



Health Professional Councils Authority

LEGAL PRACTICE NOTE

No. 4, 2014

Application and relevance of s.41O of the Health Practitioner Regulation National Law (NSW)

The legislation

Section 41O of the National Law provides:

41O Other matters to be taken into account [NSW]

In the exercise of any of its functions under Subdivision 2 or 7 of Division 3 of Part 8 with respect to a complaint about a registered health practitioner or a student, a Council must have regard to any of the following matters, to the extent the Council reasonably considers the matter to be relevant to the complaint—

(a) another complaint or notification about the practitioner or student made to the Council or the National Agency, or made to a former Board under a repealed Act, including a complaint—

(i) in respect of which the Council, the Commission or a National Board has decided no further action should be taken; and

(ii) that is not required to be referred, or that the Council or the Commission decides not to refer, under Division 3 of Part 8;

(b) a previous finding or decision of a Council inquiry in relation to the practitioner or student;

(c) a previous finding or decision of a board inquiry, professional standards committee or a tribunal established under a repealed Act in respect of the practitioner or student;

(d) a written report made by an assessor following an assessment of the practitioner's professional performance;

(e) a recommendation made, or written statement of decision on a performance review provided, by a Performance Review Panel in relation to the practitioner.

Background and history of s.41O

Section 41O has its origins in s.140A of the now repealed Medical Practice Act 1992 (NSW).

Section 140A was included in the Medical Practice Act in 2008 following the raising of concerns over the then NSW Medical Board's handling of a number of complaints about a specific medical practitioner.

In introducing the legislation containing s.140A to Parliament in 2008 the then Minister for Health, the Hon Reba Meagher MP, said:

The proposed section 140A requires that when the Board is dealing with a complaint or exercising its public protection functions, it must, to the extent they are relevant, have regard to the following matters about a practitioner:

- any other complaint against the practitioner;*
- any previous finding or determination of a professional standards committee or tribunal constituted under a health registration Act; and*

- *the outcome of any performance assessment in relation to the practitioner.*

Although these comments were made in the context of amendments to the *Medical Practice Act* and the regulation of the medical profession they are equally relevant to the National Law and to all registered health professions.

To which bodies does s.41O apply?

Section 41O is expressed to apply only when a Council is exercising any of its functions under Subdivision 2 or 7 of Division 3 of Part 8. The section talks only of the Council exercising functions and the section does not apply to any other body.

Subdivision 2 How complaints are to be dealt with [NSW]

This Subdivision concerns the Council's management of complaints including its consultation with the Health Care Complaints Commission. In other words the Councils' activities in determining if a particular complaint should be referred to the Commission for investigation; to the Tribunal; to a Committee; to a Council inquiry; to the health program; to the performance program; referred to another body; or dismissed.

Once the Council has consulted with the Commission and determined how to deal with the complaint in accordance with the Subdivision the obligation to consider the practitioner's history ceases.

Subdivision 7

Subdivision 7 concerns the Council's immediate action powers (s.150). In determining if it needs to commence proceedings under s.150 or, having commenced proceedings, impose conditions or suspend registration the Council must consider the practitioner's complaints history.

The operation of section 41O of the National Law is clear. A Council when determining how to deal with a complaint or when taking or considering action under s.150 and its related provisions must consider the practitioner's complaints history, as set out in paragraphs (a) to (e) of the section, to the extent the Council reasonably considers the matter to be relevant to the complaint.

Are there certain types of complaint that are not to be taken into account?

It is important to be mindful that paragraph (a) of s.41O requires a Council to include in its consideration of a complaint matters:

- (i) *in respect of which the Council, the Commission or a National Board has **decided no further action should be taken**; and*
- (ii) *that is not required to be referred, or that the Council or the Commission **decides not to refer, under Division 3 of Part 8**;*

(emphasis added)

It is also important to note that the use of the words *previous finding or decision* in paragraphs (b) and (c) of s.41O is not qualified by notions of proven complaints or findings of guilt.

There is no part of a practitioner's prior complaints history that is, as a matter of course, excluded from a Council's consideration under s.41O. This includes notifications about a practitioner's health which are clearly captured by the words *another complaint or notification* in paragraph (a). Of course there may be complaints that have been dismissed as vexatious or frivolous and these are unlikely to be reasonably relevant to the consideration of the matter before the Council. There may also be other complaints that because of their

antiquity or subject matter are also not reasonably relevant to the matter currently before the Council. However, the fact that a complaint has been dismissed at the consultation point without further action or has been dismissed after an Inquiry (whether by the Tribunal, a Professional Standards Committee or by a Council) has found it not proven does not mean that a Council can refuse to consider it. As discussed above Councils are required to actively consider the practitioner's entire history and make a decision as to which parts of it are relevant.

Practical application of s.41O

The legislation clearly sets out that the Council is to take the practitioner's complaints history into account when deciding how to deal with a complaint and when taking, or considering, immediate action. There are a number of steps in the management of complaints in which a practitioner's complaints history must be taken into account.

- i. Consultation with the Health Care Complaints Commission*
In consulting with the Commission the Council is exercising a function under Subdivision 2 of Division 3 of Part 8 (s.145A) and the Council is required to take the practitioner's complaints history (to the extent that the Council considers it to reasonably relevant) into account.
- ii. Consideration by the Council following consultation with the Commission*
In circumstances in which a matter is to be referred to the Council for management and the Council is considering what action to take under s.145B, the Council is required to take the practitioner's complaints history (to the extent that the Council considers it to reasonably relevant) into account.
- iii. Section 150 action*
Councils are required to consider the practitioner's complaints history both in deciding whether or not to initiate a section 150 process and in determining whether or not action (ie conditions or a suspension of registration) is appropriate.

There are also a range of other circumstances during which an appreciation of a practitioner's complaints history may be valuable and useful, with the caveat that the matter that is before the relevant body (be that a Council inquiry, an Impaired Registrants Panel or a Performance Review Panel) is to be dealt with on its own facts and merits. Those circumstances include consideration of complaints by Council Assessment Committees; consideration of complaints of unsatisfactory professional conduct by Council inquiries; review of orders by the appropriate review body under Division 8 of Part 8 of the National Law.

It is also clear that a practitioner's complaints history, including his or her history of compliance with conditions or orders, is a relevant consideration in determining appropriate orders at the end of a conduct, health or performance process.

July 2014

NOTE:

This HPCA *Legal Practice Note* (Our Ref.: HP14/6163) has been prepared by legal staff of the Health Professional Councils Authority and is to be read in conjunction with the applicable legislation and any relevant case law. Its content is information not advice and is not a substitute for the provisions of the legislation or relevant case law. Appropriate legal advice relevant to your own circumstances should be obtained before taking any action on the basis of the information contained in this document.