

GUIDELINES FOR THE CONDUCT OF PROCEEDINGS PURSUANT TO PART 8 DIVISION 3 SUBDIVISION 7 OF THE HEALTH PRACTITIONER REGULATION NATIONAL LAW (NSW) 'POWERS OF THE COUNCIL FOR THE PROTECTION OF THE PUBLIC'

(including Section 150 Proceedings)

1. OVERVIEW

The purpose of these guidelines is to explain the general process of the Medical Council of NSW when conducting proceedings under Part 8 Division 3 Subdivision 7 of the *Health Practitioner Regulation National Law(NSW)* (the National Law(NSW)). These will often be 's150 proceedings', but may also be 's150A' or 's150C proceedings'. For ease of reference these guidelines will refer to s150 proceedings. The guidelines are not a substitute for the provisions of the legislation and case law that might be relevant in the particular circumstances of a matter. In certain circumstances the Council may depart from some of the procedures outlined in these guidelines for the protection of the health and safety of the public.

2. OBTAINING LEGAL ADVICE

It is desirable that when a practitioner/student receives notification that the Council is considering taking action under section 150 that they obtain legal advice from a medical defence organisation or a legal practitioner. The staff of the Council cannot provide the practitioner/student with legal advice.

3. PURPOSE OF SECTION 150 PROCEEDINGS

Section 150 proceedings are conducted in order to determine whether it is appropriate in the circumstances to take action under section 150 of the National Law (NSW). Section 150 of the National Law (NSW) provides the Council must take certain action if at any time it is satisfied that it is appropriate to do so for the protection of the health or safety of any person or persons or if satisfied that the action is otherwise in the public interest.

The Council has the power under this section to take the following action:

- 3.1.1. It may suspend the registration of the practitioner/student.
- 3.1.2. It may impose conditions on the registration of the practitioner/student.
- 3.1.3. It may refer the practitioner/student to an Impaired Registrants Panel.
- 3.1.4. It may suspend the practitioner/student for breaching a critical compliance condition or order. A critical compliance condition or order is an order of a Medical Tribunal or a Professional Standards Committee that states that a breach of the condition or order will result in the registration of the practitioner/student being cancelled.
- 3.1.5. It may order the practitioner to undergo a performance assessment.
- 3.1.6. It may take no action.

Suspension or conditions placed on a practitioner's registration as a result of action under section 150 of the National Law (NSW) is an interim measure done either for the purpose of protecting the health and safety of persons (including the practitioner/student) or because it is appropriate in the public interest. Any such action will remain in force until the matter is resolved by other proceedings under the National Law (NSW).

4. PROCEDURE

4.1. Approval of delegates of the Council

The Council will in normal circumstances delegate to certain persons (approved by the Executive Officer) the exercise of power under Part 8 Division 3 Subdivision 7 of the National Law (NSW). This power will normally be exercised by two or three delegates conducting proceedings to consider whether any action should be taken under s150 of the National Law (NSW). At least one of these delegates must not be a registered medical practitioner or student. When determining the constitution of section 150 proceedings the Council will consider the nature of the matter and the need for particular knowledge or expertise of the delegates.

A practitioner/student should advise the Council in writing as soon as practicable whether they consider that the appointment of a person as a delegate may raise issues of bias or potential bias. The Council will then re-consider the appropriateness of the appointment.

4.2. Notification of proceedings

Initially, and if practicable, a practitioner/student will be advised by telephone that the Council will be conducting proceedings under section 150 of the National Law (NSW).

The practitioner/student will then be given reasonable notice by the Council in writing of the fact that proceedings before delegates of the Council will be held at a particular time and date to determine whether it is appropriate to take any action under section 150 of the National Law (NSW).

In certain circumstances the Council may be required to take immediate action in relation to the practitioner/student. The practitioner/student will be advised of the result of this action and be asked to attend proceedings at a later date. This will give the practitioner/student the opportunity to be heard in relation to the action taken.

In determining the date of the proceedings the protection of the health and safety of the public will be a primary consideration.

In certain circumstances the delegates may consider taking action under section 150 based on the documentary materials before them and a written reply by the practitioner/student.

The Health Care Complaints Commission is also advised that the Council will be conducting proceedings under section 150 of the National Law (NSW).

4.3. Power of the Council to obtain information, records and evidence

If the Council is of the opinion that a person is capable of providing relevant information it can require the person by notice in writing to do any of the following:

1. give a signed statement of information
2. produce documents
3. appear and give evidence at proceedings before the delegates.

It is an offence under the National Law (NSW) to fail to comply, without reasonable excuse, with such a requirement. It is also an offence to produce documents or give evidence that is false or misleading in a material particular.

The Council will also require the practitioner to provide details of any employment, accreditations with public or private health organisations or nursing homes and membership of any colleges. Failure to provide this information without reasonable excuse, may result in a finding of unsatisfactory professional conduct. The practitioner will also be required to provide details of professional indemnity insurance held.

4.4. Provision of information to the practitioner/student

The practitioner/student will be provided with a copy of any documents to be considered by the delegates at the proceedings. Unless urgent action is required the Council will provide the practitioner/student with a copy of the documents at a reasonable time in advance of the proceedings. The practitioner/student will be invited to provide any information or documents considered relevant to the Council in advance of the proceedings.

4.5. Proceedings conducted by delegates of the Council

The practitioner/student will be advised of the date and time for proceedings to take place with the delegates of the Council. The proceedings will usually take a day. During the proceedings the practitioner/student will be asked questions relevant to the matter being considered by the delegates and may provide the delegates with relevant information. The practitioner/student will be given the opportunity to be heard in relation to any relevant matter.

4.5.1. Presence of legal practitioner or support person

A practitioner/student will generally be permitted to have a legal advisor or support person present during the proceedings to provide advice and support. A practitioner/student is not entitled to be represented by a legal practitioner during the proceedings.

4.5.2. Non attendance of practitioner/student

Failure of the practitioner/student to attend the proceedings may result in the delegates considering the matter in the practitioner/student's absence. The protection of the health and safety of the public will be a primary consideration in determining whether or not to take action in the absence of the practitioner/student.

4.5.3. Audio recording of the proceedings

The proceedings at which the practitioner/student is present, or at which a person is giving oral information to the delegates, must be audio recorded.

A recording is not admissible in any civil or criminal proceedings in a court of law (other than in proceedings under the *Health Practitioner Regulation National Law (NSW)*). It is also not admissible in evidence in any inquest or inquiry under the *Coroners Act 2009*.

The practitioner/student, or the legal representative, may request in writing a copy of the recording. A copy of the recording will also be provided to the Health Care Complaints Commission. Unless required by law, a copy of the recording will not be provided to any other person.

4.5.4. Oral information from relevant persons

The delegates may hear oral information from persons who may be able to provide relevant information in the matter. This might occur in person or via telephone at the discretion of the delegates. The practitioner will be given the opportunity to ask such persons questions. The practitioner does not have a right to cross examine any person providing oral information.

4.5.5. Submissions from the practitioner/student

At the conclusion of the proceedings conducted by the delegates the practitioner/student will be invited to make submissions. Submissions can be made either orally or in writing, although given the nature of these proceedings, orally is usually more appropriate. The submission should address any relevant facts, and possible outcomes or action that might be taken by the Council. The delegates may ask the practitioner/student to address particular issues.

4.5.6. Notification to practitioner/student of action taken

The practitioner/student will be notified in writing of the action taken by the Council under section 150 as soon as possible after a decision is made by the delegates.

4.5.7. Written decision

As soon as practicable after the proceedings have concluded a written statement of reasons will be prepared and sent to the practitioner/student. A copy of the written statement of reasons will also be provided to the Health Care Complaints Commission.

5. REFERRAL OF THE MATTER TO THE HEALTH CARE COMPLAINTS COMMISSION

5.1. Referral of a complaint

If the Council takes action under s150 of the National Law (NSW) it is required to notify the Health Care Complaints Commission ('the Commission') and in certain circumstances refer the matter to the Commission for investigation. The Commission will be provided with any relevant information considered by the delegates during the proceedings, a copy of any audio recording and a copy of the written statement of decision. The Commission is required to deal with the matter as a complaint against the practitioner/student (subject to certain provisions outlined below).

5.2. Special provisions- Impairment

If the Council takes action against a practitioner/student under section 150 of the National Law (NSW) because it is of the opinion that the practitioner/student suffers from an impairment it must consult with the Commission to determine whether the matter is dealt with as a complaint against the practitioner/student (and thus investigated by the Commission) or by the Council through an Impaired Registrants Panel.

Impairment is defined in the National Law (NSW) to mean a person has a physical or mental impairment, disability, condition or disorder (including substance abuse or dependence) that detrimentally affects or is likely to detrimentally affect a practitioner's capacity to practise medicine or a student's capacity to undertake clinical training as part of the approved program of study in which the student is enrolled or arranged by an education provider.

If the matter is to be dealt with by an Impaired Registrants Panel the practitioner/student will be notified in due course about the nature of the panel and the procedure that will take place.

5.3. Special provisions - Performance Assessment

The Council may impose under s150 of the National Law (NSW) a requirement that the practitioner undergo a performance assessment. The Commission must concur with the

imposition of such a condition. If the Commission does not concur the matter will be dealt with as a complaint (and thus investigated by the Commission). In certain circumstances the matter might be dealt with by a performance assessment and as a complaint. If the Council is to conduct a performance assessment the practitioner will be notified in due course about the nature of the assessment and the procedure that assessment will take.

7. NOTIFICATION TO OTHER PERSON OR BODIES

The Council must notify the Medical Board of Australia of any action taken under section 150 of the National Law (NSW).

Relevant details of conditions or a suspension are recorded on the Medical Board of Australia's public National Register .

The Council will generally notify the practitioner's employer of any publicly recorded outcome and in the case of suspension, will also advise the relevant college, Medicare, Department of Veterans Affairs and Dept of Health (PSB).

9. POWER TO REMOVE OR ALTER CONDITIONS OR TERMINATE SUSPENSION

The Council can at any time shorten, or terminate a period of suspension or alter or remove conditions imposed under Part 8 Division 3 Subdivision 7 of the National Law (NSW). Any decision to do so will depend on the specific nature of the matter and any relevant change in circumstances.

10. APPLICATION BY THE PRACTITIONER FOR THE COUNCIL TO REVIEW ITS DECISION

A practitioner/student may apply to the Council under s150A in writing seeking a review of any order made under section 150 of the National Law (NSW), or a decision of the Council not to alter or vary conditions or to shorten or terminate a suspension. Such an application should be addressed to the Executive Officer of the Council. The application should provide any new evidence or material relevant to the decision to review the Council's orders.

Unless the application is considered by the Council to be frivolous or vexatious the Council must conduct a review of the decision to take action under section 150 of the National Law (NSW).

The nature of the review will depend on the circumstances of the matter but might include:

1. a review of the matter by a Committee of the Council, or
2. further proceedings being conducted by the delegates who considered the matter originally (if possible) or other delegates approved by the Executive Officer. This may require the practitioner/student to attend further proceedings at a specified date and time.

11. APPEAL TO THE CHAIRPERSON OF THE MEDICAL TRIBUNAL ON A POINT OF LAW

A practitioner/student can appeal to the Chairperson of the Medical Tribunal on a point of law in respect of action taken in relation to the Council's powers to:

1. suspend or impose conditions under section 150 of the National Law (NSW)
2. remove or alter conditions or terminate suspension
3. review, on application by a practitioner/student, of an exercise of its powers under section 150 of the National Law (NSW).

Such an appeal does not stay the suspension or conditions unless the Chairperson orders otherwise.

No appeal can be made to the Supreme Court until the Medical Tribunal determines the

appeal.

The Council is required to abide by the Chairperson's ruling on the point of law.

The Council suggests that prior to lodging an appeal the practitioner/student obtain legal advice from a medical defence organisation or a legal practitioner.

An appeal must be made within 28 days of the decision of the Council. The Executive Officer of the Council may in certain circumstances extend the period allowed for an appeal.

12. APPEAL TO THE MEDICAL TRIBUNAL AGAINST THE COUNCIL'S DECISION TO TAKE ACTION UNDER S150 OF THE NATIONAL LAW (NSW)

A practitioner/student has a right of appeal against a decision of the Council to take action to suspend or place conditions on the practitioner/student's registration. A practitioner/student can also appeal the Council's refusal to alter or vary conditions imposed. Such an appeal will normally be conducted as a re-hearing of the matter by the Medical Tribunal.

An appeal is to be lodged with the Executive Officer of the Council who will refer it to the Medical Tribunal.

An appeal must be made within 28 days from the practitioner/student receiving notification of the action taken by the Council under Part 8 Division 3 Subdivision 7 of the National Law (NSW). In certain circumstances the Registrar may extend the time period for lodgement of an appeal.

An appeal against a decision of the Council in these circumstances does not stay the effect of any suspension or conditions imposed on a practitioner/student's registration.

The Council suggests that prior to lodging an appeal the practitioner obtain legal advice from a medical defence organisation or a legal practitioner.

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