April 2020

Health Insights

A reminder on section 130 of the National Law: notify the National Boards of 'certain events', or face a possible finding of unprofessional conduct

Most registered health practitioners are aware of the obligation to notify the National Board of certain events should they occur. These requirements are set out in section 130 of the *Health Practitioner Regulation National Law Act 2009* (the "National Law"). However, we have recently seen an 'uptick' in the number of disciplinary decisions which have been triggered, at least in part, because practitioners have failed to notify their National Board in accordance with that provision. Most commonly, the failure has occurred when the health practitioner was charged and found guilty or convicted of criminal conduct, however there are a number of other 'events' which require notification, including a lapse in appropriate professional indemnity insurance[1].

The recent spate of disciplinary decisions in this area provides an interesting study because it highlights the extended reach of the Tribunal to discipline conduct which is completely unrelated to the practice of the relevant health profession. The decisions also seek to remind practitioners that a breach of the notification obligations under section 130 may result in a finding of unprofessional conduct. In the current turmoil caused by the COVID-19 pandemic which is serving to not only distract from, but in some cases stop, business-as-usual activities, it is important to remember that obligations such as these endure.

In this article we will examine three of the recent decisions.

Health Ombudsman v Chaffey [2020] QCAT 54

Chaffey was a registered nurse who received a single parenting payment benefit from Centrelink. Over a period of several years, Chaffey failed to correctly declare the amount of her employment income to Centrelink, resulting in an overpayment of nearly $65,000. She also made numerous false declarations as to the amount of her income over that time. Chaffey was charged with the offence of dishonestly obtaining a financial advantage. She entered a guilty plea and was sentenced to two years' imprisonment to be released after serving three months, and after providing a recognisance payment of $2000 and being subject to a

[1] Health Practitioner Regulation National Law, section 130(3)(a)(iii)

good behaviour bond for two years. She was also ordered to make reparation of $61,301.47. Chaffey had no prior criminal or disciplinary history.

The Health Ombudsman made two allegations against Chaffey in QCAT:

1) Allegation of professional misconduct constituted by criminal offending by way of social security fraud
2) Allegation of unprofessional conduct particularised as Chaffey's failure to provide written notice to the National Board when she was convicted of the offence in the Magistrates Court within seven days as required by section 130(1) of the National Law

At one stage Chaffey disputed allegation 1 because she believed the charges were of a personal nature, and not connected or involved with her employment as a nurse[2]. In our experience this can be a common misconception amongst health practitioners, who assume that the disciplinary reach of the National Boards is limited to matters concerned only with the practice of their health profession. However, the Tribunal was quick to condemn this belief, saying that it demonstrated a lack of understanding of the definition of "professional misconduct" and of the extent of a registered nurse's professional obligations[3].

For your convenience, the definition of the term "professional misconduct" includes:

…

(c) Conduct of the practitioner, whether occurring in connection with the practice of the health practitioner's profession or not that is inconsistent with the practitioner being a fit and proper person to hold registration in the profession.[4] (Emphasis added)

In its commentary on this matter, the Tribunal said:

It can be seen that the terms of the definition explicitly recognise that conduct of the practitioner not connected with the practice of the practitioner's profession may constitute professional misconduct because such conduct may, nevertheless, be inconsistent with the practitioner being a fit and proper person to hold registration. Serious criminal offending, including offences of dishonesty, is quite clearly capable of being caught by such definition and constituting professional misconduct. Such conduct has the potential to not only affect the reputation of the individual practitioner, but adversely affect the reputation of the profession and the public confidence in members of that profession.[5]

It is unsurprising therefore, that the Tribunal found allegation 1 proven. By way of sanction, Chaffey was reprimanded and conditions were placed on her registration to complete an educational course on professional accountability – an unfortunate result of her demonstrated lack of understanding and insight into the extent of her professional obligations.

In respect of allegation 2, the Tribunal considered the wording of section 130(1), which we set out (in part) for your convenience here:

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[2] *Health Ombudsman v Chaffey* [2020] QCAT 54, at [10]
[3] Ibid, at [11]
[4] Health Practitioner Regulation National Law, section 5
[5] Ibid, at [12]

(1) A registered health practitioner or student must, within 7 days after becoming aware that a relevant event has occurred in Health Practitioner Regulation National Law Act 2009 relation to the practitioner or student, give the National Board that registered the practitioner or student written notice of the event.

(2) A contravention of subsection (1) by a registered health practitioner or student does not constitute an offence but may constitute behaviour for which health, conduct or performance action may be taken.

(3) In this section—

relevant event means—

(a) in relation to a registered health practitioner—

(i) the practitioner is charged, whether in a participating jurisdiction or elsewhere, with an offence punishable by 12 months imprisonment or more; or

(ii) the practitioner is convicted of or the subject of a finding of guilt for an offence, whether in a participating jurisdiction or elsewhere, punishable by imprisonment; or

…

The key takeaway from the Tribunal's consideration of this provision, was that they said:

Not every contravention of a provision of the National Law will constitute unprofessional conduct. The definition requires a finding of professional conduct that is of a lesser standard than that which might reasonably be expected of the health practitioner.[6]

In Chaffey's case, although she failed to comply with the notice provisions after she was found guilty of the criminal charges, the reason for that failure was that she was immediately imprisoned. Further, she had in fact provided advanced notice to AHPRA prior to the hearing that she had been charged with dishonestly obtaining financial advantage from a Commonwealth entity, and that she would likely be facing some time in prison.

In these circumstances, the Tribunal said that although strictly speaking the failure to notify constituted a contravention of section 130(1), it did not amount to unprofessional conduct.

Nursing and Midwifery Board of Australia v GMR (Review and Regulation) [2020] VCAT 157

GMR was a registered nurse who in June 2018 assaulted his 16 year old daughter with a wooden rolling pin after seeing a boy enter the family home. His daughter was transported to hospital by ambulance. GMR made full admissions to police that same day, and was charged. A Family Violence Intervention Order (**FVIO**) was issued in August 2018, preventing GMR from attending the family home. GMR pleaded guilty to one charge of common assault in late August 2018 and was sentenced to a good behaviour bond without

[6] Ibid, at [24]

conviction and ordered to pay $1,500 to the court. GMR undertook to complete a men's behaviour change program, continue psychological counselling and comply with the FVIO until June 2019.

The Nursing and Midwifery Board of Australia (the **Nursing Board**) referred GMR to VCAT with two allegations – the first related to the criminal conduct itself, and the second related to GMR's failure to notify in accordance with his section 130(1) obligations. Unlike in Chaffey's case, GMR correctly notified the Board upon learning of the outcome of his criminal hearing (i.e., that he was found guilty of an offence punishable by imprisonment). However, GMR also had an obligation to notify the Board of the charges themselves before a finding of guilt had been made, because they were charges for offences punishable by imprisonment of 12 months or more (see section 130(3)(a)(i) above). He failed to make this earlier notification.

The parties jointly submitted that the assault itself constituted professional misconduct and the Tribunal agreed, making it clear that acts of family violence, although within the domestic domain, may fall within the purview of the Board's disciplinary mandate:

While it may not have been so in the past, it has been rightly accepted in a number of recent cases (in other jurisdictions) that acts of domestic and family violence committed by health practitioners can give rise to professional misconduct or unprofessional conduct under the National Law[7]

For your interest, there was some technical discussion by the Tribunal about which limb of the definition of "professional misconduct" appropriately captured GMR's conduct given that he was found guilty but not convicted of the charges. For the sake of brevity, however, suffice to say that the Tribunal found the definition was not exhaustive and would incorporate instances of family violence of this kind. In reaching this conclusion, the Tribunal cited the comments in *Health Care Complaints Commission v Haasbroek:*

General practitioners are frequently the first point of contact for victims of domestic violence. The public can only have confidence in such practitioners if the response of those practitioners to domestic violence, both personally and publicly, is exemplary.[8]

With respect to the second allegation, the failure to notify, the Board considered that GMR's breach of section 130(1) of the National Law amounted to unprofessional conduct. This is an obvious divergence from the decision that was made in Chaffey, likely because Chaffey faced the extenuating circumstances of immediate imprisonment which made notifying the Board more difficult. The type of notification required of GMR was also relevant to the Board's decision, because the requirement to notify serious charges even before guilt is determined is to "allow the relevant board to take immediate action where it is necessary to do so to protect the public"[9]. Depriving the Board of the ability to take such action likely contributed to the finding that the failure to notify constituted unprofessional conduct.

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[7] *Nursing and Midwifery Board of Australia v GMR (Review and Regulation)* [2020] VCAT 157 (12 February 2020) at [10]

[8] *Health Care Complaints Commission v Haasbroek* [2018] NSWCATOD 177 at [93]

[9] *Nursing and Midwifery Board of Australia v GMR (Review and Regulation)* [2020] VCAT 157 (12 February 2020) at [27]

On sanction, the Board and GMR jointly agreed upon a reprimand and a period of suspension of three months. Interestingly, however, the Tribunal agreed to issue a reprimand, but decided to shorten the period of suspension to one month only in light of such factors as GMR's remorse and insight, evidence of completion of the change program, proportionality of his conduct with similar cases and good character references. It acknowledged that it was unusual for a Tribunal to depart from the determinations which were agreed between the parties, but said:

Where there has been agreement between the regulator and practitioner regarding the determination, it is a matter to which weight can and should be given by the Tribunal. However it remains important for the Tribunal to consider if the determination which has been agreed is 'an appropriate remedy'.[10]

Health Care Complaints Commission v Hulst [2019] NSWCATOD 181

Hulst was a registered chiropractor. In July/August 2017, Hulst supplied dexamphetamine to two women he had met at a bar and who had asked him if he had any MDMA drugs. He supplied dexamphetamine to the women from his own prescription, on four separate occasions. He was arrested in September 2017, and in August 2018 he was convicted of three counts of supplying a prohibited drug and found guilty but not convicted of one further count of the same. He was sentenced to a good behaviour bond on conditions.

The Health Care Complaints Commission made two complaints against Hulst in the Tribunal – the first, as was the case in Chaffey and GMR, related to the criminal conduct itself. The second complaint related to Hulst's failure to notify the Chiropractic Board of Australia (the Chiropractic Board) pursuant to section 130(1), that he had been found guilty/convicted of an offence punishable by imprisonment.

Unlike in Chaffey and GMR, the Tribunal for Hulst did not make separate findings in respect of the two complaints. Instead, it made one finding of unsatisfactory professional conduct in respect of the entire matter, and sanctioned Hulst with a caution and mentoring conditions. Interestingly, the parties in Hulst jointly proposed determination and sanction orders to the Tribunal, which included a reprimand. However in a similar twist to that seen in GMR's case, the Tribunal considered that a reprimand was too harsh and downgraded the sanction to a caution in light of Hulst's conduct following the arrest (as soon as he was arrested Hulst stood down from his employment and advised his family and his employer of the circumstances of his arrest. He also attended the Smart Program for recovery from drug and alcohol abuse). On the subject of whether a reprimand or a caution was appropriate in the circumstances, the Tribunal made the following useful comments:

…reprimands have generally been given for matters of a more serious nature and in respect of people who haven't dealt with the complaint in the open and constructive way in which [Hulst] has done. The texts referred to a caution as being a written or formal warning. It is intended to act as a deterrent so that the practitioner does not repeat the conduct or the behaviour. A reprimand is a formal way of rebuking or expressing disapproval to a practitioner for something they have done and appears on a practitioner's

[10] Ibid, at [35].

registration. [Hulst] should understand that although the Tribunal disapproves of his behaviour and could have reprimanded him, for the reasons set out in the Tribunal's decision it believed it more appropriate to caution [Hulst] and allow him to practise as a chiropractor without the reprimand appearing on his registration.[11]

Finally, on the matter of providing notification to the Chiropractic Board, it is worth noting that Hulst did email the Health Care Complaints Commission (the **Commission**) about his convictions on the same day that he received them, believing that this was sufficient for the purposes of his notice obligations. On 10 August 2018 the Commission forwarded this to AHPRA, but Hulst did not himself notify AHPRA until several months later. As the Tribunal did not deal with the two complaints separately, we do not know whether these particular circumstances (indicating innocent oversight but a bona fide attempt to comply) would have helped Hulst avoid a finding of unprofessional conduct in respect of the failure to notify alone.

Conclusion

The above cases should serve as a reminder to all health practitioners to review their obligations under section 130 of the National Law, so that they are mindful of the 'certain events' which may trigger a notification obligation. This is particularly so, because these events extend to matters beyond the ordinary scope of practice to incidents which can occur in the private domain.

Practitioners should also make themselves aware of the required timeframes for notification (within 7 days of becoming aware that the relevant event has occurred), and the entity to whom notification must be made. Even if a practitioner innocently notifies another entity of the relevant event in the belief that this is sufficient for the purposes of section 130, it is likely that the failure to notify the *correct* entity will be considered a breach.

Failure to properly notify as per section 130 will likely constitute unprofessional conduct, unless extenuating circumstances exist. This finding is likely to be in addition to any other findings of unprofessional conduct or professional misconduct, relating to the original conduct which triggered the notification requirement in the first place. A finding of unprofessional conduct in relation to the failure to notify will aggravate the overall sanction imposed on the practitioner, and can be easily avoided if notification upon occurrence of the event is promptly provided.

[11] *Health Care Complaints Commission v Hulst* [2019] NSWCATOD 181, at [45]

April 2020

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This article was originally produced for publication by the Australian Dental Association.

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