HEALTH PROFESSIONAL COUNCIL AUTHORITY BENCH BOOK

FOR THE USE OF COMMITTEES, COUNCILS, PANELS

AND TRIBUNALS

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Contents

COMMENTARY COMMON TO ALL INQUIRIES

1. Role of disciplinary bodies: Protective jurisdiction

1.1. The primary objective of the *Health Practitioner Regulation (National Law) NSW* ("the *National Law*") is the protection of the health and safety of the public. Section 3A of the *National Law* provides:

> "3A Objective and guiding principle [NSW]
>
> In the exercise of functions under a NSW provision, the protection of the health and safety of the public must be the paramount consideration."

See also cl. 9 of Schedule 5 of the *Civil and Administrative Tribunal Act 2013* ("*CAT Act*").

1.2. Accordingly, disciplinary bodies exercise a "protective jurisdiction", whose purpose is to protect the public from the misconduct, poor professional performance or impairment (mental and physical) of health professionals which may put the public at risk of harm.

1.3. One important aspect of the significance of disciplinary bodies exercising a "protective jurisdiction" is that the context of the conduct, including the practitioner's behaviour following the conduct in question is of the utmost significance. In other words, the fact that wrongful or inappropriate conduct occurred does not determine the action that should be taken. For example, if similar complaints are established against two health practitioners, yet the first practitioner demonstrates insight into the aspects in which his or her conduct fell short of acceptable standards, but the second practitioner maintains that he or she acted correctly, it is likely that the disciplinary action imposed in respect of the second practitioner will be much more restrictive than that imposed in respect of the first practitioner. Such differential treatment is reflective of the fact that the primary purpose of disciplinary action is to protect the public, rather than to punish the practitioner. See *Reimers v Health Care Complaints Commission* [2012] NSWCA 317 per Basten JA at [13], with whom Campbell and Hoeben JJA agreed ("the underlying purpose of a disciplinary order of deregistration is not primarily punitive, but protective").

1.4. As a protective jurisdiction, particular importance may be attached to:

- whether the conduct giving rise to the notification was deliberate or reckless;
- whether the practitioner demonstrates insight;
- what efforts the practitioner has made to improve their skills and knowledge following the complaint or notification;
- what other contributing factors may have played a role in the conduct in question (for example, fatigue, inadequate systems and procedures);
- whether there is a pattern of behaviour;
- the potential for harm.

1.5. It must also be borne in mind that while the purpose of disciplinary proceedings is to protect the public, such proceedings also exist for the protection of the profession: *Health Care Complaints Commission v Litchfield* (1997) 41 NSWLR 630 at 637, in which it was said that "*disciplinary proceedings against members of a profession are intended to maintain proper ethical and professional standards, primarily for the protection of the public, but also for the protection of the profession*." See also *Health Care Complaints Commission v Do* [2014] NSWCA 307 at [35]ff and *Law Society of New South Wales v Foreman* (1994) 34 NSWLR 408. For this reason, the impact of the practitioner's conduct on public confidence in the profession is also an important consideration. See also *Medical Board of Australia v Tausif (Occupational Discipline)* [2015] ACAT 4.

2. History of the National Law (New South Wales)

2.1. Historically, the regulation of health professionals – including the accreditation, registration and management of complaints - was conducted at the State level.

2.2. In March 2008 the Intergovernmental Agreement for a National Registration and Accreditation Scheme for the Health Professions was signed by the Council of Australian Governments (COAG). In that agreement, the States and Territories agreed to establish "a single national scheme, with a single national agency encompassing both the registration and accreditation functions" for the health professions (COAG, 2008, p.2).

2.3. In 2010 the National Regulation and Accreditation Scheme ("NRAS") came into effect through the *National Law*. The *National Law* was initially passed in Queensland and was then adopted by each State Parliament (with some variations in various States and Territories). The *National Law* established National Health Practitioner Boards and the Australian Health Practitioner Regulation Agency to operate the system across Australia.

2.4. The *National Law* currently regulates the following health professions:

(1) Aboriginal and Torres Strait Islander health practice
(2) Chinese medicine
(3) Chiropractors
(4) Dental practitioners (including dentists, dental hygienists, dental prosthetists, dental therapists and oral health therapists)
(5) Medical practitioners
(6) Medical radiation practitioners
(7) Nurses and midwives
(8) Occupational therapists
(9) Optometrists
(10) Osteopaths
(11) Pharmacists
(12) Physiotherapists
(13) Podiatrists
(14) Psychologists

2.5. New South Wales joined the NRAS as a "co-regulatory" jurisdiction. New South Wales adopted the accreditation and registration parts of the *National Law*, it did not, however, adopt the *National Law* provisions for complaints and performance. Rather, the New South Wales Parliament enacted a NSW specific Part 8 of the *National Law*, which sets out the New South Wales regulatory provisions that apply to complaints, health and performance issues in New South Wales.

2.6. By reason of the NSW specific Part 8 of the *National Law*, New South Wales differs from the other States and Territories. In New South Wales, registration functions are performed by the relevant National Health Practitioner Boards, whilst complaints, performance and health functions are dealt with by the Health Care

Complaints Commission and Health Professional Council for the relevant profession. The Councils are supported by the Health Professional Councils Authority.

3. Definitions

"Competence"

3.1. Section 139 of the *National Law* provides as follows concerning the competence of a practitioner to practise a health profession:

> "A person is competent to practise a health profession only if the person -
>
> (a) has sufficient physical capacity, mental capacity, knowledge and skill to practise the profession; and
>
> (b) has sufficient communication skills for the practice of the profession, including an adequate command of the English language."

3.2. A finding that a practitioner will or is likely to, at some future time, lack capacity to practice their profession does not establish lack of competence. In *Tung v Health Care Complaints Commission & Anor* [2011] NSWCA 219, the practitioner appealed against an order for deregistration made by the Medical Tribunal after finding that a practitioner's impairment was "*of a nature* that it will affect *her capacity to practise medicine*". Justice Giles, with whom Campbell JA and Tobias AJA agreed, found:

> "[G]iven the futurity in the Tribunal's finding in my view it was not open to the Tribunal to find that she was not competent to practice medicine. No doubt there is room for some futurity in the definition of competence to practice medicine. It is in terms of present capacity, but practice of medicine is a continuum and a practitioner whose physical or mental deterioration will inevitably and soon make him or her incapable could be said to lack sufficient physical or mental capacity to practice medicine. That is not the present case. The finding, understood in the light of the reasons as a whole, was one of likelihood at an indefinite future time. It could not properly be found that the appellant did not presently have sufficient mental capacity or other competence to practice medicine": at [62].

"Critical compliance condition"

3.3. A "critical compliance condition" is an order that a contravention of the order or condition will result in the health practitioner's registration in the health profession being cancelled: see ss. 146B, 149A and 163B of the *National Law*.

"Good character"

3.4. In *Ex Parte Tziniolis; re the Medical Practitioners Act* [1967] 1 NSWR 357, Holmes JA at 377:

> "'Good character' is not a summation of acts alone but relates rather to the quality of a person [emphasis added]. The quality is to be judged by acts and motives, that is to say, behaviour and the mental and emotional situations accompanying that behaviour. However, character cannot always be estimated by one act or one class of act. As much about a person as is known will form the evidence from which the inference of good character or not of good character is drawn."

3.5. Similarly, Walsh JA said at 451 and 452 that in deciding whether the applicant was of bad character:

> "... the Court is required to consider matters affecting the moral standards, attitudes and qualities of the applicant and not merely... his general reputation... we are entitled to enquire into what may be described as personal misconduct, as distinct from professional misconduct, in determining... whether or not the applicant is a man of good character, whilst recognising that there may be some kinds of conduct … deserving of disapproval which have little or no bearing on the question whether... an applicant for registration as a medical practitioner is a person of good character." (See also at 475-6, per Wallace P.)

3.6. In *McBride v Walton* (unreported, NSWCA, 15 July 1994), the New South Wales Court of Appeal set out six factors to be taken into account when determining whether a finding of professional misconduct should be followed by a finding of good character. The six factors are:

(a) whether the misconduct can be satisfactorily explained as an error of judgment rather than a defect of character;
(b) the intrinsic seriousness of the misconduct qua fitness to practise [the relevant health profession];

(c) whether the misconduct should be viewed as an isolated episode and hence atypical or uncharacteristic of the practitioner's normal qualities of character;
(d) the motivation which may have given rise to the proven episode of misconduct;
(e) the underlying qualities of character shown by previous and other misconduct; and
(f) whether the practitioner's conduct post the proven episode of misconduct demonstrates that public and professional confidence may be reposed in him to uphold and observe the high standards of moral rectitude required of a [health] practitioner.

3.7. A common theme running through the cases concerning good character is the obligation on professionals to be honest and candid with their professional regulators and investigative bodies. Reference to this duty is found in cases relating to nurses, *Health Care Complaints Commission v Meyer* [2008] NSWNMT 22; cases relating to legal practitioners, *In re Davis,* and *Morrissey v The New South Wales Bar Association* [2006] NSWSC 323; and cases relating to medical practitioners, *Re Dr Richard Wingate* [2007] NSWMT 2. An excellent discussion of the duty of candour is to be found in the decision of the Nursing and Midwifery Tribunal in *Health Care Complaints Commission (HCCC) v Waddell No.1* [2012] NSWNMT 17*.*

See further:

Health Care Complaints Commission v Karalasingham [2007] NSWCA 267 at [51] and [54];
Re Dr Richard Wingate [2007] NSWMT 2
Health Care Complaints Commission v Meyer [2008] NSWNMT 22
Health Care Complaints Commission v Pierce [2010] NSWNMT 23
Health Care Complaints Commission v Buksh [2013] NSWNMT 22

"Impairment"

3.8. Section 5 of the *National Law* defines "*impairment*" as follows:

> "*impairment*, in relation to a person, means the person has a physical or mental impairment, disability, condition or disorder (including substance

> abuse or dependence) that detrimentally affects or is likely to detrimentally affect—
>
> (a) for a registered health practitioner or an applicant for registration in a health profession, the person's capacity to practise the profession; or
>
> (b) for a student, the student's capacity to undertake clinical training—
>
> (i) as part of the approved program of study in which the student is enrolled; or
>
> (ii) arranged by an education provider."

3.9. A finding of impairment is not of itself sufficient to found an order to suspend or cancel a health practitioner's registration under s. 149C of the *National Law*: *Tung v Health Care Complaints Commission & Anor* [2011] NSWCA 219 at [23] per Giles JA with whom Campbell JA and Tobias AJA agreed. However, a finding of impairment may be relevant in considering whether a practitioner is competent to practice the practitioner's profession under s. 149C(1)(a) of the *National Law.* In *Lindsay v Health Care Complaints Commission* [2010] NSWCA 194 the Court of Appeal noted that:

> "There is clearly a close relationship between a finding of impairment, based on the existence of a disorder which is likely to detrimentally affect a practitioner's mental capacity to practise medicine, and a finding of lack of competence to practise medicine based on a want of sufficient mental capacity to practise medicine. Accordingly, a finding of impairment of that sort may very well lead to a finding that the medical practitioner is not competent to practise medicine within the meaning of s 64(1)(a) of the Act [now s. 149C(1)(a)]": at [168] per Sackville AJA, with whom Giles and Young JJA relevantly agreed.

3.10. Whilst impairment alone cannot sustain an allegation of professional misconduct or unsatisfactory professional conduct, *conduct resulting from* an impairment is capable of being professional misconduct or unsatisfactory professional conduct. In *Reimers v Health Care Complaints Commission* [2012] NSWCA 317 it was argued that conduct which results from an impairment cannot be professional misconduct, or that it is manifestly unreasonable to treat misconduct which is the result of an impairment as professional misconduct warranting deregistration. Both propositions were held to be untenable: *Reimers*, per Basten JA at [11]-[13] (with whom Campbell and Hoeben JJA agreed).

"Professional misconduct"

3.11. Section 139E of the *National Law* defines "professional misconduct" as follows:

> "For the purposes of this Law, professional misconduct of a registered health practitioner means—
>
> (a) unsatisfactory professional conduct of a sufficiently serious nature to justify suspension or cancellation of the practitioner's registration; or
>
> (b) more than one instance of unsatisfactory professional conduct that, when the instances are considered together, amount to conduct of a sufficiently serious nature to justify suspension or cancellation of the practitioner's registration."

3.12. Section 139E draws upon the common law definition of misconduct as found in *Allinson v General Council of Medical Education an Registration* [1984] 1 QB 750, in which it was said that professional misconduct is conduct "*which would be disgraceful or dishonourable by professional brethren of good repute and competency*."

3.13. It may be observed that while the phrase "professional misconduct" is framed in terms of the availability of orders suspending or cancelling a practitioner's registration, the imposition of an order of suspension or cancellation of registration does not necessarily follow a finding of professional misconduct: *Lucire v Health Care Complaints Commission* [2011] NSWCA 99 at [65].

"Professional performance"

3.14. Section 153 of the *National Law* defines "*professional performance*" as follows:

> "153 Meaning of "professional performance" [NSW]
>
> For the purposes of this Division, a reference to the professional performance of a registered health practitioner is a reference to the knowledge, skill or judgment possessed and applied by the practitioner in the practice of the practitioner's health profession."

"Unsatisfactory professional conduct"

3.15. Section 139B of the *National Law* defines "unsatisfactory professional conduct" as follows:

"(1) Unsatisfactory professional conduct of a registered health practitioner includes each of the following -

(a) Conduct significantly below reasonable standard

Conduct that demonstrates the knowledge, skill or judgment possessed, or care exercised, by the practitioner in the practice of the practitioner's profession is significantly below the standard reasonably expected of a practitioner of an equivalent level of training or experience.

(b) Contravention of this Law or regulations

A contravention by the practitioner (whether by act or omission) of a provision of this Law, or the regulations under this Law or under the NSW regulations, whether or not the practitioner has been prosecuted for or convicted of an offence in respect of the contravention.

(c) Contravention of conditions of registration or undertaking

A contravention by the practitioner (whether by act or omission) of—

(i) a condition to which the practitioner's registration is subject; or

(ii) an undertaking given to a National Board.

(d) Failure to comply with decision or order of Committee or Tribunal

A contravention by the practitioner (whether by act or omission) of a decision or order made by a Committee or Tribunal in relation to the practitioner.

(e) Contravention of requirement under Health Care Complaints Act 1993

A contravention by the practitioner of section 34A(4) of the Health Care Complaints Act 1993.

(f) Accepting benefit for referral or recommendation to health service provider

Accepting from a health service provider (or from another person on behalf of the health service provider) a benefit as inducement, consideration or reward for—

(i) referring another person to the health service provider; or

(ii) recommending another person use any health service provided by the health service provider or consult with the health service provider in relation to a health matter.

(g) Accepting benefit for recommendation of health product

Accepting from a person who supplies a health product (or from another person on behalf of the supplier) a benefit as inducement, consideration or reward for recommending that another person use the health product, but does not include accepting a benefit that consists of ordinary retail conduct.

(h) Offering a benefit for a referral or recommendation

Offering or giving a person a benefit as inducement, consideration or reward for the person -

(i) referring another person to the registered health practitioner; or

(ii) recommending to another person that the person use a health service provided by the practitioner or consult the practitioner in relation to a health matter.

(i) Failure to disclose pecuniary interest in giving referral or recommendation

Referring a person to, or recommending that a person use or consult—

(i) another health service provider; or

(ii) a health service; or

(iii) a health product;

if the practitioner has a pecuniary interest in giving that referral or recommendation, unless the practitioner discloses the nature of the interest to the person before or at the time of giving the referral or recommendation.

(j) Engaging in over servicing

Engaging in over servicing.

(k) Supervision of assistants

Permitting an assistant employed by the practitioner (in connection with the practitioner's professional practice) who is not a registered health practitioner to attend, treat or perform operations on patients in respect of matters requiring professional discretion or skill.

(l) Other improper or unethical conduct

Any other improper or unethical conduct relating to the practice or purported practice of the practitioner's profession.

(2) For the purposes of subsection (1)(i), a registered health practitioner has a pecuniary interest in giving a referral or recommendation—

(a) if the health service provider, or the supplier of the health product, to which the referral or recommendation relates is a public company and the practitioner holds 5% or more of the issued share capital of the company; or

(b) if the health service provider, or the supplier of the health product, to which the referral or recommendation relates is a private company and the practitioner has any interest in the company; or

(c) if the health service provider, or the supplier of the health product, to whom the referral or recommendation relates is a natural person who is a partner of the practitioner; or

(d) in any circumstances prescribed by the NSW regulations.

> (3) For avoidance of doubt, a reference in this section to a referral or recommendation that is given to a person includes a referral or recommendation that is given to more than one person or to persons of a particular class.
>
> (4) In this section—
>
> benefit means money, property or anything else of value.
>
> recommend a health product includes supply or prescribe the health product.
>
> supply includes sell."

3.16. There are additional provisions relating to unsatisfactory professional conduct for medical practitioners (s. 139C of the *National Law*) and pharmacists (s. 139D of the *National Law*).

3.17. The phrase "*significantly below the standard reasonably expected of a practitioner of an equivalent level of training or experience*" (see s. 139B(1)(a)) is not defined in the *National Law*. However, in *Re A Medical Practitioner and the Medical Practice Act* (unreported, NSWMT, 3 September 2007), Deputy Chairperson Judge Freeman stated (in relation to legislation in the same terms as s. 139B of the *National Law*) that:

> "As a general principle, the use of the term "significant" may in law be taken to mean not trivial, of importance, or substantial."

4. Dealing with diversity

4.1. Many health practitioners and patients come from culturally diverse backgrounds and have different values, lifestyles, views and experience of the Australian legal system. Such diversity should be borne in mind by all decision makers.

4.2. In particular, it is important to note that persons from culturally diverse backgrounds may have different communication styles – both linguistically and in their body language and level of eye contact. Such differences should be particularly borne in mind when making assessments as to the credit of witnesses from culturally diverse backgrounds.

4.3. Where a respondent or witness is hearing or visually impaired, special accommodation will need to be made. An appropriate interpreter and/ or other assistance must be organised prior to the hearing. Other accommodations, such the granting of short breaks or adjournments should also be considered and made available where appropriate.

See further *Equality Before the Law Benchbook*:
http://www.judcom.nsw.gov.au/publications/benchbks/equality

5. Bias

Actual bias and apprehended bias

5.1. Bias may be actual or apprehended. If bias is established, a tribunal member is obliged not to determine the matter.

Actual bias

5.2. Actual bias is established only where a party can establish that a decision maker is actually prejudiced against them. Actual bias will arise where the decision maker is:

> "… so committed to a conclusion already formed as to be incapable of alteration, whatever evidence or arguments may be presented." (*Minister of Immigration and Multicultural Affairs v Jia* (2001) 205 CLR 507 at 532, per Gleeson CJ and Gummow J.)

5.3. Actual bias is difficult to establish. It requires evidence that the decision maker will not *in fact* consider the case with an open mind. For this reason, it is more common for parties to allege apprehended bias, which does not require evidence of the decision-maker's actual state of mind.

Apprehended bias

<u>Test</u>

5.4. The test for determining whether there is an apprehension of bias is whether a fair-minded lay observer might reasonably apprehend that the decision maker might not

bring an impartial mind to the resolution of the question the decision maker is required to decide: *Isbester v Knox City Council* [2015] HCA 20 at [21]; *Johnson v Johnson* (2000) 201 CLR 488 at [12]; *Ebner v Official Trustee in Bankruptcy* (2000) 205 CLR 337 at [6]; *Michael Wilson & Partners v Robert Nicholls* (2011) 282 ALR 685 at [31]. The test for apprehended bias gives due recognition to the principle that justice must both be done and be seen to be done: *Johnson v Johnson* at [14]. In contrast to an allegation of actual bias, an allegation of apprehended bias requires no prediction about how the decision maker will in fact approach the matter: *Ebner v Official Trustee in Bankruptcy* at 345; *Gaudie v Local Court of New South Wales and Anor* [2013] NSWSC 1425 at [86].

5.5. When determining whether there is an apprehension of bias, regard may be had to:

1) the nature of the decision, the context in which it was made and the circumstances leading to the decision: *Isbester v Knox City Council* [2015] HCA 20 at [23];
2) later statements which may qualify or explain earlier remarks;
3) earlier statements which may provide context to later remarks/ the context in which any comments are made;
4) the facts and legal history of the case being considered by the relevant tribunal;
5) material which is not in the public domain: *Barakat v Goritsas (No. 2)* [2012] NSWCA 36 at [58]-[63]; *Gaudie* at [100].

5.6. Decision makers have a duty to sit unless disqualified by law: *Sankey v Whitlam* [1977] 1 NSWLR 333. Decision makers should not accede too readily to suggestions of an apprehension of bias, so that they do not encourage parties to believe that by seeking disqualification of a judge, they will have their case determined by a person more likely to decide the case in their favour: see *Re JRL; Ex p CJL* (1986) 161 CLR 342 at 352; *Gaudie* at [81]. Parties should not be given a "right of veto" over the identity of the decision-maker assigned to their case: *Brown v DML Resources* [2001] NSWSC 250, at [15], per Austin J.

5.7. However, if there is any real doubt as to whether an apprehension of bias has arisen, the prudent course is for the decision maker to recuse him or herself, particularly if the application is made prior to the hearing of the matter: *Ebner v*

Official Trustee in Bankruptcy (2000) 205 CLR 337 at 348, per Gleeson CJ, McHugh, Gummow and Hayne JJ.

5.8. It is important to identify possible bias at an early stage. The continued participation of a member who is subject to an apprehension of bias may jeopardise the entire decision: "[t]*he participation of others does not overcome the apprehension that* [a decision maker's] *interest in the outcome might affect not only her decision-making, but that of others": Isbester v Knox City Council* [2015] HCA 20 at [48].

Examples of apprehended bias which may be relevant in the health context

5.9. In the disciplinary context, an apprehension of bias may arise as a result of prejudgment or predetermination of an issue, association with a party or witness, access to outside influence or information, or as a result of conduct by a decision maker within the hearing.

5.10. Particular kinds of apprehended bias which may arise in the context of decisions under the *National Law* include:

(1) Where the decision-maker has made prior decisions concerning a health practitioner: careful consideration should be given as to whether the decision-maker is able to bring an "independent mind" to the hearing. Where the decision maker has made adverse conclusions in a prior case as to a witness's credibility and the credibility of that witness is in issue in the present matter, the decision-maker should recuse him or herself: *Livesey v NSW Bar Association* (1983) 151 CLR 288. Generally speaking, where a member of a Professional Standards Committee or Tribunal has previously been involved in making decisions in respect of that respondent should recuse themselves: see, for example *Singh v Medical Council of NSW* [2015] NSWCATOD 4. However, the position may be different in respect of Councils, Impaired Registrants Panels and Performance Review Panels, particularly where the previous decision has not involved findings of credit (for example, where the decision maker has only been involved in the making of procedural decisions concerning the practitioner): see further HPCA Legal Practice Note No 1 of 2015, "*Bias and apprehended bias*".

(2) An association with a party or a witness which goes beyond mere acquaintance may give rise to an apprehension of bias: *S & M Motor Repairs Pty Ltd v Caltex Oil* (1988) 12 NSWLR 358; *Medical Board of Australia v Dr Piesse* [2011] VCAT 64. In particular, an apprehension of bias may arise where the decision maker currently, or has in the past, worked closely with a party (for example, where a professional member was a supervisor of the respondent, or where the professional member is an employee of a party). Where there is a past association, consideration should be given to the length of the association, whether it was a social relationship or a work relationship, what kind of association (for example, a supervisor or colleague), and whether the decision maker has information about the party which may prejudice his or her assessment of the dispute. Where the association has ceased, a relevant consideration will be how long ago the association ceased.

In the case of hearings conducted by a Council, it should be noted that cl. 16 of Sched. 5C of the *National Law* requires that a member who has disclosed a direct or indirect pecuniary interest in a matter that is being considered by the Council must not be present during deliberations of the Council or take part in any decision of the Council in respect of that matter.

(3) Expert members and expert knowledge/ membership of associations: Many members of panels, and peer or expert members of a Tribunal or Professional Standards Committee, must possess particular qualifications as a precondition to appointment (for example, registration in the relevant health profession). In *Re Polites; ex parte Hoyts Corp Pty Ltd* (1991) 173 CLR 78 at 86 - 87, Brennan, Gaudron and McHugh JJ said that rules of apprehended bias "cannot be pressed too far" in the context of a Tribunal where the qualifications for membership "are such that the members are likely to have some prior knowledge of the circumstances which give rise to the issues for determination or to have formed an attitude about the way in which such issues should be determined." See similarly *Bannister v Walton* (Court of Appeal, unreported, 1 April 1996).

A panel member who is a member of the same professional association as a respondent or an expert witness (such as a peer reviewer), or who has attended professional seminars with a peer reviewer, is not necessarily

biased (indeed, as expert members and peer reviewers commonly share expertise, such association is not uncommon). Nonetheless, there may be an apprehension of bias where the association is closer such as where the expert member and peer reviewer or respondent are related or close social friends, or where the expert member would stand to benefit financially from an adverse finding against a respondent (such as where the respondent is a close and direct competitor of the expert member). In such a case, the expert member should recuse him or herself.

5.11. Decision makers must be cautious to ensure that their conduct during a hearing does not give rise to an apprehension of bias. In particular, it has been held that:

1. Views expressed so "*vehemently or trenchantly*" that they suggest that the decision-maker could not hear the case with an open mind may give rise to an apprehension of bias: *Timmins v Gormley* [2000] 1 All ER 65; [2000] QB 451, *Newcastle City Council v Lindsay* [2004] NSWCA 198 at [35]-[38] and *Gaudie v Local Court of New South Wales* [2013] NSWSC 1425 at [175]. Similarly, expressing a concluded view before hearing all the evidence may give rise to an apprehension of bias: *Antoun v R* (2006) 80 ALJR 497. However, the expression of tentative views is permissible (and indeed, may be an appropriate way of ensuring procedural fairness): *Galea v Galea* (1990) 19 NSWLR 263.

2. Forming a view based on stereotypes may give rise to an apprehension of bias: *R v Justices of Rankin River* (1962) 3 FLR 215; *Hoang v R* (2002) 128 A Crim R 422.

3. Communication with a party, a witness or a legal representative in the absence of, and without the consent or approval of the other party may give rise to an apprehension of bias: *Re JRL; Ex p CJL* (1986) 161 CLR 342.

Procedure

<u>Disclosure</u>

5.12. In many Council hearings, Panels and Committees, there will be a requirement for each decision-maker to declare in writing that they do not have a conflict of interest in hearing the proceedings. See for example, cl. 16 of Schedule 5C of the *National Law* which requires a Council member to disclose any direct or indirect pecuniary interest that the member may have in a matter about to be considered by a Council.

5.13. Whether or not such a disclosure is required, the presiding member of the decision-making body should ask each of the other members if they have had any prior contact with the complainant, any witnesses in the proceedings, or have worked at the health institution or facility in question or if there is any other basis on which it could be thought that a member might be biased. The presiding member should emphasise that the question is one of an apprehension of bias, and that an absence of actual bias is not sufficient.

5.14. Where there are matters that might give rise to an application for bias, those matters should be drawn to the attention of the parties, even if it is believed that the parties are aware of them: *S & M Motor Repairs Pty Ltd v Caltex Oil (Australia) Pty Ltd* (1988) 12 NSWLR 358 and *Dovade Pty Ltd v Westpac Banking Corporation* (1999) 46 NSWLR 168 at [105]–[107]. This is obviously best done at the earliest possible opportunity. If both parties do not wish to make an application for the decision maker to recuse themselves, and if the presiding member is satisfied that it is appropriate for the decision maker to hear the matter, the hearing may proceed.

<u>The making of an application for actual or apprehended bias</u>

5.15. The procedure whereby an application for actual or apprehended bias is made depends in large part upon the form of hearing (for example, an IRP, PRP, s 150, Professional Standards Committee or Tribunal hearing). For this reason, the procedure is addressed in respect of each of the different forms of hearing below.

See further Legal Practice Note No 1 of 2015 "*Bias and apprehended bias*", HPCA.

<u>References:</u>

J. Tarrant, *Disqualification for Bias* (The Federation Press, 2012)

M. Aronsen and M. Groves, *Judicial Review of Administrative Action* (Lawbook Co, 5th ed, 2013)

A Guide to Conduct for Tribunal Members, Administrative Review Council, September 2001 (revised August 2009), Part 2

Guide to Conduct of Panel Members, AHPRA

6. Procedural Fairness

6.1. A fundamental aspect of the requirement to accord procedural fairness or natural justice is the requirement for a person whose interests are affected by a decision to be heard before the decision is made (the hearing rule). In the disciplinary context, the main features of the right to be heard are:

1) That the practitioner or student must have notice of the case which they have to answer;
2) That the practitioner or student must have notice of the material upon which the decision is to be made;
3) That the practitioner or student must be given an opportunity to bring evidence to the attention of the decision-maker, and to make submissions concerning the decision to be made;
4) Provide reasons for the decision.

In some circumstances (for example, the hearing of a complaint before a Tribunal or Professional Standards Committee), the right to be heard also extends to the right to be legally represented in the hearing: cl. 27 of Sched. 5 of the *CAT Act* (Tribunal), s. 171B of the *National Law* (Professional Standards Committee).

6.2. In general, the decision maker will be required to:

- advise the practitioner of the matters that will be considered (for example, the complaint or notification) and the possible outcomes of the decision;
- provide the practitioner with a copy of the material that is to be relied on;
- permit the practitioner a reasonable time (in the circumstances) to provide the decision maker with evidence and/or submissions in respect of the matters to which the decision relates (this may involve the granting of an adjournment to the practitioner);
- determine the action to be taken only on the basis of the evidence before it;
- provide reasons for the decision.

6.3. Particular aspects of the duty to accord procedural fairness are addressed below in respect of PRPs, IRPs, s. 150 hearings and hearings before Professional Standards Committees and Tribunals.

See further:

Administrative Review Council (ARC) 2007, *Decision Making: Natural Justice,* Best Practice guide 2, Commonwealth of Australia

M. Aronsen and M. Groves, *Judicial Review of Administrative Action* (Lawbook Co, 5th ed, 2013)

7. Duty to provide reasons

7.1. The duty to provide reasons for a decision-maker's decision is an essential aspect of the duty to afford procedural fairness. In *Solomon v Australian Health Practitioner Regulation Agency* [2015] WASC 203 at [142], Wheeler J described the duty to afford reasons under the *National Law* in the following terms:

> "So far as the 'reasons' of the panel are concerned, it is fair in my view, to characterise the mere listing of matters allegedly considered by the panel as a complete failure to provide reasons. The essence of reasons for decision is that they disclose the reasoning processes of the Tribunal. Fulfilment of the obligation to give reasons ensures that a person whose interests may be adversely affected by a decision understands why the decision has been made, and allows a party dissatisfied with a decision to determine whether there has been reviewable error." (citing *Re a Medical Assessment Panel; Ex parte Hays* (Unreported WASC, Library No 980575)).

7.2. Justice Wheeler went on to state that "at a minimum", the reasons should set out what the decision maker considers to be the material facts which emerged from the materials to which it referred and set out the process of reasoning from those material facts to its conclusion. The decision maker should also make particular reference to material which would appear to be inconsistent with the conclusion which it reached explain why such material was considered not to be relevant, or to be outweighed by other considerations

SECTION 150 INQUIRIES

8. Purpose

8.1. Section 150 of the *National Law* provides Councils with an important power to protect the public to suspend a practitioner's registration or to impose conditions if it is considered that "urgent interim" action is warranted. The safety of the public and the public interest are the primary concerns of s. 150.

9. The exercise of powers under s. 150

9.1. *Precondition to the exercise of powers:* Before exercising powers under s. 150 of the *National Law*, the Council must be satisfied that it is appropriate to take action for the protection of the health or safety of any person or persons, or that it is in the public interest to do so.

9.2. *Delay:* It is important that any action under s. 150 be taken quickly. There are potentially serious adverse consequences of delay in the making of s. 150 orders. Importantly, public safety may be jeopardised by a Council's failure to act expeditiously. Moreover, an appellate tribunal may be more likely to set aside s. 150 orders which have been attended by delay on the basis that the Council's delay itself is suggestive that the practitioner does not pose a risk to public health and safety.

9.3. *Protection of the public is the paramount concern*: Section 3A of the *National Law* provides that "in the exercise of functions under a NSW provision, the protection of the health and safety of the public must be the paramount consideration." Accordingly, the effect of any conditions on a practitioner's reputation or employability must be subordinate to the protection of the health and safety of the public. See similarly *Health Care Complaints Commission v Do* [2014] NSWCA 307 at [35].

9.4. *Findings of fact*: In determining whether to take action under s. 150, it is not the role of the Council or Tribunal to make findings of fact or make a determination of the merits of any complaint. In *Saedlounia v Medical Council of New South Wales* [2015] NSWCATOD 53, the Tribunal said of s. 150:

> "The purpose is protection of the public. In cases such as this where serious allegations have been made which, if true, could require suspension or cancellation of the appellant's registration, but the evidence is incomplete and further investigation is needed, the issue is not whether the allegations are proved, but whether the evidence establishes a risk to the public requiring imposition of a condition for protection of the public."

9.5. Similarly, in *Lindsay v NSW Medical Board* [2008] NSWSC 40 at [79], Hall J commented (in respect of s. 66 of the *Medical Practice Act*) that:

> "An inquiry, hearing or interview process conducted for the purposes of the Board or its delegates determining matters under s.66(1) could be considered to be preliminary or interim in nature or, as it was termed in the present proceedings, 'interlocutory'. Such a process, in the present case, as earlier observed, did not involve the making of findings of fact or the determination of the merits of any complaint. Any observations or conclusions expressed by the Board or its delegates under s.66 following an inquiry, hearing or interview, are, and can only be, strictly for the limited purposes of s.66(1). Such observations or conclusions are not to be equated to findings on material questions of fact as may be made by the Medical Tribunal in proceedings conducted by the Tribunal under Part 11 of the Act."

See also *Ord v Nursing and Midwifery Board of Australia* [2014] QCAT 688 at [8]; *Shahinper v Psychology Board of Australia* [2013] QCAT 593 at [14]; *Liddell and Medical Board of Australia* [2012] WASAT 120 at [21]; *I v Medical Board of Australia* [2011] SAHPT 18 at [31], [36], [38] and [43]; *Colquhoun v Psychology Council of NSW* [2011] NSWPST 3 at [9].

9.6. In other words, the Council does not determine whether the alleged conduct in fact took place but whether there is a basis for satisfaction under s. 150 that it is "appropriate" to impose conditions for the protection of the health or safety of any person or persons or because the imposition of conditions is otherwise in the public interest. In considering this question, the nature of the allegations is of particular relevance: *Ord* at [8].

9.7. *Briginshaw standard:* The *Briginshaw* standard will not apply to factual findings because it is not the role of the Council to make findings on the complaint: *R v Medical Board of Australia* [2013] WASAT 28 at [105] - [106]; *Shahinper v Psychology Board of Australia* [2013] QCAT 593; *Colquhoun v Psychology Council of NSW* [2011] NSWPST 3 at [13]. However, as the imposition of conditions may affect a practitioner's reputation and livelihood, the *Briginshaw* will apply to require that the

Council be "comfortably satisfied" that the imposition of conditions is appropriate or otherwise in the public interest.

9.8. *Rules of evidence*: The material that the Council may rely upon in considering whether to impose orders under s. 150 may "include material that would not conventionally be considered as strictly evidentiary in nature, for example, complaints and allegations": *Lindsay v NSW Medical Board* [2008] NSWSC 40 at [77(c)] and [151]. See also *Sabet v Medical Practitioners Board* [2008] VSC 346 at [40]; *Ord v Nursing and Midwifery Board of Australia* [2014] QCAT 688 at [8]; *Liddell and Medical Board of Australia* [2012] WASAT 120 at [20]; *Colquhoun v Psychology Council of NSW* [2011] NSWPST 3 at [42]; and *I v Medical Board of Australia* [2011] SAHPT 18 at [27].

9.9. *Pattern of allegations*: As the rules of evidence do not apply, the Council is entitled to consider any "themes" or "patterns" in the allegations or complaints made against a practitioner (even where all of those allegations are still under investigation and are denied by the practitioner). As Hall J observed in *Lindsay v NSW Medical Board* [2008] NSWSC 40 at [146]:

> "It is clear, as a matter of common sense, that a sufficient level of concern may arise from a multiplicity of complaints directed at a particular registered medical practitioner particularly if the (sic) do reflect a pattern on matters of concern. The complaints, as earlier discussed, cannot constitute evidence of the facts asserted in them or that are or subjacent to them."

9.10. Accordingly, the Council is entitled to consider any "themes" or "patterns" in the allegations or complaints made against a practitioner (even where all of those allegations are still under investigation and are denied by the practitioner).

9.11. In this respect, it must also be borne in mind that s. 41O of the *National Law* requires a Council to have regard to the following matters, to the extent the Council reasonably considers the matter to be relevant to the complaint:

> "(a) another complaint or notification about the practitioner or student made to the Council or the National Agency, or made to a former Board under a repealed Act, including a complaint-
>
> (i) in respect of which the Council, the Commission or a National Board has decided no further action should be taken; and

(ii) that is not required to be referred, or that the Council or the Commission decides not to refer, under Division 3 of Part 8;…"

9.12. *Absence of complaint:* Orders under s. 150 can be made whether or not a complaint has been made against the student or practitioner: s. 150(4)(a) of the *National Law*. Orders may also be made where Tribunal proceedings are pending: s. 150(4)(b) of the *National Law*.

9.13. *Critical compliance conditions:* A suspension order under s. 150 of the *National Law* must be made where a practitioner or student has contravened a "critical compliance condition": s. 150(3)(a) of the *National Law*. Where such an order is made the Council must refer the matter to the Tribunal as a complaint: s. 150(3)(b) of the *National Law*.

9.14. *Consent:* Section 41P provides that a Council may exercise any of its functions under the *National Law* with the written consent of the health practitioner or student in question. However, it must be observed that s. 41P is a machinery provision - it does not provide a Council with a separate power to impose conditions. Accordingly, a Council may not exercise power under s. 41P without being satisfied that the preconditions to the exercise of power in s. 150 (or another provision of the *National Law*) are satisfied. However, where consent is given under s. 41P, it is not necessary for the Council to satisfy each of the procedural steps that are required under s. 150: see further HPCA Legal Practice Note No 2 of 2014.

10. How long are s. 150 orders in force for?

10.1. Action taken under s. 150 of the *National Law* is always "interim" in nature. Section 150 orders can only be made pending the outcome of a formal investigation by the Health Care Complaints Commission or referral for further management through the health or performance pathways.

11. Procedure

11.1. Given the significant consequences that a s. 150 order may have on a practitioner's practice and/ or reputation, Councils should exercise caution in making orders under s. 150, and must ensure that procedural fairness is accorded to the practitioner in

question (see further *Procedural Fairness* at Part 6 above). Nonetheless, Councils must also bear in mind their responsibility to protect the public (see esp. s. 3A of the *National Law*), and should not shy away from making s. 150 orders where public health and safety may be jeopardised by a practitioner's conduct.

11.2. *Apprehended bias*: Before making any orders pursuant to s. 150, the Council should ensure that its members are not subject to a conflict of interest or that there is no apprehended or actual bias in any of its members or delegates. It should be particularly noted that cl. 16 of Schedule 5C of the *National Law* requires a Council member to disclose any direct or indirect pecuniary interest that the member may have in a matter about to be considered by a Council. However, in view of the urgency in which s. 150 hearings operate and the more flexible procedures (particularly as to the admission of evidence) may mean that the apprehension of bias rule may not be applied in s. 150 hearings with the same rigour that it is applied in hearings before Tribunals and Professional Standards Committees. See further Bias at Part 5 above.

11.3. *Delegation*: A Council may consider delegating its decision under s. 150: s. 41J(1) of the *National Law*. Where a Council delegates its decision to a group of two or more persons, at least one of those persons must be a person who (a) is not a registered health practitioner or student in the health profession for which the Council is established; and (b) has not at any time been registered as a health practitioner or student in that health profession under this Law or a corresponding prior Act: s. 150(7) of the *National Law*.

11.4. *The circumstances in which the practitioner should attend*: Because of the seriousness of s.150 orders, where possible, the practitioner or student should be afforded an opportunity to attend and give evidence before the Council. Where the circumstances are urgent, the Council may act without hearing from the practitioner; however, the Council must give notice of the hearing to the practitioner: *X v NSW Medical Board* (1992) 32 ALD 330 at 333; *Lindsay v NSW Medical Board* [2008] NSWSC 40 at [82]. This may be done by telephoning the practitioner and advising him or her of the hearing, with written confirmation sent by email or couriered to the practitioner's address, or any other method by which the Council may be satisfied that the practitioner is on notice of the hearing.

11.5. *Taking other complaints into account:* Section 41O of the *National Law* requires that the Council must have regard to "any of the following matters, to the extent the Council reasonably considers the matter to have relevance to the complaint":

> "(a) another complaint or notification about the practitioner or student made to the Council or the National Agency, or made to a former Board under a repealed Act, including a complaint—
>
> (i) in respect of which the Council, the Commission or a National Board has decided no further action should be taken; and
>
> (ii) that is not required to be referred, or that the Council or the Commission decides not to refer, under Division 3 of Part 8;
>
> (b) a previous finding or decision of a Council inquiry in relation to the practitioner or student;
>
> (c) a previous finding or decision of a board inquiry, professional standards committee or a tribunal established under a repealed Act in respect of the practitioner or student;
>
> (d) a written report made by an assessor following an assessment of the practitioner's professional performance;
>
> (e) a recommendation made, or written statement of decision on a performance review provided, by a Performance Review Panel in relation to the practitioner."

11.6. *Recording*: If the Council or its delegates hears oral evidence from the practitioner or any other persons, the proceedings must be audio recorded: s. 150B of the *National Law*.

11.7. *Reasons*: All action taken under s. 150 must be documented. Written notice must be provided to the health practitioner or student of any action taken under s. 150: s 150(6) of the *National Law*. Reasons must be given by the Council for any conclusion that the orders are necessary or unnecessary for the protection of the health or safety of any person or persons or that it is in the public interest for the orders to be made. In preparing these reasons, it is essential to bear in mind that orders under s. 150 are exceptional in nature, and of serious import to the practitioner or student in question. The reasons should thoroughly document the reasons why action under s. 150 is necessary (for example: What are the deficits in the practitioner's practice that have been identified? On what evidence were those

deficits identified? What risks to public safety are presented by those deficits? How will the conditions protect the public against the deficits?).

11.8. *Referral:*A Council must, as soon as practicable, but no later than 7 days after taking action under s. 150, refer the matter to the Health Care Complaints Commission for investigation: s. 150D of the *National Law*.

12. Adjournments

12.1. A s. 150 hearing may be adjourned. It may be appropriate to adjourn a s. 150 hearing where further information is required. However, in considering whether to adjourn s.150 hearings, and the length of any adjournment, the Council should bear in mind the adverse consequences of delay: see para 9.2 above. Where a practitioner requests an adjournment, it will be appropriate for the Council to consider any undertakings that the practitioner is prepared to make during the adjournment.

13. Orders that may be made

13.1. *Suspension:* Under s. 150, orders may be made suspending the registration of a health practitioner or student. Where a health practitioner or student has contravened a critical compliance condition, the Council must make a suspension order and must refer the matter to the Tribunal to be dealt with as a complaint: s. 150(3) of the *National Law*. Any suspension made under s. 150 has effect until a complaint about the health practitioner or student is dealt with or until the suspension is ended by the Council: s. 150(2) of the *National Law*.

13.2. *Conditions:* Under s. 150, orders may also be made imposing conditions on the registration of a health practitioner or student. When framing conditions, care must be taken to ensure that the conditions are practical, implementable and so that they will achieve the desired protective effect. See further Conditions Handbook. It should be noted that because conditions under s. 150 are interim in nature, and have a purpose of immediately protecting the public, orders for mentoring will not usually be appropriate. On the other hand, orders for supervision may be appropriate.

13.3. *Performance Assessment:* A Council may also impose a condition on a registered health practitioner requiring the practitioner to undergo a performance assessment, but this condition will have no effect unless the Health Care Complaints Commission agrees with the imposition of the condition: s. 150(5) of the *National Law*. See further s. 150E of the *National Law*.

SECTION 150A REVIEWS

14. Purpose

14.1. Under s. 150A, a practitioner may request a review of action taken under s. 150 of the *National Law* at any time. (An appeal may also be made to the Tribunal pursuant to s. 159 of the *National Law*.)

14.2. Section 150A(2)(a) of the *National Law* provides that a Council may refuse to reconsider its decision if the Council is of the opinion that the application is frivolous or vexatious. The Council must otherwise reconsider its decision, and must consider any new evidence or material submitted by the practitioner or student that the Council reasonably considers is relevant: s. 150A(2)(b).

14.3. Section 150A(4) of the *National Law* provides that a Council may vary or set aside a decision only if the Council is satisfied that there has been a change in the health practitioner's or student's circumstances that justifies the variation or setting aside of the decision. The requirement that the Council be satisfied that there is a "change" in the health practitioner or student's circumstances means that action under s. 150A will not be appropriate where the new evidence demonstrates that the Council was not aware of, or had misapprehended the situation previously. Where this occurs, it may be appropriate for a Council to alter or remove conditions under s. 150C of the *National Law*.

15. Procedure

15.1. *Apprehended bias*: Before making any orders pursuant to s. 150A, the Council should ensure that its members are not subject to a conflict or interest or that there is no apprehended or actual bias in any of its members. It should be particularly

noted that cl. 16 of Schedule 5C of the *National Law* requires a Council member to disclose any direct or indirect pecuniary interest that the member may have in a matter about to be considered by a Council. See further Bias at Part 5 above. If there is a conflict or apprehended or actual bias, the Council member must be excluded from all involvement in the decision making process.

15.2. *Reasons*: As with action taken under s. 150, all decisions made under s. 150A must be documented. Reasons must be given by the Council for its conclusion that the orders are necessary for the protection of the health or safety of any person or persons or that it is in the public interest for the orders to be made. In preparing these reasons, it is essential to bear in mind that orders under s. 150 are exceptional in nature, and will have a serious impact upon the practitioner or student in question. The reasons should thoroughly document the reasons why any suspension or conditions confirmed or varied under s. 150A are necessary (for example, what are the deficits in the practitioner's practice that have been identified? on what evidence were those deficits identified? what risks to public safety are presented by those deficits? how will the conditions protect the public against the deficits?)

15.3. *Delegation*: A Council may consider delegating its decision: s. 41J(1) of the National Law.

15.4. *Taking other complaints into account:* Section 41O requires that the Council must have regard to "any of the following matters, to the extent the Council reasonably considers the matter to have relevance to the complaint":

> "(a) another complaint or notification about the practitioner or student made to the Council or the National Agency, or made to a former Board under a repealed Act, including a complaint—
>
> (i) in respect of which the Council, the Commission or a National Board has decided no further action should be taken; and
>
> (ii) that is not required to be referred, or that the Council or the Commission decides not to refer, under Division 3 of Part 8;
>
> (b) a previous finding or decision of a Council inquiry in relation to the practitioner or student;

(c) a previous finding or decision of a board inquiry, professional standards committee or a tribunal established under a repealed Act in respect of the practitioner or student;

(d) a written report made by an assessor following an assessment of the practitioner's professional performance;

(e) a recommendation made, or written statement of decision on a performance review provided, by a Performance Review Panel in relation to the practitioner."

15.5. *Power to obtain information:* Section 150J of the *National Law* provides that where a Council is of the opinion that a person is capable of giving information, documents (including medical records) or evidence that would assist the Council in making a decision under s. 150 of the *National Law*, the Council may, by written notice given to the person, require the person to do one or more of the following-

(a) to give the Council, in writing signed by the person (or, in the case of a corporation, by a competent officer of the corporation), within the time and in the way specified in the notice, information of which the person has knowledge;

(b) to produce to the Council, in accordance with the notice, documents;

(c) to appear before the Council or a member of staff of the Council authorised by the President or Deputy President of the Council at a specified reasonable time and place and give evidence, either orally or in writing, and produce documents.

15.6. *Failure to provide information:* It is an offence for a person to fail to comply with a written notice under s. 150J without reasonable excuse. It is also an offence for a person to provide information, documents or evidence knowing that such information, documents or evidence is false in a material particular: s. 150J(3) of the *National Law*.

15.7. *Recording*: If the Council or its delegates hears oral evidence from the practitioner or any other persons, the proceedings must be audio recorded: s. 150B of the *National Law*.

16. Adjournments

16.1. A s. 150A review may be adjourned. It may be appropriate to adjourn a s. 150A review where further information is required. Alternatively, an adjournment may also

be sought by the health practitioner. As suspension/ conditions will already be in place, the question of protection of the public will not weigh as heavily in respect of any adjournments sought by a practitioner in a s. 150A review, as compared to a s. 150 hearing.

17. Orders

17.1. The Council may affirm or vary the s. 150 decision, or set the s. 150 decision aside and take any action the Council has the power to make under s. 150 (for example, impose conditions).

IMPAIRED REGISTRANTS PANELS

18. Purpose

18.1. Impaired Registrants Panels ("IRPs") fall within the scope of what is commonly referred to as the "the Health Program". As the Medical Council has stated, the Health Program is:

> "… designed to be non-disciplinary and non-adversarial… It is aimed at protecting the public while at the same time allowing participants with health problems to remain in active medical practice or training.
>
> The Program is notification based, receiving both self-notifications and third party notifications. It manages registrants suffering from psychiatric illness, problems with the abuse of alcohol or the self-administration of addictive drugs and occasionally, physical illness…"[2]

19. Definition of "impairment"

19.1. Section 5 of the *National Law* defines "impairment" as follows:

> "*impairment*, in relation to a person, means the person has a physical or mental impairment, disability, condition or disorder (including substance abuse or dependence) that detrimentally affects or is likely to detrimentally affect—
>
> (a) for a registered health practitioner or an applicant for registration in a health profession, the person's capacity to practise the profession; or

[2] Medical Council of New South Wales, Health Program, Participant's Handbook (update June 2013).

(b) for a student, the student's capacity to undertake clinical training—

(i) as part of the approved program of study in which the student is enrolled; or

(ii) arranged by an education provider."

20. Procedure

20.1. *Referral:* A Council may refer a matter to IRP if the Council considers the matter indicates a registered health practitioner or student has or may have an impairment: s. 152D(1) of the *National Law*. Such referral does not depend on a complaint having been made about the practitioner or student: s. 152D(2) of the *National Law*.

20.2. *Composition of the IRP:* The IRP consists of two or three members appointed by the Council. Panelists are drawn from a pool of members, which includes both health practitioners and lay members, all of whom are experienced in working with practitioners experiencing problems with their health. An IRP must include at least one medical practitioner and one member of the relevant profession.

20.3. *Notice:* The Council must give notice to the health practitioner or student of any proposed inquiry by an IRP: s. 152G of the *National Law*. The notice must advice the health practitioner or student of the matters to which the inquiry relates.

20.4. *Where complaint is being investigated by the HCCC:* Unless the Health Care Complaints Commission agrees, the IRP must not investigate or take any other action in relation to practitioner or student if the Panel becomes aware the practitioner is the subject of a complaint that is being investigated by the Health Care Complaints Commission: s. 152F of the *National Law*.

20.5. *No rules of evidence:* IRP hearings are conducted in the absence of the public and with as little formality and technicality as possible.

20.6. *Actual or apprehended bias*: Before proceeding, an IRP should ensure that its members are not subject to a conflict or interest or that there is no apprehended or actual bias in any of its members. See further Bias at Part 5 above.

20.7. *Attendance of the practitioner or student:* The practitioner or student who is the subject of an inquiry by an IRP is entitled to make oral or written representations to

the Panel about the matters being or to be the subject of the inquiry: s. 152H(1) of the *National Law*. However, the IRP may proceed in the absence of the practitioner or student, if the practitioner or student has been given notice of the inquiry: s. 152H(2) of the *National Law*.

20.8. *Representation*: The practitioner is entitled to be accompanied by a legal representative or other adviser, but may not be represented.

20.9. *Recording*: There is no legislative requirement for IRP proceedings to be recorded. However, it is recommended that the proceedings be recorded, particularly where evidence is given by the health practitioner or other witnesses to the IRP. If proceedings are not recorded, full notes of all oral evidence and submissions made to the IRP should be made contemporaneously.

21. Adjournments

21.1. An IRP hearing may be adjourned. It may be appropriate to adjourn an IRP hearing where further information is required. However, in considering whether to adjourn an IRP hearing, and the length of any adjournment, the IRP should consider whether the public requires protection during the period of the adjournment. Where a practitioner or student requests an adjournment, it may be appropriate for the IRP to consider any undertakings that the practitioner is prepared to make during the adjournment.

22. Orders that may be made

22.1. An IRP must make an assessment about a matter referred to it, based on the results of its inquiry into the matter: s. 152I of the *National Law*. On the basis of this assessment, the IRP may do any one or more of the following:

> "(a) counsel the practitioner or student concerned or recommend the practitioner or student undertake specified counselling (including, but not limited to, psychological counselling);
>
> (b) recommend the practitioner or student concerned to agree to conditions being placed on the practitioner's or student's registration or to having the practitioner's or student's registration suspended for a specified period;

(c) make recommendations to the Council that referred the matter to it as to action that the Panel considers should be taken in relation to the matter."

22.2. Where the IRP recommends that conditions be placed on a practitioner or student's registration, and the practitioner or student agrees to those conditions, the Council may impose the conditions as agreed: s.152J of the *National Law*. Such conditions may later be varied or removed by the Council under s. 152K of the *National Law*.

22.3. If the practitioner or student does not voluntarily agree to the conditions recommended by the IRP, the Council must deal with the matter that was the subject of the referral to the IRP as a complaint: s. 152L of the *National Law*.

23. Reasons

23.1. The IRP must give a written report about the matter to the Council that referred the matter to it: s. 152I(4)(a) of the *National Law*. The report must detail the results of the Panel's inquiries and assessment in respect of the referral and any action taken by the Panel in relation to it: s. 152I(4)(b) of the *National Law*.

PERFORMANCE REVIEW PANELS

24. Purpose

24.1. Performance Review Panels ("PRPs") fall within the scope of what is commonly referred to as the "Performance Program". As the Medical Council has stated, the Performance Program:

> "…is designed to complement the existing conduct and health streams by providing an alternative pathway for practitioners who are neither impaired nor being investigated by the HCCC or being dealt with via other disciplinary processes, but for whom the [relevant] Council has concerns about the standard of their clinical performance.
>
> The program is designed to provide an avenue for education and retraining where inadequacies are identified, while at all times ensuring that the public is properly protected. It is designed to address patterns of practice rather than one-off incidents unless the single incident is demonstrative of a broader problem."[3]

[3] http://www.mcnsw.org.au/page/6/doctors--performance--conduct---health/professional-performance/

25. Definition of "unsatisfactory professional performance"

25.1. Section 153 of the *National Law* defines "professional performance" as follows:

> "153 Meaning of "professional performance" [NSW]
>
> For the purposes of this Division, a reference to the professional performance of a registered health practitioner is a reference to the knowledge, skill or judgment possessed and applied by the practitioner in the practice of the practitioner's health profession*."*

25.2. Section 153A of the *National Law* defines the term "unsatisfactory" in respect of "professional performance" as follows:

> "For the purposes of this Division, the professional performance of a registered health practitioner is unsatisfactory if it is below the standard reasonably expected of a practitioner of an equivalent level of training or experience."

Statutory framework

25.3. Section 154(1) of the *National Law* provides that a Council may decide to have the professional performance of a registered health practitioner assessed "if a matter comes to its attention that indicates the professional performance of the registered health practitioner, or any aspect of the practitioner's professional performance, is or may be unsatisfactory." Such an assessment is performed by one or more assessors pursuant to Subdivision 2 of Division 5 of Part 8 of the *National Law*. At the conclusion of the performance assessment, a report must prepared by the assessors pursuant to s. 155B of the *National Law.*

25.4. Section 155C of the *National Law* provides that upon receipt of the assessor's report, the Council may, amongst other things, require a PRP to conduct a performance review in relation to the practitioner.

25.5. The performance review is conducted under s. 156 of the *National Law*. As outlined below (at para 28), s. 156C of the *National Law* provides that the PRP may take action in respect of the practitioner, including imposing conditions on the practitioner's registration.

26. Procedure

26.1. *Notice:* The practitioner must receive at least 14 days notice of the performance review. It is the Chairperson's responsibility to ensure that such notice is given: s. 156(2) of the *National Law*.

26.2. *Where a complaint is being investigated by the Health Care Complaints Commission:* Unless the Health Care Complaints Commission agrees to the continuation of the performance review, the PRP must not take any action in relation to the registered health practitioner if the Panel becomes aware the practitioner is the subject of a complaint that is being investigated by the Health Care Complaints Commission: s. 156A of the *National Law*.

26.3. *No rules of evidence:* Performance reviews are conducted in the absence of the public and with as little formality and technicality as possible.

26.4. *Actual or apprehended bias*: Before proceeding, a PRP should ensure that its members are not subject to a conflict or interest or that there is no apprehended or actual bias in any of its members. See further Bias at Part 5 above.

26.5. *Representation:* The practitioner is entitled to be accompanied by a legal representative or other adviser, but may not be represented.

26.6. *Procedural fairness:* The purpose of a PRP hearing is to assess matters related to a practitioner's professional performance, rather than to determine a complaint against a practitioner. However, in order to accord the practitioner procedural fairness, it is essential that the practitioner be given notice of the areas of performance which are of concern to the PRP, and to be provided an opportunity to provide information and evidence relating to those concerns. See also Procedural Fairness at Part 6 above.

26.7. *Recording*: There is no legislative requirement for the PRP proceedings to be recorded. However, it is strongly recommended that the proceedings be recorded, particularly where evidence is given by the health practitioner or other witnesses to the PRP. If proceedings are not recorded, full notes of all oral evidence and submissions made to the PRP should be made contemporaneously.

26.8. *Termination of the PRP:* Section 156B of the *National Law* provides that the PRP must terminate the performance review if, before or during the performance review, the Panel forms the opinion that:

> (a) the performance review raises a significant issue of public health or safety that, in the Panel's opinion, requires investigation by the Commission; or
>
> (b) the performance review raises a prima facie case of professional misconduct by the registered health practitioner, or unsatisfactory professional conduct by the registered health practitioner.

26.9. If the Panel terminates the performance review, it must refer the issue or case back to the Council with a recommendation that a complaint be made against the registered health practitioner: s. 156B(2) of the *National Law*. Where this occurs, the Council must deal with the matter in accordance with the recommendation: s. 156B(3) of the *National Law*.

27. Scope of the PRP assessment

27.1. The scope of the PRP hearing is informed by the performance assessment which precedes it. As outlined above, s. 154(1) of the *National Law* provides that a Council may decide to have the professional performance of a registered health practitioner assessed "if a matter comes to its attention that indicates the professional performance of the registered health practitioner, or any aspect of the practitioner's professional performance, is or may be unsatisfactory." Subsection 154(2) of the *National Law* specifically provides that:

> "Subsection (1) is not limited to matters that are the subject of a complaint or notification to the Council and may include a pattern of complaints about a registered health practitioner's practice."

27.2. Section 155C of the *National Law* provides that upon receipt of the assessor's report, the Council may require a PRP to conduct a performance review in relation to the practitioner. Accordingly, the performance assessment does not depend upon there being a valid complaint against the practitioner, and is not limited to the subject matter of the complaint.

27.3. In summary, subject to the duty to afford a practitioner procedural fairness (and, specifically in this context, to provide the practitioner with an opportunity to answer any allegations concerning areas in which the practitioner's professional performance is deficient), a PRP may consider any aspect of a practitioner's performance. The PRP is not limited to the matters which were the subject of a complaint or notification to the Council.

28. Action that may be taken by Performance Review Panel at the conclusion of the hearing

28.1. At the completion of the PRP, the PRP may make such recommendations to the Council about the practitioner as the PRP considers appropriate: s. 156C(1) of the *National Law*.

28.2. If the PRP finds that the practitioner's professional performance, or a particular aspect of the practitioner's professional performance, is unsatisfactory, it may:

- Direct that conditions be placed on the practitioner's registration, provided that is considers that such conditions are "*appropriate*": s. 156C(2)(a). Such conditions may include mentoring, supervision, education, limitation of practice and other conditions (see further Conditions Bank Handbook);
- Order that the practitioner completes a specified educational course: s. 156C(2)(b);
- Order that the practitioner report on the practitioner's practise of the health profession at the times, in the way and to the persons specified by the Panel: s. 156C(2)(c); and
- Order that the practitioner to "seek and take advice, in relation to the management of the practitioner's practice", from the persons specified by the PRP: s. 156C(2)(d).

28.3. Whilst it is necessary for the PRP to make a finding that the practitioner's performance is unsatisfactory in order for the above orders to be made, it should be noted that there is no specific finding in relation to the triggering notification or complaint.

28.4. *Orders v conditions:* The PRP may order a practitioner to complete a specified educational course, or may direct that "conditions" be placed on the practitioner's registration.

28.5. As to the distinction between a condition and an order, see HPCA Practice Note No 1 of 2014. In short, a condition will be recorded on the National Register (s. 225(k) of the *National Law*); whereas there is no statutory requirement for the details of an order to be recorded on the National Register, although a National Board may choose to do so if it considers that it is appropriate for this information to be recorded (s. 225(p) of the *National Law*). It should also be noted that conditions will remain on the register until they are removed following a formal removal process, whilst orders do not require formal removal.

28.6. *Re-assessment:* A PRP may also recommend that a practitioner's professional performance be re-assessed by one or more assessors at a future date. Re-assessment may be extensive, or may be limited to a particular area. Re-assessment is generally conducted by the original performance assessors.

29. Reasons

29.1. *Timing:* A Performance Review Panel must, within one month of making a decision on a performance review of a registered health practitioner give a written statement of its decision to the practitioner and to the Council: s. 156E(1) of the *National Law*.

29.2. *Content:* The statement of the decision must include reasons for this decision: 156E(2)(a) of the *National Law*. Reasons must be given by the PRP for any finding that the practitioner's performance is (or is not) unsatisfactory. Reasons must also be given for any conclusion that orders or conditions are necessary or unnecessary for the protection of the health or safety of any person or persons or that it is in the public interest for the orders to be made. The reasons should thoroughly document the reasons why any orders have been made by the PRP. Where any facts or evidence are contested by the health practitioner, the PRP should set out the reasons why the Council has made the factual findings in question, including providing a full account of any oral evidence of the practitioner (this is particularly important where the PRP proceedings are not recorded).

29.3. *Confidential information:* The PRP is not required to include confidential information in its statement of reasons: s. 156(4) of the *National Law*. If the statement would be false or misleading if it did not include the confidential information, the Council is not required to provide the statement: s. 156(2) of the *National Law*. However, in this event, the Council must give a "confidential information notice" to the person within one month after the decision is made: s. 156(3) and s. 156(4) of the *National Law*.

COUNCIL INQUIRIES

30. Purpose

30.1. A Council may deal with a complaint by an inquiry, except where the health practitioner is registered in the medical or nursing and midwifery professions: s. 148 of the *National Law*. Where the health practitioner is registered in either of the medical or nursing and midwifery professions, a conduct complaint is dealt with by a Tribunal or Professional Standards Committee.

30.2. As a Council cannot suspend or cancel the registration of a health practitioner at an inquiry, a complaint of professional misconduct cannot be determined by a Council inquiry. Such a complaint should be referred to the Tribunal. In this connection, it should be noted that s. 145D of the *National Law* provides that the Council for a health profession is under a duty to refer a complaint to the Tribunal if, at any time, it forms the opinion that the complaint may, if substantiated, provide grounds for the suspension or cancellation of a registered health practitioner's or student's registration. (However, if the complaint relates solely or principally to the practitioner or student's physical or mental capacity to practise the profession, the Council may instead refer the complaint to a Committee or Impaired Registrants Panel).

31. Procedure

31.1. *General procedure*: If a complaint about a health practitioner or student is to be dealt with by way of an inquiry at a meeting of the Council, the meeting must be held in accordance with Part 3 of Schedule 5C and Subdivision 5 of Division 3 of Part 8 of the *National Law*: s. 148A of the *National Law*. Particular procedural requirements are outlined below.

31.2. *Apprehended bias*: Before proceeding with an inquiry, the Council should ensure that its members are not subject to a conflict or interest or that there is no apprehended or actual bias in any of its members. It should be particularly noted that cl. 16 of Schedule 5C of the *National Law* requires a Council member to disclose any direct or indirect pecuniary interest that the member may have in a matter about to be considered by a Council. See further Bias at Part 5 above.

31.3. *Counsel assisting:* The Council may be assisted by a legal practitioner when dealing with the complaint at a meeting of the Council: s. 148A(2) of the *National Law*.

31.4. *Attendance of the practitioner:* the registered health practitioner or student is entitled to attend the meeting at which the complaint is dealt with and to make submissions to the Council: s. 148D(1) of the *National Law*. The Council may proceed in the absence of the health practitioner or student: s. 148C(e) of the *National Law*. However, this power is subject to the obligation of the Council to provide procedural fairness to the practitioner. In particular, the health practitioner or student must be given adequate notice of the hearing. The Council must also carefully consider any explanation of the practitioner or student for his or her inability to attend before proceeding in their absence. See further Procedural Fairness at Part 6 above.

31.5. *Legal representation:* The registered health practitioner or student is not entitled to be legally represented at the inquiry but may be accompanied by a support person: s. 148D(6) of the *National Law*. The support person can be an Australian lawyer: s. 148D(6) of the *National Law*.

31.6. *Involvement of the Health Care Complaints Commission:* The Council must give the Health Care Complaints Commission a copy of any submission made to the Council by the registered health practitioner or student in respect of the complaint or in respect of any recommendation of the Committee concerning the complaint: s. 148A(3) of the *National Law*. The Council must give the Health Care Complaints Commission an opportunity to make a submission to the Council with respect to the complaint and the Commission may for that purpose attend the meeting at which the complaint is dealt with s. 148D(3) of the *National Law*. However, unless the Health Care Complaints Commission recommended that the complaint by dealt with at a meeting of the Council, the Health Care Complaints Commission may not be present at the meeting except while actually making a submission: s. 148D(4) of the

National Law (where the Health Care Complaints Commission made a recommendation that the complaint be dealt with at a meeting of the Council the Health Care Complaints Commission may be present throughout the Council's inquiry: s. 148D(5) of the *National Law*). The Health Care Complaints Commission is not entitled to be legally represented at the inquiry: s. 148D(7).

31.7. *Involvement of the Assessment Committee:* Pursuant to s. 147D of the *National Law*, where an Assessment Committee has investigated a complaint, the Assessment Committee may make a recommendation that a complaint be dealt with at a meeting of the Council as a complaint of unsatisfactory professional conduct. Where this occurs, the Assessment Committee may, if the Council so requires, make a submission to the Council with respect to the complaint and may for that purpose attend the meeting at which the complaint is dealt with: s. 148D(2) of the *National Law*. The Assessment Committee may not be present in the meeting except while actually making the submission, unless the Council otherwise decides: s. 148D(4) of the *National Law*.

31.8. *Evidence and submissions:* The Council is to decide the procedure for the calling of a meeting to deal with a complaint and for the conduct of the meeting, subject to the *National Law* and the *Regulations*: s. 148B of the *National Law*. The Council may receive written or oral submissions: s. 148C(b) of the *National Law.* The Council must proceed with as little formality and technicality, and as much expedition, as the requirements of this Law and the proper consideration of the complaint permit: s. 148C(b) of the *National Law*.

31.9. The Council may inform itself on any matter in the way it thinks fit and is not bound by the rules of evidence: s. 148C(a) and 148C(d) of the *National Law*. However, "[t]*he power to disregard the rules of evidence, … is not a power to give weight to evidence which has no probative value, still less when it is procedurally unfair to do so*": *Yelds v Nurses Tribunal* (2000) 49 NSWLR 491 at [28]. See similarly *R v War Pensions Entitlement Appeal Tribunal; ex parte Bott* (1933) 50 CLR 228 at 256. Accordingly, although the rules of evidence do not apply, the Council should carefully consider the probative value of hearsay, opinion and/or tendency evidence.

31.10. *Recording:* There is no legislative requirement for the Council inquiry to be recorded. However, it is strongly recommended that the proceedings be recorded, particularly

where evidence is given by the health practitioner or other witnesses to the Council. If proceedings are not recorded, full notes of all oral evidence and submissions made to the Council should be made contemporaneously. It should also be noted that there is a requirement that the Council keep full and accurate minutes of the meeting of the Council: cl. 22 of Sched. 5C of the *National Law*.

32. Orders and when they may be made

32.1. The orders that may be made at a Council inquiry are (s. 148E of the *National Law*):

(a) caution or reprimand the practitioner;

(b) make an order for the withholding or refunding of part or all of the payment with respect to the fees to be charged or paid for the services that are the subject of the complaint;

(c) direct that specified conditions relating to the practitioner's practice of the health profession be imposed on the practitioner's registration;

(d) order that the practitioner seek and undergo medical or psychiatric treatment or counselling (including, but not limited to, psychological counselling);

(e) order that the practitioner complete an educational course specified by the Council;

(f) order that the practitioner report on his or her practice at the times, in the way and to the persons specified by the Council;

(g) order that the practitioner seek and take advice, in relation to the management of his or her practice, from persons specified by the Council.

32.2. In respect of a student, the Council may order that the student be cautioned or reprimanded; that specified conditions be imposed on the student's registration; that the student seek and undergo medical or psychiatric counselling; or that the student complete an educational course specified by the Council.

32.3. If the health practitioner is not registered, an order or direction can still be given by the Council, but has effect only so as to prevent the person being registered unless the order is complied with or to require the conditions concerned to be imposed when the person is registered, as appropriate: s. 148E(3) of the *National Law*.

32.4. Curiously, in contrast to s. 148F of the *National Law*, which deals with the ordering of a fine (see below at para 32.5), and in contrast to the provisions dealing with Tribunals and Professional Standards Committees (see below at para 47.3), there is no specific requirement that a Council be satisfied that a practitioner is guilty of unsatisfactory professional conduct before making orders under s. 148E. Given the absence of this specific requirement, it could be argued that a Council would be permitted to make orders under s. 148E without first making a finding of unsatisfactory professional conduct. On the other hand, in view of the serious consequences that an order under s. 148E has for a practitioner, and in view of the structure of the *National Law* (which posits a Council inquiry as an alternative to a hearing by a Professional Standards Committee), and in particular, the fact that the Council is determining a "complaint", the better (and safer view) is that a Council should be satisfied that one or more particulars of the complaint are made out and that the practitioner or student is guilty of unsatisfactory professional conduct before making orders under s. 148E of the *National Law*. When making such findings, the Council should apply the *Briginshaw* standard: see further *Briginshaw* standard at para 46.1ff below.

32.5. *Fines:* A Council may also impose a fine of an amount up to 50 penalty units (s. 148F of the *National Law*). However, a fine must not be imposed unless the Council finds the health practitioner to have been guilty of unsatisfactory professional conduct and the Council is satisfied there is no other order, or combination of orders, that is appropriate in the public interest: s. 148F(2) of the *National Law*. A fine is not to be imposed if a fine or other penalty has already been imposed by a court in respect of the conduct: s. 148F(3) of the *National Law*. Any order for a fine must specify a time to pay. The amount of the fine must be paid to the Council: s. 148F(4) of the *National Law*. As to the circumstances in which it may be appropriate for a fine to be ordered, see para 47.11 below.

32.6. *Suspension/ cancellation:* A Council does not have power to suspend or cancel the registration of a health practitioner.

32.7. However, the Council may recommend that the registration of a registered health practitioner or student be suspended or cancelled if the Council is satisfied that the health practitioner does not have sufficient physical and mental capacity to practise the practitioner's profession (or, in the case of a student, that the student has an

impairment): s. 148G of the *National Law*. If a health practitioner is not registered, a recommendation an order may be made that the health practitioner not be registered: s. 148G(2) of the *National Law*. Such a recommendation is made by referring the matter to the Tribunal: s. 148G(3) of the *National Law*. On such a referral, the Tribunal may make an order in the terms recommended; or make another order about the suspension or cancellation of the health practitioner's or student's registration as the Tribunal thinks proper based on the Council's findings: s. 148G(4) of the *National Law*. An order may also provide that an application for review of the order under Division 8 may not be made until after a specified time: s. 148G(9) of the *National Law*.

33. Reasons

33.1. The Council must, within 30 days of making its decision on the complaint, make available to the complainant, the registered health practitioner or student concerned, the National Board and any other persons it thinks fit, a written statement of the decision: s. 148H(1) of the *National Law*. If the Health Care Complaints Commission made a submission to the Council with respect to the complaint (see above at para 31.6 above), the Council must also provide the Commission with a copy of the written statement of the decision: s. 148H(2) of the *National Law*.

33.2. The written statement of the decision must give the reasons for the decision: s. 148H(3) of the *National Law*. Reasons must be given by the Council for any conclusion that the orders are necessary or unnecessary for the protection of the health or safety of any person or persons or that it is in the public interest for the orders to be made. The reasons should thoroughly document the reasons why orders have been made by the Council. Where any facts or evidence are contested by the health practitioner, the Council should set out the reasons why the Council has made the factual findings in question.

33.3. *Confidential information:* The Council is not required to include confidential information in the statement of reasons: s. 148H(4). If the statement would be false or misleading if it did not include the confidential information, the Council is not required to provide the statement: s. 148H(5) of the *National Law*. However, in this event, the Council must give a "*confidential information notice*" to the person within

one month after the decision is made: s. 148H(6) and s. 148H(7) of the *National Law*.

TRIBUNAL AND PROFESSIONAL STANDARDS COMMITTEE INQUIRIES

34. Procedure

Professional Standards Committee hearings

34.1. A Professional Standards Committee hearing will usually be case-managed by the Chairperson of the Committee. After the filing of the complaint, the Chairperson will typically list the complaint for directions. At those directions, the following matters may be dealt with:

- orders will be made for the filing and service of evidence by each party;
- the parties may be asked to confirm the number of witnesses to be called, whether any interpreters are required, whether any audio-visual equipment is required, what issues are in dispute and the likely length of the hearing;
- there may be discussion of any evidentiary issues; where necessary, a further directions hearing may be set down if there are to be formal objections to the material to be relied upon;
- there may be discussion about whether any matters may be the subject of an agreed statement of facts and/ or whether there is any admission of the complaint(s) or any particulars of the complaint(s);
- there may be discussion as to whether it will be appropriate for any expert witnesses to give evidence concurrently;
- the Chairperson may advise the parties of the power to issue summons. Directions may be made as to the date for any applications for summonses to be issued;
- the complaint will typically be listed for hearing. If there are any unusual aspects of the proceedings (such as where two complaints are heard together), the Chairperson will discuss with the parties issues that may arise (such as whether the respondents can be jointly represented).

34.2. Where the respondent is unrepresented, it will be appropriate for the Chairperson to advise the respondent of his or her right to be represented or to have a support

person to assist them, and explain procedural aspects of the hearing to the respondent. See further unrepresented litigants, at Part 46 above.

34.3. At, or after the directions hearing, one or both parties may seek that summonses to produce documents or attend be issued. The Chairperson is responsible for issuing these documents: cl. 3(1) of Sched. 5D of the *National Law*. Where summonses are not issued at a directions hearing, the usual course is for them to be provided to the Chairperson for signing by email.

34.4. The materials may be provided to the Committee members by email or post prior to the hearing, or alternatively, the materials may be provided to the Committee members at a "reading day" prior to the hearing. Committee members should read all documents; note any significant issues; make a note of any questions to be asked of witnesses; consider the particulars of the complaint; consider the opinions of peer reviewers with a view to ensuring there is exploration of any divergence of opinions; and consider whether any mitigating or aggravating circumstances may exist. It is appropriate for the Committee members to discuss aspects of the evidence prior to the hearing; however, it is essential that Committee members remain open minded, and not reach any concluded views until the conclusion of the proceedings.

34.5. Prior to the hearing of the complaint, the Chairperson should confirm with each of the Committee members that there are no circumstances that could give rise to a conflict of interest or an allegation of actual or apprehended bias: see further at Part 5 above. The Chairperson should also warn the Committee members that they must make a decision on the evidence before them, that they are not to perform any research or searches in connection with the complaint, and that they should not discuss the matter with any colleagues, friends or family members.

34.6. At the outset of the hearing of the complaint, the following will typically occur:

1. The Chairperson will announce the title of the proceedings and the names and roles of the Committee members, and will confirm the date of the complaint;
2. The legal representatives appearing for the parties (if any) will announce their appearances;

3. The Chairperson may ask the representatives whether they wish to make a brief opening;
4. The parties will tender their documentary material (any objections to that material may be heard at this time if objections have not been dealt with at a directions hearing);
5. The chairperson may ask whether there are any "house-keeping" or procedural matters that should be dealt with at the outset (such as whether any suppression orders should be made, whether the proceedings will proceed by way of a one or two stage process and the timing of the witnesses).

34.7. The Committee will then hear the oral evidence. This will usually consist of the evidence of witnesses who may be cross-examined. Witnesses may give evidence by telephone, or by videolink with the agreement of the Presiding Member. (The Presiding Member should provide the opposing party with an opportunity to be heard as to the appropriateness of this course.) The Health Care Complaints Commission's evidence is heard first, followed by the respondent's evidence. Committee members may ask questions of the witnesses at any time. However, it is generally preferable that Committee members ask questions after the conclusion of the questions asked by the parties. After the conclusion of any questioning by Committee members, the Chairperson should ask each of the parties whether they have any questions arising from the answers given by the witness.

34.8. The *National Law* does not require that witnesses be excluded from the hearing room whilst other witnesses are giving evidence. However, so as to ensure that the evidence of a witness reflects the witness' own evidence, witnesses should remain outside the hearing prior to giving their evidence. In order to accord procedural fairness, the respondent practitioner is permitted to remain in the hearing for the duration of the proceedings. Where the Committee breaks (for example, for lunch or morning tea) during the course of a witness' cross-examination, the Chairperson should also warn the witness not to discuss their evidence with any other witness during the adjournment.

34.9. At the conclusion of the evidence, each of the parties will make submissions. These may be oral, or in writing. Where possible, it is preferable for the submissions to be presented immediately after the conclusion of the evidence. (The parties should be given a short adjournment to prepare the submissions). The parties should be advised of the Committee's intention to proceed directly to submissions as the

conclusion of the evidence either at a directions hearing or at the commencement of the proceedings.

Tribunal hearings

34.10. Tribunal hearings are case managed by the List Manager of the Health Practitioner List: Cl 11 of Sched. 5 of the *CAT Act***.** The List Manager conducts directions hearings, at which time orders will be made for the filing of evidence and the hearing of the complaint.

34.11. Prior to the hearing of the complaint, the Principal Member should confirm with each of the Tribunal members that there are no circumstances that could give rise to an allegation of apprehended bias: see further at Part 5. The Principal Member should also warn the Tribunal members that they must make a decision on the evidence before them and are not to perform any research or searches in connection with the complaint.

34.12. At the outset of the hearing of the complaint, the following will typically occur:

1. The Principal Member will announce the title of the proceedings, the names and roles of the Tribunal members and the date of the complaint;
2. The legal representatives appearing for the parties (if any) will announce their appearances;
3. The Principal Member may ask the representative for the Health Care Complaints Commission whether he or she wishes to make a brief opening;
4. The parties will tender their documentary material (any objections to that material may be heard at this time);
5. The Principal Member may ask whether there are any "house-keeping" or procedural matters that should be dealt with at the outset (such as whether any suppression orders should be made, whether there is an agreed statement of facts, whether any expert evidence is to be heard concurrently, whether the proceedings will proceed by way of a one or two stage process and the timing of witnesses).

34.13. The Tribunal will then hear the oral evidence. This will usually consist of witnesses who may be cross-examined. Witnesses may give evidence by telephone, or by videolink with the agreement of the Presiding Member. (The Presiding Member

should provide the opposing party with an opportunity to be heard as to the appropriateness of this course.) The Health Care Complaint Commission's evidence is typically heard first, followed by the respondent's evidence (although if the parties wish, this order may be altered). Tribunal members may ask questions of the witnesses at any time. However, it is generally preferable that Tribunal members ask questions after the conclusion of the questions asked by the parties. After the conclusion of any questioning by Tribunal members, the Presiding Member should ask each of the parties whether they have any questions arising from the answers given by the witness.

34.14. The *National Law* does not require that witnesses be excluded from the hearing room whilst other witnesses are giving evidence. However, so as to ensure that the evidence of a witness reflects the witness' own evidence, witnesses should remain outside the hearing until they commence giving their evidence. In order to accord procedural fairness, the respondent practitioner is permitted to remain in the hearing for the duration of the proceedings. Where the Committee breaks (for example, for lunch or morning tea) during the course of a witness' evidence, the Chairperson should also warn the witness not to discuss their evidence with any other witness during the adjournment.

34.15. At the conclusion of the evidence, each of the parties will make submissions. These may be oral, or in writing. Where possible, it is preferable for oral submissions to be presented immediately after the conclusion of the evidence.

35. One or two stage hearing

35.1. In *King v Health Care Complaints Commission* [2011] NSWCA 353, the Court of Appeal (per Handley AJA and McColl JA) determined that the Medical Tribunal breached its duty of procedural fairness by ordering deregistration without giving the appellant the opportunity to adduce evidence and make submissions on the appropriate orders consequential on the Tribunal's findings (see at paras [202]-[205]).

35.2. However, in *Sudath v Health Care Complaints Commission* (2012) 84 NSWLR 474; NSWCA 171 at [25], Basten JA explained that whether there is a need for a

separate hearing will depend upon the nature of the complaint and the circumstances of the particular complaint under consideration.

35.3. Relevant considerations as to whether there should be a one or two stage hearing will include:

1) The wishes of the parties: *Lucire v Health Care Complaints Commission* [2011] NSWCA 99 at [60];
2) The extent of any admissions made by the respondent;
3) The number and complexity of the complaints: *Lucire* at [60];
4) Whether allegations are made both of professional misconduct and unsatisfactory professional conduct: *Lucire* at [60], *Deano v Health Care Complaints Commission* [2012] NSWSC 693 at [67];
5) Whether there will be a need to recall witnesses (particularly expert witnesses) to give further evidence if a two stage approach is to be adopted;
6) The delay and cost which will be occasioned by the holding of a two stage hearing.

35.4. The presiding member of the Tribunal or Professional Standards Committee should provide the parties with an opportunity to make submissions as to whether a one or two stage approach should be adopted. The presiding member should also advise the parties at the outset of the hearing as to whether a one or two stage approach will be adopted.

35.5. Whether a one or two stage approach is adopted, the Tribunal or Professional Standards Committee must provide the respondent and the complainant with an opportunity to adduce evidence and an opportunity to make submissions on consequential orders prior to making of any consequential orders: *Lucire* at [66].

36. Procedural fairness

36.1. General principles of procedural fairness are outlined above at Part 6 above. The following issues relevant to procedural fairness in the context of Professional Standards Committees and Tribunals should also be borne in mind:

Conflicting accounts

36.2. The Tribunal or Professional Standards Committee should be mindful of any discrepancies in the evidence before them and should draw such discrepancies to the attention of witnesses and the parties. If there are conflicting versions of events, the accounts should be put to the relevant witnesses. The parties should be advised as to the need to do this prior to or at the commencement of the hearing. If the parties have not put conflicting accounts to relevant witnesses, this should be done in questioning by the Tribunal or Professional Standards Committee. It is particularly important that both accounts be put before the peer reviewers, so that their opinion may be asked as to whether their levels of criticism are altered on the varying accounts. When determining which evidence should be preferred, the Professional Standards Committee or Tribunal must apply the principles set out in *Briginshaw v Briginshaw*: see further *Briginshaw* standard at para 46.1ff below.

Decision to be made on the evidence

36.3. The Tribunal or Professional Standards Committee decision must be made only on the evidence. Members of the Tribunal or Committee must not perform searches or obtain access to information outside of the information presented in the hearing.

36.4. Particular issues may arise where an expert or peer member has knowledge which is inconsistent with, or additional to the evidence that has been elicited in the hearing. (For example, in a complaint which alleges that a nurse failed to appropriately respond to a child with a fever of over 40C, an expert member may be aware of a policy of the NSW Ministry of Health which addresses the action to be taken by nurses in such a situation which has not been referred to by either of the parties). Where this occurs, it is incumbent on the expert member to advise the parties of their knowledge or opinion, so that the parties may call additional evidence, or make submissions as to the effect of this policy and its relevance to the issues in dispute. This is often achieved by the Tribunal or Professional Standards Committee asking questions of the relevant witnesses.

Taking into account demeanour of the respondent

36.5. The Tribunal or Professional Standards Committee may take into account its observations of a party's behaviour (including demeanour) in the courtroom for the

purposes of fact-finding, even though the behaviour takes place outside the witness box. This should be done cautiously, particularly where the behaviour is relied on as evidence of impairment and/ or where the practitioner is unrepresented. Importantly, this entitlement is also subject to a condition based on "*fair play and common sense*" that:

> "the parties should know or be informed of what [the judge] has noticed, and have an opportunity of answering or dealing with it."

See *Lindsay v Health Care Complaints Commission* [2010] NSWCA 194 at [233].

Fairness to both parties

36.6. Procedural fairness must be accorded both to the respondent and to the Health Care Complaints Commission: see for example *Lindsay v Health Care Complaints Commission & Anor* [2004] NSWCA 22 and *Health Care Complaints Commission v Beck* [1999] NSWCA 236.

37. Applications for apprehended bias

37.1. Apprehended bias is discussed above at Part 5.

Procedure

37.2. An application that a member of a Tribunal or Professional Standards Committee disqualify him or herself for apprehended bias may be raised by a party with the presiding member of the Tribunal or Professional Standards Committee in chambers (that is, not in open court). If this is done, both parties should be present during any such application. Only very brief information should be provided concerning the nature of the apprehension. If the nature of the allegation is unclear or complex, the party should be required to make the application in open court.

37.3. The member about whom an application for bias is made may voluntarily recuse themselves (agree not to sit). Where the member is not a legal member, the presiding member may provide the member with advice as to relevant legal principles concerning the decision to recuse oneself and advice as to whether there

appears to be an apprehension of bias. If a member determines to recuse him or herself and the hearing has not commenced, arrangements will need to be made for the replacement of that member.

37.4. If the member does not agree to recuse him or herself, the presiding member should require the application for apprehended bias to be made on the record if the application was first made in chambers. At this time, the applicant party (or their legal representative) should be invited to state the grounds on which the application is made on the record. Where relevant, the presiding member or other member may state other relevant matters on the record.

37.5. For a discussion of the applicable principles where there are disputed issues of fact (for example, an allegation is made of a factual matter which is denied by the decision maker), see *CUR24 v DPP* (2012) 83 NSWLR 385; [2012] NSWCA 65 ("*CUR 24*"). It may be appropriate to apply the fair-minded observer test in respect of the disputed evidence. That is, unless the hypothetical observer would reject the evidence as entirely implausible the presiding member should consider whether, if accepted, the evidence would raise a reasonable apprehension of bias: *CUR 24* at [22], [38], [44]. The denial of the relevant statement by the decision-maker cannot of itself provide a final answer to the question: *CUR 24* at [22].

Tribunals: further conduct of the proceedings after recusal

37.6. Where a member of a Tribunal recuses him or herself a question arises as to whether the remainder of the Tribunal may continue to hear the proceedings. This question was considered in *Singh v Medical Council of NSW* [2015] NSWCATOD 4, which considered the interrelationship between ss. 165C of the *National Law* and s. 52 of the *CAT Act*.

37.7. Section 165C of the *National Law* provides that:

> "(1) If one of the members (other than the presiding member) constituting the Tribunal for the purpose of conducting a hearing under this Law vacates office for any reason before an inquiry or appeal is completed or a decision is made in respect of an inquiry or appeal, the inquiry or appeal may be continued and a determination made by the remaining members of the Tribunal.
>
> (2) If more than one of the members vacate office, or the presiding member vacates office, for any reason before the Tribunal has completed an inquiry or

appeal or made a determination in respect of an inquiry or appeal, the inquiry or appeal is terminated.

(3) When an inquiry or appeal is terminated, the Tribunal may be reconstituted in accordance with this Division for the purposes of conducting a new inquiry or appeal in respect of the matter concerned.

(4) In this section:
presiding member means the member referred to in section 165B (2) (a)."

37.8. Section 52 of the *CAT Act* provides that:

"(1) The President may replace the member, or one of the members, constituting the Tribunal after the consideration of a matter by the Tribunal has commenced if, before the matter is determined, the member:

(a) becomes unavailable for any reason, or
(b) ceases to be a member, or
(c) ceases to have a qualification required for participation in the proceedings.

(2) The President may not replace a member unless the President has first:
(a) afforded the parties an opportunity to make submissions about the proposed replacement, and
(b) taken any such submissions into account.

(3) The Tribunal as so reconstituted is to have regard to the evidence, submissions and decisions in relation to the matter that were given or made before the Tribunal was reconstituted."

37.9. In *Singh*, the Tribunal inclined to the view that once a member of the Tribunal had voluntarily recused him or herself, it was not open for the Tribunal to proceed to determine the proceedings with the remaining members after the evidence had been tendered in the proceedings. Specifically, at [25]-[26], the Tribunal stated:

"Our tentative conclusion is that in all the circumstances the provisions of s. 52 of CATA apply and that s. 165C of the *National Law* does not apply.

In the course of submissions counsel for the respondent said 'it is arguable, although by no means certain, that the matter could proceed with the remaining members.' Whilst we have reached a contrary conclusion, we would add that that conclusion is also by no means certain."

38. Adjournments

Consideration of application for adjournment

38.1. A Tribunal or Professional Standards Committee may adjourn proceedings for any reason it thinks fit: s. 167E of the *National Law* (Tribunal), s. 171C (Professional Standards Committee).

38.2. It is the duty of a Tribunal or Professional Standards Committee to hear and determine complaints expeditiously: cl. 11(1) of Sched. 5D of the *National Law*. Accordingly, applications for adjournments must be carefully considered, and an adjournment should not be granted unless there is good reason for doing so.

38.3. However, the duty of a Tribunal or Professional Standards Committee to proceed expeditiously must be balanced against the duty of the Tribunal or Professional Standards Committee to provide procedural fairness both to the complainant and the respondent. The duty to proceed expeditiously should not override the duty of the Tribunal or Professional Standards Committee to provide the parties with an opportunity to be heard: see, for example, *Minister for Immigration and Citizenship v Li* (2013) 249 CLR 332; [2013] HCA 18. The consideration of any application for an adjournment must also take into account s. 3A of the *National Law*, which provides that the "protection of the health and safety of the public must be the paramount consideration".

38.4. Where an application is made for an adjournment of the hearing prior to the hearing, good reasons are given for the application, and time will remedy the issue in question, a reasonable extension of time should be permitted.

38.5. An assertion that a party cannot attend because of illness need not be accepted at face value. In such a case, the Tribunal or Professional Standards Committee is entitled to require that evidence of the illness be provided. See further discussion in J R S Forbes *Justice in Tribunals* (3rd ed. 2010) (Federation Press) at [12.12]. Where there is a history of application for adjournments and/ or where a medical certificate is unsatisfactory, it is open to the Tribunal or Professional Standards Committee to require the issuing practitioner to give oral evidence (this will typically be done by telephone).

38.6. The fact that both parties consent to an adjournment is not decisive. The Tribunal or Professional Standards Committee should satisfy itself that the adjournment is appropriate: *Sydney City Council v Ke-Su Investments Pty Ltd* (1985) 1 NSWLR 246

at 253 per Kirby P and 257 per Mahony JA. *AHB v NSW Trustee and Guardian* [2014] NSWCA 40.

Procedure

38.7. Where an adjournment is granted, the proceedings should be adjourned to a specific day and time. Directions should also be given to ensure that the matter is ready to proceed when next listed.

Costs of adjournment

38.8. Where an adjournment is granted to a party, and the other party suffers expense as a result of the adjournment, a Tribunal may grant a costs order in favour of the disadvantaged party if it thinks fit to do so: cl. 13 of Sched. 5D of the *National Law*. A Professional Standards Committee has no power to grant a costs order.

Failure of the respondent to appear at the hearing without an explanation

38.9. If a respondent fails to appear at a hearing and has provided no explanation of his or her failure to appear, the Tribunal or Professional Standards Committee is entitled to proceed to hear the complaint in the absence of the respondent.

38.10. However, the Tribunal or Professional Standards Committee should not proceed to hear the complaint in the absence of the respondent without first satisfying itself that the respondent had adequate notice of the date and place of the hearing of the matter. In this respect, the *National Law* requires that the Chairperson provide at least 14 days' notice of an inquiry or an appeal to the registered practitioner who is the subject of an appeal or inquiry: s. 165I of the *National Law* (Tribunals); s. 171(4) of the *National Law* (Professional Standards Committee). In this respect, it is important that the Tribunal or Professional Standards Committee satisfy itself that the notice was sent to the correct address of the practitioner. Where the Tribunal or Professional Standards Committee is so satisfied, it is nonetheless advisable for the Tribunal or Professional Standards Committee to request that the Health Care Complaints Commission attempt to telephone the practitioner before proceeding in the practitioner's absence.

39. Suppression orders

39.1. The presiding member of a Tribunal or Professional Standards Committee may direct that the name of a witness not be disclosed in proceedings: cl. 7 of Sched. 5D of the *National Law*.

39.2. The Tribunal or Professional Standards Committee may also direct that any of the following matters are not to be published:

(i) the name and address of any witness;

(ii) the name and address of a complainant;

(iii) the name and address of a registered health practitioner or student;

(iv) any specified evidence;

(v) the subject-matter of a complaint.

(See cl. 7 of Sched. 5D of the *National Law*.)

39.3. A reference to the name of any person includes a reference to "*any information, picture or other material that identifies the person or is likely to lead to the identification of the person*": cl. 7(4) of Sched. 5D of the *National Law*.

39.4. In the Tribunal, a suppression order may also be made under s. 64 of the *CAT Act*, which provides that the Tribunal may, of its own motion or on the application of a party, make orders prohibiting or restricting:

(a) the disclosure of the name of any person (whether or not a party to proceedings in the Tribunal or a witness summoned by or appearing before the Tribunal);
(b) the publication or broadcast or any report of proceedings in the Tribunal;
(c) the publication of evidence given before the Tribunal, whether in public or private, or of matters contained in documents lodged with the Tribunal or received in evidence by the Tribunal;

(d) the disclosure to some or all of the parties to the Tribunal of evidence given before the Tribunal or of the contents of a document lodged with the Tribunal, or received in evidence before the Tribunal.

39.5. A suppression direction may be given before or during the proceedings, but a suppression direction must not be given before the proceedings unless notice is given of the time and place appointed by the person presiding for consideration of the matter to the person who requested the direction, and the complainant or the registered health practitioner or student concerned, and any other person the presiding member thinks fit: cl. 7(3) of Sched. 5D of the *National Law*.

39.6. A person who contravenes a suppression order made under cl. 7 of Schedule 5D of the *National Law* is guilty of an offence.

39.7. It is usual for a suppression order to be made over the name of any patient or other private complainant connected with the complaint. Even where a formal suppression order is not made, it will usually be appropriate for the decision to contain anonymised details of such witnesses. See also – *Judgement Writing: Identity Theft Prevention and Anonymisation Policy* [http://www.supremecourt.justice.nsw.gov.au/Documents/policyidentity_theft_prevention.pdf]. See also s. 64 of the *CAT Act*.

40. Closing proceedings to the public

40.1. Proceedings of a Tribunal or a Professional Standards Committee are to be open to the public unless the Tribunal or Committee directs otherwise: s. 49(1) of the *CAT Act* (Tribunal), s. 171A(2) of the *National Law* (Professional Standards Committee).

40.2. A Tribunal or a Professional Standards Committee may close proceedings to the public, but must not do so unless it is satisfied that it is "*desirable to do so in the public interest*" because of:

(a) the subject-matter of the inquiry; or

(b) the nature of the evidence to be given.

See s. 165K of the *National Law* (Tribunal); s. 171A(3) of the *National Law* (Professional Standards Committee).

40.3. All parties should be given an opportunity to be heard before an order is made closing proceedings to the public. An order should not be made closing proceedings to the public where lesser orders (such as suppression orders) can adequately protect the public interest: *David Syme & Co Ltd v General Motors-Holden's Ltd* [1984] 2 NSWLR 294.

40.4. Where an order is made closing the court, the court door should be locked by registry staff, and a sign should be placed on the outside of the court advising members of the public that the hearing is closed and not open to the public.

41. Amendment of the complaint

41.1. The function of the complaint is to define the issues and to put the respondent on notice of the case to be met: *Health Care Complaints Commission v Bousfield* [2014] NSWCATOD 57 at [76]. It is an important component of the duty to provide procedural fairness. See *Sudath v Health Care Complaints Commission* (2012) 84 NSWLR 474; NSWCA 171 at [80] – [82]. See further Procedural Fairness at Part 6 above.

41.2. The complaint may be amended with the leave of the Tribunal or Professional Standards Committee. The Tribunal or Professional Standards Committee should hear submissions from both parties before determining whether leave should be given to amend the complaint. In determining whether leave to amend should be granted, the Tribunal or Professional Standards Committee should consider whether (and when) notice of the amendment was given to the respondent; the timing of the amendment (for example, whether it occurred after the evidence had concluded); the reasons for any delay; and whether the amendment is necessary to ensure the real issues in dispute are before the Tribunal: *Health Care Complaints Commission v Xenia Cieslak* [2013] NSWNMT 5 at [15]; and *Health Care Complaints Commission v Fraser* [2014] NSWCATOD 29 at [246]. In *Health Care Complaints Commission v Bousfield* [2014] NSWCATOD 57 at [76], the Tribunal observed:

> "If there emerges at the conclusion of the evidence facts which, if accepted, establish a factually different complaint, then such issue must be considered by the trier of fact and the pleadings should be amended in order to make the facts alleged and the particulars precisely conform to the evidence which has emerged. In the case of particulars, amendment, although desirable, is not essential. In short, amendments should only be permitted for the purpose of resolving the real issues in dispute between the parties" (citations omitted)

41.3. A Tribunal or Professional Standards Committee may grant leave to amend subject to an adjournment, provided that the respondent is not denied procedural fairness by reason of the adjournment (an example of where a respondent may be denied procedural fairness by reason of an adjournment may be where the respondent's witnesses will be unavailable at the future hearing of the matter). In addition, a Tribunal may grant leave to amend subject to an order that costs be ordered in favour of the respondent for the costs "thrown away": see, for example, *Health Care Complaints Commission v Hofer* [2014] NSWCATOD 74 at [10]. It should be noted that a Professional Standards Committee has no power to award costs.

41.4. Clause 6 of Schedule 5D of the *National Law* provides that a Tribunal or Professional Standards Committee has power to lay an additional complaint where:

> "… during the proceedings, it appears to the Committee or the Tribunal that, having regard to any matters that have arisen, another complaint could have been made against the practitioner or student concerned-
> (a) whether instead of or in addition to the complaint which was made; and
> (b) whether or not by the same complainant."

41.5. Clause 6 of Schedule 5D further provides that the Tribunal or Professional Standards Committee may take the "other complaint to have been referred to it and deal with it in the same proceedings."

41.6. The Tribunal or Professional Standards Committee must comply with duties of procedural fairness towards both the Health Care Complaints Commission (or Board or Council) and the health practitioner before laying an additional complaint under cl. 6 of Schedule 5D. In particular, it will usually be appropriate for the Tribunal or Professional Standards Committee to invite the Health Care Complaints Commission to consider whether it wishes to amend the complaint to deal with the additional matters. Where the Health Care Complaints Commission declines to so amend, a decision by a Tribunal or a Professional Standards Committee to lay an additional complaint under cl. 6 of Schedule 5D should be made cautiously. However, in view of the protective jurisdiction of the Tribunal or Professional

Standards Committee, a new complaint should be added where the substance of the new matters that have arisen differs significantly from the remainder of the complaint.

42. When a witness fails to appear/ refuses to answer questions

Tribunal

42.1. The presiding member of a Tribunal may make orders for the calling of witnesses (including the issuing of a summons to attend): ss. 46 and 48 of the *CAT Act*. The presiding member may also make orders for the issuing of summonses to produce documents: s. 48 of the *CAT Act*.

42.2. Section 67 of the *CAT Act* provides that:

> "(1) Nothing in this Act requires the disclosure of a document if the Tribunal or President is satisfied that evidence of the document could not be adduced in proceedings before a NSW court by reason of the operation of any of the following provisions of the *Evidence Act 1995* :
>
> (a) section 9 (Application of common law and equity), but only to the extent that it preserves any privilege against the adducing of evidence,
> (b) section 10 (Parliamentary privilege preserved),
> (c) Part 3.10 (Privileges) of Chapter 3."

42.3. In effect, s. 67 of the *CAT Act* applies the *Evidence Act* rules concerning privilege, including self-incrimination privilege and legal professional privilege to orders for the production of documents by the Tribunal.

42.4. Section 72(3) of the *CAT Act* provides that a person may not, without reasonable excuse, contravene an order of the Tribunal made under the *CAT Act*. Section 72(3) is a civil penalty provision. Alternatively, where a witness refuses to be sworn or affirmed before the Tribunal, or where a person refuses to produce a document contrary to a summons issued by the Tribunal, the witness or person may be cited for contempt: s. 73 of the *CAT Act*. Section 73 provides that the Tribunal has the same contempt powers as the District Court. As to the power and procedure of the Tribunal when dealing with an allegation of a contempt of court see: *Civil Trials Benchbook*, Judicial Commission of New South Wales. Chapter 10. A refusal by a

registered health practitioner to give evidence or produce documents pursuant to a Summons may be grounds for a complaint under the *National Law.*

Professional Standards Committee

42.5. The presiding member of a Professional Standards Committee may summons a person to give evidence: cl. 3(1) of Sched. 5D of the *National Law*. The presiding member may also require a person appearing before an inquiry to produce documents: cl. 3(2) of Sched. 5D of the *National Law*. It is an offence for a person to fail to comply with a summons without reasonable excuse: cl. 3(4) of Sched. 5D of the *National Law*. It is also an offence for a person giving evidence before a Professional Standards Committee to refuse to be sworn or affirmed, to fail to answer a question or to fail to produce a document without reasonable excuse: cl. 3(5) of Sched. 5D of the *National Law*.

42.6. As the *National Law* does not abrogate self-incrimination privilege, legal professional privilege or public interest immunity, a claim by a witness of any of these privileges will constitute a reasonable excuse for the purposes of the offence provisions. See further discussion of privileges at paras 46.9ff below. Embarrassment, a desire to protect one's privacy, and fear of retaliation would not typically constitute a reasonable excuse.

42.7. A Professional Standards Committee does not have power to make any orders concerning a witness who fails to appear pursuant to a summons, who refuses to be sworn, or fails to answer a question or produce a document without reasonable excuse. Rather, any prosecution for those offences will be commenced in a Local Court: s. 242 of the *National Law*. A refusal by a registered health practitioner to give evidence or produce documents pursuant to a Summons may be grounds for a complaint under the *National Law.*

42.8. Where the Professional Standards Committee is of the view that there is no reasonable excuse for a witness' refusal or failure to appear, be sworn or give evidence, the Professional Standards Committee should direct that a copy of the transcript, summons (where appropriate) and any other relevant evidence be provided to the relevant health Council for consideration as to the commencement of a prosecution. In doing so, it is appropriate for the presiding member to make a

statement on the record as to the circumstances surrounding the referral. The Tribunal or Professional Standards Committee should provide the witness with an opportunity to be heard prior to making such a referral.

Procedure

42.9. Where a witness fails to appear pursuant to a summons, the Tribunal or Professional Standards Committee should satisfy itself that the summons clearly states the correct date, time and place that the witness was required to appear. The Tribunal or Professional Standards Committee should also satisfy itself that the summons was properly served on the witness with adequate time for the witness to appear.

42.10. Where a witness present before a Tribunal or Professional Standards Committee refuses to be sworn, or fails to answer a question or produce a document, the presiding member should inquire of the witness or their legal representative as to the reason for the refusal or failure. Where the Tribunal or Professional Standards Committee is of the view that there is a reasonable excuse for the failure, the witness should not be required to be sworn, answer the question or produce the document.

42.11. Where the Tribunal or Professional Standards Committee is of the view that there is no reasonable excuse for the failure or refusal, the presiding member should warn the witness that a failure to be sworn, answer the question or produce the document in question may constitute an offence. The Tribunal or Professional Standards Committee should offer the witness a further opportunity to be sworn, answer the question or produce the document.

43. Urgent relief

43.1. Very rarely, a Tribunal or Professional Standards Committee may hold serious concerns about the safety of a practitioner continuing to practise whilst the hearing is pending. Where serious and immediate concerns are held by a Professional Standards Committee, consideration should be given to the referral of the complaint to the Tribunal under s. 171D of the *National Law*.

43.2. Where serious and immediate concerns are held by the Tribunal, the Tribunal may consider conditioning any applications for an adjournment by a practitioner on the practitioner's undertaking not to practise, or to practise subject to conditions pending the Tribunal's decision. Interlocutory orders may also be made by the Tribunal pursuant to s. 165L of the *National Law*: see, for example, *Health Care Complaints Commission v Follent* [2015] NSWCATOD 31.

44. The role of various members

44.1. The decision of the Tribunal or Professional Standards Committee is a collective decision, for which all members have collective responsibility. Except in the case of a dissenting opinion, the decision of a Tribunal or Professional Standards Committee must be agreed to by each member of the decision making body. The presiding member must ensure that each decision maker understands and agrees with the decision.

44.2. Tribunals and Professional Standards Committees are comprised of a legal member, two professional members and a lay member. Each member brings specific skills, knowledge or expertise to the decision making process. These are outlined below.

Legal/ presiding member

44.3. The role of the legal member is to guide the hearing process, to ensure that the proceedings are conducted in accordance with the law, and that procedural fairness is accorded to all parties. The legal member of the Professional Standards Committee (referred to in this document as the presiding member) is designated as the Chairperson under s. 169B(1)(a) of the *National Law*. The legal member of the Tribunal (referred to in this document as the presiding member) is the Principal or Senior Member.

Professional/ expert/ peer member

44.4. A professional member (also sometimes referred to as an expert or peer member) must be registered in the same profession (and at least one in the same division) as

the practitioner about whom the complaint has been made: s. 169B(1)(a) of the *National Law*.

44.5. The role of a professional member is to provide professional assistance, information and perspective in the inquiry. Professional members bring an understanding of the context in which the practitioner operates and the standards expected within the profession, the appropriateness or culpability of the practitioner's conduct, and the extent to which conduct may amount to unsatisfactory professional conduct or professional misconduct. They may use their expertise to inform their questioning of the parties and witnesses and to assess the evidence presented by the parties.

44.6. Professional members may also provide invaluable assistance to the legal and lay members in the interpretation and relevance of evidence of a technical nature. Where the professional member has expertise in medicine or psychology, the professional member may also recognise whether the practitioner is suffering from a physical or mental condition which may impair the practitioner's ability to practise. Professional members may also use their expertise to inform the crafting of any orders or conditions, especially so as to ensure that orders or conditions are practical, implementable and so that they will achieve the desired protective effect.

44.7. It is permissible for the Professional Standards Committee or Tribunal to prefer the expertise of its professional members to the evidence presented by the parties: *Kalil v Bray* [1977] 1 NSWLR 256 at 261; *Spurling Development Underwriting (Vic) Pty Ltd* [1973] VR 1 at 11. However, the Tribunal or Professional Standards Committee must be careful to afford procedural fairness when drawing upon knowledge which is within the area of expertise of its professional members. Generally speaking, it is impermissible for a member of a Professional Standards Committee or Tribunal to research or obtain material relevant to the complaint outside of the hearing process. However, where a professional member is aware of a specific policy or procedure which is relevant to the complaint, and which has not been tendered by the Health Care Complaints Commission, it may be appropriate for the professional member to obtain the policy, so that it may be drawn to the attention of the parties. A professional member should consult the presiding member before obtaining any such document. See further Procedural Fairness at Part 6 above.

Lay members

44.8. The role of a lay member is to act as a representative of the public. Lay members provide a perspective of public expectations of health practitioners. In particular, lay members provide an understanding and concern on behalf of health care consumers which may otherwise be lost in clinical, technical or legal discussions during the inquiry. Lay members also play an important role in ensuring that the decision reflects community attitudes and that professional members are not overly harsh or overly forgiving of their colleagues.

45. Dealing with unrepresented litigants

45.1. Respondents in the Tribunal and the Professional Standards Committees have a right to be represented by a legal practitioner: cl. 27 of Sched. 5 of the *CAT Act* and s. 165J of the *National Law* (Tribunal), s. 171B of the *National Law* (Professional Standards Committee). Legal representation is often provided free of charge by health unions or professional indemnity insurers to their members. However, a respondent may not able to access this assistance and may not be able to otherwise afford legal representation. Alternatively, a respondent may wish to represent him or herself. The right not to be represented is a "fundamental right which should not be interfered with": *R v Zorad* (1990) NSWLR 91 at 95.

45.2. Where a litigant is unrepresented and there is a risk of the party's case not being adequately presented the Tribunal or Professional Standards Committee may need to provide additional assistance to the litigant in order to ensure that the litigant receives a fair hearing: *Reisner v Bratt* [2004] NSWCA 22 at [4] – [6]. In particular, the Tribunal or Professional Standards Committee:

- may inform the litigant of their right to legal representation, and the possibility that their union (if they have one) may be able to provide such representation free of charge;
- has an obligation to "take appropriate steps to ensure that a party appearing unrepresented has sufficient information about the practice and procedure of the court as is reasonably practicable for the purpose of ensuring a fair [hearing]": *Lee v Chae-Sang Cha and Ors* [2008] NSWCA 13 at [48]. For example, an unrepresented litigant should be informed about the need to put specific allegations to witnesses;

- may intervene where potentially inadmissible evidence is sought to be tendered against the unrepresented litigant: *National Australia Bank Ltd v Rusu* (1999) 47 NSWLR 309;
- should attempt to clarify the submissions of an unrepresented litigant, particularly where the substantive issues are being obfuscated by misconceived advocacy: *Neil v Nott* (1994) 68 ALJR 509 at 510.

45.3. However, the Tribunal or Committee should not give assistance to the litigant in such a way as to "conflict with its role as an impartial adjudicator": *Reisner* at [4]. In particular, Tribunal or Committee's duty is not to "advise [the litigant] how to conduct his case; nor to advise him of how his rights should be exercised; nor to become his advocate or stand in the shoes of his … counsel": *Sadiq v NSWTG* [2015] NSWSC 716 at [18].

45.4. A Tribunal or a Professional Standards Committee may grant leave to a person who is not a legal practitioner to represent a respondent where the Tribunal or Professional Standards Committee is of the view that it is "appropriate for the person to appear": s. 45(1) of the *CAT Act* and s. 165J(1) of the *National Law* (Tribunal); s. 171B(2) of the *National Law* (Professional Standards Committee).

45.5. For proceedings in the Tribunal, s. 32 of the *NCAT Rules* provide that the following matters should be taken into account when considering an application for a person who is not a legal practitioner to represent a party:

(i) whether the proposed representative has sufficient knowledge of the issues in dispute to enable him or her to represent the applicant effectively before the Tribunal;
(ii) whether the proposed representative has the ability to deal fairly and honestly with the Tribunal and other persons involved in the proceedings; and
(iii) whether the proposed representative is vested with sufficient authority to bind the party.

45.6. Alternatively, a "MacKenzie friend" may be permitted to assist the respondent in the conduct of his or her case, but not to perform the role of an advocate. See *Damjanovic v Maley* (2002) 55 NSWLR 149 at [63] - [64].

45.7. Where an unrepresented litigant seeks to cross-examine a complainant concerning allegations of sexual impropriety, consideration may be given to whether arrangements should be made for the cross-examination to occur via an intermediary. The intermediary could be a MacKenzie friend (see above), or the unrepresented litigant may be directed to prepare a written list of questions, which may then be asked by the presiding member. Such procedures exist in respect of cross-examination of a complainant by an unrepresented accused in sexual assault proceedings: s. 294A of the *Criminal Procedure Act 1986*. The purpose of such provisions was explained by the NSW Court of Appeal in *R v MSK & MAK* (2004) 61 NSWLR 204 at [69] as follows:

> "The use by [the self-represented accused] of the opportunity to confront and to challenge his alleged victim personally and directly risks diverting the integrity of the judicial process, insofar as it is likely to intimidate the complainant to the point where he or she is unable to give a coherent and rational account of what truthfully occurred. The threat of its occurrence may also discourage a victim of sexual assault from giving evidence or even from making an initial complaint."

See further section 10 of the *Equality Before the Law* benchbook: http://www.judcom.nsw.gov.au/publications/benchbks/equality

46. Particular evidentiary issues

Briginshaw standard

46.1. Although the standard of proof required to establish a complaint is the civil standard, because of the seriousness of the allegations and the gravity of their consequences, the Tribunal or Committee must be "comfortably satisfied" that the particulars of the Complaint have been established: *Bannister v Walton* (1993) 30 NSWLR 699.

46.2. In *Briginshaw v Briginshaw* (1938) 60 CLR 336, Dixon J said at 362–363:

> "The seriousness of an allegation made, the inherent unlikelihood of an occurrence of a given description, or the gravity of the consequences flowing from a particular finding are considerations which must affect the answer to the question whether the issue has been proved to the reasonable satisfaction of the tribunal. In such matters 'reasonable satisfaction' should not be produced by inexact proofs, indefinite testimony, or indirect inferences ... This does not mean that some

> standard of persuasion is fixed intermediate between the satisfaction beyond reasonable doubt required upon a criminal inquest and the reasonable satisfaction which in a civil issue may, not must, be based on a preponderance of probability. It means that the nature of the issue necessarily affects the process by which reasonable satisfaction is attained."

46.3. The *Briginshaw* principle applies to the quality or sufficiency of the evidence available, as Mason CJ, Brennan, Deane and Gaudron JJ held in *Neat Holdings Pty v Karajan Holdings Pty Ltd* (1992) 110 ALR 449-450:

> "...the strength of the evidence necessary to establish a fact or facts on the balance of probabilities may vary according to the nature of what it is sought to prove. Thus, authoritative statements have often been made to the effect that clear or cogent or strict proof is necessary 'where so serious a matter as fraud is to be found.' Statements to that effect should not, however, be understood as directed to the standard of proof."

46.4. For further discussion of the application of the *Briginshaw* standard in disciplinary tribunals see:

> - *Nusrat Deano v Health Care Complaints Commission* [2012] NSWSC 693 at [41] – [46]
>
> - *Donnelly v Health Care Complaints Commission* (NSW) [2011] NSWSC 705 at [18]

See also Bennett, H. and Broe, G. "The civil standard of proof and the 'test' in Briginshaw: Is there a neurobiological basis to being 'comfortably satisfied'?" (2012) 86 *Australian Law Journal* at 258.

Rules of evidence

46.5. Tribunals and Professional Standards Committees are not bound to observe the rules of law governing the admission of evidence, but may inform themselves of any matter in the way they think fit: cl. 2 of Sched. 5D of the *National Law*.

46.6. However, "[t]*he power to disregard the rules of evidence, … is not a power to give weight to evidence which has no probative value, still less when it is procedurally unfair to do so*": *Yelds v Nurses Tribunal* (2000) 49 NSWLR 491 at [28]. See similarly *R v War Pensions Entitlement Appeal Tribunal; ex parte Bott* (1933) 50

CLR 228 at 256. Accordingly, although the rules of evidence do not apply, Tribunals and Professional Standards Committees should carefully consider the probative value of hearsay, opinion and tendency evidence.

46.7. The *National Law* makes specific provision for Tribunals and Professional Standards Committees to accept into evidence relevant findings, judgments and orders of courts, juries, and other tribunals, as well as the evidence before such bodies: cl. 5 of Sched. 5D of the *National Law*. Tribunals and Professional Standards Committees may also accept into evidence relevant findings, decisions, determinations, and evidence before other Professional Standards Committees and Performance and Professional Standards Panels established under the *National Law*: cl. 5 of Sched. 5D of the *National Law*.

46.8. Clause 6 of Schedule 5D of the *National Law* provides that where there is more than one related count alleged in the allegation, special care should be taken. In *Zaidi v Health Care Complaints Commission* (1998) 44 NSWLR 82, Mason P (with whom Priestly and Powell JJA agreed) said, at 91:

> "… [It] would be prudent for the judge presiding over a particular tribunal to consider directing his or her fellow members that they should exercise particular care to consider the evidence on individual charges separately, unless satisfied that there was no collaboration between the several patients and that the peculiar features of one incident (if proved) lends compelling weight to the proof of another."

Privilege

46.9. The *National Law* contains no provisions abrogating self-incrimination privilege, legal professional privilege or public interest immunity in Tribunal or Professional Standards Committee hearings. See also s. 46(3) of the *CAT Act*, which provides that s. 46(1) does not compel a witness to answer a question if the witness has a reasonable excuse for refusing to answer the question.

46.10. Self-incrimination privilege, legal professional privilege and public interest immunity are each fundamental principles under the common law rights or privileges which will not be taken to have been abolished except by clear and unmistakable implication: *Baker v Campbell* (1983) 153 CLR 52; *Lee v New South Wales Crime Commission* (2013) 251 CLR 196; [2013] HCA 39. As there is no such clear and

unmistakeable intention in the *National Law*, a witness should not be compelled to answer a question, or produce a document if to do so would abrogate the legal professional privilege or the privilege against self-incrimination.

46.11. Where there is a doubt as to whether a document/ answer attracts privilege, the parties (and, where applicable, the witness) should be given an opportunity to address the Tribunal/ Professional Standards Committee as to the application of the privilege.

When can a Tribunal/ Professional Standards Committee take the behaviour/ demeanour of a respondent into consideration?

46.12. The Tribunal or Professional Standards Committee may take into account its observations of a party's behaviour (including demeanour) in the courtroom for the purposes of fact-finding (for example, the determination of whether a practitioner suffers from an impairment), even though the behaviour takes place outside the witness box. This should be done cautiously, particularly where the behaviour is relied on as evidence of impairment and/ or where the practitioner is unrepresented. Importantly, this entitlement is subject to a condition based on "*fair play and common sense*" that:

> "the parties should know or be informed of what [the judge] has noticed, and have an opportunity of answering or dealing with it."

See *Lindsay v Health Care Complaints Commission* [2010] NSWCA 194 at [233].

46.13. On the other hand, where the demeanour observed is the party's demeanour in the witness box during evidence, the Tribunal or Professional Standards Committee may rely on the demeanour of the party in forming its assessment of the party's credibility: *Tung v Health Care Complaints Commission & Anor* [2011] NSWCA 219 at [51].

46.14. Particular caution should be taken before drawing inferences based on demeanour when dealing with a party who is from a different cultural background: see further Dealing with Diversity at Part 4 above.

Can a Tribunal/ Professional Standards Committee take into account the failure of the respondent to call or tender corroborating evidence?

46.15. In some circumstances, it will be permissible for a Tribunal or Professional Standards Committee to take into account the failure of the respondent to daw adverse inferences from a respondent's failure to call or tender corroborating evidence in their case. In *New South Wales Bar Association v Meakes* [2006] NSWCA 340, Tobias JA commented (at [77]):

> "… these were the very matters which were wholly within the knowledge of the respondent and which he did not offer to answer in the witness box. … the only inference one can draw from the respondent's refusal to give sworn testimony in this matter was that his evidence would not have assisted his case in resisting a finding of professional misconduct."

See also discussion in *Lucire v Health Care Complaints Commission* [2011] NSWCA 99 at [125] – [145].

46.16. However, the Tribunal or Professional Standards Committee should warn the respondent that such inferences may be drawn and should provide an opportunity to the respondent to provide such evidence. Such a course is particularly important where the respondent is unrepresented.

Relevance of other Tribunal decisions in making a finding of professional misconduct

46.17. In *Health Care Complaints Commission v Karalasingham* [2007] NSWCA 267, Basten JA, with the concurrence of Giles JA and Bergin J, accepted (at [70]) that a legitimate consideration "*is whether the orders made reveal inconsistency of approach on the part of the Tribunal, when viewed against other decisions revealing similar kinds of misconduct*". His Honour agreed (at [71]-[72]) that other cases might be of value as examples in indicating a range of appropriate orders but could not be seen as precedents.

46.18. However, in *Lee v Health Care Complaints Commission* [2012] NSWCA 80, Barrett JA (with whom MacFarlane and Tobias JJA agreed) observed (at [34]) that the Court should proceed on the basis that:

> "(a) comparison with the outcomes in earlier cases may be useful if those earlier cases show some discernible range or pattern;
>
> (b) such a range or pattern, even when discernable, cannot be regarded as a precedent indicating what is 'correct';
>
> (c) the range or pattern is, at best, a reflection of the accumulated experience and wisdom of decision makers;
>
> (d) the range or pattern will potentially be of value only if it is possible to gather it from an appreciation of some unifying principle;
>
> (e) since the predominant consideration is the protection of the public, a decision can only be made by reference to the facts of the particular case and by considering what measures are needed to ensure that the future behaviour of the particular practitioner is shaped in a way that is consistent with that protection; and
>
> (f) the Medical Tribunal, as a specialist Tribunal, brings special skill and experience to the task of formulating protective orders."

47. Appropriate orders

47.1. The role of the Tribunal in framing orders centres not on punishment but on the protection of the public and the maintenance of proper professional standards: *Director-General, Department of Ageing, Disability and Home Care v Lambert* (2009) 74 NSWLR 523; [2009] NSWCA 102 at [83] per Basten JA; *Lee v Health Care Complaints Commission* [2012] NSWCA 80 at [31], per Barrett JA, MacFarlan JA and Tobias AJA agreeing:

> "the overwhelming emphasis [in cases of professional misconduct] is on the protection of the public, with notions of punishment relevant only incidentally if and when material to the achievement of the protective purpose."

47.2. The power of the Tribunal to make a disciplinary order is discretionary: *Prakash v Health Care Complaints Commission* [2006] NSWCA 153 at [85] per Basten JA; *Lee v Health Care Complaints Commission* [2012] NSWCA 80 at [19], per Barrett JA, MacFarlan JA and Tobias AJA agreeing.

When consequential orders may be made

47.3. A Tribunal or Professional Standards Committee must only make consequential orders if it finds the subject-matter of a complaint against a relevant health practitioner to have been proved or where the relevant health practitioner who is the subject of the complaint admits the complaint in writing to the Committee: s. 146A of the *National Law* (Professional Standards Committee); s. 149 of the *National Law* (Tribunal).

Orders which may be made by a Tribunal

47.4. A Tribunal may make the following consequential orders where it is satisfied that a complaint has been established (s. 149A(1) of the *National Law*):

(a) caution or reprimand the practitioner;
(b) impose the conditions it considers appropriate on the practitioner's registration;
(c) order the practitioner to seek and undergo medical or psychiatric treatment or counselling (including, but not limited to, psychological counselling);
(d) order the practitioner to complete an educational course specified by the Tribunal;
(e) order the practitioner to report on the practitioner's practice at the times, in the way and to the persons specified by the Tribunal;
(f) order the practitioner to seek and take advice, in relation to the management of the practitioner's practice, from persons specified by the Tribunal.
(See s. 149A(2) of the *National Law* as to the orders which may be made by the Tribunal with respect to a student.)

47.5. Where a finding of unsatisfactory professional conduct or professional misconduct has been made, the Tribunal also has power to impose a fine of not more than 250 penalty units: s. 149B of the *National Law*. See further at para 47.11 below as to the circumstances in which the Tribunal may order that a fine be paid.

47.6. Where a health practitioner is no longer registered, an order or direction may still be given by the Tribunal, but such an order or direction will have effect only to prevent the practitioner being registered unless the order is complied with; or to require the conditions concerned to be imposed when the practitioner is registered: s. 149A(3) of the *National Law*.

Orders which may be made by a Professional Standards Committee

47.7. A Professional Standards Committee may make the following consequential orders where it is satisfied that a complaint has been established (s. 146A of the *National Law*):

> (a) caution or reprimand the practitioner;
>
> (b) direct that the conditions, relating to the practitioner's practising of the practitioner's profession, it considers appropriate be imposed on the practitioner's registration;
>
> (c) order that the practitioner seek and undergo medical or psychiatric treatment or counselling (including, but not limited to, psychological counselling);
>
> (d) order that the practitioner complete an educational course specified by the Committee;
>
> (e) order that the practitioner report on the practitioner's practice at the times, in the way and to the persons specified by the Committee;
>
> (f) order that the practitioner seek and take advice, in relation to the management of the practitioner's practice, from the persons specified by the Committee.

47.8. A Professional Standards Committee does not have power to suspend or cancel the registration of a health practitioner. A Professional Standards Committee must immediately terminate its inquiry if, before or during the inquiry, the Committee forms the opinion that the complaint, if substantiated, may provide grounds for the suspension or cancellation of the registration of the relevant health practitioner; or if the Committee becomes aware the Council or the Commission has referred the complaint or another complaint about the practitioner to the Tribunal: s. 171D(1) of the *National Law*. If a complaint is terminated, the Committee must inform the Council of the referral: s. 171D(5) of the *National Law*.

47.9. A Professional Standards Committee need not terminate an inquiry if the allegations in the complaint and any pending complaint relate solely or principally to the practitioner's physical or mental capacity to practise the practitioner's profession: s. 171D(2) of the *National Law*.

47.10. A sample order for the termination of a complaint is:

> This Professional Standards Committee has formed the opinion that the complaint, if substantiated, may provide grounds for suspension or cancellation of the registration of the respondent. The Professional Standards Committee accordingly terminates this complaint (numbered [insert number]**)** and refers the complaint to the Tribunal pursuant to s. 171D of the *National Law*.

Fines

47.11. A Tribunal or Professional Standards Committee may order that a registered health practitioner pay a fine: ss. 146C(1) and 149(1) of the *National Law.* A fine may not be ordered unless the Tribunal or Professional Standards Committee is satisfied there is no other order, or combination of orders, that is appropriate in the public interest: ss. 146C(2), 148F(2) and 149B(2) of the *National Law*. The Tribunal cannot order a fine if a fine or other penalty has already been imposed by a court in respect of the conduct: ss. 146C(2), 148F(2) and 149(3) of the *National Law*. As the protection of the public is the primary purpose of disciplinary proceedings, the imposition of fines is relatively rare. A fine will typically be appropriate where the health practitioner has obtained a financial benefit as a result of his or her unsatisfactory professional conduct or professional misconduct, but where orders for compensation are inappropriate (for example, where the victim(s) are unknown).

Removal v Suspension

47.12. In *Medical Board of Australia v Dr ZOF No. 2 (Review and Regulation)* [2015] VCAT 379 at [17], the Victorian Civil and Administrative Tribunal ("VCAT") described the difference between removal (or cancellation of registration) and suspension of registration as follows:

> "The major difference between a period of suspension and cancellation is that once the doctor's registration is cancelled, he must reapply after the period specified. He is still not guaranteed that he will be so registered. He must still satisfy the Board that registration is appropriate and that he fulfils the qualifications for general registration ...
>
> Cancellation of registration sends a clear message of unsuitability for practice. Suspension may be thought to indicate confidence in the doctor's future ability to practice once the period of suspension is served…" (citing *Honey v Medical Practitioners Board of Victoria* [2007] VCAT 526 at [42])

47.13. Where probable permanent unfitness to practise has not been demonstrated, and censure of the practitioner is otherwise required by the circumstances of serious demonstrated fault in the impugned conduct, suspension rather than removal of practising rights will be the more appropriate protective order: *NSW Bar Association v Cummins* (2001) 52 NSWLR 279; [2001] NSWCA 284 at [26] to [27].

47.14. On the other hand, "[s]*uspension may be thought to indicate confidence in the* [practitioner]*'s future ability to practise once the period of suspension is served*", whereas "*cancellation of registration sends a clear message of unsuitability to practise*": *Nursing and Midwifery Board v Chen (Review and Regulation)* [2013] VCAT 1413 at [30]. Because a registrant will have an entitlement to resume practice at the end of the suspension period, suspension will be inappropriate where the registrant is unlikely to be competent to practise at the end of the suspension period: *Chen* at [32].

47.15. An order of suspension is not a trivial order: *Medical Board of Australia v Dr ZOF No. 2 (Review and Regulation)* [2015] VCAT 379 at [17]. The making of an order for suspension will have a "devastating effect on one's financial position, one's standing in the community, one's practice and one's office establishment": *Dr ZOF* at [17].

47.16. An order of suspension must be made for a specified period: *Health Care Complaints Commission v Philipiah* [2013] NSWCA 342.

Reprimand v caution

47.17. A reprimand differs from a caution in that a reprimand is an "*official rebuke for past wrongful conduct, whereas a caution is a reminder to take care in the future and avoid repetition*": *Psychologists Board of Australia v Coleman (Review and Regulation)* [2013] VCAT 738.

47.18. In drawing this distinction, the Tribunal in *Coleman* referred to the decision in *Peeke v Medical Board of Victoria* (unreported, Victorian Supreme Court, 19 January 1994), where Marks J rejected an argument that a reprimand would trivialise a serious lapse in professional standards, stating:

> "I am not able to agree with the Board that a reprimand is a trivial penalty. It may be inappropriate or inadequate in many circumstances, but a reprimand, to a professional person, has a potential for serious adverse implications."

47.19. Practically speaking, the difference between a reprimand and a caution is that whilst a reprimand appears on the register, a caution does not appear on the register.

47.20. A reprimand or a caution may be general, or may be specific to the conduct found. It is open to a Tribunal or Professional Standards Committee to "severely" reprimand a practitioner. In *Lindsay v Health Care Complaints Commission* [2005] NSWCA 356, Hodgson JA observed at [3] that:

> "the power of the Tribunal under s.61(1)(a) of the *Medical Practices Act* to "caution or reprimand the person" authorises the Tribunal to issue to the person a form of words, the precise content of which can be determined by the Tribunal, so long as the form of words does truly constitute either the cautioning or reprimanding of the person. Accordingly, in my opinion, an order "that [the person] be severely reprimanded" is within that power."

47.21. Sample reprimands include:

> The doctor is reprimanded: *Health Care Complaints Commission v Dr A Esin Dalat Ozme* [2012] NSWMT 15.
>
> Dr Howe be severely reprimanded for entering into a personal and intimate relationship with a patient from 23 March 2006 to late November 2006: *Health Care Complaints Commission v Howe* [2010] NSWMT 12.
>
> Dr Howe be severely reprimanded for providing Patient A with six bottles of Ritalin for use by her daughter, in circumstances where he did not hold an authority to prescribe Ritalin to the patient's daughter and where another medical practitioner held such an authority and the patient's daughter was a child: *Health Care Complaints Commission v Howe* [2010] NSWMT 12.
>
> The respondent be reprimanded in respect of his writing of the Schedule 2 for Patient MA: *Health Care Complaints Commission v Dr Brendan O'Sullivan* [2010] NSWMT 5.

47.22. A sample caution is:

> The respondent, Dr Malay Kanti Halder, is cautioned pursuant to s 61(1)(a) of the *Medical Practice Act* 1992: *Health Care Complaints Commission v Halder* [2011] NSWMT 8.

Framing Conditions or Orders

47.23. Where conditions are imposed requiring the completion of educational courses or supervision, the condition should be precise and clear: *Health Care Complaints Commission v Perceval* [2014] NSWCATOD 38. Moreover:

> "Particularly when imposed in a disciplinary context, such restrictions are not lightly imposed nor may they be treated lightly."

See also *Health Care Complaints Commission v Lopez (No 2)* [2014] NSWCATOD 15.

47.24. Where a condition or order requires the health practitioner to complete further education, a date should be nominated by which the educational course must be completed. As educational providers frequently change course offerings and course dates, it is necessary for the Tribunal or Professional Standards Committee to specify what is to occur if the course is no longer offered or if the course dates change. A flexible way of providing for such eventualities is for the condition to specify that the relevant health Council may approve an alternative course or dates. For example:

> "The Practitioner is to undertake the First Line Emergency Care course or an equivalent course or combination of courses approved by the Nursing and Midwifery Council. The commencement date should be no later than 31 December 2012 or a later date approved by the Nursing and Midwifery Council": *Health Care Complaints Commission v Molony* [2012] NSWNMPSC 1.

47.25. In addition, provision may also be made for unexpected eventualities by the specification of the relevant health Council as the appropriate review body for the purposes of ss. 163 – 163C of the *National Law*. For example:

> "The Nursing and Midwifery Council is the appropriate review body for the purposes of ss. 163 – 163C of the *National Law*."

47.26. The Tribunal or a Professional Standards Committee does not have the power to bind third parties. Accordingly, the Tribunal or Professional Standards Committee cannot require the practitioner's employer to pay for education or provide a form of education, nor can the Tribunal or Professional Standards Committee require a Health Profession Council to perform any function.

47.27. The Tribunal or Professional Standards Committee may also specify that a condition is a "critical compliance condition." A "critical compliance condition" is an order that a contravention of the order or condition will result in the health practitioner's registration in the health profession being immediately suspended under section 150 and subsequently cancelled by the Tribunal: see ss. 146B, 149A and 163B of the *National Law*. Such orders should be cautiously made, as contravention of the condition, even if unintentional, must result in the hearing of a further complaint before the Tribunal.

47.28. As to the distinction between a condition and an order, see HPCA Practice Note No 1 of 2014. In short, a condition will be recorded on the National Register (s. 225(k) of the *National Law*); whereas there is no statutory requirement for the details of an order to be recorded on the National Register, although a National Board may choose to do so if it considers that it is appropriate for this information to be recorded (s. 225(p) of the *National Law*). It should also be noted that conditions will remain on the register until they are removed following a formal removal process, whilst orders do not require formal removal. Accordingly, if the Tribunal or Professional Standards Committee considers that it is appropriate for the matter to be recorded on the National Register, it should be expressed as a condition rather than as an order.

See further Conditions Bank Handbook.

Withdrawal of a complaint

47.29. Clause 12 of Sch. 5D to the *National Law* provides that:

> "(1) A Committee or the Tribunal may decide not to conduct an inquiry, or at any time to terminate an inquiry or appeal, if—
>
> (a) any of the following circumstances apply—
>
> (i) a complainant fails to comply with a requirement made of the complainant by the Committee or the Tribunal;
>
> (ii) the person about whom the complaint is made ceases to be a registered health practitioner or student;
>
> (iii) the complaint before the Committee or the Tribunal is withdrawn; and

(b) in the opinion of the Committee or the Tribunal it is not in the public interest for the inquiry or appeal to continue.

(2) A Committee or the Tribunal must not conduct or continue any inquiry or any appeal if the registered health practitioner or student concerned dies.

(3) The power conferred on a Committee or the Tribunal by this clause may be exercised by the Chairperson of the Committee or the member of the Tribunal presiding and, if exercised by the Chairperson or member, is taken to have been exercised by the Committee or the Tribunal."

47.30. In *HCCC v Khan* [2014] NSWCATOD 83, A/Judge Boland made orders permitting the Health Care Complaints Commission to withdraw its complaint against Dr Khan pursuant to cl. 12 of Sch. 5D to the *National Law* and dismissing the proceedings pursuant to s. 55(1)(a) of the *CAT Act*.

47.31. Dr Khan had practised as a psychiatrist between 1977 and October 2012. He did not resume practice after conditions were placed on his registration following an inquiry under s. 150 of the *National Law* in September 2012. When the Health Care Complaints Commission sought to withdraw its complaint, Dr Khan had retired and surrendered his registration.

47.32. A/Judge Boland held that cl. 12 of Sch. 5D confers a discretion on the Tribunal to determine not to conduct an inquiry, or at any time to terminate an inquiry in the circumstances set out in cl 12(1)(a) (i)-(iii), subject to being satisfied that it is not in the public interest for the matter to be determined at a substantive hearing.

47.33. In circumstances where Dr Khan was no longer registered, and in light of the fact that the Medical Council and the Health Care Complaints Commission had made it clear to him that, should he again apply for re-registration, they would consider re-instituting proceedings against him in the Tribunal, A/Judge Boland found that Dr Khan was not likely to pose a future risk to the health and safety of the public. Her Honour found that if the matter were heard by the Tribunal, other professional misconduct matters could be unnecessarily delayed and significant costs would be involved. These factors together outweighed the only potential benefit to the public of the inquiry proceeding, that is, general deterrence. A/Judge Boland also held that a senior judicial officer (as defined in the National Law) has the power, at a directions hearing, to dismiss a complaint brought by the Health Care Complaints Commission. See also *Health Care Complaints Commission v Campbell* [2014]

NSWCATOD 107 (5 September 2014); *Health Care Complaints Commission v BQB* [2014] NSWCATOD 157 (14 November 2014); *Health Care Complaints Commission v Harley* [2014] NSWCATOD 110 (8 October 2014).

48. Costs

Statutory power

48.1. Clause 13 of Schedule 5D of the *National Law* provides that a Tribunal may order the complainant, the registered health practitioner or student concerned, or any other person entitled to appear at an inquiry or appeal to pay costs "*as decided by the Tribunal."* (It may be noted that cl. 13(4) provides that this clause applies instead of s. 60 of the *CAT Act*, which provides that each party to proceedings in the Tribunal is to pay the party's own costs, unless exceptional circumstances exist.)

48.2. As there is no costs provision that applies to a Professional Standards Committee, a Professional Standards Committee cannot make an order for costs.

When costs should be ordered

48.3. As a general rule, costs of proceedings before the Tribunal "*should follow the event*": *HCCC v Philipiah* [2013] NSWCA 342 at [42].

48.4. Costs are intended to compensate a successful party. They are not intended to penalise an unsuccessful party: *Philipiah* at [44]. Costs should not be refused on the basis that the award of costs would cause hardship to the party against whom the order is made, nor is impecuniosity a basis for refusing to grant a costs order to a successful party.

48.5. Factors which may militate against the recovery by the Health Care Complaints Commission of its costs may include:

(i) Where the Commission fails to obtain findings of professional misconduct (even if it obtains findings of unsatisfactory professional conduct);

(ii) Where the Commission fails to establish all of the particulars of professional misconduct alleged; or

(iii) Where the Commission has taken procedural steps that gave rise to unnecessary expense in preparing for the hearing.

(See *Philipiah* at [42], citing *Lucire v Health Care Complaints Commission (No 2)* [2011] NSWCA 182 at [48] – [52]).

What costs should be ordered

48.6. Sample costs orders include:

> The respondent is to pay the costs of the applicant (or vice versa);
>
> The respondent is to pay the complainant's costs in an amount assessed by the Tribunal in default of agreement: *Health Care Complaints Commission v Tsouroutis* [2012] NSWMT 2.

48.7. As clause 13 of Schedule 5D provides that the Tribunal may order costs to be paid "as decided by the Tribunal", it is open to the Tribunal to specify parts of the proceedings for which costs will not be recoverable, or to specify that costs of a specified sum be made. Examples of such orders include:

> The respondent pay the Commission's costs of the proceedings before the Tribunal in the sum of $18,279.26: *Health Care Complaints Commission v Philipiah* [2013] NSWCA 342.
>
> Respondent to pay the Complainant's costs of the amended complaint, excluding the costs directly involved in the previous hearing: *Health Care Complaints Commission v Dr Annette Dao Quynh Do (No. 3)* [2013] NSWMT 16.
>
> Dr Howe is to pay the HCCC's costs of these proceedings, on the ordinary basis as defined in Sch 3 of the Civil Procedure Act 2005: *Health Care Complaints Commission v Howe* [2010] NSWMT 12.