

Expert Guidelines

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 provide grounds for disciplinary action against 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 paramount principle which governs health regulation is the public interest, which includes protection of the public. Disciplinary action is not taken by the Commission with a view to punishing the practitioner but to protect patients from health practitioners who act unethically, improperly and/or significantly below the expected standard. The aim of disciplinary action is to "maintain proper ethical and professional standards, primarily for the protection of the public, but also for the protection of the profession".¹
4. For unregistered practitioners, professional associations have a role in ensuring their members meet expected standards. An outcome of an investigation concerning an unregistered practitioner may include a recommendation that the professional association initiate disciplinary action or other appropriate action depending on its articles of association, by-laws or other instruments.
5. The public expects a safe service from health professionals whether they are subject to statutory regulation or self-regulation. The Commission takes action when there is sufficient evidence that practitioners are impaired, lack competence, act unethically or improperly, or practice significantly below the expected standard in terms of their skill, judgment, knowledge or care. The Commission, professional advisers and reviewers play a critical role in supporting health system safety.
6. Below are some questions and answers that may assist you in providing your report to the Commission.

What is expected of me as a reviewer?

7. 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 comment on whether you believe that there is sufficient evidence to prove a complaint.

¹ *Health Care Complaints Commission v Litchfield* (1997) 41 NSWLR 630 at 637

8. You will be given certain facts which we ask that you assume to be correct for the purposes of preparing your report.
9. You will be asked to describe the standard you would reasonably expect of a practitioner with equivalent training or experience to that of the practitioner the subject of the complaint. The standard should be that which applied at the time of the events the subject of the complaint. You will then be asked whether the conduct of the practitioner is below that standard, and if it is, whether it is significantly below it or otherwise and to provide reasons for your opinion.
10. You are being asked to provide an opinion which you believe reflects the opinions 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.
11. You are asked to provide a balanced, objective and considered opinion and the language you use should reflect this.

What standard should I use?

12. The standard is what is reasonably expected of a practitioner with the same training or experience as the practitioner complained about at the time of the events the subject of complaint.
13. If you are of the opinion that the practitioner's conduct was below what was reasonably expected at the time of the events complained about, you should state whether it was significantly below that standard or otherwise.
14. If the complaint proceeds to a disciplinary hearing, the Professional Standards Committee or the Tribunal will ultimately decide whether the practitioner is guilty of unsatisfactory professional conduct or professional misconduct.
15. The *Medical Practice Act 1992* describes "unsatisfactory professional conduct" as
"Any conduct that demonstrates that the knowledge, skill or judgement possessed, or care exercised, by the practitioner in the practice of medicine is significantly below the standard reasonably expected of a practitioner of an equivalent level of training or experience."
16. "Professional misconduct" is defined as "unsatisfactory professional conduct of a sufficiently serious nature to justify suspension of the practitioner from practising medicine or the removal of the practitioner's name from the Register."
17. This definition is the same for all registered health practitioners in NSW (except pharmacists). If you are providing an opinion about the conduct of a practitioner who is not a medical practitioner, you will be provided with the relevant provisions of the legislation.

What type of disciplinary action might occur?

18. The Commission can take disciplinary action at the end of an investigation if there is sufficient evidence to prove that the conduct of a particular health practitioner may amount to unsatisfactory professional conduct or professional misconduct. This type of conduct is defined in the various registration Acts. For example, the *Medical Practice Act 1992* states that, among other matters, the following can amount to unsatisfactory professional conduct:

- Conduct which demonstrates that the skill, knowledge or judgment possessed, or care exercised, by the practitioner in the practice of medicine is significantly below the standard reasonably expected of a practitioner of an equivalent level of training or experience;
- Contravention of the Medical Practice Act or regulations;
- Contravention of any conditions to which the practitioner's registration is subject;
- Specified criminal convictions and criminal findings;
- Accepting or offering benefits for referrals or recommendations;
- Over-servicing;
- Assisting unregistered practitioners;
- Failing to render urgent attention;
- Failing to give information, produce documents or give evidence to the Commission when requested to do so by notice in writing, without reasonable excuse;
- Other improper or unethical conduct relating to the practice or purported practice of medicine.

19. If a Professional Standards Committee or Tribunal finds the complaint proved, it may reprimand or caution the practitioner, order that the practitioner undergo counselling or medical or psychiatric treatment, complete educational courses or report on or take advice in relation to their medical practice, or impose conditions relating to the practice of medicine. The practitioner may also be suspended from practice or their name removed from the register of practitioners. Some practitioners may also be fined in certain circumstances.

If I am critical, how do I describe my criticism?

20. If you are of the opinion that the practitioner's conduct was significantly below what is reasonably expected, you will also be asked whether that departure invites your strong criticism of the conduct of the practitioner. You may provide an opinion of what you would have done in the circumstances but your report should focus on your opinion as to the reasonable standard and whether the conduct falls significantly below it, if at all. You must give reasons for your opinions.

21. 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 health professionals 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.

22. 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.

23. It is also important to note that whether there is any adverse outcome for the patient is not relevant in disciplinary cases. The Commission's role is to investigate the appropriateness of care given, not whether that care had an adverse outcome. Unlike medical negligence cases, disciplinary action can be taken without any harm having been suffered by the patient.

24. 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?

25. 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.
- Describe the standard reasonably expected and give reasons for your opinion.
- Describe whether the conduct complained of falls below that standard and give reasons for your opinion by reference to the facts and other matters within your knowledge and expertise.
- Describe the extent to which the conduct fell below that standard, (if at all) that is significantly or otherwise, and give reasons for your opinion by reference to the facts and other matters within your knowledge and expertise.
- If you are of the opinion that the conduct is significantly below that standard, state whether your criticism of the conduct is strong or otherwise.
- Describe the basis on which you believe that your peers of good standing would hold the same view as you, 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?

26. 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.

27. 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.

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

What will happen to my report?

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

1. Refer the complaint to the Director of Proceedings, whose role is to determine whether the complaint should be prosecuted before a disciplinary body (Professional Standards Committee or Tribunal).
2. Refer the complaint to the appropriate registration authority (if any) for consideration of the taking of action under the relevant health registration Act, such as the referral of the health practitioner for performance assessment, counselling or impairment assessment.
3. Make comments to the health practitioner on the matter the subject of the complaint.
4. Terminate the matter.
5. Refer the matter the subject of the complaint to the Director of Public Prosecutions.

30. Your opinion will be important in determining the outcome of the investigation. If you do not believe that the practitioner's conduct fell significantly below the expected standard, consideration will be given by the Commission to terminating the matter, making comments to the practitioner or counselling. If you do believe that it fell significantly below the expected standard and expressed strong criticism, the Commission may prosecute a complaint before a Professional Standards Committee or a Tribunal.

31. 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 but any identification of you will be deleted. You may be asked to provide additional information in response to any submissions or further information obtained by the investigation officer.

32. At the end of an investigation the investigation officer will write to advise you of the outcome. If disciplinary action is proposed, you may be called to give evidence before the relevant disciplinary body. If this is the case, you will be contacted at a later time by the Commission's legal advisers to discuss your role as a witness and the anticipated date of the hearing.

What if I have a conflict of interest?

33. If you are providing a written report, 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. The Commission will assess other connections and will discuss any concerns with you.

Will I be identified as a reviewer?

34. The Commission's policy is not to disclose the identity of an expert to the practitioner against whom the complaint is made during the investigation process. Your identity will be disclosed if disciplinary action is taken and you are required to give evidence in those proceedings. When copies of any reports are provided to health practitioners during the investigation stage any reference to your name and contact details will be removed.

35. The Commission will disclose the identity of the reviewer to a registration authority, and often provide a copy of the report to it, during consultation about the most appropriate action to take at the end of an investigation.

How will my report be used?

36. Expert reports may be used in disciplinary or related proceedings under a health registration Act but 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 disciplinary hearings.

37. The Commission is exempt from providing information in response to applications under the *Freedom of Information Act 1989* in relation to its

complaints handling, investigative, complaints resolution and reporting functions.

38. 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?

39. 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*.

40. 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 any other person, nor can you discuss the complaint with any of the parties involved.

41. 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?

42. 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. The investigator will discuss with you the applicable fee.

43. 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.

44. 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.

45. The Commission will pay reasonable witness fees and expenses set by the appropriate court scale for experts and peer reviewers who have to attend a disciplinary hearing and give evidence. 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.

46. 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.