



Review Resource Document 24 (2011)

## WELFARE OF ANAESTHETISTS SPECIAL INTEREST GROUP

### MANDATORY REPORTING

#### PREAMBLE

Mandatory reporting requirements apply in New Zealand and nationally in Australia.

The **Australian** national requirements for mandatory reporting of health professionals apply from 1 July 2010. The *Health Practitioner Regulation National Law* makes all health professionals liable to make mandatory reports in relation to the conduct of other health professionals. A significant difference under this new law is that any health professional in any of the 10 professions\* is required to report in relation to any other health professional.

(\*10 health professions regulated under the new legislation: doctors, nurses, dentists, optometrists, osteopaths, pharmacists, physiotherapists, chiropractors, podiatrists and psychologists).

In **New Zealand** the Health Practitioners Competence Assurance Act 2003 has provisions for mandatory reporting; in addition it does contain several discretionary “may report” provisions.

Reporting of notifiable conduct to the Medical Council of New Zealand (MCNZ) is mandatory (see below).

#### NOTIFIABLE CONDUCT

The trigger for reporting is if “notifiable conduct” occurs (see details below).

This is where a registered health practitioner:

- practices while intoxicated by alcohol or drugs;
- engages in sexual misconduct in connection with practice;
- places the public at risk of substantial harm in his or her practice because of impairment;
- places the public at risk of harm in his or her practice in a way that constitutes a significant departure from accepted professional standards.

#### WHEN TO REPORT

A registered health practitioner is required to report another registered health practitioner if the first person forms a reasonable belief, in the course of his or her practice, that notifiable conduct has occurred.

That is, if you are a registered health practitioner, you must report if you believe that another registered health practitioner has behaved in a way that constitutes notifiable conduct.

Under these circumstances you are required to notify the Australian Health Practitioner Regulation Agency (AHPRA) as soon as practicable, or the MCNZ in New Zealand.



There is no set time limit, but clearly reports of notifiable conduct should be made at the earliest practical opportunity, once a reasonable belief has been formed that notifiable conduct has occurred.

In Australia, students are required to register under the new law; AHPRA must be notified to if a student is placing the public at substantial risk of harm because of impairment.

### **WHAT IF I DON'T NOTIFY ?**

It is not an offence or criminal act if a health practitioner fails to make a mandatory report.

However, the failure to make a mandatory report can be referred to the relevant Board or Council for consideration as to whether the failure constitutes misconduct, and the relevant Council or Board would decide what, if any, sanctions would apply.

### **EXCEPTIONS**

General exceptions apply to information which is obtained in the course of actions relating to insurance claims for professional indemnity insurers, if the information is obtained in relation to legal proceedings, or providing assistance, or advice, in legal proceedings. An exemption applies for a health practitioner who is a lawyer, for providing legal assistance.

An exemption applies to registered quality assurance committees or bodies, registered under Australian State or Territory legislation or under Commonwealth legislation. These statutory schemes provide statutory confidentiality for information obtained pursuant to the registered activities. If statutory confidentiality applies, then a mandatory report is not necessary.

A report is not required if a health practitioner knows or reasonably believes that regulatory body has already been notified in relation to the conduct. Thus if another health practitioner or the employer of the person involved has already notified MCNZ or AHPRA, then no further report is required.

### **WHAT IS NOT EXCEPTED**

There is no exception for information which comes to a health practitioner as a treating doctor or treating health professional or for information obtained in the course of a health program for health practitioners (unless the program is registered under the statutory schemes referred to above).

### **EMPLOYERS**

#### **Australia**

If an employer reasonably believes that an employee health practitioner has behaved in a way that constitutes notifiable conduct, a mandatory report to AHPRA must be made.

Many health professionals are not employees of hospitals or aged care facilities, and accordingly the report is only required in respect of health professionals who are employees.

If AHPRA becomes aware that an employer has failed to make a mandatory report, AHPRA is required to report that failure to the responsible State or Commonwealth Minister for consideration and action.



## **New Zealand**

Employers are obliged to report competence issues, and these are excluded from confidentiality arrangements which may be negotiated within employment agreements. Anaesthetic technicians, once registered later in 2011, will also be able to both report and be reported on under the HPCA Act.

## **PRIVATE HOSPITALS**

If a colleague or member of the administrative staff of a private hospital becomes aware that a visiting medical officer (VMO) credentialed at that hospital displays conduct which is notifiable, then the credentialing committee should be notified. If the conduct is confirmed (see RD 13), a report must be made.

## **EDUCATION PROVIDERS**

An education provider is required to notify in relation to its students, if the education provider reasonably believes that the public is at substantial risk of harm arising from impairment of the student.

## **VOLUNTARY NOTIFICATION**

As with existing legislation, members of the public and health professionals can make voluntary notifications if they believe that there has been any misconduct or any cause of concern in relation to a health practitioner.

Voluntary notification can certainly be made for a range of expanded grounds, for example:

- any impairment of a health practitioner;
- conduct of a health practitioner that is of a lesser standard than expected;
- if the health professional is not a fit and proper person;
- if there is any legal contravention.

## **PROTECTION**

Section 237 of the new law in Australia gives protection from civil, criminal or administrative process where a notification is made to AHPRA “in good faith”.

If a notification is made for malicious or vindictive purposes, this protection may be lost.

The protection would prevent any action for defamation, and the protection applies whether the notification to AHPRA is made on a mandatory or voluntary basis, so long as it is made “in good faith”.

## **CAN I BE SUED IF I FAIL TO REPORT?**

In some jurisdictions case law indicates that if a person fails to make a mandatory report, which s/he is required to make, and other people are injured after that time, the injured parties could sue the person who failed to make a mandatory report.



Alternatively the person could be liable under the mandatory reporting laws currently in existence. This issue is not clearly determined, but leaves open the question as to whether a civil claim of this nature could arise.

## GENERAL

There is much more information regarding the new Australian national registration on the AHPRA website <http://www.ahpra.gov.au>

AHPRA is providing advice to assist all health professionals, employers and health bodies in understanding their rights and responsibilities under the new scheme.

In New Zealand, under section 45 of the Health Practitioners Competence Assurance Act 2003 (HPCAA), doctors and doctors' employers are required to advise MCNZ if they have reason to believe that the doctor is unable to perform the functions required due to a mental or physical condition.

**Thanks to Mr Michael Gorton AM for generating this document**

## Welfare of Anaesthetists' Special Interest Group Resource Documents (RDs)

**RD 07 Sexual misconduct**

**RD 13 The Impaired Colleague**

**Medical Council of New Zealand. [www.mcnz.org.nz](http://www.mcnz.org.nz)**

Health Practitioner Regulation National Law Act 2009 Australia.

In s141 this law states that:

A registered health practitioner must notify AHPRA if he or she (the first health practitioner), in the course of practising the first practitioner's profession, he/she forms a reasonable belief that –

- (a) another registered health practitioners(the second health practitioner) has behaved in a way that constitutes notifiable conduct; or
- (b) a student has an impairment that, in the course of the student undertaking clinical training, may place the public at substantial risk of harm.

In s 140 the term “notifiable conduct” is defined.

Notifiable conduct means the practitioner:

- (a) practised the practitioner's profession while intoxicated by alcohol or drugs; or
- (b) engaged in sexual misconduct in connection with the practice of the practitioner's profession; or
- (c) placed the public at risk of substantial harm in the practitioner's practice of the profession because the practitioner has an impairment; or
- (d) placed the public at risk of harm because the practitioner has practiced the profession in a way that constitutes a significant departure from accepted professional standards.

In s 5, impairment is defined

Impairment is defined as meaning a 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..., the person's capacity to practice 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.
  - iii.



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*Promulgated: 2011*

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