]

Some of the concepts above are discussed in Chapter 9 of this guide.

Obligation to notify the Board of a 'relevant event'

Section 130(1) of the National Law provides that practitioners and students must give notice to the relevant Board in writing within seven days of them becoming aware that a **relevant event** has occurred.

'Relevant event' is defined in section 130(3) of the National Law to include circumstances in which:

- the practitioner is charged, whether in a participating jurisdiction or elsewhere, with an offence punishable by 12 months' imprisonment or more;
- the practitioner is convicted or found guilty of an offence, whether in a participating jurisdiction or elsewhere, punishable by imprisonment;
- appropriate professional indemnity insurance arrangements are no longer in place for the practitioner's practice of the profession;
- the practitioner's right to practise at a hospital or another facility at which health services are provided is withdrawn or restricted because of the practitioner's conduct, professional performance or health;
- the practitioner's billing privileges are withdrawn or restricted under the *Medicare Australia Act 1973* of the Commonwealth because of the practitioner's conduct, professional performance or health;
- the practitioner's authority under a law of a state or territory to administer, obtain, possess, prescribe, sell, supply or use a scheduled medicine or class of scheduled medicines is cancelled or restricted;
- a complaint is made about the practitioner to an entity referred to in section 219 (1) (a) to (e); or
- the practitioner's registration under the law of another country that provides for the registration of health practitioners is suspended or cancelled or made subject to a condition or another restriction.

While a notice provided under section 130 is not a notification, the information contained in the notice may cause the relevant Board to raise an 'own motion' notification.

2.4 Jurisdictional considerations

People formerly registered

Under section 138 of the National Law, the health, performance and conduct provisions of the National Law apply even if a person was, but is no longer, registered in a health profession. A notification may be made, and a disciplinary process may be initiated, about the person's behaviour while registered as if the person were still registered by the relevant Board.

Similarly, under section 139 of the National Law, a notification may be made about a person's behaviour while registered under a corresponding prior Act (which is defined in section 5 of the National Law).

Effect of suspension of registration

Under section 207 of the National Law, a person whose registration is suspended is taken to not be registered under the National Law during the period of suspension. However, a person *is* taken to be registered for the purposes of the health, performance and conduct provisions of the National Law (Part 8). Accordingly, a person whose registration is suspended may still be subject to disciplinary action.

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[16] *Health Practitioner Regulation (Adoption of National Law) Act 2009 (NSW).*

Behaviour outside the jurisdiction

A health practitioner can be subject to regulatory action in one state or territory for conduct occurring in another. Under section 8, the National Law operates in respect of acts, transactions and matters done, entered into or occurring outside, as well as in, the territorial limits of the relevant jurisdiction.

If Ahpra receives a notification concerning behaviour occurring in a co-regulatory jurisdiction, it will not deal with the notification and will refer the notification to the appropriate co-regulatory authority.[17]

If Ahpra receives a notification concerning behaviour occurring in more than one jurisdiction, and one of the jurisdictions is a co-regulatory jurisdiction, it will:

- if the relevant practitioner's principal place of practice is in the co-regulatory jurisdiction, refer the notification to the co-regulatory jurisdiction; or
- otherwise, deal with the notification in the usual way (by referring it to the relevant Board).[18]

Behaviour while unregistered

Practitioners may be subject to regulatory action for behaviour occurring while unregistered. A National Board is required to refer a matter about a 'registered health practitioner' to a responsible tribunal if it reasonably believes that:

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

Although jurisdiction is conferred on the responsible tribunal for matters about registered health practitioners, the conduct the subject of the referral may have occurred at a time when the practitioner was unregistered.

> *Example*
>
> *In Dental Board of Australia v Dr Ho,[19] the matter before the responsible tribunal involved conduct occurring while Dr Ho was unregistered, although he had been registered previously and was registered at the time of the referral. The fact that the alleged conduct occurred while Dr Ho was unregistered was not a bar to the Tribunal determining the matter.*

Another example may be a practitioner who is found to have, at a time when they were not registered, engaged in historical conduct the subject of a criminal investigation or prosecution. If the practitioner is registered when the conduct is brought to the attention of the Board, the practitioner may be subject to immediate action and disciplinary action about that conduct.

Personal and professional conduct

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

'Professional conduct' refers to conduct that is connected to the practitioner's practice of the profession (such as their conduct with a patient, at work or in a relevant academic setting). On the other hand, 'personal conduct' as that term is used in this guide, relates to conduct occurring in a setting unrelated to the practitioner's practice of the profession.

Regulatory action may be taken about either professional or personal conduct. For example, subparagraph (c) of the definition of professional misconduct (discussed further at 9.5) contained within section 5 of the National Law, refers to:

> *'conduct … 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' (emphasis added).*

These concepts are discussed in more detail in Chapter 9.

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[17] National Law, s 148.

[18] National Law, s 148(3).

[19] *Dental Board of Australia v Ho* [2019] VCAT 467.

2.5 Preliminary assessment

KEY POINTS

- The preliminary assessment of a notification must be completed within 60 days.
- In some circumstances, it may be necessary and/or appropriate for Ahpra to refer a notification to another complaints entity, including the police.
- Ahpra must make a record on a national database of all notifications brought to its attention. This ensures that there is a comprehensive record of all notifications about a registered practitioner or student.
- All notifications must be assessed.
- A Board can decide at any time to take no further action about a notification. If a Board decides it requires more information about a practitioner who is the subject of a notification, it can investigate the practitioner or require the practitioner to go for a health assessment or performance assessment.

Upon receipt of a notification about a health practitioner or a student, Ahpra must, as soon as practicable, refer the notification to the applicable Board(s).[20] If the behaviour giving rise to a notification has occurred or is reasonably believed to have occurred in a co-regulatory jurisdiction, Ahpra must refer the notification to the relevant co-regulatory agency.[21]

A Board has 60 days to decide under section 149 of the National Law whether or not:

- the notification relates to a person who is a health practitioner or a student registered in a health profession for which the Board is established;
- the notification relates to a matter that is a ground for notification; and
- it is a notification that could also be made to a health complaints entity.

In some circumstances, Ahpra may refer notifications to the police and/or other national or state-based complaints bodies.[22]

Boards may receive more than one notification about a registered health practitioner's same, or similar, behaviour. In these circumstances, a Board may decide to deal with the notifications together.[23] Similarly, notifications may be made about health practitioners who are registered in more than one health profession. When this occurs, the notifications can be dealt with collaboratively between the relevant Boards.[24]

After recording the details of the notification and determining that the notification is about a practitioner and is made on a ground for which a notification can be made, a Board may decide to take no further action under section 151 if:

- the Board reasonably believes the notification is frivolous, vexatious, misconceived or lacking in substance;
- given the amount of time that has elapsed since the matter that is the subject of the notification occurred, it is not practicable for the Board to investigate or otherwise deal with the notification;
- the person to whom the notification relates has not been, or is no longer, registered in a health profession for which the Board is established and it is not in the public interest for the Board to investigate or otherwise deal with the notification;
- the subject matter of the notification has already been dealt with adequately by the Board;
- the subject matter of the notification:
    - is being dealt with, or has already been dealt with, by another entity; or
    - has been referred by the Board to another entity to be dealt with by that entity; or

[20] National Law, s 148(1).

[21] National Law, s 148(2).

[22] See National Law, s 220. For example, the Aged Care Quality and Safety Commission, the NDIS Quality and Safeguards Commission or the Commission for Children and Young People (in Victoria).

[23] National Law, s 153.

[24] National Law, s 154.

- the health practitioner to whom the notification relates has taken appropriate steps to remedy the matter that was the subject of the notification and the Board reasonably believes no further action is required.

Even if a Board decides to take no further action about a notification, the Board can consider the notification at a later time as a part of a pattern of conduct or practice by the health practitioner.[25]

If a Board believes that it is appropriate, it may:

- start an investigation into the practitioner;[26]
- consider immediate action about the practitioner;[27]
- consider cautioning the practitioner, which is a warning to a practitioner about their conduct or the way they practise;[28]
- consider imposing conditions (or accepting an undertaking) from a practitioner that requires the practitioner to do something or stop doing something;[29]
- require the practitioner to undergo a health[30] or performance assessment;[31]
- refer the practitioner to a hearing by a panel;[32] or
- refer the practitioner to a responsible tribunal.[33]

These actions are discussed further in Chapters 3 to 8.

[25] National Law, 151(2).
[26] See National Law, s 160.
[27] See National Law, s 156.
[28] See National Law, s 178.
[29] See National Law, s 178.
[30] See National Law, s 169.
[31] See National Law, s 170.
[32] See National Law, ss 181 and 182.
[33] See National Law, s 193.

3. Immediate action

3.1 Introduction

KEY POINTS

- The Board's immediate action powers enable it to restrict or preclude a practitioner's practice of their profession as an interim step while it investigates a practitioner.
- The Board only uses these interim powers with a small number of practitioners and after it provides a practitioner with an opportunity to explain why the action should not be taken.
- Examples of behaviour about which immediate action may be taken include:
  - alleged serious criminal conduct (including where charges have been laid but before any conviction);
  - conduct unconnected to practice that may diminish the public's confidence in the profession;
  - serious performance issues;
  - sexual misconduct;
  - substance abuse;
  - breaches of conditions on registration.
- Examples of other circumstances in which immediate action might be taken include where:
  - a practitioner has, or may have, an impairment that could pose a serious risk to the public;
  - a practitioner's registration was improperly obtained because the practitioner or someone else gave the relevant Board information or a document that was false or misleading in a material particular; and
  - a practitioner's registration has been cancelled or suspended in a non-participating jurisdiction (whether within Australia or elsewhere).

Immediate action is interim action that a Board can take to restrict or suspend a practitioner's ability to practise. A Board will do so if it reasonably believes that interim regulatory action is necessary to protect the public from a serious risk or is otherwise in the public interest. Immediate action may be taken at any time, although it is most often taken very soon after a notification about a practitioner has been received. A Board will move quickly if necessary to address risk posed by a practitioner or if the public interest requires it.

Immediate action is defined to mean:

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

Immediate action can only be taken in circumstances where there also has been, or will be, some other further action taken in respect of a practitioner (such as an investigation or a health or performance assessment). The nature and seriousness of the practitioner's conduct or performance deficiencies, or impairment/potential impairment, are decisive factors in determining whether immediate action is necessary, and the form it will take. Community expectations also bear upon whether the Board reasonably believes that it would be in the public interest to take immediate action.

Because of the interim nature of immediate action decisions, often the allegations about the practitioner's conduct or performance have not yet been fully investigated. Quite often, no proven conduct or sworn evidence is available when the immediate action is considered. A Board will assess the material before it when considering whether immediate action is required. If it forms a **reasonable belief**, on the information before it, that the requirements for immediate action are met (discussed at 3.2), a Board will take that action.

Common themes

Immediate action is usually taken when a Board reasonably believes that interim action is necessary to protect the public from serious risk or is otherwise in the public interest. This is often because the practitioner may have engaged in these types of conduct:

Serious criminal conduct	Allegations of sexual assault, drug-related offences and any other charges or allegations that could constitute a serious criminal offence (particularly if this relates to a health practitioner's work/professional practice).
Serious performance issues	Successive serious performance failures or an isolated performance incident that suggests a risk to future patients.
Drugs	Accusations of stealing drugs from the workplace, drug-taking at work, being under the influence of drugs at work, self-administration of scheduled medicines and inappropriate prescribing of schedule medications.
Alcohol	Allegations of presenting to work under the influence of alcohol.
Sexual behaviour	Inappropriate sexual contact (including inappropriate touching or physical examination) or serious boundary violations with a patient.
Theft	Stealing drugs from the workplace.
Health	Impairments – serious incidents (for example, involuntary admission to hospital under mental health legislation) or concerns about memory/behaviour.
Breach of conditions	A practitioner has conditions on their registration and the conduct/incident described may breach the conditions.
Other conduct that may diminish public confidence in the profession in which the practitioner is registered	Allegations of inappropriate conduct that is inconsistent with the qualities and character traits expected of a practitioner and/or the profession in which they are registered. For example, posting offensive or demeaning comments on social media that may, in some circumstances, undermine the public's confidence in the profession.

3.2 Power to take immediate action

KEY POINTS

- A Board may take immediate action if:
  - it reasonably believes that, because of their conduct, performance or health, a practitioner poses a serious risk to people, and it is necessary to take immediate action to protect public health or safety;
  - a practitioner's registration was improperly obtained because they, or someone else, gave the Board information or a document that was false or misleading in a material particular;
  - the practitioner's registration has been cancelled or suspended in a non-participating jurisdiction (whether in Australia or elsewhere); or
  - it reasonably believes that the action is otherwise in the public interest.

Power to take immediate action

Under section 156 of the National Law, a Board may take immediate action about a registered health practitioner for which the Board is established if one (or more) of the following grounds are met:

Section	Grounds
156(1)(a)	The Board reasonably believes that: • because of the practitioner's conduct, performance or health, the practitioner poses a serious risk to people; and • it is necessary to take immediate action to protect public health or safety
156(1)(c)	The practitioner's registration was improperly obtained because the practitioner or someone else gave the Board information or a document that was false or misleading in a material particular
156(1)(d)	The practitioner's registration has been cancelled or suspended under the law of a jurisdiction, whether in Australia or elsewhere, that is not a participating jurisdiction
156(1)(e)	The Board reasonably believes that the action is otherwise in the public interest

Additional information about the most common grounds for taking of immediate action are outlined.

Section 156(1)(a): Serious risk to persons

Section 156(1)(a) of the National Law allows a Board to take immediate action where it reasonably believes that the practitioner poses a serious risk to people, and that it is necessary to protect public health or safety.

Serious risk

This means that, first, the Board must form a reasonable belief of 'serious risk' posed by the practitioner, based on the information available to it about the practitioner's conduct, performance or health.

In considering whether a practitioner poses a serious risk to the public, a Board is not required to make factual findings about the practitioner's conduct (or performance or health). Often the fact of, and serious nature of, allegations about a practitioner, where supported by witness statements or other documentary material (even where the witness has not been cross-examined about their statement), will be sufficient to support a reasonable belief as to the existence of a serious risk.[34]

The Board will consider the specific nature of the serious risk. This includes an assessment of 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). For example, responsible tribunals have previously confirmed that the following kinds of risks are 'serious' and appropriate grounds for taking immediate action:

- the risk to the public of unnecessary surgery, incorrect or inadequate treatment or failure to provide adequate rehabilitation or access to services as a result of a lack of up-to-date medical knowledge;
- the risk to the public posed by a practitioner alleged to have engaged in sexual misconduct;
- the risk posed to paediatric patients with Perthes disease as a result of a practitioner's unsatisfactory clinical decision-making about the use of platelet rich plasma;
- the risk posed to people who may purchase drugs illegally manufactured with dextromethorpan as an ingredient; and
- the risk posed to the public by a practitioner who published material on social media about vaccines, chemotherapy, and vitamin C and COVID-19, that had no proper clinical basis and was contrary to accepted medical practice or that was otherwise untrue or misleading.

Necessity

Having formed a reasonable belief that a practitioner poses a 'serious risk' to people (as set out above), a Board must also form a reasonable belief that the proposed immediate action is **necessary** to protect public health and safety. The concept of what is 'necessary' has been stated to be 'a flexible one and one that varies according to the nature of the case.'[35] In the context of immediate action, it is best understood as being the same as 'required'.

The nature and seriousness of the practitioner's conduct or performance deficiencies, or impairment/potential impairment, are decisive factors in determining whether immediate action is necessary, and the form it will take. The form of immediate action will reflect the minimum regulatory response the Board considers necessary to address the identified serious risks to the public.

Section 156(1)(c): Registration improperly obtained

Under section 156(1)(c), a Board may take immediate action about a registered practitioner if that practitioner's registration was improperly obtained because the practitioner, or someone else, gave the National Board information or a document that was false or misleading in a material particular. For example, where a practitioner creates and relies upon a false document in seeking to have their overseas qualifications verified.

Section 156(1)(d): Suspended under the law of a non-participating jurisdiction

Under section 156(1)(d), immediate action may be taken by a Board in respect of practitioner who has been suspended under the law of another, non-participating jurisdiction. This may occur in circumstances where a practitioner has been suspended before a final hearing has taken place.[36]

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[34] *Lidell v Medical Board of Australia* [2012] WASAT 120, at [21]–[22].

[35] *Sabet v Medical Practitioners Board* [2008] VSC 346 at [62].

[36] *Ahmad v Medical Board of Australia* [2017] VCAT 1646 at [56].

Section 156(1)(e): Otherwise in the public interest

The 'public interest' ground contained in section 156(1)(e) was introduced into the National Law by the *Health Practitioner Regulation National Law and Other Legislation Amendment Act 2017* (Qld) (**Amendment Act**) and commenced operation on 1 March 2018.

The public interest ground allows the Boards to consider and take immediate action in circumstances where the Board may not have formed a view that the practitioner poses a serious risk to people; but it is otherwise in the public interest to do so.

The National Law provides one example of when the public interest ground might be engaged:

> *Example of when action may be taken in the public interest:*
>
> *A registered health practitioner is charged with a serious criminal offence, unrelated to the practitioner's practice, for which immediate action is required to be taken to maintain public confidence in the provision of services by health practitioners.*

The Supreme Court of Victoria has previously considered the public interest ground. The Court held that the example in the National Law is not exhaustive.[37] The Court also held that the word 'otherwise' in the sub-section indicates that this ground 'provides an additional and alternative source of power that is available' where none of the other grounds are met. It later commented that:

> *… in other cases, it may be necessary to take action to reassure the public that the regulatory system is safe and adequate to protect the public and the reputation of the profession as a whole … As a consequence, the Board may conclude, in those circumstances, that it is in the public interest to take immediate action in order to address the question of public confidence. The relevant public confidence to which the example is directed, is confidence in the profession of services by health professionals.*[38]

The Second Reading Speech of the Amendment Act demonstrates this:

> *It is important to ensure that immediate action can be taken against health practitioners where public interest considerations require it. An example of where the public interest test may be used to take immediate action is if a serious criminal charges laid but the charges may not be directly related to the person's conduct as a health practitioner. In cases like these it can be difficult to show that the threshold of 'serious risk to persons' in the National Law is reached. However, it may be appropriate to impose conditions on the person's registration for public protection and confidence in the health profession.*

Accordingly, the public interest ground has been engaged, and relied upon in circumstances other than serious criminal offending.

> *Example of when action may be taken in the public interest – social media posting:*
>
> *The social media posts of a registered health practitioner arguably denigrate, demean and slur members of their profession who engage in legal and ethical medical treatment and/or vulnerable members of the community, and if immediate action were not taken, it would significantly undermine public confidence in the medical profession and the willingness of (some) members of the public to seek appropriate treatment.*

When considering whether or not to take immediate action under section 156(1)(e), Boards will consider and balance matters such as:

- the impact of the practitioner's conduct on the public's confidence in the relevant profession, specifically, the confidence in the provision of services by medical practitioners (which will necessarily impact the willingness or not of members of the public to access medical treatment);
- the maintenance of professional standards; and
- the competing public interests that weigh against the taking of immediate action – for example:
    - the public interest in allowing an otherwise competent practitioner to continue to provide health services in an area of need; and
    - the public interest in ensuring the regulatory system responds proportionately and fairly when allegations are made.

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[37] *Medical Board of Australia v Liang Joo Leow* [2019] VSC 532 at [77]

[38] *Medical Board of Australia v Liang Joo Leow* [2019] VSC 532 at [81]-[82]

The concept of the ‘public interest’ is not exhaustively defined by the National Law or in the decided cases. Specific considerations may weigh more heavily in some cases than others.

The public interest ground provides for immediate action to be taken where it is appropriate to do so to maintain the public's confidence in the relevant health profession (and despite any competing public interests). This may be the case even if the alleged conduct occurred outside a practitioner's practice of the profession. The alleged conduct does not have to satisfy the grounds contained in section 156(1)(a) to (d). It is not limited to conduct that is the subject of a criminal investigation or charges. In many, if not most, cases, the only logical form of immediate action under the public interest ground is suspension. This is because, in most cases, the potential risk to the reputation of (and the public's confidence in) the relevant profession can only be addressed by ensuring that the relevant practitioner is not permitted to practise the profession during the period of immediate action.

EXAMPLE 1

Practitioner charged with serious criminal offences – immediate action taken under section 156(1)(e)

FACTS	DECISION
A practitioner (who was registered in multiple professions) was arrested and charged with serious forced labour offences.	Each of the relevant Boards took immediate action by imposing conditions on the practitioner's registration. The decision was upheld by the responsible tribunal on review. The Tribunal considered 'that the fact of charges having been laid against [the practitioner] coupled with the serious nature of those charges supported by the (albeit untested) allegations in and of itself provide[d] a sufficient factual basis to form a reasonable belief that it [was] in the public interest for immediate action to be taken'.

3.3 Additional concepts relevant to immediate action

Evidence

It is not necessary for the relevant Board to make factual findings regarding alleged conduct before making a decision to take immediate action.[39] The conduct forming the basis of the allegations does not need to be proved on the balance of probabilities when the Board considers taking immediate action.[40]

EXAMPLE **Practitioner charged with criminal offences in respect of patients**	
FACTS	**DECISION**
A practitioner was charged with two counts of aggravated indecent assault of two female patients. He denied the allegations.	The Board took immediate action under section 156(1)(a) by suspending the practitioner's registration. The practitioner appealed the decision to the responsible tribunal. The Tribunal found that there was a significant cause for concern of possible harm or danger to the health or safety of others. Although the charges had not been proven at that time, the Tribunal stated that 'an immediate action order does not entail a detailed enquiry by the Board … It requires urgent action on an urgent basis because of the need to protect the public'.

Reasonable belief

In the immediate action context:

- 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'.[41]

The particular grounds for immediate action detailed in sections 156(1)(c) and (d) do not rely on the Board forming a reasonable belief, but rather 'depend on the objective existence of specified facts'.[42]

3.4 Procedure and show cause process

Show cause process

Before taking immediate action to suspend or impose conditions, the Board will:

- give the practitioner notice of the proposed immediate action; and
- invite the practitioner to make a submission to the Board, within the time stated in the notice.[43]

Generally, the notice will:

- explain that the Board is proposing to take immediate action and describe the nature of immediate action proposed;
- set out the reasons for the proposed immediate action;
- include copies of, or summarise, the information the Board considered before proposing to take immediate action; and
- invite the practitioner to make a submission and/or to attend before the Board to make a verbal submission.

Upon receipt of the notice, a practitioner may choose to provide a submission or to make no submission. The practitioner may provide submissions in writing and/or verbally to the Board.[44] The time permitted for

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[39] *Gertsman v Medical Board of Australia* [2019] VCAT 830 at [23]; *Lindsay v New South Wales Medical Board* (2008) NSWCR 40; *WD v Medical Board of Australia* [2013] QCAT 614.

[40] *Syme v Medical Board of Australia* [2016] VCAT 2150 at [34].

[41] *CJE v Medical Board of Australia* [2019] VCAT 178 at [25]; *George v Rockett* (1990) 170 CLR 104.

[42] *Bernadt v Medical Board of Australia* [2013] WASCA 259 (18 November 2013) at [46].

[43] National Law, s 157(1).

[44] National Law, s 157(2).

a practitioner to prepare a submission is often very limited, due to the nature of the Board's obligation to urgently consider immediate action.

Before deciding whether to take immediate action, the Board will consider the practitioner's submissions.[45] It will also consider all relevant information available to it at that time, including:

- the notification and any supporting information from the notifier;
- information from any witnesses (for example, a patient, colleague or employer);
- patient records or clinical information;
- assessor's reports following a health or performance assessment; and
- information received from a practitioner's treating health practitioner, supervisor, employer or third parties such as the police, coroner or other relevant entity.

Decision to take immediate action

The Board will decide whether to take immediate action or not after it considers any submissions from the practitioner.

In considering whether to take immediate action, Boards will have reference to the 'COAG Health Council Policy Direction 2019-1'. In particular, this Policy Direction notes the Boards' mandate to prioritise public protection and requires Boards (and Ahpra), when deciding whether to take regulatory action, to take into account the potential impact of the practitioner's conduct on the public, including vulnerable people.

If the Board decides to take immediate action, it will, immediately after deciding to take such action:

- give written notice of the Board's decision to the practitioner; and
- take the further action the Board considers appropriate, including, for example, investigating the practitioner or requiring the practitioner to undergo a health or performance assessment.[46]

The practitioner's entry on the public register will be updated to reflect the immediate action taken.

Period of immediate action

Immediate action will take effect on the day the notice is given to the practitioner or any later day stated in the notice. The Board's decision continues to have effect until the earlier of the following occurs:

- the decision is set aside on appeal; or
- if applicable:
    - any suspension is revoked, or any conditions are removed by the Board; or
    - the Board and the practitioner agree to end any undertaking.[47]

This flowchart summarises the immediate action process:

[45] National Law, s 157(3).
[46] National Law, s 158(1).
[47] National Law, s 159.

Review of decision to take immediate action

Immediate action decisions may be appealable if they fall within the types of decisions set out in section 199 of the National Law.

4. Health and performance assessments

KEY POINTS

- A Board may require a registered health practitioner to undergo:
  - a health assessment, if it reasonably believes that the practitioner has, or may have, an impairment; and/or
  - a performance assessment, if it reasonably believes that the way the practitioner practises the profession is, or may be, unsatisfactory.
- During the performance and health assessment process, practitioners are provided the opportunity to respond to the Board's concerns.
- If adverse findings are made by an assessor about a practitioner, the Board may decide to take appropriate action.
- A Board can decide to take no further action after considering a report from a health assessor or performance assessor.

4.1 Introduction

In some circumstances, a Board may require a registered health practitioner to undergo a **health assessment** and/or a **performance assessment**. The Board is responsible for paying for the assessment.[48]

4.2 Health assessments

A Board may require a practitioner to undergo a **health assessment** if the Board reasonably believes, because of a notification or any other reason, that the practitioner has, or may have, an **impairment**.[49]

A **health assessment** is defined in the National Law as:

> *an assessment of a person to determine whether the person has an impairment, and includes a medical, physical, psychiatric or psychological examination or test of the person.*[50]

An **impairment** is defined as:

> *a physical or mental impairment, disability, condition or disorder (including substance abuse or dependence) that detrimentally affects or is likely to detrimentally affect a practitioner's capacity to practise their profession.*[51]

Impairments that may detrimentally affect a practitioner's ability to practise include:

- addiction to, dependence on or misuse of drugs (illicit or prescription) or alcohol;
- a psychological condition that is not presently, or is unable to be, adequately managed or stabilised; and
- deficiencies in memory or cognition.[52]

Typically, notifications relating to impairments are made by treating doctors, employers and by the practitioner themselves. Possible impairments might also be identified when monitoring compliance with restrictions or during an investigation into other issues.

4.3 Decision to require health assessment

Many health practitioners have ongoing health conditions that are well-managed and do not affect their ability to practise safely. However, a Board may require the practitioner to undergo a health assessment if it is concerned that the practitioner might have an impairment that could adversely affect the practitioner's ability to practise. Reasonable belief as to the possibility of an impairment is sufficient.[53]

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[48] National Law, s 171(4).

[49] National Law, s 169.

[50] National Law, s 5.

[51] National Law, s 5.

[52] For a further explanation of the concept of impairment, see *Regulatory Operations Guideline: Managing risk to public safety via relevant action*, February 2018.

[53] *Coppa v Medical Board of Australia* [2014] NTSC 48 at [51].

A practitioner with a well-managed condition (which otherwise would, if not adequately managed, affect their capacity to practise safely) who demonstrates insight into their condition and complies with recommended treatment, is unlikely to place the public at risk. Alternatively, a practitioner with a similar illness, who lacks insight and/or refuses to comply with treatment recommendations, may pose a risk and a health assessment may be appropriate.

4.4 Health assessment process

Before a health assessment

Ahpra will appoint an assessor who has been approved by the relevant Board to carry out a health assessment.[54] The assessor will be a medical practitioner or psychologist who is:

- not a member of the Board;[55] and
- experienced, appropriately qualified and independent.

So as to ensure independence, it is important that there is no conflict of interest between the practitioner and the person carrying out the assessment. The practitioner and the assessor will be asked to confirm that they have no financial, personal or professional relationship before the assessment.

The Board will provide the practitioner with written notice, stating, among other things:

- the nature of the assessment to be carried out; and
- that if the practitioner does not undergo the assessment, the Board may take other regulatory action (for example, immediate action, relevant action, referral to a panel or the responsible tribunal).[56]

Before and during a health assessment, the assessor may require the practitioner to undergo other testing, for example neuropsychological testing, drug or alcohol testing or radiological imaging.

During a health assessment

The health assessment will generally involve a consultation or series of consultations, arranged by Ahpra, between the practitioner and the appointed assessor. The assessor may also wish to review any relevant medical records, and/or require the practitioner to undergo further testing.

4.5 Performance assessments

A Board may require a practitioner to undergo a **performance assessment** if the Board reasonably believes, because of a notification or for any other reason, that the way the practitioner practises the profession is, or may be, **unsatisfactory.**[57] Other than when considering notifications, a Board might develop a reasonable belief when monitoring compliance with restrictions or during an investigation into other issues.

A **performance assessment** is defined in the National Law as:

> *an assessment of the knowledge, skill or judgment possessed, or care exercised by, a registered health practitioner in the practice of the health profession in which the practitioner is registered.*[58]

The meaning of '**unsatisfactory professional performance'** is discussed at 9.4.

Examples of practices that may result in a Board directing a practitioner to undergo a performance assessment include concerns about:

- excessive and/or inappropriate prescribing practices;
- assessment and diagnostic skills;
- procedures carried out to a poor standard;
- decisions relating to treatment that are not clinically justified or evidence-based; or
- inadequate record-keeping.

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[54] National Law, s 171(1).
[55] National Law, s 171(2)(a).
[56] National Law, s 172.
[57] National Law, s 170.
[58] National Law, s 5.

4.6 Performance assessment process

Before a performance assessment

Ahpra will appoint an assessor or assessors who has been approved by the Board to carry out a performance assessment.[59] The assessor(s) will be a registered health practitioner who:

- is experienced, appropriate qualified and independent;
- is a member of the same health profession as the practitioner undergoing the assessment; and
- is not a member of the Board established for that profession.[60]

Where possible and appropriate, the Board selects assessors whose scope of practice is similar to that of the practitioner being assessed. For example, a rural practitioner may be assessed by a practitioner familiar with the particular challenges of rural practice.

The Board will provide the practitioner with written notice, stating, among other things:

- the nature of the assessment to be carried out; and
- if the practitioner does not undergo the assessment, the Board may continue to take proceedings (such as immediate action, referral to a panel or referral to the responsible tribunal).[61]

The practitioner will be asked to complete a pre-assessment questionnaire. This allows the assessor to formulate an appropriate assessment plan.

During a performance assessment

There are many different forms of performance assessments, and each one is specifically designed to ensure that it addresses the areas of concern.

Depending on the reason for the assessment, the focus might be on:

- assessment of patients;
- clinical reasoning and decision-making;
- response to emergency situations;
- document management; and/or
- prescribing, dispensing and the administration of drugs.

In most performance assessments, the assessor(s) will:

- gather information about what the health practitioner does in the course of everyday practice; and
- assess that information against an **expected standard** to make decisions about the quality of the health practitioner's performance.

The concept of expected standards and professional standards is discussed at 9.2.

In the course of the performance assessment, the assessor may:

- observe the way the practitioner practises;
- conduct an interview with the practitioner;
- audit the practitioner's clinical records;
- undertake role playing or simulated scenarios; and
- evaluate information provided by colleagues, supervisors and peers.

The practitioner will have an opportunity to talk about the concerns raised with the assessor and may discuss any relevant education or professional development they have carried out.

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[59] National Law, s 171(1).

[60] National Law, s 171(2)(b).

[61] National Law, s 172.

4.7 Potential outcomes of health and performance assessments

After the assessment

After the assessment, the assessor(s) will produce a report and provide it to the Board.[62] As soon as practicable after carrying out the assessment, the Board will give a copy of the report to:

- the practitioner; or
- if the report contains information the Board considers may, if disclosed, be prejudicial to the practitioner's mental health or wellbeing, to a medical practitioner or psychologist nominated by the practitioner.[63]

The Board will then discuss the report with the practitioner.[64] If the report makes an adverse finding about the practitioner's practice of the profession or states that the assessor finds the practitioner has an impairment, the Board will discuss with the practitioner ways of dealing with the finding. This will include whether the practitioner is prepared to alter the way they practise or provide undertakings directed at ensuring the practitioner's impairment is adequately dealt with.[65] At this time, the practitioner may provide their response to the assessor's findings and discuss any recommendations made in the report. Usually, an Ahpra officer will attend this meeting and will make a record of the discussion.

Decisions about the assessor's report

After considering the assessor's report and the discussions held with the registered health practitioner, the Board may decide to:

- take action the Board considers necessary or appropriate under another division (such as: take immediate action under Division 7; relevant action under Division 10; referral to a performance and professional standards panel under Division 11; or referral to a responsible tribunal under Division 12);
- refer the matter to another entity, including, for example, a **health complaints entity** for investigation or other action; or
- take no further action.

If a performance or health assessment has been initiated after the Board received a notification, the Board may inform the notifier of its decision about the matter and the reasons for its decision.[66]

For further information regarding health and performance assessments, Ahpra has published information sheets for practitioners on its website.

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[62] National Law, s 175.
[63] National Law, s 176(1).
[64] National Law, s 176(3)(a).
[65] National Law, s 176(3)(b).
[66] National Law, s 177A.

5. Investigations

5.1 Decision of a National Board to investigate a notification

Division 8 of Part 8 of the National Law sets out the processes and procedures relevant to investigating a registered health practitioner.

KEY POINTS

- A Board may decide to investigate a registered health practitioner if it:
  - it requires more information to enable it to decide if the practitioner poses a risk to patients because of the way that practitioner is practising the profession
  - it is concerned by an allegation of the conduct of the practitioner and requires more information
  - it is concerned that the practitioner has, or may have, an impairment and it requires information to help it understand whether this could adversely impact the practitioner's ability to practise safely.
- A Board may decide to investigate a practitioner on its own motion (even if it has not received a notification about the practitioner).

Decision to investigate: relevant considerations

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

- because the Board has received a notification about the practitioner;
- because the Board for any other reason believes;
  - the practitioner has, or may have, an impairment;
  - the way the practitioner practises the profession is, or may be, unsatisfactory; or
  - the practitioner's conduct is, or may be, unsatisfactory; or
- to ensure the practitioner is complying with:
  - the conditions imposed on the practitioner's registration; or
  - an undertaking given by the practitioner to the Board.[67]

When deciding whether an investigation is 'necessary or appropriate', a primary consideration for the Board is the possible risk posed by the concerns raised in the notification(s) to the practitioner, the practitioner's patients and colleagues, the wider public, and the standing of the profession.

Own-motion investigations

A Board may decide to investigate a practitioner on its own motion, even if a formal notification has not been made. This is referred to as an **own-motion investigation**.[68] Own-motion investigations will take place to determine whether there has been compliance with a condition or when relevant information has come to the Board's attention other than via a notification made about a particular practitioner. For example, information may be reported in the media, or be uncovered during an investigation into a different practitioner. In these circumstances, the Board will assess the information and, if it decides it is necessary or appropriate, may start an own-motion investigation and if so, the scope of that investigation.

[67] National Law, s 160.

[68] See National Law, s 160(1)(b).

5.2 Conduct of investigation

KEY POINTS

- After deciding to investigate a practitioner, a Board will:
  - usually advise the practitioner in writing that they are being investigated; and
  - appoint an appropriate investigator to investigate the matter, ensuring that there is no conflict of interest between the investigator and the practitioner.
- A Board may decide to investigate a practitioner on its own motion (even if it has not received a notification about the practitioner).

As soon as practicable after deciding to investigate a registered health practitioner, a Board will usually give the practitioner written notice about the investigation.[69] The notice must include information about the nature of the matter being investigated.[70] Ordinarily, Ahpra will provide the practitioner with a copy, or a summary, of the notification.

The nature of the investigation about the practitioner may change during the course of the investigation, based on the information collected. The nature of the investigation may also be different to the concerns raised by a notifier, based on the Board's assessment of the risk posed by the practitioner.

A Board will not give notice of an investigation to a practitioner if it reasonably believes that doing so will:

- seriously prejudice the investigation;
- place a person's health and safety at risk; or
- place a person at risk of harassment or intimidation.[71]

Every investigation is different. The process will depend on the nature of the concerns raised about the practitioner, the information required by the investigator, the complexity of the matter and how many people are involved and the assessment of the level of risk.

During the investigation, the investigator is likely to seek information from different sources, including:

- the notifier;
- the practitioner;
- relevant clinical records;
- witnesses (if any); and
- independent experts (where applicable).

Appointment of investigator

A Board will direct an 'appropriate investigator' to conduct the investigation.[72] It is important that there is no conflict of interest between the investigator and the practitioner. This means that only an investigator who does not know the practitioner, or other any relevant parties (such as the notifier), in a personal capacity will be appointed.

The investigator is usually an Ahpra employee

At the start of the investigation, the investigator will provide the practitioner with his or her contact details and is available to address any questions the practitioner has about the investigation process.

During the investigation

A Board will provide a written update about the progress of the investigation to the practitioner and the notifier (if applicable) at least every three months.[73]

Timeframes during investigations, such as the time in which the practitioner may be requested to provide a response, can be short. This is because a Board must ensure that the investigator conducts the investigation

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[69] National Law, s 161(1).

[70] National Law, s 161(2).

[71] National Law, s 161(4).

[72] National Law, s 160(2).

[73] National Law, s 161(3). The Board need not provide notice to the practitioner if the Board reasonably believes giving the notice may seriously prejudice the investigation, place at risk a person's health or safety or place a person at risk of harassment or intimidation.

as quickly as practicable, considering the nature of the matter to be investigated.[74] More complex investigations (such as those that involve multiple notifications, or matters about which extensive evidence is required) will generally take longer to complete than more straightforward investigations.

Powers of an investigator

KEY POINTS

- Investigators appointed under the National Law have various statutory powers to obtain evidence and information relevant to an investigation, including:
  - powers requiring a person to provide information, answer questions or produce documents;
  - powers permitting the investigator to search places (such a practitioner's residence, or place of practice) and seize objects or documents.
- A person who, without reasonable excuse, fails to comply with an investigator's request may be liable to a penalty.
- A practitioner who fails to cooperate with an investigation or provides false or misleading information in the course of an investigation may be also subject to disciplinary action.

Schedule 5 of the National Law sets out the various powers of investigators.

An investigator may, by written notice given to a person, require the person to:

- give stated information to the investigator within a reasonable time; or
- attend before the investigator to answer questions or produce documents.[75]

Investigators often issue '**Schedule 5 requests**' by which practitioners, employers and third parties relevant to the allegations are required by the National Law to produce documents or provide information. An investigator does not have to give a practitioner a list of questions that the investigator plans to ask.

Obligation to co-operate

A person who fails to give information, attend to answer questions or produce documents without reasonable excuse in response to a Schedule 5 request, may be liable to a penalty.[76] An example of a reasonable excuse would be if the production of documents might tend to incriminate the individual required to provide them.[77]

Similarly, a person will be in breach of the National Law and may be liable to a penalty if they:

- provide false or misleading information to an investigator;
- provide a document containing information the person knows is false or misleading in a material particular;
- obstruct[78] an investigator in the exercise of a power, unless the person has a reasonable excuse.[79]

Practitioners have obligations to cooperate with legitimate regulatory inquiries, in addition to potential exposure to the above penalties. If the practitioner who is being investigated fails to cooperate with the investigation, fails to attend to answer questions, fails to provide information without reasonable excuse, or provides false and misleading information, this may also result in regulatory action being taken by the relevant Board.

Searching places

In certain circumstances, an investigator is empowered to conduct a search of the practitioner's place(s) of practice, place of residence or any other place for the purposes of conducting an investigation.

When conducting an investigation, an investigator may enter a place if:

- its occupier consents to entry;

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[74] National Law, s 162.

[75] National Law, Sch 5, cl 1.

[76] National Law, Sch 5, cl 2. The maximum penalty is $5,000 for individuals and $10,000 for body corporates.

[77] National Law, Sch 5, cl 2(3).

[78] Obstruct is defined to include hinder and attempt to obstruct or hinder.

[79] National Law, Sch 5, cl 20 - 22. The maximum penalty is $5,000 for individuals and $10,000 for body corporates.

- it is a public place and the entry is made when it is open to the public; or
- the entry is authorised by a warrant.

An investigator may obtain a warrant by making the appropriate application to a magistrate. Before issuing the warrant, the magistrate must be satisfied that there are reasonable grounds for suspecting there is a particular thing or activity that may provide evidence of an offence against the National Law at the place.[80]

Before entering a place under warrant, an investigator is required to (or make a reasonable attempt to):

- identify himself or herself to a person present at the place (who is an occupier of the place) by producing the investigator's identity card or another document evidencing the investigator's appointment;
- give the person a copy of the warrant and tell the person the investigator is permitted by the warrant to enter the place; and
- give the person an opportunity to allow the investigator immediate entry to the place without using force.[81]

There may be some circumstances in which the above procedure will not be followed – namely where an investigator reasonably believes that immediate entry to the premises or place is required to ensure that the effective execution of the warrant is not frustrated. An example of this might be if an investigator reasonably believes that evidence might be destroyed if it is not seized immediately and without notice.

Once an investigator enters a place, they may:

- search any part of the place;
- inspect, measure, test, photograph or film any part of the place or anything at the place;
- take a thing, or a sample of a thing, for analysis, measurement or testing; and
- copy, or take an extract from, a document at the place.

Investigators may seize things in the following circumstances:[82]

Type of search	Circumstances in which the investigator can seize things
Public place (when the place is open to the public)	• If the investigator reasonably believes the thing is evidence that is relevant to the investigation.
Private place with the occupier's consent	• If the investigator reasonably believes the thing is evidence that is relevant to the investigation, and seizure of the thing is consistent with the purpose of entry as told to the occupier when asking for consent; or • if the investigator reasonably believes the seizure is necessary to prevent the thing being hidden, lost or destroyed.
Warrant	• Seize the evidence for which the warrant was issued; or • if the investigator reasonably believes the thing is relevant evidence to the investigation, and the investigator reasonably believes the seizure is necessary to prevent the thing being hidden, lost or destroyed.

The investigator may also:

- require the occupier of a place, or a person at a place, to give the investigator reasonable help to exercise the investigator's powers; and
- require the occupier of a place, or a person at a place, to give the investigator information to help the investigator in conducting the investigation.[83]

This may include searching for relevant files and accessing locked areas.

[80] National Law, Sch 5, cl 6(1).
[81] National Law, Sch 5, cl 8.
[82] National Law, Sch 5, cl 11.
[83] National Law, Sch 5, cl 9(2).

Unless the occupier or person has a reasonable excuse, failure to give reasonable help or give information to help the investigator constitutes an offence under the National Law and may result in a penalty.[84]

The National Law provides a process for dealing with seized and forfeited items under a warrant.[85] Certain processes also apply if a property is damaged in the course of search and seizure process (including a process by which compensation may be sought).[86]

Procedural fairness

KEY POINTS

- Procedural fairness is a legal principle which requires that fair and proper procedures are followed when making a decision
- Procedural fairness in investigations under the National Law generally requires that:
  - a practitioner is provided with the opportunity to respond to the allegations against him or her; and
  - where the scope of issues the subject of an investigation is expanded, a practitioner is provided with the opportunity to respond to the new issues.

Investigations are conducted in a procedurally fair way. **Procedural fairness** is a legal principle which requires that fair and proper procedures are followed when making a decision that may affect a person's rights or interests.

The National Law is not prescriptive about what is required to ensure that a practitioner is afforded procedural fairness in the course of an investigation. Common law principles will apply.[87] What this means in practice is that the process an investigator adopts is flexible and may vary depending on the nature of the investigation.

In most cases, it will be appropriate for an investigator to provide a practitioner with material that is relevant to the allegations being investigated.

Where evidence is obtained during the course of an investigation that will have the effect of expanding the scope of the issues which are the subject of the investigation, procedural fairness may require the practitioner to be given an additional opportunity to respond to any new issues.

Circumstances in which an investigation may be placed on hold

An investigation may be placed on hold if it is unable to be progressed for a period of time (but has not yet concluded).

This may occur, for example, when there is a criminal investigation or proceeding underway which relates to the practitioner's conduct that is being investigated. Often, the Board's investigation will be placed on hold until the conclusion of the criminal investigation or prosecution. It is generally considered appropriate for criminal proceedings to take place before a disciplinary proceeding for several reasons (such as to minimise the chance of witnesses having to give evidence in two separate proceedings, though this still may be required). As discussed at 9.7, even if a criminal proceeding ends in acquittal, the relevant conduct may still be found proven for the purposes of a disciplinary proceeding.

A Board will notify a practitioner if it decides to place an investigation on hold.

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[84] National Law, Sch 5, cl 10. The maximum penalty is $5,000 for individuals and $10,000 for body corporates.

[85] National Law, Sch 5, Part 2,

[86] See National Law, Sch 5, Cl 18–19.

[87] *Pham v Legal Services Commissioner* [2016] VSCA 256 at [237].

5.3 Potential outcomes of investigation

KEY POINTS

- At the conclusion of an investigation, the investigator must provide the relevant Board with a written report (which includes the investigator's findings and their recommendations about any action to be taken).
- The Board will then consider the investigator's report and decide whether or not to take further action about the matter.
- Further action might include:
  - referring the matter to another entity (such as a health complaints entity);
  - taking immediate action;
  - directing the practitioner to undergo a health or performance assessment;
  - taking relevant action under section 178 of the National Law;
  - referring the matter to a panel; or
  - referring the matter to a responsible tribunal.

As soon as practicable after completing an investigation, the investigator must give a written report to the relevant Board, which includes the investigator's findings and recommendations about any action to be taken.[88]

The Board will then consider the investigator's report and decide:

- to take no further action; or
- to either or both:
  - take action the Board considers necessary or appropriate under another division of Part 8 of the National Law;
  - refer the matter to another entity, including, for example, a health complaints entity for investigation or other action.[89]

Action available to a Board under other divisions of Part 8 include:

- immediate action (see Chapter 3);
- directing the practitioner to undergo a health or performance assessment (see Chapter 4);
- relevant action under section 178 (see Chapter 6);
- referring the matter to a health or professional performance and standards panel (see Chapter 7); and
- referring the matter to a responsible tribunal (see Chapter 8).

If a Board makes a decision under section 167, the Board may inform a notifier (who made the notification to which the investigation related) of its decision, as well as the reasons for the decision.[90]

[88] National Law, s 166.
[89] National Law, s 167.
[90] National Law, s 167A.

6. Relevant action under Division 10 of Part 8 of the National Law

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

KEY POINTS

- When action about a practitioner is appropriate but the practitioner is not required to be referred to a responsible tribunal or panel, a Board may in some circumstances take 'relevant action'. This may include:
  - cautioning the practitioner;
  - accepting an undertaking from the practitioner;
  - imposing conditions on the practitioner's registration; or
  - referring the matter to another entity.
- A Board may take such action if it reasonably believes that:
  - the practitioner's performance or conduct is, or may be, unsatisfactory; or
  - the practitioner has, or may have, an impairment.
- The practitioner will be provided with the opportunity to make written or verbal submissions about the proposed relevant action.

6.1 Decision of a National Board to take relevant action

A Board may take **'relevant action'** under section 178 of the National Law if it reasonably believes, because of a notification, or for any other reason, that:

- the way a registered health practitioner practises the health profession, or the practitioner's professional conduct, is, or may be, unsatisfactory; or
- a registered health practitioner has, or may have, an impairment; and
- 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 panel.[91]

The meaning of:

- **'professional conduct'** is discussed at 9.5; and
- **'impairment'** is discussed at 9.6.

Relevant action enables the Boards to protect the public from any current or future risk that has been highlighted by the performance, health or conduct of a registered health practitioner.

The Boards may decide to not take relevant action in circumstances where:

- no risk to current or future patients or other members of the public has been identified; or
- appropriate strategies have already been established to mitigate the identified risk.

'Is or may be' / 'has or may have'

Generally, before taking relevant action under section 178 of the National Law, the relevant Board will hold a reasonable belief that the practitioner's practice or conduct *is* unsatisfactory. However, a Board is not *required* to hold a reasonable belief that a practitioner's practice or conduct *is* unsatisfactory but merely that it *may be.*[92] Such cases will be quite rare.[93]

A Board also does not need to prove that the practitioner behaved in a way that constitutes unprofessional conduct or professional misconduct.[94]

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[91] National Law, s 178(1).

[92] da Horta v Podiatry Board of Australia [No 2] [2017] WASC 264.

[93] See *Regulatory Operations Guideline: Managing risk to public safety via relevant action,* February 2018.

[94] XDH v Medical Board of Australia [2019] VCAT 377 at [19] citing Popovski v Dental Board of Australia [2018] VCAT 73 at [27].

Similarly, reasonable belief as to the *possibility* that the practitioner has an impairment has been held to be sufficient for a practitioner to be referred for a health assessment.[95]

6.2 Relevant action available to Board

'Relevant action' includes:

- cautioning the practitioner;
- accepting an undertaking from the practitioner;
- imposing conditions on the practitioner's registration;
- referring the matter to another entity, including, for example, a health complaints entity, for investigation or other action.[96]

An **undertaking** is a formal promise to do something or not do something. For example, a practitioner might undertake to practise between the hours of 9.00am and 5.00pm only.

Cautions and conditions are discussed further at 10.2.

The form of relevant action will reflect the necessary regulatory response that a Board considers to be required to respond to the risk posed by a practitioner. The nature and seriousness of findings about a practitioner are decisive factors in determining whether relevant action is necessary, and the form it will take.

Examples of the conditions that a Board may impose on a practitioner's registration include conditions requiring a practitioner:

- to complete specified further education or training within a specified period;
- to undertake a specified period of supervised practice;
- to do, or refrain from doing, something in connection with the practitioner's practice;
- to manage the practitioner's practice in a specified way;
- to report to a specified person about the practitioner's practice; or
- not to employ, engage or recommend a specified person, or class of people.

If a Board decides to take relevant action by imposing a condition on a practitioner's registration, it will also impose a review period for the condition.[97]

When a condition is reviewed, the Board will decide whether to:

- remove the condition;
- amend the condition; or
- maintain the condition.

Section 125 of the National Law additionally sets out the process by which conditions or an undertaking may be changed or removed (on application by a practitioner). Such an application must not be made during the review period for a condition or undertaking, unless the practitioner reasonably believes that there has been a material change in their circumstances.

Sections 125 and 126 of the National Law provide for changing conditions on the Board's initiative and the removal of conditions or undertakings.

6.3 Procedure and show cause process

If a Board proposes to take relevant action about a registered health practitioner, the Board will:

- provide the practitioner with written notice of the proposed relevant action; and
- invite the practitioner to make a written or verbal submission to the Board about the proposed relevant action.[98]

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[95] *Coppa v Medical Board of Australia* [2014] NTSC 48.

[96] National Law, s 178(2).

[97] National Law, s 178(3).

[98] National Law, s 179(1).

The notice will also stipulate the reasonable timeframe within which a practitioner must provide their submission.[99]

A practitioner may decide to not make any submissions to the Board. If the practitioner does make submissions, the Board will consider them before making its decision.

The process by which a Board provides a practitioner with the opportunity to make submissions is known as the '**show cause process'.**

6.4 Options available to the Board

At the conclusion of the show cause process, a Board will decide to:

- take no action about the matter; or
- do either or both of the following:
    - take the proposed relevant action or other relevant action;
    - refer the matter to another entity, including, for example, a health complaints entity, for investigation or other action.[100]

6.5 Notice of the decision

As soon as practicable after making a decision to take relevant action, a Board will provide written notice of the decision to:

- the practitioner;
- the notifier, if the decision was the result of a notification;[101]
- an employer, another entity for whom the practitioner provides services or other practitioners with whom the practitioner shares premises.[102]

The notice may include the reasons for the decision.[103]

6.6 After the decision has been made

Ordinarily, if a condition has been imposed on, or undertakings accepted, about a practitioner's registration, then those conditions or undertakings are published on the national register of practitioners.[104] There are some circumstances in which a Board may decide that conditions or details of an undertaking need not be published – for example, where they would disclose information about a practitioner's health condition.[105] However, in all cases, that a condition or undertaking applies to the registration will be published. Cautions are not required to be published on the national register.[106]

A decision of a Board under section 178 of the National Law to impose conditions on person's registration is appellable under section 199 of the National Law.

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[99] National Law, s 179(1)(b).

[100] National Law, s 179(2).

[101] National Law, s 180(1). For more detail, see *Common Protocol: Informing notifiers about the reasons for National Board decisions* August 2018.

[102] National Law, s 206(2).

[103] National Law, s 180(2); *da Horta v Podiatry Board of Australia* [No 2] [2017] WASC 264 at [51].

[104] The national register of practitioners contains up-to-date information about the registration status of all registered health practitioners in Australia.

[105] See National Law, s 226.

[106] See National Law, s 225.

7. Health panels and performance and professional standards panels

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

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

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

More serious matters, where a Board forms a reasonable belief that a practitioner has engaged in professional misconduct, are required to be referred to a responsible tribunal. This is discussed in Chapter 8.

KEY POINTS

- A Board may establish a health panel if it reasonably believes that a practitioner has, or may have, an impairment (and that it is necessary and appropriate for the matter to be referred to a panel).
- A Board may establish a performance and professional standards panel if it reasonably believes that:
  - the way a practitioner practises the profession is, or may be, unsatisfactory; or
  - the practitioner's professional conduct is, or may be, unsatisfactory; and
  - that it is necessary and appropriate for the matter to be referred to a panel.

7.1 Health panels

A Board may establish a health panel if:

- it reasonably believes, because of a notification or any other reason, that a health practitioner has, or may have, an impairment; and
- the Board decides it is necessary or appropriate for the matter to be referred to a panel.[107]

Reasonable belief as to the *possibility* that the practitioner has an impairment will be sufficient.[108]

The meaning of '**impairment**' is discussed at 9.5.

7.2 Performance and professional standards panels

A Board may establish a performance and professional standards panel if:

- the Board reasonably believes, because of a notification or for any other reason, that:
  - the way a practitioner practises the profession is, or may be, unsatisfactory; or
  - the practitioner's professional conduct is, or may be, unsatisfactory; and
- the Board decides it is necessary or appropriate for the matter to be referred to a panel.[109]

A Board is not required to hold a reasonable belief that a practitioner's practice or conduct *is* unsatisfactory but merely that it *may* be.[110]

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[107] National Law, s 181(1).

[108] *Coppa v Medical Board of Australia* [2014] NTSC 48.

[109] National Law, s 182(1).

[110] *da Horta v Podiatry Board of Australia* [No 2] [2017] WASC 264.

7.3 Composition of panels

Each Board may appoint individuals to a list of people approved to be members of panels.[111]

Each panel will consist of at least three members chosen from the approved person list, of which:

For health panels	For performance and professional standards panels
• at least one member is a registered health practitioner in the same health profession as the practitioner who is the subject of the hearing; • at least one member is a medical practitioner with relevant expertise* about the matter that is the subject of the hearing; and • at least one member is not, and has not been, a registered health practitioner in the same health profession as the practitioner who is the subject of the hearing.[112]	• at least half, but no more than two-thirds of the members must be people who are registered health practitioners in the same health profession as the practitioner who is the subject of the hearing; and • at least one member must be a person who represents the community.[113]

**Relevant expertise may include, for example, specialist qualifications in psychiatry, drug and alcohol addiction or neurology.*

When choosing panel members, a Board must, if possible, choose a member from the jurisdiction in which the matter occurred.[114]

A person may not be appointed to be a panel member if that person has been involved in any proceedings about the matter that is the subject of the panel hearing.[115]

7.4 Process and procedure

KEY POINTS

- A Panel will provide notice to a practitioner of the details of a panel hearing.
- The practitioner may be accompanied at the hearing by an Australian legal practitioner or other person for support. A legal practitioner or support person may only appear on behalf of the practitioner with leave of the panel.
- A panel hearing is not open to the public.
- Panel hearings are intended to be less formal than court proceedings.
- A panel must observe the principles of natural justice but it is not bound by the rules of evidence.

Notice

After a Board establishes a panel, the panel will provide notice of the hearing to the practitioner. The notice will state, among other things:

- the date, time and place at which the hearing is to be held;
- the nature of the hearing and the matters to be considered; and
- the types of decisions the panel may make at the end of the hearing.[116]

Ahpra will inform the practitioner of the names of the panel members who will be hearing the matter. This gives the practitioner the opportunity to inform Ahpra of any concerns about, or conflicts with, selected panel members.

The practitioner must attend the hearing. If they fail to attend, the panel may make a decision in the practitioner's absence.[117]

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[111] National Law, s 183.
[112] National Law, s 181(2).
[113] National Law, ss 182(2)-(5).
[114] National Law, s181(3).
[115] National Law, ss 181(6) and 182(6).
[116] National Law, s 184.
[117] National Law, s 188; this will only occur if the panel reasonably believes that the practitioner has been given notice of the hearing.

Scope

The panel may only consider the allegations that form the 'matters to be considered' as articulated in the notice.[118]

Legal representation and support people

The practitioner may be accompanied at the hearing by an Australian legal practitioner or other person for support.[119] A legal practitioner or support person may only appear on behalf of the practitioner with leave of the panel.[120] Leave will only be granted by a panel if the panel considers it appropriate in the particular circumstances of the hearing.[121]

Circumstances that a panel may take into account include:

- the practitioner's ability to participate in the process;
- the complexity of the material to be considered;
- the seriousness of the allegations; and
- the nature of the notification.

Nature of the hearing

A hearing before a panel is not open to the public.[122] It is an inquisitorial process, rather than an adversarial one.

A panel may decide its own procedures, subject to Division 11 of Part 8 of the National Law.[123]

Generally, the panel will ask questions and consider submissions made by the practitioner. It will also be provided with all the relevant information, including documents and information:

- provided by the practitioner, notifier and other relevant parties such as experts and witnesses;
- obtained by the investigator during the investigation; and
- all material the Board relied upon when deciding to establish a panel to hear the matter.

If the matter being heard by a panel relates to a notification, the notifier may, with leave of the panel, make a submission to the panel about the matter.[124]

Generally, witnesses or people other than the practitioner will not be required to attend, or be made available to attend, a panel hearing.

Procedural fairness

The practitioner will:

- be provided with all material before the panel so that they have the opportunity to understand the nature of the concerns and prepare a response; and
- be given an opportunity to discuss the allegations with the panel and make submissions.

Panel hearings are intended to be less formal than court proceedings. A panel must observe the principles of **procedural fairness** but it is not bound by the rules of evidence.[125]

In most cases, witnesses will not attend panel hearings and the panel may properly consider and rely upon a witnesses' written statements.

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[118] *Psychology Board of Australia v Fox* [2013] ACAT 75 at [53].
[119] National Law, s 186(1).
[120] National Law, s 186(2).
[121] National Law, s 186(3).
[122] National Law, s 189.
[123] National Law, s 185(1).
[124] National Law, s 187.
[125] National Law, s 185(2).

A panel may also have regard to:

- a report prepared by an assessor about the practitioner; and
- any other information the panel considers relevant to hearing the matter.[126]

Other relevant information may include:

- clinical records;
- statements from witnesses, colleagues and employers;
- notifications;
- relevant codes and guidelines;
- character references submitted by the practitioner; and
- any other documentary evidence (for example, data obtained from Medicare or the Pharmaceutical Benefits Scheme).

Standard of proof

The standard of proof for a panel hearing is the civil standard known as ‘satisfaction on the balance of probabilities’ that the alleged behaviour occurred. This means that the panel must be comfortably satisfied that the practitioner actually behaved in the way that is alleged

but does not mean that the panel must be satisfied 'beyond reasonable doubt'.

Adjourning or ceasing a hearing

A hearing may be adjourned by a panel if it decides that it requires further information about a specific issue.

A panel must stop hearing a matter and require the Board to refer the matter to a responsible tribunal, if at any stage:

- the practitioner asks the panel to refer the matter to a responsible tribunal under section 193;
- the panel reasonably believes the evidence demonstrates:
    - the practitioner may have behaved in a way that constitutes professional misconduct; or
    - the practitioner's registration may have been improperly obtained because the practitioner or someone else gave the Board information or a document that was false or misleading in a material particular.[127]

The meaning of **'professional misconduct'** is discussed at 9.5.

[126] National Law, s 185(3).

[127] National Law, s 190.

7.5 Decision of a panel

KEY POINTS

A panel may:

- stop the hearing and refer the matter to the responsible tribunal, if it reasonably believes that the practitioner has behaved in a way that constitutes professional misconduct;
- if satisfied to the requisite standard, make findings that the practitioner:
  - has behaved in a way that constitutes unsatisfactory professional performance or unprofessional conduct; and/or
  - has an impairment; and
- if a panel makes such a finding about a practitioner, impose a condition on the practitioner's registration and/or;
  - for a health panel, suspend the practitioner's registration;
  - for a performance and professional standards panel, caution or reprimand the practitioner.

After hearing a matter, a panel may decide:

- the practitioner has no case to answer and no further action is to be taken; or
- one or more of the following:
  - the practitioner has behaved in a way that constitutes unsatisfactory professional performance;
  - the practitioner has behaved in a way that constitutes unprofessional conduct;
  - the practitioner has an impairment;
  - the matter must be referred to a responsible tribunal under section 193;
  - the matter must be referred to another entity, including, for example, a health complaints entity, for investigation or other action.[128]

The meaning of **unsatisfactory professional performance** is discussed at 9.4.

The meaning of **unprofessional conduct** is discussed at 9.3.

If a panel decides that a practitioner has no case to answer, this will not prevent the Board or an adjudication body from taking the matter into consideration at a later time as part of a pattern of conduct or practice by the practitioner.[129] The meaning of a finding that a practitioner has no case to answer is discussed in more detail at 9.6.

If a panel decides that the practitioner has an impairment, or has behaved in a way that constitutes unsatisfactory professional performance or unprofessional conduct, the panel may decide to:

- impose a condition on the practitioner's registration;
- for a health panel, suspend the practitioner's registration; or
- for a performance and professional standards panel, caution or reprimand the practitioner.[130]

If a panel decides to impose a condition on the practitioner's registration, it must decide a review period for the condition.[131] Upon the expiration of the review period, the Board will review the condition to consider whether it is still required and/or requires amending.

Examples of conditions that a panel may impose include conditions requiring the practitioner to:

- complete specified further education or training within a specified period;
- undertake a specified period of supervised practice;
- do, or refrain from doing, something in connection with the practitioner’s practice;
- manage the practitioner’s practice in a specified way;

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[128] National Law, s 191(1).

[129] National Law, s 191(5).

[130] National Law, s 191(3).

[131] National Law, s 191(4).

- report to a specified person at specified times about the practitioner's practice;
- not employ, engage or recommend a specified person, or class of people.[132]

If a panel decides to suspend a practitioner's registration, it must also decide a date by which the suspension must be reconsidered by a panel.[133] This is known as the **reconsideration date**.

Cautions, conditions, suspensions and reprimands are discussed further at 10.2.

7.6 Notice of the decision

As soon as practicable after making a decision, the panel will give notice of the decision to the Board. Within 30 days, the Board will give written notice of the decision to the practitioner, and if the hearing related to a notification, the notifier.[134]

The notice to the practitioner will state:

- the decision made by the panel;
- the reasons for the decision;
- that the practitioner may appeal the decision; and
- how an application for appeal may be made and the period within which it must be made.[135]

7.7 After the decision has been made

The following decisions by panels are appellable under the National Law:

- a decision to impose a condition on a practitioner's registration;[136]
- a decision by a health panel to suspend a practitioner's registration;[137]
- a decision by a performance and professional standards panel to reprimand the practitioner.[138]

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[132] National Law, s 191(3)(a).
[133] National Law, s 191(4A).
[134] National Law, s 192.
[135] National Law, s 192(3).
[136] National Law, s 199(1)(i).
[137] National Law, s 199(j).
[138] National Law, s 199(k).

8. Referral to the responsible tribunal

Division 12 of Part 8 of the National Law sets out:

- when a Board must refer a matter to the responsible tribunal;
- how disciplinary proceedings before a responsible tribunal are to be conducted; and
- the powers of the responsible tribunal when making decisions.

KEY POINTS

- A Board is required to refer a matter to a responsible tribunal if it forms a reasonable belief that:
  - a practitioner has behaved in a way that constitutes professional misconduct; or
  - a practitioner's registration was improperly obtained because the practitioner or someone else gave the Board information or a document that was false or misleading in a material particular.
- After a decision has been made to refer a matter to a responsible tribunal, the Board will start a disciplinary proceeding against the practitioner. This is done by filing a document with the responsible tribunal, which is then served on the practitioner.
- The responsible tribunal is responsible for managing the proceeding, and will generally order the parties attend a compulsory conference to see if the matter is capable of resolution.
- A final hearing may be required to determine any issues the parties were not able to resolve, or depending on the jurisdiction, to approve any agreed outcome.
- Final hearings are open to the public.

8.1 Decision to refer the matter to the responsible tribunal

A Board **must** refer a matter about a registered health practitioner to a responsible tribunal if:

- the Board reasonably believes, based on a notification or for any other reason:
  - that the practitioner has behaved in a way that constitutes professional misconduct;[139] or
  - that the practitioner's registration was improperly obtained because the practitioner or someone else gave the Board information or a document that was false or misleading in a material particular; or
- a panel established by the Board requires the Board to refer the matter to a responsible tribunal.[140]

In all participating jurisdictions, except for Queensland and NSW, if the requisite reasonable belief is formed, the Board **must** refer the matter to the responsible tribunal.

In Queensland, this test operates in an amended form, and tribunal referrals are predominantly dealt with by OHO. However, there remains limited circumstances in which a Board may decide to refer a matter to a responsible tribunal.

In NSW, the Boards have no power to refer a matter to the responsible tribunal. This chapter does not cover tribunal referrals in NSW.

Responsible tribunal

Responsible tribunals are independent of the Boards and Ahpra. Each participating state and territory has its own responsible tribunal. This table sets out the responsible tribunal in each participating jurisdiction (with the exception of NSW):

State	Responsible tribunal
Queensland	Queensland Civil and Administrative Tribunal
Victoria	Victorian Civil and Administrative Tribunal
South Australia	South Australian Civil and Administrative Tribunal
Australian Capital Territory	ACT Civil and Administrative Tribunal

[139] The concept of 'professional misconduct' is discussed at 9.5.

[140] National Law, s 193(1). A decision by a panel to stop a hearing and require a Board to refer a matter to a responsible tribunal is discussed at 7.4.

State	Responsible tribunal
Tasmania	Tasmanian Health Practitioners Tribunal
Western Australia	State Administrative Tribunal
Northern Territory	Northern Territory Civil and Administrative Tribunal

8.2 Commencement of disciplinary proceedings before a responsible tribunal

Initiating process

A Board must refer the matter to the responsible tribunal of the state or territory in which the behaviour or conduct that is the subject of the matter occurred.[141] If the behaviour occurred in more than one jurisdiction, the Board must refer the matter to the responsible tribunal of the state or territory in which the practitioner's principal place of practice is located.[142]

When a decision to refer a matter is made, Ahpra will provide written notice of the decision to the practitioner, or the practitioner's representative (if applicable).[143] The Board may decide at this stage to engage its own legal representation to prepare the referral documents and represent it in the proceeding.

To give effect to the decision to refer, the Board (or the solicitors engaged by the Board), will file a document(s) with the relevant responsible tribunal to start disciplinary proceedings. A copy of that document(s) will also be served on the practitioner or their representative. The precise form and title of the document(s) that initiate the tribunal process differs between the various tribunals – each responsible tribunal will have its own requirements.

The documents starting the disciplinary proceeding will include a document setting out the allegations made about the practitioner. The purpose of this document is to put the practitioner on notice of what the Board says occurred and, in the Board's view, how that conduct ought to be characterised – that is, the appropriate **findings** that the Board will ask the responsible tribunal to make (discussed further in Chapter 9). Again, each jurisdiction has its own procedural requirements, however, a practitioner will be given an opportunity to respond to this document.

Parties to a disciplinary proceeding started before a responsible tribunal

Identity of the parties

The parties to a proceeding started by the Board are:

- the Board that referred the matter; and
- the practitioner.[144]

In most jurisdictions, tribunal documents, including orders and decisions, will refer to the Board as the Applicant/Complainant, and to the practitioner as the Respondent.

Legal representation

Parties in disciplinary proceedings before a responsible tribunal may be legally represented, though in some responsible tribunals the legal representative may need to seek leave to appear.

The Board will usually be represented by a firm of solicitors. If a practitioner's professional indemnity insurer has agreed to cover the practitioner's legal costs and expenses, the insurer may engage lawyers to represent the practitioner. Otherwise, engagement of a lawyer is a decision for the practitioner to make.

Nature of disciplinary proceeding before a responsible tribunal

Disciplinary proceedings before a responsible tribunal are less formal than court proceedings. This is because they are designed to be more accessible to people appearing without legal representation, and to

[141] National Law, s 193(2)(a)(i).
[142] National Law, s 193(2)(a)(ii).
[143] National Law, s 193(2)(b).
[144] National Law, s 194.

run in a quicker and more cost-effective manner. Tribunals are not bound by the same strict rules of evidence as courts.

The proceedings are generally open to members of the public except where otherwise ordered (in some jurisdictions, interlocutory hearings are not open to the public). A tribunal's final decision will usually be published on the tribunal's website and/or the Australasian Legal Information Institute (AustLII) website.

Witness confidentiality

Efforts will be made by the Boards to protect the confidentiality of witnesses and notifiers. Where necessary, a Board will request:

- an order that the responsible tribunal close the tribunal's file, meaning that it can only be viewed by the parties to a proceeding and their representatives, without leave of the tribunal;
- an order protecting the privacy of its witnesses. For example, it may request the responsible tribunal make:
    - **A suppression or non-publication order.** This order may be made by the responsible tribunal to restrict or prevent the publication of, for example, any information that might enable the identification of a witness or their family members (this would include their name, and potentially other information such as where the alleged conduct occurred).
    - **A pseudonym order.** This order is generally made prior to the commencement of a proceeding, requiring that a person/people be named by way of pseudonym in court documents yet to be produced and filed. Where a pseudonym order has been made, this will not 'prohibit or restrict the publication or other disclosure of information in connection with a proceeding'. Pseudonym orders can also be made, following the commencement of a proceeding.

The powers of a responsible tribunal to make orders closing a file, suppression orders, non-publication orders or pseudonym orders varies between the states and territories. It is not usual for a responsible tribunal to make a suppression order restricting publication of the practitioner's identity. Publication of the practitioner's identity is, in most cases, essential for the purposes of open justice and is one of the means by which the National Law achieves its aim of protecting the public.

Efficiency of proceedings

Boards seek to have proceedings progress through to completion as efficiently as possible. The purpose of this is to:

- limit the emotional, financial and professional impact on the affected practitioner;
- limit the impact on the notifier, witnesses and victims who may have been significantly affected by the conduct and want proceedings to be finalised as quickly as possible to allow them to move on. This is particularly so for victims required to give evidence, where the impact of preparing for final hearing (and any subsequent delay) can be traumatic; and
- limit the financial cost of the proceeding.

8.3 Pre-hearing process

Directions hearings/administrative mentions

The responsible tribunal determines the timeframe of hearings, conducts the hearing and makes final orders/delivers the tribunal’s final decision. It will closely manage the proceedings. It may be necessary to have more than one administrative hearing (usually called 'directions hearings', 'mentions' or 'administrative mentions'), before a matter is finally heard and determined. This is to ensure the efficient running of the proceedings, and that procedural fairness is afforded to the practitioner.

Directions hearings

After a proceeding is started, the responsible tribunal will, in most cases, make orders that the matter be listed for an initial directions hearing. Directions hearings are intended to be short hearings before a tribunal member to confirm a timetable for the proceeding (the steps that must be undertaken to bring the matter to completion).

At a directions hearing, the Board and the practitioner will inform the responsible tribunal how they think the case should be managed, including the timing of:

- the issuing of any summonses/inspection of documents;

- the filing and exchange of documents/material by each party; and
- the listing of any other interim hearings, such as a compulsory conference or mediation.

At the conclusion of a directions hearing, the tribunal member will make orders setting out how the case will proceed.

Consent orders/administrative mentions

Occasionally there may be more than one directions hearing over the life of a proceeding. That said, attending directions hearings incurs time and expense for the parties, notifiers, victims and the responsible tribunal. Accordingly, Ahpra strives to avoid multiple directions hearings and it is common for either:

- the parties to reach agreement on what any procedural orders should look like, particularly if the Board and the practitioner are legally represented. If agreement can be reached, the parties will put these orders into a document, and sign it ('consent orders'). In many instances, if the tribunal agrees with the orders, the directions hearing will be 'vacated' (cancelled) and the requested orders will be made 'by consent'; or
- the responsible tribunal to list an administrative hearing date (by which time the parties are to report to the tribunal by electronic communication) (**administrative mention**). This helps discussions between the parties about what appropriate consent orders may look like, and provides a date by which time 'consent orders' are to be filed with the responsible tribunal.

Compulsory conference/mediation

What is a compulsory conference?

It is common practice for tribunals to require the parties to attend a 'compulsory conference', 'preliminary conference' or 'mediation' (the name of this hearing varies between the various responsible tribunals – in this guide, the term 'compulsory conference' is used). Its purpose is to aid discussions between the parties to:

- narrow the issues in dispute; and
- explore whether a resolution can be reached.

A compulsory conference is a confidential meeting attended by the parties and presided over by a tribunal member. It provides the parties with the opportunity to discuss the allegations, factual matters that are agreed or in dispute, and the outcome each party considers appropriate. The parties are not permitted to disclose what was said in a compulsory conference to third parties.

A compulsory conference is conducted on a 'without prejudice' basis. This means that anything said in the compulsory conference (for example – any concessions made to see if a resolution can be reached) may not be used by either party in the course of the proceeding.

When presiding over a compulsory conference, the role of the tribunal member is not to make a decision about the case, but to help discussion between the parties and make any consequential orders. Because of the confidential and 'without prejudice' nature of a compulsory conference, the tribunal member who presides over it, will not usually preside over any final hearing.

What happens at a compulsory conference?

At the compulsory conference, the parties will see if they can reach agreement on the facts, findings (see Chapter 9) and determinations/disciplinary sanction/penalty (see Chapter 10 – for the remainder of this chapter, the term **determination** will be used).

If an agreement on the facts can be reached, the parties will prepare an **Agreed statement of facts** and sign it. In almost all cases, it will be possible for the parties to reach agreement on at least some of the alleged facts – for example, the fact that a particular person was the practitioner's patient; or that specific conduct did in fact, take place.

If the parties can agree on the facts, then they may also be in a position to agree on the findings (that is, the appropriate characterisation of the conduct as professional misconduct, unprofessional conduct or unsatisfactory professional performance) and the determinations to be imposed by the responsible tribunal. If the parties are able to reach agreement on these matters, the agreement will be recorded in the agreed statement of facts (the title of the agreed statement of facts document will generally be changed to reflect this).

A compulsory conference in a disciplinary proceeding before a responsible tribunal is not comparable to a mediation in a civil proceeding. In a civil proceeding, the party that started the proceeding is generally seeking financial compensation. This requires the parties to be commercial when negotiating an outcome. A disciplinary proceeding is not a civil proceeding. The purpose of the proceeding is not financial, it is protective (see 10.2). A Board must act in accordance with its statutory objectives and functions, and comply with its model litigant policy.

A Board will only have started a disciplinary proceeding before a responsible tribunal because, on the information before it, it formed a reasonable belief that:

- the practitioner had engaged in specific conduct; and
- that conduct constitutes professional misconduct.

As a consequence of this a Board will:

- only make concessions about factual matters where it is necessary or appropriate in light of the available evidence;
- only agree to a characterisation of the conduct that properly reflects the evidence/gravity of the conduct (see Chapter 9); and
- only agree to determinations that properly reflect the variety of considerations to which it (and the responsible tribunal) must pay regard (see Chapter 10).

What happens after a compulsory conference?

If a complete resolution of the matter is reached between the parties, each jurisdiction will finalise the matter according to its own procedures and requirements. In some jurisdictions, the responsible tribunal may make orders on the day on the basis of the parties' agreed statement of facts. In other jurisdictions, the responsible tribunal may require a short final hearing.

If the responsible tribunal requires a final hearing, the parties will be required to make submissions about the agreed resolution, and why the responsible tribunal should make orders consistent with that agreement. A responsible tribunal is unlikely to depart from an agreement without a clear or exceptional reason.

It is common for the Board and the practitioner to agree on the facts, but not agree on the findings and determinations. In this circumstance, the parties will have a final hearing before the responsible tribunal about:

- how the conduct should be characterised; and
- what determinations should be made.

If the matter cannot be resolved, the tribunal member will make orders setting the matter down for a contested final hearing on all issues (facts, findings and determinations). This may be a staged process (that is, a contested hearing on the facts, and a separate hearing on the findings and determinations).

In all cases, an agreed outcome (in whole or in part) will generally make the final hearing quicker, more efficient and less costly for all parties.

Other matters

Issuing a summons

A responsible tribunal has the power to summons a person to produce documents or attend to provide evidence in a proceeding. Failure to comply with a summons is an offence and may result in a penalty (including a period of imprisonment).

Issuing a summons may be necessary when the Board or the practitioner:

- want to rely on evidence or documents held by a third party; and
- must formally require that third party to attend to give evidence and/or produce the documents to the responsible tribunal.

Exchange of material

The exchange of material allows:

- the practitioner to review the evidence that will be relied upon by the Board, and permits them to understand the case against them, and the evidence that will be relied upon by the Board;
- the Board to understand the position the practitioner will take.

This can be a very time-consuming and expensive step for a party to take. Therefore, each jurisdiction has its own requirements for when this step takes place, and in what circumstances. However, if the matter is to proceed to a contested hearing, it is a step that the parties will likely be required to take. Generally:

- the Board will be required to file and serve the material upon which it proposes to rely first;
- the practitioner will be provided with the opportunity consider it, and file and serve:
    - the material upon which they will rely; or
    - an outline document which sets out the practitioner's response to the documents (each responsible tribunal will have its own requirements); and
- the Board will generally be given the opportunity to review any material filed by the practitioner, and file any 'material in reply' (if necessary).

The reference to 'material' means any substantive evidentiary documents. These may include documents collected in the course of the investigation, clinical records, witness statements or independent expert opinions either party may rely upon.

This process:

- ensures that, before the hearing, to some extent, each party is on notice of the evidence that the other party will rely on at the hearing (and/or of the arguments that will be made); and
- enables the parties to narrow the issues in dispute.

8.4 Final hearing

Constitution of tribunal

A final hearing is presided over by a panel of tribunal members. The tribunal panel is generally constituted by a presiding member with legal qualifications, as well as at least one member who is a health professional in the same profession as the relevant practitioner (called **professional members**). Sometimes members of the community also sit on the tribunal panel. The specific make-up of each tribunal panel will differ between responsible tribunals.

The purpose of having a professional member sit on the tribunal panel is partially to ensure that a practitioner's conduct is being assessed with the assistance and perspective of one of their professional peers. It also enables the responsible tribunal to hear a matter without the need for formal evidence about knowledge, matters or concepts that are generally accepted or known within a certain profession.

Standard and burden of proof

The burden of proof rests with the Board, meaning that the Board is required to prove that professional misconduct has occurred. A practitioner is not required to 'prove their innocence'. The Board is required to prove its case on the balance of probabilities.

Evidence

Before the final hearing, the Board will prepare, file and serve a Tribunal Book:

In a contested hearing, this will comprise the material exchanged between the parties.

In cases where a final hearing is required after resolution of the matter, the parties will usually agree upon the composition of the Tribunal Book.

Oral evidence may also be given in proceedings, and is commonly provided by both lay and expert witnesses (who will adopt any statement they have made, and be subject to cross-examination).[145] The practitioner who is the subject of a referral may also decide to give evidence. All evidence given orally at a final hearing is given on oath or affirmation.

Even where the conduct the subject of the allegation is admitted by a practitioner, the practitioner may decide to give oral evidence about:

- the way they have reflected on their actions;
- their understanding of the consequences of their actions;
- the context in which their actions were taken; and

[145] The rules about expert evidence differ between each responsible tribunal. The role of expert evidence is discussed further at 9.2.

- the action they have taken since the conduct occurred.

This evidence may assist the responsible tribunal when deciding the appropriate determinations. This is discussed further at 10.2.

It can be difficult for some witnesses to attend at the responsible tribunal to give evidence, particularly when they reside interstate or overseas. In some circumstances, the tribunal may grant leave for a witness to give evidence by videolink or telephone.

8.5 Findings and determinations available to a responsible tribunal

After hearing a matter, the responsible tribunal will consider the evidence, make findings of fact and decide whether the allegations are proven. It may then decide:

- the practitioner has no case to answer and no further action is to be taken about the matter; or
- one or more of the following:
    - the practitioner has behaved in a way that constitutes unsatisfactory professional performance;
    - the practitioner has behaved in a way that constitutes unprofessional conduct;
    - the practitioner has behaved in a way that constitutes professional misconduct;
    - the practitioner has an impairment;
    - the practitioner's registration was improperly obtained because the practitioner or someone else gave the National Board established for the practitioner's health profession information or a document that was false or misleading in a material particular.[146]

The meanings of the above findings are discussed in detail in Chapter 9.

Determinations

If a responsible tribunal makes a finding (other than a finding that the practitioner has no case to answer), it may:

- caution or reprimand the practitioner;
- impose a condition on the practitioner's registration;
- require the practitioner to pay a fine of not more than $30,000 to the Board that registers the practitioner;
- suspend the practitioner's registration for a specified period; and/or
- cancel the practitioner's registration.[147]

If a responsible tribunal decides to impose a condition on the practitioner's registration, it must also decide a review period of the condition.[148]

If the responsible tribunal decides to cancel a person's registration or the person does not hold registration, the tribunal may also decide to:

- disqualify the person from applying for registration as a registered health practitioner for a specified period; or
- prohibit the person, either permanently or for a stated period, from:
    - providing any health service or a specified health service; or
    - using any title or a specified title.[149]

The above determinations, and the principles about the imposition of determinations under the National Law, are discussed in detail in Chapter 10.

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[146] National Law, s 196(1).
[147] National Law, s 196(2).
[148] National Law, s 196(3),
[149] National Law, s 196(4).

8.6 Costs

Section 201 of the National Law provides that a responsible tribunal may make any orders about costs that it considers appropriate for the proceedings. There are also costs provisions in the enabling acts for each of the responsible tribunals about the awarding of costs that may be considered.[150]

Across the jurisdictions, if a tribunal makes orders substantially in line with those sought by the Board, the usual course is for a Board to seek an order that the practitioner pay its costs. However, the various responsible tribunals vary in their approach to this issue. For example, in Victoria, the Victorian Civil and Administrative Tribunal has recently stated the primary factor that it considers to be relevant is the nature of the proven conduct and the findings made by it: where it has been established that an individual has been found to have entirely breached their professional obligations, it is appropriate that the practitioner bear the cost of the related disciplinary proceedings.[151]

8.7 Other matters relevant to tribunal referrals

Allegations pre-dating the National Law

From time to time, matters will involve conduct occurring before 1 July 2010, which predates the National Law. In these circumstances, the relevant Board's allegations will be framed as contraventions of the National Law, rather than contraventions of previously historical legislation.

To assist in transitioning from prior Acts to the National Law, a number of savings and transitional provisions were introduced. Relevantly, Regulation 30, which expired on 30 June 2015, provided that if Ahpra received a notification about a registered health practitioner and the subject matter of the notification occurred while they were registered under a corresponding prior Act, proceedings could be taken under Part 8 of the National Law as if they were registered under the National Law.

A responsible tribunal was recently required to determine:

- whether it continued to have jurisdiction to deal with notifications that would have been dealt with under Regulation 30, if it had not expired; and
- if yes, whether it had power to make findings and determinations that were available at the time of the prior Act, or those available under the National Law.

In relation to the first issue, the Tribunal found that the practitioner's contention that the Board did not have the power to deal with the notification, and therefore the Tribunal did not have jurisdiction would, if accepted, create anomalous results because the Board would have power to investigate and refer matters involving health practitioners registered under a corresponding prior Act and under the National Law, but the Tribunal would have no power to make findings and determinations in relation to them unless the practitioner was not, and never had been, registered under the National Law. Further, during debate in the House of Assembly regarding the Bills for introduction of the National Law in Tasmania, the Minister for Health expressly accepted that the National Law could be applied to a 'pre-1 July complaint'. The Tribunal considered that this supported an argument that the National Law applies after the expiration of the savings and transitional provisions including Regulation 30.

In relation to the second issue, the Tribunal relied on *Walton v McBride*,[152] and the following relevant principles from that case:

- construction of legislation should take into account its objective, namely, protection of the public;
- legislation must be given full force and effect according to its terms; and

[150] The relevance of these provisions may differ between jurisdictions – for example, the Victorian Civil and Administrative Tribunal has recently decided that section 109 of *Victorian Civil and Administrative Tribunal Act 1998* (Vic) and section 195 of the National Law are inconsistent, and that the Tribunal must apply section 195 of the National Law when determining whether to award costs.

[151] See *Psychology Board of Australia v Asher* [2020] VCAT 1281.

[152] [1989] NSWCA 222.

- the presumption against retrospective operation is inappropriate where the legislation evinces a contrary intention.

The Tribunal observed that there are a number of indications in the National Law which evince a contrary intention, and in fact indicate that Parliament envisaged that the new provisions, definitions and sanctions should be applied in respect of complaints or notifications that had been received but not started prior to 1 July 2010. It also noted that it would be curious if complaints or notifications that had been received but not started prior to 1 July 2010 were to be dealt with under the National Law but a complaint or notification not yet lodged was not to be dealt with under the National Law.

On that basis, and in respect of the second question, the Tribunal concluded that it has the power to make findings and determinations available to it under the National Law.

9. Available findings under the National Law

9.1 Introduction

As set out in Chapters 7 and 8, at the end of a performance and professional standards panel (**PPSP**) hearing, or a disciplinary proceeding before a responsible tribunal, the decision-maker will make findings of fact and decide how to characterise the matter.

Decisions that may be made by a PPSP

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

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

Decisions that may be made by a responsible tribunal

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

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

When a decision-maker characterises a practitioner's conduct or health in these terms, they are often described as **'findings'.** This is an important step in any proceeding, as it either disposes of (ends) the matter, or will inform what, if any, regulatory action is taken against the practitioner.

This chapter will focus predominantly on the terms **'unprofessional conduct'**, **'professional misconduct'** and **'unsatisfactory professional performance'**. Unsatisfactory professional performance is a subset of unprofessional conduct.[153] These terms are used in various sections of the National Law; and are defined in section 5. These various findings reflect the nature and/or the severity of the matter.

9.2 Professional standards

What are professional standards?

KEY POINTS

- The concept of 'professional standards' is relevant to any disciplinary proceeding under the National Law in which a decision-maker is asked to make a finding of unsatisfactory professional performance, unprofessional conduct or professional misconduct.
- These terms are defined by reference to the standard 'expected' of a practitioner by:
  - their professional peers;
  - the public; and/or
  - a practitioner of an equivalent level of training or experience.
- The 'standard' expected of a practitioner can be worked out by reference to, for example:
  - Board standards, policies, codes and guidelines;
  - employer/government department policies, standards, codes and guidelines;

[153] *Solomon v Ahpra* [2015] WASC 203, [126].

- expert evidence; and/or
- the decision-maker's evaluation of community/public expectations of registered health practitioners.

When a practitioner is alleged to have engaged in unprofessional conduct or professional misconduct, a decision-maker must (once the facts underpinning the allegations have been established):

- determine the standard expected of the practitioner (either by the public or their professional peers);
- decide whether or not the practitioner's conduct was below the expected standard; and
- if the practitioner's conduct was below the expected standard, make an assessment as to the extent to which the practitioner's conduct was below the expected standard (by reference to the standard expected of a practitioner of an equivalent level of training and experience).

When a practitioner is alleged to have engaged in unsatisfactory professional performance a decision-maker must (once the facts underpinning the allegations have been established):

- determine the standard expected of a practitioner of an equivalent level of training and experience;
- decide whether or not the practitioner's conduct was below the expected standard; and
- if the practitioner's conduct was below the expected standard, make an assessment as to the extent to which the practitioner's conduct was below the expected standard.

This last step (determining the extent of the departure) is relevant because, as discussed below:

- a 'substantial' departure from standards may constitute professional misconduct; whereas
- a lesser departure is more likely to be characterised as unprofessional conduct or unsatisfactory professional performance.

Role of codes and guidelines under the National Law

Section 41 of the National Law expressly provides that a Board-approved registration standard, code or guideline is admissible in proceedings under the National Law as 'evidence of what constitutes appropriate professional conduct or practice for the health profession'.[154] Approved registration standards, codes and guidelines as well as Board approved policies are available through the website for each National Board, which can be accessed via www.ahpra.gov.au.

Role of guidelines and documents published by other entities

Other documents commonly referred to in proceedings under the National Law include guidelines, standards, policies and documents published by other entities, such as:

- peak bodies (for example, the Australian Dental Association);
- government bodies (for example, a state or territory health department, Medicare, the Therapeutic Goods Administration); and
- employers (for example, hospital or aged care facility codes of conduct, policies and standards).

These documents can assist in establishing the relevant professional standard expected of a practitioner by their professional peers or the public. Of course, this will depend on what the document is and the identity of the entity that published it.

When reliance is placed on a document created by a third party, it is common (though not necessarily required, depending on the decision-maker or tribunal) for it to be produced by a witness from the relevant entity (who might be in a position to explain the document and how it was developed). This may depend on what the document is, and the identity of the entity that published it.

Role of expert evidence

A Board might be required to lead expert evidence to establish a relevant professional standard. **'Expert evidence'** refers to **opinion evidence** provided by an independent person who has specialised knowledge of a subject by reason of their training, study or experience that informs that opinion.

[154] Section 40 of the National Law states that a Board must ensure that there is wide-ranging consultation about the content of a registration standard or a code or a guideline.

Expert evidence must be provided by a person who is independent from both the Board and the practitioner the subject of the proceeding.

Expert evidence is most likely to be of assistance when:

- the issues involved in the case are novel or highly specific, and are not specifically addressed by the relevant code and guidelines; or
- the extent or degree to which a practitioner's conduct constitutes a departure from professional standards is in dispute (and it is necessary and appropriate for an expert to give their opinion on this issue).

Role of public/community expectations

The role of public/community expectations is reflected in the definition of 'unprofessional conduct', which, as stated above, includes a reference to 'conduct that is of a lesser standard than that which might reasonably be expected of the health practitioner by the public'.[155] Accordingly, the standard expected by the community is an important yardstick against which a practitioner's conduct may be judged.

The concept of community expectations is also relevant to the definition of professional misconduct, which is defined by reference to unprofessional conduct, and also refers to 'conduct that is inconsistent with the practitioner being a fit and proper person'.[156] An assessment of whether a practitioner's conduct is inconsistent with the practitioner being a 'fit and proper person' necessarily requires consideration to be given to the standards and expectations of the community. The concept of 'fit and proper' is discussed in more detail at 9.5.

9.3 Meaning of unprofessional conduct

KEY POINTS

- Unprofessional conduct is defined to mean 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.
- The definition of the term also deems specific types of conduct to be unprofessional conduct, and includes specific instances where conduct occurring outside of the practitioner's practice of the profession can be the subject of regulatory action.

Section 5 of the National Law sets out the definitions of specific terms. It states that:

> ***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*

[155] National Law, s 5 (definition of 'unprofessional conduct').

[156] National Law, s 5 (definition of 'professional misconduct').

(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

(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.

Sub-sections (a) to (h) are not examples of conduct or events that satisfy the general test; rather they are stand-alone definitions of the term.

The Boards interpret the term 'professional conduct' to merely require there to be a connection between the conduct and the profession. Any interaction in which a practitioner may be seen or received as a member, or representative, of the profession, may be considered 'professional conduct'.

Whether certain conduct has a sufficient connection to a practitioner's profession will depend on several factors. There is an entire spectrum of behaviour which is connected to practice but does not involve patients or clients.

Examples of unprofessional conduct

The examples below are of types of conduct which have previously been found to constitute unprofessional conduct under the National Law by responsible tribunals.

They are not a definitive guide about whether a certain kind of conduct is characterised in a certain way. Even where the same kind of conduct arises in different cases, the degree of the departure from professional standards may be different – depending on, for example, the number of patients involved and any harm that was caused.

EXAMPLE 1

Involvement in non-evidence-based medical practices

FACTS	DECISION
A medical practitioner was found to have used unconventional medical practices (namely infusions of bicarbonate of soda) on a patient who had breast cancer.	Unprofessional conduct under the general definition (being 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). In making this finding, reliance was placed on the Guidelines on Unconventional Medical Practice which applied at the relevant time. The Guidelines informed the standard of practice expected of practitioners when they had chosen to practise outside the norms of standard medical practice. The practices of the medical practitioner were found to lie beyond the range of conventional practice because there is insufficient scientific evidence of their efficacy and safety.

EXAMPLE 2

Clinical issues – failure to adequately care for and treat patient; failure to ensure an ambulance was called in a timely manner; leaving unconscious patient without medical supervision; performing late-stage termination procedure without anaesthesia while patient was unconscious, and in renal and liver failure

FACTS	DECISION
A medical practitioner performed a late term termination of pregnancy procedure over three days on a patient. The medical practitioner was found to have failed to adequately clinically care for and treat his patient to the extent that he failed to access, follow-up or consider the results of urgent blood tests and ensure an ambulance had been called in a timely manner. The	Finding: Unprofessional conduct under the general definition (being 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). The tribunal considered several factors when considering the relevant standard, including that: • the practitioner faced what he believed was an obstetric emergency, and rather than a deliberate departure from accepted standards, the practitioner was out of his depth when dealing with this highly unusual situation;

responsible tribunal found that the medical practitioner should not have performed the procedure where the patient was unconscious, in renal and liver failure and with no anaesthesia and leaving his unconscious patient without his direct medical supervision.	• there was evidence that the practitioner attempted to delegate the calling of an ambulance to the nurses; and • at the time of leaving the patient, she was in the hands of trained ambulance officers who did not request any further assistance and indicated that the matter was under control and they would be managing the patient thereafter.

EXAMPLE 3

Clinical issues – failure to notify the Board of a relevant event under section 130(1) of the National Law, namely serious criminal charges

FACTS	DECISION
A nurse was found to have failed to give the Board notice within seven days that a relevant event occurred (namely, that he was charged with an offence punishable by more than 12 months imprisonment). The charge related to possessing and accessing child pornography. The nurse admitted that he failed to notify the Board of the criminal charges.	Unprofessional conduct within the meaning of subparagraph (a) of the definition. In making this finding, reliance was placed on the nurse's failure to make himself aware of his responsibilities as a registered health professional and the serious nature of the conduct.

EXAMPLE 4

Clinical issues – boundary breach – inappropriate conversation with patient

FACTS	DECISION
A medical practitioner was found to have made inappropriate comments about a patient's physique, as well as lewd and sexual suggestions. The medical practitioner later telephoned the patient and made further inappropriate comments before inviting her to dinner.	Unprofessional conduct under the general definition (being 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). In making this finding, reliance was placed on the practitioner's violations of the well-established and well-understood boundaries to be maintained between health practitioners and their patients. Further, the practitioner's comments about the patient's physique and conversation about sex were found to be additionally inappropriate and unprofessional in circumstances where he had just carried out an intimate examination of her.

EXAMPLE 5

Clinical issues – failure to comply with conditions imposed upon registration

FACTS	DECISION
A dentist was found to have failed to comply with conditions on his registration relating to supervision, education and scope of practice.	Unprofessional conduct under the general definition (being 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). In making this finding, the tribunal had regard to the fact that the dentist, by previous regulatory action, had been cautioned to ensure that (in the future) he complied with any requirements set down by the Board.

EXAMPLE 6

Providing medical care to a person with whom the practitioner was engaged a in close personal relationship

FACTS	DECISION
A medical practitioner was found to have:	Unprofessional conduct under the general definition (being professional conduct that is of a lesser standard than that which might reasonably be expected of the health practitioner by the public or the

• engaged in an inappropriate social or close personal relationship with a patient, and later an inappropriate sexual relationship with that patient; • provided prescription medication to that patient with whom she was engaged in a social, personal and sexual relationship; and • prescribed a schedule 8 poison to that patient without a valid permit.	practitioner's professional peers). *Good medical practice: a code of conduct for doctors in Australia*, was a relevant standard the tribunal regarded, as it requires that, whenever possible, a practitioner should avoid providing medical care to anyone with whom they have a close personal relationship.

EXAMPLE 7

Clinical issues – authorising pathology requests about multiple patients without performing adequate examinations on the patients, obtaining informed consent or providing follow-up care

FACTS	DECISION
A medical practitioner was found to have failed to act in accordance with the relevant code of conduct with several patients, including by: • authorising pathology requests where no doctor-patient relationship existed and at the request of an unregistered practitioner; • failing to provide the clinical care that would be reasonably expected of a practitioner with a similar level of training or experience; • failing to keep adequate clinical records; and • failing to follow up on results or arrange further management.	Unprofessional conduct under the general definition (being 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). The Tribunal found the practitioner's conduct to be at the highest end of unprofessional conduct. In making this assessment the tribunal considered *Good medical practice: a code of conduct for doctors in Australia*. Specifically, the tribunal held that the medical practitioner failed to provide the level of clinical care to patients that would reasonably be expected of a practitioner with a similar level of training and experience, and failed to maintain adequate clinical records.

EXAMPLE 8

Clinical issues – inappropriate prescribing, failure to clinically manage patients; inadequate record-keeping

FACTS	DECISION
A medical practitioner was found to have: • prescribed testosterone and hGH Somatropin to patients without proper clinical justification; • failed to appropriately clinically manage those patients; and • failed to adequately record his medical treatment of those patients; • failed to obtain the opinion of a suitably qualified specialist before initiating treatment.	Unprofessional conduct under the general definition (being 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). In making this finding, the tribunal considered that the practitioner was at the time a junior doctor still in training, in his third year post-graduation, and who had not at the time started general practitioner training. The tribunal found it appropriate to take this into account in determining the relevant standard that should apply to characterise the conduct.

EXAMPLE 9

Self-administering/misappropriating a patient's medication for practitioner's own use

FACTS	DECISION
A nurse was found to have procured and consumed opioid medication (namely	Unprofessional conduct under the general definition (being professional conduct that is of a lesser standard than that

Oxycontin) belonging to his former patient for his own purposes.	which might reasonably be expected of the health practitioner by the public or the practitioner's professional peers). In making this finding, reliance was placed on the *National competency standard for the enrolled nurse*, *Code of professional conduct for nurses in Australia*, *A nurse's guide to professional boundaries* and the *Code of ethics for nurses in Australia*.

9.4 Meaning of unsatisfactory professional performance

KEY POINTS

- Unsatisfactory professional performance is defined to mean 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.
- Unsatisfactory professional performance is an alternative, though equally serious, finding to unprofessional conduct.
- Unsatisfactory professional performance and 'unprofessional conduct' are not mutually exclusive. Rather, the definition of unsatisfactory professional performance requires the decision-maker to apply a different lens to conduct that may be of concern.

Section 5 of the National Law states that:

> ***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.*

Elements of unsatisfactory professional performance

The definition of unsatisfactory professional performance requires the decision-maker to look behind the conduct, and assess the practitioner's 'knowledge, skill, or judgment possessed, or care exercised' that led to it occurring.

There are three elements to the definition of unsatisfactory professional performance:

- that the relevant behaviour enables an inference to be drawn about the knowledge, skill or judgment possessed, or care exercised, by the practitioner;
- that the knowledge, skill or judgment possessed, or the care exercised, is 'in the practice of the health profession in which the practitioner is registered'; and
- that the level of knowledge, skill or judgment possessed, or care exercised is 'below the standard reasonably expected of a health practitioner of an equivalent level of training and experience'.

Reaching a conclusion about the third element involves answering three questions:

1. What level of training and experience is possessed by the practitioner?
2. What standard of knowledge, skill or judgment possessed, or care exercised, would be expected of a health practitioner with that level of training or experience?
3. Was the knowledge, skill or judgment possessed, or care exercised by the practitioner below the standard identified in the answer to question 2?

The concept of expected, or professional, standards is discussed at 9.2, including the ways in which a potential departure from standards is assessed.

A finding of unsatisfactory professional performance may be more suitable than a finding of unprofessional conduct, because, for example, such a finding may lend itself to a decision-maker identifying a more suitable determination. For example, if the behaviour can be traced back to a skill deficit, a decision-maker may look to whether a determination can rectify that deficit, and if so, what protective action must be taken until that occurs.

Relationship between ‘unsatisfactory professional performance’ and ‘unprofessional conduct’

Unsatisfactory professional performance is considered to be equally as serious as, though different to, unprofessional conduct. All matters that come before the Board relate to 'behaviour' or ‘conduct’ in a general sense. A notification or complaint will identify an act or omission of the practitioner that the notifier has taken issue with or wants to bring to the Board’s attention. For this reason, ‘unsatisfactory professional performance’ has been described as 'a subset of unprofessional conduct'.[157] The decision-maker is considering 'conduct', just through a different lens.

The definition of unsatisfactory professional performance is arguably narrower than the definition of unprofessional conduct. While the definition of ‘unprofessional conduct’ applies to any behaviour that is considered ‘professional conduct’, the definition of ‘unsatisfactory professional performance' is limited to:

- the ‘knowledge, skill or judgment possessed, or care exercised’ by a practitioner’; and
- only when it occurs in the practice of the profession in which the practitioner is registered.

Because the difference between ‘unprofessional conduct’ and ‘unsatisfactory professional performance’ is one of perspective (that is, the ‘lens’ applied to the ‘behaviour’ or ‘conduct’ before the Board), it is important to note that a substantial departure from expected professional standards will still need to be considered with reference to the definitions of professional misconduct. For example, ‘behaviour’ or ‘conduct’ that may be considered to be a serious example of ‘unsatisfactory professional performance’ may require consideration under definitions (a) or (c) of ‘professional misconduct’.

Example of unsatisfactory professional performance

EXAMPLE

Failure to establish and maintain adequate system for recording clinical notes and managing and responding to test results

FACTS	DECISION
A medical practitioner was found to have, among other things: • failed to establish and maintain an adequate system for ensuring that test results and other clinical correspondence received by him were acted on in a timely manner (including systems for following up, and protecting against failing to follow up, test results and clinical correspondence). • failed to establish and maintain an adequate system for recording and storing patient clinical records.	The responsible tribunal made findings of unsatisfactory professional performance about each of these issues. In making this finding, reliance was placed on a performance assessment report/expert opinion about the practitioner’s practice management systems and the code of conduct.

9.5 Meaning of professional misconduct

Section 5 of the National Law states that:

> ***professional misconduct,*** *of a registered health practitioner, includes:*
>
> *(a) unprofessional conduct by the practitioner that 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*
>
> *(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.*

Paragraphs (a) and (b) of the definition of 'professional misconduct' refer back to the definition of 'unprofessional conduct'. These definitions are designed to capture instances of ‘unprofessional conduct’ that

[157] *Solomon v Australian Health Practitioners Regulation Agency* [2015] WASC 203, at [126].

fall substantially below the standard expected of a practitioner of an equivalent level of training or experience (whether that is a single incident, a course of conduct or a series of incidents).

Paragraph (c) of the definition of ‘professional misconduct’ is designed to capture misconduct that is inconsistent with a practitioner being fit and proper to hold registration. This definition is designed to apply to any conduct, whether it occurs inside or outside the practice of the profession.

The definition of professional misconduct is expressed as 'including' the categories of conduct described in subparagraphs (a), (b) and (c). It is also common for responsible tribunals to refer to the relevant **common law** principles applicable to the concept of professional misconduct as a means of interpreting the statutory definition. '**Common law**' refers to legal principles developed through past decisions of courts and tribunals, as opposed to laws created by Parliament through legislation, such as the National Law.

The concept of professional misconduct exists in the common law, currently and historically, about some registered professions. Some of the more well-known common law statements describing professional misconduct in its various forms (at common law and in earlier legislation) are set out in the table below.

Decision	Comments
Conduct that departs from professional standards	
Qidwai v Brown [1984] 1 NSWLR 100 at 105, per Priestley JA	Priestley JA held that the test for whether a practitioner has committed 'misconduct in a professional respect' is whether *'the practitioner was in such breach of the written or unwritten rules of the profession as would reasonably incur the strong reprobation of professional brethren of good repute and competence'.*
Myers v Elman [1940] AC 282 at 288-289, per Viscount Maugham	Viscount Maugham affirmed that a solicitor could be struck off the rolls or suspended on the ground of 'professional misconduct', words which he found *'have been properly defined as conduct which would reasonably be regarded as disgraceful or dishonourable by solicitors of good repute and competency'.*
Campbell v Dental Board of Victoria [1999] VSC 113 at [23]-[24], per Mandie J	*'The test to be applied is whether the conduct violates or falls short of, to a substantial degree, the standard of professional conduct observed or approved by members of the profession of good repute and competency.'*
Conduct inconsistent with being a fit and proper person to hold registration	
NSW Bar Association v Cummins [2001] NSWCA 284, per Spigelman CJ	*'There is authority in favour of extending the terminology “professional misconduct” to acts not occurring directly in the course of professional practice. That is not to say that any form of personal misconduct may be regarded as professional misconduct. The authorities appear to me to suggest two kinds of relationships that justify applying the terminology in this broader way. First, acts may be sufficiently closely connected with actual practice, albeit not occurring in the course of such practice. Secondly, conduct outside the course of practice may manifest the presence or absence of qualities which are incompatible with, or essential for, the conduct of practice. In this second case, the terminology of “professional misconduct” overlaps with and, usually it is not necessary to distinguish it from, the terminology of “good fame and character” or “fit and proper person".'*
A Solicitor v Council of the Law Society NSW [2004] HCA 1 per Gleeson CJ, McHugh, Gummow, Kirby and Callinan JJ at 267	*'… even though conduct was not engaged in directly in the course of professional practice, it may be so connected to such practice as to amount to professional misconduct. Furthermore, even where it does not involve professional misconduct a person's behaviour may demonstrate qualities of a kind that require a conclusion that a person is not a fit and proper person to practise.'*

Decision	Comments
Ziems v Prothonotary of Supreme Court of New South Wales [1957] HCA 46, per Fullaghar J	*'... the whole approach of a Court to a case of personal misconduct must surely be very different from its approach in a case of professional misconduct. Generally speaking, the latter must have a much more direct bearing on the question of a man's fitness to practise than the former.'*
Sobey v Commercial and Private Agents Board (1979) 22 SASR 70	*'But for the purposes of the case under appeal, I think all I need to say is that, in my opinion, what is meant by that expression is the applicant must show not only that he is possessed of a requisite knowledge of the duties and responsibilities devolving upon him as the holder of the particular license under the act, but also that he is possessed of sufficient moral integrity and rectitude of character as to permit him to be safely accredited to the public, without further enquiry, as a person to be entrusted with this sort of which the licence entails.'*

Subparagraph (a): Unprofessional conduct substantially below expected standards

Professional misconduct under subparagraph (a) of the definition refers to unprofessional conduct by a practitioner that amounts to conduct that is substantially below the standard reasonably expected of a registered health practitioner of an equivalent level of training or experience.

The concept of professional standards is discussed at 9.2, including the ways in which a potential departure from standards is assessed.

EXAMPLE 1

Failure to maintain professional indemnity insurance and false declaration about same

FACTS

A registered chiropractor was found to have:

- failed to maintain adequate professional indemnity insurance (as required by the Board's registration standard) for a period of approximately 16 months; and
- made a false declaration to Ahpra on his annual registration renewal application (about whether he held adequate insurance cover).

DECISION

The responsible tribunal found the allegations proven, and made findings of professional misconduct within the meaning of subparagraph (a) of the definition for both allegations. In making this finding, the tribunal relied on the requirements of the *Registration standard: professional indemnity insurance arrangements*.

EXAMPLE 2

Breach of professional boundaries

FACTS

A medical practitioner was found to have transgressed professional boundaries by engaging in a personal and intimate relationship with his patient and/or former patient. The practitioner:

- communicated with the patient by telephone on various occasions for reasons unrelated to her clinical care;
- shared details of his personal life with the patient;
- had coffee with the patient in public, for reasons unrelated to her clinical care;
- had dinner with the patient;
- went out for drinks with the patient on at least one occasion;
- danced with and/or hugged and/or kissed the patient on at least one occasion; and
- stayed overnight in a hotel room with the patient.

The practitioner admitted to the alleged conduct, and also admitted that his conduct constituted professional misconduct within the meaning of subparagraph (a) of the definition.

FINDING

The responsible tribunal found the allegation proven and made a finding of professional misconduct within the meaning of subparagraph (a) of the definition. In making this finding, the tribunal had regard to *Good medical practice: a code of conduct for doctors*, which underlines the importance of maintaining professional boundaries.

Subparagraph (b): Multiple instances of unprofessional conduct

As stated above, subparagraph (b) of the definition of professional misconduct contemplates that there may be some circumstances in which more than once instance of unprofessional conduct, when considered together, amount to conduct that is substantially below the standard expected of a registered practitioner of an equivalent level of training or experience.

EXAMPLE 2

Breach of professional boundaries, inappropriate prescribing of medication, failure to notify Board of being found guilty of a criminal offence, and practising while impaired

FACTS

A medical practitioner was found to have:

- breached professional boundaries with a patient (**Allegation 1**);
- inappropriately prescribed medication to the patient while engaged in a relationship with her;
- failed to notify the Board within 7 days of being found guilty of a criminal offence; and
- practised as a medical practitioner while aware, or while he ought to have been aware, that he had an impairment that could adversely affect his judgment, performance or his patients' health (**Allegations 2–4**).

FINDING

The responsible tribunal found the allegations proven, and decided that:

- the practitioner's conduct the subject of Allegation 1 constitutes professional misconduct within the meaning of subparagraphs (a) and (c) of the definition; and
- the practitioner's conduct the subject of Allegations 2–4 constitutes unprofessional conduct, and that these three instances of unprofessional conduct, taken together, amount to professional misconduct within the meaning of paragraph (b) of the definition. In making this finding, reliance was placed upon *Good medical practice: a code of conduct for doctors*.

Subparagraph (c): Conduct inconsistent with being a fit and proper person to hold registration

KEY POINTS

- Professional misconduct under subparagraph (c) relates to conduct which is indicative of the practitioner possessing personal qualities that are incompatible with them being a 'fit and proper person' to hold registration in the relevant profession.
- The test for whether a practitioner is a fit and proper person will be applied in the context of the health profession to which they belong, and the characteristics and qualities that are essential to that profession.
- A decision that a practitioner has engaged in professional misconduct under subparagraph (c) does not have the automatic effect of cancelling, or otherwise interfering with, their registration, but it is often an appropriate outcome.

Subparagraph (c) of the definition of professional misconduct applies to conduct of the practitioner, whether occurring in connection with their practice or not, that is inconsistent with the practitioner being a fit and proper person to hold registration in the profession.

Meaning of 'fit and proper person'

The meaning of ‘fit and proper’ has been considered in several decisions. By way of example, the tribunal in *Psychology Board of Australia v Griersmith*[158] stated:

> *The term ‘**fit and proper** person’ is not defined in the **National Law** but its meaning has been the subject of much judicial comment. The test does not carry defined criteria but allows for a wide range of matters to be considered. It includes not only whether a person has the necessary honesty, knowledge and ability but also whether the person possesses sufficient moral integrity and rectitude of character to permit them to be accredited to the public as a person to be entrusted with the sort of work the relevant registration or licence entails. The decision maker needs to make a value judgment and, in so doing, must make an assessment of the seriousness or otherwise of the particular conduct for evaluation. The same approach is to be applied to weighing matters in favour of the person. The test must be applied in the context of what the person will be authorised to do if the relevant permission is given.*

[158] [2019] VCAT 52 at [67] (*Griersmith*).

Griersmith illustrates the point that whether the conduct is inconsistent with the practitioner being a fit and proper person must be considered in the context of what they are permitted to do, if they are registered. For example, personal conduct which is not unlawful or the subject of a criminal finding may still form the basis of a finding under subparagraph (c) if it is indicative of the practitioner possessing qualities which are incompatible with their profession, or indicative of the absence of qualities that are essential to that profession.

Whether occurring in connection with their practice or not

Professional misconduct under subparagraph (c) is expressly defined as being inclusive of conduct that is **not** connected with the person's practice of the profession (**personal conduct**). It captures all conduct that is inconsistent with a practitioner being a fit and proper person to hold registration.

Relationship between finding under paragraph (c) and determinations

Cancellation of a practitioner's registration can often follow a finding of professional misconduct under subparagraph (c). However, this is not inevitably the case. A decision that a practitioner has engaged in professional misconduct under subparagraph (c) **does not** have the automatic effect of cancelling, or otherwise requiring the responsible tribunal to interfere with, a practitioner's registration.

Subparagraph (c) refers to conduct that it is 'inconsistent with a practitioner being a fit and proper person to hold registration in the profession'. This is a characterisation of the conduct the practitioner has engaged in. It is not an assessment of whether the practitioner is fit and proper to hold registration at the time the responsible tribunal is considering the matter, and arriving at its determinations. As discussed in Chapter 10, there are a range of matters a responsible tribunal must consider when arriving at a determination.

Examples of professional misconduct

The following examples are of the types of conduct which have recently been found to constitute professional misconduct under the National Law by various responsible tribunals.

As with the earlier examples, these examples are not a definitive guide as to whether a certain kind of conduct is characterised in a certain way. All cases turn on their own facts. Often tribunals will assess the same 'type' of conduct differently based on the individual facts and circumstances.

EXAMPLE 1

Non-sexual boundary breach – over-involvement in patient's affairs; failure to manage a conflict of interest; breach of the relevant code of conduct

FACTS	FINDING
A nurse was found to have: • transgressed the boundaries that should, and ordinarily do, exist between a registered nurse and a patient in that she was overly involved in the affairs of a patient and failed to adequately manage a conflict of interest (**Allegation 1**); • failed to manage a conflict of interest in that she obtained a benefit under a patient's will in circumstances where she knew, before his death, that he intended to name her as a beneficiary (**Allegation 2**); and • failed to practise the profession of nursing in a reflective manner in that she failed to have regard to the views and beliefs expressed by her colleagues (**Allegation 3**).	The responsible tribunal found that each of the allegations constituted professional misconduct within the meaning of subparagraph (c) of the definition. In making this finding, the tribunal had regard to the *Code of professional conduct for nurses in Australia*, the *Nurses' guide to professional boundaries* and *A code of ethics for nurses in Australia*.

EXAMPLE 2

Clinical issues – dispensing in excessive quantities and/or more frequently than authorised; failure to take reasonable steps to address the rate of prescribing; criminal findings of guilt about dispensing

FACTS	FINDING
A registered pharmacist was found to have: • dispensed anabolic steroids to a patient more frequently and/or in greater quantities than was	The responsible tribunal found that each of the allegations constituted professional misconduct within the meaning of subparagraphs (a) and (b) of the definition. In making this

authorised by the relevant prescribers (by failing to seek approval from the relevant prescriber to dispense multiple supplies and/or repeats on the same day) (**Allegation 1**); • failed to raise concerns with the relevant prescribers and/or the Department of Health and Human Services to address the rate of the steroid injections supplied to the patient, which clearly exceeded the normal and/or intended therapeutic dose range and/or compromised patient safety (**Allegation 2**); and • been found guilty of three criminal charges about the dispending of the steroids, which was the subject of a further allegation before the responsible tribunal (**Allegation 3**).	finding, reliance was placed upon the *Guidelines for dispensing of medicines* and the *Guidelines on practice-specific issues*, and that the relevant conduct occurred over a nearly three-year period.

EXAMPLE 3

Boundary breach – starting relationship with patient under care; establishing sexual relationship with previous patient; inappropriately communicating with a previous patient

FACTS	FINDING
A nurse was found to have: • failed to maintain professional boundaries by commencing a personal relationship with a patient, whilst the patient was under her professional care (**Allegation 1**); • established and continued an intimate and sexual relationship with the patient after the patient ceased to be under the nurse's care (**Allegation 2);** and • to have inappropriately communicated with the patient (**Allegation 3).**	The responsible tribunal found that each of the allegations constituted professional misconduct within the meaning of subparagraphs (a) and (b) of the definition. In making this finding, the tribunal had regard to the *Code of ethics for nurses in Australia*, *Code of professional conduct for nurses in Australia* and *Professional boundaries for nurses*, and specifically noted that, even as a young and inexperienced nurse, the practitioner's conduct was substantially below the standard of conduct that would reasonably be expected.

EXAMPLE 4

Boundary breach – inappropriate contact with patient's breasts; inappropriate statements of a sexual nature

FACTS	FINDING
A medical practitioner was found to have: • made inappropriate physical contact with a patient's breast or breasts while treating her (**Allegation 1**); and • made statements to the patient of a sexual nature, which were inappropriate and/or unrelated to her clinical care (**Allegation 2**).	The responsible tribunal found that each of the allegations constituted professional misconduct within the meaning of subparagraphs (a) and (b) of the definition. *Good medical practice: a code of conduct for doctors* in Australia and *Sexual boundaries: guidelines for doctors* were relevant to the tribunal's decision.

EXAMPLE 5

Breach of undertaking and Board guidelines – failure to adequately supervise an international medical graduate

FACTS	FINDING
A medical practitioner failed to provide adequate supervision or oversight of an international medical graduate, in accordance with the graduate's approved supervision level and conditional registration. This was found to have breached the	The responsible tribunal found that the practitioner had engaged in professional misconduct, though the relevant subparagraph was not specified.

relevant Board guidelines, as well as a supervision agreement and undertaking provided to the Board.	

EXAMPLE 6

Boundary breach – relationship with patient; provision of false or misleading information to Board

FACTS	FINDING
A psychologist was found to have: • maintained an intimate personal and sexual relationship with a patient (**Allegation 1**); and • deliberately and wilfully sought to mislead the Board about the nature of his relationship with that patient, during the investigation of that relationship (**Allegation 2**).	The responsible tribunal found that each of the allegations constituted professional misconduct within the meaning of subparagraph (c) of the definition. In making this finding, the Tribunal had regard to the *Code of ethics* published by the Australian Psychology Society.

EXAMPLE 7

Clinical issues and non-sexual boundary breach – inappropriate prescribing to family member, failure to provide adequate treatment, acting outside scope of registration, failure to maintain professional boundaries with family member, provision of false or misleading information to Ahpra

FACTS	FINDING
A dentist was found to have: • inappropriately prescribed medication to his family member and for himself; • failed to provide adequate treatment and care to a family member; • acted outside the scope of his registered health speciality in the treatment and care of a family member; • failed to maintain professional boundaries about his treatment and care of a family member; • acted contrary to the code of conduct; and • provided false and misleading information about his prescribing and employment status to an investigator, contrary to his statutory obligations under the National Law and relevant code of conduct.	The responsible tribunal found that the practitioner had engaged in professional misconduct, though the relevant subparagraph was not specified. In making this finding, reliance was placed upon the *Code of conduct for registered health practitioners*.

EXAMPLE 8

Failure to comply with condition to attend for urinalysis; failure to comply with condition to obtain approval of Ahpra before starting employment; misappropriation of, and fraudulently completing, prescription slips; use of fraudulent prescription slips to obtain prescription medication; criminal convictions

FACTS	FINDING
A nurse was found to have: • failed to comply with conditions imposed upon her registration in that she failed to attend for random urinalysis as directed and obtain the approval of Ahpra prior to starting nursing employment (**Allegations 1 and 2**); • stolen some prescription slips belonging to her employer (**Allegation 3**); • fraudulently completed a prescription slip by handwriting false details (**Allegation 4**);	The responsible tribunal found that: • the nurse's conduct the subject of Allegation 1 constituted professional misconduct within the meaning of subparagraph (b) of the definition, given the history of her condition, her prior non-compliance, letters and warnings provided to her about compliance, opportunity provided to give an explanation and the purpose of the condition; and • the nurse's conduct the subject of each of Allegations 2 to 6 constituted professional misconduct within the meaning of subparagraph (c) of the definition, as the

• attempted to use the fraudulent prescription slip to obtain prescription medication (**Allegation 5**); • been found guilty, without conviction, of one count of theft and one count of attempting to obtain property by deception (**Allegation 6**).	conduct leading to the conviction was plainly inconsistent with her being a fit and proper person to hold a registration in the profession.

EXAMPLE 9

Failure to demonstrate expected standards of professional conduct towards colleagues by inappropriately touching a student nurse; boundary breach with patient

FACTS	FINDING
A nurse was found to have failed to demonstrate the standard of professional conduct expected of a registered nurse towards his colleagues in that he: • touched a student nurse in an intimate and/or inappropriate manner, and made sexually suggestive statements to her (**Allegation 1**); • breached professional boundaries a patient by touching her breast in a manner which was inappropriate and/or without clinical justification (**Allegation 2**).	The responsible tribunal found that each of the allegations constituted professional misconduct within the meaning of subparagraph (a) of the definition. In making this finding, the tribunal relied on the *Code of ethics for nurses in Australia* and found that the nurse's conduct breached fundamental standards applicable to him as registered nurse.

EXAMPLE 10

Engaging in sexually inappropriate conduct towards students at a tertiary institution where the practitioner was teaching

FACTS	FINDING
A provisionally registered psychologist who was teaching at a university was found to have engaged in conduct that was inconsistent with being a fit and proper person to hold registration as a psychologist in that he exploited a power imbalance by engaging in an inappropriate or sexual relationship with a student. The practitioner was also found to have behaved inappropriately towards other students. The conduct the subject of the allegations included: • sending sexually suggestive text messages and telephoning the student; • threatening to change the student's grade if she did not engage or comply with the practitioner's requests to engage in sexual behaviour or communications with him; • attending social events with the students; and • making sexually suggestive statements to the students.	The responsible tribunal found that the practitioner had engaged in professional misconduct within the meaning of subparagraph (c) of the definition. In making this finding, the tribunal had regard to the Australian Psychology Society *Code of ethics*, which provides that psychologists avoid engaging in disreputable conduct that reflects on their ability to practise as a psychologist and that reflects negatively on the profession or discipline.

Distinction between unnecessary clinical examinations and sexual misconduct

Frequently, there is a question in referral proceedings about how certain conduct involving an intimate clinical examination ought to be characterised, namely whether it is an unnecessary examination (and therefore indicative, perhaps, of a performance issue), or deliberate sexual misconduct of a very serious nature. For example, where a practitioner has ostensibly performed an internal vaginal examination on a patient that is not clinically justified in the circumstances, there is often a question about whether, in fact, a sexual assault or rape has taken place (instead of merely an unnecessary examination).

It is the position of Ahpra and the Boards that, while there may be competing explanations or purported characterisations of the conduct, most if not all of these explanations involve a serious abuse of trust and are an extremely serious example of misconduct. Even if it is not possible to positively establish that an examination was conducted for a sexual purpose (in the subjective mind of the practitioner), an unwarranted examination or one which was conducted in the absence of fully informed consent may nonetheless constitute a sexual boundary violation.[159] In a recent decision, a responsible tribunal reached a similar conclusion.

9.6 Other findings

The National Law also includes other findings that can be made by a panel or responsible tribunal. These are discussed below.

There are more potential findings available to a responsible tribunal than a panel.[160] This is because more serious conduct is required to be referred to a responsible tribunal.

No case to answer

A potential finding of a PPSP or responsible tribunal is that the practitioner 'has no case to answer and no further action is to be taken about the matter'.[161]

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[159] See e.g,, the Medical Board of Australia's *Sexual boundaries in the doctor-patient relationship guidelines*, at 3.1.

[160] National Law, s 196 contra s 191.

[161] National Law, s 191 and 196.

This finding will be made by a decision-maker when either:

- the facts underpinning the allegations against a practitioner are not proved to the relevant standard of proof;[162] or
- the decision-maker is not satisfied that the practitioner's conduct should be characterised in a way which would require another finding to be made, such as unprofessional conduct or professional misconduct.

Registration improperly obtained

A less common finding available to a responsible tribunal is that 'the practitioner's registration was improperly obtained because the practitioner or someone else gave the National Board established for the practitioner's health profession information or a document that was false or misleading in a material particular'.[163]

[162] Discussed at 8.4.

[163] National Law, s 196(1)(b)(v).

EXAMPLE 1 **Registration obtained using falsified document**	
FACTS A medical practitioner's application for limited registration was granted on the basis of a falsified Certificate of Good Standing (purportedly from the Malaysian Medical Council).	**FINDING** The responsible tribunal was satisfied that: • the document was false in a material particular in that it was not signed by the purported author and was not issued by the Malaysian Medical Council; and • the practitioner's registration was improperly obtained because of the document in that: – the document was a prerequisite for his registration in accordance with the relevant registration standard; and – reliance was placed on the false document.

Impairment

KEY POINTS

- Whether or not a person has an impairment will generally be assessed on the basis of medical evidence.
- A finding that a practitioner has an impairment will not preclude that practitioner also being found to have engaged in professional misconduct or unprofessional conduct.

A responsible tribunal can find that 'the practitioner has an impairment'.[164] While many matters that involve 'impairment' are dealt with under the health assessment/health panel process, there may be occasion for a responsible tribunal to consider it.

Impairment is defined in section 5 of the National Law as follows:

> ***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.*

Whether or not a person has an impairment will generally be assessed on the basis of medical evidence, such as a health assessment, medical reports, records or other evidence from a treating practitioner (usually a medical practitioner or psychologist). The health assessment process is discussed in more detail at 4.2. A decision-maker may also review medical evidence from other sources, for example, reports produced by a practitioner or clinical records.

A finding that a practitioner has an impairment is a result of the decision-maker's assessment at the time of its decision. Such a finding will not be made, for example, because a practitioner may have had an impairment in the past.

Relationship to misconduct

It is important to note that a finding that a practitioner has an impairment will not preclude that practitioner also being found to have engaged in professional misconduct or unprofessional conduct. Conduct that constitutes professional misconduct or unprofessional conduct does not cease to be such because it is caused by an impairment (such as a substance misuse disorder). However, the existence of an impairment may explain the conduct.

[164] National Law, s 191(1)(b)(iv).

9.7 Other matters relevant to findings

KEY POINTS

- It is possible for a decision-maker to make one finding about multiple allegations against a practitioner (**global finding**).
- A global finding might be made where, for example, multiple less serious allegations amount to a more serious finding when taken together.
- It is possible for conduct the subject of a criminal investigation or proceedings to form the basis for a disciplinary proceeding under the National Law, even if no charges were laid, or no finding of guilt was made.

'Global' or collective findings

A responsible tribunal may decide to make a single finding about multiple allegations against a practitioner. This is often referred to as a **global finding.**

By way of example, a global finding may be considered appropriate:

- when the allegations are part of a related course of conduct;
- when the allegations are very similar; or
- when paragraph (b) of professional misconduct is considered an appropriate finding about multiple allegations that did not, individually, reach the threshold of professional misconduct under paragraph (a).

EXAMPLE 1

Criminal conviction and failure to make adequate clinical records

FACTS	FINDING
An enrolled nurse was found to have: • been convicted of three counts of rape and two counts of sexual assault, including with a patient (**Allegation 1**); and • failed to make adequate clinical records about the same patient (**Allegation 2**). The conduct the subject of Allegation 2 had the effect of obscuring his criminal offending, which was the subject of Allegation 1.	The responsible tribunal made a global finding that the nurse had engaged in professional misconduct within the meaning of subparagraph (c) of the definition.

EXAMPLE 2

Breach of professional boundaries, inappropriate prescribing of medication, failure to notify Board of being found guilty of a criminal offence and practising while aware, or ought to have been aware, that he had an impairment

FACTS	FINDINGS
A medical practitioner was found to have: • breached professional boundaries with a patient; (**Allegation 1**) • inappropriately prescribed medication to that patient while engaged in a relationship with her; (**Allegation 2**) • failed to notify the Board within 7 days of being found guilty of a criminal offence; (**Allegation 3**); and • practised as a medical practitioner while he was aware, or ought to have been aware, that he had an impairment that could adversely affect his judgment, performance or his patients' health (**Allegation 4**).	The responsible tribunal found that: • the practitioner's conduct the subject of Allegation 1 constitutes professional misconduct within the meaning of subparagraphs (a) and (c) of the definition; and • the practitioner's conduct the subject of Allegations 2–4 constitutes unprofessional conduct, and that these three instances of unprofessional conduct, taken together, amount to professional misconduct within the meaning of paragraph (b) of the definition.

Conduct the subject of criminal proceedings

It is common for conduct the subject of a criminal investigation or proceedings to form the basis of a disciplinary proceeding against a practitioner. This is because:

- paragraph (c) of the definition of ‘unprofessional conduct’ deems a specific class of criminal finding to be ‘unprofessional conduct’ (which may subsequently meet the definition set out in paragraph (a) of professional misconduct); and
- criminal conduct may meet the definition set out in paragraph (c) of professional misconduct.

Generally, if a criminal finding of guilt has been made against the practitioner/a practitioner has accepted responsibility for the conduct, the disciplinary proceeding will proceed on the facts as found and/or admitted in the criminal proceeding.

Whether the conviction of a practitioner is sufficient to fall within paragraph (a) or (c) of the definition of professional misconduct will depend on the nature and circumstances of the offence. Serious offences such as murder or sexual assault will generally amount to professional misconduct. On the other hand, minor driving offences are unlikely to meet the definition. Between these extremes are a range of offences that may or may not meet the definition depending on the circumstances. For example, a fraud conviction is likely to amount to professional misconduct if it is particularly serious (taking into account the size of the fraud, the impact on the victims etc) however it is possible that in other cases the circumstances of the offence would not be serious enough to amount to professional misconduct.

In some instances, the Board may start a disciplinary proceeding even if the practitioner:

- was not charged; or
- was charged, but was not found guilty.

There are two main reasons why a Board may pursue a matter, in these circumstances. To illustrate this, we can use the example of Ahpra receiving a notification from police stating that a patient has made a complaint against a practitioner about sexual touching that took place during a consultation.

- EXAMPLE 1: Assume that there was insufficient evidence to prove that the sexual touching occurred, and the police decided not to charge the practitioner or the practitioner was acquitted of the charges. This would not determine how the Board may deal with the matter. This is because:
    - the relevant standard of proof in criminal cases is 'beyond reasonable doubt'. This is a higher standard of proof than the 'balance of probabilities', which is applied in disciplinary matters.[165]
    - the rules of evidence will generally not strictly apply in panel or tribunal proceedings.
    - the lower evidentiary requirements means that it may be possible for:
        - the Board to form a reasonable belief that the conduct occurred and that the conduct amounts to professional misconduct (subsequently requiring the Board to refer the matter to the responsible tribunal); and
        - a responsible tribunal to find that the allegation is proven, on the balance of probabilities.

- EXAMPLE 2: Assume that the police decide not to charge the practitioner because the allegation of criminal conduct was misconceived. The police investigation identified that:
    - there was no criminal conduct, because the touching was consensual;
    - the issue was that the practitioner carried on a sexual relationship with the patient for a period of time, when the patient was vulnerable and under the practitioner's care.

In these circumstances, the police may refer the matter to the Board. While the conduct may not be criminal, there may be sufficient evidence of a serious breach of professional boundaries (regardless that the conduct was consensual and/or no criminal offending occurred).

EXAMPLE 1 **Conduct the subject of criminal proceedings**	
FACTS A registered nurse was alleged to have had non-consensual sexual contact with some patients. The conduct the subject of the allegations had been investigated by police, resulting in the nurse being charged with multiple counts of rape and sexual assault. Separate trials were ordered for each complainant, and the nurse was acquitted of all charges. The entirety of the evidence from the criminal trials (about all complainants and relevant witnesses) was put before the responsible tribunal, which found the evidence to be 'powerfully probative'. The nurse did not participate in the proceeding, though his sworn evidence from two of the criminal trials was before the tribunal.	**FINDING** The evidence of the complainants was accepted by the tribunal. The tribunal was satisfied to the requisite standard that the allegations were proven and that the conduct constituted professional misconduct.

[165] Refer to Chapter 7 for a discussion of the standard of proof in panel hearings and Chapter 8 regarding disciplinary proceedings before a responsible tribunal.

10. Determinations under the National Law

10.1 Introduction

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

- set out the relevant principles that apply, in a general sense, to determinations under the National Law;
- explain the various determinations that may be imposed;
- focus on determinations that may be imposed at the conclusion of the conduct and performance settings – that is, those imposed by a performance and professional standards panel (**PPSP**) or a responsible tribunal.

This chapter will not consider the regulatory action that may be taken by Boards about health under the health assessment process and/or health panel process (discussed in Chapters 4 and 7).

Further, this chapter does not explicitly consider the regulatory action that may be taken by Boards under section 178 of the National Law. However, the general themes of this chapter are informed by:

- when or why a Board may take regulatory action under that section; and
- the purpose of the regulatory action a Board may take under that section.

This chapter generally refers to the relevant decision-maker as being a responsible tribunal. However, a PPSP (as discussed in Chapter 7), also has the power to take action about a practitioner's registration. The general principles discussed in this chapter are relevant to, and inform, the PPSP process.

Determinations that may be made by a responsible tribunal

Once a responsible tribunal has made a finding or findings about a practitioner's conduct, performance or health, it may then also decide to:

- caution or reprimand the practitioner;
- impose a condition on the practitioner's registration;
- require the practitioner to pay a fine of not more than $30,000 to the relevant Board that registers the practitioner;
- suspend the practitioner's registration for a specified period; or
- cancel the practitioner's registration.[166]

If a responsible tribunal decides to cancel a practitioner's registration (or the practitioner is not registered at the time of the tribunal's decision), the tribunal may also decide to:

- disqualify the practitioner from applying for registration for a specified period; or
- prohibit them, either permanently or for a stated period, from:
    - providing any health service or a specified health service; or
    - using any title or a specified title.[167]

Determinations that may be made by a PPSP

Once a PPSP has made a finding or findings about a practitioner's conduct or performance, it may then also decide to:

- caution or reprimand the practitioner; and/or
- impose a condition on the practitioner's registration.

10.2 Determinations available under the National Law

This section discusses the various determinations which are available under the National Law and provides specific examples of when each kind of determination has been considered the appropriate form of disciplinary action.

KEY POINTS

[166] National Law, ss 191 and 196.

[167] National Law, s 196(4).

- The primary purpose of determinations under the National Law is to protect the public.
- Determinations may cause a practitioner to feel like they have been 'punished'
- 'Protection of the public' means protecting the public from, among other things:
    - practitioners who engage in unethical, or unlawful conduct;
    - practitioners who practise in an unsafe or incompetent manner; and
    - a culture of sub-standard practice from which harm may flow.

'Protection of the public' is the primary purpose of a determination. This is distinct from the concept of 'punishment'.[168] However, regardless of this distinction, determinations will almost invariably carry subjective feelings of punishment for the practitioner concerned. This is unavoidable. The feeling of being 'punished' is one of the features of a determination that may assist it to achieve its primary purpose.

Section 32(a) of the National Law provides that the objectives of the National Registration and Accreditation Scheme include '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'. Section 3(a) provides that 'restrictions on the practice of a health profession are to be imposed under the scheme only if it is necessary to ensure health services are provided safely and are of an appropriate quality'.

Protection of the public

'Protection of the public' is the paramount consideration of a responsible tribunal or PPSP when deciding the appropriate disciplinary action to take. This concept is not defined, can mean many different things and can be achieved in a variety of ways. For example, the NSW Nursing and Midwifery Tribunal has commented that:

- the 'protection' may be:
    - 'protection from actual harm caused by health practitioners who do not meet the standards required by law and codes of conduct'; and/or
    - 'protection from a culture of sub-standard practice or lacking in professional ethics from which harm may flow';[169]
- this 'protection' may be achieved by taking a form of regulatory action 'intended to bring home to the practitioner the seriousness of the practitioner's departure from professional standards, and intended to deter the practitioner from any further departure'.[170] This concept is known as **specific deterrence,** and is discussed further in chapter 11 below.
- this 'protection' may be made 'to emphasise to other members of the profession, or to reassure the public, that a certain type of conduct is not acceptable'.[171]

  A determination which acts to warn other members of the profession against engaging in certain conduct (due to the disciplinary consequences which may follow) has the effect of **general deterrence,** which is discussed further in chapter11.

  A determination which acts to 'reassure the public' that a certain type of conduct is not acceptable is assisting to **protect the profession** and **maintain professional standards** by demonstrating that the relevant profession does not allow certain conduct. This also serves the public interest by providing reassurance that appropriate standards are being maintained within the relevant profession. These concepts are discussed further in chapter 11.

Ultimately, determinations under the National Law (and the disciplinary process more broadly) can operate to protect the public in a variety of ways, depending on the facts and circumstances of the matter.

The concept of 'protection of the public' is often contrasted with the concept of 'punitive purpose' (that is, to punish). It is accepted that the 'protection of the public' does not hold the 'punishment of the practitioner' as its primary focus. However, regardless of this distinction, determinations still cause the practitioner to feel like they have been punished.

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[168] See, for example, *Medical Board of Australia v Jansz* [2011] VCAT 1026 at [362] , citing *Psychology Board of Australia v Mair* [2010] VSC 628; *Chinese Medicine Registration Board v Woo* [2010] VCAT 753 at [46].

[169] *Health Care Complaints Commission v Jane Waddell* (No 2) [2013] NSWNMT 2 at [106] (Waddell).

[170] *Waddell,* above n 4, at [47].

[171] *Waddell,* above n 4, at [48].

In fact, sometimes the 'protection of the public' will require a decision-maker to make a determination that is harsher on the practitioner, than if punishment were the sole purpose. If a decision-maker forms the view that a practitioner poses a risk to the public, then an appropriately restrictive determination will be made (regardless of the effect of this on the practitioner).

Determinations available under the National Law

Caution

KEY POINTS

- A caution is a warning to a practitioner to refrain from engaging in certain conduct.
- A caution is generally considered to be less serious than a reprimand, and is not usually published on the public national register.

A caution is a formal warning to a practitioner to refrain from engaging in certain conduct again. A caution is not usually recorded on the national register, though may be if the Board considers it appropriate to do so. As such, a caution is generally intended to protect the public by way of specific deterrence – a practitioner is warned not to engage in certain conduct in the future.

EXAMPLE 1

Practitioner failed to assist member of public – caution

FACTS

A medical practitioner was found to have acted improperly by falsely advising a member of the public (who was seeking medical assistance for her child) that he was not a doctor. Under legislation that preceded the National Law, the Board reprimanded the practitioner and imposed a fine. The practitioner appealed that decision to the responsible tribunal.

DETERMINATION

The practitioner was cautioned.

RELEVANT CONSIDERATIONS:

In arriving at its determination, the responsible tribunal took into account that:

- the conduct was a momentary lapse, in circumstances where the practitioner was experiencing significant personal stress;
- the practitioner demonstrated genuine and almost immediate recognition of his impropriety; and
- the conduct was out of character for the practitioner, who had an otherwise unblemished disciplinary record.

The responsible tribunal considered that, in the circumstances:

- the imposition of a reprimand and fine would be excessive and unnecessary; and
- that the publication of the finding and the caution would be sufficient to ensure that the practitioner, and the profession generally, was discouraged from engaging in such conduct.

Reprimand

KEY POINTS

- A reprimand is a formal and public denunciation of a practitioner's conduct, which is recorded on the public register of practitioners.
- A reprimand will be appropriate where there is a need for general, as well as specific, deterrence.
- A PPSP or a responsible tribunal may reprimand a practitioner.

A reprimand is a formal way of rebuking or expressing disapproval to a practitioner, and the public, for the practitioner's conduct. Unlike a caution, which is a reminder not to engage in similar conduct in the future and is generally not published on the national register of practitioners, a reprimand is:

- an official and public rebuke for past conduct;
- recorded on the national register of practitioners; and
- not trivial and considered to be more serious than a caution.[172]

EXAMPLE 1

Excessive prescribing of anabolic steroids – reprimand

FACTS

A medical practitioner was found to have prescribed clinically inappropriate and excessive amounts of testosterone to a patient, over a period of over two years. The practitioner's prescribing was also the subject of criminal prosecution in the Magistrates' Court (relating to two breaches of the *Drugs Poisons and Controlled Substances Regulations 2006* (Vic), to which the practitioner pleaded guilty).

FINDING

Professional misconduct under subparagraph (a) of the definition.

DETERMINATION

The practitioner was reprimanded.

RELEVANT CONSIDERATIONS

In arriving at its determination, the responsible tribunal took into account that:

- almost five years had elapsed between the conduct taking place and the matter coming before the tribunal; and
- the practitioner had:
  - voluntarily completed extensive further education to address his lack of knowledge about the prescribing of anabolic steroids;
  - put measures in place within his practice to reduce the risk of similar conduct taking place; and
  - demonstrated appropriate insight and remorse.

The responsible tribunal ultimately considered that conditions that might otherwise have been imposed on the practitioner's registration were not necessary, and that a reprimand was the most appropriate determination.

Conditions

KEY POINTS

- Conditions restrict a practitioner's practice in some way, such as by requiring them to do something, or preventing them from doing something, in their profession.
- The National Restrictions Library provides standard form wording for common types of conditions.

A condition restricts a practitioner's registration in some way. Imposing a condition on a practitioner's registration means the practitioner must:

- do something, or
- refrain from doing something

in their profession.

[172] See *Peeke v Medical Board of Australia* Unreported, VSC 10170 of 1993; *Medical Board of Australia v Fox* [2016] VCAT 408 at [63].

Generally speaking, conditions are published on the public national register. However, in circumstances where a condition has been imposed because the practitioner has an impairment, the Board has discretion to not publish it if:

- it is necessary to protect the practitioner's privacy; and
- there is no overriding public interest for the condition to be recorded.[173]

Common examples of conditions include those requiring the practitioners to:

- complete further education or training;
- only practise under the supervision of another practitioner;
- do, or refrain from doing, something in connection with the practitioner's practice (such a prohibition on prescribing certain medications);
- manage their practice or place of practice in a specified way;
- report to a named person (such as an employer) at specified times while practising, or not employ, engage or recommend or work with a specified person, or class of people;
- submit to drug screening and refrain from drug use (except for prescribed medications);
- submit to alcohol breath testing at the workplace; and
- be supervised by a treating practitioner.

If a PPSP or responsible tribunal decides to impose a condition on a practitioner's registration, it must also decide a 'review period' for the condition. At the conclusion of the review period, the relevant Board will review whether the conditions are still required.

Purpose of conditions

Generally speaking, the primary purpose of conditions (as a final form of disciplinary action) is to:

- manage the risk posed by a practitioner by restricting their practice; and / or
- assist in facilitating the rehabilitation of a practitioner; and
- enable ongoing monitoring regarding the practitioner's compliance with the conditions.

National Restrictions Library

The National Restrictions Library (**NRL**) is a document published by Ahpra which provides standard form wording for common types of conditions. The NRL generally structures conditions to comprise:

- a core restriction, which contains the primary restriction or requirement, and
- a monitoring and compliance framework.

The NRL, and general structure of conditions, ensures that:

- practitioners are able to comply with the conditions in practical terms; and
- compliance with the conditions is able to be effectively monitored by Ahpra's compliance team.

Ahpra's compliance team monitors compliance with conditions on behalf of Boards.

Wherever possible, a decision-maker is encouraged to adopt the wording provided by the NRL. However, the NRL does not limit the kinds of conditions available to a decision-maker, and what the final form of the conditions will look like.

[173] National Law, s 226.

EXAMPLE 1

Unsuccessful procedure – patient's safety placed at risk – conditions

FACTS

A registered dentist was found to have carried out a complex implant procedure that he was not sufficiently experienced or qualified to perform, and in doing so, to have placed his patient's safety at significant risk (due to the way in which the surgery was carried out). The relevant patient was required to undergo three corrective surgeries.

FINDING

Professional misconduct under subparagraph (a) of the definition.

DETERMINATION

The responsible tribunal imposed conditions on the practitioner's registration to the effect that:

- the practitioner was not permitted to perform any dental implant surgery, except:
  - once the required education has been completed; and
  - in accordance with the supervision requirements;
- the required education included completion of a graduate diploma covering the field of implant dentistry from an Australian university dental school; and
- the practitioner was required to be supervised by another practitioner when undertaking dental implant surgery for a period of 12 months.

RELEVANT CONSIDERATIONS

In arriving at its determination, the responsible tribunal:

- considered that:
  - in light of the multiple clinical shortcomings demonstrated by the dentist, the dentist required extensive further education to minimise the risk to the public;
  - such education must take the form of a graduate diploma from a university dental school;
  - that the dentist showed a lack of insight as to the need to up-skill himself; and
- noted that its assessment about public safety was made about complex implant surgery only (not regular dentistry, which the dentist was not restricted from practising).

EXAMPLE 2

Failure to maintain adequate professional indemnity insurance – reprimand, conditions and suspension

FACTS

A registered chiropractor was found to have failed to maintain adequate professional indemnity insurance for a period of seven months, and to have made multiple false declarations to Ahpra on their annual registration renewal application (about whether they held adequate insurance cover).

FINDING

Professional misconduct under subparagraph (a) of the definition.

DETERMINATION

The responsible tribunal:

- reprimanded the practitioner;
- imposed conditions on the practitioner's registration to the effect that:
  - they must provide evidence of his professional indemnity insurance coverage to the Board on an ongoing annual basis;
  - the review period for the condition is five years; and
- suspended the practitioner's registration for a period of one month.

RELEVANT CONSIDERATIONS

In arriving at its determination, the responsible tribunal:

- considered that while the practitioner's conduct was for the most part, not deliberate, it was highly reckless;
- gave some weight to the insight shown by the practitioner but noted that it remained concerned that they did not demonstrate a clear level of insight into how serious his conduct was;
- took the practitioner's relevant personal circumstances (being personal and financial stress) into account; and
- considered that a suspension of the practitioner's registration was required in the interests of general deterrence, in addition to a reprimand and the imposition of conditions.

EXAMPLE 3

Breach of professional boundaries – reprimand, conditions and suspension

FACTS

A medical practitioner was found to have transgressed professional boundaries by engaging in a personal and intimate relationship with their patient and/or former patient.

The practitioner:

- communicated with the patient by telephone on various occasions for reasons unrelated to her clinical care;
- shared details of his personal life with the patient;
- had coffee with the patient in public, for reasons unrelated to the patient's clinical care;
- had dinner with the patient;
- went out for drinks with the patient on at least one occasion;
- danced with and/or hugged and/or kissed the patient on at least one occasion; and
- stayed overnight in a hotel room with the patient.

FINDING

Professional misconduct under subparagraph (a) of the definition.

DETERMINATION

Relevant considerations: In arriving at its determination, the responsible tribunal:

- accepted that the medical practitioner had acquired some insight into their conduct and how the transgression came about (and was unlikely to re-offend);
- accepted that specific deterrence was therefore not a significant factor in determining the appropriate determination;
- took into account that the practitioner had been practising since the notification was made and that there had been no further complaints against them;
- considered that there is a need to deter other practitioners from this kind of conduct; and
- was satisfied that the period of suspension proposed by the Board was meaningful without being crushing or punitive.

DETERMINATIONS:
The responsible tribunal:

- reprimanded the practitioner;
- imposed conditions on the practitioner's registration to the effect that:
  - the practitioner must be mentored by another practitioner, who may be required to report to Board;
  - the practitioner must, at the conclusion of the mentoring period, provide a report to the Board demonstrating that he has reflected on the issues that gave rise to the conditions and outlining how he has incorporated the lessons learnt from the mentoring; and
  - the review period for the condition is 18 months; and
- suspended the practitioner's registration for a period of three months.

Fines

KEY POINTS

- A responsible tribunal may require a practitioner to pay a fine of not more than $30,000 to the relevant Board that registers the practitioner.
- A fine can achieve significant general deterrence without restricting the practitioner's practice.

Under section 196(2)(c) of the National Law, a responsible tribunal may require a practitioner to pay a fine of not more than $30,000 to the Board that registers the practitioner. A fine can be imposed on its own or in conjunction with other determinations

A fine on its own (or combined with another non-restrictive determination, such as a reprimand) can be an effective means of specific and/or general deterrence, without restricting the practitioner's practice, in the appropriate circumstance.

Fines have been imposed by a responsible tribunal where, for example:

- a practitioner has engaged in misconduct of a financial nature;
- a practitioner has engaged in deliberate conduct; or
- a practitioner has engaged in misconduct of a clinical nature that is serious, but where conditions, suspension or cancellation were not considered appropriate.

However, the imposition of a fine is not limited to these circumstances.

EXAMPLE 1

Practitioner recklessly made unjustified Medicare claims – reprimand, suspension, fine

FACTS

A registered dentist was found to have:

- breached their obligations under the Medicare Enhanced Primary Care Scheme; and
- wrongly obtained a financial benefit by recklessly making claims under that scheme that were not justified.

FINDING

Professional misconduct under the relevant prior legislation (the conduct took place before the start of the National Law, and the finding had to be made under the prior relevant legislation).

DETERMINATION

The responsible tribunal:

- reprimanded the practitioner;
- suspended the practitioner's registration for a period of two months;
- required the practitioner to undertake a Board-approved ethics unit; and
- fined the practitioner the sum of $5,000.

RELEVANT CONSIDERATIONS:

In arriving at its determination, the responsible tribunal:

- took into account that the practitioner had been experiencing serious health issues and financial difficulties;
- accepted and placed weight on the fact that, while the practitioner had invoiced the relevant Medicare scheme before performing the relevant services, the practitioner did intend to provide the services on a future date; and
- emphasised that had the practitioner invoiced the Medicare scheme in circumstances where she never intended to provide the services for which she claimed, then a longer period of suspension, and a higher fine, would have been imposed.

EXAMPLE 2

Practitioner failed to comply with the Board's continuing professional development (CPD) registration standard while declaring that he had done so; practitioner provided false information to the Board – reprimand, conditions, fine

FACTS

A registered chiropractor was found to have:

- failed to complete his CPD for a period of approximately five years, while declaring on five occasions (when applying to renew his registration) that he had met the CPD requirements;
- failed to hold a current first aid certificate as required by the Board's CPD registration standard, while declaring on four occasions (when applying to renew his registration) that he held a first aid certificate; and
- provided false information to the Board when it was conducting an investigation into these matters.

FINDING

- Professional misconduct under subparagraphs (a) and/or (b) of the definition.

DETERMINATION

The responsible tribunal:

- reprimanded the practitioner;
- imposed a condition on the practitioner's registration to the effect that he must submit evidence of CPD compliance to the satisfaction of the Board with his registration application for every registration period, for a period of five years from the date of the decision; and
- fined the practitioner the sum of $7,500.

RELEVANT CONSIDERATIONS

In arriving at its determination, the responsible tribunal:

- considered that the practitioner had failed to demonstrate any or adequate insight into the serious nature of his conduct;
- considered that the practitioner knew that they were being deliberately dishonest, were aware of the CPD requirements and chose not to comply with them;
- considered that the practitioner had displayed an arrogant approach to their professional obligations;
- recognised that the practitioner had an otherwise unblemished record over a long career; and
- noted that that the practitioner had since admitted their conduct and completed their CPD and first aid requirements.

EXAMPLE 3

Practitioner continued to treat patient when aware that he was named as beneficiary under will and had received gifts from patient.

FACTS

A medical practitioner was found to have continued to treat a patient in circumstances where he was aware that he was a named as a beneficiary in the patient's will. Before the patient's death, she had gifted various amounts of money to the practitioner and his son.

FINDINGS

Professional misconduct.

DETERMINATION

The responsible tribunal:

- reprimanded the practitioner;
- imposed a condition on the practitioner's registration to the effect that:
  - the practitioner must complete a Board-approved program of education, including a reflective practice report, about specified relevant topics concerning professional ethics and boundaries; and
  - the review period for the condition is twelve months; and
- fined the practitioner the sum of $25,000.

RELEVANT CONSIDERATIONS

In arriving at its determination, the responsible tribunal:

- accepted that while the patient was vulnerable, the patient was not manipulated by the practitioner, with whom they had a genuine friendship;
- took into account that the practitioner had never been the subject of disciplinary action previously;
- considered the need to protect the public and maintain confidence in the profession by reinforcing high professional standards and denouncing transgressions;
- took into account that there was no suggestion of medical incompetence or misleading conduct;
- took into account that the practitioner accepted and understood their failure to preserve the proper boundaries of a doctor-patient relationship.

Suspension and Cancellation

KEY POINTS

- If a practitioner's registration is suspended by a responsible tribunal, they cannot practise or work as a registered health practitioner in that profession, in any Australian state or territory, until the period of suspension lapses.
- If a practitioner's registration is cancelled by a responsible tribunal, they cannot practise or work as a registered health practitioner in that profession, in any Australian state or territory, until re-registered by the Board.
- The primary difference between cancellation and suspension of registration is the barrier to return to practise. If a practitioner's registration is cancelled:
    - It sends a clear message that they are unsuitable to hold registration; and
    - there is no guarantee of re-registration, if they apply at a later date.

Suspension

A practitioner whose registration is suspended by a responsible tribunal cannot practise or work as a registered health practitioner in that profession, in any Australian state or territory, until the suspension lapses. For example, if a responsible tribunal orders a one-month suspension, the suspension would lapse at the conclusion of that time. Once a suspension lapses, the practitioner's right to practise is automatically reinstated. In some instances, the period of suspension might start immediately. At other times, a responsible tribunal might specify a start date for the suspension.

Cancellation

A practitioner whose registration has been cancelled by a responsible tribunal cannot practise or work as a registered health practitioner in that profession, in any Australian state or territory. A practitioner must re-apply for registration if they wish to work as a registered health practitioner in that profession again.

Difference between suspension and cancellation

Cancellation and suspension are both very serious outcomes for a practitioner. The primary difference between cancellation and suspension is that:

- at the completion of a period of suspension, a practitioner is permitted to return to practise unrestricted (or with any restrictions that were imposed on their registration); and
- following cancellation of their registration, a practitioner can only return to practise following a successful application for registration. There is no guarantee that such an application will be successful.

Cancellation will generally be preferred where:

- the practitioner is unsuitable to practise; and/or
- the gravity of the conduct was so serious, cancellation is necessary.

Suspension will generally be preferred where:

- the gravity of the conduct warrants it; and
- there is confidence in the practitioner's future ability to practise once the period of suspension is served.

EXAMPLE 1

Failure to comply with condition to attend for urinalysis; failure to comply with condition to obtain approval of Ahpra before starting employment; misappropriation of, and fraudulently completing, prescription slips; use of fraudulent prescription slips to obtain prescription medication; criminal convictions – reprimand, cancellation

FACTS

A nurse was found to have:

- failed to comply with conditions imposed upon her registration in that she failed to attend for random urinalysis as directed and obtain the approval of Ahpra before starting nursing employment;
- stolen some prescription slips belonging to her employer;
- fraudulently completed a prescription slip by handwriting false details;
- attempted to use the fraudulent prescription slip to obtain prescription medication;
- been found guilty, without conviction, of one count of theft and one count of attempting to obtain property by deception.

FINDING

Professional misconduct under subparagraphs (a) and/or (c) of the definition.

DETERMINATION

The responsible tribunal:

- reprimanded the practitioner; and
- cancelled the practitioner's registration.

RELEVANT CONSIDERATIONS

In arriving at its determination, the responsible tribunal:

- noted that, as the practitioner did not give evidence, it was unable to assess the level of insight demonstrated by the practitioner into their professional obligations;
- stated that its decision to cancel the practitioner's registration was made on the basis of general deterrence, to ensure that other practitioners are put on notice of the serious consequences of engaging in criminal behaviour and breaching professional responsibilities; and
- considered that (given the practitioner was, by the time of the hearing, drug-free and had not practised for more than three years) the imposition of a further disqualification period would be unduly punitive.

EXAMPLE 2

Failure to urgently refer patient to specialist; failure to establish and maintain adequate system for recording clinical notes and managing and responding to test results; failure to comply with conditions on registration – reprimand, cancellation

FACTS

A medical practitioner was found to have:

- failed to refer a patient to a specialist gynaecologist in circumstances where the patient required urgent assessment and treatment;
- failed to establish and maintain an adequate system for ensuring that test results and other clinical correspondence received by them were acted on in a timely manner (including systems for following up, and protecting against failing to follow up, test results and clinical correspondence).
- failed to establish and maintain an adequate system for recording and storing patient clinical records,
- failed to comply with conditions on their registration.

FINDINGS

- Professional misconduct under paragraph (a); unsatisfactory professional performance.

DETERMINATION

The responsible tribunal:

- reprimanded the practitioner; and
- cancelled the practitioner's registration.

RELEVANT CONSIDERATIONS

In arriving at its determination, the responsible tribunal:

- considered that the practitioner's conduct, spanning several years, clearly warranted cancellation of his registration:
  - for reasons of specific deterrence, general deterrence and the maintenance of the reputation of the medical profession;
  - Because it could not be confident that the practitioner would be fit to resume practise after a period of suspension;
- noted that the practitioner's failures placed patients at risk.

EXAMPLE 3

Boundary breach – relationship with patient; provision of false or misleading information to Board – reprimand, cancellation, disqualification

FACTS

A registered psychologist was found to have engaged in an intimate and sexual relationship with a patient. The relationship continued for several months while the practitioner was still treating the patient. The practitioner subsequently provided misleading information to the Board about the relationship.

FINDINGS

Professional misconduct under subparagraph (c) of the definition.

DETERMINATION

The responsible tribunal:

- reprimanded the practitioner;
- cancelled the practitioner's registration; and
- disqualified the practitioner from re-applying for registration for a period of two years.

RELEVANT CONSIDERATIONS

In arriving at its determination, the responsible tribunal:

- noted that the conduct was isolated, and that the practitioner had no prior disciplinary history;
- considered that the practitioner understood the error of their ways;
- took into account the effect of the conduct on the patient; and
- concluded that cancellation was nonetheless warranted.

Disqualification

KEY POINTS

- Where a responsible tribunal decides to cancel a practitioner's registration (or the practitioner is not registered at the time the decision is made), the tribunal may also decide to disqualify the practitioner from applying for registration as a registered health practitioner for a specified period of time (**disqualification period**).
- There is no guarantee that a Board will decide to re-register a practitioner at the conclusion of the disqualification period.

Under section 196(4)(a) of the National Law, where a responsible tribunal decides to cancel a practitioner's registration (or the practitioner is not registered), the tribunal may also decide to disqualify the practitioner from applying for registration as a registered health practitioner for a specified period of time (**disqualification period**).

Responsible tribunals frequently impose a disqualification period when deciding to cancel a practitioner's registration. A practitioner can only apply for registration at the expiry of a disqualification period. There is no guarantee that a Board will decide to register a practitioner.

EXAMPLE 1

Nurse misappropriated and self-administered medication; criminally convicted of burglary and theft of medications from hospital – reprimand, cancellation, disqualification

FACTS

A registered nurse was found to have:

- presented as intoxicated while at work, having self-administered medication intended for patient use;
- been convicted of criminal offences, including
  - burglary (when the nurse entered various hospitals, attempted to pass himself off as a nurse on duty and accessed, or tried to access, secure areas where he knew drugs were stored); and
  - theft (relating to occasions in which the nurse succeeded in stealing drugs).

FINDING

Professional misconduct.

DETERMINATION

The responsible tribunal:

- reprimanded the practitioner;
- cancelled the practitioner's registration; and
- disqualified the practitioner from re-applying for registration for a period of two years.

RELEVANT CONSIDERATIONS

In arriving at its determination, the responsible tribunal:

- considered that its determination must send a clear message to the public at large, to patients and their families, that the nursing profession:
  - will not tolerate a drug-impaired nurse on duty;
  - will not accept or excuse a nurse stealing drugs intended for critical-care patients, or abusing their knowledge of hospital layouts, and procedures, to gain access to places where drugs are kept;
  - will not allow vulnerable, seriously ill patients to be placed at risk of harm, or denied the drugs intended to alleviate their suffering by permitting drug-impaired, or drug-abusing nurses to attend to them; and
  - expects nurses to seek the professional help available to them if they are at risk of impairment by reason of substance abuse;
- considered that the practitioner had failed to demonstrate insight into the wrongfulness of their conduct or its impact, and that therefore its determinations must serve as a deterrent to the practitioner; and
- noted that the practitioner did have a prior disciplinary history.

EXAMPLE 2

Engaging in sexually inappropriate conduct towards students at a tertiary institution where the practitioner was teaching – reprimand, disqualification

FACTS

A provisionally registered psychologist who was teaching at a university was found to have:

- exploited a power imbalance by engaging in an inappropriate or sexual relationship with a student.
- behaved inappropriately towards multiple other students.

The conduct the subject of the allegations included:

- sending sexually suggestive text messages and telephoning the student;
- threatening to change the student's grade if she did not engage or comply with the practitioner's requests to engage in sexual behaviour or communications with him;
- attending social events with the students; and
- making sexually suggestive statements to the students.

FINDING

Professional misconduct under subparagraph (c) of the definition.

DETERMINATION

The responsible tribunal:

- reprimanded the practitioner;
- disqualified the practitioner from re-applying for registration for a period of two years.

RELEVANT CONSIDERATIONS

- The practitioner was not registered at the time of the responsible tribunal's decision.
- The term 'fit and proper person' does not carry defined criteria, but allows for a wide range of matters to be considered, including whether a person has the necessary honesty, knowledge, ability and possesses sufficient moral integrity and rectitude of character to permit them to be accredited to the public as a person to be entrusted with the sort of work the relevant registration or licence entails.
- The power imbalance, the practitioner was warned against his behaviour by the year coordinator and the practitioner's ability to manoeuvre professional boundaries meant that the conduct was considered to be deliberate, predatory and opportunistic.

Prohibition orders

KEY POINTS

- A prohibition order is an order restricting a practitioner from providing any health service or a specified health service, or from using any title or a specified title.
- The definition of 'health service' is inclusive of many health-related services, including those that are not regulated under the National Law.
- A prohibition order is a more comprehensive means of protecting the public from an unregistered practitioner.
- A breach of a prohibition order is a criminal offence.

Under section 196(4)(b) of the National Law, where a responsible tribunal decides to cancel a practitioner's registration (or the practitioner is not registered), the tribunal may also decide to prohibit the practitioner, either permanently or for a stated period, from:

- providing any health service or specified health service; or
- using any title or a specified title.

An order of this kind is often referred to as a prohibition order.

A prohibition order may be appropriate in circumstances where a responsible tribunal has serious concerns about the risk posed by a practitioner to the public, and especially where these concerns are not alleviated by:

- a practitioner no longer being registered at the time the determination is made; or
- a practitioner’s registration having been cancelled.

For example, a responsible tribunal may impose a prohibition order if it finds that the conduct/risk posed by the practitioner is such that the practitioner should not be permitted to provide any kind of health service or a class of health service.[174]

It is common for Boards to seek a prohibition order alongside a period of disqualification, and it has been common for responsible tribunals to use them in this way (although, each responsible tribunal has its own position on this issue).

Meaning of 'health service'

'Health service' is defined in section 5 of the National Law as:

health service includes the following services, whether provided as public or private services

(a) services provided by registered health practitioners;

(b) hospital services;

(c) mental health services;

(d) pharmaceutical services;

(e) ambulance services;

(f) community health services;

(g) health education services;

(h) welfare services necessary to implement any services referred to in paragraphs (a) to (g);

(i) services provided by dietitians, masseurs, naturopaths, social workers, speech pathologists, audiologists or audiometrists; and

(j) pathology services.

The definition of 'health service' is inclusive of many health-related services, including those that are not regulated by the National Law.

A person who is subject to a prohibition order must, before providing a health service, give written notice of the prohibition to:

(a) the person to whom they intend to provide the health service to (or that person's parent or guardian);

(b) their employer (if the health service is to be provided in their capacity as an employee);

(c) the relevant contracting entity (if the health service is to be provided pursuant to a contract for services or other arrangement); or

(d) if they are providing the health service as a volunteer for or on behalf of an entity, that entity.[175]

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[174] Section 196(4)(b) was amended by the *Health Practitioner Regulation National Law and Other Legislation Amendment Act 2017* (QLD). The explanatory memorandum about the amendment bill, which sets out the changes made to this section and the reasons behind them, can be accessed at <https://www.parliament.qld.gov.au/documents/tableOffice/TabledPapers/2017/5517T909.pdf>.

[175] National Law, s 196A(2).

Breach of prohibition order

Section 196A of the National Law creates criminal offences about prohibition orders. For example, in most states and territories, the maximum penalty for breaching a prohibition order is a $60,000 fine, or three years' imprisonment, or both.

EXAMPLE 1

Non-sexual boundary breach – over-involvement in patient's affairs; failure to manage a conflict of interest; breach of the relevant code of conduct – disqualification, prohibition order

FACTS

A nurse was found to have:

- over-involved herself in the affairs of a patient and failed to adequately manage a conflict of interest;
- failed to manage a conflict of interest in that she obtained a benefit under a patient's will in circumstances where she knew, before the patient's death, that the patient intended to name her as a beneficiary;
- failed to practise the profession of nursing in a reflective manner in that she failed to have regard to the view and beliefs expressed by her colleagues.

FINDING

Professional misconduct under subparagraph (c) of the definition.

DETERMINATION

The responsible tribunal:

- disqualified the practitioner from re-applying for registration for a period of five years; and
- prohibited the practitioner from providing any health service involving provision of care to people in residential aged care, or receiving home or community-based aged care or disability care, for a period of five years.

RELEVANT CONSIDERATIONS

In arriving at its determination, the responsible tribunal:

- noted that the nurse was no longer registered;
- noted that the nurse's conduct constituted determined actions to ensure that the patient made a will in her favour, and that no-one knew the patient had done so until after he died;
- noted that the nurse abused her leadership role and authority by directing staff under her to breach their own professional obligations;
- noted that instead of refusing the benefit under the will, the nurse obtained it, thereby profiting from her misconduct;
- took into account that the nurse made some admissions, though they were late, and noted that this reduced the period of disqualification that would otherwise have been ordered; and
- considered that the nurse would present a continuing risk to the public if she were permitted to work in areas that provide services to the vulnerable elderly population or those who are otherwise infirm or disabled.

EXAMPLE 2

Practitioner convicted of fraud – disqualification, prohibition order

FACTS

A dentist was convicted of multiple counts of obtaining a benefit by fraud. The fraud involved a business loan for the purchase of dental equipment. The dentist inflated the amounts required for the equipment by generating fictitious invoices and doctoring credit card statements. The dentist failed to give notice to the Board that he had been charged with the offences.

FINDING

Professional misconduct though the relevant subparagraph was not specified.

DETERMINATIONS

The tribunal:

- disqualified the practitioner from re-applying for registration for a period of three years; and
- prohibited the practitioner from using the title 'doctor' or providing any health service, which prohibition should apply until he is returned to the register of health practitioners.

RELEVANT CONSIDERATIONS

The responsible tribunal:

- noted that the dentist was no longer registered;
- noted that the public expects health practitioners to be 'scrupulously honest';
- considered that dentists and other health practitioners must be able to rely on the honesty of their colleagues, as well as registration Boards on the veracity of practitioners;
- stated that neither the public, the profession, the health insurance funds, nor the regulator could place any reliance upon the word of the practitioner;
- considered the practitioner's significant disciplinary history; and
- took into account that the practitioner had mental health issues (noting that to afford this factor too much weight would overlook the protective role of disciplinary proceedings).

11. General principles relating to determinations under the National Law

11.1 Introduction

Decision-makers, when considering the form of determinations that are appropriate in the protection of the public in a particular case, consider several factors. This chapter covers these topics:

- Specific deterrence
- General deterrence
- Protection of / confidence in the profession
- Maintenance of professional standards
- Rehabilitation
- Choice of determinations
- Parity of determinations
- Global determinations

This chapter will also cover the following factors, which may be relevant to the decision-making process:

- Insight
- Remorse
- Evidence of good character
- Level of experience
- Delay
- Personal circumstances
- Disciplinary history
- Impact on complainant/victim
- Impact on patient community

How a decision-maker arrives at a determination

Some of the principles or factors discussed in this chapter will be given more or less weight than others (or not considered at all), depending on the facts and circumstances of the matter. This guide provides general information only. Each responsible tribunal has its own procedures and requirements. Consequently, these principles may be considered explicitly, or merely provide a background against which a decision is made.

The decision-maker is to consider its determination, and what disciplinary action is appropriate, by reference to:

- the conduct; and
- facts and circumstances at the date of the decision;

not by reference to the facts and circumstances as they were at the date of the conduct only. This is because what is appropriate, might be informed by facts/circumstances that have arisen in the intervening period.

The determination process requires the decision-maker to balance different (and often competing) principles and factors to arrive at disciplinary action that properly and appropriately 'protects the public'. These same considerations inform the submissions that may be made on behalf of a Board in disciplinary proceedings before a responsible tribunal.

General principles

Specific deterrence

In the disciplinary context '**specific deterrence**' is the concept of discouraging a practitioner who has engaged in misconduct from engaging in further misconduct.

If a decision-maker cannot be satisfied that the practitioner has acquired adequate **insight/remorse** into his or her conduct; and/or is at risk of engaging in similar misconduct again, specific deterrence may be given more weight by the decision-maker when arriving at its determination.

Conversely, if a practitioner has demonstrated sufficient insight or remorse, a decision-maker might be satisfied that the risk of engaging in similar misconduct again is low, and specific deterrence may be given little, if any weight.

Other factors may be relevant to assessing specific deterrence. Some of these are discussed in more detail in the rest of this chapter.

General deterrence

In a disciplinary context **'general deterrence'** is the concept of discouraging other practitioners and members of the profession from engaging in misconduct of the kind before the decision-maker. It is an understanding that misconduct followed by adverse consequences for the practitioner who engaged in it will prevent other practitioners engaging in the same or similar misconduct.

General deterrence may be given more weight when there is a greater potential for harm to be caused as a result of the behaviour. More serious conduct may require a more serious determination in the interests of general deterrence.

Protection of the profession and maintenance of professional standards

The **maintenance of professional standards**, and/or the **protection of the profession** (that is, maintaining its standing in the community), is sometimes expressed as a separate objective of determinations under the National Law. Put simply, the protection of the public requires the maintenance of adequate professional standards.

Determinations which protect the profession and/or maintain professional standards uphold the public's confidence in the relevant profession.

Rehabilitation

There is a broad public interest in ensuring that, when appropriate, people with special skills who breach the standards of their profession are rehabilitated and returned to practise. In some circumstances, this may cause a responsible tribunal to focus more on a determination that assists the rehabilitation of the identified deficit (for example, by imposing conditions on the practitioner's registration).

However, this proposition must be balanced against the other competing principles, factors and considerations at play – remembering 'protection of the public' is the primary purpose of the determination process. Taking this on board, owing to, for example:

- the seriousness of the misconduct engaged in;
- the number of instances of misconduct (that is, whether the conduct is a 'one-off');
- a previous disciplinary history; or
- a lack of insight or remorse on the part of the practitioner,

'rehabilitation of the practitioner' may work against the practitioner, or alternatively be given little, if any weight.

For example, a responsible tribunal might form the view that a practitioner is unlikely to ever be rehabilitated, or at least, unlikely to be rehabilitated in a foreseeable period of time (such that cancellation is required). Alternatively, a responsible tribunal might accept that a practitioner has good prospects of being rehabilitated, but cancellation is required in the interests of general deterrence, protection of the profession/maintenance of professional standards.

Choice of determinations

Where there is a choice of appropriate determinations, the responsible tribunal should choose that or those that maximise the protection of the public.

Parity in determinations

While it is in the public interest (particularly in the context of a national scheme) for there to be general parity (or consistency) in determinations imposed for conduct of a particular kind, each case must be decided on its own facts. Ultimately, the appropriate disciplinary consequence must be determined considering:

- what is necessary and appropriate to protect the public and the profession; and
- the particular circumstances of the case.

Global determinations

A decision-maker can take a 'global' approach to determinations (rather than imposing a separate determination for each finding of misconduct). This may be more appropriate where the conduct the subject of the various allegations is part of a general course of conduct, making it difficult or artificial to deal with each allegation on its own.

Paramountcy of public protection

The COAG Health Council has issued Policy Direction 2019-1 to the Boards and Ahpra. This policy direction affirms the paramountcy of public protection and specifically requires the Boards and Ahpra to:

- take into account the potential impact of the practitioner's conduct on the public (including vulnerable people) and consider the extent to which deterring other practitioners from participating in similar conduct would support the protection of the public and engender confidence in the regulated profession;
- when considering whether conduct may be unprofessional conduct or professional misconduct, give at least equal weight to the expectations of the public as well as professional peers about the expected standards of practice;
- when considering the nature of regulatory action to be taken, or sanctions sought, ensure that the risk that the practitioner poses to the public and the need for effective deterrence outweigh the potential impact upon the practitioner.

Factors that may be relevant to decision-making

Insight and remorse

KEY POINTS

- **Insight** (a practitioner's acceptance and understanding of their wrongdoing) and **remorse** (a practitioner's genuine regret of the harm they did, or might have, caused) are both relevant to the extent to how heavily **specific deterrence** weighs in the determinations process**.**
- The most effective way for a decision-maker to assess the level of insight or remorse demonstrated by a practitioner is by hearing direct evidence from the practitioner.

The degree to which a practitioner has acquired **insight** into their conduct is relevant to determinations, as this relates to the ongoing risk posed by the practitioner. **Insight** in this context refers to a practitioner's understanding and awareness of their conduct, including:

- an acceptance that the conduct was below the expected standard;
- an understanding of the ways in which the conduct was below the expected standard;
- an appreciation of the circumstances which led to the conduct and an understanding of the consequences; and
- a willingness to take measures to identify risk factors, and to do what is necessary to avoid further transgressions.

In this context, a practitioner who has gained genuine insight into their conduct is, in principle, less likely to engage in misconduct again. It is therefore relevant to how much weight a decision-maker gives to **specific deterrence.** It will also inform a decision-maker's assessment of whether a practitioner is readily capable of being rehabilitated, and therefore whether a rehabilitation-focused determination is appropriate.

In some circumstances, that a practitioner has demonstrated appropriate **remorse** (that is, they regret their conduct) may similarly be relevant. However, for a responsible tribunal to be satisfied that a practitioner's remorse has the effect of reducing their risk to the community, it must also be satisfied that the demonstrated remorse is:

- genuine (that is, not self-serving); and
- coupled with appropriate insight.

A practitioner who regrets their conduct only because of the consequences to themselves, will unlikely be taken to have demonstrated sufficient insight and remorse.

Assessing insight and remorse

Assessing the degree of genuine insight or remorse demonstrated by a practitioner can be a difficult exercise, depending on the quality of evidence available.

One means by which insight and remorse might be assessed is through the use of medical evidence, such as from a treating psychologist or psychiatrist, who has discussed the conduct with the practitioner in a clinical setting. The other more direct way to assess insight and remorse is by direct evidence from the practitioner.

A practitioner the subject of a disciplinary proceeding is not required to give evidence if they do not wish to do so. However, in the event that there is no evidence of insight, or the evidence relied upon by the practitioner is not up-to-date, the tribunal may have difficulty in balancing this factor in favour of the practitioner.

Character evidence

KEY POINTS

- Character references are commonly relied upon in disciplinary proceedings under the National Law, and the weight that is placed on this evidence will vary.
- Character references will be given less weight if it is not clear whether the referee is fully apprised of the details of the practitioner's conduct.

Practitioners in disciplinary proceedings under the National Law commonly rely on character references, about both issues of fact, and submissions on the appropriate determination. 'Character references' usually refer to letters or affidavits from senior professional colleagues or community associates, in support of a practitioner's 'good character'.

The weight that is placed on these references by a decision-maker will vary, though they are generally considered to be relevant. A character reference is unlikely to be given much (if any) weight if it is unclear what the referee knows about the conduct that is the subject of the proceeding.

Delay

KEY POINTS

- Delay between the commencement of the disciplinary process and the final hearing can be relevant.
- The relevance of delay to a decision-maker's determination will depend, in part, on the reasons for the delay; and what has transpired over the period of the delay.

The period of time that passes from receipt of a notification, to the start of a disciplinary proceeding, to a decision-maker making a final determination (by way of resolution or not), can be lengthy. It is often described by decision-makers as ‘delay’.

‘Delay’ can be due to many factors, ranging from the inherent complexity of the investigation to the availability of responsible tribunals and panels to hear and determine the matter. This passing of time is often unavoidable. Considered on its own, it is generally not relevant to a determination. However, it can become relevant if, for example:

- it is coupled with a practitioner developing appropriate insight or not developing any insight; and/or
- the effect it has had on the practitioner (such as feelings of anxiety and uncertainty) is sufficient for the purposes of specific deterrence.

The weight a decision-maker will give to ‘delay’ will also depend, in part, on the reasons for it. For example, if the practitioner is partially or wholly responsible for the delay, the effect it has had on the practitioner may be of reduced relevance.

Personal circumstances

KEY POINTS

- Matters personal to a practitioner at the time of a determination (such as financial difficulties or family stressors) can be relevant when considering specific deterrence.
- The relevance of a practitioner’s personal circumstances at the time of the misconduct will usually be linked with other factors such as insight.

Personal matters at the time of the determination considered, for example, shame, the negative experience of being subject to disciplinary proceedings and the potential financial consequences of a determination, are likely to be of relevance only to the extent that they contribute to the deterrent objective of the disciplinary process (for example, specific deterrence).

The personal circumstances of a practitioner that led to the misconduct can provide context to the decision-maker, when considering insight, the general principles and what weight to attribute to them. While the practitioner's personal circumstances may assist in explaining a practitioner's conduct, they are unlikely to justify or rationalise a departure from expected professional standards. For example:

- Where those circumstances identify a specific risk factor that led to the conduct in question, such as overwork, the decision-maker may use this to inform what determinations are necessary to control that risk (for example, the imposition of a condition directed at controlling this risk factor, such as supervision or reduced hours).
- Where those circumstances identify:
    - a stressor that led to the practitioner making a poor decision;
    - that the practitioner has no insight into that stressor and has taken no steps to resolve or control it,

  this may assist the decision-maker when deciding what weight to give to specific deterrence (for example, it may cause a decision-maker to consider the practitioner an ongoing risk, and that more weight needs to be given to specific deterrence).
- If an inexperienced practitioner who engaged in unsatisfactory professional performance did so in circumstances where:
    - they would have benefited from support or supervision; and
    - that lack of supervision and support contributed to their conduct,

  then a decision-maker may consider a 'rehabilitative' determination is appropriate (for example, a decision-maker might feel confident that the conduct would not be repeated if the practitioner was adequately supervised and supported, and impose conditions to this effect).

Health

KEY POINTS

- That a practitioner has a health condition, either at the time of the conduct or the time that the determinations are made, may have the effect of reducing the need for specific or general deterrence; but it may conversely increase the need for 'protection of the public'.
- Where serious health concerns are raised, it might also be appropriate for a decision-maker to consider whether a practitioner is suffering from an impairment, which may influence what determinations are available and/or appropriate.

Health conditions may be relevant to a decision-maker's determination. For example:

- The presence of a mental health condition at the time of the misconduct may assist the decision-maker to understand and assess:
  - whether the practitioner has insight into their condition or the circumstances that precipitated their conduct;
  - the risk of that conduct recurring; and
  - what determinations may be necessary to protect against that risk;
- The presence of an unmanaged substance abuse disorder the time of the determinations hearing, may assist the decision-maker to understand and assess:
  - the capacity of the practitioner to return to work and/or comply with conditions on their registration; and
  - what form of determination may ultimately be appropriate.

For example, the presence of a significant addiction, with inadequate evidence that it is being sufficiently managed, may mean that cancellation is effectively the only appropriate determination.

Disciplinary history

KEY POINTS

- That a practitioner has previously been subject to disciplinary action is likely to be relevant to a decision-maker's assessment of the risk to the community posed by a practitioner.
- Conversely, the fact that a practitioner has been practising for a long period of time and does not have a prior disciplinary history might assist a decision-maker in feeling comfortable that the misconduct was an isolated occurrence.

The fact that a practitioner has previously been subject to disciplinary action is likely to be relevant to a decision-maker's determination. This is because a practitioner's past conduct may be relevant to how the practitioner's overall risk to the community is assessed. For example, a decision-maker may view:

- an extensive disciplinary history as evidencing of the practitioner's attitude to their professional obligations; and/or
- a disciplinary history involving similar conduct, as:
  - evidence that past (and potentially more lenient) disciplinary action has failed;
  - inconsistent with any submission that the practitioner has gained insight into their conduct; and/or
  - indicative that a practitioner is not capable of being rehabilitated.

Conversely, the fact that a practitioner has been practising for a long period of time and does not have a prior disciplinary history may also be relevant. It might assist a decision-maker feel comfortable that the misconduct was an isolated or 'one-off' occurrence.

Impact on a patient community

KEY POINTS

- It may be appropriate for a decision-maker to consider the consequences to a patient community if a practitioner is suspended or their registration is cancelled.
- The public interest in the practitioner remaining in practice must be weighed against the public interest in protecting patients against any repetition of the conduct.

Infrequently, it may be appropriate for a decision-maker to consider the consequences to a patient community if a practitioner is suspended/restricted in their practice. When this issue is raised, the decision-maker must weigh the public interest in the practitioner remaining in practice against the public interest in protecting patients against any repetition of the conduct/protection of the public more generally.

Subjective impact on patient, notifier or complainant

KEY POINTS

- Where the adverse consequences of, or risks associated with, a practitioner's conduct are reasonably foreseeable, then these may be properly considered by a decision-maker in evaluating the practitioner's conduct and deciding the appropriate determinations.
- Adverse consequences to a patient, notifier or complainant (whether financial, physical or psychological) resulting from a practitioner's conduct are likely to be relevant.

In proceedings under the National Law, determinations will ordinarily be assessed according to the nature of the misconduct, rather than its consequences. This means that the focus of the decision-maker's assessment is on what the practitioner did, rather than the impact of the practitioner's conduct (for example, on the relevant notifier or patient). However, where the adverse consequences of, or risks associated with, a practitioner's conduct are reasonably foreseeable, then it may become relevant to the assessment of the determination.

12. Procedural fairness

12.1 Introduction

KEY POINTS

- Procedural fairness is a legal principle which requires fairness in the process that is used in making decisions that may affect a person's rights or interests.
- Procedural fairness is relevant to the steps that national law bodies take in approaching regulatory decision-making. Procedural fairness is not the same as whether a particular outcome is perceived as being 'fair'.

What is procedural fairness?

'Procedural fairness' means acting fairly in administrative decision making. It relates to the fairness of the **procedure** by which a decision is made and is also referred to as **natural justice.**

The concept of procedural fairness is critical to fair decision making. It recognises and addresses possible power imbalances, ensures individuals are treated with dignity and promotes public confidence in decision making. Moreover, ensuring that the procedure by which a decision is made is fair makes it much more likely that the ultimate decision will also be fair in a substantive sense.

As administrative decision-makers, the Boards and their delegates owe a duty to afford procedural fairness to people affected by their decisions. Whether something is 'procedurally fair' depends on the circumstances – this is discussed further below.

In general, procedural fairness traditionally involves two requirements:

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

The fair hearing rule requires a decision maker to afford a person an appropriate opportunity to be heard before making a decision which affects their interests. The rule against bias ensures that a decision maker can be objectively regarded as impartial and not having pre-judged a decision.

The term **'affected person'** is used in this chapter to describe a person whose interests are or may be affected by a decision or proposed decision. This will normally be a practitioner who is the subject of regulatory action in respect of their registration status or as a result of a notification.

Purpose of this chapter

This chapter will outline, in general terms, the requirements of procedural fairness, as well as provide examples of how these concepts apply in the context of regulatory action taken under Part 8 of the National Law. The final portion of the chapter will discuss procedural fairness under the National Law in more detail.

12.2 The fair hearing rule

KEY POINTS

- The fair hearing rule requires a decision maker to afford a person a reasonable opportunity to respond to information being considered before making a decision affecting their interests.
- In practice, what the fair hearing rule requires will differ depending on the context and the circumstances surrounding the decision to be made. However, the key elements will remain the same.

What is required by the fair hearing rule?

The fair hearing rule requires that, before a decision is made that can adversely affect a person's right, interest or legitimate expectation, the decision-maker must:

- give the person sufficient prior notice that a decision may be made;
- inform the person of the information, particularly adverse information, on which the decision may be based;
- provide the person with the right, and reasonable opportunity, to make a submission in reply; and

- make the ultimate decision in good faith, after considering any submission or arguments from the affected person.

While some form of the above steps will almost always be required, in practice, the fair hearing rule, as with all aspects of procedural fairness, may apply differently in different contexts. What is specifically required to ensure procedural fairness may also vary between different decisions of the same kind, due to differences in the circumstances of each specific case.

The nature of the decision being made can influence how much is required to be done in order to comply with the fair hearing rule. For example, the nature of the decision being made (along with other specific circumstances in a particular case) can influence:

- the format in which a person is permitted to provide any response (eg in writing, or by submissions in person, or both);
- whether a person is permitted to have a legal representative appear and speak on their behalf;
- how much material is provided to a person in advance of their response being received; and
- how long a person is given to prepare their response.

Some decisions will require a more comprehensive process in order to ensure that the fair hearing rule has been complied with. In general terms, the fair hearing rule may require additional, or more fulsome, steps to be taken where:

- the decision to be made is final, rather than of a preliminary or interim nature;
- there are no or limited appeal rights available to the affected person after the decision has been made;
- the hearing will be held in public or the outcome of the decision will be published; or
- the subject matter (such as allegations against an affected person, or the degree to which the decision will affect the person's rights) is particularly serious.

In other circumstances, it may not be necessary or possible for the decision-maker to take as many steps to comply with the fair hearing rule. Examples of these circumstances include where the decision to be made is of an urgent nature or of an interim nature.

EXAMPLE 1

Immediate action under section 156 of the National Law

CONTEXT	APPLICATION
In the immediate action context, the decisions to be made by the Board (or, more commonly, a committee of the Board) are often of an urgent nature, due to serious concerns having been raised about whether the practitioner constitutes a serious risk to the persons (or it is otherwise in the public interest that immediate action be taken).	As a result, practitioners are generally provided with much less time to provide a response to the proposed immediate action than they would be provided, for example, during an investigation in which they are asked to provide a response. This is appropriate in the circumstances due to the urgent nature of the decision to be made. Although less time may be available, the practitioner should still be given the information the Board is considering to decide whether to take immediate action, and offered the opportunity to provide a written or oral submission.

For more information about the immediate action process, see Chapter 3.

Requirement to provide information on which the decision will be based

Generally, all **relevant, credible and significant** material that is available should be considered by the decision maker. That information, whether adverse to the interests of the affected person or potentially exculpatory, will usually be provided to the affected person in order to allow them to fully understand the

issues raised against them and so that they can provide an effective response. This does not necessarily mean that the person must be provided with copies of all evidence or documents that the decision-maker will consider in every case. For example, if providing a full copy of material would expose another person to risk, the affected person may be provided with redacted material or a summary of the relevant material.

The right to make a submission in reply

In most circumstances, it will only be necessary to provide the affected person with an opportunity to make a written, rather than oral, submission. An oral hearing is ordinarily only required where there are matters of credit or truthfulness to be resolved, or where there are disputed factual matters or inconsistencies in evidence. However the practitioner may be provided with the opportunity to make an oral submission if sought and such a request is reasonable in the circumstances.

If an oral hearing has been arranged, there is no absolute right for an affected person to be represented by a lawyer, agent or other person[176]. Often, because of the seriousness of the matter and the complexity of the issues involved, procedural fairness will require that the affected person is permitted representation and generally a person will be allowed to have a representative present if they want such assistance. Regardless of whether a person is represented at the hearing, an affected person is always entitled to take such advice from a legal representative as they consider necessary or appropriate.

The requirement to consider the submission of an affected person

The requirement to fairly consider submissions made or evidence led by a person merely means that the decision-maker must take those matters and all other relevant material into account in making the decision. It does not mean that the decision-maker is obliged to agree with those submissions, or prefer that evidence.

12.3 The rule against bias

KEY POINTS

- The rule against bias requires a decision-maker to be objectively regarded as impartial and not having pre-judged a decision.
- The law recognises two types of bias: actual bias and apprehended bias.
- The surrounding context will be relevant to whether particular conduct or circumstances constitutes actual or apprehended bias.

What is meant by the rule against bias?

The rationale for the rule against bias arises from two principles in the common law:

- that decision making must be impartial; and
- that impartial decision making and the absence of bias promote public confidence in the justice system.

Types of bias

The law recognises two types of bias:

- **actual bias**, which is present when a decision-maker's mind, because of an interest in the outcome of a decision (such as a financial or family interest), actual hostility or prejudice towards or pre-judged position about an affected person, is so closed to persuasion by the affected person that relevant arguments are ineffective; and
- **apprehended bias**, which is present where a fair-minded, reasonably well informed lay[177] observer might reasonably apprehend that the decision-maker might not bring an impartial mind to the resolution of the question that the decision-maker is deciding.

Findings of actual bias are rarely made in practice, as it is very difficult to prove that a decision-maker has, for some reason, reached a fixed and final conclusion and is not open to persuasion or argument. Further, in many cases, decision-making bodies are not comprised of just one person but a number of different people

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[176] In the context of performance and professional standards or health panel hearings, a practitioner or student who is the subject of the hearing is entitled to be accompanied by an Australian legal practitioner or other person, and the panel may grant leave for the legal practitioner or other person to appear on behalf of the practitioner or student if the panel considers it appropriate in the particular circumstances – section 186 of the National Law.

[177] 'Lay' in this context means a person without legal qualifications or training.

(such as a board or a committee). It is difficult to establish, in such cases, that the interest or views of one person have had the effect that the decision-making body, as a whole, has demonstrated actual bias.

A finding of apprehended bias is more likely, though still uncommon and is not to be found lightly.

Apprehended bias is more than reaching a preliminary view about something (with respect to which the final view or decision is yet to be made). In fact, the fair hearing rule may in some circumstances require a decision-maker to place an affected person on notice of a preliminary view about a particular matter if it is adverse to the affected person. This is for the purposes of allowing the affected person to properly respond, and is not indicative of apprehended bias.

EXAMPLE 1

Notice by a Board of proposed action under section 178 of the National Law

CONTEXT	APPLICATION
If a Board proposes to take relevant action under section 178 of the National Law, the Board will: • provide the practitioner with written notice of the action that it proposes to take; and • invite the practitioner to make a written or oral submission to the Board about the proposed action.	The reason that this process is followed (called the **show cause process**) is to ensure that procedural fairness is afforded to the practitioner in terms of the fair hearing rule (discussed earlier in this chapter). The indication by the Board that it **proposes** to take certain action in respect of the practitioner, because of a certain view, does not constitute actual or apprehended bias.

For more information about section 178 of the National Law, see Chapter 6.

Examples of apprehended bias

Examples of conduct or circumstances which may constitute apprehended bias include:

- where a decision-maker has already played a different role in the same matter, such as an investigator or prosecutor, such that they have prior knowledge and/or beliefs about the matter;
- where a decision-maker appears to hold views which suggest that they may pre-judge the outcome (for example, views about a particular attribute or social group that the affected person has or belongs to);
- where a decision-maker that is adjudicating a dispute between two parties privately communicates with one party;
- where there is a familial, personal or close professional relationship between the decision-maker and one party;
- where a decision maker has previously made a decision in respect of the practitioner in which the decision maker expressed views about the credibility of the practitioner or made pejorative comments about the character of the practitioner;
- where a decision-maker has a financial interest associated with one party or a particular outcome; and
- where a decision-maker displays excessive undue hostility or favouritism towards one party.

The relevance of the surrounding circumstances

As with the fair hearing rule (and all aspects of procedural fairness), whether particular conduct or circumstances constitute actual or apprehended bias will depend on the context in which the decision is to be made and by whom it is to be made.

Further, administrative decisions are normally made within a specific statutory context: that is, the legislation under which the decision is made may specify certain characteristics of the decision-maker or as to the constitution or make-up of the decision-making body.

For example, it is common that decisions concerning licensing or registration in a profession are made by a body or panel including members of that profession, so that the decision-maker has the benefit of relevant professional knowledge in making the decision. This may mean that, for example, the decision-makers belong to or are registered with an organisation which is a party in a proceeding. In that context, those circumstances alone would be very unlikely to constitute apprehended bias. However, in other contexts

(such as in a decision to be made by a judge in court), it would be reasonable to expect that the judge has no affiliation or association with either party.

There are also some exceptions to the rule against bias (such as necessity or consent).

EXAMPLE 2

Decisions made under the National Law by responsible tribunals

CONTEXT	APPLICATION
In most jurisdictions, a responsible tribunal hearing referral proceedings (and sometimes review proceedings) under the Nation Law is presided by a panel of tribunal members. The panel is generally constituted by a presiding member with legal qualifications, as well as at least one member who is a health professional in the same profession as the relevant practitioner.	The purpose of having a professional member sit on the tribunal panel is partially to ensure that a practitioner's conduct is being assessed with the assistance and perspective of one of their professional peers. While this may have the effect that a matter concerning a practitioner is heard by at least one person who is registered with the same board that is a party to the proceeding, this does not constitute apprehended bias in the circumstances (in fact, it is generally a legislative requirement).

For more information about the tribunal hearing process, see Chapter 8.

12.4 Procedural fairness in decision making under the National Law

As administrative decision-makers, the Boards and their delegates owe duties to afford procedural fairness to people affected by their decisions (usually, health practitioners registered under the National Law).

As illustrated above, what is required in order to ensure procedural fairness is context-dependent. It is possible for procedural fairness requirements to differ between decisions of the same kind, having regard to the circumstances of a particular case.

Does the National Law stipulate procedural fairness requirements?

KEY POINTS

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

In many processes governed by Part 8 of the National Law and indeed, in many other aspects of decision making under different parts of the National Law, specific procedures are required to be followed before a decision is made.

An example of this are the show cause procedures required when taking immediate action or relevant action: these procedures, when followed correctly, generally give effect to the fair hearing rule.

The procedures set out in the National Law must be (and are) followed in making decisions to which they apply, and these procedures, when followed, generally ensure procedural fairness. However:

- following the procedures does not automatically mean that procedural fairness has been provided (though this will usually be the case, as the procedures have been designed for this purpose);
- any failure by a Board or committee to follow the procedures does not necessarily mean that procedural fairness has not been provided; and
- where there are no specific procedures, procedural fairness must still be provided.

In summary, the obligation for decision makers to follow any relevant procedures under the National Law is separate to the obligation to afford procedural fairness to an affected person.

The remainder of this chapter will outline the ways in which practitioners are afforded procedural fairness in procedures under Part 8 of the National Law. Further information about each procedure is provided elsewhere in the Regulatory Guide.

Procedural fairness in the Immediate Action process

KEY POINTS

- The National Law establishes a 'show cause' process which must be followed before immediate action is taken.
- Some aspects of this process are flexible, and what is required in order to ensure procedural fairness depends on the circumstances of the particular case.

The immediate action process is outlined in Division 7 of Part 8 of the National Law, and is discussed in detail in Chapter 3. Immediate action is interim action that a Board can take to restrict or suspend a practitioner's ability to practise. A Board will do so if it reasonably believes that interim regulatory action is necessary to protect the public from a serious risk, or is otherwise in the public interest.

As noted above, before taking immediate action, a Board (or relevant committee of the Board) is required to:

- give the practitioner notice of the proposed immediate action; and
- invite the practitioner to make a submission to the Board, within the time stated in the notice.[178]

Upon receipt of the notice, a practitioner may choose to provide a submission or to make no submission. The practitioner may provide submissions in writing and/or orally to the Board.[179] As the fair hearing rule rarely requires that an affected person be provided with an oral hearing, this aspect of the National Law likely extends beyond the requirements of procedural fairness at common law (though the National Law is not prescriptive about the forum in which oral submissions are to be provided).

The National Law does not stipulate the time within which a practitioner must make a submission. What amount of time is procedurally fair will depend on the circumstances of the particular case. In urgent situations, the stated time in the notice from the relevant Board to the practitioner about the proposed immediate action may be a matter of hours. In the case of a long-standing investigation where there is not, or is unlikely to be, imminent danger to the health of patients and there has been extensive correspondence with the practitioner, procedural fairness will likely require a longer time period to respond.

In addition to the urgency, the fact that an immediate action decision is of an interim nature (in that the immediate action will only remain in place for a limited time) is also relevant to what is required by procedural fairness in the circumstances.

Procedural fairness in the investigation process

KEY POINTS

- The National Law is not prescriptive about what is required to ensure that a practitioner is afforded procedural fairness in the course of an investigation.
- The fair hearing rule requires that practitioners are provided with the opportunity to respond to the allegations being investigated and any relevant, significant and credible evidence or material prior to any form of relevant action being taken.

The investigation process is outlined in Division 8 of Part 8 of the National Law, and is discussed in detail in Chapter 5.

The National Law is not prescriptive about what is required to ensure that a practitioner is afforded procedural fairness in the course of an investigation, although affected persons must be given notice of the nature of a notification received about them unless doing so would prejudice an investigation or place another person at risk.[180] Otherwise, it is open for an investigator to take a flexible approach, which may vary, depending on the nature of the investigation.

Procedural fairness does not necessarily require a practitioner to be provided with relevant material and an opportunity to make submissions during or at the conclusion of an investigation. That obligation arises if the Board or panel (the decision maker) proposes to impose a disciplinary sanction.

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[178] National Law, s 157(1).

[179] National Law, s 157(2).

[180] National Law, s 152.

An investigator recommending that a Board take no action with no adverse finding in respect of a notification need not offer the practitioner an opportunity to make a submission prior to that recommendation being made. If the Board disagrees with the recommendation and proposes to take action, then the affected person will be provided with an opportunity to make a submission before a final decision is made by the Board.

Similarly, if the investigator is recommending that a Board refer a matter to a responsible tribunal, a practitioner need not be given an opportunity to make a submission as the tribunal will ensure that procedural fairness is provided to the practitioner before any decision is made. In this situation, the decision of a Board to refer a matter to a responsible tribunal is a decision that is procedural and interim in nature.

An investigator may decide to provide material to a practitioner prior to submitting an investigation report to a Board. This is because the investigator is required to make a recommendation to a Board and may consider that the views of the practitioner would assist in developing that recommendation. But doing so is not a requirement of procedural fairness.

Where evidence is obtained during the course of an investigation that will have the effect of expanding the scope of the issues which are the subject of the investigation, the practitioner will generally be given an additional opportunity to respond to any new issues.

Procedural fairness in the Relevant Action process

KEY POINTS

- The National Law establishes a 'show cause' process which must be followed before relevant action is taken.
- Some aspects of this process are flexible, and what is required in order to ensure procedural fairness depends on the circumstances of the particular case.

The relevant action process is outlined in Division 10 of Part 8 of the National Law, and is discussed in detail in Chapter 6.

Similar to the immediate action process, before taking relevant action with respect to a practitioner, a Board will:

- provide the practitioner with written notice of the proposed relevant action; and
- invite the practitioner to make a written or oral submission to the Board about the proposed relevant action.[181]

As with the immediate action process, the National Law is silent as to the time within which a practitioner must make a submission. However, as a decision to take relevant action:

- is not generally of an urgent nature; and
- is a final[182] decision (rather than an interim decision, such as immediate action),

it will generally be appropriate to allow the practitioner a greater time period within which to respond to the proposed action (compared to, for example, a decision made in the immediate action context). In determining the length of time allowed for submissions, matters such as the complexity of issues, the volume of material and whether expert opinions might be necessary will all be relevant

Additionally, the National Law provides that the 'show cause' process outlined above does not apply where the relevant action relates to a matter in which an investigation, health assessment or performance assessment has been conducted.[183] This is because, in many instances, the practitioner will already be on notice of any potential adverse material or findings (as a result of the investigation or assessment process).

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[181] National Law, s 179(1).

[182] The decision is of a final nature in that, compared with immediate action which is intended as an emergency, interim measure, a decision to take relevant action is generally the final outcome of a matter. This does not mean that the relevant action will be in place permanently, or that the decision to take relevant action cannot be reviewed or appealed.

[183] National Law, s 179(3).

However, the fair hearing rule always applies regardless of the procedures set out in the National Law. Accordingly, there will still be some circumstances where it is necessary and appropriate to follow the show cause process in order to ensure procedural fairness (even where it is not strictly required). As a consequence and to ensure that fair hearing rule is fully complied with in all circumstances, Ahpra's policy is to always follow the show cause process when relevant action has been proposed by the Board (regardless of whether or not it is strictly required).

Procedural fairness in the panel hearing process

KEY POINTS

- The National Law sets out some of the baseline requirements for panel hearings, and also provides that panels are bound by the rules of natural justice.
- Factors such as the complexity and seriousness of the matter will be relevant to whether procedural fairness requires that a practitioner is permitted legal representation.

The health panel and performance and professional standards panel processes are outlined in Division 11 of Part 8 of the National Law, and are discussed in detail in Chapter 7.

Panels under the National Law may determine their own procedure, but must comply with the rules of natural justice (meaning procedural fairness).[184]

The National Law requires that the panel must give notice about the hearing to allow a practitioner an opportunity to consider the allegations, to prepare a response or arguments about the issues in question, or to make counter-arguments.[185] There are a number of matters that must be included in the notice.[186]

As with all decision-making under the National Law, the amount of information and the level of detail that is provided to the practitioner before the hearing, in accordance with the fair hearing rule, will vary depending on the seriousness and complexity of the allegations. However, it is normal practice to provide the practitioner with all material that the panel will consider at the hearing at a reasonable time prior to the hearing in order to allow the practitioner an appropriate chance to consider it and obtain any evidence or other material in reply, and make any submissions on it.

Similarly, the time period within which the practitioner will be asked to respond to the notice may also vary (having regard to these factors).

The National Law provides that, at a panel hearing, a practitioner may be accompanied by a legal practitioner or another person.[187] The legal practitioner or other person may only appear *on behalf of* the practitioner with leave of the panel, which will only be granted if the panel considers it appropriate in the particular circumstances of the hearing.[188]

Whether or not the fair hearing rule requires a panel to grant permission for a legal representative to appear on a person's behalf will depend, once again, on the circumstances of the particular case. As noted above, procedural fairness does not necessarily guarantee the right to legal representation. Relevant factors include the practitioner's ability to understand the hearing and the issues, the legal, clinical and factual complexity of the case, the seriousness of the issues involved and the extent to which a panel may be assisted by the practitioner being legally represented. But generally, if a person wishes to be legally represented, they are likely to be granted permission.

[184] National Law, s 185.
[185] National Law, s 184.
[186] National Law, s 184.
[187] National Law, s 186(1).
[188] National Law, s 186(2)-(3).

General comments about the application of the rule against bias in Board decision making

KEY POINTS

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

The National Law requires that at least half of the members of a Board must be members of the profession to which the Board relates.[189] Similarly, panels (which are differently constituted depending on the type of panel) always include at least one member who is a health practitioner registered in the same profession as the practitioner who is the subject of the panel hearing. Board, panel and committee members are provided with training about avoiding conflicts of interest and understanding the rule against bias.

In order to ensure that the rule against bias is complied with, Board, committee or panel members are asked, before being involved in a decision or hearing about a particular practitioner to declare whether they (due to knowledge about the practitioner or otherwise) may not be able to bring an impartial mind to the decision.

Where a Board or committee member declares any such knowledge (where arising from a professional, social or other setting) in respect of a practitioner that might affect the Board or committee member's ability to act impartially, they will be excluded from any decision-making concerning that practitioner. Where a potential panel member declares any such partiality or knowledge in respect of a practitioner, they will not be appointed to a panel concerning that practitioner.

12.5 Consequences of a failure to afford procedural fairness

KEY POINTS

- The usual consequence of a failure to afford procedural fairness, where it has been significant enough to affect the outcome, is that the relevant decision must be set aside, and re-made in a procedurally fair manner.
- It is possible for a later hearing to cure an earlier breach of procedural fairness, provided that the later hearing is conducted properly and free from bias.

The consequence of a failure to afford procedural fairness to an affected person in making a decision is that the decision may be set aside (and remade in a procedurally fair manner). However, this will only be the case where the error or breach was material to the ultimate decision – that is, that there is a realistic possibility that the decision might have been different if procedural fairness was provided.

It is also possible for a later hearing to 'cure' any defect in the decision-making process. This is usually the case where a different decision-maker, such as independent court or tribunal, considers the matter afresh and makes its own decision on the merits. Provided that the fair hearing rule and the rule against bias are followed in the later hearing, any earlier breach of procedural fairness is unlikely to be material to (or capable of affecting) the later decision.

[189] National Law, s 33.

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Reviews and approvals

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