



Health Professional Councils Authority

LEGAL PRACTICE NOTE

No. 10

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.

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),
- 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.

In paragraphs 9 -12 of *McKinnon v Secretary, Department of Treasury* [2005] FCAFC 142, Justice Tamberlin spoke of the public interest in this way:

The reference to "the public interest" appears in an extensive range of legislative provisions upon which tribunals and courts are required to make determinations as to what decision will be in the public interest. This expression 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. ..

The High Court said in *O'Sullivan v Farrer* 1989 168 CLR 210 at paragraph 13 that

the expression "in the public interest", when used in a statute, classically imports a discretionary value judgment to be made by reference to undefined factual matters..'. The use of the term therefore requires a decision maker to take into account a range of considerations that are particular to the case being determined and which, while not necessarily being explicitly set out, relate to the objects of the particular statute.

While in *Hogan v Hinch* [2011] HCA 4 at paragraph 31 Chief Justice French noted

When used in a statute, the term [public interest] derives its content from the subject matter and the scope and purpose of the enactment in which it appears.

There will often be competing public interests at play in any particular case. For example there may be a 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.

Identifying the public interest will generally be a balancing exercise, weighing up these competing interests and deciding where the balance falls.

Below are some references to the public interest from cases determined by the NSW Civil and Administrative Tribunal under the *National Law*:

In *Crickitt v Medical Council of NSW (No 2) [2015] NSWCATOD 115* the Tribunal noted at paragraph 47 that:

It would be in the public interest to prevent harm being suffered by a person or persons if it could be predicated that this may occur. Of course, the public interest may accommodate other matters which impact on the honour and integrity of the profession generally. These would include conviction for a serious crime, or failing to lodge taxation returns for an inordinate period.

And in paragraph 56(7)(f) the Tribunal went on to note that:

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.

In *Singh v Medical Council of NSW (No 2) [2015] NSWCATOD 28* the Tribunal said at paragraph 44 in relation to a practitioner who was in breach of conditions on his registration that :

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 .. 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.

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.

Consideration of the public interest can arise in the context of urgent interim action proceedings under section 150 of the National Law and related reviews or appeals:

- In reviewing a section 150 decision under section 150A the decision makers have to balance the interests of the practitioner as indicated, for example, in changed practices, remedial education and other rehabilitative steps against the identified public risk. For a practitioner where there are boundary crossing allegations, that public risk could be protecting vulnerable members of the community such as children, frail aged and persons with mental health conditions against the power imbalance that exists between the treating health practitioner and the patient or client. Additionally, in reaching a decision the impact of that decision on maintaining public confidence that the regulatory mechanisms will protect them from unscrupulous practitioners is an important factor to consider.
- The Tribunal considered the public interest in *Crickitt v Medical Council of NSW [2015] NSWCATAO 115*, in the context of the medical practitioner's appeal against the suspension of his registration, following allegations that he had murdered his wife. The Tribunal scrutinised the circumstances regarding his medical treatment and prescribing practices for his wife, his improper use of medical records and his dishonesty in dealing with the police. The medical treatment of his wife and his subsequent conduct following her death was viewed as unethical, improper and dishonourable, and in the Tribunal's view, such practices placed all his patients at risk. It was therefore in the public interest and appropriate that his registration remain suspended pending further proceedings. The public interest limb of section 150 was the prevailing consideration in this case because, with the wife's death and no other patient concerns identified, there were no circumstances to enliven appropriate action for the health and safety of any person or person.

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 *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.

(see *Duncan V Independent Commission Against Corruption [2016] NSWCA 143, at 224-235*).
3. In considering appropriate protective measures in cases of serious misconduct, 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. This is done by taking appropriate disciplinary action, including suspension or cancellation of registration to send a clear message to the profession and the community about appropriate standards of practice and denouncing unacceptable conduct (see *HCCC v Do [2014] NSWCA 307 at paragraph 35*). Practitioners as members of a profession are also expected to exhibit high moral values, integrity and ethical behaviour which honours the confidence, respect and privilege given to them by the public. (see the above reference to *Crickitt v Medical Council of NSW [2015] NSWCA 115*)

4. There are often competing public interests to be assessed in determining appropriate protective orders. This may be particularly apparent in cases involving health practitioners providing health services to rural and remote communities with limited access to health services. There is a public interest in the practitioner continuing to practise which is weighed against the public interest in protecting clients from any repetition of the offending conduct (see *Medical Board of Australia v Fox (Review and Regulation) [2016] VCAT 408 at paragraph 52*). The circumstances of a health practitioner's professional practice i.e. high workload with limited support in a remote setting can be mitigating considerations, however, they do not excuse conduct which is systemic and which is objectively serious. The balance will generally fall in favour of taking appropriate protective measures to protect the public against such conduct and satisfying the public interest in general deterrence of other professionals from engaging in similar misconduct.

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:

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**** AMENDMENT NOTE:** The text of the dot point on page 1 and marked ** was amended in September 2017 because the previous references to s 152I (2) (b) and s 152J were in error.