



Health Professional Councils Authority



Dealing with complaints

A guide for health service providers

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The following paper explains how the NSW regulatory authorities deal with notifications and complaints about health service providers in NSW. It is designed to provide an overview of the processes and powers of the Health Care Complaints Commission and the health professional Councils when handling complaints.

Introduction

The Health Care Complaints Commission

The Health Care Complaints Commission acts to protect public health and safety by dealing with complaints about health service providers in NSW. This includes complaints about:

- **health organisations**, such as public and private hospitals, community health services, medical practices, day procedure centres. The Commission manages these complaints; the NSW health professional Councils do not have a role in managing these complaints.
- **registered health practitioners**, such as medical practitioners, nurses and midwives, dental practitioners, psychologists, physiotherapists. Both the Commission and the relevant NSW health profession Council have roles in managing these notifications / complaints.
- **unregistered health practitioners**, such as dieticians, social workers, massage therapists, naturopaths. The Commission manages these complaints; the NSW health professional Councils do not have a role in managing these complaints.

Please note

The term *health service provider* is used in this document to describe both health organisations and individual health practitioners.

The Commission is an independent body that was established under the *Health Care Complaints Act 1993* [HCC Act]. The Act defines the scope of the Commission's work, which is to:

- receive and assess complaints relating to health service providers in NSW
- resolve or assist in the resolution of complaints
- investigate serious complaints that raise significant issues of public health and safety
- issue public statements and prohibition orders against unregistered health practitioners
- prosecute serious complaints against registered health practitioners.

The Commission is committed to acting fairly to all parties involved in a complaint.

The following paper summarises the relevant provisions set out in the HCC Act, the *Health Practitioner Regulation National Law (NSW)* [National Law], as well as other relevant legislation.

The NSW health professional Councils and the Health Professional Councils Authority

Since 1 July 2010, NSW health professionals have been registered under the National Registration and Accreditation Scheme. However, NSW retained the system in place prior to 1 July 2010 to manage conduct, performance and health matters concerning health professionals practising in NSW. Concerns about the practice of registered health professionals in NSW are managed under a co-regulatory arrangement involving the Health Care Complaints Commission and health professional Councils (formerly known as boards)..

Registration and Accreditation

From 1 July 2010, responsibility for the registration of health practitioners in Australia, including in NSW, passed from the former NSW registration boards to the National Boards established under the National Law. A registered practitioner is registered to practise anywhere in Australia and is subject to the same standards and requirements Australia-wide.

The National Boards are supported by the Australian Health Practitioner Regulation Agency (AHPRA) and are responsible for registering health practitioners and for deciding the requirements for registration. The National Boards develop and recommend standards, develop and approve codes and guidelines for their respective health professions and approve accredited programs of study which provide the necessary qualifications for registration. In all states and territories, other than NSW and as of July 2014 Queensland, the Boards also manage notifications and complaints about the conduct, health and performance of registered practitioners and the health and conduct of registered students.

The fourteen health professional Councils in NSW are:

- Aboriginal and Torres Strait Islander Health Practice Council of NSW
- Chinese Medicine Council of NSW
- Chiropractic Council of NSW
- Dental Council of NSW
- Medical Council of NSW
- Medical Radiation Practice Council of NSW
- Nursing & Midwifery Council of NSW
- Occupational Therapy Council of NSW
- Optometry Council of NSW
- Osteopathy Council of NSW
- Pharmacy Council of NSW
- Physiotherapy Council of NSW
- Podiatry Council of NSW
- Psychology Council of NSW

The primary responsibility of the Councils is the protection of the health and safety of the public. The Councils and the Commission consult on the management and actions to be taken in relation to all notifications and complaints received about the service of registered health practitioners in NSW.

Role of the Health Professional Councils Authority

The Health Professional Councils Authority (HPCA) provides secretariat and corporate support services to the health professional Councils. These services include shared administrative, financial, legal and policy services to assist Councils to meet their statutory responsibilities.

Each Council is supported directly by a number of HPCA staff and each Council has (or shares) an Executive Officer.

The HPCA has officers and business premises located at two different locations. Staff supporting the Medical Council are located at Gladesville (in the offices of the former NSW Medical Board on the former Gladesville Hospital site). Staff supporting the other professions are located on Level 6, 477 Pitt Street, Haymarket.

The Commission complaint process - Overview



The Commission deals with complaints about both individual health practitioners and health organisations. Complaints about individual practitioners can concern registered practitioners, such as medical practitioners, nurses and dental practitioners, or unregistered health practitioners, such as naturopaths, massage therapists, dieticians and counsellors.

Following the receipt of a complaint, all complaints are assessed. When assessing a complaint, the Commission may seek a response from the health service provider. Where clinical issues are involved, the Commission may obtain health records and seek advice from an internal medical or nursing adviser. The Commission assesses all relevant information. Where the complaint concerns a registered practitioner, the Commission must consult with the relevant professional Council.

The possible outcomes of an assessment are:

- The Commission can **refer** a complaint about a registered practitioner / student **to the relevant professional Council** [1] to consider taking action such as counselling, dealing with a complaint by inquiry at a meeting of Council, performance management or action regarding impairment.
- The Commission can **discontinue** [2] dealing with a complaint for many reasons – for example, the time that has passed since the incident makes it difficult to investigate the complaint effectively.
- In some cases, it may be appropriate to **refer** the complaint **to another body** [3] to be dealt with by it. This can include referral to the Director-General of NSW Health, where the complaint alleges a breach of legislation such as the *Poisons and Therapeutic Goods Act*; referral to Medicare Australia for alleged over-servicing; or to the Commonwealth Department of Health and Ageing for complaints about conditions in nursing homes.
- Some complaints may be **resolved during the assessment process** [4], where the information included in the response from the health service provider addresses all the issues to the satisfaction of the complainant. Where there are more complex matters, complaints can be referred for **resolution** [5]. The Commission provides two resolution options, either a Resolution Officer assists the parties to resolve any outstanding issues, or an independent conciliator facilitates a conciliation meeting.
- The Commission refers complaints about individual practitioners for **formal investigation** [6] where, if substantiated, the complaint provides grounds for disciplinary action or involves gross negligence. Complaints about health organisations are investigated if they raise a significant issue of public health or safety.
- The Commission can refer a minor complaint about a public health organisation back to the organisation to try to **resolve** the matter **locally** [7] with the complainant, if the organisation agrees to this.

Where the Commission has **investigated a complaint**, it may:

- **Issue a prohibition order and/or public statement** [8] about an unregistered health practitioner. A prohibition order can ban or limit the practitioner from providing health services. The practitioner must advise potential clients of the order prior to treating them. A breach of the order is a criminal offence. The Commission can also issue a public statement.
- **Refer** the complaint **to a professional Council** [9] to take action. The professional Council may assess registered practitioners for performance or impairment, conduct an inquiry at a Council meeting or may counsel them about their conduct.
- **Refer** the complaint **to the Commission's Director of Proceedings** [10] who determines whether a complaint against a registered health practitioner should be prosecuted before a disciplinary body. If the Director of Proceedings determines that a matter does not meet the threshold for prosecution, it is **referred back to the Commissioner** to consider other appropriate action. If a decision is made to prosecute, a complaint about unsatisfactory professional conduct will usually be prosecuted before a Professional Standards Committee, while a complaint about

professional misconduct will be prosecuted before the NSW Civil and Administrative Tribunal.

- **Make comments [11].** In the case of a registered health practitioner, the Commission makes comments where there was poor care or treatment, but not to an extent that would justify referring the matter to the Director of Proceedings. Comments can also be made to an unregistered health practitioner. Comments are made to a health organisation when the Commission finds that the provision of health care was inadequate, but the organisation has already taken measures to prevent a similar occurrence in the future. In such cases the Commission does not make recommendations.
- **Refer the matter to the Director of Public Prosecutions [12]** to consider criminal charges.
- **Terminate** the complaint (take no further action) [13] where the investigation has found no or insufficient evidence of deficient conduct, care or treatment.
- **Make recommendations.** [14] Recommendations are made to a health organisation where an investigation finds that there has been poor health service delivery and identifies systemic improvements that should be made. The Commission provides its recommendations to the relevant health organisation as well as to the Director-General of NSW Health and the Clinical Excellence Commission, so that they may consider implementing the recommendations on a broader basis. The Commission follows up the health organisation's implementation of its recommendations. If the Commission is not satisfied with the implementation, it may, ultimately, make a special report to Parliament.

Following prosecution of a registered health practitioner:

- A Professional Standards Committee or Tribunal may find the complaint proven [15], and it can **reprimand, fine and/or impose conditions** on the practitioner. Only a Tribunal can **suspend or cancel** a practitioner's registration. The Tribunal may also issue a prohibition order banning the practitioner from practising in another area of health service – for example, a psychiatrist whose registration has been cancelled can be banned from working as a counsellor.
- The disciplinary body can **dismiss** a complaint it finds not proven.

Inquiries, notifications and complaints received

Not all inquiries to the Commission are complaints. The Commission runs an Inquiry Service, which usually is the first point of contact for people. Often, inquiries can be dealt with in a less formal, more rapid way.

Inquiries

The Commission received 10,934 inquiries in 2012-13. Most of these inquiries were made by telephone and were resolved by providing information to the caller, for example, clarifying practices in relation to accessing local health services and what to expect from services. Callers were advised about strategies to enable them to sort out their concerns directly with the provider.

Sometimes, when a person contacts the Commission's Inquiry Service to discuss their issues, a phone call to the health service provider may be sufficient to get the required information and there is no need to lodge a complaint. The caller may be given the contact details of the relevant health service provider so they can try to resolve their concerns directly with them. In some cases, the Inquiry Officer will call the health service provider to pass on the concerns directly and request that contact be made with the caller. There will be no further involvement of the Commission.

Notifications

Notifications about registered health practitioners

Mandatory reporting

Under sections 140-143 of the National Law, health practitioners, employers and education providers are required to report notifiable conduct of a registered health practitioner, such as where the practitioner has:

- (a) practised their profession while intoxicated by alcohol or drugs; or
- (b) engaged in sexual misconduct in connection with the practice of their profession; or
- (c) placed the public at risk of substantial harm in their practice of the profession because the practitioner has an impairment; or
- (d) placed the public at risk of harm because the practitioner has practised the profession in a way that constitutes a significant departure from accepted professional standards.

Notifications of mandatory reports must be made to the Australian Health Practitioner Regulation Agency (AHPRA, www.ahpra.gov.au). AHPRA forwards the notifications to the relevant health professional Council, which will consult with the Commission. Since June 2012, mandatory notifications relating to practitioners with a primary place of practice in NSW are automatically deemed to be complaints and will be assessed by the Health Care Complaints Commission.

More detailed information regarding mandatory notifications can be found on the Commission's website at www.hccc.nsw.gov.au. Each National Board has also issued guidelines on mandatory notifications that can be accessed on the relevant Board website through www.ahpra.gov.au.

Voluntary notifications

There may also be situations which may not reach the threshold for a mandatory notification to AHPRA, but are nevertheless considered serious enough to warrant making a voluntary notification.

Voluntary notifications can relate to issues of health, performance or conduct of a health practitioner, but are not of such a serious nature as to require a mandatory notification. Notifications can be made to the relevant professional Council, AHPRA or the Health Care

Complaints Commission. As part of the co-regulatory arrangements in NSW, the Council and the Commission consult in order to determine the most appropriate way to deal with such notifications.

A registered health practitioner can also self-notify to the relevant professional Council about health issues. The Council acts on self-notifications in the same way as any other voluntary notification.

Complaints

The HCC Act requires that a formal complaint to the Commission needs to be in writing. During 2012-13, the Commission received 4,554 written complaints, of which 2,821 (61.5%) were about registered and previously registered health practitioners, 126 (2.8%) about unregistered or unknown health practitioners, and 1,607 (35.3%) about health organisations.

Who can make a complaint to the Commission?

As set out in section 8 of the HCC Act, anyone can make a complaint to the Health Care Complaints Commission. This includes:

- the patient who received the health service
- a parent or guardian
- a friend or family member
- a health service provider
- a member of Parliament
- the Director-General of NSW Health
- The Minister for Health.

Where an individual health practitioner is employed by a health service, the health service can make a complaint about this person to the Commission.

However, where the health service has investigated a matter internally and is satisfied that there has been no misconduct, although the patient or family remain dissatisfied, the health service should advise the patient or family to complain, or give their contact details to the Commission which will try to contact the patient who received the health service and ask them whether they wish to make a complaint.

What can be complained about?

In general, complaints can be made about:

- the professional conduct of a health practitioner, including any alleged breaches of the code of conduct for unregistered health practitioners
- a health service that affects, or is likely to affect, the clinical management or care of a patient.

In relation to registered health practitioners, complaints can also be made about:

- impairment
- lack of competence
- criminal conviction or finding
- not being a suitable person to hold registration in a relevant health profession.

How can a complaint be made?

Complaints to the Commission must be in writing. Persons requiring assistance to put their complaint in writing can contact the Commission's Inquiry Service who can help them.

Complaints can also be made in other languages. Complaint forms in 20 languages can be downloaded from the Commission's website at <http://www.hccc.nsw.gov.au>.

Complaints about registered health practitioners can also be made to one of the health professional Councils or AHPRA. Councils have an obligation to notify the Commission of any complaints they receive and vice versa (sections 10 and 11 of the HCC Act). AHPRA forwards all complaints to the HCCC.

Complaints about registered health practitioners

Co-regulatory arrangements between the Commission and the NSW Health Professional Councils

Complaints about registered health practitioners can be made to the Commission, the Australian Health Practitioner Regulation Agency, or the NSW Councils.

The Councils and the Commission are required to notify each other as soon as practicable after receiving a complaint.

The Councils and the Commission are required to consult on complaints in order to determine what course of action to take in relation to the complaint.

Where the Commission has assessed a complaint about a registered health practitioner, it must consult with the relevant Council about the most appropriate way to deal with the complaint (section 12 of the HCC Act). Where the Commission and the Council disagree on the appropriate outcome, section 13 of the HCC Act provides that the highest call wins. This means that if one body believes it should be investigated, then it must be investigated. Also, if neither body believes it should be investigated, but one body believes it should be referred to the relevant Council for their management, then it must be referred to the Council.

Section 13 (2A) of the HCC Act states that associated complaints that may have been discontinued earlier can be re-opened at this stage, investigated, or referred to the Council.

The aim of the legislation is to enable the Commission and the Councils to co-regulate registered health practitioners. The legislation allows complete information sharing between the bodies, and both bodies may require complaints be assessed for investigation, thus creating a balanced co-regulation on all decisions which may result in disciplinary action (see Note to section 15 of the HCC Act).

The Councils' role in NSW

Following consultation, one of the options available is to refer a complaint to a Council to manage through a conduct, performance or health pathway. Once a complaint is referred to a Council, the Commission ceases to be involved in its management. A Council can however request that a complaint be reassessed at some future point in time, if for example following further information, the Council is of the view that the matter requires investigation by the Commission.

Councils' immediate action powers

Each Council has the capacity to take interim action to suspend a practitioner's registration or impose conditions in urgent circumstances. A Council must exercise those powers if it is satisfied that such action is appropriate for the protection of the health or safety of a person or it is otherwise in the public interest.

Any immediate action taken by a Council is an interim measure only. When a Council takes immediate action, the matter must be referred to the Commission for consultation and if appropriate investigation

Councils have exercised their immediate action power in a variety of circumstances, including when a practitioner:

Please note

When notified of a complaint relating to an incident that is currently subject of an Root Cause Analysis (RCA), it is not sufficient to inform the Commission that the RCA report will be provided once the investigation has been finalised.

An RCA report is generally not an appropriate response to a complaint that was lodged with the Commission, as an RCA investigation has a systemic focus, and the complaint may raise completely different issues.

- has been charged with serious criminal matters (particularly if arising within their professional practice)
- suffers from a serious impairment and demonstrates little or no insight into the extent of his/her problem and the risk posed to the public
- is the subject of complaints or investigation where serious concerns have been raised in relation to competency or performance
- has breached conditions imposed on his/her registration.

A practitioner can request a Council to review the immediate action it has taken. In addition, under section 159 of the National Law, a practitioner has the right to appeal to the NSW Civil and Administrative Tribunal against any Council action such as suspension or imposition of conditions.

Councils' pathways – conduct, health, performance and monitoring

A practitioner who has a complaint referred to a Council may be managed through more than one of the Council's pathways. A complaint which discloses a performance concern may on further consideration, reveal that the practitioner also suffers from an impairment so that this practitioner may be managed through both the performance and health pathways.

Conduct pathway

On occasions, a complaint that relates to a practitioner's professional conduct, but which does not raise a significant public health concern or would provide grounds for disciplinary action, is referred to the Council. The Council can deal with the complaint in a number of ways, including counselling the practitioner in writing or through an interview or, following an inquiry by Council, caution or reprimand the practitioner / student, impose conditions on the practitioner's / student's registration, or place other orders on the practitioner / student.

Health pathway

Councils are responsible for managing a practitioner's impairment through their non-disciplinary Health Pathways. A practitioner is considered to be impaired if he or she has a physical, cognitive or mental health impairment, disability, condition or disorder (including substance abuse or dependence) that detrimentally affects or is likely to detrimentally affect the practitioner's capacity to practise the profession or the student's capacity to undertake clinical training. This may include psychiatric illness (depression, bipolar disorders or eating disorders), addiction or self-administration of prescription or illicit drugs or alcohol, or a physical illness or disability such as a neurological injury.

Not all health issues will result in intervention by the Council. Intervention by a Council usually occurs when the practitioner's ability to practise is affected, or the practitioner lacks the insight to manage their illness, follow treating practitioners' recommendations or practise within their limitations.

When a complaint indicates that a practitioner may be impaired, the practitioner is usually assessed by a Council appointed practitioner, often a psychiatrist, who will prepare a report for the Council. The Council will then review this report and decide whether to convene an Impaired Registrants Panel.

Most impaired practitioners can continue to practise, subject to appropriate limitations. As a result, the most common outcome of an Impaired Registrants Panel is that conditions are placed on the practitioner's registration. Impaired Registrants Panels are non-disciplinary and are designed to encourage impaired practitioners to seek treatment for their impairment and to safely remain in practice.

Practitioners are monitored by a Council over an extended period of time. Practitioners whose impairment relates to drugs or alcohol can expect to be monitored by a Council for a minimum of three years. Practitioners with psychiatric illness may remain in the health program for an extended period, although the intensity of monitoring is varied according to the stability of their illness. Over time, as a practitioner develops insight into their impairment and develop relapse prevention strategies, the conditions and the frequency of review are eased. A practitioner will exit the health program once a Council is satisfied that the practitioner has

actively sought to manage his or her impairment, is willing and able to take responsibility for his/her own health and is safe to practise without conditions.

Performance Pathway

The Performance Program is another non-disciplinary pathway that a Council can use to deal with notifications/complaints about practitioners, who are neither impaired or have not engaged in unsatisfactory professional conduct or professional misconduct, but where concerns have been expressed in relation to the standard of the practitioner's professional performance.

Professional performance of a 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. The professional performance of a practitioner is unsatisfactory if it is below the standard reasonably expected of a practitioner of an equivalent level of training or experience.

A Council assesses a practitioner's performance through a performance assessment. A performance assessment could be based on a simulated clinical situation but is more frequently based on an actual clinical situation. An assessment focuses on the practitioner's fitness to practise. It is not punitive; it leads to early intervention/remediation and it is broad based, in that it is not limited to the matter that triggered the assessment. In order to ascertain the practitioner's fitness to practise, the practitioner's entire practice is assessed by one or more peers appointed by a Council. Tools developed by Councils to undertake a performance assessment include:

- general interview
- observed practice
- record review
- review of audits
- interviews with colleagues and clinical interviews.

The assessment domains include:

- clinical expertise
- personal development
- education
- teamwork and training
- professional behaviour
- management practices
- personal health/wellbeing.

A Council will convene a Performance Review Panel to consider a performance assessment report, if its findings are that the practitioner's performance is unsatisfactory and remedial action is required. A Council must refer the matter as a complaint to the Commission if the assessment raises a significant issue of public health or safety, or raises a case of unsatisfactory professional conduct or professional misconduct against the practitioner.

A Performance Review Panel may impose orders / conditions on a practitioner's registration. Conditions may relate to education or public protection or both. Educational conditions may include the practitioner's attendance at courses, spending time observing another practitioner or engaging in additional Continuing Professional Development activities. Conditions imposed for public protection may include the limitation on the scope of practice or requiring supervision.

Monitoring

Under the provisions of the National Law, the Australian Health Practitioner Regulation Agency is required to notify the practitioner's employer of the conditions imposed on the practitioner's registration.

Councils are also responsible for monitoring conditions imposed on a practitioner's / student's registration following a performance, conduct or health outcome.

The level, complexity and duration of monitoring activity will vary considerably over the range of cases administered by the Monitoring Program. Some cases may require no more than a periodic letter to confirm the practitioner's or student's circumstances. Others require more frequent contact and scrutiny. Typically, Councils monitor a practitioner's compliance with conditions by reviewing data from Medicare Australia or from the Ministry of Health's Pharmaceutical Services. A Council may also audit a practitioner's records and is also required to review supervision reports and take action in response to any concerns expressed in those reports.

Practitioners can expect to have a condition removed when there is no evidence of breach and when the practitioner has complied with the requirement, such as completion of a course, or following a period of supervision with satisfactory supervision reports.

Complaints about unregistered practitioners

NSW has established a minimum set of rules – the Code of Conduct – for unregistered health practitioners.

An unregistered health practitioner is any health practitioner, who is not required to be registered under the *Health Practitioner Regulation National Law*, or a registered health practitioner who provides services that are unrelated to their registration. This includes health counsellors, masseurs, naturopaths and many other allied and alternative health providers.

The Health Care Complaints Commission, as an independent body, deals with complaints about health service providers in NSW, including complaints about unregistered health practitioners.

The Commission has several options for dealing with complaints about unregistered health practitioners. Following investigation of the complaint, if it has found a breach of the Code of Conduct and considers the practitioner to be a risk to the public's health and safety, it may:

- issue an order prohibiting the person from providing health services for a period of time
- issue an order placing conditions on the provision of health services
- provide a warning to the public about the practitioner and their services.

Code of Conduct

The Code of Conduct for unregistered health practitioners came into effect under Schedule 3 of the Public Health (General) Regulation 2002 on 1 August 2008. The Code was amended in July 2010 to include dental technicians and optical dispensers who were previously registered in NSW.

The Code of Conduct informs consumers what they can expect from practitioners and the mechanisms by which they may complain about the conduct of, or services provided by, an unregistered health service provider.

The key aspects of the code are that health practitioners:

- must provide health services in safe and ethical manner.
- who are diagnosed with an infectious medical condition must ensure that they practise in a manner that does not put clients at risk.
- must not make claims to cure certain serious illnesses.
- must adopt standard precautions for infection control.
- must give appropriate treatment advice, which includes not dissuading clients from seeking or continuing with treatment by a registered medical practitioner and accepting the rights of their clients to make informed choices in relation to their health care.

- must not practise under the influence of alcohol or drugs.
- must not practise with certain physical or mental conditions that affect or are likely to affect their ability to practise, or places their clients at the risk of harm.
- must not financially exploit clients.
- are required to have an adequate clinical basis for treatments.
- must not misinform their clients.
- must not engage in a sexual or improper personal relationship with a client.
- must comply with relevant privacy laws.
- must keep appropriate records.
- must keep appropriate insurance.
- must display the code and other information (with some exceptions).
- must not sell or supply optical appliances, unless they are appropriately licensed and adhere to the relevant legislation.

All unregistered health practitioners have to display the full code of conduct and the notice about how a client can make a complaint to the Health Care Complaints Commission, **except** health practitioners who work:

- in any premises of the public health system
- private hospitals and day procedures centre
- premises of the Ambulance Service of NSW
- premises of approved providers that fall under the *Commonwealth Aged Care Act 1997*, such as nursing homes.

Complaints about health organisations

Complaints about a health organisation can be made to the relevant health organisation, its management, the Local Health District Clinical Governance representative, or the Health Care Complaints Commission.

Patients and their families have the right to make a complaint and also have the right to receive information about how to make a complaint. (See National Charter of Patient Rights released by the Australian Commission on Quality and Safety in Health Care (<http://www.safetyandquality.gov.au>).

Interaction with NSW Health policy

Root cause analysis

For any incident, near miss and complaint in the public health system, staff are required to notify these in the Incident Information Management System.

If the incident falls into the Severity Assessment Code (SAC) 1 category, the health organisation is obliged to undertake a root cause analysis (RCA). (See Incident Management Policy PD2014_004, available at

http://www0.health.nsw.gov.au/policies/pd/2014/PD2014_004.html

The privilege attached to the root cause analysis under the *Health Administration Act 1982* means that only the final RCA report can be given to the patient or any other third parties, including the Health Care Complaints Commission. This is relevant in cases where the patient or their family lodge a complaint with the Commission and the Commission requests information relating to the incident.

Please note

When notified of a complaint relating to an incident that is currently subject of a root cause analysis (RCA), it is not sufficient to inform the Commission that the RCA report will be provided once the investigation has been finalised.

An RCA report is generally not an appropriate response to a complaint that was lodged with the Commission, as an RCA investigation has a systemic focus, and the complaint may raise completely different issues.

Open Disclosure

SAC 1 and SAC 2 incidents require open disclosure of the incident to the patient and/or their families within 24 hours of the incident, by the health care professional responsible for the care of the patient. (See PD2007_040 Open Disclosure http://www.health.nsw.gov.au/policies/pd/2007/pdf/PD2007_040.pdf and GL2007_007 Open Disclosure Guidelines http://www.health.nsw.gov.au/policies/gl/2007/pdf/GL2007_007.pdf).

An updated Open Disclosure Policy will be released in 2014.

Despite an open disclosure process, the patient or their family may still lodge a complaint about the health service providers involved in the incident.

Assessing complaints

Under its legislation, the Commission must assess all written complaints it receives within 60 days. Section 22A of the HCC Act requires the Commission to take into account associated complaints. This includes earlier complaints about the same practitioner or health organisation insofar as the Commission considers them to be relevant.

The aim of assessing complaints is to decide the best way to deal with the issues raised in the complaint.

As part of its assessment, the Commission may notify the person or health service complained about and seek a response. The Commission may also assess a complaint based on the information contained in the complaint. This applies usually to complaints that are most likely discontinued and relate to issues such as waiting times, unless extreme, or dissatisfaction about fees charged.

Usually, the Commission provides a copy of the complaint to the health service provider. It will ask the health service provider to provide a response within 28 days so that this response can be considered when assessing the complaint.

Please note

The Commission can only notify the health service provider complained about. That means that in cases where the complaint is about an individual practitioner, such as a doctor or nurse, the Commission may only notify this person, not the hospital or facility who is their employer. In these instances, the individual provider may notify management or their clinical governance representative seeking support or assistance in responding to the complaint.

In most instances (for exceptions see section 28 (4) of the HCC Act), the Commission is required to notify its final decision to the health service provider complained about.

Responding to a complaint

Sometimes, a health service provider may want to try to resolve a complaint that is made to the Commission directly with the complainant. This will depend on the circumstances. Where the complaint is the first time the health service provider has been made aware of an issue and the issue is not of a serious nature, it may be appropriate to try to resolve the complaint directly with the complainant. However, where the issues were raised previously with the health service provider, the fact that the person lodged a complaint may indicate that they are not willing to talk to them anymore. Also, where there are allegations of serious misconduct or issues, it may not be appropriate, as it could be perceived by the complainant as an attempt to 'cover up' the matter.

Preparing a response to the Commission

When receiving a notification of a complaint, health practitioners are free to seek support and assistance to provide a response to the complaint from their medical defence organisation or the management of the health facility they work for.

Where the Commission seeks a response, it will ask you to address the significant issues raised by the complainant. Please note that copies of responses are provided to the complainant, unless the provider expressly has asked the Commission to use it for assessment purposes only.

It is a good idea to phrase the response letter in a conciliatory tone, keeping in mind that it will most likely be read by the complainant.

The response should be proportionate to the seriousness of the alleged conduct. The more serious the allegations, the more detailed the response should be. Include references to medical records or other evidence where it supports the response. Where the complaint includes allegations about an individual and the organisation is responding on their behalf, their names should be included in the response to the Commission.

In addition to a response to the complaint, the Commission may seek medical records or any other relevant information. The health service provider can send such information to the Commission separately to the response. The Commission would like to receive any records or information as soon as possible, as it helps it to speed up its assessment process.

The Commission has internal medical and nursing advisors who may review relevant information and records to give an opinion about whether they believe there has been a departure from expected standards. Opinions can also be sought from other clinical experts.

At the end of the assessment, all relevant information, including the original complaint, the response from the provider, any medical or other records, as well as the opinion of the internal clinical advisors is taken into account when deciding how to best deal with the complaint.

Before making a final decision in relation to a complaint about a registered health practitioner, the Commission must consult with the relevant professional Council. The legislation provides that the higher call wins, meaning that if the Commission is of the opinion that the complaint warrants formal investigation, but the Council believes the issues are less serious and could be addressed through counselling of the practitioner, the complaint must be investigated and vice versa.

Privacy

The Commission is an exempt body under the *Health Records and Information Privacy Act 2002*, which means that health service providers are allowed to provide private health information to the Commission if they are satisfied that the Commission needs it to deal with a complaint. In addition, under section 21A of the HCC Act, the Commission can require any person to provide information and/or records (including medical records, and other evidence), which the Commission considers are relevant for the assessment of the complaint.

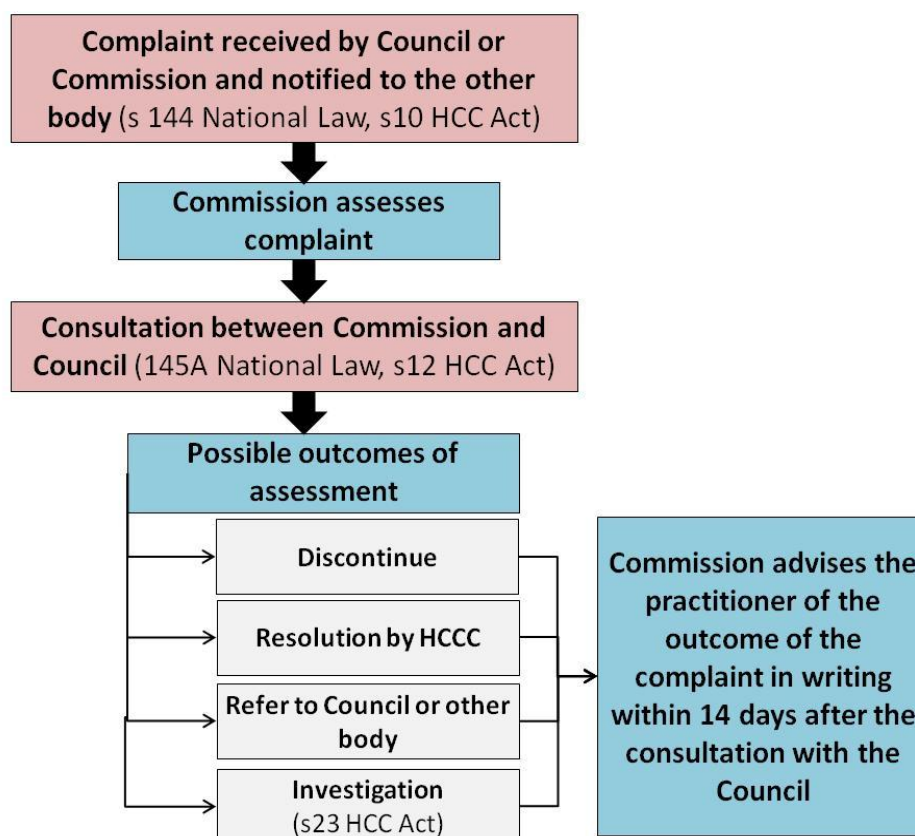
If you are in doubt whether you can release sensitive information, you can contact the assessment officer asking for a Notice to Produce the information under section 21A of the HCC Act.

For a detailed description of the possible outcomes following an assessment, refer to 'Outcomes of the assessment of a complaint' on page 17.

Under section 28 of the HCC Act, the relevant health service provider is advised of the outcome of the assessment within 14 days after the final decision has been made. If a health service is the only provider named in the complaint, the Commission would usually provide a copy of its decision letter to the complainant for their information.

Outcomes of the assessment of a complaint

Health practitioners



In relation to complaints about health practitioners, the Commission must **investigate complaints** where it appears that the complaint:

- raises a significant issues of public health and safety
- raises a significant question as to the appropriate care or treatment provided
- would, if proven, provide grounds for disciplinary action against a health practitioner or constitute gross negligence
- appears to involve a breach of a prohibition order under Division 3, part 2A of the *Public Health Act 1991*

Please note

Where there appear to be serious risks to public health and safety, the relevant Council can temporarily suspend or impose conditions on the health practitioner under section 150 of the National Law. See also page 10.

Where a complaint does not require investigation, other options are:

The Commission can **refer** a complaint about a registered health practitioner **to the relevant Council** to consider taking action, such as conducting a Council inquiry, counselling, a performance assessment or an assessment for possible impairment.

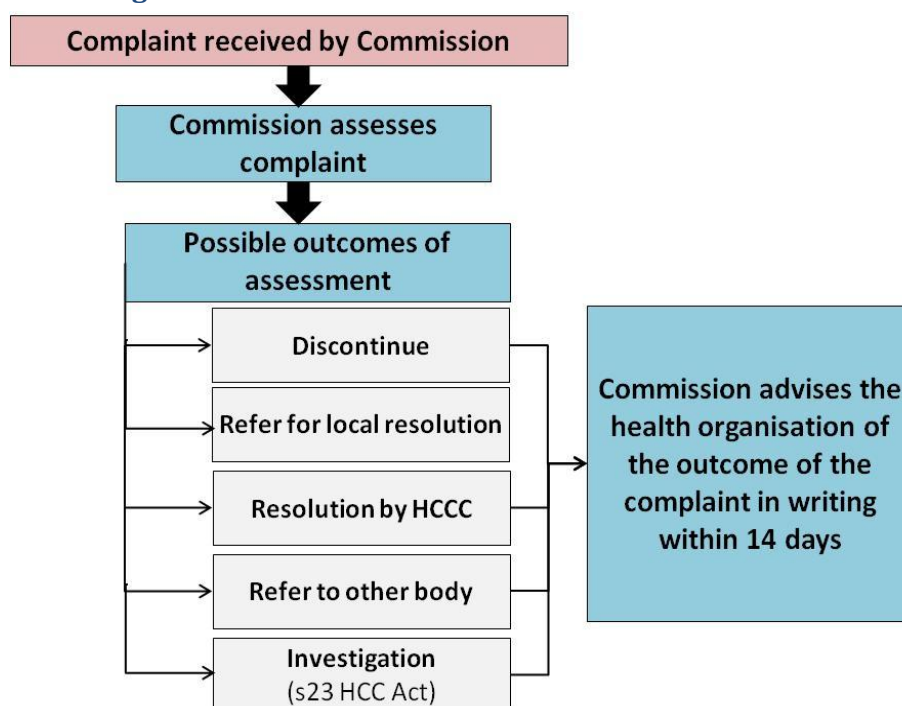
In some cases, it is appropriate to **refer the complaint to another body** to be dealt with by it. This could, for example, include referral to Medicare Australia for investigation of an alleged fraud of Medicare claims. Another option may be to refer a complaint to the NSW Fair Trading for potential breaches of the *Fair Trading Act* or other relevant legislation.

Sometimes, the complaint can be **resolved during the assessment process**. This may occur where the response from the health service provider has addressed all issues raised by the complainant and explains the measures that have been taken to prevent similar situations from happening again.

Complaint may be suitable for referral to the Commission's **Resolution Service**. The Resolution Service can assist all parties to a complaint, to try to reach a resolution of their issues.

The Commission can **discontinue** dealing with a complaint.

Health organisations



The Commission must **investigate complaints** about a health organisation where it appears that the complaint:

- raises a significant issues of public health and safety
- raises a significant question as to the appropriate care or treatment provided.

Where a complaint does not require investigation, the Commission has other options to deal with the complaint.

In relation to a health organisation, the Commission can refer a complaint about a public health organisation back to the organisation to try to **resolve the matter locally** with the complainant, if the organisation agrees to this. This option may be appropriate where the complaint concerns issues such as the quality of food or accommodation, attitude or minor disagreements between patients and staff.

The Commission can **discontinue** dealing with a complaint for many reasons –

for example, the time that has elapsed since the incident makes it difficult to investigate the matter effectively. In 2012-13, 47.3% of all complaints that were received were discontinued after the assessment.

Sometimes, the complaint can be **resolved during the assessment process**. This may be where the response from the health service provider has addressed all issues raised by the complainant and explains the measures that have been taken to prevent similar situations from happening again.

Often a complaint is suitable for a referral to the Commission's **Resolution Service**. The Resolution Service can assist all parties to a complaint, to try to reach a resolution of their issues.

In some cases, it is appropriate to **refer the complaint to another body** to be dealt with by them. This can include referral to the Director-General of NSW Health where there appears to be a breach of legislation such as the *Poisons and Therapeutic Goods Act*.

Review of an assessment decision

Under section 28(9) of the HCC Act, the complainant has the right to request a review of the Commission's assessment decision. If such a request is received, the Commission will refer the case for review to an independent officer who was not involved in the initial assessment of the complaint.

As part of the review process, the complainant may provide additional information. The review process may result in the initial assessment decision being changed.

The Commission notifies the health service provider of the review only if it requires further information, or if as a result of the review, the original assessment decision is changed.

Under section 20A of the HCC Act, the Commission also has an obligation to keep under review its assessment of a complaint while it is dealing with the complaint. This might mean that where additional information or evidence comes to light, an additional health care provider who was involved in the care and treatment of a patient might be added, or considering new evidence, the original assessment decision may be altered. Any changes to the original assessment decision where they relate to registered providers, the Commission must consult with the relevant health professional Council.

Resolving complaints

Under the HCC Act, the Commission has a statutory duty to resolve complaints. The aim is always to find a resolution to the issues that were raised in the complaint that is acceptable to all parties involved. Resolution is always voluntary.

There are various stages at which complaints or inquiries might be resolved, as well as different resolution options available to the Commission, depending on the circumstances of the individual case.

Please note

Whether a complaint is suitable for referral to the Commission's Resolution Service (process described below) is determined when the complaint is being assessed and will usually apply to more complex matters. It should not be confused with other avenues of resolution, including:

- Resolving issues that are raised in an **inquiry**. Sometimes, when a person contacts the Commission's Inquiry Service to discuss their issues, a phone call to the health service provider may be sufficient to get the required information and there is no need to lodge a complaint (see also Inquiries, page 8).
- In other cases, a complaint may be **resolved during the assessment process** (see Outcomes of the assessment of a complaint). This may be where the response from the health service provider has addressed all issues raised by the complainant and explains the measures that have been taken to prevent similar situations from happening again. The Commission confirms with the complainant that they consider the complaint resolved.
- In relation to complaints about a public health organisation, the Commission can refer complaints back to the organisation to try to **resolve the matter locally** with the complainant, if the organisation agrees to this.

The Commission may refer complaints that are suitable for resolution, and do not require investigation, to its Resolution Service. The Commission stays involved by providing a Resolution Officer to assist the parties to negotiate the resolution of the complaint.

The Resolution Officer will direct the process and will contact both parties when the complaint is referred to see if they are willing to be involved. The process is voluntary and it will not proceed if one party declines to participate.

After initial discussions, the Resolution Officer will tailor resolution strategies to suit the needs of the parties. The resolution process will differ according to the issues raised, the parties involved, and the outcomes desired. However, common resolution strategies are:

- clarifying information already provided
- seeking a further written response to outstanding issues and an apology, if appropriate
- negotiating practice and policy change and development
- organising a face-to-face meeting that will be facilitated by the Resolution Officer.

Sometimes, as a result of the complaint, the health service provider may agree to change their practice to provide better care and treatment in future. The Commission records such quality and safety improvements, and where appropriate, a Resolution Officer will contact the health service provider to follow up on the implementation.

Conciliation

The Resolution Officer might also suggest that conciliation of the complaint is appropriate. Conciliation is a formal meeting that is facilitated by an independent conciliator. Conciliation processes have a statutory privilege which means that anything said in a conciliation meeting cannot be used in any other legal proceedings. Both parties must consent to be involved in a conciliation process. If conciliation takes place a Resolution Officer will organise the process.

Investigating complaints

Under section 23 of the HCC Act, the Commission must investigate complaints that raise serious issues of public health and safety, involve gross negligence or if found proven, would warrant disciplinary action against a practitioner.

Notifying the employer

Where a complaint about an individual health practitioner is referred for investigation, the Commission must notify the employer of the practitioner under section 28 of the HCC Act. This applies to the employer at the time when the incident under investigation occurred. In addition, the Commission has the discretion to notify the current employer of the health practitioner.

The Commission also notifies the employers of a health practitioner of the outcome of an investigation if the health service initially lodged the complaint and is considered the complainant. For other cases, the Commission has the discretion to notify the employer of the outcome of the investigation into an individual health practitioner.

What happens during an investigation?

The aim of an investigation is to find evidence that would prove or disprove that

- there was a significant issue of public health and safety
- there was a significant question as to the appropriate care or treatment provided
- a registered health practitioner had engaged in unsatisfactory professional conduct, or professional misconduct
- an unregistered health practitioner had breached the Code of Conduct for unregistered health practitioners.

As part of the investigation, the Commission is able to obtain evidence from any person. The Commission may compel the production of documents or information, including requiring written reports and also has the power to compel any person to give oral evidence. The Commission might ask the health service to assist with arranging interviews with individuals who are of interest to the Commission.

Privacy

The Commission is an exempt body under the *Health Records and Information Privacy Act 2002*, which means that health service providers are allowed to provide private health information to the Commission if they are satisfied that the Commission needs it to deal with a complaint.

In addition, under section 34A of the HCC Act, the Commission can require any person to provide information and/or records (including medical records, and other evidence), which the Commission considers are relevant for the investigation of the complaint.

A failure to provide requested information without a reasonable excuse is considered unsatisfactory professional conduct.

Expert advice

The Commission may also obtain expert advice. During the investigation, the Commission uses expert advisers to determine whether the conduct of the practitioner complained about significantly departs from accepted standards of a practitioner with a similar level of experience and training, and if so, to what extent.

The de-identified expert report will be provided to the practitioner complained about together with the Commission's findings. The practitioner is given the opportunity to make a submission before a final decision is made.

The Commission has a panel of experts from a broad range of backgrounds and contacts relevant Colleges or Associations, if it requires an expert in a particular area. The aim is to match the expertise of the expert advisor as closely as possible to the practitioner complained

about. Experts usually have 28 days to provide their report. Experts may also be used when investigating organisational conduct.

As required by section 20A of the HCC Act, the Commission must continuously review its assessment of the complaint. Sometimes, during the investigation, new evidence leads to additional health service providers being identified whose conduct is relevant to the complaint. These will be referred for assessment to decide the most appropriate way to deal with them.

Outcomes for health practitioners

Immediate action

Where there appears to be serious risks to public health and safety from a registered health practitioner, the relevant professional Council can temporarily suspend or impose conditions on the health practitioner under section 150 of the National Law. The Commission may ask the Council to consider taking such action.

In relation to unregistered practitioners, the Commission can issue an interim prohibition order, banning the practitioner from providing some or any health services while the Commission finalises its investigation.

Please note

Under section 94A of the HCC Act, following an investigation, the Commission can issue a public warning about unsafe treatments or health services that pose a risk to the public health and safety.

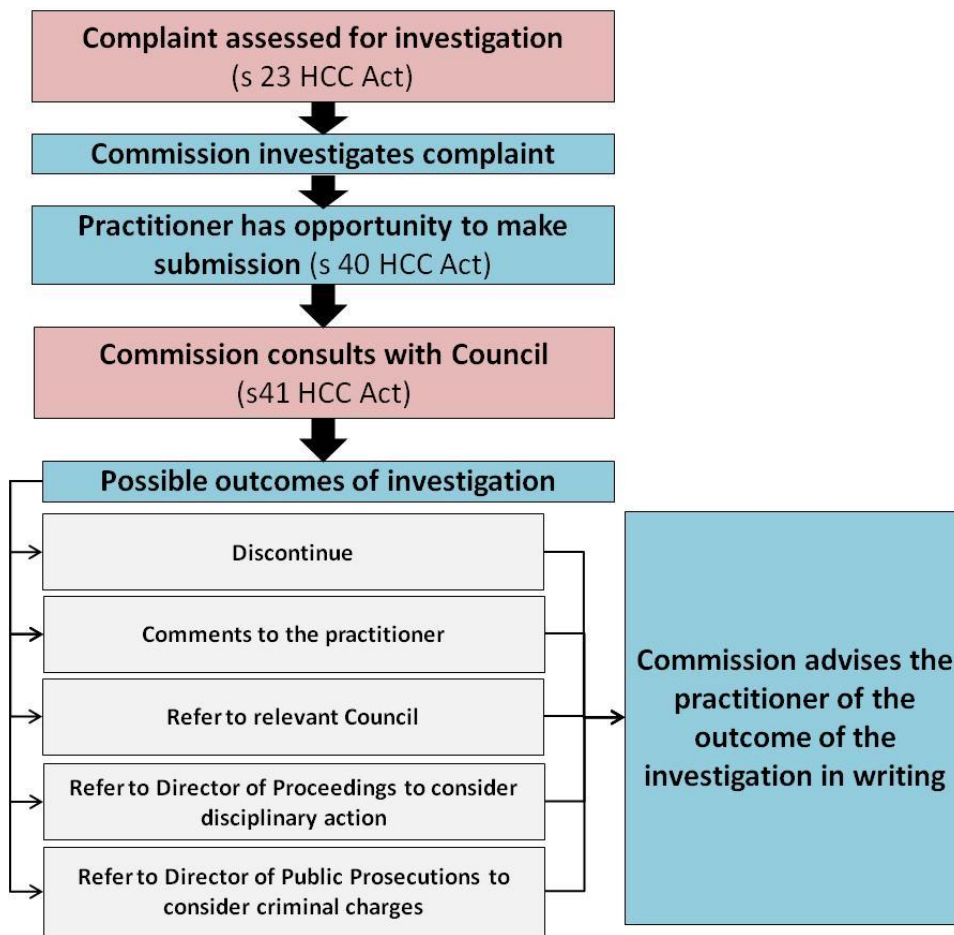
Right to make submission

Under section 40 of the HCC Act, the Commission must give the practitioner complained about the opportunity to respond to its findings, before finalising the investigation. Under the legislation, the practitioner has 28 days to do so.

Outcomes for registered health practitioners

Consultation with NSW Councils

In relation to registered health practitioners, the Commission must consult with the relevant Council before notifying the parties of the outcomes of its investigation under section 41 of the HCC Act.



In relation to registered health practitioners, at the end of an investigation, the Commission can **refer the complaint to the Director of Proceedings** to consider prosecuting the practitioner before a disciplinary body (the NSW Civil and Administrative Tribunal or a Professional Standards Committee for medical, nursing and midwifery practitioners).

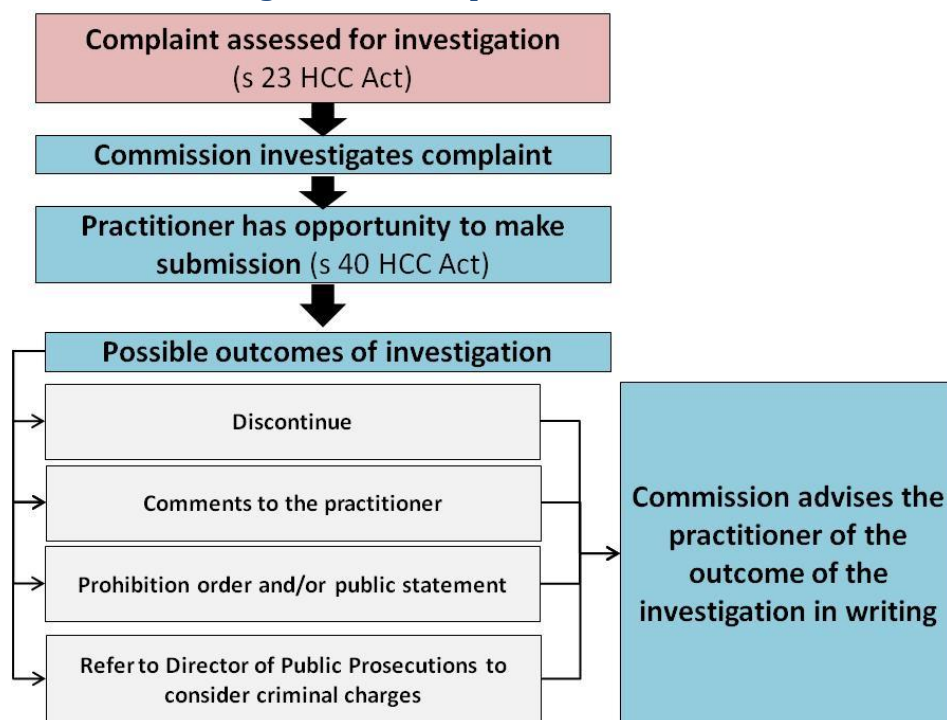
It may **refer the complaint to the relevant Council** to take action. The Council may refer the practitioner for a performance or impairment assessment or may counsel them about their conduct or conduct an inquiry (see pages 10-12).

The Commission can also **make comments** to the health practitioner where there was poor care or treatment, but not to an extent that would justify referring the matter to the Director of Proceedings.

Where the investigation has found no or insufficient evidence of inappropriate conduct, care or treatment, the complaint will be **terminated** (no further action taken).

The Commission can refer the matter to the Director of Public Prosecutions to consider criminal charges.

Outcomes for unregistered health practitioners



In relation to unregistered health practitioners, at the end of an investigation, the Commission has the power to **issue a prohibition order and/or make a public statement** about an unregistered health practitioner. A prohibition order can ban the provision of any health services or limit the health services that the practitioner can provide, and the practitioner must advise potential patients of the order before treating them. A breach of the order is a criminal offence. Prohibition orders and public statements are published on the Commission's website at <http://www.hccc.nsw.gov.au>.

The Commission can also **make comments** to the health practitioner where there was poor care or treatment, but not to an extent that would justify making a public statement or issuing a prohibition order.

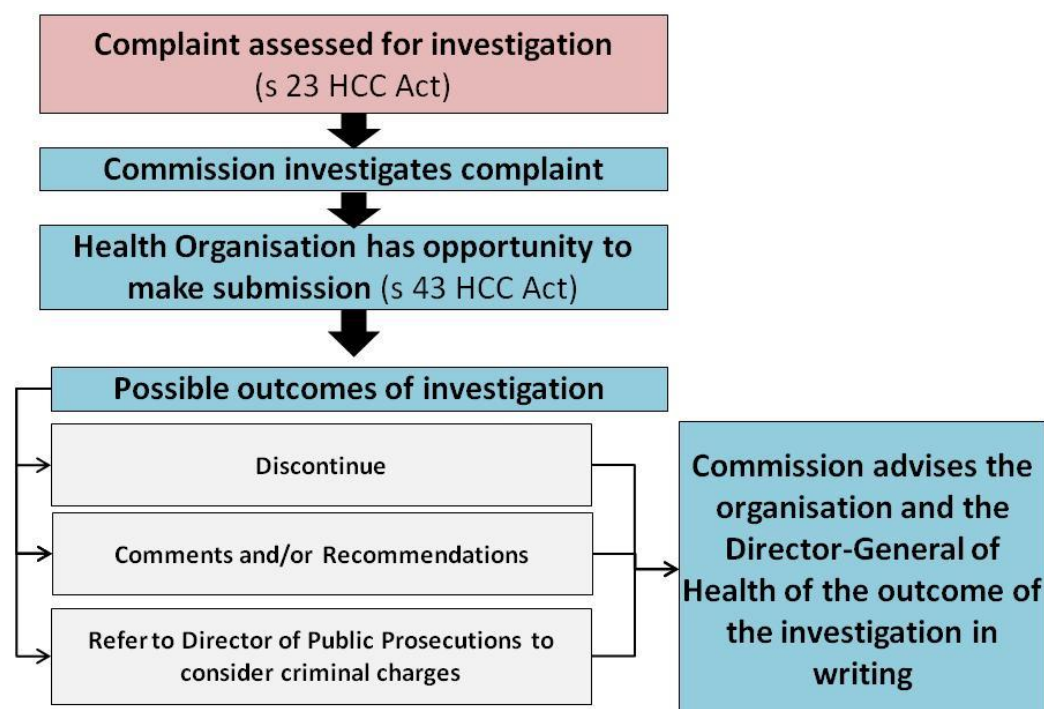
Where the investigation has found no or insufficient evidence of inappropriate conduct, care or treatment, the complaint will be **terminated** (no further action taken).

The Commission can refer the matter to the Director of Public Prosecutions to consider criminal charges.

Review of an investigation decision

Under section 41(3) of the HCC Act, the complainant has the right to request a review of the Commission's investigation decision in relation to health practitioners. If such a request is received, the Commission refers the case for review to an officer who was not involved in the original investigation of the complaint.

Outcomes for health organisations



In relation to a health organisation, at the end of an investigation, the Commission can **terminate the complaint** (take no further action), where the investigation has found no or insufficient evidence of inappropriate conduct, care or treatment.

The Commission can also **make comments** to the health organisation to acknowledge that the organisation has already taken measures to prevent poor health service delivery in the future, and there is no need for the Commission to make recommendations.

The Commission can **make recommendations** to the health service where an investigation finds that there has been poor health service delivery and identifies systemic improvements that should be made. During the investigation, the Commission will consult closely with the relevant health service to ensure that its recommendations are practical and can be implemented. Prior to the recommendations being finalised, the health service will be provided with draft recommendations under section 43 of the HCC Act and will be invited to make a submission in response to these draft recommendations.

The Commission provides its final recommendations to the Director-General of the Ministry of Health and the Clinical Excellence Commission, so that they may consider the implications of the recommendations on a broader basis.

The Commission follows up the implementation of its recommendations. If the Commission is not satisfied with the implementation of the recommendations, it may, after consultation with the Director-General, make a report to the Minister. If the Commission is not satisfied with the Minister's response, it may make a special report to Parliament.

Please note

Under section 94A of the HCC Act, following an investigation, the Commission can issue a public warning about unsafe treatments or health services that pose a risk to the public health and safety.

The Commission will usually follow up the implementation of its recommendations through the relevant Local Health District. The Commission also undertakes selected audits of the implementation of its recommendations.

Prosecuting complaints

Only complaints about registered health practitioners can be referred to the Director of Proceedings to consider prosecution before a disciplinary body.

Complaints that are referred to the Director of Proceedings are reviewed by the Director. The Director independently determines whether or not to prosecute the matter. When doing so, the Director has to take into account the following criteria that are set out in section 90C of the HCC Act:

- the likelihood of proving the complaint
- the seriousness of the allegations
- any submissions the practitioner may have made
- the protection of the health and safety of the public.

The Director must also consult with the relevant Council about the determination whether or not to prosecute and in which forum, as required by section 90B (3)(b) of the HCC Act.

If the Director of Proceedings determines that a matter does not meet the threshold for prosecution, it is referred back to the Commissioner to consider other appropriate action.

If a decision is made to prosecute, a complaint about unsatisfactory professional conduct will usually be prosecuted before a Professional Standards Committee, while a complaint about professional misconduct will be prosecuted before the NSW Civil and Administrative Tribunal which has the power to suspend or cancel a practitioner's registration.

Where the disciplinary body finds the complaint proven, it can caution, reprimand, fine and/or impose conditions on the practitioner. Only the Tribunal can suspend or cancel a practitioner's registration as an outcome of the prosecution. (A Council may only suspend a practitioner's registration as an interim measure while the complaint is being investigated.)

The Tribunal may also issue a prohibition order banning the practitioner from practising in another area of health service – for example, a psychiatrist whose registration as a medical practitioner has been cancelled can be banned from working as a counsellor.

Publication of Tribunal and Professional Standards Committee decisions

The Commission is required to publish the decisions of the NSW Civil and Administrative Tribunal or Professional Standards Committees. These are available through its website www.hccc.nsw.gov.au.

All Tribunal decisions can be accessed through NSW Caselaw (www.caselaw.nsw.gov.au).

Professional Standards Committee decisions relating to medical practitioners are available on the website of the Medical Council of NSW (www.mcnsw.org.au) can be accessed on AUSTLII (www.austlii.edu.au).

Professional Standards Committee decisions relating to nurses and midwives can be accessed on AUSTLII (www.austlii.edu.au).

Employment checks

As part of the employment checking procedures, the Commission may be approached to provide information about the complaint history in relation to a particular health practitioner.

The Commission can only release such information with the written consent of the relevant health practitioner.

The consent form should state that the practitioner authorises the Commission to release any information relating to complaints that were made about this practitioner to the Health Care Complaints Commission.

Requests for employment checks should be addressed to:

Commissioner
Health Care Complaints Commission
LMB 18
Strawberry Hills NSW 2012

Fax: 02 9281 4585
Email: hccc@hccc.nsw.gov.au

When conducting employment checks, it is recommended to search the current National register of health practitioners at www.ahpra.gov.au. Where the Council has imposed temporary conditions or a suspension on a practitioner's registration, these will be noted on the register. Where conditions were imposed by a disciplinary body such as the NSW Civil and Administrative Tribunal or Professional Standards Committees, these are also noted on the register.

The Australian Health Practitioner Regulation Agency (www.ahpra.gov.au) also publishes a register of practitioners whose registration has been cancelled under the National Law. The names of practitioners whose registration had been cancelled or suspended prior to the introduction of the National Law on 1 July 2010 are not available through this register.

Instead, the Australian Health Practitioner Regulation Agency has a link to sites which publish decisions concerning cancellations prior to 1 July 2010.

Contacting the Commission

When contacting the Commission in relation to a particular complaint, please always refer to the specific case number stated on all correspondence that is sent by the Commission. All correspondence also includes the name and contact details of the relevant case officer.

For general matters, you can contact the Commission at:

Telephone	(02) 9219 7444
Toll Free in NSW	1800 043 159
TTY service for the hearing impaired	(02) 9219 7555
Fax	(02) 9281 4585
Email	hccc@hccc.nsw.gov.au
Office address	Level 13, 323 Castlereagh Street (corner of Hay St) SYDNEY NSW 2000
	The office is located close to Central Station and is accessible by wheelchair.
Business Hours	9.00am to 5.00pm Monday to Friday
Postal address	Locked Mail Bag 18 STRAWBERRY HILLS NSW 2012
Document exchange	DX 11617, SYDNEY DOWNTOWN
Interpreter service	People who prefer a language other than English should contact the Commission through the Telephone Interpreter Service (TIS) on 131 450.

Contacting the Health Professional Councils

The Health Professional Councils Authority provides the contact for all of the health professional Councils in NSW.

Phone	1300 197 177
Fax	(02) 9281 2030
TTY service for the hearing impaired	(02) 9219 0250
Website	http://www.hpca.nsw.gov.au/
Email	mail@hpca.nsw.gov.au
Postal address	Locked Bag 20 HAYMARKET NSW 1238

Useful links and Resources

Legislation

Health Care Complaints Act, 1993, accessible online at

<http://www.legislation.nsw.gov.au/maintop/view/inforce/act+105+1993+cd+0+N>

Health Practitioner Regulation National Law (NSW) No 86a, accessible online at

<http://www.legislation.nsw.gov.au/maintop/view/inforce/act+86a+2009+cd+0+N>

Code of Conduct for unregistered health practitioners, Schedule 3 of the Public Health (General) Regulation 2002, accessible online at

<http://www.legislation.nsw.gov.au/maintop/view/inforce/subordleg+644+2002+cd+0+N>

Information and brochures

Health Care Complaints Commission: Responding to complaints lodged with the Commission, accessible online at <http://www.hccc.nsw.gov.au/Information/Information-For-Health-Providers/Responding-/default.aspx>

NSW Ombudsman: Managing Unreasonable Complainant Conduct Practice Manual 2009. PDF version of the manual is available for free at

<http://www.ombo.nsw.gov.au/show.asp?id=533>; hard copies can be ordered from the Office of the NSW Ombudsman at a cost of \$25.00.

NSW Ombudsman: Apologies - A practical guide (2nd Edition), 2009. PDF version of the manual can be accessed free of cost at <http://www.ombo.nsw.gov.au/show.asp?id=452>. Hard copies can be ordered from the Office of the NSW Ombudsman at a cost of \$22.00.

Websites

Health Care Complaints Commission (HCCC), <http://www.hccc.nsw.gov.au/>

Health Professional Councils Authority (HPCA), <http://www.hpca.nsw.gov.au/>

Australian Health Practitioner Regulation Agency (AHPRA), <http://www.ahpra.gov.au/>