

Mandatory reporting and complaints handling – the protections

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The Requirements- Health Practitioner Regulation National Law (NSW) – S.141

- This section applies to a registered health practitioner (the "first health practitioner") who, in the course of practicing the first health practitioner's profession, forms a reasonable belief that-
 - another registered health practitioner (the "second health practitioner") has behaved in a way that constitutes notifiable conduct; or
 - a student has an impairment that, in the course of the student undertaking clinical training, may place the public at substantial risk of harm.
- The first health practitioner must, as soon as practicable after forming the reasonable belief, notify the National Agency of the second health practitioner's notifiable conduct or the student's impairment.



The Requirements- Health Practitioner Regulation National Law (NSW) – S.143A

- 143A (only in NSW) – a mandatory notification is a complaint for the purpose of this Part and for Health Care Complaints Act including ss.96 and 98



The Requirements - Health Practitioner Regulation National Law (NSW) s.140

- Definition of “notifiable conduct”
 - (a) Practised while intoxicated by alcohol or drugs
 - (b) Engaged in sexual misconduct
 - (c) Placed public at risk of serious harm because of impairment
 - (d) Placed the public at risk of harm because the practitioner has practised the profession in a way that constitutes a significant departure from accepted professional standards.



The Requirements - Medical Practice Act 1992 (NSW) s.71A (now repealed)

Reportable misconduct

- S.71A(2)

A medical practitioner who forms a reasonable belief that another medical practitioner has committed reportable misconduct must as soon as practicable report the conduct to the Board.

The Requirements - Medical Practice Act 1992 (NSW) s.71A(3) (now repealed)

- A report under this section:

- (a) is to be made and dealt with in the same way as a complaint

- (b) is to be taken as a complaint for the purposes of this Part and s.96 and s.98 of the Health Care Complaints Act 1993 (NSW)

- This is re-enacted in NSW in s.143A of the National Law– a mandatory notification is a complaint for the purpose of this Part and for Health Care Complaints Act including ss.96 and 98

The Requirements - Medical Practice Act 1992 (NSW) (now repealed)

- **s.71A(1) definitions of reportable misconduct**
 - (a) practices medicine while intoxicated
 - (b) practices medicine in a manner that constitutes a flagrant departure from accepted standards of professional practice or competence and risks harm to some other person
 - (c) sexual misconduct
- Note: no mention of impairment



The Protections Health Practitioner National Law s.237

- **237 Protection from liability for persons making notification or otherwise providing information**
 - This section applies to a person who, **in good faith-**
 - makes a notification under this Law; or
 - gives information in the course of an investigation or for another purpose under this Law to a person exercising functions under this Law.
 - Provides information or is otherwise concerned in the making of a notification
 - The person is not liable, civilly, criminally or under an administrative process, or in defamation for giving the information. Not a breach of professional etiquette.



The Protections Medical Practice Act (NSW) s.47 (now repealed)

- s.47(1) If a person makes a complaint, and does so in good faith:
- (a) making the complaint is not a breach of professional etiquette or a departure from accepted standards, and
 - (b) no liability for defamation is incurred because of the complaint, and
 - (c) does not constitute a ground for civil proceedings for malicious prosecution or for conspiracy
- s.47(3) Does not limit the operation of s.96 of the Health Care Complaints Act



The Protections Health Care Complaints Act (NSW) s.96(2)

s.96(2) The making of a complaint, or the reporting of any matter or thing that could give rise to a complaint to the Commission or a registration authority by any person does not, if it was done in good faith, subject the person personally to any action, liability claim or demand



The Protections Defamation Act 2005

27 Defence of absolute privilege

It is a defence to the publication of defamatory matter if the defendant proves that it was published on an occasion of absolute privilege (as specified in Schedule 1)

Also:

27(2)(b) Matter published in the course of proceedings of an Australian court or Australian tribunal including originating process



The Protections Defamation Act 2005

- **Schedule 1 clause 15 Matters arising under Health Practitioner Regulation National Law in relation to medical practitioners**
- **.....matter that is published:**
 - to or by any of the following for the purpose of the assessment or referral of a complaint against a medical practitioner or other matter or the holding of any inquiry, performance review, investigation or appeal in respect of a medical practitioner under the Health Practitioner Regulation National Law:



The Protections Defamation Act 2005

- **Schedule 1 clause 15 continued**
- **Matter published to:**
 - (i) the NSW Medical Council NSW
 - (ii) the Medical Board of Australia
 - (iii) an Impaired Registrants Panel
 - (iv) a performance review panel
 - (v) a Professional Standards Committee
 - (vi) the Medical Tribunal
 - (vii) members of any of the above
 - (viii) an assessor



The Reality Dr Lucire v Dr Parmegiani

- The Plaintiff commenced proceedings against Dr Parmegiani for damages
- The matter complained of was a letter sent by Dr Parmegiani to the NSW Medical Board concerning evidence given regarding conditions imposed on Dr Lucire.
- No complaint pursued by HCCC
- Three causes of action were pleaded
 - defamation,
 - injurious falsehood
 - misleading and deceptive conduct (s.42 of the Fair Trading Act 1987 (NSW))
- The matter came before Judge Gibson pursuant to an application by Dr Parmegiani for summary dismissal on the basis of the absolute privilege under section 27 of the *Defamation Act* and an absolute privilege at common law.



The Reality Dr Lucire v Dr Parmegiani

- Gibson J found in favour of Defendant on Defamation Act absolute privilege but found no common law absolute privilege so injurious falsehood and Fair Trading Act claims remained.
- Plaintiff appealed and the defendant cross appealed.
- NSW Court of Appeal held that the Defamation Act did not provide an absolute privilege for the making of a complaint and that no common law absolute privilege applied. Nicholas J wrote the majority judgment *“the inevitable conclusion is that it was the legislature’s intention to confine the protection of absolute privilege to communications made for the purpose of dealing with a complaint once made”*



The Reality Dr Lucire v Dr Parmegiani

- *“Where it intended to extend the protection to the making of a complaint it has expressed that intention in clear terms, as in cl 18(a) and cl 32(a) by use of the words “... for the purpose of the making ... of a complaint”. The omission of similar words from cl 15(1)(a) supports the conclusion that it was not intended to include the making of a complaint.”*
- *The making of a complaint originates no proceedings in the Tribunal. It cannot be said it sets its proceedings in motion.*
- Thus with respect to mandatory report requirements whilst the HCCC and MCNSW obtain an absolute privilege, the person who makes the complaint does not and if sued will need to meet assertions that the complaint was not made in good faith



The Implications

- No protection against commencement of civil litigation
- Choosing not to make mandatory report may expose practitioner to disciplinary proceedings
- Exemption from mandatory reporting when providing health services to another practitioner – WA only
- *Lucire v Parmegiani* decision applies to all complaints, not just mandatory notifications: allows redress for malicious complaints
- Misuse of mandatory reporting – right of practitioner to defend their good name remains



Still to be decided

- Meaning of “good faith” and how qualified protections are dealt with in practice
- Ongoing proceedings *Lucire v Parmegiani*
- Watch this space

