



Health Professional Councils Authority

# LEGAL PRACTICE NOTE

## No. 10.1<sup>1</sup>

### The public interest

#### Introduction

The concept of the *public interest* fundamentally underpins the health practitioner regulation framework. This is reflected in the inclusion of a number of references to the public interest in Part 8 of the *Health Practitioner Regulation National Law (NSW)* [the *National Law*], dealing with the Health, Performance and Conduct Programs and regulatory actions of Councils.

It is vital that those involved in the work of the Councils have a good understanding of the concept of the public interest and an ability to apply the concept in consideration of the matters before them.

Appendix A provides additional information on the application of the public interest test to immediate action under s.150 of the National Law, while Appendix B provides an overview of reported Court and Tribunal cases addressing the public interest.

#### How does public interest fit into the health practitioner regulatory system?

The content of the *National Law* itself sign-posts some of the public interest considerations to be taken into account by decision-makers. For example the objectives and overriding principles as set out in sections 3 and 3A of the *National Law* include:

- to provide for the protection of the public ... (s3(2)(a))
- to facilitate access to services provided by health practitioners in accordance with the public interest (s3(2)(e)),
- .. the protection of the health and safety of the public must be the paramount consideration (s3A), and
- An entity .... is to exercise its functions having regard to the objectives and guiding principles of the national registration and accreditation scheme... (s4).

There are also a number of sections that impose a specific obligation to consider the public interest when exercising regulatory functions under Part 8 of the *National Law*. Those sections include:

- the obligation of Council to impose interim conditions/suspension, if it is in the public interest to do so (s150),

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<sup>1</sup> First issued March 2017; re-issued in September 2017 to correct a cross-referencing error; re-issued in February 2020 as v.10.1 with the addition of Appendices.

- the power of the Tribunal to suspend/cancel registration (s149C),
- the power of Council to act on the IRP's recommendation to suspend or impose conditions on a student's registration, if Council is satisfied that it is in the public interest (s152M(2)),
- imposition of fines by the Tribunal, a Professional Standards Committee (PSC) or a Council Inquiry (s149B, s146C, s148F), and
- the power of the Tribunal or a PSC to terminate proceedings or decide not to hold an Inquiry (Schedule 5D clause 12(1)(b))

### **What is the public interest?**

There is no statutory definition of the public interest. It is not a fixed concept and in any instance discerning the public interest will depend on particular circumstances of the case and the broader public concerns of the time. The courts have made some comment and given guidance on the concept but have not sought to tie it down.

Essential features of the public interest that have been identified by the Courts include:

- It involves a discretionary value judgement requiring the decision maker to consider the objectives of the particular statute<sup>2</sup>.
- It is multi-faceted and a decision maker will need to weigh competing considerations (for example the tension between the public interest against a practitioner engaging in a sexual relationship with a patient and the public interest in having the benefit of the services of that practitioner who in all other respects has demonstrated his or her competence) when making a decision<sup>3</sup>.

### **Practical application to the *National Law***

Important considerations in identifying the public interest are section 3 of the National Law which sets out the aims of the statutory scheme and, more particularly, section 3A which says that the paramount consideration is the protection of the health and safety of the public.

Identifying the public interest will also require a consideration of broader community values and sentiment. In some instances, these values will be uncontestable – for example, the public's abhorrence of child sexual abuse. Such a value might be evidenced by, for example, the Royal Commission into Institutional Responses to Child Sexual Abuse. At other times, the public's values might be harder to identify. Some examples of situations in which competing values may make it difficult to clearly discern the public interest are:

- health practitioners advocating for voluntary euthanasia,
- health practitioners questioning the value of infectious disease vaccination, and
- dental practitioners questioning fluoridation of public water supplies.

In applying the public interest test decision-makers should remember:

1. There is no immutable definition of 'public interest'. Rather, it takes its meaning from the subject matter being considered and from the statutory and factual context within which the matter is to be decided. The statutory context includes sections 3, 3A and 4 of the

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<sup>2</sup> *O'Sullivan v Farrer* 1989 168 CLR 210, *Hogan v Hinch* [2011] HCA 4

<sup>3</sup> *McKinnon v Secretary, Department of Treasury* [2005] FCAFC 142,

*National Law* and the identification of the public interest within the particular matter is determined by the decision maker.

2. In determining what is 'in the public interest', the decision-maker will engage in a process by which he or she:
  - a) identifies the particular public interest considerations which are relevant to the matter (including by reference to the objects of the legislation, and relevant *policies*),
  - b) classifies each of those public interest considerations, as to whether it is for or against a proposed decision, and then
  - c) exercises a discretionary value judgement as to the balance of the weight of those considerations.<sup>4</sup>
3. In considering appropriate protective measures in cases of serious misconduct (or allegations of such conduct), a consideration of the public interest involves the concept of general deterrence. It is not enough to take measures to address the specific conduct of the health practitioner; regard must also be had to protecting the public from similar misconduct of other health practitioners and maintaining public confidence in the standards of the profession.

(Note that deterrence has limited relevance in s.150 proceedings due to matters being proved in the s.150 context.)

4. The weight given to individual public interest considerations in a particular matter may shift over time and in light of developments in the matter and the practitioner's insight or further conduct.<sup>5</sup> Decision makers must be prepared to revisit their conclusions in light of such developments.

## **Conclusion**

Decision-makers should recognise that decisions taken under the *National Law* involve consideration of what is in the public interest in the particular circumstances of each individual matter being determined.

The public interest is often addressed by the specific protective measures taken for the public's health and safety. However, in matters where decision makers are concerned that, for example, the imposition of conditions will not adequately reflect the public's level of concern and expectations, then careful consideration should be given to identifying and acting on a broader understanding of the public interest.

Just as with other aspects of reasoning and decision making, public interest considerations should be clearly recorded in the written reasons for decision.

## **NOTE:**

This HPCA Legal Practice Note (Our ref: HP19/156182) has been prepared by the legal staff of the Health Professional Councils Authority and is to read in conjunction with the applicable legislation and any relevant case law. Its content is information, not advice, and it is not a substitute for the provisions of the

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<sup>4</sup> *Duncan v Independent Commission Against Corruption* [2016] NSWCA 143, at [224]-[235]

<sup>5</sup> *Hill v Medical Council of New South Wales* [2019] NSWCATOD 97

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.

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## **APPENDIX A: Public Interest in the context of s.150 of the National Law**

Considerations of the public interest most commonly arise in the context of urgent interim action proceedings under s.150 of the National Law.

Section 150 states that the Council *must* take action if satisfied the action is *otherwise in the public interest*. This is so even if the Council is *not* satisfied under the first limb of s.150 that action is appropriate for the protection of health or safety of any person/s. In *Crickitt v Medical Council of NSW* [2015] NSWCATOD 86 at [33] the Tribunal clearly draws this distinction where it states "... we are entitled to consider the matter by reference to the protection of the health or safety of any person or persons, in addition to, or alternative to the public interest ground." (emphasis added)

It is important to note at the outset that s.150 action is interim and designed to operate in a protective manner whilst other regulatory action is commonly taken to remediate the practitioner's conduct, health or professional performance.

### **Why was the public interest limb introduced?**

The 'public interest' limb of s.150 was introduced through the 2008 amendment to s.66 of the *Medical Practice Act 1992 (NSW)*. As the second reading speech for the Medical Practice Amendment Bill 2008 reveals, the inclusion of the 'public interest' limb in s.66 was directed towards expanding the powers of the then Medical Board to suspend or impose conditions on a practitioner's registration on public interest grounds, even where the practitioner poses no risk to a person's health or safety.

*"... the bill amends section 66 of the Medical Practice Act to clarify that the actions under this section must be guided by what is needed to protect the public interest. The Board ..... should look to the outcome which best addresses the statutory purpose of the protection of the public or is otherwise in the public interest."*

### **What factors have been taken into account when assessing if the requirement to serve public interest is satisfied?**

In taking action under s.150 decision makers must balance the interests of the practitioner against the identified public risk. It is not enough to take measures to address the specific alleged conduct of the health practitioner. Regard must also be had to maintaining public confidence in the standards of the profession.

There are often competing public interests to be assessed in determining appropriate protective orders. This may be particularly apparent in some cases and not so clear in others.

The Tribunal in *Crickitt*<sup>6</sup> considered that the community expects practitioners, as members of a profession, to exhibit "*high moral and ethical values*" which honours the confidence, respect and privilege given to them. *Crickitt* is a good example of factors that were weighed when

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<sup>6</sup> at [56]

assessing the legislative intent of the public interest limb in s.150. While there was nothing to suggest that Dr Crickitt was anything other than a perfectly competent medical practitioner who posed no risk of harm to any patient, his having been charged with the murder of his wife was held to justify his interim suspension under s.150 on public interest grounds.

In *Clarke v Nursing and Midwifery Council* [2017] NSWCATOD 163 the Tribunal emphasised the importance of practitioners complying with appropriate Council processes and that this was in the broader public interest:

*Ms Clarke's committed intransigence in relation to Council processes means that the s150C conditions are also 'otherwise in the public interest'. The reluctance of the appellant over a long period to comply with the requirements of her professional governing body give cause for concern in terms of her ability to comply with and uphold professional standards. Health practitioners must work with regulators, and within regulation, including for example appreciating the necessity of co-operating with investigations or assessments undertaken to protect the health and safety of the public, even if the practitioner may believe that the originating concern or complaint is unfounded."* [52]

In *Hill v Medical Council of New South Wales* [2019] NSWCATOD 97 the Tribunal set aside the Medical Council's s.150 decision to suspend the practitioner whose competency as an anaesthetist was not in doubt. In assessing the public interest the Tribunal gave weight to the absence of prior complaints against the practitioner, his demonstrated understanding of relevant guidelines and a clear willingness to learn from his mistakes.

While the Council's decision to suspend the practitioner's registration was set aside on the grounds that it is [not] *presently in the public interest* the Tribunal accepted [at 73] the Medical Council's approach to and understanding of the public interest. That approach included:

*consideration of the public interest must involve consideration of matters which impact upon the honour and integrity of the medical profession generally. No actual harm needs to be demonstrated.* [53]

and

*in considering the public interest, limited weight should be given to the length of time which the investigation of the matter may take.* [65]

There is a significant public interest in maintaining the confidence in the regulation of health professionals, as confidence in such regulation is fundamental to maintaining confidence in the capabilities of health professionals generally, and the effectiveness of the broader healthcare system. As identified in *Hill* the balance of public interest considerations justifying specific regulatory action may shift and Councils should be open to reviewing their decisions as necessary.

## APPENDIX B: Case Digest

The following cases demonstrate a range of factors that decision makers have considered relevant when evaluating the public interest.

### NCAT

*Crickitt v Medical Council of NSW (No 2)* [2015] NSWCATOD 115 the Tribunal said at [56]:

*“A consideration of the public interest will always include the need for patients to have confidence in the competence of medical practitioners and that medical practitioners will exhibit traits consistent with the honourable practice of an honourable profession. Integrity, trustworthiness and high moral and ethical values are an integral part of the practice of medicine, as is compliance with regulatory requirements and codes of practice established by those responsible for the administration of the medical profession. The public must have confidence that medical practitioners who treat them exhibit these traits.”* (cited in *Hill v Medical Council of New South Wales* [2019] NSWCATOD 97 at [54]).

*Coutinho v Dental Council of New South Wales* [2018] NSWCATOD 98 at [49]:

*“...Determining whether the public interest requires a suspension of a professional’s registration involves a balancing of matters including the nature of the offence, whether the conduct giving rise to the offence would lead to the erosion of confidence by the public or patients in the relevant profession, as against the draconian nature of the suspension and its impact on the professional involved and his or her patients.”*

The following cases entail quite different circumstances that applied the concept of the public interest.

*Singh v Medical Council of NSW (No 2)* [2015] NSWCATOD 28 at [44] the Tribunal, in considering a practitioner who was in breach of conditions on his registration, indicated that public protection and the public interest can go hand-in-hand:

*“...To allow him to continue to practice, albeit under supervision, in all the circumstances would be contrary to the necessary protection of the public and would not be in the public interest. Furthermore, it would create a blatant example, of which any medical practitioner could take advantage, of a situation where this appellant has basically continued to practice thumbing his nose at the relevant authorities. Such a situation is not inimical to the appropriate regulation of medical practitioners in accordance with the statutory regime established by the legislature and is not in the public interest.”*

*In Health Care Complaints Commission v Sarfraz* [2015] NSWCATOD 75 the practitioner had consented to the suspension of his registration and surrendered his resignation due to his age (75). The issue was whether the matter should continue to final hearing, given that there was “scant” evidence to determine the complaints of ‘significant impairment in intellectual and memory capacity’ and ‘severe impairment in executive functions’. The Tribunal held at [29]:

*“...pursuing this complaint to a final hearing is not in the interests of the public. Public funds would be expended in the litigation, and the outcome, assuming the particulars in the complaint are established, (cancellation of registration) in practical terms, so far as public safety is concerned, is identical to the practitioner surrendering his registration.”*

## VCAT

In *Medical Board of Australia v Fox (Review and Regulation)* [2016] VCAT 408:

The Tribunal considered the remote location of a practitioner, the limited support available and heavy workload as mitigating factors. Nevertheless, they held that such factors could not excuse conduct that is objectively serious. The outcome must be appropriate in the circumstances of the complaint balancing public protection, deterrence to other practitioners and maintaining the standards of the profession.

## NSW Court of Appeal

*Prakash v HCCC* [2006] NSWCA 153 at [91], (per Basten JA):

*“...the public interest includes indirectly, the standing of the medical profession and the maintenance of public confidence in the high standard of practitioners. There is also an element of deterrence or, to put it more positively, encouragement to other practitioners to recognise the importance of complying with professional standards and the risks of failing to do so.”* (cited in *Health Care Complaints Commission v Khan (No. 2)* [2019] NSWCATOD 37 at [43]).

*Peter Cecil Harcourt Dawson v Law Society of NSW* [1989] NSWCA 58 at [10]:

*“There is no public interest in denying forever the chance of redemption and rehabilitation to former practitioners. On the contrary, the public is better served if, in appropriate cases, those who have offended, once they have affirmatively proved reform, are afforded a second chance ....”*  
(cited in *Scully v Health Care Complaints Commission* [2013] NSWNMT 7 at [49]; *Shah v Health Care Complaints Commission* [2014] NSWCATOD 94; and *Ahmad v Health Care Complaints Commission* [2019] NSWCATOD 35)

## Federal Court

*McKinnon v Secretary, Department of Treasury* [2005] FCAFC 142, at [9]–[12] per Tamberlin J

*This expression [the public interest] is, on the authorities, one that does not have any fixed meaning. It is of the widest import and is generally not defined or described in the legislative framework, nor, generally speaking, can it be defined. ..*

*[It] directs attention to that conclusion or determination which best serves the advancement of the interest or welfare of the public, society or the nation and its content will depend on each particular set of circumstances. ..*

*[It] is often used in the sense of a consideration to be balanced against private interests or in contradistinction to the notion of individual interest. ..*

...

*[It] is not one homogenous undivided concept. It will often be multi-faceted and the decision-maker will have to consider and evaluate the relative weight of these facets before reaching a final conclusion as to where the public interest resides. This ultimate evaluation of the public interest will involve a determination of what are the relevant facets of the public interest that are competing and the comparative importance that ought to be given to them so that “the public interest” can be ascertained and served. ..*

*Comalco Aluminium (Bell Bay) Ltd v O’Connor and Others* (1995) 131 ALR 657, at page 681 per Wilcox CJ and Keely J

*The purpose of the reference to 'public interest' is to ensure that private interests are not the only matters taken into account: to make clear that the interests of the whole community are matters for the Commissioner's consideration. The effect of the reference is to amplify the 'scope and purpose' of the legislation*