

## **HEALTH PRACTITIONERS COMPETENCE ASSURANCE ACT 2003 THE COURT CONVICTION PROCESS**

This booklet explains the investigation process for referrals of court convictions made under the Health Practitioners Competence Assurance Act 2003 (HPCA Act).

The Nursing Council of New Zealand (the Council) is a statutory body continued in existence by the HPCA Act. The HPCA Act sets out several functions concerning the registration, continuing competence and fitness to practise of nurses, and includes the consideration of nurses' court convictions.

### **Referral of conviction from courts**

The HPCA Act requires court registrars to send a notice of conviction to the Council for a nurse convicted of:

- an offence punishable by imprisonment for a term of three months or longer
- an offence against the following Acts:
  - Births, Deaths, and Marriages Registration Act 1995
  - Burial and Cremation Act 1964
  - Contraception, Sterilisation, and Abortion Act 1977
  - Coroners Act 2006
  - Health Act 1956
  - Health and Disability Services (Safety) Act 2001
  - Human Tissue Act 1964
  - Injury Prevention, Rehabilitation, and Compensation Act 2001
  - Medicines Act 1981
  - Mental Health (Compulsory Assessment and Treatment) Act 1992
  - Misuse of Drugs Act 1975
  - Radiation Protection Act 1965.

### **Interim suspension pending investigation**

If a nurse is alleged to have engaged in conduct relevant to a pending criminal proceeding or an investigation by the Health and Disability Commissioner or a Professional Conduct Committee, and the Council believes the conduct casts doubt on the appropriateness of the nurse's conduct in his or her professional capacity, the

Council may suspend the nurse's practising certificate or include conditions in the nurse's scope of practice. The nurse will be given the opportunity to make oral and written submissions before this occurs.

## **Referral to Professional Conduct Committee**

The HPCA Act requires the notice of conviction to be referred to a Professional Conduct Committee (PCC) to consider what action, if any, should be taken in response to the referral.

## **Appointment of a PCC**

The Council has appointed a PCC to consider all referrals of conviction. This PCC comprises two nurses and a lay appointment. If there is a conflict of interest, the Council will appoint another PCC member.

## **Membership of the PCC and legal advisor**

Once a nurse's conviction has been referred to a PCC, the nurse will be informed in writing of the referral and given a copy of the certificate of conviction, the names of the proposed PCC members and the name and contact details of the PCC legal advisor.

The nurse may make a written request for changes to the membership of the PCC, and outline his or her reasons for this. The request must be made within five working days of the nurse being informed of the intended PCC membership. The Council must consider the request but need not comply with it.

The legal advisor is generally a member of the Council's staff and the contact person for the nurse for information about the PCC process.

The nurse may choose, and is encouraged, to seek the representation or support of a legal representative, professional advisor or support person through this process. Professional organisations, including the New Zealand Nurses Organisation, Public Service Association or College of Nurses, may provide representation and support for their members.

Nurses who wish to have representation are strongly recommended to contact that person or their professional organisation at this time to ensure they are involved in the process.

## **Appointment of legal advisor and investigator**

The PCC has an investigator and legal advisor appointed. The investigator gathers the information the PCC requires for its consideration of the referral. The legal advisor provides legal advice to the PCC on matters of law, procedure or evidence.

## **Interim suspension during an investigation**

If, during the investigation of the complaint, the PCC believes the nurse's practice poses a risk of serious harm to the public, it must notify the Council and provide reasons for this belief.

If a PCC believes these reasons justify the nurse's suspension of practice for health, competency or conduct concerns, it may recommend that the Council take appropriate action.

If the complaint or investigation raises competency or conduct concerns, the nurse will be given an opportunity to make written and/or oral submissions to the Council before it decides whether to suspend the nurse from practice or include conditions in his or her scope of practice. If a PCC notifies the Council of health concerns, interim suspension of the nurse may occur without notice.

## **PCC meeting**

### **PCC meeting dates and venue**

The PCC meets at three-monthly intervals to consider nurses with court convictions. Meetings are generally held at the offices of the Council in Wellington. In special circumstances, a meeting may be convened in a centre agreed to by the PCC and the nurse. The nurse will be informed well in advance of the proposed meeting date.

### **Information considered by the PCC**

The information gathered by the investigator for a referral of conviction usually consists of:

- a certified copy of the conviction
- the police summary of facts
- the sentencing notes of the judge.

If the conviction was not the result of a guilty plea, the police summary of facts may not always be included. This information is given to the nurse with the letter informing him or her of the PCC meeting date and venue.

### **Natural justice**

The process must comply with the rules of natural justice. This means that, to protect the interests of people who may be adversely affected by a decision, those people must be given the opportunity to respond to the information gathered by the PCC. The PCC and nurse receive the same information before that meeting.

## **PCC meeting process**

The PCC meeting is a relatively informal process. However, because the PCC is considering what action, if any, to take on a referral of conviction, a degree of formality is required.

The nurse may choose to provide a written submission for consideration by the PCC rather than attend the meeting. If the nurse attends the meeting, he or she may choose to read a prepared statement and answer the PCC's questions as they arise. If the nurse is legally represented, his or her representative may prefer to address the PCC first. The PCC convenor will ask the representative and nurse how they wish to proceed. A recording of the meeting is taken.

The legal advisor attends the hearing to advise the PCC but is not present during the PCC's deliberations.

## **The PCC's role**

The PCC's role in considering a referral of conviction is to decide whether the conviction meets a threshold of seriousness and may reflect adversely on a nurse's fitness to practise.

The PCC deliberates at the conclusion of the meeting and provides an oral decision shortly after the hearing if it is in a position to do so. The PCC must make recommendations and/or determinations in relation to the referral within 14 days of completing the investigation.

The PCC will also consider whether the conviction should be dealt with through other processes available under the HPCA Act, such as a competence review or consideration by the Health Committee.

The PCC must give written notice of any recommendations or its determination, and the reasons for it, to the Registrar and the nurse.

## **PCC recommendations**

The PCC may recommend that the Council does one or more of the following:

- reviews the competence of the nurse
- reviews the nurse's fitness to practise (health)
- reviews the nurse's scope of practice
- refers the subject matter of the investigation to the police
- counsels the nurse.

Any recommendations are referred to the Council to decide what action it will take. The Council must consider the recommendations promptly but does not need to follow them.

## **Review of competence**

Information about the competence review process is available on the Council's website [www.nursingcouncil.org.nz](http://www.nursingcouncil.org.nz) or in the booklet *The Competence Review Process*. Under this process, the nurse will be asked to provide information about his or her practice and any professional development that has been completed, and may be offered an opportunity to meet with a competence review panel.

## **Referral to the Health Committee**

Information about the health process is also available on the Council's website or in the booklet *The Health Process*. Under this process, the nurse will be asked to have a medical examination (paid for by the Council) and meet with the Health Committee. The Health Committee may include conditions in a nurse's scope of practice or suspend a nurse if he or she is unable to practise because of a mental or physical condition.

## **Letter of counsel**

A recommendation that the Council counsels a nurse generally means a letter is sent to the nurse recommending an improvement in the nurse's practice or behaviour.

## **Review of scope of practice**

A PCC may also recommend that the Council includes a condition in the nurse's scope of practice, such as practising under supervision. If such a recommendation is made, the nurse is given the opportunity to make a written and/or oral submission before the Council reviews the nurse's scope of practice.

## **PCC determinations**

A PCC may also determine that:

- no further steps be taken in relation to the subject matter of the referral
- a charge that the conviction reflects adversely on fitness to practise be brought against the nurse before the Health Practitioners Disciplinary Tribunal (the Tribunal).

## **Charges before the Tribunal**

If a PCC decides to lay a charge against a nurse, it must frame an appropriate charge and lay it before the Tribunal.

## **Health Practitioners Disciplinary Tribunal**

The HPCA Act establishes an independent disciplinary tribunal, which is separate from Council, to hear charges laid against all health practitioners. When considering charges against a nurse, the Tribunal will comprise a chair, who is a lawyer, three nurses and a layperson.

The hearings are in public, unless there are compelling reasons for a private hearing, and may be held in Wellington.

The Tribunal will decide whether the conviction reflects adversely on the nurse's fitness to practise and whether to impose a penalty.

Information about the Tribunal and its processes is available from its website at [www.hpdt.org.nz](http://www.hpdt.org.nz).

## **Appeal**

The decisions of PCCs are not subject to appeal. However, a PCC or the nurse may appeal decisions of the Tribunal in the High Court.

## **Judicial review**

Decisions of PCCs may be reviewed in the High Court. The purpose of a judicial review is to review the process that the decision maker used to come to a decision and ensure that the decision itself is within the confines of the Act and is not clearly unreasonable. The question is whether a fair and reasonable process resulted in a fair and reasonable outcome.

## **Enquiries**

Any enquiries about the court conviction process should be addressed to the investigators/legal advisors of the Council.

**The relevant sections of the Health Practitioners Competence Assurance Act 2003 follow.**

#### **PART 4 - COMPLAINTS AND DISCIPLINE**

##### ***Referral of complaints and interim suspensions***

#### **64 Complaints about practitioners—**

(1) Whenever the responsible authority receives a complaint alleging that the practice or conduct of a health practitioner has affected a health consumer, the authority must promptly forward the complaint to the Health and Disability Commissioner.

(2) This section does not apply to a complaint that an authority receives from the Health and Disability Commissioner.

(3) In subsection (1), “health consumer” has the same meaning as in the Health and Disability Commissioner Act 1994.

#### **65 Response to complaints referred by Health and Disability Commissioner—**

(1) When the Health and Disability Commissioner refers a complaint to the responsible authority under section 34(1)(a) of the Health and Disability Commissioner Act 1994, the authority must promptly assess the complaint and consider, in light of the nature and circumstances of the complaint, the action or actions that the authority should take to respond to the complaint.

(2) Without limiting the generality of subsection (1), the authority may decide to refer the complaint to a professional conduct committee.

#### **66 Health and Disability Commissioner must notify authority of pending complaint—**

The Health and Disability Commissioner must, under section 42(1) of the Health and Disability Commissioner Act 1994, notify the responsible authority of any investigation under that Act that directly concerns a health practitioner.

#### **67 Notification of convictions—**

A registrar of a court in New Zealand who knows that a person convicted in the court is a health practitioner must send a notice of the conviction to the responsible authority if the conviction is for—

- (a) an offence punishable by imprisonment for a term of 3 months or longer; or
- (b) an offence against—
  - (i) the Births, Deaths, and Marriages Registration Act 1995; or
  - (ii) the Burial and Cremation Act 1964; or
  - (iii) the Contraception, Sterilisation, and Abortion Act 1977; or

- (iv) the Coroners Act 1988; or
- (v) the Health Act 1956; or
- (vi) the Health and Disability Services (Safety) Act 2001; or
- (vii) the Human Tissue Act 1964; or
- (viii) the Injury Prevention, Rehabilitation, and Compensation Act 2001; or
- (ix) the Medicines Act 1981; or
- (x) the Mental Health (Compulsory Assessment and Treatment) Act 1992; or
- (xi) the Misuse of Drugs Act 1975; or
- (xii) the Radiation Protection Act 1965.

**68 Referral of complaints and notices of conviction to professional conduct committee—**

(1) If the responsible authority decides, under section 65(2), to refer a complaint to a professional conduct committee, it must do so as soon as practicable after it makes that decision.

(2) When a notice of conviction is given under section 67 to the authority, the authority must, as soon as reasonably practicable after receiving the notice, refer the notice to a professional conduct committee.

(3) If the responsible authority considers that information in its possession raises 1 or more questions about the appropriateness of the conduct or the safety of the practice of a health practitioner, it may refer any or all of those questions to a professional conduct committee.

(4) If at any time, while a matter concerning a health practitioner is under consideration by a professional conduct committee, the responsible authority thinks that a further matter concerning that practitioner should form part of the committee's consideration, the authority may refer the further matter to the committee.

**69 Interim suspension of practising certificate pending prosecution or investigation—**

(1) This section applies if a practitioner is alleged to have engaged in conduct that—  
(a) is relevant to—  
(i) a criminal proceeding that is pending against the practitioner; or  
(ii) an investigation about the practitioner that is pending under the Health and Disability Commissioner Act 1994 or under this Act; and  
(b) in the opinion of the responsible authority held on reasonable grounds, casts doubt on the appropriateness of the practitioner's conduct in his or her professional capacity.

(2) If this section applies, the responsible authority may order that—  
(a) the practising certificate of the health practitioner be suspended; or  
(b) 1 or more conditions be included in the health practitioner's scope of practice.

(3) The authority may not make an order under subsection (2) unless it has first—  
(a) informed the health practitioner concerned why it may make an order under that subsection in respect of the health practitioner; and

(b) given the health practitioner a reasonable opportunity to make written submissions and be heard on the question, either personally or by his or her representative.

(4) The authority must revoke an order under subsection (2) as soon as practicable after—

(a) the authority is satisfied that the appropriateness of the practitioner's conduct in his or her professional capacity is no longer in doubt; or

(b) the criminal proceeding on which the practitioner's suspension is based is disposed of otherwise than by his or her conviction; or

(c) if the criminal proceeding on which the practitioner's suspension is based results in his or her conviction, the authority is satisfied that no disciplinary action is to be taken or continued in respect of that conviction under the Health and Disability Commissioner Act 1994 or under this Act; or

(d) if the investigation on which the practitioner's suspension is based has been completed, the authority is satisfied that the practitioner will not be charged as a result of the investigation.

(5) An order under subsection (2) or subsection (4) takes effect immediately, and the authority must ensure that the practitioner is notified as soon as practicable.

#### **70 No action to be taken while matter under investigation by Health and Disability Commissioner—**

(1) When, in accordance with section 64, an authority notifies the Health and Disability Commissioner of a complaint or, in accordance with section 66, the Health and Disability Commissioner notifies an authority of an investigation, the authority may not take any action under this Part concerning the complaint or the subject matter of the investigation until—

(a) the Health and Disability Commissioner notifies the authority—

(i) that the matter is not to be investigated, or investigated further, under the Health and Disability Commissioner Act 1994; or

(ii) that the complaint or matter has been resolved; or

(iii) that the matter is not to be referred to the Director of Proceedings under section 45(2)(f) of that Act; or

(b) the Director of Proceedings notifies the authority of his or her decision under section 49 of that Act not to institute disciplinary proceedings in relation to the matter.

(2) This section is subject to section 69.

#### ***Professional conduct committees***

#### **71 Professional conduct committees—**

(1) Each authority may from time to time appoint, in relation to a particular case or cases of a particular class, a professional conduct committee consisting of—

(a) 2 health practitioners who are registered with the authority; and

(b) 1 layperson.

(2) The authority may, if in any particular case it considers it appropriate to do so, appoint, under subsection (1), a health practitioner or, as the case requires, a layperson who is a member of the authority.

(3) The authority must appoint 1 of the members of each professional conduct committee to preside at the meetings of the committee.

## **72 Committees may regulate own procedure—**

(1) A professional conduct committee may regulate its procedure as it thinks fit.

(2) A professional conduct committee must adopt and follow procedures that will ensure that, in relation to each matter referred to the committee, the health practitioner who is the subject of the reference, the responsible authority, and any complainant, are each kept informed about the progress of the reference.

(3) Subsection (1) is subject to subsection (2) and the other provisions of this Act, to the rules of natural justice, and to any regulations made under this Act.

## **73 Committees may appoint legal advisers and investigators—**

(1) A professional conduct committee may appoint a legal adviser approved by the authority to advise the committee on matters of law, procedure, or evidence.

(2) A professional conduct committee may appoint an investigator to collect information required by the committee and to investigate complaints.

(3) A person appointed under this section must not be present during the deliberations of the committee.

(4) The legal adviser may not, under section 91(5), represent the committee before the Tribunal at the hearing of a charge if the adviser assisted the committee in the investigation that led to the charge.

## **74 Information to be given to practitioner and complainant—**

(1) Within 14 working days after a matter concerning a health practitioner is referred to a professional conduct committee, the authority must ensure—

(a) that the health practitioner is given written notice of—

(i) the particulars of the matter; and

(ii) the membership or intended membership of the professional conduct committee that is to consider the matter; and

(b) in the case of a complaint, that the complainant is given written notice of the membership or intended membership of the professional conduct committee that is to consider the matter.

(2) As soon as reasonably practicable after a further matter concerning a health practitioner is referred to a professional conduct committee under section 68(4), the authority must ensure that the health practitioner is given written notice of the particulars of the further matter.

(3) Subsection (1) is subject to section 154.

**75 Practitioners and complainants may request changes in membership of professional conduct committee—**

(1) Within 5 working days after being informed of the membership or intended membership of the professional conduct committee that is to consider a matter about a health practitioner, the practitioner or, in the case of a complaint, the complainant may give the authority concerned notice—

- (a) requesting that any or all of the members or intended members not be appointed as, or not act as, members of that committee; and
- (b) stating the reasons for the request.

(2) The authority—

- (a) must have regard to the request; but
- (b) need not comply with it.

**76 Professional conduct committees may receive evidence—**

(1) A professional conduct committee may receive as evidence any statement, document, information, or matter that, in its opinion, may assist it to deal effectively with the subject of its investigation, whether or not that statement, document, information, or matter would be admissible in a court of law.

(2) In particular, a professional conduct committee may hear oral evidence and receive statements and submissions from any or all of the following persons:

- (a) the health practitioner who is the subject of the committee's investigation;
- (b) any employer of that health practitioner;
- (c) any person in association with whom that health practitioner practises;
- (d) if the matter referred to the committee is a complaint, the complainant;
- (e) any clinical expert.

(3) Despite subsections (1) and (2), a professional conduct committee must give the health practitioner who is the subject of the committee's investigation a reasonable opportunity to present evidence on each matter, including any further matter, that is referred to the committee under section 68 and forms part of the investigation.

(4) Any complainant may be supported by a person nominated by the complainant; and that person may, with the leave of the committee, be heard at a hearing.

(5) A professional conduct committee may require that any evidence it receives be supported by a statutory declaration in the manner provided for by section 9 of the Oaths and Declarations Act 1957.

(6) Subsection (5) does not apply to a submission made by the health practitioner or a complainant under section 80(4).

(7) No civil or disciplinary proceedings lie against any person in respect of any evidence given, or statements or submissions made, under this section by that person, unless the person has acted in bad faith.

**77 Powers to call for information or documents—**

(1) If the conditions stated in subsection (2) are satisfied, a professional conduct committee may, by notice in writing, require any person to produce to the committee any papers, documents, records, or things.

(2) The conditions referred to in subsection (1) are that—

(a) the members of the committee believe, on reasonable grounds, that the exercise of the powers conferred by that subsection is necessary to enable the committee to carry out its investigation; and

(b) the person to whom a notice under that subsection is to be given has failed to comply with a previous request to produce to the committee, within a reasonable time, the papers, documents, records, or things required by the notice; and

(c) the members of the committee believe, on reasonable grounds, that—

(i) it is not reasonably practicable to obtain the information required by the committee from another source; or

(ii) for the purposes of the investigation, it is necessary to obtain the papers, documents, records, or things to verify or refute information obtained from another source.

**78 Compliance with requirement to provide information or document—**

(1) A person who receives a notice under section 77 must, without charge, comply with the requirement stated in the notice in the manner and within the period (being not less than 10 working days after the notice is given to the person) specified in the notice.

(2) Subsection (1) does not require a person to provide any information or produce any document that would be privileged in a court of law.

(3) No person is required to produce to a committee any papers, records, documents, or things if compliance with that requirement would be in breach of an obligation of secrecy or nondisclosure imposed on the person by an enactment (other than the Official Information Act 1982 or the Privacy Act 1993).

(4) Every person commits an offence, and is liable on summary conviction to a fine not exceeding \$10,000, who, when required to comply with a notice given under section 77,—

(a) refuses or fails without reasonable excuse to comply with the notice; or

(b) knowingly or recklessly provides information that is false or misleading in any material particular.

**79 Professional conduct committee may recommend suspension of practitioner's practising certificate if public at risk—**

If, at any time in the course of investigating a matter about a health practitioner, a professional conduct committee has reason to believe that the practitioner's practice poses a risk of serious harm to the public, the committee—

(a) must immediately notify the responsible authority of that belief and the reasons for it; and

(b) if, in the opinion of the committee, those reasons justify the suspension of the practitioner's practising certificate under section 39(2), section 48(2), or section 69(2), may recommend that the authority take appropriate action.

## **80 Recommendations and determinations of professional conduct committee—**

(1) Within 14 working days after completing its investigation into a matter concerning a health practitioner, the committee must make—

- (a) 1 or more of the recommendations specified in subsection (2); or
- (b) 1 of the determinations specified in subsection (3); or
- (c) both.

(2) The recommendations referred to in subsection (1)(a) are—

- (a) that the authority review the competence of the health practitioner to practise his or her profession:
- (b) that the authority review the fitness of the health practitioner to practise his or her profession:
- (c) that the authority review the practitioner's scope of practice:
- (d) that the authority refer the subject matter of the investigation to the police:
- (e) that the authority counsel the practitioner.

(3) The determinations referred to in subsection (1)(b) are—

- (a) that no further steps be taken under this Act in relation to the subject matter of the investigation:
- (b) that a charge be brought against the health practitioner before the Tribunal:
- (c) in the case of a complaint, that the complaint be submitted to conciliation.

(4) The committee may not make a recommendation or determination unless the health practitioner concerned and any complainant has each been given a reasonable opportunity to make written submissions and be heard on the matter under investigation, either personally or by a representative; and for that purpose the committee must give the health practitioner and the complainant written notice of—

- (a) the latest date by which the committee will receive written submissions from the health practitioner and the complainant; and
- (b) the date on which the committee will hear persons who are entitled to be heard and wish to be heard.

## **81 Procedure after committee makes recommendation or determination—**

(1) A professional conduct committee must give written notice of any recommendation or determination under section 80 in respect of a health practitioner, and the reasons for it, to—

- (a) the Registrar of the responsible authority; and
- (b) the health practitioner; and
- (c) in the case of a complaint, the complainant.

(2) If it decides to lay a charge against the health practitioner before the Tribunal, the professional conduct committee must—

- (a) formulate an appropriate charge; and
- (b) lay it before the Tribunal.

(3) An authority that receives notice of a recommendation specified in section 80(2) must promptly consider the recommendation.

## **82 Settlement of complaint by conciliation—**

(1) If a professional conduct committee has decided to submit a complaint to conciliation, it must appoint an independent person (the "conciliator") to assist the health practitioner and complainant concerned to resolve the complaint by agreement.

(2) The conciliator must, within a reasonable time after his or her appointment, provide the professional conduct committee and the responsible authority with a written report as to whether or not the complaint has been successfully resolved by agreement.

(3) If, after consideration of the conciliator's report, the professional conduct committee thinks that the complaint has not been successfully resolved by agreement, it must promptly decide whether—

- (a) the committee should lay a charge against the practitioner before the Tribunal; or
- (b) the committee should make 1 or more of the recommendations specified in section 80(2) about the practitioner; or
- (c) no further steps be taken under this Act in relation to the complaint.

(4) If the professional conduct committee decides to lay a charge before the Tribunal, it must—

- (a) formulate an appropriate charge; and
- (b) lay it before the Tribunal, together with a copy of the conciliator's report; and
- (c) give a copy of the charge and the report to the practitioner, the responsible authority, and the complainant.

(5) The costs of conciliation must be paid by the responsible authority.

(6) If the committee makes a determination that no further steps be taken under this Act in relation to the complaint,—

- (a) no further steps may be taken under this Act in relation to the complaint; and
- (b) the committee must give the practitioner, the responsible authority, and complainant written notice of—
  - (i) the determination; and
  - (ii) the committee's reasons.

## **83 Restriction on information obtained by professional conduct committees—**

A professional conduct committee or a member or former member of the committee or a person who assists or has assisted the committee may use or disclose any information obtained in the course of the performance of the committee's functions only for the purposes of this Act.