

# 24 The disciplinary process: the Professional Conduct Committee and the Health Practitioners Disciplinary Tribunal

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Part 4 of the Health Practitioners Competence Assurance Act 2003 (the Act) sets out the complaints procedures which apply to doctors and establishes the Health Practitioners Disciplinary Tribunal (the Tribunal) which hears and determines disciplinary charges brought against doctors (and other health professionals).

One of the principal purposes of the complaints and disciplinary process is public protection; to protect the public and the profession from persons who are unfit to practise. Another purpose is to enable the profession to ensure the conduct of its members conforms to the standards generally expected of them.

Complaints about doctors may be made to the Medical Council or the Health and Disability Commissioner (HDC). The Medical Council must refer all complaints it receives to the HDC. The HDC has the power to refer complaints back to the Medical Council and if a complaint is referred back then the Council must promptly assess the complaint and consider what action should be taken to

respond to the complaint. The Medical Council may decide to refer the matter to a Professional Conduct Committee (PCC) for investigation.

The HDC must notify the Medical Council of any investigation under the HDC Act that directly involves a doctor and the Medical Council may take no action while the matter is under investigation by the HDC.

### **Professional Conduct Committees**

PCCs deal with complaints referred from the HDC and with referrals after convictions in a court of law. In addition, if the Medical Council considers information in its possession raises questions about the conduct or the safety of a doctor's practice, then it may refer those questions to a PCC. Further, if while a matter is under consideration by a PCC, the Council thinks a further matter concerning that doctor should form part of the PCC's consideration, it may refer the further matter to the committee.

A charge brought by the Director of Proceedings goes directly to the Tribunal and bypasses the PCC process.

### **Membership**

PCCs comprise three members appointed by the Medical Council. Two are doctors and one is a lay person. One member coordinates the investigation process and presides at PCC meetings. This member is usually known as the Convenor. Both the doctor and the complainant are advised of the intended composition of a PCC and have an opportunity to request changes in membership.

Usually, where possible, one of the doctors on the PCC practises in the same vocational scope of medicine or a similar vocational scope as that in which the doctor being investigated practises. The other doctor is usually selected from a more general area (for example, general practice). This ensures there is an appropriate mix of general medical knowledge and specialised knowledge on the committee.

If there are multiple complainants involving one doctor the same PCC generally deals with all the complaints.

### **Process**

The PCC may investigate however it sees fit. Care is taken to ensure the parties are informed about the progress of the investigation and that the investigation is carried out fairly and in accordance with natural justice principles.

The PCC has wide powers to receive evidence and may receive any statement, document, information or matter that in its opinion, may assist it to deal effectively with its investigation (even if the evidence would not be admissible in a court of law). The PCC has the power to call for information or documents from any person and in the event of refusal or failure without reasonable excuse to comply with a request for information (or knowingly or recklessly providing false or misleading information), that person is liable to a fine not exceeding \$10,000. In respect of patients, consent is normally obtained in writing before the PCC obtains medical records.

The PCC must give the doctor who is under investigation a reasonable opportunity to present evidence about each matter the subject of the PCC's investigation. The PCC may hear oral evidence and receive written statements and submissions from any or all of the following persons: the doctor; the doctor's employer; any person in association with whom the doctor practises; the complainant and any clinical experts. The PCC usually gives the complainant and the doctor an opportunity to meet with the Committee in person.

Complainants may bring a support person (patient advocate, family or whānau member, friend or counsellor) to a PCC meeting. This is important particularly if the complainant is disabled or if the complaint concerns sensitive issues like sexual impropriety.

The PCC usually appoints a legal assessor to advise it on matters of law, procedure, and evidence. It is also entitled to appoint an investigator to collect information and to investigate complaints. However, neither the legal assessor nor the investigator may be present during any deliberations of the PCC.

### **Recommendations and determinations**

The PCC's role is to determine whether the issues it has investigated are matters of competence or discipline and then to recommend and/or determine an appropriate course of action.

The PCC may recommend the Medical Council should assess the doctor's performance; and/or review the doctor's fitness to practise medicine; and/or review the doctor's scope of practice; and/or refer the subject matter of the investigation to the Police; and/or counsel the doctor.

The PCC may also make one of the following "determinations": that no further steps be taken in relation to the complaint or conviction; a disciplinary charge should be brought against the doctor before the Tribunal; or a complaint should be submitted to conciliation.

The PCC must make its recommendations and/or determination within 14 days after the completion of its investigation. Written notice of any recommendations and/or determination, and the reasons on which they are based, must be given to the Registrar of the Medical Council, and the doctor concerned (and in the case of a complaint, the complainant). The Medical Council must "promptly" consider any recommendations.

It is not the responsibility of the PCC to reach a view on the guilt of the practitioner if the matter is considered to be a disciplinary matter. If the PCC determines to lay a disciplinary charge then the Tribunal will determine the outcome and whether or not established conduct is professional misconduct.

If the PCC decides the complaint or conviction should be considered by the Tribunal it must frame an appropriate charge and lay it before the Tribunal in writing. Where a charge is laid against a doctor before the Tribunal, the chairperson of the Tribunal is required to convene a hearing of the Tribunal to consider the charge as soon as reasonably practicable.

If the PCC determines the complaint should be the subject of conciliation, it must appoint an independent conciliator to help those concerned to resolve the

complaint by agreement. If the complaint has not been successfully resolved by agreement, the PCC must promptly decide whether it should lay a charge against the doctor before the Tribunal, or whether to make any recommendations to the Medical Council about the doctor; or whether no further steps should be taken in relation to the complaint.

## **Health Practitioners Disciplinary Tribunal**

### **Function**

The Tribunal's principal function is to hear and determine charges brought against doctors (and other health professionals) by the Director of Proceedings or by a PCC.

### **Membership**

The Tribunal has a legal chairperson, one or more legal deputies and a panel of doctors and laypersons. The panel is maintained by the Minister of Health. For each hearing the Tribunal must comprise a legal chair and four other persons selected by the chair or deputy from the panel, three of whom must be professional peers of the doctor (ie. doctors). One member must be a lay person.

### **Procedures**

The Tribunal controls its own procedures in accordance with the Act, and has wide powers to summon witnesses and records. Refusing to attend or to cooperate, or acting in contempt are offences punishable by fine.

### **Charges**

The Tribunal must notify the doctor in writing of the charge and provide enough particulars to inform the doctor clearly of the substance of the allegations against him/her. A provisional hearing date is set between 20 and 60 working days from the date of the notice. In most cases the hearing dates are rescheduled. On occasions hearings are adjourned.

Once a doctor has been notified of a charge they must advise the Tribunal within 10 working days whether or not they wish to be heard by the Tribunal. Doctors can be heard personally or they may be (and usually are) represented by a lawyer.

### **Interim suspension**

The Tribunal has the power pending the hearing of a charge, to suspend the doctor or impose conditions on his or her practice if the Tribunal is satisfied it is necessary or desirable to protect the health or safety of the public. The Tribunal does not have to give notice to the doctor that it intends to make such an order but it must advise the doctor of the order once it has been made, the reasons for it, and their right to apply for variation or revocation of the order. The Tribunal must also serve a copy of the order on the doctor's employer, and on the Medical Council. Any application for revocation has to be heard within 10 working days after it is received by the Tribunal.

## **Public hearings**

Although the Tribunal has the power to restrict publication and hold hearings in private, the emphasis is on public hearings. The Tribunal can make various orders restricting the public nature of the hearing including ordering that the whole or part of the hearing be heard in private and suppressing the publication of the name or particulars of any person, including the doctor.

Applications for private hearings are rarely granted. Applications for name suppression are usually supported by affidavit evidence of the reasons why an order is sought and the Tribunal is required to balance the respective interests of the doctor, the complainant and the public interest before exercising its discretion.

Witnesses are given special protection if their evidence relates to a sexual matter, or relates to another matter that may require the witness to give intimate or distressing evidence. Only certain people may be present during evidence of this nature including a news media reporter, any person the witness chooses, and any person the doctor chooses. The witness may object to the presence of a person of the doctor's choice.

The Tribunal has the power to order that a witness be permitted to give their evidence from behind a screen, if necessary (Tribunal Decision No. 7/Med04/03P).

In sexual cases no person may publish the name of the complainant or any particulars likely to lead to the complainant's identification, unless the complainant is 16 years or older and the Tribunal makes an order permitting the publication. However, if the complainant is 16 years or older and applies to the Tribunal for an order and the Tribunal is satisfied the complainant understands the nature and effect of the application, the Tribunal must make an order. The Tribunal may restrict publication of any evidence relating to the sexual acts. If the Tribunal makes a privacy order any person can apply for it to be revoked, including representatives of the media.

## **Procedures**

The Tribunal can regulate its own procedures however the procedures must accord with the rules of natural justice. Each party must be given a fair opportunity to put their evidence and call relevant witnesses. The Tribunal may receive as evidence any statement, document, information, or matter that may help it deal effectively with the matters before it, whether or not it would be admissible as evidence in a court of law.

Witnesses usually read out their evidence from a written statement. They are then cross examined by opposing legal counsel and questioned by members of the Tribunal. The evidence is recorded by a stenographer. The hearings are either heard in the Tribunal's hearing rooms in Wellington or in the closest major centre to the events in suitable conference venues where there are facilities for hearing and waiting rooms.

The prosecution has the burden of proving the charge. It must prove the doctor's guilt. The Tribunal has to be satisfied to the civil standard of proof ("on the balance of probabilities" rather than "beyond reasonable doubt") that a doctor is

guilty of the charge, although the standard of proof is applied flexibly depending on the seriousness of the allegations (*Z v Dental CAC* ([2008] NZSC 55)).

### **Findings**

The Tribunal may find that the doctor

- Has been guilty of professional misconduct because of an act or omission that amounted to malpractice or negligence in relation to the doctor's registered scope of practice when the conduct occurred; or
- Has been guilty of professional misconduct because of an act or omission that has brought or was likely to bring discredit to the medical profession; or
- Has been convicted of an offence that reflects adversely on his or her fitness to practice (convictions for offences against relevant health acts including Contraception, Sterilisation and Abortion, Coroners, Medicines, the Injury Prevention, Rehabilitation and Compensation, and Misuse of Drugs; or for an offence punishable by a term of three months imprisonment or longer); or
- Has practised his or her profession while not holding a current practising certificate; or
- Has performed a health service without being permitted to perform that service by his or her scope of practice; or
- Has failed to observe any conditions included in his or her scope of practice; or
- Has breached a penalty order of the Tribunal.

The charge of professional misconduct has been part of New Zealand's medical disciplinary regime for many years.

A two step process is involved in testing what constitutes professional misconduct under the Act.

The first step involves an objective assessment of whether the doctor's acts or omissions in relation to their practice can reasonably be regarded as constituting malpractice or negligence; or otherwise meets the standard of having brought or was likely to bring discredit to the profession. The second step (often referred to as 'threshold') involves the Tribunal being satisfied the doctor's acts or omissions require a disciplinary sanction for the purposes of protecting the public or maintaining professional standards or punishing the doctor.

Malpractice involves immoral, illegal or unethical conduct or neglect of professional duty (improper professional conduct). Negligence generally involves breach of a doctor's duty in their professional setting. Bringing discredit to the profession involves bringing harm to the reputation of the profession and involves an objective assessment of whether reasonable members of the public, informed and with knowledge of all the factual circumstances, could reasonably conclude that the reputation and good standing of the profession was lowered by the behaviour of the doctor concerned.

The test recognises that not all acts or omissions which constitute a failure to adhere to the standards expected of a medical practitioner will constitute professional misconduct.



deliberations now rely on both public as well as professional opinion; and it is that mix of opinion which sets the standard.

The Tribunal usually issues a fully reasoned written decision once it has determined the charge. The Tribunal posts its decision on its website ([www.hpdt.org.nz](http://www.hpdt.org.nz)).

### **Penalties**

The penalties available to the Tribunal if a doctor is found guilty are cancellation of the doctor's registration; suspension of the doctor for up to three years; the imposition of conditions on practice for up to three years; censure; a fine of up to \$30,000; and the payment of costs and expenses incurred by other parties, including the HDC, the PCC (for its investigation and the prosecution) the Tribunal (hearing costs).

The Tribunal cannot impose a fine in dealing with an offence for which the doctor has been convicted by a court. In all other cases the full range of penalties (including cancellation of registration) is available.

There is no power to order costs to be paid to a doctor acquitted of a charge.

The Tribunal has no power to award compensation or costs to a complainant.

After cancelling the doctor's registration, the Tribunal may impose one or more conditions which the doctor must satisfy before applying for registration again. The conditions may include any or all of the following; a condition requiring the doctor to undertake a specified course of education or training; to undergo a medical examination and treatment or psychological or psychiatric examination, counselling or therapy; to attend a course of treatment or therapy for alcohol or drug abuse (the doctor must consent to these); and any other condition designed to address the matter that gave rise to the cancellation of the doctor's registration.

### **Appeals**

Appeals must be filed within 20 working days from the date of the Tribunal's decision. Unless a Court orders otherwise, the penalties imposed by the Tribunal stay in force pending the outcome of an appeal. Appeals against decisions of the Tribunal are to the High Court, whose decision is final on all matters except points of law, which may be appealed to the Court of Appeal. Instead of determining an appeal, the High Court may direct the Tribunal to reconsider the whole or any part of its decision or order, and when reconsidering, the Tribunal must take the Court's reasons into account and give effect to the Court's directions.

The Tribunal's decision whether a doctor's conduct is negligent, malpractice or brings the profession into discredit is assessed on appeal on the basis of whether the Court considers the decision is wrong. Deference to the Tribunal's decision may be appropriate where the Tribunal has a particular advantage such as medical expertise or an assessment of credibility of witnesses. The Tribunal's decision whether the conduct justifies a finding of guilt of professional misconduct, being an exercise of discretion entrusted to the Tribunal, is assessed on the basis of whether or not the decision involved an error of law, or the taking into account of irrelevant considerations, failing to take into account relevant considerations or whether there was a clear failure by the Tribunal to balance properly the relevant considerations (*E v Director of Proceedings & Anon* (High Court, 11 June 2008, Ronald Young J)). Appeals are generally dealt with on the papers.

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