

## **Guidelines regarding the use of Legal Practitioners in Proceedings before a Professional Standards Committee**

**Note: Representatives of the Medical Council of NSW, the Health Care Complaints Commission, and the Australian Medical Association agree these Guidelines (that were developed, as set out below under the now repealed *Medical Practice Act 1992*) apply equally to proceedings before a Professional Standards Committee that are conducted under the *Health Practitioner Regulation National Law (NSW)***

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### **Background**

The *Health Legislation Amendment Act 2009* was assented to on 13 May 2009. In the relevant 'Agreement in Principle' speech on 25 March 2009, and in relation to the proposed amendment to section 177 of the *Medical Practice Act* (the Act) to allow legal representation for the parties to a Professional Standards Committee, the Minister stated that "the Government is keen to ensure that proceedings for the Professional Standards Committee do not become overly legalistic and process driven." Consequently he advised that the amendment to s177 of the Act would "commence on proclamation rather than assent to allow for a code of conduct regarding the use of legal practitioners in proceedings before the Professional Standards Committee to be developed."

This document sets out Guidelines regarding the use of Legal Practitioners in Proceedings before a Professional Standards Committee as agreed following consultation between the AMA, the HCCC and the NSWMB during mid 2009 as facilitated by NSW DoH. The Guidelines have been subsequently amended so they refer to the *Health Practitioner Regulation National Law (NSW)*, which came into operation on 1 July 2010.

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### **Context**

In agreeing to the Guidelines, the following legal framework is noted:

- 1) The new provisions confer an entitlement to legal representation for the parties (which will generally be the medical practitioner concerned and the Health Care Complaints Commission), but do not preclude Professional Standards Committee (PSC) hearings proceeding with non-legal advisers present and assisting, or with no advisers present.
- 2) Legal practitioners before a PSC will seek to conduct themselves in a way that is appropriate and sensitive to the inquisitorial nature of a PSC Inquiry and to its protective jurisdiction. It is understood that legal practitioners appearing before a PSC will comply with the legislative framework that regulates their professional conduct.
- 3) The PSC is charged with ensuring a proper and fair hearing is conducted. PSC members understand the fact that whilst the strict rules of evidence do not apply at PSC hearings procedural fairness to the parties is paramount.
- 4) A PSC Inquiry is convened and conducted in accordance with the following provisions of the *Health Practitioner Regulation National Law (NSW) No 86a* (the Law):

Sections 3 (objectives and guiding principles) and 5 (definitions)  
Part 8, Division 1  
Part 8, Division 3, Subdivision 3  
Part 8, Division 6, Subdivisions 1 and 4  
Part 8, Division 8  
Part 8, Division 11

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In particular clause 2 of Schedule 5D to the Act provides: *“In proceedings before it, a Committee ... is not bound to observe the rules of law governing the admission of evidence, but may inform itself of any matter in such manner as it thinks fit.”*

Also noted is the Council’s information document “Information for Parties to Professional Standards Committee Inquiries” which is available on the Board’s website.

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### **Agreed Guidelines for Legal Practitioners appearing before a PSC**

- A PSC hearing is conducted as an Inquiry with all PSC members able to ask relevant questions directly of the parties and any witnesses. Legal practitioners representing the parties are also entitled at appropriate times to ask relevant questions of the witnesses.
- A legal practitioner’s role is to assist the PSC, and should achieve a balance between being an advocate for the client’s legal rights and the role as an adviser in the context of an inquisitorial hearing and avoid the more adversarial elements of legal representation.
- A legal practitioner should present relevant evidence that will assist the PSC to reach a fair and impartial decision and refrain from making objections on overly technical points.
- Proceedings are directed by the Chairperson of the PSC.
- Where possible reserve relevant legal argument for submissions rather than attempting lengthy discussion of points of law during the hearing.
- Be conscious of the needs and level of understanding of those who may be participating in the hearing and communicate accordingly.
- Remain aware of the sensitive nature of some evidence in PSC proceedings, and where appropriate request non-publication directions.
- Be prepared to provide oral submissions at the conclusion of the hearing unless written submissions have been requested by the PSC. Matters of interest to the PSC may include:
  1. Comments on the strength or weakness of relevant evidence;
  2. Whether particulars appear to be proved, and if so, do they amount to proof of the Complaint;
  3. The basis for any appropriate orders;
  4. Who should receive a copy of the PSC decision, and on what basis.

In the pre-hearing phase:

- Communicate with the Council’s Legal Officer who has been nominated to assist the PSC should there be any issue in relation to preparation for hearing, such as compliance with the timetable or procedural matters;
- Assist the PSC by cooperating with the other party to delimit the issues in dispute at the earliest possible stage.
- Provide reasons for requesting that any Notices to Produce or Summonses be issued by the PSC, so the PSC can be satisfied of their relevance to the matter to be heard.
- Provide reasons for any request for adjournment of the hearing so that the PSC can weigh its duty to deal with matters expeditiously with its duty to accord procedural fairness to the parties.