

Legislative amendments to powers and functions of the Commission

Health Legislation (Miscellaneous Amendments) Act 2020

On 21 October 2020, the Parliament of NSW passed the *Health Legislation (Miscellaneous Amendments) Bill 2020*, which largely commenced on the date of assent on 27 Oct 2020. Amendments relevant to the work of the Commission are as follows:

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- The Commission is now able to issue a **public warning** in relation to a **named health service provider (individual or organisation)**. This is an important amendment to strengthen the protective powers of the Commission. We can be more specific about the person or persons involved in delivering a health service that pose a clear public risk.
- The Commission now has the power to **refer** complaints for local resolution to a private health facility if it appears that the complaint may be capable of resolution at a local level (subject to consent).
- The Commission now has the power to **refer** complaints to a broader range of bodies if it appears that the person or body is able to take appropriate action regarding the complaint. Previously the power was limited to referring it to another body with the power to investigate the complaint. This limited the ability to refer it to bodies that may have the ability to take other action such as education, practice improvement or community awareness e.g. referral to the Mental Health Commission.
- Amendments to **search warrant powers** that enable warrantless entry, search, and seizure **for non-residential premises**. For a part of premises used solely for residential purposes, consent or a warrant is required.

New powers relating to health organisations

- To strengthen the Commission's powers relating to substantiated complaints about health organisations the amendments provide that during or after an investigation the Commission can issue:
 - Interim prohibition orders against relevant health organisations;

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- Prohibition orders against relevant health organisations;
- Public statements about relevant health organisations.
- Due process and natural justice principles apply in the same way as they do to individual practitioners (i.e. opportunity to make submissions, requirement to make the reasons for the decision clear, a written statement of decision, and right of appeal).
- The orders will relate to breaches of a code of conduct for health organisations and the content of that code will be subject to consultation led by the Ministry of Health.

Increases to maximum penalties and sanctions for offences

- Substantial increases in the maximum penalty (*under the Health Care Complaints Act 1993*) (the Act) for failing to comply with notices to provide information during assessments or investigations from 20 penalty units (\$2,200) to 200 penalty units (\$22,000).
- In addition, contravention of a notice can ground an allegation of unsatisfactory professional conduct under section 139B (1) of the National Law.
- Increase in the maximum penalty (*under the Act*) for an offence of intimidation or bribery of complainants from 50 penalty units (\$5,500) to 200 penalty units (\$22,000) (the 12 months imprisonment remains the same).
- Increase in the maximum penalty (*under the Public Health Act 2010*) for the contravention of a prohibition order from 200 penalty units and/or 12 months imprisonment to 500 penalty units and/or 3 years imprisonment (for an individual, the penalty is 1,100 penalty units for a corporation). This offence is now an indictable offence (i.e. can be prosecuted either summarily or on indictment).
- Commission correspondence has been updated to communicate these new penalties and amendment of the Commission's website information is also underway.

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Monitoring and Compliance framework

- A new compliance framework has been created to strengthen the ability of the Commission to ensure effective compliance monitoring and enforcement with interim prohibition orders and prohibition orders (as well as with any recommendations made by the Commission to a health organisation under section 42), including:
 - Entry and search and seizure powers;
 - The power to obtain information, records and evidence.

Disclosure of information

- To assist in the effective protection of sensitive and privileged complaints evidence between the Commission and the Professional Councils, a new privilege was inserted for Professional Councils, such that they cannot be compelled to give evidence about or produce documents containing information exchanged between the Council and the Commission under the *Act* or the *Health Practitioner Regulation National Law (NSW)*, save for in particular circumstances outlined in the relevant provision (section 99A).