



July 2014

## **Principles for the assessment and management of complaints and notifications**

### **Introduction**

The Council's functions, powers and responsibilities as a regulator are specified in the Health Practitioners Competence Assurance Act 2003 (HPCAA). Parts 3 and 4 of the Act specify powers and responsibilities in regard to competence and conduct matters respectively.

The purpose of these principles is to provide a framework for good decision-making about complaints and notifications assessed and managed by the Council. The principles are not intended to cover every specific scenario but rather provide guidance on how complaints should be assessed and managed. The framework applies to the decisions of the Complaints Triage Team (CTT) and of Council.

This is an accountability document for the Medical Council of New Zealand (the Council). It should be read in conjunction with other accountability documents including the Council's business plan and the Protocol on Decision-making Principles, both of which include principles relevant to this topic.

Each principle is supported by commentary on its application.

### **Current relevant principles**

The Council has approved principles in its business plan and in its protocol for decision-making.

#### *Business Plan*

The relevant principles are:

- In undertaking all its functions, Council will focus primarily on achieving its purpose of protecting the health and safety of the public.
- Council will be accountable for its decisions to the public, Parliament and the Minister of Health and, in relation to the efficient use of funds to achieve its purpose under the HPCAA, to the profession.
- Council will make its decisions as an independent regulator of the medical profession free of influence from external bodies.
- Council will operate as a right touch regulator, ensuring the most effective, efficient, consistent and proportionate regulation for the profession.

- Council will consider whether there is a risk of harm or risk of serious harm to the public when managing doctors with competence, conduct and/or health concerns.
- Council will work in a collaborative and constructive manner with all key stakeholders and continue to foster mutual trust and respect in all our relationships.
- Council will aim for excellence in everything that we do and will focus on continually improving our performance.
- In all decisions, Council will honour the principles of natural justice.
- Council will set standards that signify a high and readily attainable level of medical practice.

### Protocol for decision-making

The relevant principles are:

- **Accountability:**  
The Council is accountable for its decisions to the public, the Minister of Health and Parliament and, in relation to the efficient use of funds to achieve its purpose under the HPCAA, to the profession. This means that the Council will consider:
  - Whether the decision is consistent with its principal purpose – to protect the health and safety of the public.
  - Whether the decision is consistent with its functions under the HPCAA ie, setting standards, ensuring competence, promoting education and training, promoting public awareness, etc.
- **Trust:**  
The Council will consider trust in key relationships when deciding governance and quasi-judicial matters. The key relationships are:
  - Between the profession and the public.
  - Between the public and the Council.
  - Between the profession and the Council.
 The Council will consider:
  - would the decision improve the trust in one or more of these relationships?
  - What would be the impact on the other relationship(s)?
- **Independence:**
  - The independence of Council members is important to ensure the integrity of Council's decisions. The Council does not represent the profession and must be free from influence from external bodies. Council members will decide governance and quasi-judicial matters independently of any stakeholder interest, personal interest or relationship and professional interest or relationship. (Please also refer to the Council's Policy on conflict of interest).
- **Inquiry:**
  - Council will inquire into and assess all relevant and available information in deciding governance and quasi-judicial matters. This would include examining critically all assumptions to determine opinion and fact.
- **Consistency:**
  - Council aims to ensure good decisions over time by giving consideration to earlier decisions when deciding governance and quasi-judicial matters. Council acknowledges that regulatory standards change over time and decisions will always be based on the standards existing at that time.
- **Cultural competence:**
  - Council recognises that doctors in New Zealand work with a population that is culturally diverse and therefore cross-cultural doctor-patient and doctor-clinical team interactions are common. Council will itself demonstrate and continue to

promote awareness amongst all doctors of cultural diversity and the ability to function effectively, and respectfully, when working with people of different cultural backgrounds.

- HPCAA:
  - The Council will always act consistent with the purpose, principles and specific enabling provisions of the HPCAA.
- Principles of natural justice:
  - The Council will apply the specific provisions of the HPCAA regarding providing relevant information and giving reasonable opportunity to make written submissions and be heard.
  - Proceedings of Council will be conducted so that they are fair to all parties.
  - The Council will only take into account relevant considerations and extenuating circumstances and ignore irrelevant considerations.
  - All members of Council should act without bias (refer to Council's Policy on conflict of interest) and act in good faith.

## **Principles for assessment and management of complaints and notifications**

### *Principle 1 – Decision-maker responsibilities*

*The Council is committed to exercising its powers and meeting its responsibilities in an open and accountable way.*

The Council aims to act in an open and accountable way in all its dealings with doctors and their counsel, complainants, and stakeholders such as District Health Boards (DHBs), private hospitals, Primary Health Organisations (PHOs) etc. This includes:

- Assessing information through the CTT.
- Ensuring the doctor has full information to respond to any complaint or notification.
- Actively sharing information with stakeholders to ensure protection of the public.
- Clearly articulating the reasons for all decisions.

The Council will respect the rights to confidentiality and privacy of doctors however the over-riding principle must always be the protection of public health and safety. All orders of the Council, including conditions and suspensions, will be available to the public through the Council's website and public web register. The Council's website will also link doctors with any Health Practitioner Disciplinary Tribunal (HPDT) Order that is specific to that doctor, subject to any suppression orders of the HPDT or any other Court.

Voluntary undertakings will only be used in competence and conduct cases as a temporary intervention to manage any immediate risk of harm or serious harm. Voluntary undertakings will not be available to the public.

To properly exercise powers and responsibilities under the HPCAA, members of CTT and Council should be familiar with all relevant Council principles, terms of reference for the CTT, Council's standards where they relate to a specific complaint or notification, and the principles of natural justice.

Where further information is required to assist the Council in making a decision, CTT will consider inquiring further through the mechanism of a preliminary competence inquiry (PCI). In all cases where a PCI is undertaken, the case and information from the PCI will be considered by Council.

If a complaint is being investigated by the Health and Disability Commissioner (HDC), the Council will still consider exercising its powers under Part 3 and / or section 69 of the HPCAA. If a complaint is being investigated by the Coroner, Police, Privacy Commissioner or other outside organisation, the Council will still consider the complaint and either exercise or defer any of its powers under the HPCAA as it deems appropriate.

Principle 2 – specific complaint or notification

*Where a complaint or notification raises questions of competence or conduct, the focus of the Council must be on the specific professional practice of the doctor that may be a risk of harm or a risk of serious harm to the public.*

The Council will initially assess whether there is a risk of harm or a risk of serious harm to the public<sup>1</sup>. The Council will take active steps to obtain information to inform a decision on risk. Where such risk is identified, the Council's first consideration will be to effectively manage that risk so as to protect the public. This will include the following actions:

- Where the doctor is employed or contracted with a DHB, private hospital, PHO or other service provider, the Council will work collaboratively with that organisation to ensure immediate steps to manage any risk are implemented. Whether a look-back of a doctor's practise and patient records is required will be the decision of that organisation.
- The Council will liaise immediately with the doctor in such cases to discuss voluntary restrictions on practice or possible ceasing of practice (or alternatively, to issue a section 35 Notice under the HPCAA). Any agreement implemented with the doctor will be shared with the relevant DHB, private hospital, PHO or other service provider.

Whilst the Council will work collaboratively with a DHB, private hospital, PHO or other health service provider, it will always consider taking its own appropriate action under the HPCAA. Council will always retain its independence as a medical regulator.

In deciding what actions are appropriate for any case, the doctor's scope of practice and the context of his/her working environment should be considered. This means that doctors working in solo practise may have additional restrictions compared to doctors working within a team environment.

The CTT and Council will be advised of all cases where risk of harm or risk of serious harm has been identified.

The Council will communicate with the person complaining or notifying the Council and any DHB, private hospital, PHO or other health service provider in accordance with the relevant MOU and Council's communications protocol.

Where the complaint falls within the jurisdiction of the Health and Disability Commissioner (HDC), the complaint will be forwarded to the HDC. The Council will maintain close liaison with the HDC to determine what actions, if any, the HDC intends to take regarding a specific complaint.

The Council will consider action under Part 3 of the HPCAA if it appears that the complaint raises concerns about a doctor's competence or health.

Where the HDC is investigating a complaint which is in the nature of conduct, Council may take action under section 69 of the HPCAA.

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<sup>1</sup> Refer also Principle 3

### Principle 3 – the seriousness of the complaint or notification

*The Council will prioritise complaints and notifications to ensure that those cases where there is a higher risk to public health and safety are managed first. If there is a likelihood of an ongoing risk, the Council will take immediate steps to ensure public health and safety is protected.*

When assessing the seriousness of competence and conduct complaints and notifications, consideration needs to be given to the Council's definitions of risk of harm and risk of serious harm.

Risk of harm may be indicated by:

- a pattern of practice over a period of time that suggests the doctor's practice of medicine may not meet the required standard of competence; or
- a single incident that demonstrates a significant departure from accepted standards of medical practice; or
- recognised poor performance where local interventions have failed – this does not exclude notification of serious concerns where internal review or audit is inaccessible or unavailable to the person with the concern; or criminal offending; or
- professional isolation with declining standards that become apparent.

Risk of serious harm may be indicated by:

- an individual patient may be seriously harmed by the doctor; or
- the doctor may pose a continued threat to more than one patient and as such the harm is collectively considered 'serious'; or
- there is sufficient evidence to suggest that the alleged criminal offending is of such a nature that the doctor poses a risk of harm to one or more members of the public.

Where a complaint or notification is received that alleges criminal, sexual or drug offending by a doctor, the Council will consider this as a risk of serious harm until evidence can be provided that mitigates this.

Given the purpose and functions of the Council under the HPCAA, there does not have to be patient harm or an adverse outcome for action to be taken. It is sufficient for the Council to reasonably believe that there is a risk of harm or of serious harm to the public.

Where a risk of serious harm is identified, Council will be given the opportunity to make orders under section 39 or 69, irrespective of what other action the Council may have already taken.

### Principle 4 – practising medicine

*The Council's primary purpose is to protect the health and safety of the public. When assessing complaints and notifications, the focus of the Council must be on doctors who engage in behaviour that indicates concerns regarding their competence or conduct.*

The Council defines the practice of medicine as including any of the following:

- advertising, holding out to the public, or representing in any manner that one is authorised to practise medicine in New Zealand.
- signing any medical certificate required for statutory purposes such as death and cremation certificates

- prescribing medicines, the sale or supply of which is restricted by law to prescription by medical practitioners or designated prescribers
- assessing, diagnosing, treating, reporting or giving advice in a medical capacity, using the knowledge, skills, attitudes and competence initially attained for the MBChB degree (or equivalent) and built upon in postgraduate and continuing medical education (CME) wherever there could be an issue of public safety.

### Notes

1. "Practice" in this context goes wider than clinical medicine to include teaching, research, medical or health management, in hospitals, clinics, general practices and community and institutional contexts, whether paid or voluntary.
2. Emergency care is so much a part of a doctor's professional ethic that in the opinion of the Council a qualified doctor who is not registered may render medical or surgical aid to any person in an emergency when a registered doctor is unavailable.

The Council's focus is on matters related to a doctor's competence or conduct in the practice of medicine. This generally means consideration of matters in the workplace (whether in DHBs, private hospitals, the community or otherwise) where health consumers may be put at risk. The Council does not seek to regulate the private behaviour of doctors unless the conduct "raises one or more questions about the appropriateness of the conduct or the safety of the practice of a health practitioner" or they are unable to practise safely and competently.

The Council will not respond to matters that are of an industrial or employer-related nature, unless they relate clearly to the practise of medicine.

### Principle 5 – actions taken by the Council must be 'right touch'

*The actions taken by the Council to protect the health and safety of the public must be proportionate to the actual or perceived risk of harm or risk of serious harm. The Council must assess the risk to the public and exercise its powers at the appropriate level necessary to achieve a safe outcome for the public.*

The Council will exercise its powers with the purpose of protecting public health and safety rather than punishing the doctor. The Council does not have a punitive role<sup>2</sup> and decisions and actions must be proportionate to the risk, taking into account the seriousness of the competence or conduct issues raised. The lowest possible intervention that effectively protects the health and safety of the public should be the aim of the Council.

### Principle 6 - Health issues may explain, but should not excuse, criminal or other behaviour or poor performance that has or may harm the public

The Council may receive some complaints and/or notifications related to competence or conduct but after assessment/investigation they are deemed to be due to an underlying health issue. A decision on how such cases are managed should be taken at the governance level of the Council. Council should be provided with the range of relevant options ie, a competence review, a conduct inquiry, and/or a referral to health for assessment.

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<sup>2</sup> Although the Council does not have a punitive role, it may establish a PCC to investigate conduct, and the PCC may lay disciplinary charges before the HPDT.

Complaints may be received by the Council through several channels. Where there are potential health issues and competence or conduct issues, the information will be provided to both the Health Manager and the Professional Standards Manager. The main factors are:

- Where the doctor has been convicted of a crime.
- Where a health consumer may have been affected through the possible negligence, recklessness or deliberate action of the doctor.
- Where there is an alleged breach of the Council's published standards.

If the Council decides to manage the complaint and/or notification as a health concern only, the Council must be mindful of the original complaint and/or notification and respond to that complainant/notifier appropriately.

Council will also turn its mind to whether a doctor should practise without restriction if s/he has been cleared by Health. Where there has been corresponding competence and/or conduct concerns, Council will consider restrictions on a doctor's practise under the competence and conduct provisions of the HPCAA.

#### Principle 7 – considering trends across multiple complaints

*Where The Council has received multiple complaints, it will consider any overall trends identified in the complaints prior to determining what action is appropriate.*

*Council will follow this process irrespective of whether the HDC has investigated one or more of the complaints or decided that there has or has not been a breach of the Code of Health and Disability Services Consumers' Rights (the Code).*

There is increasing research evidence which shows that a doctor who receives a complaint is significantly more likely to receive further complaints in his/her practice, compared with doctors that have not received a complaint. Complaints are one indicator that a doctor may not be practising at the appropriate standards of competence or conduct.

#### Principle 8 – anonymous complaints and notifications

*The Council will use its best endeavours to encourage complainants/notifiers to formalise their complaints/notifications. The Council will, where it identifies other possible sources of information, actively try and obtain the relevant information. Doctors should be provided an opportunity to comment on an anonymous complaint unless it is considered frivolous or vexatious.*

An anonymous complaint/notification may be made for various reasons, including that the complainant/notifier is scared of retribution. However any complaint/notification may raise valid concerns about a doctor. Therefore the Council should inquire into any anonymous complaint/notification to assess whether further investigation is appropriate.

Any decision to undertake a formal investigation, such as a PCC or PAC, following receipt of an anonymous complaint/notification must be made by the governance members of the Council.

#### Principle 9 – Monitoring and enforcement of conditions and voluntary undertakings

*For the Council to adequately protect public health and safety, any conditions or voluntary undertakings must be monitored and enforced.*

All conditions or voluntary undertakings imposed due to a risk of harm or risk of serious harm must be monitored by the Council. The Council may rely on supervisors or other organisations to undertake monitoring of the doctor's practice. Where the Council does delegate monitoring, the Council will expect regular reports from the supervisor or organisation. These expectations will be agreed by the Council and the supervisor on a case by case basis and recorded in EDRMS.

Monitoring provides confidence to the Council that risk is being effectively managed and increases the trust of the public that the Council is meeting its regulatory purpose.

Where non-compliance or partial compliance is identified, the Council needs to consider whether further action, including considering the conduct provisions of the HPCAA, is necessary to protect public health and safety. This may include suspending the doctor from practice. Financial considerations, such as whether the doctor needs to continue working to support him/her should not influence the Council's decision. Protection of the health and safety of the public must be the over-riding consideration of the Council.

*Principle 10 – ethical responsibilities to notify patients regarding access to personal health records*

*The Council may establish a PCC to investigate the conduct of a doctor. In the course of such investigation the PCC may access individual patient records. There is no obligation on the PCC to advise the patients that their records are being accessed and may be used as evidence in a prosecution, if any, or a doctor.*

First; a PCC has the power to require information that would otherwise be protected by the Privacy Act. This means that consent is not needed for the PCC to review patients' records.

Secondly; the purpose of reviewing patient notes in investigations is to consider the conduct of the doctor. It is not intended as a patient consultation.

A related issue for consideration by Council is what action should be taken where a PCC identifies a serious departure from expected standards, when reviewing a patient's notes and that there may be a current risk for the patient.

In these situations, the PCC should advise the Medical Adviser and Registrar of the Council of their specific concerns. The Medical Adviser and Registrar will then consider what action, if any, it is appropriate for the Council to take. This may include advising the relevant DHB, private hospital, PHO or other relevant stakeholder of the information.

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