

Our Ref: 08/189 : DD13/01742
Your Ref:

4 February 2013

The Hon Leslie Williams MLA
Chair
Committee on the Health Care Complaints Commission
Parliament of New South Wales
Macquarie Street
SYDNEY NSW 2000

By Email: chccc@parliament.nsw.gov.au

Dear Mrs Williams,

Response to Additional Questions – Inquiry into Health Care Complaints and Complaints Handling in NSW

I refer to your letter dated 21 January 2013 requesting a response to additional questions relating to your Inquiry.

The Council responds to these questions as follows:

1. Your submission supports further information being made available to consumers outlining the role of the Council in complaint management.
 - What further information should be made available?

Complaints against medical practitioners in NSW are assessed and managed by the Health Care Complaints Commission (HCCC) and the Medical Council of NSW (the Council).

As is evident from the HCCC's and the Council's annual reports, a proportion of the total number of complaints that are received and assessed are referred to the Council for it to manage. The HCCC annual report states that 276 of the 1,461 complaints made against medical practitioners (or approximately 19%) were referred to the Council following the preliminary assessment of the complaint.

Usually, these complaints do not reach the threshold requiring investigation or relate to a practitioner's professional performance or health, so the Council and the HCCC refer the complaint to the Council to manage through its non-disciplinary Health and Performance pathways or its Conduct pathway.

Given a not insubstantial number of complaints are referred to the Council to manage, then it would be appropriate, in the Council's view, for consumers to be informed of the role of the Council and be provided with information concerning

the nature and scope of the Council's non-disciplinary Health and Performance Programs.

As stated in the Council's submission dated 3 February 2012, the Council has detailed information available on its website concerning these non-disciplinary Performance and Health Programs. However it does not appear that this information is part of the information that is generally made available to consumers either through written, electronic or other means, about the complaints handling procedures in NSW.

2. What should be done to clarify the confusion highlighted in your submission concerning the National Registration and Accreditation Scheme?

The Council understands that the Medical Board of Australia and the other National Boards that are part of the National Registration and Accreditation Scheme intend to review various registration standards, guidelines and codes that were initially developed before the scheme commenced.

The Council further understands that included within this review will be the Guidelines for Mandatory Notifications issued by the Medical Board of Australia.

The Council sees this as an opportunity to provide clarification to practitioners, employers and universities concerning the threshold that must be reached prior to the obligation arising to report notifiable conduct as defined in the *Health Practitioner Regulation National Law (NSW)*.

3. Your submission notes that complainants are sometimes dissatisfied with the amount of information provided to them following the Council's consideration of a complaint.
 - Generally, what information does your organisation provide to complainants?
 - Do you have processes in place to regularly inform complainants through the various stages of the complaint management procedure?

Generally, the Council adopts a similar process with respect to complaints referred to it to manage through its Performance, Conduct and Health Programs.

The Council will always write to the complainant to advise him/her that the complaint has been referred to the Council to manage, following completion of the preliminary assessment with the HCCC. At that time complainants are also provided with an information sheet which outlines the possible courses of action available to the Council following its consideration of the complaint and the practitioner's response. **Enclosed** is a copy of the information sheet that is sent to complainants when a complaint is referred to the Conduct Program or to the Performance Program.

Following the Council's consideration of the matter, the complainant will be advised of the outcome. On occasions and if appropriate the practitioner's response will be provided to the complainant.

The Council has available a number of mechanisms for dealing with a complaint and this includes either conducting a Performance Interview with the practitioner or a disciplinary Counselling Interview. If such an interview occurs, then the complainant is advised that an interview/counselling has occurred.

However the Council does not provide the complainant with a copy of the report which is prepared following the interview/counselling because of the confidentiality and privacy issues which arise from this process. **Enclosed** is a copy of the Council's Position Statement concerning Performance Interview reports dated 27 March 2012. This may provide the Committee with further insight into the difficulties that the Council faces when balancing the competing obligations of protecting a practitioner's privacy and ensuring its processes and decisions are transparent and that complainants are provided with adequate information concerning the outcome of a complaint. It is not always possible to provide detailed reasons for a particular course of action taken by the Council due to the ongoing privacy and confidentiality requirements.

On some occasions, a complainant may be provided with information concerning any published outcome of a matter, including any public conditions which may be published on the Register of Medical Practitioners.

The Council again notes that the HCCC as an investigative agency is exempt from many of the privacy principles that the Council is subject to and which arise from the *Privacy and Personal Information Protection Act 1998* and the *Health Records and Information Privacy Act 2002*.

Please do not hesitate to contact the Medical Council's Executive Officer, Ameer Tadros on 9879 2211, should you require clarification or further information in relation to any of these responses.

Yours faithfully,



Ameer Tadros
Executive Officer



MEDICAL COUNCIL OF NEW SOUTH WALES

REFERRAL OF COMPLAINTS TO THE MEDICAL COUNCIL OF NSW UNDER SECTION 25B OF THE HEALTH CARE COMPLAINTS ACT (Conduct)

Information for Complainants

You have made a complaint about a doctor to the Medical Council of New South Wales (the Council), the Health Care Complaints Commission (HCCC) or the Australian Health Practitioner Regulation Agency (AHPRA). In NSW the Council and the HCCC have consulted with each other on how this complaint is to be handled (as they are required to do by law). On the information available they have assessed your complaint and referred it to the Council for further action, rather than it being investigated by the HCCC. This means that while your complaint is taken seriously, on the information currently available it is unlikely to lead to formal disciplinary proceedings against the doctor.

After referral to the Council, the doctor will be provided with a copy of your complaint and asked to respond to it. Your complaint and the doctor's response will be considered by the Council and one of the following decisions will be made:

1. the doctor's response has satisfactorily addressed the issues raised in the complaint and no further action is required;
2. the doctor's actions have caused you distress and the doctor will be requested to apologise to you;
3. a Council letter be sent to the doctor from the Council's Medical Director, drawing attention to particular areas that are of concern to the Council;
4. the doctor should attend the Council for a Counselling or Conduct Interview;
5. the doctor be referred to the Council's Health or Performance Program;
6. no further action is required by the Council, but there may remain unresolved issues of concern to you. In this case, the Council will consult further with the Commission as to whether it is appropriate to refer the complaint to :
 - conciliation between yourself and the doctor at the Health Conciliation Registry with the assistance of a conciliator or
 - direct resolution with the assistance of a Complaints Resolution Officer;
7. the Council makes a complaint to the HCCC
 - as it is unable to deal with the matter as further information is required such as a peer opinion or medical records,
 - there are serious concerns about professional conduct warranting investigation by the HCCC.

At the conclusion of this process, you will be advised of the outcome and where appropriate, you will be provided with a copy of the doctor's response. If the Council determines that the doctor should attend the Council for a Counselling or Conduct Interview, you will be advised of the outcome of the Interview in due course.

If you are seeking financial compensation from the doctor then you are advised to seek legal advice, as compensation is not available through the Council's processes.



MEDICAL COUNCIL OF NEW SOUTH WALES
REFERRAL OF COMPLAINTS
TO THE MEDICAL COUNCIL OF NEW SOUTH WALES
UNDER SECTION 25B OF THE HEALTH CARE COMPLAINTS ACT

Information for Complainants

You have made a complaint about a doctor to the Medical Council of New South Wales (the Council) or the Health Care Complaints Commission (HCCC). The Council and the HCCC have consulted with each other on how this complaint is to be handled (as they are required to do by law). On the information available they have assessed your complaint and referred it to the Council for further action, rather than it being investigated by the HCCC.

After referral to the Council, the doctor will be provided with a copy of your complaint and asked to respond to it. Your complaint and the doctor's response will be considered by the Council and one of the following decisions will be made:

1. the doctor's response has satisfactorily addressed the issues raised in the complaint and no further action is required;
2. the doctor's actions have caused you distress and the doctor will be requested to apologise to you;
3. a Council letter be sent to the doctor from the Council's Medical Director, drawing attention to particular areas that are of concern to the Council;
4. the doctor should attend the Council for an Interview;
5. the doctor be required to undergo a detailed Performance Assessment;
6. no further action is required by the Council, but there may remain unresolved issues of concern for you. The Council will refer the matter to the HCCC in order for you to obtain further assistance;
7. there are concerns that the doctor's health may be impacting on his/her professional performance and the matter is referred to the Council's Health Committee;
8. there are concerns that the doctor's professional conduct may warrant the matter being referred to the HCCC for investigation which may result in formal disciplinary proceedings against the doctor.

When the Council has finished dealing with your complaint, you will be advised of the outcome and if appropriate, you will be provided with a copy of the doctor's response.

If you are seeking financial compensation from the doctor then you are advised to seek legal advice, as compensation is not available through the Council's processes.



PERFORMANCE INTERVIEW REPORTS POSITION STATEMENT

Date of publication: 27 March 2012 **Record Number:** DD12/05544 **File Number:** 02/068

Version: Final

Summary: Following a Performance Interview, a report is provided to the Performance Committee in order to consider the recommendations arising from the interview. Given the nature of the Interview and the confidential information that is at times included in the report, the Council's position is that such reports should not ordinarily be released to the complainant.

Instead the complainant will be advised that the practitioner has been interviewed and wherever possible, be provided with information concerning the outcome of the interview and some limited information about the interview.

Applies to: Performance Interview Panellists and the Performance Committee

Author: Ameer Tadros, Executive Officer

Owner: Medical Council of NSW

Relevant legislation:

- *Health Practitioner Regulation National Law (NSW)*
- *Privacy and Personal Information Protection Act 1998 (NSW)*
- *Health Records and Information Privacy Act 2002 (NSW)*

Review date: March 2017



PERFORMANCE INTERVIEW REPORTS POSITION STATEMENT

PURPOSE

A Performance Interview is an informal interview. The interview report is likely to include personal information about the medical practitioner and may, on occasions, include other issues which were not raised in the triggering complaint.

The Medical Council of NSW (the Council) has considered whether the report should be provided to the person who made the complaint that initiated the Performance Interview.

The Council is mindful of its obligation to maintain confidentiality in relation to certain information provided by a medical practitioner and the expectations of complainants to be informed of the outcome of their complaint and the reasons for it.

BACKGROUND

A Performance Interview is one of the mechanisms developed by the Council, through its Performance Committee, to explore the issues raised in a complaint. The Interview enables the Council to obtain further information in order to assist it when deciding if the practitioner should be referred for a Performance Assessment. The Interview also assists the Council to decide whether any other courses of action are appropriate.

A practitioner's attendance at a Performance Interview is voluntary. Many interview reports include information about the practitioner's practice and personal situation, including discussion about the practitioner's health. This information extends beyond the content and issues raised in the complaint that initiated the Interview.

The Performance Interview report informs the Council as to the issues raised and the recommendations made by the Panel members who conducted the Interview.

The Performance Committee has previously resolved that if a Performance Interview resulted in the Council deciding to refer a practitioner for a Performance Assessment, the interview report would not be released to the complainant. However, if the Council determined that no further action was required, it would usually release the report to the complainant, unless there was a reason not to release it, (such as if the complainant was a third party or the report included confidential information about the medical practitioner). This position statement reconsiders that approach.

ISSUES CONSIDERED

Performance Interviews are an informal discussion with the medical practitioner. The report will often include details about the medical practitioner's health, professional and personal circumstances. The inclusion of such information assists the Performance Committee in its decision concerning what, if any, further action is necessary in response to the complaint.

A medical practitioner's candour at a Performance Interview is encouraged and assists in the successful management of matters through the Council's Performance Program. However this may be eroded if the Performance Interview report is provided to the complainant,

particularly as the Performance Interview is voluntary, it is not recorded, and the practitioner is not given an opportunity to provide comments or corrections to the report, prior to it being considered by the Council's Performance Committee.

The Council has considered that on the one hand, release of Performance Interview reports may result in the Council being in breach of its legislative obligations. The Council notes that it is not lawful for it to disclose a medical practitioner's health or personal information, whether to complainants or anyone else, unless exceptions to the confidentiality and privacy obligations apply as set out in the *Health Practitioner Regulation National Law (NSW)*, the *Privacy and Personal Information Protection Act 1998 (NSW)* and the *Health Records and Information Privacy Act 2002 (NSW)*.

On the other hand, the Council also has an obligation to be transparent about its processes and its decision-making which centres upon ensuring public protection. Complainants have expectations that they will be informed as to the management of their complaint and the outcome.

The Council has considered whether it should seek the medical practitioner's consent to release a Performance Interview report to the complainant. Alternatively, the Council could in advance advise the medical practitioner that the Interview report is likely to be released and seek consent prior to the practitioner attending the Performance Interview. However, this is likely to erode a practitioner's candour during the Interview and potentially limit the effectiveness of the Interview.

The Council has also considered whether it could provide a redacted report to complainants with the confidential information removed. Issues in relation to the practitioner's practice which are not directly relevant to the matters complained about would also have to be redacted. It is likely that large sections of the report would be removed, rendering it difficult to read and interpret and possibly eroding a complainant's confidence in the transparency and fairness of the Council's processes.

COUNCIL POSITION

Having considered these issues, the Council is of the view that following a Performance Interview, a complainant should be advised by letter that:

1. An interview has taken place and the date of the interview.
2. The issues of concern raised by the complaint were fully explored with the medical practitioner during the interview.
3. Following the interview, the Performance Committee has determined that:
 - i. No further action under the *Health Practitioner Regulation National Law (NSW)* is required.
The reasons for this decision may include the following:
 - a. The medical practitioner has been counselled by the Council.
 - b. That the Council understands the medical practitioner has now changed (or has undertaken to change) aspects of his/her practice.
 - c. That having considered the issues raised in the complaint and the medical practitioner's response, the Council is satisfied that no further action is necessary.
 - or
 - ii. There will be no further action taken about the initial complaint and the Council's consideration of this complaint is finalised. However as a result of the Performance Interview, the medical practitioner's professional

performance will be assessed in accordance with the provisions of the *Health Practitioner Regulation National Law (NSW)* (the Law). The Council is unable to disclose further information about this due to the confidentiality requirements contained within the Law. It is possible that conditions may eventually be imposed on the practitioner's registration, and if so, these will appear on the public online register available through the Australian Health Practitioner Regulation Agency website.

or
iii.

There will be no further action taken about the initial complaint and the Council's consideration of this complaint is finalised. However as a result of the Performance Interview, the Council is considering other matters which cannot be disclosed due to the confidentiality requirements contained within the Law. It is possible that conditions may eventually be imposed on the practitioner's registration, and if so, these will appear on the public online register available through the Australian Health Practitioner Regulation Agency website.

27 March 2012