Health Professional Councils Authority

# LEGAL PRACTICE NOTE
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## References to Minimum Regulatory Force and why they should be avoided by decision makers and regulators

### Introduction

From time to time decision-makers under the *Health Practitioner Regulation National Law (NSW)* (the National Law) are invited to take the minimum action that is necessary to protect the health and safety of the public. This invitation can be couched as an obligation to take the minimum action necessary; an obligation to take the minimum action that is appropriate; or a requirement to take the least restrictive action impacting upon the health practitioner

It may be noted that the "principal" of minimum regulatory force is set out in the AHPRA regulatory principles, however those regulatory principles have no statutory backing. It may also be noted that section 3(3)(c) of the National Law provides one of the guiding principles for the National Scheme is that *restrictions on the practice of a health profession are to be imposed only if it is necessary to ensure health services are provided safely and are of an appropriate quality.* The term used in section 3(3)(c) is "health profession" which is the collective noun rather than the term "health professional" or "health practitioner".

Therefore there are a number of arguments that give the invitation to apply minimum regulatory force a superficial appeal. However it is critical to recognise that the concept of minimum regulatory force, however it is expressed, is not part of the statutory test for taking action under any aspect of the regulatory regime applying in New South Wales.

### Section 150 of the National Law

References to minimum regulatory force are most often made within the context of section 150 (immediate) action proceedings and appeals. However these references reflect a misreading of the section and, significantly, fail to apply the paramount consideration as set out in section 3A of the National Law. That section requires the protection of public health and safety to be the paramount consideration whenever a person exercises functions under a NSW provision.

Furthermore, the "minimum regulatory force" approach neglects the legislative evolution of section 150 and its antecedent in section 66 of the *Medical Practice Act 1992 (NSW)*. In this respect the 2nd reading speech of the Minister for Health when introducing the *Medical Practice Amendment Bill 2008* into the New South Wales Parliament is informative. In that speech, the Minister explicitly rejected the notion that the least restrictive option is to be

preferred because it was not protective of the public or otherwise in the public interest. The Minister said:

> *In the case of Dr Reeves, the Medical Board held a section 66 inquiry after becoming aware that Dr Reeves had been practising as an obstetrician in breach of his conditions of practice. The inquiry found that Dr Reeves could not adequately explain why he had breached his conditions, and expressed concerns about Dr Reeves' candour. Notwithstanding this, the inquiry felt that it was unable to suspend Dr Reeves by reason of the strict wording of section 66 that allows the Board only to take such action as is "necessary" to protect the life or health of a person.*
>
> *This situation is obviously unacceptable! … The Board is not, therefore, required to limit itself to the least restrictive option as occurred in the inquiry into Dr Reeves. Rather, they should look to the outcome which best addresses the statutory purpose of the protection of the public or is otherwise in the public interest. If this broader test had been applicable at the time of the section 66 inquiry in the Reeves matter, combined with the clarification that the paramount consideration is the protection of the public, there may well have been a different conclusion as to the appropriate action to take in order to protect the public.*

## Case Law

The NSW Civil and Administrative Tribunal has very clearly set out its position that the concept of minimum regulatory force has no standing within the context of a section 150 decision: see Phillips v Osteopathy Council of New South Wales [2017] NSWCATOD 50, where the Tribunal stated:

> *The reference to "the minimum regulatory force appropriate to manage the risk….." does not reflect the formulation of the test contained in the section which is directed to orders which the Council is satisfied are appropriate for the protection of the health or safety of any person or persons or otherwise in the public interest. The orders must respond to the conclusion of the satisfaction that it is appropriate to impose them for the stated reasons.*

While the Tribunal made these observations in the context of section 150, it is vital for decision makers to recognise that the concept of minimum regulatory force is not formally part of any test to be applied by a person exercising functions under a NSW provision of the National Law.

Significantly, neither of the phrases "minimum regulatory force" or "regulatory force" appear at any point in the National Law.

Of course Councils are not at liberty to take disproportionate action in response to a concern and in s.150 proceedings the requirement for a Council to be satisfied it is *appropriate* to take action establishes an important check on their decision making.

## Conclusion

While the concept of minimum regulatory force may be a useful touchstone for some regulatory decision making it is important that decision makers do not incorrectly elevate it to

the level of statutory criterion or obligation and remain focused on the protection of the health and safety of the public.

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**NOTE:**

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