

Health Care Complaints Commission

Expert Guidelines for complaints against unregistered practitioners

Commission Investigations

1. The Commission's function is to investigate serious complaints that raise a significant issue of public health or safety, a significant question about the appropriate care or treatment of a patient or, if substantiated, would involve gross negligence on the part of a health practitioner.
2. During an investigation expert advice is often sought from a sufficiently qualified or experienced practitioner. The Commission's processes for complaint handling are set out in more detail on the Commission's website www.hccc.nsw.gov.au.
3. The public expects a safe and ethical service from health professionals whether they are subject to statutory regulation or self-regulation. In relation to unregistered practitioners (UP) any investigation by the Commission goes to determining whether the practitioner has breached any clauses of the Code of Conduct for Unregistered Practitioners, August 2008 ('the Code') and, further, whether the health practitioner poses a risk to public health and safety. In making its determination of an investigation, experts play a critical role in advising the Commission.
4. A copy of the Code of Conduct is attached to these guidelines.

What is expected of me as a reviewer?

5. As an expert reviewer you will generally be asked to comment on the health care provided by a practitioner or practitioners to a particular patient or patients. You are not asked to determine facts in issue or to comment on whether you believe that there is sufficient evidence to prove a complaint.
6. Where facts are in dispute, you may be asked to give your opinion assuming different sets of facts. For example the evidence of a complainant and practitioner may give different accounts of advice or treatment given. Where there is such a conflict of evidence you may be asked for your opinion assuming the truth of each of the differing accounts.
7. You are being asked to provide an opinion which you believe reflects the opinions and conduct of your peers of good standing. If you are aware of a respectable, yet minority body of opinion which differs from yours, you should indicate that in your report.
8. You are asked to provide a balanced, objective and considered opinion and the language you use should reflect this.

What type of action might the Commission take at the end of an investigation into a practitioner?

9. The Commission can:
 - a. take no further action;
 - b. make comments to the practitioner; or
 - c. make a prohibition order against the practitioner, if there is sufficient evidence that he or she has breached the Code and is a risk to the health and safety of the public. A prohibition order can either:
 - i. prohibit them from providing health services or specified health services for the period specified in the order or permanently; or
 - ii. place such conditions as the Commission thinks appropriate on the provision of health services or specified health services by the health practitioner for the period specified in the order or permanently.
 - d. Make a public statement;
 - e. Refer the matter the subject of the complaint to the Director of Public Prosecutions

How do I indicate/ frame my opinion?

10. You will see from reading the code that many of the clauses concern simple questions of fact. For example, clause 8 requires practitioners not to practice under the influence of drugs or alcohol. Clause 9 requires them not to practice with certain mental or physical conditions. Further clauses prohibit financial exploitation and require practitioners not to misinform or make misrepresentations to their clients; not attempt to dissuade clients from seeking more conventional treatment; not to engage in sexual or other improper relationships with clients; to display the Code and to maintain professional indemnity insurance. Any breaches of these clauses of the Code are largely questions of evidence and fact and it is rare that you would be asked for advice on such matters.
11. On the other hand, other clauses of the Code are concerned more directly with the nature of the particular health service being delivered. In particular the safe practice; ethical behaviour; qualifications and competence of the practitioner and interaction with other health service providers. These are more likely to be the areas of practice where you will be asked to provide expert opinion. **You will not be asked to give an opinion on whether the conduct of a practitioner constitutes a breach of the code.** This is a matter of law and fact that will be determined by the Commission.
12. Instead, you will be asked for your opinion on the practice with reference to the areas of practice identified by the Code. For example, whether the practice is safe; ethical; whether the practitioner is adequately qualified to provide the service in question; whether the practitioner should have referred the client elsewhere; whether the practitioner adequately understood the interaction of their therapy with other medications or therapies being used by the client.

13. Where you are critical of the practice of a practitioner you will also be asked for your opinion on whether the practitioner poses a risk to the health or safety of the public. In addition, we encourage you to provide an opinion of what you believe should have been done in the circumstances, but you must give reasons for your opinion. Where possible your reasoning should be supported with relevant best practice documentation references.
14. You are expected to give your opinion about matters within your area of professional knowledge and expertise. You are not expected to comment on matters or on the conduct of practitioners outside your expertise. You may raise with the investigation officer any concerns about aspects of the complaint outside your expertise that you believe should be considered.
15. If any of the facts you have been asked to assume are inconsistent with your knowledge and experience, you should make reference to this in your report. However, in doing so you should not comment on the credibility of the complainant or any other person.
16. If you feel unable to give a full opinion at the time of the request because of the lack of some important information you should contact the investigation officer who will be able to either obtain the information or explain its absence.

What should my report contain?

17. The following will assist you in compiling your report:
 - Accurately list all the documents and records that you reviewed in preparing your report. This list should specifically identify each document such as hospital/medical records, x-rays, transcripts, statements and interviews. If you have an email address the investigation officer will email the list of documents provided by the Commission to allow you to more easily transfer the information.
 - Record the facts which you have been asked to assume.
 - Clearly identify any areas of the practitioner's conduct on which you have been asked to advise and add any others if you believe there are significant issues and give reasons for your opinion.
 - Give your opinion on whether or not the conduct complained of represents a risk to the health or safety of the public and, if so, the nature and seriousness of that risk.
 - Describe the basis on which you have reached your opinion e.g. published articles, codes of practice, guidelines etc.

- The report should be based on facts rather than assumptions. If you have found it necessary to make assumptions in order to properly comment on a matter, make this clear in your report.

How should I structure my report?

18. You should check that:

- You have listed all the documents you have reviewed.
- You have addressed each of the matters referred to above.
- You have responded to any specific questions posed in the Commission's letter of request for a report.
- You have provided any additional information relevant to the conduct of the practitioner which relates to the Code and any risk to public health or safety.

19. Although you are asked to respond to specific questions posed by the Commission you are able to comment on other aspects of the care given, within your area of expertise.

20. Always attach to your report a current copy of your curriculum vitae, including academic qualifications, membership of professional associations, experience, and publications (if not recently provided to the Commission).

What will happen to my report?

21. On completion of the investigation, the Commission has five options available:

- a. Terminate the matter
- b. Make comments to the practitioner on the matter the subject of the complaint.
- c. Make a prohibition order
- d. Make a public statement
- e. Refer the matter the subject of the complaint to the Director of Public Prosecutions.

22. Your opinion will be important in determining the outcome of the investigation. If you do not believe that the practitioner's conduct is wrong or may require some minor improvement, consideration will be given by the Commission to terminating the matter or making comments to the practitioner. If there appears to be a breach of the code and there is a risk to public health or safety, the Commission may make a prohibition order and/or a public statement.

23. If, at the completion of the investigation, the Commission proposes to do anything other than terminate the investigation, it must first give the practitioner an opportunity to make submissions. The Commission will usually provide the practitioner with a copy of your report. You may be asked to provide additional information in response to any submissions or further information obtained by the investigation officer.

24. At the end of an investigation the investigation officer will write to advise you of the outcome.

What if I have a conflict of interest?

25. When you are commissioned as an expert, the *Health Care Complaints Act 1993* requires you to complete a statement concerning your personal, financial or professional connection with the health practitioner under investigation. The Commission cannot obtain a report from a person with a financial connection with the practitioner.
26. If you believe that there is or might be a conflict of interest, let the Commission know immediately. Meeting the person in a professional setting, eg at a conference does not necessarily preclude you from providing an objective report, although an adversarial history with a practitioner or against a particular practice, may well be a conflict of interest sufficient to disqualify you as an independent expert on whom the Commission can rely.
27. If you feel you cannot provide an objective report, or believe that a reasonable person would consider that there is a conflict of interest, do not proceed to providing a report.

Will I be identified as a reviewer?

28. The Commission's general policy is not to disclose the identity of an expert to the practitioner against whom the complaint is made during the investigation process. However, your identity may be disclosed to the practitioner at the end of the investigation to the UP if the Commission proposes to make a prohibition order. When copies of any reports are provided to health practitioners at the time of proposing a prohibition order any reference to your name and qualifications may be included. Your contact details will be removed.

How will my report be used?

29. Expert reports may be used to assist in determining the outcome to a Commission investigation or an appeal to the Commission's decision under s 41C of the *Health Care Complaints Act 2010*. Expert reports can only be used in other legal proceedings (such as civil claims) with the consent of the expert, the complainant and the health practitioner whose conduct is the subject of the report. The expert, the Commission and the Commissioner cannot be compelled to produce the report or give evidence in relation to it in any proceedings other than an appeal under s 41C. If requested, the Commission will generally provide a copy of the expert report to the Coroner or the Police, but only after having sought your consent. There are restrictions on using the report in other proceedings.
30. The Commission is exempt from providing information in response to applications under the *Government Information Public Access Act 2009* in relation to its complaints handling, investigation, complaints resolution and reporting functions.

31. The Commission is subject to the jurisdiction of the NSW Ombudsman and the Independent Commission Against Corruption and may be required to provide information, including copies of expert reports, to those bodies.

What confidentiality issues should I be aware of?

32. As a health provider, you will already be aware of the need to keep information about particular patient care confidential. In addition to your professional obligations, there are confidentiality restrictions imposed by the *Health Care Complaints Act 1993*, breach of which constitutes an offence.
33. As a reviewer you are expected to safeguard the confidentiality of complainants, patients and the practitioners involved. The material you are given must not be divulged to other persons, nor can you discuss the complaint with any of the parties involved. In some circumstances you may, however, discuss the matter with a colleague in a generalised, de-identified and hypothetical way. If you do have such a discussion, you must disclose this in your expert report.
34. On completion of the review the Commission's investigation officer will ask you to return the information provided to you, or to keep it safely until the investigation is concluded.

How much will I be paid?

35. The Commission has a set rate of fees for experts and peer reviewers. There is a set fee for straightforward cases and one for more complex cases where there are multiple complaints or patients. The investigator will discuss with you the applicable fee.
36. The fee set by the Commission may not reflect the work that you put into it. The Commission knows that many of our reviewers spend a significant period of time researching and writing a report. The fees paid by the Commission are all-inclusive, and there will not normally be payment for subsequent reports that are requested due to the receipt of new information.
37. Payment can only be made on a tax invoice quoting your Australian Business Number (ABN). The tax invoice must be addressed to the Office of the Health Care Complaints Commission, abbreviations are not acceptable. The investigator will provide you with a tax invoice form.
38. Goods and Services Tax (GST) can only be paid if you are registered for GST with the ATO (please note that having an ABN does not automatically register you to charge GST). If you do not have an ABN you must include a statement that acknowledges that you understand that the Commission will apply Withholding Tax of 48.5% to your payment.

39. In the event that there is an appeal against the Commission's decision by the practitioner and the Commission requires the expert as a witness, the Commission will pay reasonable witness fees and expenses set by the appropriate court scale for expert reviewers who have to attend a hearing and give evidence.
40. If there is doubt about the rate to be paid you should contact the investigator prior to accepting the matter for review. All claims for payment should be made in writing stipulating the file number and the names of the identified practitioner or health service and the complainant and the date on which the report was forwarded to the Commission.

Will I be required to give oral evidence?

41. In rare cases you may be required to appear before the Commission to elaborate on your opinion, or for material put to the Commission by the respondent practitioner to be put to you.
42. If the Commission makes a prohibition order or public statement the respondent practitioner has a right of appeal to the Administrative Decisions Tribunal. If the right of appeal was exercised it is possible that you could be required as a witness before the Administrative Decisions Tribunal (ADT).