

Legislative Assembly for the Australian Capital Territory

Health Professionals Regulations 2004

Explanatory Statement

Circulated by authority of

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## Health Professionals Regulations 2004

This regulation has been developed to provide process and machinery provisions that support the operation of the *Health Professions Act 2004*. The regulations are an important source of instruction in relation to how powers and bodies established in the principle Act are to be exercised or structured. Such matters have been set in regulation with the dual objectives of having an Act that is not overwhelmed by instructional detail and also to provide a legislative framework that is readily amenable to process review.

**CHAPTER 1. INTRODUCTORY** – This chapter provides for the naming of the regulation as the *Health Professionals Regulations 2004*. Chapter 1 also provides for the commencement of this regulation on the day that section 13 (Main Objects) of the Act commences.

This chapter further clarifies that the Dictionary at the end of the regulations defines certain words and expressions that are used throughout this regulation.

**CHAPTER 2. HEALTH PROFESSION BOARDS** – This Chapter sets out matters associated with the establishment and operation of health profession boards.

**Part 2.1 Establishment of Health profession Boards** – The regulations provide that a health profession board is established when it is referred to in Schedule 1 of this regulation. This part further provides that matters that are specific to particular health profession boards will be set out in separate schedules to this regulation. For example Schedule 2 of the regulations sets out matters specific to medical practitioners. *(Note: It is intended to seek the approval of separate schedules relating to all other approved health professions during the commencement period of the legislation)* **Regulation 4(3)** requires that if a schedule requires or allows something to be approved by a health profession board, the approval must be in writing and is a notifiable instrument.

It is important to note that this part should be read in conjunction with Section 138 of the *Health Professions Act 2004*. Section 138 provides that health professions that were registered under a former Act will continue to be regulated.

Part 2.1 of these regulations should also be read in parallel with part 4 of the Act – ‘Regulation of health professions’, and part 5 of the Act – ‘Health profession Boards’.

**Part 2.2 Health profession board members** – The regulations provide for the membership of health profession boards, Ministerial appointment of the board president, the election of a deputy board president, the appointment and election of board members and arrangements for the appointment of community members.

**Regulation 9** requires that at least half of the members of individual health profession boards (other than the board president and the community representative) are to be appointed by the Minister. Elected health board members, as indicated in the individual

health profession Schedules to these regulations, must be elected under part 2.3 (Elections). An appointment term of no longer than 4 years is provided for under **Regulation 10**. The appointment, by the Minister, of a number of community representatives (as indicated by the health profession's Schedule) is provided under this regulation. **Regulation 11** requires the Minister to consult with the relevant health profession board before appointing someone other than a community representative. **Regulation 12** allows the Minister to appoint a community representative only if the person is on the community representative list for the board.

**Regulations 14 and 15** provide for the removal of board members in certain circumstances and outlines the procedures required of the board president proposing the removal of the board member.

Arrangements for the discretionary payment of board members and other board assistance are provided in **Regulations 17 and 18**. Health profession boards may under **Regulation 19** apply to the Minister for approval of an activity (relevant to the Act), that may result in the board incurring an extraordinary liability, or for financial assistance if the board believes on reasonable grounds that it may incur extraordinary expenses in relation to the legal fees or damages because of the administration of the Act.

**Regulation 20** allows a health board to engage staff to help it exercise its functions and also requires a health profession board to appoint an executive officer who will undertake the functions outlined in **Regulation 21**. A health board is authorised to delegate functions to certain persons or bodies under **Regulation 22**.

**Part 2.3 Elections** – This part provides for the election of board members where a board is composed of appointed and elected members. Part 2.3 draws from and replaces requirements that existed under the *Health Professions Boards (Elections) Act 1980*. As with the *Health Professions Boards (Elections) Act 1980* this part is prescriptive in terms of all election requirements, with the addition of requirements in respect to casual vacancies, however does defer on certain matters of detail to the *Electoral Act 1992*.

#### **Division 2.3.1 General**

**Regulation 23** defines the terms used in this part of the Act.

**Regulation 24** provides in detail the requirements to be satisfied by the board president for election dates for a health profession. **Regulation 25** provides for the Minister to undertake the things required of the health profession board in Regulation 24 in certain circumstances when there is no board president.

As soon as practicable after the election start day for the election of a health profession the board president is required to provide, to the electoral commissioner, a list which complies with the requirements stated in **Regulation 26**. The electoral commissioner is required to notify registered health professionals on this list, of information relevant to

the election as outlined in **Regulation 27**. The eligibility criteria for a member of a health profession board are prescribed in **Regulation 28** and require the person to be a registered health professional in the health profession and to have been continuously registered, or continuously registered under a corresponding law of a local jurisdiction and this Act, for at least three years before the election start day. **Regulations 29 to 31** describe nomination procedures for the election of candidates as members of health profession boards and include the requirements for a candidate's withdrawal. **Regulation 32** provides for the application of the Electoral Act, section 110 (Rejection of nominations) to an election under this part.

Direction is provided under **Regulations 34 to 36** in relation to the actions required of the electoral commissioner in circumstances where the numbers of candidates is less than, equal to, or greater than the number of positions available. **Regulation 37** restricts voting eligibility to a person who is on the election start day, registered in the health profession, and voting is limited to one vote per elector under **Regulation 38**. Detail relating to ballot papers including: the positions of candidates on the ballot paper; the distribution and replacement of ballot papers; and the process relating to the placement of ballot papers in ballot paper envelopes, is provided in **Regulations 39 to 43**.

**Regulations 44** provides for the application of the Electoral Act, part 12, (The Scrutiny) to an election under this Act in specified circumstances. **Regulations 45 and 46** allow a candidate for an election for a health profession board to appoint a scrutineer and prescribes certain conduct of scrutineers. Candidates are prohibited from taking any part in the conduct of an election under **Regulation 47**.

The electoral commissioner is required under **Regulation 48** to, as soon as practicable after the result of an election for the health profession has been decided, to declare the successful candidate elected and to tell the president of the health profession board in writing about the election of each person elected. Such a declaration is a notifiable instrument. **Regulation 49** provides that the term for an elected member begins on the day the person is declared elected and is for 4 years. **Regulation 50** provides the circumstances for the destruction of election material by the electoral commissioner. **Regulation 52** authorises the electoral commissioner to approve forms for this part of the Act and requires that an approved form is a notifiable instrument.

**Division 2.3.2 Casual and temporary vacancies in elected positions**-provides for circumstances where a casual or temporary vacancy occurs in a position on a health profession board (to which a member is elected rather than appointed) is to be filled, and details the processes surrounding the filling of such vacancies.

**Regulation 53** provides the definitions for this division.

To ensure elected board member positions do not remain unfilled for long periods **Regulation 54** requires the president of the health profession board to inform the electoral commissioner in writing of the casual vacancy in cases where the former's board member's term had more than a year to run. **Regulation 56** requires that a person may

apply to be a candidate for a position on a health profession board for which a casual vacancy has happened if the person was a candidate in the last election for the position; and was not elected at that election; and is an eligible person. **Regulation 58** specifies the actions required of the electoral commissioner in cases where there is only 1 candidate for a casual vacancy, and in cases where there is more than 1 candidate.

**Regulation 59** allows the Minister to nominate a person to be a member of the board in cases where the formerly elected board member's term had less than a year to run; or the electoral commissioner tells the president (under Regulation 55(4) that it is not practicable to fill the vacancy; or the commissioner tells the president (under Regulation 57(2) that there are no candidates for the vacancy; and when the health profession board is satisfied that it is not practicable for the board to exercise its functions without filling the vacancy. If the Minister nominates an eligible person under this regulation, the Minister must tell the electoral commissioner who must then declare the person elected.

**Regulation 60** specifies the term of a board member elected under Division 2.3.2.

**Regulation 61** allows a health profession board to ask the Minister to appoint a member temporarily in circumstances where a health professional board is unable to exercise its function due to a temporary vacancy.

**Division 2.3.3 Disputed elections**-provides for the Supreme Court (known as the Court of Disputed Health Elections) to hear and decide on matters concerning the validity of elections and to matters relating to the eligibility of elected members or membership vacancies. **Regulation 64** provides for the Supreme Court to have the same powers when exercising jurisdiction under this part as it has when exercising its original jurisdiction. Under **Regulation 65** the Court of Disputed Health Elections decision is final and conclusive and not subject to appeal.

**Regulation 66** establishes the circumstances when the validity of an election is to be taken to be in dispute. Only a candidate in the election, an elector for the election, and the electoral commissioner are entitled, under **Regulation 67**, to dispute the validity of an election for a health profession. The necessary administrative requirements for an application (or withdrawal of an application) disputing the validity of an election are specified in **Regulations 68 to 72**. **Regulation 74** specifies the circumstances when a person ceases to be a respondent to a disputed election application and the actions required of the person (or his or her personal representative). Under **Regulation 77** the Court of Disputed Health Elections must hear and decide a disputed election application and take actions specified in this regulation including the making of other orders in relation to the disputed election application that the court considers appropriate.

**Regulation 78** authorises the Court of Disputed Health Elections to make a declaration under Regulation 77 (1) (a) or (b) on the grounds of an illegal practice in relation to the election if it is satisfied that the result of the election was, or was likely to have been, affected by the illegal practice. If the Court of Disputed Health Elections finds an illegal practice in relation to an election, the registrar is required to report the finding to the electoral commissioner, the director of public prosecutions, and the chairperson of the health profession board to which the election is related. **Regulation 79** requires the Court

of Disputed Health Elections to declare the election of a person void if the Court finds that the person declared elected committed, or attempted to commit, bribery or undue influence in relation to an election. The Court is authorised under **Regulation 81** to make enquiries it considers appropriate in deciding a disputed election application. Areas of regard and disregard by the Court of Disputed Health Elections, including the inspection of electoral papers, are specified in **Regulations 82 to 84**.

The filing of a dispute election application does not prevent the Electoral Commissioner or staff from having access to certain documents to exercise a function under these regulations, unless the Court of Disputed Health Elections otherwise orders (**Regulation 85**). The serving of copies of declarations made by the Court of Disputed Health Elections and the effect of court declarations are specified in **Regulations 86 and 87**.

Under **Regulation 89** a party in a proceeding is entitled to be represented by only one (1) lawyer appearing as counsel. **Regulation 90** authorises the Court of Disputed Health Elections to order the Territory to pay some or all of the costs of the proceeding, even if the Territory is not a party to a proceeding.

**Division 2.3.4 Electoral Offences**—This section contains offence provisions in relation to Part 2.3 (Elections) of these Regulations. All of the offences are offences of strict liability in accordance with current legal policy for regulatory offences with small or moderate penalties. This means that conduct alone is sufficient to make the defendant culpable. However, under the Criminal Code, all strict liability offences have a specific defence of mistake of fact. The penalties prescribed within this division have been devised to act as deterrent for the offences in the context of this legislation.

**Under Regulation 91** a health professional is prohibited from voting more than once at the same election. **Regulation 92** states the circumstances that constitute interference with voting, and allows an elector assistance in cases where they would otherwise be unable to vote. An assistant is defined in this regulation as being a nominee of the elector, or if there is not a nominee, then an authorised witness. **Regulations 93 and 94** stipulate offences in relation to completed ballot papers. An officer commits an offence under **Regulation 95** if the officer does anything to influence someone else's vote, and under **Regulation 96** a person must not, by violence or intimidation, hinder or interfere with the free exercise of a function under these regulations. **Regulation 97** specifies the circumstances which constitute voting fraud.

**Part 2.4 Health profession board meetings** – Part 2.4 provides procedural guidance in relation to board meetings.

**Regulation 98** states when health profession board meetings may be held and, under **Regulation 99**, that board meetings are to be open to the public unless the board decides otherwise. **Regulation 100** allows the Minister to refer, in writing, a matter to the health profession board for consideration if the Minister considers the matter involves the protection of the public or of the public interest. **Regulation 102** requires the board president to preside over a health profession board meeting, and in the president's

absence, the deputy president. In circumstances where neither board president nor deputy is present at a health profession board meeting attended by a quorum of board members, the members present may elect a member to preside at the meeting. A board quorum for a health profession board meeting is stated in **Regulation 103** as being a majority of the board members (including any positions that are vacant). Details relating to voting at board meetings and the circumstances when a decision on a question arising at a meeting must be postponed are detailed in **Regulation 104**.

Each health profession board is required under **Regulation 105** to keep a record of what happened at its meetings. **Regulation 107** requires a board member to disclose any personal interest, or a direct or indirect financial interest, in a matter being considered by the health profession board and provides the process to be followed upon disclosure.

**Part 2.5 Health Profession Board functions** – The regulations provide that, in an addition to the functions of a board provided for under part 5 of the *Health Professionals Act 2004*, the health profession board has certain other functions and obligations. **Regulation 108** requires the board to form ties with relevant entities that further the promotion and achievement of suitability to practise standards and professional development standards for the health profession.

**Regulation 109** provides for the Minister, in assessing a health board's performance, to consider whether the standards approved by the board (under Regulation 134) have met public benefit guidelines. In assessing a health boards performance the Minister may also consider under **Regulation 110** how a board has managed applications and reports under the Act and, under **Regulation 111**, whether the board has sent renewal notices for registration in accordance with regulation 126 (Renewal notice for registration).

### **Chapter 3 REGISTRATION OF HEALTH PROFESSIONALS**

**Part 3.1 Application for registration** – This part details the requirements for registration as a health professional, the powers available to a health professional board in relation to an application for registration, the requirements to be met for registration, the length of registration and the issue of practising certificates. This part also provides for the appropriate application of the *Mutual Recognition Act 1992 (Cwlth)* and the *Trans-Tasman Mutual Recognition Act 1977 (Cwlth)* in respect to the recognition of registration by local jurisdictions.

Of particular note within this part –

**Regulation 112. Application for registration** – establishes the informational requirements that are to be met in an application for registration.

**Regulation 113. Registration of health professionals** - determines that on receipt of an application for registration a board must either –

1. Register a person unconditionally; or
2. register the person conditionally; or

3. refuse to register the person.

**Regulation 114. Suitability to practise requirements** - provides that a health professional board is to consider a person to be suitable to practise in a profession or a specialty area of the profession if –

1. the person has the qualifications for the health profession, or specialty area, set out in the schedule for the profession; and
2. the person has successfully completed training (which may include an internship) set out in the schedule for the profession or specialty area; and
3. the person is generally competent.

This section should also be read in conjunction with clause 37 (Who may be registered as a health professional) of the *Health Professionals Act 2004*.

**Regulation 115. General competence to practise** – provides that a health profession board, in deciding if a health professional is generally competent, must consider

1. whether the person is mentally and physically health enough to practice;
2. whether the person has an addiction to alcohol or another drug;
3. whether the person has been convicted, or found guilty, in the ACT or a local jurisdiction of an offence that indicates that the person may not be competent to practise the profession;
4. whether the person’s practice experience is recent enough to allow the person to practise the profession adequately, taking into account the requirements included in the schedule that relates to the particular profession.

The regulations further provide that the health board may also consider other relevant matters that may have a bearing on a person’s competence in relation to a health profession.

**Regulation 116 - Conditional registration** - Where a board decides not to register a person unconditionally it may register a person conditionally if satisfied that conditional registration is in the public interest and the person will not endanger public safety. Clause 37 of the Act provides for the award of conditional registration. **Regulation 117** establishes the circumstances when conditional registration is in the public interest however the regulation does not limit when it is in the public interest to conditionally register a person.

**Regulation 118 - Specialty area registration** –provides that a board may prescribe requirements for admission within a specialty area of the health profession. Such requirements are to be detailed in the schedule to the regulations that relates to the profession. A person may only practise in the specialist area if the person meets the requirements and is registered to practise in that specialty.

**Regulation 119 - Powers of health profession boards to require further information-** provides that a health professional board may, before making a decision on an application for registration, ask the person for additional information or ask (in writing) for the person to appear before the board to give information concerning their entitlement to registration. If the person does not provide the information requested by the board the board may refuse to consider the application.

**Regulation 120 - Length of registration** –provides that registration as a health professional is to be granted for a period of not more than one year.

**Regulation 121 - Practising certificate** –provides that if a health profession board registers someone as a health professional they must give the person a practising certificate. In circumstances where conditional registration has been granted, the practising certificate must state that the registration is conditional and that the conditions on registration may be obtained from the health profession board unless the board decides otherwise under Regulation 154 (3) (Access to Registers).

**Regulation 122 -Replacement of practising certificates-** provides direction in circumstances where a person’s practising certificate is damaged, lost, stolen or destroyed.

**Regulation 123 - Return of practising certificate-** provides for the return of a health professional’s practising certificate in circumstances that are prescribed in this particular regulation.

**Part 3.2 End of registration and renewal** – Part 3.2 provides for circumstances when the registration of a health professional ends, the process for renewal of registration and the circumstances where late payment of registration may be granted. Of particular note is **Regulation 128** which allows the health profession board to renew the health professional’s registration retrospectively in circumstances where the person’s registration has ended without being renewed and the health profession does not pay the fee for registration renewal within two (2) weeks after the registration has expired.

**Part 3.3 Maintaining competence and continuing professional development** – Part 3.3 establishes the responsibilities of the health professional and health profession boards in maintaining competence and continuing professional development.

**Regulation 129** provides that it is a health professional’s responsibility to ensure that he or she remains suitable to practise the profession for which he or she is registered. Under **Regulation 130** the health profession board is provided with the role of establishing (or facilitating the establishment of), programs to support, promote and assess health professionals’ general and professional competence.

**Regulation 131 - Standards for the maintenance of competence** –provides that a health profession board, in consultation with professional representative bodies, is

required to develop or endorse written standards about the actions a registered health professional needs to take to maintain professional competence and continue professional development. The health profession board is required to ensure, as far as practicable, that the standards developed or endorsed are consistent with any standards developed by professional representative bodies for the particular profession. A standard, or its endorsement, is a notifiable instrument. Sub regulation (6) of this regulation describes what the standards must include. The standards may provide that membership of a named organisation (for example membership of a professional association) or participation in a named course or program is sufficient evidence of maintenance of competence to practice and professional development.

It is important to read this section in association with clause 23 of the *Health Professionals Act 2004*. Satisfaction of a standard for maintaining competence and continuing professional development may be considered in assessing a person's suitability to be unconditionally registered in a health profession.

**Regulation 132 - Use of information about continuing competence** –provides that a health profession board may use information about a health professional's continuing competence or professional development in a number of ways to protect public safety or to promote the public interest. It should be noted that a board may use information gained under the authority of this part in an assessment of a person's suitability to practise. Board may also use information that it obtains under this part to support a report about a health professional

## **CHAPTER 4 REQUIRED STANDARD OF PRACTICE**

The purpose of this Chapter is to permit a health profession board to decide what behaviour does or does not meet the required standard of practice in relation to relevant health professionals. This Part should be read in conjunction with clause 18 of the *Health Professionals Act 2004* wherein the term *required standard of practice* is defined and provision is made for the regulations to prescribe what behaviour does or does not meet the required standard of practice. A required standard of practice if breached means that a health professional is not competent to practise.

### **Part 4.1 Required Standard of Practice generally**

**Regulation 134 - Standard statements** –provides that a health profession board may develop and or approve standards statements that make up the required standard of practice for the health profession it regulates. Standards developed by the board or another entity must be approved in writing by the board. An approval is a notifiable instrument.

**Regulation 135 -Pattern of practice or particular acts-** provides that in deciding whether or not a registered health professional meets the required standard of practice a health professional's act, acts, or pattern of practice may be considered.

**Regulation 136 - Endangering public** –provides guidance to an assessment as to whether a health professional has breached a required standard of practice. An assessment should consider if the act, acts, or pattern of practice of a health professional endangered public health or safety.

**Regulation 137 - Lack of competence to practise** – provides that a health professional breaches the required standard of practice if the health professional engages in a standard of practice that demonstrates a lack of competence to practise, knowledge, skill, judgement or care by the health professional.

**Part 4.2 Specific breaches of the required standard of practice** – This part prescribes a minimum set of required standards of practice that are to apply to all health professionals that are registered under the *Health Professions Act 2004*. Under **Regulation 138** if a health professional breaches this part, the health professional breaches the required standard of practice and is not competent to practice unless the health professional board decides otherwise. Under **Regulation 139** a registered health professional must not breach a standards statement that applies to the professional.

**Regulation 140** requires that a health professional must tell their health profession board if the health professional is charged with committing an offence. Sub regulation (2) of this regulation requires that, as soon as practicable after the day the health professional is charged (but in any case within 7 days after that day), that the charge be identified sufficiently to allow the board to decide whether the charge indicates that the health professional may be contravening the Act.

Other specific breaches of the required standard of practice under this part relate to-

1. breach of relevant legislative requirements for infection control or reporting of notifiable disease (**Regulation 141**);
2. practising while under the influence of a drug or dependent on a drug that affects the health professionals ability to practice or professional performance (**Regulation 142**);
3. giving a drug of dependence or a prohibited substance to a drug addicted person where this action is not part of a treatment plan for the person (**Regulation 143**);
4. inappropriate behaviour involving someone who is or was a user of a health service provided by the health professional (**Regulation 144**);
5. failure to report another registered health professional in cases where a registered health professional believes on reasonable grounds that another registered health professional has or is contravening a required standard of practice or a suitability to practise requirement (and that the contravention does not relate to an administrative matter) and that the contravention has, or has had, a substantial affect on a member of the public (**Regulation 145**);
6. failure to maintain adequate clinical records or changing a clinical record to deceive someone (**Regulation 146**);
7. signing a certificate that misrepresents a fact (**Regulation 147**);

8. allowing someone else (an assistant) to treat a user of a health service, or perform a procedure on a health service user where the procedure requires professional discretion or skill (**Regulation 148**);
9. advertising a health service in a way that is misleading (**Regulation 149**); and
10. engaging in behaviour that contravenes another law that reflects on the ability or commitment of the individual to provide an adequate standard of care for patients (**Regulation 150**). Without limiting this type of behaviour, a health professional is considered to have engaged in such behaviour if:
  - a) while registered they have been convicted, or found guilty, of an offence punishable by imprisonment for 6 months or longer and the behaviour on which the conviction or finding of guilt is based reflects adversely on their suitability to practise; or
  - b) convicted or found guilty, of an offence against the *Health Insurance Act 1973* (Cwlth) committed while registered; or
  - c) the health professional breaches the health rights and responsibilities code while registered (*see ACT Community & Health Services Complaints Act 1993-Part 6*)

## CHAPTER 5 THE REGISTER

This chapter provides for the keeping of a register or registers by a health professional board in relation to the health professionals that the health profession boards regulates. Under **Regulation 151** a health profession board must keep a register and ensure that the information in the register is as accurate and current as practicable. **Regulation 152** describes what information the register is to contain and, under **Regulation 153**, requires that the information in the register is to be accessible and extractable. **Regulation 154** requires that the executive officer of a health profession board is responsible for keeping the register on behalf of the board. **Regulation 155** stipulates the access requirements to registers. Requests for changes of details in the register and how changes can be sought are provided for in **Regulation 156**.

### SCHEDULES

#### SCHEDULE 1 REGULATED PROFESSIONS

Schedule 1 provides for the listing of health profession boards that are established under regulation 4. Column 3 and column 4 of Schedule 1 identifies the profession specific schedule that relates to a particular health board.

#### SCHEDULE 2 MEDICAL PRACTITIONERS

Schedule 2 is the schedule referred to in Schedule 1 and regulation 4 relating to the Medical Practitioners Health Profession Board. The Schedule (incomplete) prescribes the makeup of the membership of the Medical Board for the purposes of election processes prior to the commencement of the Medical Schedule.