



College Submission
September 2023

Ahpra and the National Boards - interim prohibition orders

About the Australian College of Rural and Remote Medicine (ACRRM)

ACRRM's vision is *the right doctors, in the right places, with the right skills, providing rural and remote people with excellent health care*. It provides a quality Fellowship program including training, professional development, and clinical practice standards; and support and advocacy services for rural doctors and the communities they serve.

ACRRM is accredited by the Australian Medical Council to set standards for the specialty of general practice. The College's programs are specifically designed to provide Fellows with the extended skills required to deliver the highest quality Rural Generalist model of care in rural and remote communities, which often experience a shortage of local specialist and allied health services.

ACRRM has more than 5000 rural doctor members including 1000 registrars, who live and work in rural, remote, and Aboriginal and Torres Strait Islander communities across Australia. Our members provide expert front line medical care in a diverse range of settings including general practices, hospitals, emergency departments, Aboriginal Medical Services, and other remote settings such as RFDS and Australian Antarctic Division.

General Comments

Thank you for the opportunity to provide feedback on the new power given to Ahpra and the National Boards under the National Law to issue interim prohibition orders (IPOs) to unregistered practitioners, including practitioners whose registration has lapsed or been suspended.

An IPO issued by Ahpra, or a National Board can prohibit or restrict a person from providing a specified health service or all health services, and prohibit a person from using protected titles. We note the intention to only take this step "in extraordinary situations that are very serious"¹ and where

¹ Ahpra targeted consultation paper IPOs, page 5, Para 7



time is of the essence, the principle of protection of the public and public confidence in the safety of health services being paramount.

The College has previously raised concerns regarding amendments to the National Law being too broad in scope, both during the consultation process on amendments to the National Law², and in later Ahpra consultations³. Wide-ranging powers have been conferred on Ahpra and the National Boards, and in the view of the College these powers have failed to strike an appropriate balance between measures to protect the public and the basic human rights of health practitioners.

In developing guidance on how the new power to issue IPOs will be used in practice, Ahpra has the opportunity to ensure the necessary safeguards are put in place to ensure powers are used lawfully and appropriately. We have commented on the sections of the Regulatory Guide which cause concern to the College and its members.

Response to Consultation Questions

Question one: Is it clear who the decision maker for issuing IPOs is and under that circumstances

The draft text of the new chapter of the Regulatory guide is unclear in several places. In particular, paragraph 4 of Section 14.1 Introduction states:

“Generally, where the unregistered person is a person whose registration is suspended, or who is the subject of ongoing proceedings under Part 8, the relevant National Board will be the decision maker in relation to any proposal to issue an interim prohibition order for the person.”

Paragraph 5 states:

“In other cases, Ahpra will be the decision maker.”

We would recommend removal of the word “Generally” from paragraph 4, and the addition of the word “all” in paragraph 5 so these paragraphs would read as follows:

“Where the unregistered person is a person whose registration is suspended, or who is the subject of ongoing proceedings under Part 8, the relevant National Board will be the decision maker in relation to any proposal to issue an interim prohibition order for the person.

*In **all** other cases, Ahpra will be the decision maker.”*

These amendments would provide clarity around who the decision maker will be in each case.

Question two: Is the threshold that needs to be met to allow either Ahpra or a National Board to issue an IPO clear?

The Regulatory Guide specifies that the threshold test of reasonable belief.

Reasonable belief is defined in the Regulatory Guide as requiring:

“..the existence of a factual matrix sufficient to induce the belief in a reasonable person”

² [ACRRM Submission Health Practitioner National Law](#), June 2022

³ [ACRRM Submission Ahpra and the National Boards proposed use of new power to issue public statements](#), February 2023



“an inclination of the mind toward assenting to, rather than rejecting, a proposition”.

We presume that both definitions have been included in the Guide in order to draw the distinction between merely holding a belief, which is subjective, and holding a reasonable belief, which can be based on an objective test.

It is concerning that the Guide states:

“There must be information available to the decision maker which gives rise to a reasonable belief that one or more offences have been committed, but the decision maker is not required to make factual findings about any particular contravention.”

Although we appreciate the threshold does not require factual findings, it is important to note that the test of reasonable belief does necessitate at least some reference to objective facts, otherwise it could fall into the category of belief or suspicion. Reasonable belief should be supported by objective evidence that would reasonably lead a person to believe that there is a risk to the public if an IPO is not made.

We would recommend that this section of the Guide is amended to make it clear that the Ahpra and the National Boards will employ an objectively reasonable and balanced approach to decision making around IPOs. Ahpra and the National Boards should not make assumptions and act on them without testing the validity of those assumptions with reference to facts, particularly when IPOs will be issued in response to allegations which will not have been fully investigated at the time the IPO is issued.

Furthermore, the draft Regulatory Guide states that there must be a reasonable belief that a person has:

- Contravened a relevant provision, or
- Is the subject of an assessment, investigation or other proceeding under Part 8 of the National Law;

And that, in addition, there is (i) a serious risk to the public and (ii) it is necessary for an IPO to be issued to protect public safety.

Relevant provisions for the purpose of S159C are sections of the National Law, which, when contravened by an unregistered person, constitute a criminal offence. The Guide proceeds to outline the principles of “serious risk” and “necessity” which must be applied in the decision making process, and to define these terms.

The College notes that the principles have been well defined, however would suggest that the use of the heading **“Person alleged to have committed an offence”** is misleading in the context of this section of the Guide, and should be deleted. The Guide should be amended to effectively delineate the grounds, which are contravention of a relevant provision OR subject to a Part 8 assessment, investigation or proceeding PLUS serious risk PLUS necessity. Use of the heading in this context suggests that an allegation of an offence having been committed is sufficient, creates ambiguity.

Question three: Is the guidance about show cause process clear?

The guidance in *Section 14.3 Procedure and show cause process* is generally clear and easy to understand, however the College would reiterate points made in earlier submissions regarding the timeframes given to practitioners to object to the issuing of an order. Before issuing an IPO, the decision maker must give the practitioner notice, and invite the practitioner to make a submission to the decision maker.

The Guide:



- Does not specify the time permitted for a person to provide a submission in response to the proposed issuing of an interim order by Ahpra or the National Boards
- Specifies that once a decision has been made to issue an IPO, the decision is effective immediately.

Whilst we appreciate the decision makers obligation to protect the public, the lack of specificity in point one, and the specificity of point two are contrary to natural justice. Practitioners have no way of knowing what the timeline might be in the process, with this being entirely the domain of Ahpra and the National Boards to decide.

The College has stated on several occasions since these legislative amendments were opened for consultation in 2022 that it is an essential feature of the rule of law that legislation be clear and be able to be understood by those who are bound by it. We would reiterate our concerns that the legislation is too broad in scope, lacking in the necessary detail and prone to “catch-all” phraseology.

Presumably, Ahpra and the National Boards will set the time limits on a base by case basis. In some cases, the likely lack of time permitted to make a submission could preclude a health practitioner from securing access to legal advice prior to an IPO being issued. The Guide provides little or no clarity around the time limits which are likely to apply. The legislation is vague, and the Guide is similarly vague in its language, creating a situation where Ahpra and the National Boards hold considerable power to make decisions which have the potential to seriously impact practitioners income stream and wellbeing.

The College supports provisions designed to protect the public and ensure safety of services provided by registered health practitioners. These however should not preclude the basic human rights of health practitioners and access to justice. Considering there are later provisions in the legislation, which are referenced in the Guide, allowing “urgent action” to be taken, there would not appear to be any reason why the Guide cannot specify the time limits which will apply, even if this is a sliding scale based on severity. We would recommend a time range is set for notices. e.g.

- *invite the practitioner to make a submission to the decision maker, within the time stated in the notice **which time period will be at the discretion of the decision maker but not less than x days and not more than x days.***

As stated previously, these powers are wide ranging, broad in scope, as such we consider it imperative that they are accompanied by rigorously worded provisions in the Regulatory Guide to ensure that they are exercised only in the most serious cases to protect the public where they high threshold test is met.



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ACRRM acknowledges Australian Aboriginal People and Torres Strait Islander People as the first inhabitants of the nation. We respect the Traditional Owners of lands across Australia in which our members and staff work and live, and pay respect to their Elders past present and future.