

OSPG Guidance: Duty to Report and Reprisal Protection

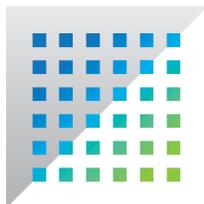
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Version Control History

Version #	Date (YYY-MM-DD)	Modification	Approved by
1.0	2021-02-05	Initial version	Paul Craven, Superintendent
1.1	2021-03-29	Updated to provide guidance to regulatory bodies in referring reports to other regulatory bodies	Paul Craven, Superintendent
1.2	2022-07-14	Updated to include information about timing considerations for s.57 and s.58	Rebecca Freedman, Director



OSPG Guidance: Duty to Report and Reprisal Protection

Purpose:

This guidance document provides a common understanding for regulatory bodies of the s.58 Duty to Report, how it relates to the s.57 ethical responsibility to report, and how regulatory bodies and OSPG will work with other authorities to strengthen the process to refer complaints and coordinate investigations where applicable. The guidance also provides clarity on the role of regulatory bodies and of OSPG to respond to reprisal reports.

Context and Intent:

Ethical responsibility to report: Section 57(2)(i) of the *Professional Governance Act* (PGA) requires regulatory bodies to set an ethical responsibility, through their codes of ethics, for their registrants to report to the regulatory body or any other appropriate authority if they have reasonable and probable grounds to believe that the practice of another registrant or other person, including firms and employers, might pose a risk of significant harm to the environment or to the health or safety of the public or a group of people. A regulatory body may also extend or clarify a registrants' ethical responsibility to report any hazardous, illegal, or unethical professional practice, including disclosure of legal proceedings, findings or records respecting oneself.

This ethical responsibility is not new – though it is now standardized across regulatory bodies. The intent is for professionals to understand that one of their duties is to look out for the public interest, not just in their own work, but in their observation of the work of others.

Statutory Duty to Report: Section 58 of the PGA places a statutory duty on a registrant to report to a regulatory body if they have reasonable and probable grounds to believe that the practice of an identified registrant (from any regulatory body) might pose a risk of significant harm to the environment or to the health or safety of the public or a group of people. The duty extends to employers and partners who terminate a registrant's employment, revoke, or suspend all or part of a registrant's privileges, or dissolve a partnership of a registrant following reasonable and probable grounds to believe that the registrant is engaged in the regulated practice in a manner that may pose a risk of significant harm to the environment or to the health or safety of the public or a group of people.

The intent behind the creation of the statutory duty is to overcome barriers to professionals reporting (these include a reluctance to report on peers and fear of reprisals, no clear penalties for failing to report, and a lack of confidence that their reporting would lead to the regulatory body addressing the concern). The statutory duty has available penalties for not reporting and corresponding reprisal protection in s.103.

Standard for reporting: The language about risk of significant harm to the environment or the health and safety of the public sets a high standard for reporting. It is meant to increase the number of



instances of serious concerns about competence or unprofessional and unethical conduct coming to the attention of the regulatory bodies, while not requiring reporting for lower-level misconduct, which is addressed through the s.57 ethical responsibility to report.

Timing Considerations: Both the ethical responsibility to report in s.57 and the statutory duty to report in s.58 apply to the past behaviour of registrants and the behaviour of registrants that may result in a risk of significant harm arising in the future. Past behaviour is included because an individual may not become aware of behaviour that would trigger one or both of these requirements until after the behaviour has occurred. Behaviour that may result in a risk of significant harm arising in the future is included so that such behaviour can be identified and reported before harm occurs.

The statutory duty to report only applies to situations that occurred after the PGA came into effect in February 2021. The ethical responsibility to report applies to the behaviour of registrants prior to February 2021; it was required by the statutes that regulated the professions before the PGA came into effect. The specifics of the situation and legislation in effect at the time when the behaviour occurred will help regulatory bodies determine how best to respond to any complaints triggered by s.57 or s.58.

Reprisal Protection: Reprisal protection in the PGA is broad and applies beyond s.58 to complaints or giving evidence or otherwise assisting in a complaint or prosecution. The PGA lays out clear actions that can be taken by regulatory bodies and by OSPG to address allegations of reprisals – these are discussed in more detail below.

Standards of Good Regulation

The OSPG Standards of Good Regulation set out standards and criteria that will be considered when assessing regulatory body performance over time. Standard 6 below reflects OSPG expectations regarding the duty to report:

6. The regulatory body assesses and mitigates risks to the environment or to the health and safety of the public in respect of its registrants.

Please refer to the Standards of Good Regulation document for further information about this standard.

Background

This guidance was developed collaboratively and iteratively following discussions at the April 2020, August 2020, and September 2020 regulatory body meetings and at targeted meetings with regulatory bodies, investigation teams within government, and the Professional Governance Advisory Committee.

Registrants are responsible for keeping current on their own regulatory body's policy and expectations in respect of the ethical duty to report under section 57.

Policy Direction

Reporting an Identified Registrant

While the reporting trigger requires an assessment about whether a registrant's practice might pose a risk of significant harm to the environment or to the health and safety of the public or a group of people,



there are likely scenarios which would typically trigger the s.58 reporting duty of registrants (and employers/partners), as laid out below. One caveat is that registrants should be able to reasonably identify unethical behaviour of a registrant, regardless of profession or area of expertise, but may only be able to identify incompetent behaviour of a registrant with similar areas of practice and expertise.

- Misrepresented credentials or the areas of practice a registrant is competent to practice in
- Conflicts of interest (actual or perceived) where appropriate steps have not been taken to address the conflict
- Incompetence or technical errors observed (where potential impact requires urgent attention or where registrant refuses to address the errors)
- Unethical behaviour – e.g., removal of another consultant’s signed report or any tampering with documents

This list is not exclusive - additional scenarios may be added over time.

For clarity, the s.58 duty is NOT meant to require registrants to raise concerns to regulatory bodies about risk of significant harm arising from government policies or authorization decisions a registrant may be operating under. There are other mechanisms for registrants and others to bring these types of concerns to the authority having jurisdiction. Educating registrants and employers/partners on the expected reporting triggers, having a plan and process in place to refer complaints that are outside of the regulatory bodies’ jurisdiction, and tracking the number of complaints that are outside this jurisdiction are important actions that regulatory bodies can take to address concerns that the s.58 reporting duty is going to result in an undue amount or inappropriate types of complaints.

OSPG and Regulatory Body Roles for Duty to Report and Reprisal Protection

A failure to report the risk of harm posed by a registrant’s practice would likely come to light during a regulatory body complaints investigation (e.g., discovering that the registrant’s behaviours being investigated were known by other registrants and not reported), or a complaint made to OSPG about registrants not fulfilling this duty. The procedures followed, sanctions available and roles of regulatory bodies and OSPG will vary dependent on whether a registrant or a non-registrant (may be an employer/partner) is involved. Refer to OSPG Guidance: Overview of OSPG Audits, Investigations, and Performance Reviews for further clarification.

Although there are sanctions available for use when the duty to report provision is not met, it is OSPG’s expectation to promote compliance with the reporting provision through guidance, education and warning letters and only resort to escalated enforcement measures and sanctions when needed.

Registrants may report situations of reprisals to their respective regulatory body or to the OSPG. The procedures followed, sanctions available, and roles of regulatory bodies and OSPG will vary dependent on whether a registrant or a non-registrant (may be an employer/partner) is accused of taking reprisals. Refer to OSPG Guidance: Overview of OSPG Audits, Investigations, and Performance Reviews for further clarification.



Referrals and Coordination of Investigations

Reports requiring referral to a different regulatory body: A registrant may report a matter to his/her own regulatory body that concerns a registrant of a different regulatory body. Regulatory bodies should be prepared to direct registrants to make reports to the appropriate complaints intake contact for each of the other regulatory bodies and may also bring the matter to the attention of the other regulatory body, in line with confidentiality requirements.

Reports in respect of government policy: The s.58 duty concerns reporting on a registrant whose practice may pose a risk of significant harm to the environment or to the health and safety of the public. However, a professional may not always be able to distinguish between the activity/industry posing a risk of harm and the professional's practice posing a risk of harm. Registrants may report to regulatory bodies a concern with government policy or an authorization for the activity rather than the work of the professional. Regulatory bodies may refer these matters to government, and if the matters are not addressed, the risk of harm could continue and public trust could be eroded.

OSPG suggests that reported concerns related to government policy or authorization decisions brought to the attention of regulatory bodies should be tracked. Where possible, and in line with confidentiality requirements, regulatory bodies may disclose the reported concerns to the secretariat of the Professional Governance Advisory Committee (PGAC), who would then share the tracked concerns with the PGAC and Ministry representatives who could follow up to confirm that filed concerns were brought to the attention of the appropriate policy teams.

While regulatory bodies are responsible for oversight of their registrants' practice, and ministries or other government entities are responsible for compliance and enforcement of their policies and statutes, there may not always be clear jurisdiction; for example, a registrant's incompetence could lead to non-compliance with a regulatory requirement and this could be uncovered in a number of ways. It will be important for regulatory bodies and government entities carrying out investigations to be able to refer matters to each other as appropriate, determine investigation needs, and coordinate where required. To that end, OSPG will work alongside regulatory bodies to facilitate relationships and points of contact with various investigation teams.

Coordination of investigations: Clear and consistent guidance for registrants who participate in investigations led by government entities is also important as information uncovered in the course of an investigation could trigger a registrant's duty to report to regulatory bodies. Internal procedures for bringing concerns forward may be followed (e.g., seeking supervisor support) if they don't fetter a registrant's statutory duty in the PGA. The type of information a registrant provides to a regulatory body, when reporting a concern in this scenario, could be constrained by the government entity's investigation. The regulatory body will likely need to gather information from several sources as part of its due diligence to determine if an investigation should be initiated. If information is needed from the government entity's investigation team, the regulatory body can request it through official channels, following provisions in the Freedom of Information and Protection of Privacy Act (s.33.1(1)(l)).

Expectations for Regulatory Bodies

Duty to Report:



- Regulatory bodies should publish their own guidance and expectations in respect of registrants' ethical duty to report under s.57.
- Building upon OSPG guidance for registrants and employers/partners (see appendix), regulatory bodies should provide guidance on the s.58 duty to report, including:
 - The intent of the duty and how it differs from any other reporting requirements (code of ethics)
 - Terminology such as “reasonable and probable grounds”¹, “significant harm to the environment”², and “promptly report”³, including any profession-specific context that aids in understanding of this concept.
 - Process to follow when making a report to regulatory bodies, including any due diligence actions that may/must be taken (e.g., reasonable steps to determine the identity of the registrant if not known).
 - Clarity that non-registrants engaged in regulated practice do not trigger the duty to report (but may trigger other reporting requirements).
 - Consequences of a failure to report (PGA offence provisions and any regulatory body complaint and discipline related actions that may be taken).
- Regulatory bodies (aided by OSPG) may seek protocol agreements with organizations that employ registrants who may be carrying out investigation/compliance & enforcement work in the course of their employment to address how they may also meet their s.58 duty.

Reprisals:

- Regulatory bodies should provide guidance to registrants on s.103 of the PGA related to reprisals:
 - A person must not evict, discharge, suspend, expel, intimidate, coerce, impose any pecuniary or other penalty on or otherwise discriminate against a registrant who makes a report under s.58.
 - Failure to abide by s.103 is a contravention of the PGA.
 - Registrants may report situations of reprisals to their respective regulatory body or to the OSPG.
 - Guidance to registrants should focus on ways to prevent reprisals (including ensuring registrants understand the reprisal protection afforded to them, and the role regulatory bodies can play in bringing forward a complaint against a registrant after receiving concerns as per OSPG Guidance – Regulatory Body Complaints and Discipline) and lay out actions that can be taken by various parties, including those receiving reprisals.

¹ The test or standard for reasonable and probable grounds considers what a reasonable person would conclude based on objective and credible information; registrants are not required to establish a case on the face of it before making the complaint; and reports must be made in good faith and should not be used as a tactic for delay or improper purpose.

² The *Freedom of Information and Privacy Protection Act* Interpretation Manual breaks down the meaning of the individual words used in the term “significant harm to the environment or to the health and safety of the public” but the term must be applied contextually – what is or is not significant harm cannot be pre-determined. It may be more useful to speak broadly that the term sets a high bar for reporting meant to exclude lower level misconduct, and focus guidance on the type of registrant behaviours that regulatory bodies should be informed about.

³ Allows for due diligence to meet the test of reasonable and probable grounds; once this test is met, registrants must not hold onto information but take immediate steps to engage the regulatory body.



- OSPG expects regulatory bodies to provide a clear mechanism by which registrants could report reprisals, have a process to refer a reprisal report to the OSPG, and to clearly outline any additional action that a regulatory body may take when it becomes aware of reprisals.

Enforcement:

- Regulatory bodies must treat a report under s.58 as a complaint to the regulatory body:
 - Follow general complaint process.
 - Ensure there is a process to triage and prioritise given the potential risk of significant harm to the environment or health and safety of the public (same process as extraordinary measures to protect the public).
 - Consider whether another authority having jurisdiction should be notified.
 - Notify other authority if appropriate.
- Contravention of s.58 is a breach of the PGA and is considered an offence.
 - A registrant's failure to report could be the topic of a complaint made to the regulatory body or could be uncovered during an investigation or discipline matter of another registrant.
 - If the facts in an investigation/discipline matter disclose that another registrant knew of the risk of significant harm to the environment or health and safety of the public and did not report it, this may merit an investigation into whether they did not fulfill their duty under s.58.

OSPG expects regulatory bodies to have a process to notify OSPG when investigating a breach of s.58, as per OSPG Guidance: Overview of OSPG Audits, Investigations, and Performance Reviews.

Bylaws:

- Regulatory bodies may make bylaws to support conduct-based reporting requirements related to:
 - Incompetence;
 - Professional misconduct;
 - Conduct unbecoming of a registrant;
 - Breach of the PGA;
 - Breach of regulatory body bylaws; and,
 - Breach of the bylaws (Code of Ethics).

Record Keeping:

- OSPG expects regulatory bodies to document reports that are submitted related to s.58 of the PGA; regulatory bodies may also document reports that are submitted through a broader reporting responsibility specified in bylaws.
- OSPG expects regulatory bodies to establish⁴ the following annual records to track the process and results related to s.58:
 - Number of complaints received in accordance with statutory reporting requirements, source of the complaints (inside or outside the profession, employers or partners), nature of the complaints and their disposition, including complaints referred to other authorities.

⁴ The expectations for data tracking may be adjusted over time to reflect on-the-ground practicalities and experiences.



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- Percent change of complaints submitted through duty to report requirement over previous year
- Number and percentage of complaints submitted through duty to report requirement that result in extraordinary action to protect the public, and what action was taken.
- Number of instances where a citation is issued for the contravention of s.58 that arise out of investigation/discipline files.
- OSPG expects regulatory bodies to provide the reports and information above as requested by the OSPG.