

POLICY ON RISK OF HARM

Background

The principal purpose of the Health Practitioners Competence Assurance Act 2003 (HPCA) is to protect public health and safety by ensuring health practitioners are competent and fit to practise. The Optometrists and Dispensing Opticians Board (the Board) is charged with ensuring that optometrists and dispensing opticians (practitioners) are competent and fit to practise when they apply for registration and on an ongoing basis.

Section 35 of HPCA requires the Board to notify certain persons by written notice, if it has reason to believe that the practice of a practitioner may pose a risk of harm to the public. In addition the Board may notify persons who work with the practitioner.

The Board has approved the following policy on the threshold for notification of risk of harm.

Risk of Harm

The Board does not usually release information about an individual practitioner without the permission of the practitioner. However, where it believes that the practitioner's practice may pose a risk of harm to the public the Board, in accordance with s 35 of the HPCA must give the following persons written notice of the circumstances that have given rise to that belief:

- The Accident Compensation Corporation
- The Director-General of Health
- The Health and Disability Commissioner
- The employer of the practitioner.

The Board may also notify any person who works in partnership or in association with the practitioner.

Threshold for notification

Section 35(1) has three key features, as follows:

- 1) The Board is only obliged to notify when it has **reason to believe** that there is a risk of harm.

This requirement has both subjective and objective components. Subjectively, the Board's belief must be a genuine one. Objectively, the Board must have reasonable grounds for its belief. At one extreme, rumour could never provide a foundation for a reasonable belief. At the other extreme, there is no reason to think that it is necessary in all circumstances to carry out a comprehensive investigation before reasonably forming a belief. The question will always be whether the Board has adequate information before it to fairly conclude that there are reasonable grounds for its belief. In the majority of cases, the Board will only be in that position as a result of an investigation such as a competence review/performance assessment.

2) The Board's belief must relate to **a risk of harm**.

The nature of practitioners' occupations is such that merely engaging in practice presents a risk of harm. Plainly the Board cannot be obliged to notify of a risk that arises merely by reason of a practitioner practising. The risk must be one which exists over and above the risk of harm that is a necessary incident of practice.

3) The risk must be **to the public**.

The provision does not apply to risks to the practitioner. Nor is it likely to apply to risks to a practitioner's colleague or business associate. The risk must be to a member of the public, i.e. patients/clients, or potential patients/clients.

Test for risk of harm

Against the background of this analysis of s35(1), the question of whether, in any particular case, the Board is obliged to notify will be tested by asking the following questions:

- Has the Board reached a genuine belief that a practitioner's practice may pose a risk of harm (ie. the risk is not fanciful)? The Board has agreed that risk of harm is indicated by a recognised factor including but not limited to:
 - A pattern of practice over a period of time that suggests the practitioner's practice may not meet the required standards of competence, or
 - A one-off incident that demonstrates a significant departure from accepted standards, or
 - Recognised poor performance where previous Performance Assessment Committee recommendations have failed – this does not exclude notifications of serious concerns where internal review or audit is inaccessible or unavailable to the person with the concern, or
 - Relevant criminal offending, or
 - Professional isolation with apparent declining standards.
- Is that belief reasonable in the sense that it has been arrived at fairly on the basis of adequate information, or is there a need for further investigation?
- Is the Board satisfied that the risk of harm identified is a risk that is more than the acceptable risk that arises by reason simply of the carrying on of practise?
- Is the risk of harm identified in a risk to the public?
- Has the context and circumstances of the practitioner and his/her practice been taken into consideration?

If all of these questions are answered in the affirmative, then the Board is entitled to regard the case as one which meets the threshold in respect of which it is obliged to notify under s 35(1).

Interim suspension and risk of serious harm

The Board has agreed that risk of serious harm may be indicated when:

- a patient may be seriously harmed
- the practitioner may pose a threat to more than one patient and as such the harm is collectively considered 'serious'
- there is sufficient evidence to suggest that alleged criminal offending is of such a nature that the practitioner poses a risk of serious harm to one or more members of the public

Section 39 of the HPCA gives the Board the authority to order interim suspension of a practitioner's annual practising certificate or place conditions in the practitioner's scope of practice while the practitioner is undergoing a performance assessment. This can be ordered where there are reasonable grounds to believe that the practitioner poses a risk of serious harm to the public through practising below the required standard of competence.

Where the Board proposes to make such an order, the practitioner will be informed of the Board's proposal, and given an opportunity to make written or oral submissions on the matter before a final decision is made.

Approved by the Board February 2009

Date reviewed: May 2017

Date to be reviewed: May 2020