



Health Professional Councils Authority

LEGAL PRACTICE NOTE No. 1, 2014

Conditions and Orders under Part 8 of the Health Practitioner Regulation National Law (NSW)¹ – what is the distinction and why it matters

The imposition of conditions on the registration of health practitioners and students by decision making bodies is a frequent outcome flowing from health, performance or conduct proceedings under Part 8 of the *Health Practitioner Regulation National Law (NSW)* (the National Law). In many cases the relevant decision-making bodies may also make orders that require the health practitioner or student to do specific things but without imposing a condition on the practitioner's or student's registration.

The power to impose an obligation on a health practitioner or student by way of an order rather than a condition is unique to New South Wales (NSW). This practice note concerns registered health practitioners and registered students who have a principal place of practice in NSW. Commonly made orders are orders that require a practitioner to undertake an educational course or courses, or to engage in a mentoring relationship with another practitioner. It is also common for orders to be made that require a practitioner or student to undergo medical or psychological treatment or counselling, although any of these matters can also be dealt with by way of a condition.

A convenient way to distinguish conditions from orders is to note that a condition makes the practitioner's or student's registration conditional on their compliance with the condition, or otherwise limits or restricts the way that they practise their profession; whilst an order requires them to do a specific activity or task.

It is of course important to recognise that the activities or tasks that may be required by way of an order may also be linked to a condition and thereby become part of the condition. A common example of this type of linkage is a condition that a practitioner is not to engage in certain aspects of practice until such time as he or she has completed specified educational courses.

It is important to remember that many of the things that can be imposed on a practitioner by way of an order, for example mentoring, can also be imposed by way of a condition. Therefore decision making bodies need to be clear in their decisions whether they intend to impose a condition or to make an order.

Source of power

The bodies that can impose conditions and make orders and the sections providing the power to do so are set out in the following table:

¹ Note that a National Board may also register a person subject to any condition the Board considers necessary or appropriate under Part 7 of the National Law.

Registered Health Practitioners

| BODY | | CONDITIONS | ORDERS |
|----------------------------------|------------------|---|---|
| Council | s.150 inquiry | Yes, by order [s.150(1)(b)] | No |
| | Following an IRP | Yes, on recommendation of IRP and with the voluntary agreement of practitioner [s.152J] | No |
| | Council Inquiry | Yes [s.148E(1)(c)] | Yes [s.148E(1)(b), (d)-(g)] |
| Performance Review Panel | | Yes [s.156C(2)(a)] | Yes [s.156C(2)(b)-(d)] |
| Tribunal | | Yes [s.149A(1)(b)] | Yes [s.149A(1)(c)-(f) , s. 149B(1), s. 149C(5)] |
| Professional Standards Committee | | Yes [s.146B(1)(b)] | Yes [s.146B(1)(c)-(f), s.146C(1)] |

Registered Students

| BODY | | CONDITIONS | ORDERS |
|----------|------------------|--|--------------------------|
| Council | s.150 inquiry | Yes, by order [s.150(1)(c)] | No |
| | Following an IRP | Yes, on recommendation of IRP and with agreement of student [s.152J] | No |
| | Council Inquiry | Yes [s.148E(2)(b)] | Yes [s.148E(2)(c) & (d)] |
| Tribunal | | Yes [s.149A(2)(b)] | Yes [s.149A(2)(c) & (d)] |

(Students are not subject to Performance Review Panels and Professional Standards Committees).

The language of the various provisions has some inconsistencies (for example a Council acting under s.150 imposes conditions by order), which reflect the provisions' different providences. However it is clear that some bodies can only impose conditions whilst others may impose conditions as well as making a range of other orders.

The National Register

The importance of the distinction between conditions and orders is reflected in the type of information that can be recorded on the National Register of health practitioners. Section 225(k) of the National Law provides for the recording of conditions on a practitioner's registration on the National Register. Unlike conditions, there is no statutory requirement for the details of an order to be recorded in the Register, although a National Board may choose to do so if it considers that it is appropriate for the information to be included [section 225(p)].

If the decision-maker intends for the matter to be recorded on the publicly available National Register then it should be expressed as a condition.

Other States/Territories

The provisions of the National Law relating to the making of conditions are different in the rest of the country. The Health Practitioner Regulation National Law (as adopted in each other Australian jurisdiction) does not allow for the making of orders. For example section 196(2) of that Act allows a Tribunal to:

- (a) caution or reprimand a practitioner;
- (b) impose a condition on a practitioner's registration;
- (c) require the practitioner to pay a fine;
- (d) suspend the practitioner's registration;
- (e) cancel the practitioner's registration.

Similarly section 191(3) of the Law as adopted in each other Australian jurisdiction provides that a Panel (being a Health Panel or a Performance and Professional Standards Panel) may impose conditions on a practitioner's registration, a Health Panel may also suspend a practitioner's registration and a Performance and Professional Standards Panel may caution or reprimand a practitioner. However a Panel has no power to order that a practitioner do something other than by way of a condition on the practitioner's registration.

Review of Conditions

In NSW conditions imposed on a health practitioner's registration following a conduct process (Tribunal, Professional Standards Committee, or a Council inquiry) or a Performance Review Panel hearing can only be lifted following a formal review process by the *appropriate review body*. This is entirely appropriate in terms of conditions that restrict a practitioner's professional practice in the interests of protecting the public.

However, orders that require a practitioner to do a specific thing, such as undergo a period of professional supervision or mentoring, or undertake a specified educational course, but which do not restrict his or her practice whilst that thing is done should be able to be "lifted" as soon as they have been satisfactorily complied with. This is reflected in the absence of any provision that allows for the review of orders.

Contravention of Conditions and Orders

Finally the distinction between orders and conditions is further reinforced by the definition of *unsatisfactory professional conduct* as found in section 139B(1) of the National Law. Paragraph (c) of that definition provides that a contravention of *a condition to which the practitioner's registration is subject or an undertaking given to a National Board* is unsatisfactory professional conduct; whilst paragraph (d) provides that *a contravention by the practitioner (whether by act or omission) of a decision or order made by a Committee or Tribunal in relation to the practitioner* is unsatisfactory professional conduct.

The fact that the legislation deals with the consequences of the contravention of conditions and the contravention of orders (although the relevant paragraph does not cover all orders) separately, notwithstanding that the consequences are the same, is further evidence that conditions and orders are distinct.

NOTE:

This HPCA *Legal Practice Note* (Our Ref: HP14/2818) 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.

March 2014