

GUIDELINES FOR THE CONDUCT OF PROCEEDINGS PURSUANT TO PART 4 DIVISION 5 OF THE MEDICAL PRACTICE ACT 1992 'POWERS OF THE BOARD FOR THE PROTECTION OF THE PUBLIC'

1. OVERVIEW

The purpose of these guidelines is to explain the general process of the NSW Medical Board when conducting proceedings under Part 4 Division 5 of the *Medical Practice Act 1992*. These are often referred to as 's66 proceedings'. The guidelines are not a substitute for the provisions of the legislation and case law that might be relevant in the particular circumstances of a matter. In certain circumstances the Board may depart from some of the procedures outlined in these guidelines for the protection of the health and safety of the public. The protection of the health and safety of the public is the paramount consideration in exercising functions under the *Medical Practice Act 1992* ('the Act').

2. OBTAINING LEGAL ADVICE

It is desirable that when a practitioner receives notification that the Board is considering taking action under section 66 that they obtain legal advice from a medical defence organisation or a legal practitioner. The staff of the Board cannot provide the practitioner with legal advice.

3. PURPOSE OF SECTION 66 PROCEEDINGS

Section 66 proceedings are conducted in order to determine whether it is appropriate in the circumstances to take action under section 66 of the Act. Section 66 of the Act provides the Board must take certain action if at any time it is satisfied that it is appropriate to do so for the protection of the health or safety of any person or persons or if satisfied that the action is otherwise in the public interest.

The Board has the power under this section to take the following action:

- 3.1.1. It may suspend the practitioner for a period of not exceeding 8 weeks (see section 8).
- 3.1.2. It may impose conditions on the registration of the practitioner.
- 3.1.3. It may refer the practitioner to an Impaired Registrants Panel.
- 3.1.4. It may suspend the practitioner for breaching a critical compliance condition or order. A critical compliance condition or order is an order of a Medical Tribunal or a Professional Standards Committee that states that a breach of the condition or order will result in the practitioner being de-registered.
- 3.1.5. It may order the practitioner to undergo a performance assessment.
- 3.1.6. It may take no action.

Suspension or conditions placed on a practitioner's registration as a result of action under section 66 of the Act is an interim measure done either for the purpose of protecting the health and safety of persons (including the practitioner) or because it is appropriate in the public interest. Any such action will remain in force until the matter is resolved by other proceedings under the Act.

4. PROCEDURE

4.1. Approval of delegates of the Board

The Board will in normal circumstances delegate to certain persons (approved by the Registrar) the exercise of power under Part 5 Division 4 of the Act. This power will normally be exercised by two or three delegates conducting proceedings to consider whether any action should be taken under s66 of the Act. At least one of these delegates must not be a registered medical practitioner. When determining the constitution of section 66 proceedings the Board will consider the nature of the matter and the need for particular knowledge or expertise of the delegates.

A practitioner should advise the Board in writing as soon as practicable whether they consider that the appointment of a person as a delegate may raise issues of bias or potential bias. The Board will then re-consider the appropriateness of the appointment.

4.2. Notification of proceedings

Initially, and if practicable, a practitioner will be advised by telephone that the Board will be conducting proceedings under section 66 of the Act.

The practitioner will then be given reasonable notice by the Board in writing of the fact that proceedings before delegates of the Board will be held at a particular time and date to determine whether it is appropriate to take any action under section 66 of the Act.

In certain circumstances the Board may be required to take immediate action in relation to the practitioner. The practitioner will be advised of the result of this action and be asked to attend proceedings at a later date. This will give the practitioner the opportunity to be heard in relation to the action taken.

In determining the date of the proceedings the protection of the health and safety of the public will be the paramount consideration.

In certain circumstances the delegates may consider taking action under section 66 based on the documentary materials before them and a written reply by the practitioner.

The Health Care Complaints Commission is also advised that the Board will be conducting proceedings under section 66 of the Act.

4.3. Power of the Board to obtain information, records and evidence

If the Board is of the opinion that a person is capable of providing relevant information it can require the person by notice in writing to do any of the following:

1. give a signed statement of information
2. produce documents
3. appear and give evidence at proceedings before the delegates.

It is an offence under the Act to fail to comply, without reasonable excuse, with such a requirement. It is also an offence to produce documents or give evidence that is false or misleading in a material particular.

The Board will also require the practitioner to provide details of any employment, accreditations with public or private health organisations or nursing homes and membership of any colleges. Failure to provide this information without reasonable

excuse, may result in a finding of unsatisfactory professional conduct. The practitioner will also be required to provide details of professional indemnity insurance held.

4.4. Provision of information to the practitioner

The practitioner will be provided with a copy of any documents to be considered by the delegates at the proceedings. Unless urgent action is required the Board will provide the practitioner with a copy of the documents at a reasonable time in advance of the proceedings. The practitioner will be invited to provide any information or documents considered relevant to the Board in advance of the proceedings.

4.5. Proceedings conducted by delegates of the Board

The practitioner will be advised of the date and time for proceedings to take place with the delegates of the Board. The proceedings will usually take a day. During the proceedings the practitioner will be asked questions relevant to the matter being considered by the delegates and may provide the delegates with relevant information. The practitioner will be given the opportunity to be heard in relation to any relevant matter.

4.5.1. Presence of legal practitioner or support person

A practitioner will generally be permitted to have a legal advisor or support person present during the proceedings to provide advice and support. A practitioner is not entitled to be represented by a legal practitioner during the proceedings.

4.5.2. Non attendance of practitioner

Failure of the practitioner to attend the proceedings may result in the delegates considering the matter in the practitioner's absence. The protection of the health and safety of the public will be the paramount consideration in determining whether or not to take action in the absence of the practitioner.

4.5.3. Audio recording of the proceedings

The proceedings at which the practitioner is present, or at which a person is giving oral information to the delegates, must be audio recorded.

A recording is not admissible in any civil or criminal proceedings in a court of law (other than in proceedings in relation to an offence under the *Medical Practice Act*). It is also not admissible in evidence in any inquest or inquiry under the *Coroners Act 1980*.

The practitioner, or the legal representative, may request in writing a copy of the recording. A copy of the recording will also be provided to the Health Care Complaints Commission. Unless required by law, a copy of the recording will not be provided to any other person.

4.5.4. Oral information from relevant persons

The delegates may hear oral information from persons who may be able to provide relevant information in the matter. This might occur in person or via telephone at the discretion of the delegates. The practitioner will be given the opportunity to ask such persons questions. The practitioner does not have a right to cross examine any person providing oral information.

4.5.5. Submissions from the practitioner

At the conclusion of the proceedings conducted by the delegates the practitioner will be invited to make submissions. Submissions can be made either orally or in writing. The submission should address any relevant facts, and possible outcomes or action that might be taken by the Board. The delegates may ask the practitioner to address particular issues.

4.5.6. Notification to practitioner of action taken

The practitioner will be notified in writing of the action taken by the Board under section 66 as soon as possible after a decision is made by the delegates.

4.5.7. Written decision

As soon as practicable after the proceedings have concluded a written statement of reasons will be prepared and sent to the practitioner. A copy of the written statement of reasons will be also be provided to the Health Care Complaints Commission.

5. REFERRAL OF THE MATTER TO THE HEALTH CARE COMPLAINTS COMMISSION

5.1. Referral of a complaint

If the Board takes action under s66 of the Act it is required to notify the Health Care Complaints Commission ('the Commission') and in certain circumstances refer the matter to the Commission for investigation. The Commission will be provided with any relevant information considered by the delegates during the proceedings, a copy of any audio recording and a copy of the written statement of decision. The Commission is required to deal with the matter as a complaint against the practitioner (subject to certain provisions outlined below).

5.2. Special provisions- Impairment

If the Board takes action against a practitioner under section 66 of the Act because it is of the opinion that the practitioner suffers from an impairment it must consult with the Commission to determine whether the matter is dealt with as a complaint against the practitioner (and thus investigated by the Commission) or by the Board through an Impaired Registrants Panel.

Impairment is defined in the Act as any physical or mental impairment, disability, condition or disorder which detrimentally affects or is likely to detrimentally affect the person's physical or mental capacity to practise medicine. Habitual drunkenness or addiction to a deleterious drug is considered to be a physical or mental disorder.

If the matter is to be dealt with by an Impaired Registrants Panel the practitioner will be notified in due course about the nature of the panel and the procedure that will take place.

5.3. Special provisions - Performance Assessment

The Board may impose under s66 of the Act a requirement that the practitioner undergo a performance assessment. The Commission must concur with the imposition

of such a condition. If the Commission does not concur the matter will be dealt with as a complaint (and thus investigated by the Commission). In certain circumstances the matter might be dealt with by a performance assessment and as a complaint.

If the Board is to conduct a performance assessment the practitioner will be notified in due course about the nature of the assessment and the procedure that assessment will take.

6. NOTIFICATION TO THE MEDICAL TRIBUNAL

The Board must notify the Medical Tribunal within 7 days of any order suspending a practitioner from practising medicine.

7. NOTIFICATION TO OTHER PERSON OR BODIES

The Board may notify any person or body that it reasonably considers appropriate of action taken under section 66 of the Act.

The Board will generally notify other Australian State and Territory Medical Boards, the Medical Council of New Zealand and the practitioner's employer of any action taken under section 66 of the Act. If a doctor is suspended the relevant college, Medicare, Department of Veteran Affairs, Dept of Health (PSB) are also advised.

Relevant details of conditions or a suspension are recorded on the Board's Register Online. A list of suspended practitioners is also published on the Board website: www.nswmb.org.au.

8. DURATION OF ORDERS - EXTENSION OF SUSPENSION

Suspensions (of no more than eight weeks duration) can be extended by the Board after approval of the Chairperson of the Medical Tribunal, who must be satisfied that there is no material change in the circumstances that gave rise to the suspension.

Prior to seeking an extension the Board will invite the practitioner to make a submission in writing and provide any additional relevant information.

Either a Committee of the Board or the delegates of the Board who conducted the original proceedings (if possible) will review the matter and action taken in light of any further material and will make an order extending, varying or terminating the suspension. Further proceedings may be conducted to assist the Board in making this decision.

The practitioner will be notified in writing of the order to extend the suspension.

If a practitioner is suspended for breaching a critical compliance condition or order the practitioner is suspended until the matter is dealt with by the Medical Tribunal and the Board is not required to extend the order of suspension.

9. POWER TO REMOVE OR ALTER CONDITIONS OR TERMINATE SUSPENSION

The Board can at any time shorten, or terminate a period of suspension or alter or remove conditions imposed under Part 4 Division 5 of the Act. Any decision to do so will depend on the specific nature of the matter and any relevant change in circumstances.

10. APPLICATION BY THE PRACTITIONER FOR THE BOARD TO REVIEW ITS DECISION

A practitioner may apply to the Board in writing seeking a review of any order made under section 66 of the Act, or a decision of the Board not to alter or vary conditions or to

shorten or terminate a suspension. Such an application should be addressed to the Registrar of the Board.

The application should provide any new evidence or material relevant to the decision to review the Board's orders.

Unless the application is considered by the Board to be frivolous or vexatious the Board must conduct a review of the decision to take action under section 66 of the Act.

The nature of the review will depend on the circumstances of the matter but might include:

1. a review of the matter by a Committee of the Board, or
2. further proceedings being conducted by the delegates who considered the matter originally (if possible) or other persons delegated by the Board. This may require the practitioner to attend further proceedings at a specified date and time.

11. APPEAL TO THE CHAIRPERSON OF THE MEDICAL TRIBUNAL ON A POINT OF LAW

A practitioner can appeal to the Chairperson of the Medical Tribunal on a point of law in respect of action taken in relation to the Board's powers to:

1. suspend or impose conditions under section 66 of the Act
2. remove or alter conditions or terminate suspension
3. review, on application by a practitioner, its powers under section 66 of the Act.

Such an appeal does not stay the suspension or conditions unless the Chairperson orders otherwise.

No appeal can be made to the Supreme Court until the Medical Tribunal determines the appeal.

The Board is required to abide by the Chairperson's ruling on the point of law.

The Board suggests that prior to lodging an appeal the practitioner obtain legal advice from a medical defence organisation or a legal practitioner.

An appeal must be made within 28 days of the decision of the Board. The Registrar may in certain circumstances extend the period allowed for an appeal.

12. APPEAL TO THE MEDICAL TRIBUNAL AGAINST THE BOARD'S DECISION TO TAKE ACTION UNDER S66 OF THE ACT

A practitioner has a right of appeal against a decision of the Board to take action to suspend or place conditions on the practitioner's registration. A practitioner can also appeal the Board's decision to extend a period of suspension or a refusal to alter or vary conditions imposed. Such an appeal will normally be conducted as a re-hearing of the matter by the Medical Tribunal.

An appeal is to be lodged with the Registrar who will refer it to the Medical Tribunal.

An appeal must be made within 28 days from the practitioner receiving notification of the action taken by the Board under Division 4 Part 5 of the Act. In certain circumstances the Registrar may extend the time period for lodgement of an appeal.

An appeal against a decision of the Board in these circumstances does not stay the effect of any suspension or conditions imposed on a practitioner's registration.

The Board suggests that prior to lodging an appeal the practitioner obtain legal advice from a medical defence organisation or a legal practitioner.

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