

CONSULTATION DOCUMENT

Naming Policy under the Health Practitioners Competence Assurance Act 2003

Released: Tuesday, 15 October 2019

Submissions close: 5pm, Friday, 13 December 2019

Introduction

The Pharmacy Council (Council), following the recent updates to the Health Practitioners Competence Assurance Act (the Act), must develop, consult on and implement a “*Naming Policy*” by 12 April 2020, one year after the amended Act came into force.

The Naming Policy requirements are set out under new sections 157A to 157I—and apply to Council’s powers under section 157(1) of the Act to publish a notice naming a health practitioner about whom any order or direction is made under the Act. Section 157 and the new sections 157A – 157I are set out in *Appendix 1*.

Section 157(1) of the Act provides Council with the discretion to publish a notice setting out the effect of any order or direction it has made in respect of a practitioner; a summary of any finding it has made; and, the name of the practitioner concerned. Since the Act came into force in 2004, the sixteen Responsible Authorities (the regulatory authorities appointed under the Act to regulate the health professions) have used section 157 very sparingly. In Council’s case, just once.

Parliament has clearly signalled a need for better visibility of decisions about practitioner practice, and in so doing, is moving the health regulatory authorities in the direction of greater transparency in decision-making, ensuring the public can ‘see’ that regulation is happening.

Requirement for a naming policy

The Health Practitioners Competence Assurance Amendment Act 2019 introduced new sections 157A to 157I requiring Council to develop a naming policy to determine when section 157(1) will be used. Council’s Naming Policy must be issued within one year of the new sections coming into force, that is, by 12 April 2020.

Section 157B(2) provides that the purpose of a naming policy is to—

- enhance public confidence in the health professions for which Council is responsible and their procedures by providing transparency about their decision-making processes
- ensure that health practitioners whose conduct has not met expected standards may be named where it is the public interest to do so, and
- improve the safety and quality of health care.

The 2019 amendments clearly signal that in each case when Council makes an order or direction concerning a practitioner it must go through a policy process to determine whether

or not to publish under section 157 the practitioner's name, a summary of Council's findings and the effect of the order or direction. The policy must outline Council's decision-making process around releasing the names of practitioners, when it will do so, and what it will consider when making that decision.

Naming Policy proposal

A discussion paper was developed by Claro Law for the Dental Council and Pharmacy Council to assist with the development of a Naming Policy. The discussion paper is available for viewing on the [Pharmacy Council website](#).

Following its consideration of the discussion paper, Council agreed on a policy position and has approved a draft Naming Policy for stakeholder consultation—*Appendix 2*.

Council's proposed Naming Policy seeks to balance an individual practitioners' privacy interest against that of the public interest. Council recognises that every case will be different as to the weight given to each of these two interests, and so the Naming Policy aims to provide Council with robust guidance on finding the appropriate balance in the particular circumstances of individual practitioners.

The proposed Naming Policy sets out—

- a) the practitioners to whom it applies
- b) the circumstances in which a practitioner may be named
- c) the principles that will guide Council's naming decisions
- d) the criteria to be applied by Council when making a naming decision
- e) the information that may be disclosed by Council when naming a practitioner
- f) the procedures that Council will follow when deciding whether to name a practitioner
- g) the requirement for Council to have regard to the consequences for the practitioner of being named, including the likely harm to the practitioner's reputation, and
- h) the means by which a practitioner may be named.

When considering the scope of the Naming Policy, the starting point is Council's power set out in section 157(1) to publish a notice (including the name of the practitioner) setting out the effect of any order or direction it has made under the Act.

Council cannot promulgate a policy that excludes the possibility of publishing the name of a practitioner when an order or direction has been made about the practitioner under the Act. To put it another way, Council must leave open the possibility that a practitioner's name will be published when any order or direction has been made by the Council about a practitioner under the Act. To do otherwise would amount to the Council fettering its statutory power in section 157(1). That would be unlawful.

This means that Council's Naming Policy must leave open the possibility that orders or directions about competence, health and other matters about a practitioner will result in the practitioner's name being published.¹

Whether Council names a practitioner who is subject to any specific order or direction will be something to be determined on a case-by-case basis. Key relevant considerations, set out in the Naming Policy, include:

¹ A list of the orders and directions Council may make, and that will trigger consideration of whether to name the practitioner, appears in proposed draft Naming Policy (Appendix 2)

- The **public interest** in knowing the name of the practitioner. This will include (but will not be limited to):
 - Public safety. Would publication assist in ensuring the safety and quality of health services?
 - Public choice. If a reasonable patient would expect to know about the order or direction made by Council so that the patient can make an informed choice about whether to receive health services from the practitioner, that will weigh in favour of publishing the name of the practitioner;
- The **private interest** the practitioner has in not being named. This will include, but will not be limited to:
 - The nature of the information that would be published and the impact publication would have on the individual. For example, sensitive health information about the practitioner, the disclosure of which might lead to genuine harm to the practitioner, might be less likely to be disclosed than less sensitive information;
 - The context in which the order or direction is made. For example, an order or direction that involves historical information and relates to a practitioner who is no longer practising might be less likely to need to be published.

In respect of orders or directions made by Council concerning a practitioner, the proposed Naming Policy contains the following rebuttable presumptions—

- In **health cases**, there is a rebuttable presumption against naming a practitioner. Given that practitioner personal health information was particularly sensitive, Council favoured a rebuttable presumption not to name practitioner with health issues in respect of whom an order or direction had been made. But it also noted that each case would be carefully reviewed to balance the privacy of the practitioner and public interest.
- In **competence cases**, there is a rebuttable presumption in favour of naming a practitioner. Council considered the protection of public health and safety and the public's 'right to know' warranted a presumption in favour of naming practitioners whose competence had been found wanting. Each case would be carefully considered including where their name would be published.
- In **cases of interim orders**, there is a rebuttable presumption against naming a practitioner. Interim orders are usually made to protect the public while further information is gathered to verify whether a risk is substantive. Council accordingly has agreed to adopt a rebuttable presumption not to name the practitioner.

Punishment of the practitioner would not form part of Council's consideration when deciding whether to publicly name the practitioner.

Key Policy points

Council's primary obligation is to ensure that it protects the health and safety of the public. This includes ensuring that the public is provided with information in which it has an interest.

When considering naming a practitioner, Council will consider the purpose of the Act, and the purpose of the Naming Policy as set out in section 157B(2)—see *Appendix 1*.

In each case before it, Council will weigh the public interest in naming the practitioner against the practitioner's privacy interests, including the consequences for the practitioner's reputation. Where the balance is even, Council is likely to favour public interest, and name the practitioner.

Council is aware that a decision to name a practitioner is likely to have consequences for the practitioner. It will apply the Naming Policy judiciously and with appropriate regard for all of the circumstances of the particular case.

If Council proposes to name a practitioner, it will first give the practitioner the opportunity to make submissions on the proposal before making a final decision.

Applying all the above, Council's proposed Naming Policy will:

- ensure that Council does not limit the statutory discretion given in section 157(1)
- set out the principles that will be considered in each case – but will leave Council with sufficient discretion to make each decision on the basis of all the particular circumstances, and
- reflect Parliament's intention that responsible authorities move to act with greater transparency when making decisions about whether practitioners should be named.

Feedback and submissions

Council invites feedback on this consultation document from its stakeholders including practitioners, relevant associations and societies, the Privacy Commissioner, the Director-General of Health, the Health and Disability Commissioner, and other organisations with an interest in this matter. The consultation document will also be available on Council's website for feedback from any interested member or sector of the public.

Council will consider all submissions and feedback received and plan to finalise the Naming Policy in March 2020.

Submissions received will be published on Council's website and will remain available to the public. All personal contact details will be removed from submissions. Council reserves the right not to publish any submissions it considers derogatory or inflammatory.

As this is a public consultation, information provided 'in confidence' will only be accepted under special circumstances. Please contact us before submitting material 'in confidence'.

Responses can be sent via our online form. **To make a submission, please click [here](#).**

Council invites feedback on the proposal by 5.00pm 13 December 2019.

Ngā mihi

Michael A Pead
Chief Executive

Health Practitioners Competence Assurance Act 2003

Section 157 Publication of orders

- (1) An authority may publish in any publication a notice setting out—
 - (a) the effect of any order or direction it has made under this Act in respect of a health practitioner; and
 - (b) a summary of any finding it has made under this Act in respect of the health practitioner; and
 - (c) the name of the health practitioner.
- (2) If the Tribunal makes an order under this Act in respect of a health practitioner, the appropriate executive officer of the Tribunal must publish, in any publication the Tribunal directs, a notice stating—
 - (a) the effect of the order; and
 - (b) the name of the health practitioner; and
 - (c) a summary of the proceedings in which the order was made.
- (3) If a court makes an order under this Act in respect of a health practitioner, the authority with which the health practitioner is or was registered must publish, in any publication the court directs, a notice stating—
 - (a) the effect of the order; and
 - (b) the name of the health practitioner; and
 - (c) a summary of the proceedings in which the order was made.
- (4) Subsections (2) and (3) apply subject to—
 - (a) any order of the Tribunal under section 95; and
 - (b) any order of the court.
- (5) In this section, the term health practitioner includes a former health practitioner.

Section 157A Meaning of naming policy

In sections 157B to 157I, naming policy means a policy issued by an authority relating to the naming of a health practitioner in a notice published by the authority under section 157(1).

Section 157B Authorities to issue naming policies

- (1) Each authority must issue a naming policy not later than 12 months after this section comes into force.
- (2) The purpose of the naming policy is to—
 - (a) enhance public confidence in the health professions for which the authority is responsible and their disciplinary procedures by providing transparency about their decision-making processes; and
 - (b) ensure that health practitioners whose conduct has not met expected standards may be named where it is in the public interest to do so; and
 - (c) improve the safety and quality of health care.
- (3) A naming policy must set out—
 - (a) the class or classes of health practitioners in respect of whom the naming policy applies; and
 - (b) the circumstances in which a health practitioner may be named; and
 - (c) the general principles that will guide the authority's naming decisions; and
 - (d) the criteria that the authority must apply when making a naming decision; and

- (e) the requirement to have regard to the consequences for the health practitioner of being named, including the likely harm to the health practitioner's reputation; and
- (f) the procedures that the authority must follow when making a naming decision; and
- (g) the information the authority may disclose when naming a health practitioner; and
- (h) the means by which a health practitioner may be named.

157C Consultation on naming policies

Before issuing its naming policy, an authority must consult, and take into account any comments received from, the following persons:

- (a) the health practitioners registered with the authority; and
- (b) the Privacy Commissioner; and
- (c) the Director-General of Health; and
- (d) the Health and Disability Commissioner.

157D Naming policies to be available on Internet

Immediately after issuing a naming policy, an authority must make its naming policy available on an Internet site maintained by or on behalf of the authority.

157E When naming policies come into force

A naming policy comes into force on the day after the date on which it is issued.

157F Review of naming policies

- (1) An authority must review its naming policy within 3 years after the policy comes into force, and then at intervals of not more than 3 years.
- (2) Sections 157B to 157E apply with all necessary modifications to the review of a naming policy.

157G Naming policies to be consistent with law

A naming policy must be consistent with—

- (a) this Act; and
- (b) the information privacy principles in section 6 of the Privacy Act 1993; and
- (c) the general law (including natural justice rights).

157H Status of naming policies

A naming policy is—

- (a) not—
 - (i) a legislative instrument for the purposes of the Legislation Act 2012; or
 - (ii) a disallowable instrument for the purposes of the Legislation Act 2012; and
- (b) not required to be presented to the House of Representatives under section 41 of the Legislation Act 2012

157I Authority naming health practitioner in accordance with naming policy protected by qualified privilege

For the purposes of clause 3 of Part 2 of Schedule 1 of the Defamation Act 1992, any notice published by an authority under section 157(1) that names a health practitioner in accordance with a naming policy issued by the authority must be treated as an official report made by a person holding an inquiry under the authority of the Parliament of New Zealand.