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GREY AREAS NEWSLETTER

A COMMENTARY ON LEGAL ISSUES AFFECTING PROFESSIONAL REGULATION

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When Should Regulators Notify the Public of a Specific Risk?

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March 2026 - No. 312

A hospital in Australia recently expressed concern that it was not notified that a physician was under investigation by their regulator for conducting unnecessary gynaecological surgeries. The Executive Director of the hospital said that the lack of warning placed the public at risk. Ironically, the law in Australia was recently amended, not without some controversy, to permit the Australian Health Practitioner Regulation Agency (AHPRA) to notify the public of risks even though no public regulatory action had yet been taken. The Australian experience is familiar to Canadian regulators who wrestle with the question of at what point in the regulatory process they can and should publicly disclose concerning information about registrants or those engaging in unauthorized practice.

AHPRA has provided detailed guidance as to how it will use its new public notification powers. At the time of writing, the AHPRA website contains two public notifications made during the past year. Both relate to former practitioners who "may" still be providing health services.

AHPRA (and its affiliated National Boards) has issued the following guidance:

- The legislative test for publishing a notice is when the regulator "forms a reasonable belief that the practitioner or person poses a serious risk and it is necessary to protect public health or safety."
- "Examples of this are a person who continues to practise despite their registration being suspended, situations where patients may have been misdiagnosed or exposed to blood borne viruses or in the case of an unregistered practitioner, alerting the public to a 'fake' dentist."
- Generally public notification will occur only where the regulator is unable to manage the risk to the public with other regulatory tools (e.g., an interim suspension).
- Publication will help protect the public by enabling precautionary steps and encouraging anyone who has been exposed to the serious risk to contact the regulator.

- AHPRA acknowledges that the "making of a public statement potentially has a very significant impact upon the person who is named in the statement." The potential impact is one of the relevant factors the regulator takes into account before deciding to issue the publication. The individual is notified of the reasons why the regulator believes it is necessary to issue a public statement and is given an opportunity to make submissions. If a decision is then made to issue the publication, the regulator attempts to notify the individual at least 24-hours in advance.
- In addition to the individual's response to the notice of possible notification, the regulator also considers the nature and seriousness of the individual's alleged conduct, whether the public is already aware of the concern, and whether other regulatory action is sufficient to protect public health or safety.
- The public statement is typically made on AHPRA's website and on the public register (if the individual is listed there).
- The public statement will typically cite the legal authority for its making, a description of the concerns, "the necessary actions that the public should take to protect themselves from the risk", and "who members of the public can contact if they have any concerns."
- Once published, the statement can be revised or revoked at any time. The individual who is the subject of the statement can request such a change.

In Canada, few regulators have an explicit provision in their enabling legislation specifying when they can or should issue public warnings. Many regulators have confidentiality provisions that enable (but do not mandate) public disclosure of otherwise confidential information in certain circumstances (e.g., once an interim order has been made, upon a referral to discipline, or after a disciplinary finding).

Ontario's *Regulated Health Professions Act, 1991* permits disclosure "to confirm whether the College is investigating a member, if there is a compelling public interest in the disclosure of that information." While this "public interest" criterion is broader than that used in Australia, the amount of information that can be disclosed is much narrower.

Also, many regulators can disclose otherwise confidential information in connection with the administration of their legislation, which could allow some flexibility (e.g., a call for witnesses to come forward for misconduct that typically has few third-party witnesses). Further, it is not unheard of for a regulator to publish notices in local media that an unregistered person is not authorized to practise the profession or use a protected title.

Having said that, some advocate for minimal public disclosure of information about registrants where allegations have not been proved or even fully investigated and screened. Also, it would be unusual for key interested parties (e.g., employers, health facilities) not to become aware of concerns early in the investigation process. Some would say that where there is a concern that a registrant poses an ongoing risk, at least, the authority to make interim orders is adequate to protect the public and the further authority to issue public warnings is unnecessary.

The Australian precedent could still be useful for policy makers considering whether an amendment to enabling regulatory legislation on this point would be appropriate. The Australian guidelines could be of assistance for Canadian regulators developing a considered and consistent approach to permitted public disclosure.

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