



Health Professional Councils Authority

LEGAL PRACTICE NOTE No. 8, 2015

Critical impairment conditions

Introduction

In November 2014 the New South Wales Parliament passed amendments to the Health Practitioner Regulation National Law (NSW) to provide Councils with the power to designate conditions imposed on a practitioner's registration due to his or her impairment as critical impairment conditions.

It is of note that the provisions dealing with critical impairment conditions apply only to registered health practitioners and not to registered students.

It is anticipated that those amendments will commence on 1 November 2015.

The legislation

Section 150FA of the National Law will on its commencement create a regime for critical impairment conditions. That section provides as follows:

150FA Critical impairment conditions [NSW]

- (1) This section applies if a Council imposes or alters a condition under this Law on the registration of a health practitioner because of the impairment of the practitioner.
- (2) The Council may order that a contravention of a condition on the registration of a health practitioner that it imposes or alters because of the impairment of the practitioner will result in the contravention being referred to the Commission to be dealt with as a complaint against the practitioner. Any such condition is then a ***critical impairment condition***.
- (3) If a Council for a health profession is satisfied a health practitioner registered in the profession has contravened a critical impairment condition—
 - (a) the Council must refer the matter to the Commission; and
 - (b) the matter may be dealt with by the Commission as a complaint made to the Commission against the practitioner.
- (4) If the Commission decides to deal with the matter as a complaint, the Commission must investigate the complaint or cause it to be investigated and, as soon as practicable after the investigation is completed, consult with the Council about how the matter is to be dealt with, including, for example, by

referring the complaint to the Tribunal or a Committee for the health profession in which the health practitioner is registered.

(5) This section has effect despite anything to the contrary in this Law.

Background

Following concerns about the management of a range of conditions on the registration of the then Dr Suresh Nair relating to drug misuse and impairment, the New South Wales Parliament passed a range of amendments to the Health Practitioner Regulation National Law (NSW). Those amendments include the introduction of section 150FA which as set out above establishes a regime for critical impairment conditions. This regime recognises that while critical compliance orders and conditions are only imposed by PSCs and the Tribunal following a finding of unsatisfactory professional conduct or professional misconduct, there are very significant health conditions imposed by Councils following Impaired Registrant Panel processes and section 150 immediate action processes that might also appropriately be made subject to critical compliance obligations.

In her second reading speech in introducing the relevant amendments to Parliament the Minister for Health said in respect of critical impairment conditions:

In order to underline the seriousness with which we consider that compliance with health conditions imposed on a practitioner should be viewed, the bill proposes a new section 150FA, which provides for an NSW Health practitioner council to designate specific impairment conditions to be "critical impairment conditions". A breach of a critical impairment condition would result in automatic referral to the Health Care Complaints Commission for investigation. While a critical compliance order could attach to any condition, it is likely to focus on those relating to drug and/or alcohol testing.

Operation

The critical impairment condition regime had not commenced at the time of preparation of this legal practice note. However a useful guide to their expected operation can be given by comparing them to critical compliance orders and conditions and the related case law on this subject.

Distinction between critical impairment conditions and critical compliance orders and conditions

The most significant difference between the two regimes is that, unlike critical compliance orders or conditions, a breach of a critical impairment condition does not automatically result in section 150 immediate action being taken to suspend the registration of the practitioner and subsequent cancellation of registration by the Tribunal. Breach of a critical impairment condition will result in mandatory referral by the relevant Council to the Health Care Complaints Commission. The Commission and the Council then consult to determine how the matter is to be managed and this may involve investigation by the Commission or returning the matter to the Council.

The distinction demonstrates an understanding that many practitioners who are impaired may at the beginning of their participation in a Council's health program have difficulty in settling into the compliance regime. In those circumstances a regime that results in automatic suspension and cancellation of registration for

breach may be seen as unreasonably punitive and harsh. However a regime that requires a relevant breach to be referred to the independent investigator of complaints, the Health Care Complaints Commission, ensures that a breach of a critical impairment condition will be considered in an appropriately independent manner and that serious or repeated breaches are dealt with in a manner that is consistent with the public interest.

Cases

Health Care Complaints Commission v Dr Hoffer [2014] NSWCATOD 74

In this decision the Tribunal declined to designate conditions imposed on Dr Hoffer's registration as critical compliance conditions on the basis that it was not satisfied such a condition was necessary to protect the health and safety of the public. The Tribunal also noted that Dr Hoffer had at all times in the past fully complied with conditions imposed on his registration and that his previous behaviour gave the Tribunal confidence that he would continue to comply.

Conclusion

Critical impairment conditions should prove to be a useful addition to the powers of the Councils and the Commission to manage matters of practitioner impairment. The extra transparency that they will deliver in this area is to be welcomed.

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NOTE:

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