

## **MEDICAL COUNCIL of NEW SOUTH WALES**

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### **Section 150 Proceedings**

This paper was approved for circulation to Council Legal Officers and to S150 delegates at the Council meeting held on 1 February 2011.

Our ref: FF10/123 DD11/00001

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### **POSITION STATEMENT**

**The Council makes the following position statement for the guidance of section 150 delegates when weighing the relevant public interest arguments in determining whether to take action under s150:**

**It is the Council's firm view that maintaining confidence in the Council's mechanisms which are aimed at achieving protection of the health and safety of the public is an important matter of public interest.**

**Where relevant, it is important during section 150 proceedings that the Council satisfy itself that the practitioner**

- **is fully compliant with conditions of registration; and**
- **cooperates fully with Council processes and procedures**

**In matters where there is evidence of persistent and/or serious breaches of conditions or incidents of non-cooperation and where the section 150 delegates conclude they cannot be confident that conditions or processes/procedures are achieving effective protection of the public, the Council is of the view that suspension is the appropriate action to be taken.**

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### **BACKGROUND**

#### **1.1 This Position Statement**

Please refer to Document DD10/15498 "Position Statement for the guidance of section 66 delegates" by way of background to this Position Statement.

The Council agrees that the background discussion and the principles set out in that document continue to apply, with the modifications required to align the contents of the position statement with the Health Practitioner Regulation National Law (NSW) No 86a ("the Law").

The Council also agrees that the practice of appointing, wherever possible, a Council member (or recent past Board/Council member) to sit as one of the delegates approved to conduct section 150 proceedings should continue. The Council further agrees that a non Council Committee member can be appointed where a Council member is not available.

#### **1.2 Relevant Legislation**

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Section 150(1) of the Law provides as follows:

- (1) A Council must, if at any time it is satisfied it is appropriate to do so for the protection of the health or safety of any person or persons (whether or not a particular person or persons) or if satisfied the action is otherwise in the public interest—
  - (a) by order suspend a registered health practitioner's or student's registration; or
  - (b) by order impose on a registered health practitioner's registration the conditions relating to the practitioner's practising the health profession the Council considers appropriate; or
  - (c) by order impose on a student's registration the conditions the Council considers appropriate.

Section 3 provides:

### 3 Objectives and guiding principles

- (1) The object of this Law is to establish a national registration and accreditation scheme for—
  - (a) the regulation of health practitioners; and
  - (b) the registration of students undertaking—
    - (i) programs of study that provide a qualification for registration in a health profession; or
    - (ii) clinical training in a health profession.
- (2) The objectives of the national registration and accreditation scheme are—
  - (a) to provide for the protection of the public by ensuring that only health practitioners who are suitably trained and qualified to practise in a competent and ethical manner are registered; and
  - (b) to facilitate workforce mobility across Australia by reducing the administrative burden for health practitioners wishing to move between participating jurisdictions or to practise in more than one participating jurisdiction; and
  - (c) to facilitate the provision of high quality education and training of health practitioners; and
  - (d) to facilitate the rigorous and responsive assessment of overseas-trained health practitioners; and
  - (e) to facilitate access to services provided by health practitioners in accordance with the public interest; and
  - (f) to enable the continuous development of a flexible, responsive and sustainable Australian health workforce and to enable innovation in the education of, and service delivery by, health practitioners.
- (3) The guiding principles of the national registration and accreditation scheme are as follows—
  - (a) the scheme is to operate in a transparent, accountable, efficient, effective and fair way;
  - (b) fees required to be paid under the scheme are to be reasonable having regard to the efficient and effective operation of the scheme;
  - (c) restrictions on the practice of a health profession are to be imposed under the scheme only if it is necessary to ensure health services are provided safely and are of an appropriate quality.

### 1.3 Public interest considerations

The Council notes that the test for taking action under s150 of the Law remains the same as the test previously applicable under s66 of the Medical Practice Act – that is, action must be taken where it is considered appropriate and may include action being taken when the

Council is, "satisfied that the action is otherwise in the public interest".

The Council appreciates that there will be competing matters of public interest in any given section 150 proceedings and that these must be weighed for the purpose of concluding which of those matters will outweigh others when determining whether to take action and what action to take.

#### **1.4 Membership of section 150 proceedings**

Section 150 delegates act as delegates of the Council for the purpose of deciding whether to take action under Part 8 Division 3 Subdivision 7 of the Law. To the extent that is proper and without fettering their discretion, the Council expects the delegates to make decisions that are consistent with Council policies and guidelines.

To continue to assist with consistency of application of the Council policy to section 150 decisions, it is agreed that wherever possible a Council member (or recent past Board/Council member) or a non Council Committee member should be approved to sit as one of the delegates of the section 150 proceeding.

#### **1.5 Nature of section 150 proceedings**

The discussion in relation to s66 proceedings in document DD10/15498 remains equally applicable to s150 proceedings, and is set out below with modifications reflecting the new Law.

The Council is concerned that whilst hearings conducted in the Council's Health (and to some extent Performance) Program may be perceived to have a supportive and rehabilitative approach, it should not be forgotten that practitioners with conditions imposed on their registration – from whatever source – are only allowed to practise because it is considered they are safe to do so if they can satisfy the Council their conditions are being complied with.

A common reason for convening section 150 proceedings is concern that a registrant is failing to comply with conditions. The reason for convening section 150 proceedings is that it is considered that urgent, strong action may be required. This is particularly so when the apparent breaches have been serious and/or on a sustained basis. It should be noted that the Council has a degree of tolerance for breach of conditions, recognising it as a part of the recovery process where a practitioner's health is concerned. Matters are only referred to section 150 proceedings when this tolerance has been exhausted or the matter appears serious enough in itself to warrant the referral.

Section 150 proceedings are usually held very quickly and on the basis of the often limited, but concerning, information available to the Council at the time of the proceedings.

The Council appreciates the difficulties faced by section 150 delegates in coming to a decision which may be based on incomplete or inconclusive evidence. However, delegates are reminded that they are not conducting a fact finding exercise, rather, they are conducting a risk assessment on behalf of the Council in relation to the concerns that lead to the convening of the proceedings. They are required to take appropriate action to address that risk if the evidence before the section 150 proceedings has not addressed the concerns.

In this regard, delegates should accord appropriate weight to and guard against simply accepting reassuring assertions made by a practitioner during the course of the section 150 proceedings.

In a situation of repeated breach of conditions, the fact that on the day of the proceedings the practitioner is able to point to recent compliance, or recent steps taken to achieve compliance, will not necessarily be enough to retrieve the situation. There is strong public interest in the Council relying on demonstrated compliance, and repeated non compliance, followed by 11<sup>th</sup> hour repentance, should not displace this in most circumstances.

## **2. GUIDELINES FOR SECTION 150 DELEGATES**

The Council considers that it is a matter of public interest and often of public protection, for practitioners to comply with conditions on their registration and cooperate with Council processes.

Therefore the Council proposes the following guidelines be referred to by section 150 delegates when weighing relevant public interest arguments in deciding what action, if any, should be taken and the nature of that action:

1. When a matter relating to apparent breach of conditions is referred for proceedings under s150, delegates should consider:
  - a. the extent and circumstances of the suspected breach/es, including whether there is any demonstrated inability or unwillingness on the part of the practitioner to comply;
  - b. whether it is appropriate for the practitioner to be given a further opportunity to rectify their compliance;
  - c. the appropriate weight to be given to a practitioner's evidence/assurances;
  - d. whether the imposition of further conditions or amendment of conditions is likely to be sufficient action to ensure public health and safety;
  - e. the Council's position statement on maintaining confidence in the Council's mechanisms which are aimed at achieving protection of the health and safety of the public.
  
2. When a matter relating to apparent failure to cooperate with a Council process is referred for proceedings under s150, delegates should consider:
  - a. the extent and circumstances of their suspected failure to cooperate with the Council;
  - b. whether it is appropriate for the practitioner to be given a further opportunity to cooperate;
  - c. whether the practitioner can be relied upon to comply with conditions on their registration, if there is a conclusion that they have failed to cooperate with the Council;
  - d. the appropriate weight to be given to a practitioner's evidence/assurances;
  - e. the Council's position statement on maintaining confidence in the Council's mechanisms which are aimed at achieving protection of the health and safety of the public.
  
3. In the event that s150 conditions are imposed, it should be made clear to the practitioner

that a breach of these conditions is likely to result in their suspension.