



Health Professional Councils Authority

LEGAL PRACTICE NOTE No. 7, 2015

Critical compliance orders or conditions

Introduction

The *Health Practitioner Regulation National Law (NSW)* makes provision for the Tribunal and Professional Standards Committees to designate any order or condition that they make or impose on a practitioner or student as a critical compliance order or condition.

Designating an order or condition as a critical compliance order or condition means that a breach will result in immediate suspension of registration under section 150 of the National Law and subsequent cancellation of registration by the Tribunal. Unlike critical impairment conditions, the Tribunal can also attach critical compliance orders or conditions on a student's registration (note that students cannot be brought before a Professional Standards Committee).

The legislation

Section 138(1) of the *Health Practitioner Regulation National Law (NSW)* defines a critical compliance order or condition as follows:

critical compliance order or condition means an order or condition of a registered health practitioner's or student's registration that is a critical compliance order or condition under section 146B, 149A or 163B.

Section 146B provides that a Professional Standards Committee may make a condition or order a critical compliance order or condition.

Section 149A provides that the Tribunal may make an order or condition a critical compliance order or condition.

Section 163B(2) provides that if an appropriate review body alters an existing critical compliance order or condition or replaces an existing critical compliance order or condition with a new order or condition, the amended or new order or condition is, unless the review body expressly orders otherwise, a critical compliance order or condition.

Section 150(3) provides that a Council **must** suspend the registration of a practitioner or student and refer the matter to the Tribunal if satisfied that he or she has contravened a critical compliance order or condition.

Section 149C(3) provides that the Tribunal **must** cancel the registration of a health practitioner or student if it is satisfied the practitioner or student has contravened a critical compliance order or condition.

Background

Critical compliance orders and conditions were introduced to the *Medical Practice Act 1992* by the *Medical Practice Amendment Act 2008* with the relevant provisions commencing on 1 August 2008.

The amendments arose from the review of the then NSW Medical Board's handling of the case of then Dr Graham Reeves and revelations that he had practised in breach of conditions on his registration preventing him from practising obstetrics. The review identified that for a range of reasons the Medical Board had felt itself unable to suspend Reeves' registration notwithstanding the fact that he had practised in breach of the conditions on his registration. A number of important amendments, including the introduction of critical compliance orders and conditions, were made to the legislation to strengthen the regulatory approach.

Operation

Critical compliance orders and conditions are remarkably straightforward in operation. In the event that the Tribunal or a Professional Standards Committee specifies an order or condition as a critical compliance order or condition the relevant Council **must** on becoming aware of a contravention of that order or condition take action under section 150 of the National Law to suspend the registration of the practitioner or student. As soon as the Council has taken that action it **must** refer a complaint to the Tribunal (as a practical matter via the Health Care Complaints Commission) and if the Tribunal is satisfied that the contravention has occurred it **must** cancel the registration of the practitioner or student.

Only the Tribunal or a Professional Standards Committee can make an order or condition a critical compliance order or condition. Council Inquiries and section 150 proceedings cannot designate an order or condition as a critical compliance order or condition. The only exception to this rule is in those circumstances where a Council is exercising the functions of the appropriate review body under Division 8 of Part 8 of the National Law. Where a Council is acting as the appropriate review body and reviews existing critical compliance orders or conditions any new or altered order or condition that is made is also a critical compliance order or condition unless the Council expressly orders otherwise [section 162B(2)].

Cases

Medical Board of New South Wales v Dr Jason Jefferson Martin [2009]

In this decision the then Medical Tribunal discusses the mandatory nature of cancellation when a critical compliance order or condition is contravened. The Tribunal identified that there is no discretion as to cancellation with the only

discretion being as to the length of time in which the cancelled practitioner may not apply for a review of the cancellation order.

Health Care Complaints Commission v Dr Hoffer [2014] NSWCATOD 74

In this decision the Tribunal declined to designate conditions imposed on Dr Hoffer's registration as critical compliance conditions on the basis that it was not satisfied such a condition is necessary to protect the health and safety of the public. The Tribunal also noted that Dr Hoffer had at all times in the past fully complied with conditions imposed on his registration and that his previous behaviour gave the Tribunal confidence that he would continue to comply.

Health Care Complaints Commission v Bours (No 2) [2015] NSWCATOD 80

In this decision the Tribunal noted that the making of certain conditions as critical compliance conditions was a mark of the seriousness with which it viewed the practitioner's contravention. The Tribunal expressly noted that *should the practitioner flout the law again and engage in such unlawful conduct with restricted substances, the effect would be cancellation of registration.*

The above cases give guidance as to the care to be exercised in making use of the power to impose critical compliance orders or conditions. The case of Dr Martin clearly demonstrates that breach of a critical compliance order or condition can have only one consequence being cancellation of the practitioner's registration. There is no discretion and the circumstances surrounding the breach, no matter how compelling they may be, cannot lead to a different outcome.

The case of Dr Hoffer demonstrates some of the considerations that should be taken into account in deciding whether or not to impose critical compliance orders or conditions including the practitioner's past history of compliance. The case of Bours demonstrates similar considerations noting the Tribunal's pointed reference to *flouting* of the law.

Conclusion

Critical compliance conditions and orders are very powerful tools that are available to the Tribunal and Professional Standards Committees to use in circumstances where there are concerns about the ability or preparedness of practitioners to comply with orders or conditions on registration. Given how powerful these tools are and the consequences that must arise from a breach, their use is not common.

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NOTE:

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