



Health Professional Councils Authority

LEGAL PRACTICE NOTE

No. 2, 2014

Use of s.41P of the Health Practitioner Regulation National Law (NSW)

Section 41P of the Health Practitioner Regulation National Law (NSW) is a straightforward machinery or facilitative provision. The section allows a Council to obtain a practitioner's consent for the Council to exercise its functions or powers without needing to comply with each of the procedural steps that may otherwise be required before exercising the power. The section does not impose any functions or duties on a Council, nor does it provide a Council with a source of power for any action. Councils must find their functions and powers elsewhere in the National Law.

Specifically section 41P provides

41P Exercise of functions with consent [NSW]

- (1) *A Council may exercise any of its functions under this Law with respect to a registered health practitioner or student with the written consent of the practitioner or student.*
- (2) *A function exercised by the Council with the consent of the registered health practitioner or student may be exercised even though a condition otherwise required to be met or procedures otherwise required to be followed before its exercise have not been met or followed.*
- (3) *If the registered health practitioner or student withdraws the practitioner's or student's consent, the Council must take the action necessary to give effect to the withdrawal.*

The power to take action with consent is a valuable tool that allows a Council to take action to protect the public in a swift and efficient manner.

Powers of Councils

Councils have the power to impose conditions on a practitioner's registration in limited circumstances. Those circumstances are:

- under section 150 of the Law in urgent cases;
- under section 152J in cases where an impaired registrants panel has recommended that the Council impose the conditions and the practitioner has agreed; and
- under section 148E(1)(c) following a Council inquiry and a finding of unsatisfactory professional conduct (Councils other than Medicine and Nursing & Midwifery).

Councils have the power to suspend a practitioner's registration in more limited circumstances:

- under section 150 of the Law in urgent cases; and
- under section 152J in cases where an impaired registrants panel has recommended that the Council suspend the practitioner's registration and the practitioner has agreed.

A Council inquiry (other than Medicine and Nursing & Midwifery) that finds that a practitioner does not have the physical or mental capacity to practice his or her profession

may also recommend to the Tribunal Chair that the practitioner's registration be suspended or cancelled (s.148G).

Discussion

As noted above section 41P is a machinery provision and does not provide a Council with a separate power to take action in respect of a practitioner or student. The power that is to be exercised with consent must be found elsewhere in the National Law and any obligations that fall on the Council consequent to the exercise of the power must be complied with.

For example a Council cannot use s.41P to impose performance conditions on a practitioner's registration without convening a Performance Review Panel. This is because Councils do not have the power to impose conditions on a practitioner's registration under the performance provisions of the National Law and s.41P does not confer on a Council powers it does not otherwise have.

A Council may however appropriately use s.41P to take action to impose conditions on a practitioner's registration under s.150 of the National Law without going through each of the procedural steps that would otherwise be required under that section. Therefore a Council could impose conditions on a practitioner's registration under s.150 of the National Law without complying with the requirements of procedural fairness, if the practitioner consents to that action.

Once action has been taken with consent it is clear that each of the mandatory steps that flow from the particular exercise of power must be taken. Therefore in the case of action under s.150 the Council is required to:

- provide written notice of its action to the practitioner concerned (s.150(6)); and
- refer the matter to the Health Care Complaints Commission within 7 days of taking the action (s.150D).

Taking action with consent obtained under section 41P is never treated as the final step in dealing with a complaint about a registered health practitioner or student. This is particularly important in cases of urgent interim action under s.150 because of the impact of s.41P(3) and the potential for a practitioner to withdraw his or her consent to the action taken at any time. Where consent is withdrawn Councils are obliged to give effect to that withdrawal.

Councils that rely on the consent provisions under s. 41P to take action or exercise other functions under the Law concerning registered health practitioners and students must ensure that they are in a position to immediately respond if the practitioner or student withdraws their consent.

June 2014

NOTE:

This HPCA *Legal Practice Note* (Our Ref.: HP14/5759) 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.