



Health Professional Councils Authority

LEGAL PRACTICE NOTE

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PROTECTED REPORTS

Some reports, obtained by, or for, a Council and its Health and Performance Programs have a particular status under *Health Practitioner Regulation National Law (NSW)* (the National Law). Such reports are classified as protected reports. The National Law strictly limits the use of protected reports. This protection is in addition to the broad confidentiality provisions under the National Law.

The legislation

Section 138 of the *National Law* defines *protected report* - as follows:

- (a) a report prepared by an Impaired Registrants Panel for a Council;
- (b) a report prepared by an assessor for a Council or Performance Review Panel;
- (c) a report prepared by a registered health practitioner about an examination conducted under section 145E, 152B or 152C;
- (d) a report prepared by a registered health practitioner for a Council in connection with an examination of a person by the health practitioner as required by a condition of registration or an order imposed by an adjudication body on the person;
- (e) a report prepared by a registered health practitioner for a Council under a request made by a person to the health practitioner in connection with a matter being dealt with by an Impaired Registrants Panel;
- (f) a report prepared, under clause 12 of Schedule 5B, by a person giving expert advice to a Performance Review Panel.

Section 176F(1) provides that a person who has obtained a protected report must not, directly or indirectly, make a record of or disclose to another person information in a protected report.

Section 176F(2) provides that information contained in a protected report can be released for the purpose of exercising functions under the National Law or to the Health Care Complaints Commission.

Section 176F(3) provides that a protected report may not be admitted or used in civil proceedings without the consent of both the author and the subject practitioner.

Section 176F(4) provides that a person may not be compelled (for example by subpoena) to produce a protected report, or to give evidence in relation to the report or its contents, in civil proceedings before a court.

Sections 145E, 152B or 152C require a registered health practitioner or student to comply with a Council's request for an independent assessment of their health.

Schedule 5B clause 12 provides that a Performance Review Panel (PRP) may obtain an expert report on the matter that is the subject of the performance review.

Sections 148H, 156F, and s171F of the National Law and clause 28(1)(c) of Schedule 5 of the *Civil and Administrative Tribunal Act 2013* provide that a statement of a decision required to be given to a person under the National Law need not include confidential information from a protected report. Instead, a confidential information notice may be given to indicate the reason why information has not been included in the statement of decision or that the statement of decision will not be provided.

Background to protected reports

From July 1993, reports about a medical practitioner's health were protected from use in civil proceedings under the *Medical Practice Act 1992*. Similar protections were introduced to the *Nurses Act 1991* in 1996.

The term “**protected report**” was introduced in the *Medical Practice Act 1992* by the *Medical Practice Amendment Act 2000*. The provisions, which commenced on 1 October 2000, provided for the protection of reports concerning medical practitioners in the Performance and Health Programs. Those further amendments were incorporated in the *Nurses and Midwives Act 1991* in 2004. Protected reports were introduced for all other health professions via the National Law.

Protected reports in the Health Program

Registered health practitioners and students whose personal health is impacting on, or has the potential to impact on, their safe practice are ordinarily managed in a Council's Health Program. Health Programs are designed to protect the public while at the same time allowing registrants with health problems to remain in active practice or training. Registrants are ordinarily required attend a Council Appointed Practitioner (CAP) for an independent assessment of their health. The report from the CAP to the Council is a protected report. On receipt of this report, a Council decides whether to convene an Impaired Registrant Panel (IRP). If an IRP is held, the Panel prepares a report for the Council, that report is a protected report, as is a report by a treating practitioner in connection with a matter before the IRP.

Protected Reports in the Performance Program

In circumstances where a Council is concerned that a practitioner's performance, or any aspect of that performance, is unsatisfactory the Council may have the practitioner's professional performance assessed. A report prepared by a performance assessor is a protected report.

Rationale for protected status of health and performance reports

Authors of protected reports are engaged for the specific purpose of assisting a Council in its role of protecting the public and the profession. In circumstances where the report prepared by a CAP, an IRP or a performance assessor could be obtained and used for other purposes, for example in private civil litigation, the authors of those reports may feel constrained in their role of reporting independently to the Council and may cease providing their reports. This would significantly hamper a Council's ability to obtain necessary information to carry out its protective functions,

and the Council's programs, designed to protect the health and safety of the public, are likely to be compromised.

As noted above, s.176F (2) provides that a protected report may be used for functions under the National Law and may also be released to the Health Care Complaints Commission. Accordingly a protected report may be used in relevant matters before the Civil and Administrative Tribunal of New South Wales, a Professional Standards Committee, a Council Inquiry, an Impaired Registrant Panel, or a Performance Review Panel.

Restrictions on protected reports in civil proceedings

The National Law provides that a person cannot be compelled to produce a protected report to a court nor can a person be required to give evidence in relation to a protected report (or any part of a report) in civil proceedings. Authors of protected reports rarely consent to the use of their report in civil proceedings as this potentially exposes them to being required for cross-examination in a court about a report prepared for another purpose. When both the author and the person who is the subject of the report consent, a protected report may be used in civil proceedings.

Use of protected reports in other proceedings

Protected reports must be produced to courts in response to subpoenas and/or summonses issued in the criminal jurisdiction, a Royal Commission, a Coroner's Court, and for certain other enquiries.

Considerations when preparing statements of decision or releasing protected reports

Statements of reasons for a decision need not contain confidential information that would reveal the contents of a protected report. The National Law provides that a **confidential information notice** may be given to indicate the reason why information has not been included in the decision or that the decision will not be provided.

A protected report includes a copy, reproduction and duplicate of the report or any part of the report. Care needs to be taken to ensure that a person does not, *directly* or *indirectly*, disclose a protected report or information contained in it to another person other than for the purpose of exercising functions under the National Law or to the Commission. This includes making a record of or disclosing to another person information contained in the protected report where the person has obtained that information in exercising functions under the National Law.

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NOTE:

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