



# OPTOMETRISTS AND DISPENSING OPTICIANS BOARD

Te Poari o ngā Kaimātai Whatu me ngā Kaiwahakarato Mōhiti

## NAMING POLICY

Refers to the following key legislation:

- Health Practitioners Competence Assurance Act 2003
- Privacy Act 1993
- Official Information Act 1982
- Defamation Act 1992
- The New Zealand Bill of Rights Act 1990

And refers to the following related information on the Board website:

- Standards of Ethical Conduct
- Standards of Clinical Competence
- Standards of Cultural Competence
- Decisions by the Health Practitioners Disciplinary Tribunal
- Recently suspended practitioners

### **Policy statement**

The Optometrists and Dispensing Opticians Board (the Board) exists to protect public safety. As the regulator it oversees professional standards for both professions. The Board makes sure practitioners meet and maintain professional standards of education, conduct and performance, so that optometrists and dispensing opticians deliver high quality healthcare throughout their careers. The Board will hold optometrists and dispensing opticians to account if their conduct falls short of these standards.

This naming policy will enhance public confidence in optometrists and dispensing opticians by allowing consumers to make an informed choice about the optometrist or dispensing optician they engage with. It allows the Board to publish information about an optometrist or dispensing optician where that optometrist or dispensing optician has fallen short of professional expectations or is otherwise the subject of an order or direction.

The naming policy was developed in accordance with section 157B of the Health Practitioners Competence Assurance Act 2003 (HPCA Act), which states that the purpose of the naming policy is to:

- enhance public confidence in practitioners by providing transparency about the Board's disciplinary procedures and decision-making processes; and
- ensure that practitioners whose conduct has not met expected standards may be named where it is in the public interest to do so; and
- improve the safety and quality of health care.

The primary purpose of naming any practitioner under this policy will be to protect the public. The decision to name will not be done to punish the practitioner.

For additional information on the background to the development of this policy, please see Appendix 3 below, the consultation document issued on the development of this policy.

## **1 Health practitioners for whom the naming policy applies**

a. This naming policy applies to:

- I. Any practitioner registered with the Board; or
- II. Any practitioner who has previously held registration with the Board.

b. In New Zealand, practitioners are registered health practitioners who practise within their scope of practice, as prescribed by the Board under section 11 of the HPCA Act.

## **2 Circumstances in which a practitioner may be named**

a. The Board may publish in any publication the name of a practitioner who is the subject of an order or direction made by the Board under the HPCA Act.

b. Publication of a practitioner's name shall only occur following the completion of any Board process, and not while any investigation or deliberations are ongoing.

c. Notwithstanding section 2b above, the Board may decide to name a practitioner who is the subject of an interim suspension order; or has interim change to or conditions imposed on his or her scope of practice, under sections 38, 39(1), 43, 48 or 69 of the HPCA Act; or where there has been non-compliance with an order or direction made by the Board.

d. The Board will not routinely publish the names and details where practitioners were investigated but are not the subject of any orders or direction, except for:

- I. Practitioners who have been exonerated during any investigation, who may ask the Board to publish their name and the details of that exoneration in order to clear their name.
  - II. Practitioners who are the subject of confusion where their name is the same as or very similar to that of another practitioner or health practitioner named in an order, who may ask the Board to publish their name with clarification to avoid confusion.
- e. This policy does not affect the existing requirement/s for the Board to share information about a practitioner under sections 35, 138 or 156A(2)(a) of the HPCA Act.

In respect of orders or directions made by the Board concerning a practitioner, the following rebuttable presumptions will apply –

- In **health cases**, there is a rebuttable presumption against naming a practitioner.

Given that practitioner personal health information is particularly sensitive, the Board favoured a rebuttable presumption not to name a practitioner with health issues in respect of whom an order or direction had been made. But it also noted each case would be carefully reviewed to balance the privacy of the practitioner and public interest.

- In **competence cases**, there is a rebuttable presumption in favour of naming a practitioner.

The Board considered the protection of public health and safety and the public's 'right to know' warranted a presumption in favour of naming practitioners whose competence had been found wanting. Each case would be carefully considered including where their name would be published.

- In **cases of interim orders**, there is a rebuttable presumption against naming a practitioner.

Interim orders are usually made to protect the public while further information is gathered to verify whether or not a risk is substantive. The Board accordingly agreed to adopt a rebuttable presumption not to name the practitioner.

### **3 General principles that will guide the Board's naming decisions**

- a. In making a decision about the publication of information relating to a practitioner, the Board will maintain a focus on protecting public safety and will apply the relevant principles of Right Touch/Risk Based regulation to its decision. These principles are: -
  - *Consistency* – the Board is satisfied that the decision is consistent with legal requirements and the requirements of this policy.
  - *Transparency* – the Board is satisfied that its process has been transparent, and that its decision complies with its obligations to provide transparency to the public about the health practitioners the Board regulates.
  - *Targeting* – the Board is satisfied that the way in which it proposes to name the practitioner, including the media in which the notice will be published, is appropriately targeted towards the members of the public who may seek healthcare services from the practitioner.
  - *Accountability* – the Board is satisfied that its decision assists it in meeting its responsibility to be accountable to the public, and to the practitioners it regulates.
  - *Proportionality* – the Board is satisfied that its decisions relating to naming the practitioner – including the decision to name, the contents of the notice, and the media in which the notice will be published – are proportionate to the risk identified.
  - *Agility* – the Board is satisfied that it has responded appropriately to the issue, including acting where it believes action is necessary to mitigate risk to the public, as opposed to delaying action until that risk eventuates. The Board has also put systems in place to ensure that it is able to reconsider the matter promptly at any point where new information appears to alter its current position.
- b. When deciding what information is published, the Board must weigh the public interest in making the information available against the consequences for the practitioner of being named, including the likely harm to the practitioner's reputation.
- c. The Board will consider whether to publish to a particular group or to a wider audience, and in doing so will take into account the reasons for publishing the notice. Targeted publication will be preferred over general publication unless the application of this policy or the circumstances suggest otherwise.

#### 4 **Criteria that the Board must apply when making a naming decision**

When assessing whether to publish the name of a practitioner in a notice issued under s157(1) of the HPCA Act, the Board must consider the Privacy Act 1993, natural justice rights and any other relevant matters.

Whether the Board names a practitioner who is subject to any specific order or direction will be something to be determined on a case-by-case basis. Key relevant considerations include:

- The **public interest** in knowing the name of the practitioner. This will include (but will not be limited to):
  - Public safety. Would publication assist in ensuring the safety and quality of health services?
  - Public choice. If a reasonable patient would expect to know about the order or direction made by the Board so that the patient can make an informed choice about whether to receive health services from the practitioner, that will weigh in favour of publishing the name of the practitioner;
- The **private interest** the practitioner has in not being named. This will include (but will not be limited to):
  - The nature of the information that would be published and the impact publication would have on the individual. For example, sensitive health information about the practitioner, like disclosure of which might lead to genuine harm to the practitioner, might be less likely to be disclosed than less sensitive information;
  - The context in which the order or direction is made. For example, an order or direction that involves historical information and relates to a practitioner who is no longer practising might be less likely to need to be published.

The Board will apply the following criteria:

- a. Public safety - ensuring the safety and quality of health care and the competence of practitioners. Non-disclosure in a particular case may run the risk of harm to patients in the future. Disclosure may elicit other complaints or concerns about a practitioner's competence.

- b. Public choice - The right of existing and potential patients to know the disciplinary history of a particular practitioner so as to be able to make an informed choice whether to engage their services in the future.
- c. Accountability - practitioners are accustomed to being held to account for the standard of care or service they provide. They should expect that some information may need to be disclosed if serious accountability or health and safety concerns are raised, including non-compliance with an existing order.
- d. Nature of the concerns - does the concern raise serious safety or competence concerns, does non-disclosure raise a risk of harm to patients in the future? Concerns of a serious nature will raise stronger public interest considerations in favour of disclosure.
- e. Whether the investigation is ongoing - disclosing the details of an allegation during an ongoing investigation may unfairly suggest that there is substance to the allegation.
- f. Action taken in respect of the outcome of an investigation – the public interest in disclosure will be higher, and a practitioner’s legitimate expectation of privacy will be reduced, where a concern has been investigated and found to be substantiated. It will be in the public interest to know the remedial actions or consequences imposed on the practitioner.
- g. Extent to which information is already in the public domain - the privacy interest may be diminished by prior knowledge or public availability of the information. If information about the concern is already in the public domain, this may increase the public interest in disclosure of a summary about the outcome of any investigation. The purpose of such disclosure would be to demonstrate that appropriate action has been taken to investigate the concern and institute any protective measures or remedial action.
- h. Likelihood of harm to the practitioner arising from disclosure - there may be factors that heighten the risk of personal or professional harm arising from disclosure, for example the physical or mental health of the practitioner, or the size of the community in which they practise.
- i. Likelihood of harm to any complainant arising from non-disclosure – there may be factors that heighten the risk of harm to a complainant from not naming a practitioner and/or how a practitioner is named.

## **5 Information the authority may disclose when naming a practitioner**

- a. Where the Board has elected to publish information about a practitioner, it will release a summary of the information with appropriate context.
- b. Publications instigated by the Board may include the name of the practitioner, a short context of the concern and citation of the relevant section of the HPCA Act.
- c. Where the order relates to the health of a practitioner, additional consideration is needed with regards to the impact any disclosure may have on the practitioner.

## **6 Means by which a practitioner may be named**

- a. Publication will be made via posting on the relevant section of the Board's website; and may also be by inclusion in the Board's electronic newsletter or other suitable media.
- b. In addition, the Board may also annotate the practitioner's entry on the Register to include a reference to the order or direction.
- c. Information published on the Board's website will be reviewed periodically, at an interval agreed by the Board at the time the information is first published or as new information comes to hand but not more than two (2) years after publication.
- d. The Board may elect to share the information with other health regulators in New Zealand, or equivalent regulatory bodies overseas.

## **7 Procedures the Board must follow when making a naming decision**

- a. Where the Board proposes to publish information about a practitioner, having considered the factors in section four (4) of this policy, it will be required to make the practitioner aware of this proposal and the proposed content thirty (30) business days in advance of the anticipated publication.
- b. Sending the information in section 7a to the practitioner's last known email address will be sufficient for this purpose.
- c. The advance notice timing in section 7a above provides the practitioner with an opportunity to:
  - I. consider the content and make any submissions to the Board within fifteen (15) working days of receiving the notice<sup>1</sup>; and
  - II. make their employer or any practice partners aware of the publication.
- d. Where the practitioner provides submissions to the Board in accordance with section 7c, the Board must consider those submissions before making a final decision whether or not to make the publication and the content and scope of any publication.

<sup>1</sup> Requests for extensions of time will be considered on a case-by-case basis.

e. Where a publication relates to a specific event or concern, irrespective of whether that clearly identifies a practitioner or complainant, the Board must also provide the intended publication content to that practitioner (and any complainant) in advance of publication.

- I. the practitioner (and any complainant) will be given an opportunity to consider the content and make a submission to the Board within fifteen (15) business days of receiving the notice<sup>1</sup>.

## **Appendices**

Appendix 1: Table of all orders that the Board may make that will trigger consideration of whether to name a practitioner

Appendix 2: Considerations when balancing practitioner's privacy interest against public interest

Date approved by the Board: March 2020

Date of next review: March 2023



**Appendix 1: Table of all orders that the Board may make that will trigger consideration of whether to name a practitioner**

Section of the HPCA Act	Order/Direction
31(4)	Cancel interim practising certificate
38(1)	<p>Where the Authority has reason to believe the practitioner fails to meet the required standard of competence, it may order one or more of the following:</p> <ul style="list-style-type: none"> <li>• Competence programme</li> <li>• Conditions</li> <li>• Examination or assessment</li> <li>• Counselling or assistance.</li> </ul>
39	Interim suspension of practising certificate or conditions pending competence review, where there are reasonable grounds for believing the practitioner poses a risk of serious harm.
43	<p>Where a practitioner does not satisfy the requirements or a competence or recertification programme, the Authority may:</p> <ul style="list-style-type: none"> <li>• Change permitted health services s43(1)(a)(i)</li> <li>• Include conditions s43(1)(a)(ii)</li> <li>• Suspend registration s43(1)(b).</li> </ul>
48(2)	<p>Authority suspects practitioner is unable to perform required functions due to a mental or physical condition:</p> <ul style="list-style-type: none"> <li>• Interim suspension s48(2)(a)</li> <li>• Changing permitted health services s48(2)(b)(i)</li> <li>• Conditions s48(2)(b)(ii).</li> </ul>
48(3)	Extension of s48(2) order – 20 more days
50	<p>Authority is satisfied that the practitioner is unable to perform the required functions due to a mental or physical condition</p> <ul style="list-style-type: none"> <li>• Suspension s50(3)</li> <li>• Conditions s50(4).</li> </ul>
51	<p>Revoking suspension imposed under sections 39, 48, 50, 67A-s51(1)            Revoking conditions imposed under sections 39, 48, 50, 67A – s51(2)            Order to vary conditions imposed under sections 39, 48, 50, 67A, 69A</p>
67A(2)	Upon receipt of notice of conviction, Authority may order:

	<ul style="list-style-type: none"> <li>• Medical examination or treatment ((2)(b)(i))</li> <li>• Psychological or psychiatric examination ((2)(b)(ii))</li> <li>• Course of treatment or therapy for alcohol or drug abuse ((2)(b)(iii)).</li> </ul>
67A(6)(b)	Following 67A orders, Authority may order conditions.
69	Interim action if appropriateness of practitioner's conduct is in doubt: <ul style="list-style-type: none"> <li>• Suspension – s69(2)(a)</li> <li>• Conditions – s69(2)(b).</li> </ul>
69(4)	Revocation of 'with notice' orders for suspension or conditions
69(A)	Without notice interim suspension where there is a conduct or criminal proceeding and Authority believes the practitioner poses a risk of serious harm to the public.
69A(5)	Revoking (without notice) suspension
69A(6)	Authority may include conditions when revoking without notice suspension.
142	Health practitioner requests cancellation – Authority may direct the Registrar to cancel registration.
143	Health practitioner dies – Authority may direct the Registrar to cancel registration.
144(5)	Authority may direct Registrar to cancel an entry in the Register.
146	Authority may direct the Registrar to cancel registration if: <ul style="list-style-type: none"> <li>• Practitioner gave false or misleading information – s146(1)(a)</li> <li>• Practitioner is not entitled to registration – s146(1)(b)</li> </ul> Authority may direct Registrar to notify cancellation in any publications it so directs – s146(3).
147(5)	Authority may review the registration of a practitioner where their qualification is cancelled or suspended or an overseas authority removes, cancels or suspends the practitioner's registration. Authority may suspend or cancel the practitioner's registration s147(5)(b).

## Appendix 2: Considerations when balancing practitioner’s privacy interest against public interest<sup>2</sup>

Table 1: Practitioner’s privacy interest

Extent to which information is already known to the requester, or in the public domain	<ul style="list-style-type: none"> <li>The privacy interest may be diminished by prior knowledge or public availability of information.</li> </ul>
Age and relevance of complaint information	<ul style="list-style-type: none"> <li>The privacy interest may be higher if the matter is historical and of no current relevance. In this context, the disclosure of personal information about the health practitioner may be unfair.</li> </ul>
Whether the matter is substantiated	<ul style="list-style-type: none"> <li>The privacy interest is higher where the matter is unsubstantiated – the allegation made has not been formally upheld (i.e. at initial receipt of the notification, and while enquiries are being made or an investigation is being undertaken).</li> <li>A health practitioner’s legitimate expectation of privacy will be diminished where the matter has been substantiated (e.g. results of competence review, Tribunal decision).</li> </ul>
Whether the investigation is ongoing	<ul style="list-style-type: none"> <li>Health practitioners are likely to have a higher privacy interest while the investigation of a matter is ongoing. Disclosing the existence of a matter during an ongoing investigation may unfairly suggest that there is substance to the matter.</li> </ul>
Likelihood of harm arising from disclosure	<ul style="list-style-type: none"> <li>There may be factors that heighten the risk of personal or professional harm arising from the disclosure of information, for example the physical or mental health of the practitioner, or the size of the community in which they practice.</li> </ul>
Minimising harm by placing information in context	<ul style="list-style-type: none"> <li>It is important to consider whether any potential harm from disclosure can be mitigated by releasing summary information with appropriate context.</li> </ul>

Table 2: Public interest considerations

Public safety	<ul style="list-style-type: none"> <li>Ensuring the safety and quality of health care and the competence of health practitioners. Non-disclosure in a particular case may run the risk of harm to future patients. Disclosure may elicit other complaints or concerns about a practitioner’s conduct or competence.</li> </ul>
The ‘reasonable patient’ test	<ul style="list-style-type: none"> <li>If a reasonable patient would expect to know about the order or direction made, so that the patient can make an informed choice about whether to receive health services from the practitioner that will weigh in favour of publishing the name of the practitioner.</li> </ul>
Accountability of health practitioners and	<ul style="list-style-type: none"> <li>Health practitioners are accustomed to being held to account for the standard of care or service they</li> </ul>

<sup>2</sup> Adapted from the Ombudsman Opinion “Request for health practitioner’s complaint history with HDC” Case number 355627, June 2016, and HDC Naming Policy, 1 July 2008

providers of health services	provide. They should expect that some information about their practice needs to be disclosed if serious accountability or health and safety concerns are raised.
Accountability of agency	<ul style="list-style-type: none"> <li>An agency receiving notifications about health practitioners is accountable for the proper discharge of its responsibilities in the assessment and investigation of those matters and in taking any necessary remedial action.</li> </ul>
Nature of information	<ul style="list-style-type: none"> <li>Does the information raise serious safety or competence concerns? Does non-disclosure raise a risk of harm to future patients? Complaints and concerns of a serious, as opposed to trivial or inconsequential nature, will raise stronger public interest considerations in favour of disclosure.</li> </ul>
Number of notifications	<ul style="list-style-type: none"> <li>A high frequency of notifications, or notifications raising recurrent themes may be indicative of wider competence issues, and justify disclosure of additional information in the public interest.</li> </ul>
Role of practitioner and seniority, degree of responsibility, and ability to impact on members of the public	<ul style="list-style-type: none"> <li>In relation to a DHB psychiatrist, former Ombudsman <b>David McGhee noted ‘the competing public interest is also high, particularly where the employee in question held a position of responsibility in respect of particularly vulnerable members of society.’</b></li> </ul>
Action taken in respect of the matter	<ul style="list-style-type: none"> <li>The public interest in disclosure may be higher where a complaint has been investigated and found to be substantiated.</li> </ul>
Extent to which information about the matter is already in the public domain	<ul style="list-style-type: none"> <li>If information about the matter is already in the public domain, this may increase the public interest in disclosure of a summary about the outcome of the matter. The purpose of such disclosure would be to demonstrate that appropriate action has been taken to investigate and implement any protective measures or remedial action.</li> </ul>
Age of complaint information	<ul style="list-style-type: none"> <li>The public interest in disclosure may be lower if the issues raised are historical and have minimal relevance.</li> </ul>
Risk of harm or risk of serious harm	<ul style="list-style-type: none"> <li>Where the Board has formed a view that a practitioner poses a risk of harm or a risk of serious harm (under the relevant sections of the Act), that might weigh in favour of naming the practitioner.</li> </ul>

Table 3: General public interest considerations against naming

Inhibiting open disclosure	<ul style="list-style-type: none"> <li>Routinely naming individual practitioners may undermine progress in creating a culture of open disclosure to improve the quality of safe care.</li> </ul>
Early resolution may hinder improved practice	<ul style="list-style-type: none"> <li>Practitioners may seek early resolution to complaints to avoid risk of being named. While this may suit the individual complainant, the underlying issues may not be addressed, risking repeat, and an ultimate failure to properly ensure that the public is protected.</li> </ul>

Damage to  
**colleague's**  
reputation

- Registered health practitioners considering notifying of **concerns about a colleague's competence may be less** inclined to do so if they hear this will unfairly impact on the **colleague's reputation.**