



College Submission
February 2023

Feedback on Ahpra and the National Boards proposed use of new power to issue public statements (warnings)

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 face-to-face specialist and allied health services.

ACRRM has more than 5000 rural doctor members and over 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.

Initial Comments

ACRRM welcomes the opportunity to provide feedback on changes to the National Law which have conferred significant powers on Ahpra and the National Boards, specifically the power under the new Part 8, Division 7B to issue public statements (warnings).

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. The College has previously raised concerns that in several places the legislation is too broad in scope, lacking in the necessary detail and prone to "catch-all" phraseology.

Provisions which confer power on an entity should clearly express the nature of the power and where appropriate, provide guidance as to how the entity on which the power is conferred should exercise it. Considering the broad scope of the new legislative provisions, it is imperative that proposed additions to Ahpra's Regulatory Guide sufficiently articulate how the power to issue public statements will be used in practice.



Response to Feedback Questions

1. Is it clear who will be the decision maker for issuing a public statement and under what circumstances?

The College raised concerns during the consultation process on amendments to the National Law that in several places the amendments were too broad in scope, conferred wide-ranging powers on Ahpra and the National Boards, and struck the wrong 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 public statements (warnings) 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 would expect the issue of who will hold the power to make a decision to issue a public statement to be clarified by the Regulatory Guide, however the wording is unclear:

- Section 159Q of the National Law states that a regulatory body may make a public statement about a person if certain conditions specified under subsections (1)(a) and (b) are met.
- Pages 4 and 5 of Attachment A to Ahpra's consultation paper attempt to outline the process for determining the decision maker, stating that this will depend on the registration status of the person who will be the subject of the proposed statement, with
 - the National Boards issuing statements if the person is or was a registered practitioner, and
 - Ahpra issuing statements if the conduct occurred when the person was unregistered.
- On the face of it, this would appear to give certainty to those contravening the National Law around who will make decisions to issue public statements.
- However, the wording on page 8 of *Attachment B – Draft text for Regulatory Guide* is problematic in that its use of vague language e.g. in *Section A- Who will be the decision maker?* there is reference to "generally" and "in most other cases".

We can see no reason for the language of this section to be vague, particularly when the paragraph three goes on to state that:

"Any decision to propose a public statement or to issue a public statement will be made by the Ahpra Chief Executive Officer on advice from the Executive Director of Regulatory Operations and General Counsel".

We can only assume that the intention is that *all* decisions to propose a public statement will be made by the Ahpra CEO, however this is unclear from our reading of both Attachment A and Attachment B.

The result is there is no clarity around who the decision maker will be. We would recommend amending the wording in the Regulatory Guide to ensure there is no doubt, and that the Guide makes it clear which situations will be determined by Ahpra and which will be determined by the National Boards.

2. Does the proposed approach provide clarity about the threshold tests that need to be met to allow either Ahpra or a National Board to issue a public statement?

Although the Regulatory Guide specifies that the statutory provision "*sets a high threshold for the exercise of the power and it is therefore a power that will not be used commonly*", the threshold test is the 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”

The Regulatory Guide goes on to define **belief** as:

“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 contraventions have occurred, 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.

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 public notices. Ahpra and the National Boards should not make assumptions and act on them without testing the validity of those assumptions with reference to facts.

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 a public statement is not made.

3. Is the guidance clear about the procedures that are to be followed to support a public statement being made, revised or revoked?

The guidance in Section C – Procedure and show cause process – is generally clear and easy to follow, however we note that the Guide:

- Does not specify the time permitted for a person to provide a submission in response to the issuing of a notice by Ahpra or the National Boards that they propose to issue a public statement.
- Specifies that once a decision has been made to issue a public statement, the appeal period is one day

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 surely contrary to natural justice. In some cases, the lack of time permitted to make a submission, or to lodge an appeal could preclude a health practitioner from securing access to legal advice prior to a public statement being made.

Provisions designed to protect the public and ensure public confidence in the safety of services provided by registered health practitioners should not be utilised to contravene the basic human rights of health practitioners and access to justice. Reference to one business day is unlikely to offer sufficient time to seek an injunction.

We note that Ahpra or the National Boards may proceed to issue public statements even where it is indicated that an appeal will be lodged. They may also decide to bring the matter to the attention of the public via social media, media release or otherwise. Although the legislation contains provisions



relating to subsequent revocation of public statements in certain circumstances, once the statement and potential associated media has been released, arguably the damage to business and reputation will be done. In addition, in light of Ahpra's recent consultation in relation to including disciplinary history on the public register, it is unclear whether the issuing and subsequent revocation of a public notice would continue to appear on a health practitioners record.

As stated previously, these powers are wide ranging, broad in scope, and must be 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.

4. Is there any other information that we should consider providing to help practitioners and consumers better understand how we will use this new power to issue public statements (warnings)?

In Attachment A, page 4, the new power is stated as being *"more likely [to] be used for serious matters involving unregistered people as opposed to currently registered practitioners"*.

It is also stated that it will only need to be used in a small number of cases where the public would be left at serious risk unless a public statement was made.

Whilst we appreciate the intent, the legislation treats registered practitioners in precisely the same way as unregistered practitioners, which means that in all cases, registration status aside, Ahpra and the National Boards can decide to issue these statements. It would therefore be useful if Ahpra and the National Boards could clarify their approach. The phraseology *"more likely"* is unhelpful.

We can see a clear use and purpose for this power in the case of unregistered persons undertaking services which pose a threat to public safety. Individuals falling into this category are not subject to the National law and the myriad of provisions governing registered practitioners to ensure the safety of the public, and this new power provides a mechanism to warn and protect the public.

However, surely a better way to protect the public from a registered health practitioner who may pose a serious risk to public safety would be to utilise provisions in the legislation relating to suspension or restrictions on practice.

To assist practitioners better understand how the power will be used, it may be useful to provide a broader set of case examples. Of the examples listed at present, only one relates to a registered practitioner. From a consumer perspective, it would also be useful if any public awareness around the power made it clear that the power was intended mainly for use in relation to unregistered persons.

5. Are there ways we can explain how this new power may be used to avoid misunderstandings among practitioners and consumers?

As indicated in our earlier responses, due to the legislation conferring broad powers, the Regulatory Guide should be more specific in its language, particularly in relation to who will exercise the power and the time permitted to respond to a notice.

6. Do you have any feedback on the draft wording of the proposed new chapter to be inserted into the published Regulatory Guide? (attachment B to the consultation paper)

Page 8 Section A – Who will be the decision maker

We would recommend the following amendments to section A to ensure that it is clear which cases will be decided by the National Boards and which will be decided by Ahpra.



A. Who will be the decision maker?

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

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

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

In each case, any decision to propose a public statement or to issue a public statement will be made by the Ahpra Chief Executive Officer on advice from the Executive Director of Regulatory Operations and General Counsel.

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

Page 9 Section B – Grounds for making a public statement

We would recommended deleting reference to the definition of belief, as belief is not the test specified by the legislation.

In the context of a public statement:

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

Page 11 Section C – Procedure and show cause process

There are multiple references to "within the time stated in the notice". We would recommend that the Regulatory Guide sets a time range for notices. e.g.

Show cause process

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

- a copy of the proposed public statement;
- information about the way in which it is proposed to make the public statement; and
- invite the 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, the purported appeal period of one day is contrary to natural justice. The decision maker can still issue the notice even where an appeal has been lodged, with only an injunction or interim order staying the public statement.



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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.