Kia ora koutou,

Thank you for providing your Naming Policy for consultation. The Commissioner has reviewed each naming policy developed according to the Health Practitioners Competence Assurance Act and is providing feedback generally on all policies as there is significant overlap in the way in which each policy has been prepared.

The naming policies are directed at the purpose set out by the HPCAA. They:

- set out the purpose of the policy;
- refer to public safety, public choice and accountability;
- state that naming will not be made for punitive purposes;
- refer to upholding principles of natural justice including a right of reply for practitioners;
- refer to the individual circumstances of the case and the nature of the concerns;
- refer to weighing the privacy interest(s) against the public interest in naming.

Our specific feedback regarding inclusion of certain points is as follows.

1) Policies should distinguish between decisions relating to competence orders under sections 38 and 43 (competence reviews and competence/recertification programmes), and decisions relating to interventions where there are concerns about a practitioner's health/fitness to practice.

   The policy should state that in health cases (i.e. interventions where there are concerns about a practitioner's health) there is a rebuttable presumption against naming. This means the responsible authority would approach those cases from the starting point that the practitioner should not be named unless there are specific reasons to do so. Conversely, in competence cases, there would be a rebuttable presumption in favour of naming – i.e. that the practitioner should be named unless there are good reasons not to do so. This distinction is appropriate because of the sensitive personal information at issue when the review relates to the practitioner's health or fitness to practice. It will ensure that a practitioner's privacy is appropriately protected when naming would disclose this sensitive health information.

2) Policies should include an Appendix setting out considerations to take into account when weighing the privacy interest(s) against the public interest. This Appendix should guide the authority through the various factors to consider. The policy should also specify the decision that should be made if the privacy interest and public interest holds equal weight.

3) Policies should refer to avoiding publishing anything that discloses information about another person (such as a complainant, colleague or family member) or whose information could reasonably be ascertained from the information published, along with avoiding publishing anything that could breach a patient's privacy. Authorities may also like to consider whether their policies should include asking patients about their view on a practitioner being named, as some patients may prefer to 'go public' even where that will disclose their own health information.

4) Policies should require the responsible authority to consider whether publication of a naming order on a website should be removed after a certain date or at the end of a set period. This is a useful consideration given IPP 9 retention requirements and the issue of old orders still being available long after a practitioner has improved their performance, particularly given the ease of search engine indexing. Authorities should also consider whether naming orders should be indexed online.

5) It is important to reach the appropriate balance between providing an authority with discretion, and with setting out each factor to be considered. This is particularly given the balancing requirements between privacy and public interest. Policies which clearly set out each consideration/factor to be taken into account, rather than providing the authority with unfettered discretion, are more useful in guiding the authority through their decision-making. However policies also need to avoid being overly direct or prescriptive if that has the effect of reducing a statutory discretion. The policy must provide for the authority to take the facts of each case into account in making their determination.

6) The naming is expressly authorised by section 157 of the HPCAA, which means the policies do not need to engage analysis about the IPP 11 exceptions – i.e., it is not necessary to rely on the "serious threat" exception to support the naming policy. However, IPP 11 may still appropriately inform the responsible authority's decision to disclose information in other circumstances outside the naming policy.

The Commissioner is happy for you to share this feedback with other responsible authorities who are still drafting their policy.

I am also happy to follow up on any questions you may have on the above, please don't hesitate to email me.

Nga mihi nui,
Vee

Vee Blackwood | (they/them/she/her)

Policy Adviser | Kaitohutohu, Policy and Operations

Office of the Privacy Commissioner Te Mana Mātāpono Matatapu
PO Box 10094 | Wellington 6143 | New Zealand
Level 8 | 109-111 Featherston St | Wellington 6011