GOVERNMENT GAZETTE

OF THE

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Government Notice

MINISTRY OF HEALTH AND SOCIAL SERVICES

No. 289 2015

REGULATIONS RELATING TO INVESTIGATION OF ALLEGED UNPROFESSIONAL CONDUCT BY REGISTERED PERSON, AND INSTITUTING AND CONDUCTING OF PROFESSIONAL CONDUCT INQUIRY: PHARMACY ACT, 2004

Under section 66(5) of the Pharmacy Act, 2004 (Act No. 9 of 2004), and on the recommendation of the Pharmacy Council of Namibia, I have made the regulations set out in the Schedule.

B. HAUFIKU
MINISTER OF HEALTH AND SOCIAL SERVICES Windhoek, 23 November 2015

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Definitions

1. In these regulations, a word or expression to which a meaning is assigned in the Act bears that meaning and unless the context otherwise indicates -

"accused" means the registered person against whom a complaint has been lodged or in respect of whom the Council is conducting an inquiry under Part VI of the Act and these regulations;

"complaint" means a complaint, charge or allegation of unprofessional conduct against a registered person lodged with the registrar, or an allegation of unprofessional or improper conduct or misconduct made against or in respect of that registered person;

"inquiry" means a professional conduct inquiry conducted by the Council under sections 47 and 48 of the Act;

"party" means the accused or the *pro forma* " complainant, whichever may be applicable; and

"the Act" means the Pharmacy Act, 2004 (Act No. 9 of 2004).

Lodging of complaint

2. A complaint referred to in section 46(1)(a) of the Act against any registered person must be in writing and be addressed to and lodged with the registrar at the office of the registrar.

Procedures on receipt of complaint

3. (1) On receipt of a complaint referred to in section 46(1)(a) of the Act or when becoming aware of any allegation referred to in subsection (1)(b) of that section, the Council may conduct, under Part VI of the Act and these regulations, an inquiry into that complaint or allegation.

(2) For the purposes of section 46(4)(a) of the Act, the Council may call for further

information from the person who lodged the complaint or made the allegation, or any other person, to be submitted to the Council in the form of an affidavit or in the manner that the Council may require.

(3) Before conducting an inquiry referred to in subregulation (1), the Council -

(a) must notify the registered person against whom a complaint was lodged or in respect of whom an allegation of unprofessional conduct was made, in writing of the complaint or allegation and furnish particulars to that registered person;

(b) may request the registered person referred to in paragraph (a) to furnish the Council with a written explanation relating to that complaint or allegation before a date specified by the Council in the written notice under that paragraph; and

(c) must inform that registered person that any explanation furnished by him or her in terms of paragraph (b) may be used in evidence against him or her in any professional conduct inquiry conducted by the Council.

(4) Despite this regulation the Council in concurrence with the president may, and without complying with subregulation (2) or subregulation (3)(b) and (c), refer the complaint directly to the chairperson of the preliminary investigation committee for consideration by that committee under section 12(5)(b) of the Act.

Procedures on receipt of further information or explanation

4. On receipt of further information or an explanation referred to in regulation 3, the Council must submit the complaint and the further information or explanation to the chairperson of the preliminary investigation committee for consideration by that committee under section 12(5)(b) of the Act.

Further investigation and legal advice

5. The preliminary investigation committee or the chairperson of that committee, in addition to the conducting of a preliminary investigation under section 12(5)(b)(i) of the Act, may seek, in concurrence with the registrar, legal advice or other assistance relating to the complaint under investigation.

Preliminary investigation committee decision

6. If the preliminary investigation committee, after conducting a preliminary investigation under section 12(5)(b) of the Act, finds that the complaint or allegation under investigation -

(a) even if substantiated -

(i) does not appear to constitute unprofessional conduct by that accused; or

(ii) for any other reason must not be the subject of an inquiry by the Council, the committee may recommend to the Council that a disciplinary inquiry under Part V of the Act into the conduct of that accused must not be conducted; or

(b) appears to constitute unprofessional conduct by the accused and that the Council must conduct a disciplinary inquiry under Part VI of the Act into the alleged unprofessional conduct of that registered person, the committee may recommend to the Council that an inquiry must be conducted, and must set out the grounds for its findings and recommendations.

Enquiry by Council into complaint of unprofessional conduct

7. (1) The notice to the registered person referred to in section 47(4) of the Act must be -

(a) substantially in the form of Form 1 set out in the Annexure;

(b) accompanied by a charge sheet formulated by the *pro forma* complainant and setting out in full the alleged unprofessional conduct that the registered person is guilty; and

(c) be delivered to that registered person in accordance with subsection (5) or (6) of that section.

(2) If a witness must be summonsed at the instance of the registered person referred to in subregulation (1), the Council may require that registered person to deposit with the Council an amount determined by the registrar, which amount must be sufficient to cover the costs in connection with the summonsing of the witness.

(3) The Council must pay the costs referred to in subregulation (2) from the amounts deposited in terms of that subregulation.

Procedures at professional conduct inquiry conducted by Council

8. (1) At an inquiry -

(a) the *pro forma* complainant must read the charge sheet to the accused, if the accused is not present at the inquiry, to his or her legal representative; and

(b) the person presiding at the inquiry must ask the accused, or if the accused is not present at the inquiry, his or her legal representative, to plead guilty or not guilty to the charge referred to in paragraph (a) and the plea must be so recorded in the minutes of the inquiry; or

(c) if neither the accused nor his or her legal representative is present at the inquiry, the procedures prescribed by of section 47(7) of the Act must be complied with.

(2) If the accused is not present at the inquiry, a plea of guilty must be entered only if the accused, prior to the commencement of the inquiry, has clearly and in writing under his or her signature, informed the Council that he or she pleads guilty.

(3) If the accused or his or her legal representative fails to plead to the charge it must be so recorded and a plea of not guilty be entered, and a plea so entered has the same effect as if the accused had pleaded not guilty.

(4) If -

(a) a plea of guilty is entered, the Council must decide whether or not any evidence must be led; and

(b) a plea of not guilty is entered, evidence in support of the case against the accused must be led.

(5) The *pro forma* complainant must be given the opportunity to state the case against

accused and to lead evidence in support of that case the the accused has the right to state his or her case and to lead evidence in support of his or her case.

(6) If the accused is neither present nor represented at the inquiry, the Council may proceed with the inquiry under section 47(7) of the Act in the absence of the accused.

(7) The case of the *pro forma* complainant and the accused must be regarded as closed after evidence has been led as contemplated by subregulations (5) and (6).

(8) The person presiding at the inquiry may allow further evidence to be led or witnesses to be recalled by either the *pro forma* complainant or the accused, or by both, after their cases have been closed.

(9) After the evidence of a witness has been given, the other party has the right to cross-examine that witness and then any member of the Council may put questions to the witness.

(10) Further cross-examination of a witness must be allowed on any matter arising from questions put by any member of the Council.

(11) After the cross-examination of a witness, the party by whom the witness is called has the right to re-examine that witness, but re-examination must be confined to matters raised in cross-examination and questions posed in terms of subsection (9).

(12) Oral evidence must be taken on oath or affirmation by the person presiding at the inquiry.

(13) Any person giving evidence at an inquiry is subject to section 47(9) of the Act.

(14) The Council may decline to admit evidence given at an inquiry when the witness who gave the evidence is not available for cross-examination or refuses to be cross examined.

(15) Written evidence given by way of an affidavit or a solemn declaration by witness who is not present at the inquiry is admissible only with the consent of the opposing party.

(16) A copy of the transcript of proceedings before a court of law, authenticated to the satisfaction of the Council, is on its mere production admissible as evidence at ar inquiry and proof of the facts recorded therein.

(17) The Council, if practicable and if it appears necessary, may call any witness whose evidence appears in a record referred to in subregulation (16) for the purposes of further examination or cross-examination.

(18) After the parties have closed their cases the Council, of its own accord and at any time, may call further witnesses or recall any witness to be questioned by the members of the Council, and then by the *pro forma* complainant and the accused or his or her legal representative.

(19) After all evidence has been given at the inquiry, the pro form complainant has the right, and then the accused or his or her legal representative has the right, to address the Council on the evidence and on any legal question involved.

(20) After the accused or his or her legal representative addressed the Council in terms of subregulation (19), the *pro forma* complainant has the right to reply to points of law raised by the accused or his or her legal representative in his or her address.

(21) After the parties have addressed the Council in terms of subregulation (19) and the *pro forma* complainant has replied in terms of subregulation (20), the Council may deliberate on the case *in camera*.

(22) The Council may find the accused not guilty of any of the charges even if he or she has pleaded guilty.

(23) If the Council finds an accused -

(a) not guilty of unprofessional conduct, the registrar, under section 50(7) of the Act, must inform the accused of that finding;

(b) guilty of unprofessional conduct -

(i) the *pro forma* complainant -

(aa) and the accused or his or her legal representative, may make representations to the Council, either orally or in writing, regarding

a suitable penalty to be imposed, and may adduce evidence in support of the representations made; and

(bb) must prove to the Council the previous convictions, if any, of the accused on any charge of unprofessional conduct, and the penalties imposed on him or her by any health or social services professions council or board, or other competent body, that so convicted the accused, by means of the submission to the Council of a certificate, signed by the person presiding at the inquiry where the accused had been so convicted, or by the registrar of that council or board or other competent authority, confirming the previous convictions and penalties imposed under the Act or any other law;

(ii) the Council, after having heard the *pro forma* complainant and the accused or his or her legal representative -

(aa) must deliberate *in camera* upon the penalty to be imposed on the accused referred to in sub-subparagraph (bb); and

(bb) may impose on the accused any one or more of the penalties specified by section 50(1), subject to section 51, of the Act.

(24) A certificate submitted to the Council by the *pro forma* complainant under subregulation (23)(b)(i)(bb) must be regarded, until the contrary is proven, as proof of the facts contained therein.

(25) If the accused is neither present nor represented at the inquiry, any written representation or statement made by him or her or on his or behalf, or explanations, if any, that have any bearing on a penalty must be taken into account by the Council when considering the imposition of a penalty.

(26) A witness called under subregulation (23)(b)(i)(aa) may be questioned by the other party and by the members of the Council.

(27) The Council may of its own accord or at the request of the *pro forma* complainant or of the accused or his or her legal representative, adjourn an inquiry to a date, time and place that it may determine and inform the parties at the inquiry, or it may communicate to the parties by registered post.

Summonsing of witnesses

9. A summons under section -

(a) 47(4) of the Act to a witness to appear at a professional conduct inquiry must be in the form of Form 1;

(b) 47(8)(b) of the Act to a witness to appear at a professional conduct inquiry must be in the form of Form 2, set out in the Annexures to these regulations.

Accessibility to disciplinary inquiry

10. (1) The proceedings at a professional conduct inquiry under Part VI of the Act is open to the public, but -

(a) any point arising in connection with, or in the course of, or evidence adduced at a disciplinary inquiry may be discussed and decided by the Council, at its discretion, *in camera*;

(b) the Council, on good cause shown and at its discretion, may order that a person at any time and in any manner, may not publish any information that may probably reveal the identity of any particular person involved with the inquiry in any manner, other than the accused.

(2) A person who contravenes or fails to comply with an order made under subregulation (1) is guilty of an offence and is liable to a fine not exceeding N$ 4 000 or imprisonment for a period not exceeding 12 months, or to both such fine and such imprisonment.

Obstruction or interruption of proceedings at inquiry

11. (1) A person who obstructs or interrupts the proceedings at a professional conduct inquiry, or insults a member of the Council or the professional conduct committee, or misbehaves at the inquiry in any other way -

(a) is guilty of an offence and is liable to a fine not exceeding N$4 000 or a period of imprisonment not exceeding 12 months, or both such fine and such imprisonment; and

(b) may be removed from the venue of the inquiry by order of the person presiding at the inquiry.

(2) If the accused is removed from the inquiry under subregulation (1)(b), the person presiding at the inquiry may direct that the inquiry be proceeded with in his or her absence.

Procedures at professional conduct inquiry conducted by professional conduct committee

12. When the Council, under section 47(1)(b) of the Act, delegates to the professional conduct committee established under section 12(2)(a) of the Act its powers to conduct a professional conduct inquiry under Part VI of the Act, these regulations apply, with the necessary changes, to a professional conduct inquiry conducted by that committee under that Part.

Ratification by Council of decision of professional conduct committee

13. (1) The Council may vary, ratify or refuse to ratify the decision of the professional conduct committee submitted to the members of the Council under paragraph (k), (1) or (m) of section 12(2) of the Act.

(2) The finding and any penalty imposed on the person charged, if ratified by the Council, must be communicated to the person in accordance with section 50(4) of the Act.

(3) The Council must cause to be published in the Gazette any finding of guilty and the associated penalty with reference to the name of the person charged, the contravention and the penalty imposed on him or her.

(4) If the Council fails to ratify a decision made or penalty imposed by the professional conduct committee, the Council must proceed with the matter under section 47(15) of the Act.

ANNEXURES

FORM 1
(Regulations 7 and 9)

PHARMACY COUNCIL: NOTICE IN TERMS OF SECTION 47(4) OF PHARMACY ACT, 2004 (ACT NO. 9 OF 2004) OF A DISCIPLINARY INQUIRY CONDUCTED BY COUNCIL

To: Mr/Mrs/Miss* .....

Identity Number: .....

Address: .....

I have been directed to inform you that a complaint/charge/allegation* has been lodged with or came to the attention of the Pharmacy Council, that you being a person registered under the Pharmacy Act, 2004 (Act No. 9 of 2004), are guilty of improper conduct or misconduct in that you has been lodged with or brought before the Council, and will be considered at an inquiry of the Council/a disciplinary committee of the Council* to be held

.....

.....

.....

at ..... (place)

on ..... (date)

at ..... (time) .....

....
Signature of President/ Secretary* Date

ACKNOWLEDGEMENT OF RECEIPT

I ..... registered person duly registered/enrolled under the PHARMACY ACT, 2004 (ACT NO. 9 OF 2004) do hereby acknowledge receipt of this Notice.

....
Signature Date

* Delete whichever does not apply.

FORM 2

(Regulation 9(b))

PHARMACY COUNCIL: SUMMONS IN TERMS OF SECTION 47(8)(b) OF PHARMACY ACT, 2004 (ACT NO. 9 OF 2004) TO APPEAR AS A WITNESS AT A DISCIPLINARY INQUIRY BY COUNCIL OR A COMMITTEE OF COUNCIL

To: .....
(name)

.....
(occupation)

of .....
(business address)

.....
(residential address)

are hereby summoned to appear at .....

on the ..... day of ..... 20 ....., at ..... h ....., before the PHARMACY COUNCIL /a disciplinary committee of the Council established in terms of the Pharmacy Act, 2004 (Act No. 9 of 2004), * to give evidence in respect of the following conduct

.....

.....

.....

.....

of .....

registered/enrolled* under the said Act as .....
and you are directed to produce at the time and place aforesaid the books, records, documents and things specified in the list below, and then and there to give evidence in relation to the said inquiry.

of the Council this .....day of ..... 20.....

.....
Signature of President/Secretary*

* Delete whichever does not apply.

List of books, records, documents and things to be produced:

.....

.....

.....

.....

Note: Your attention is directed to section 47(8) of the PHARMACY ACT, 2004 (ACT NO. 9 OF 2004), which provides as follows:

"(8) (a) For the purpose of an inquiry in terms of this PART, the Council or the professional conduct committee may summons any witness to appear at a specified date, time and venue to give evidence before the Council or the professional conduct committee, to submit to it any document, book, record, or other thing relevant to the inquiry as specified in such summons.

(b) .....

(c) Any person who has been duly summonsed -

(i) refuses or without sufficient cause fails to attend and give evidence relevant to the inquiry and place specified in the summons; or

(iii) leaves the inquiry without the consent of the person presiding at such inquiry, whether or not such person has given evidence; or

(iv) refuses to give evidence before the Council or refuses to answer fully and satisfactorily to the best of his or her knowledge and belief any question lawfully put to him or her, or refuses to produce any document, book, record or thing which that person has in terms of the summons been required to produce,

is guilty of an offence and on conviction liable to the penalties specified in section 68(a).".

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