

# The complaint investigation process



## **Introduction**

This information sheet explains the investigation process for complaints made under the Health Practitioners Competence Assurance Act 2003 (the Act).

To provide a culturally safe and appropriate response for nurses, complainants and witnesses, after consultation with those participants, the process will be conducted in a way that is consistent with the principles of Te Tiriti o Waitangi, has regard to appropriate tikanga Māori, upholds the mana of the parties and has regard to any specific cultural preferences or circumstances of the parties.

## **Complaints**

The Nursing Council accepts written complaints from any person. A complaint should contain enough information to enable the Council to decide what action, if any, should be taken about the complaint. If the complaint does not include sufficient detail, the person making the complaint may be asked to provide further information.

The Council has a form on its website that can be completed on line but will accept any form of written complaint.

Anonymous complaints are not usually investigated unless further inquiry is possible. Any complaint including the name of the complainant, but minus contact details, will be provided to the nurse.

The Council may refer a matter to a Professional Conduct Committee (PCC) for investigation without a complaint having been made if it has information that raises questions about the appropriateness of the nurse's conduct or safety to practise.

## **Protection for those providing a statement**

Any person who provides evidence about a complaint cannot be the subject of civil or disciplinary proceedings unless they have acted in bad faith.

## **Case management**

The Registrar decides whether the matter is a health, conduct or competence issue. The Registrar also considers Health and Disability Commissioner (the Commissioner) opinions to decide whether there are any professional issues that require further action such as a review of a nurse's competence or health. An assessment of risk is also taken at this point and interim orders such as suspension of a nurse's practising certificate or including conditions in a nurse's scope of practice may be considered.



## Health and Disability Commissioner

All complaints received by the Council that allege a nurse's practice or conduct has affected a health consumer must be referred to the Commissioner who decides if they have jurisdiction in respect of the matter and whether the Commissioner will investigate the complaint or refer it to the Council to investigate. The Commissioner may refer complaints to the Council when the competence, fitness to practise or the appropriateness of a nurse is in doubt.

Complaints about a nurse's practice or conduct that do not affect a health consumer may be referred directly to a PCC or for an initial assessment.

### Initial assessment

Where it is not clear that a complaint is serious enough to require investigation or within the Council's jurisdiction it may have an initial assessment. This means obtaining further information from the complainant either by phone, Zoom or in person. The nurse is then provided with an opportunity to respond to that information in writing before a decision is made as to whether the matter will be referred to a PCC for further investigation.

### Grounds for referral to a PCC

If the complaint is sufficiently serious and within the Council's jurisdiction it will be referred to a PCC. Employment issues between a nurse and their employer or between colleagues, or complaints that are not linked to the nurse's professional conduct or protection of public safety may be outside the Council's jurisdiction. Serious professional issues between colleagues may be referred where there is link to public safety

### Interim orders pending an investigation

If a nurse is under investigation by the Commissioner or a PCC and the Council believes the alleged conduct casts doubt on the appropriateness of the nurse's conduct in their 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.

Where the Council is of the opinion that the alleged conduct poses a risk of serious harm to the public it may suspend the nurse's practising certificate before providing them with an opportunity to be heard, but the Council must provide this opportunity within 20 working days of suspending the practising certificate.



## **Communication about the complaint**

Once a decision has been made to refer a complaint to a PCC, the nurse and complainant will be informed and given the name and contact details of the legal advisor at the Council who will provide information on the progress of the complaint.

Nurses are 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, Society of Nurses or College of Nurses, provide representation and support for their members. Nurses who wish to have representation are strongly recommended to engage their representative early to ensure they are involved in the process.

## **Appointment of a PCC**

A PCC is appointed by the Council for each complaint from a panel of nurses and laypersons. To recognise Council's commitment to the principles of Te Tiriti O Waitangi, where the nurse who is the subject of the investigation or the complainant is Māori a Māori member from the panel will be appointed. If the context of the complaint has an ethnic or cultural component this will also guide the makeup of the PCC.

The Council endeavours to have ethnicity, cultural and gender identities of the nurse or complainant reflected in the Committee membership.

Each PCC is made up of two nurses, one of whom has experience in the same general area of practice as the nurse under investigation, and a layperson.

A copy of the complaint is sent to the proposed PCC members before their appointment by the Council so they can declare any conflict of interest. If there is a conflict of interest the Council will appoint another PCC member.

The nurse and complainant are sent the names of the proposed PCC members. The nurse or complainant may request a change to the membership of the PCC with reasons for that request.

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

Each PCC appoints an investigator and legal advisor. The investigator investigates the complaint on the PCC's behalf. The legal advisor is usually a member of the Council's staff and the contact person for the nurse and the complainant for information about the PCC process. The legal advisor provides legal advice to the PCC on matters of law, procedure and evidence.



## **Particulars of the complaint**

The nurse must receive details of the complaint within 14 days of it being referred to a PCC. A PCC may also investigate any additional matter when the Council believes that matter should form part of the investigation. The nurse must receive details of any additional matter within 14 days of its referral to a PCC.

## **PCC process**

### **Investigation**

The PCC investigator contacts the complainant and other witnesses to organise interviews and to collect other information. The investigation involves taking statements and collecting clinical notes and any other information relevant to the complaint. These interviews are undertaken in person where possible. They can also take place by phone or Zoom. Statements are then prepared and sent to the witnesses for amendment, approval and signature.

A PCC cannot just accept allegations made by the complainant about the nurse or accept the results of a complainant's own investigation. A PCC may receive evidence that would not normally be admissible in court, but the information must be relevant to the complaint.

The nurse is not interviewed during this part of the investigation but is given the opportunity at the PCC meeting to respond to all the information that has been gathered.

### **Notice to provide information**

A PCC may ask a person to produce papers, documents, records or other items it believes are necessary for its investigation. The PCC will make a written request for the information and will provide a reasonable timeframe for its delivery. If the person does not comply with the request, a formal notice is sent asking for the information.

### **Disclosure of information**

The investigation is carried out in private, and the PCC keeps any information gathered during the investigation confidential to those involved. PCCs not make any public comment during an investigation and strongly recommends the parties involved do the same during the process.

### **Interim suspension during an investigation**

If 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 because of health, competence or conduct concerns, it may recommend the Council take appropriate action.



## **PCC meeting date**

Once the investigation is nearing completion a PCC meeting date is proposed. This is agreed upon by the nurse, their legal representative, the complainant and the PCC. Any requests for an adjournment, together with the reasons, should be sent to the legal advisor. Usually an adjournment is agreed to as the nurse requires sufficient time to prepare a response, or a complainant may wish to meet the PCC.

## **Investigation information**

The information collected during the investigation is sent to the nurse at least three weeks before the PCC meeting date. The nurse is given an opportunity to object to the information, usually on the grounds that it is not relevant. Objections are sent to the legal adviser who decides whether information will be removed before it is sent to the PCC.

The nurse and complainant are invited to meet the PCC and given the confirmed date, time and venue of the meeting. The PCC receives the investigation information one week before the meeting.

## **PCC meeting times and venues**

PCCs meet in towns or cities close to where the nurse lives. The meeting may be held in a different centre as agreed by the PCC, nurse and complainant. Generally, the meeting will take place in a hotel conference room and usually takes a maximum of two hours.

## **PCC meeting process**

To promote a culturally safe and appropriate response for Māori nurses and complainants after consultation with those participants, the hearing can be conducted in a Tikanga/Kawa appropriate process. This can include:

- Karakia (to open and close the hui)
- Mihimihi from participants to the hearing
- Inclusion of Council's Kaumatua at the hearing
- Consideration of where best to have the hearing
- Consideration of individual specific cultural needs

Further work is being undertaken on tikanga appropriate hearings for Māori nurses.

The PCC meeting is a relatively informal process. However, because a PCC is considering whether to take any further action a degree of formality is required.



The nurse is invited to send any information they would like the PCC to consider in advance, but this may also be provided at the meeting. The meeting is recorded to assist with the decision and a transcript or copy of the recording can be provided to the nurse. The nurse may choose to provide a written statement to the PCC rather than attend the meeting and/or attend the meeting by Zoom.

## **Natural justice**

The process must comply with the rules of natural justice, which means to protect the interests of those people who may be adversely affected by a decision, they must be given the opportunity to respond to the information gathered during the investigation.

## **Complainant**

The PCC invites the complainant to attend the meeting to answer questions about the complaint. The complainant may read a statement or provide a submission. The complainant may have a support person and/or lawyer present, and that person may be heard at the meeting.

The nurse does not sit in while the complainant speaks to the PCC, but a recording is taken of that meeting and the nurse may choose to listen to that recording before meeting the PCC.

## **Nurse's response**

The nurse is then invited to respond to the information gathered during the investigation along with any additional matters that may have been raised by the complainant or other witnesses. The complainant does not attend the meeting while the nurse responds but may be asked to be available for any further questions the PCC may have after hearing from the nurse. This information must then be given to the nurse for a response before any decision is made.

Generally, the nurse reads a statement and answers the PCC's questions as they arise. If the nurse is legally represented, their representative may prefer to address the PCC first. The PCC convener will ask the representative and nurse how they wish to proceed.

If the nurse considers there has been insufficient time to prepare a response to additional matters raised by the complainant or a witness, then they may ask for an adjournment of the meeting.

## **Legal advisor**

The legal advisor attends the hearing to advise the PCC on any legal or procedural matters but is not present during the PCC's deliberations.



## **PCC recommendations/determinations**

The PCC may provide an oral decision or email the decision shortly after the hearing. The PCC must provide recommendations and/or determinations with reasons to the Registrar, nurse and complainant.

A PCC does not decide whether a nurse is guilty of professional misconduct. That is a matter for the Health Practitioners Disciplinary Tribunal if the PCC lays charges of professional misconduct.

A PCC considers whether:

- there is sufficient evidence to support the allegations in the complaint or revealed during the investigation
- these allegations reach a threshold of seriousness to frame a charge of professional misconduct.

A PCC cannot make findings of credibility because it does not conduct a hearing where evidence is given by witnesses.

A PCC will also consider whether the conduct or matter should be dealt with through other processes available under the Act, such as a competence review or a health review, or whether to make other recommendations to the Council.

## **PCC recommendations**

A PCC may recommend 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.

The nurse will be provided with an opportunity to respond to those recommendations before a decision is made.

## **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. If the nurse is referred to this process, they will be asked to provide information about their practice and professional development and may be required to have a review of their competence.



## Review of fitness to practise (health)

Information about the health process is also available on the Council's website [www.nursingcouncil.org.nz](http://www.nursingcouncil.org.nz) or in the booklet The Health Process. If the nurse is referred to this process, they may be required to have a health practitioner examination.

## Letter of counsel

A recommendation that the Council counsels a nurse means an education letter is sent to the nurse recommending an improvement in the nurse's conduct or reminding them of their professional obligations.

## Review of scope of practice

A PCC may recommend the Council includes a condition in the nurse's scope of practice, such as practising under supervision or completing an education programme on professional boundaries.

## PCC determinations

A PCC may also decide that:

- no further steps be taken in relation to the matter of the investigation
- a charge of professional misconduct be brought against the nurse before the Health Practitioners Disciplinary Tribunal (Tribunal)
- the complaint be referred for conciliation.

## Conciliation

A PCC may appoint a conciliator to assist a nurse and complainant to resolve a complaint. The costs for this will be paid by the Council. The conciliator must report in writing to the PCC and Council outlining whether the complaint has been successfully resolved by agreement within a reasonable timeframe after the conciliator's appointment.

The PCC considers the conciliator's report and, if it believes the complaint has not been successfully resolved by agreement, will decide whether to:

- lay a charge before the Tribunal with the conciliator's report, or
- make a recommendation to the Council, or
- take no further steps.

## 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. The charge must not contain allegations that the nurse was not given the opportunity to respond to during the PCC investigation.



## Health Practitioners Disciplinary Tribunal

The HPCA Act establishes an independent Tribunal, which is separate from the Council, to hear charges laid against all health practitioners. When considering charges against a nurse, the Tribunal is made up of 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 are usually held either in the area where the alleged conduct took place or the nearest main centre. The Tribunal has also adopted a tikanga approach to hearings.

The Tribunal will decide whether the alleged conduct is proven, whether that conduct amounts to professional misconduct and whether to impose a penalty. Information about the Tribunal and its processes is available on its website at [www.hpdt.org.nz](http://www.hpdt.org.nz).

Any person who is required to provide evidence as a witness for the PCC will meet with the lawyer prosecuting the charges at least one month before the hearing to discuss the process of giving evidence.

## Appeal

Decisions of PCCs are not subject to appeal. However, a PCC or the nurse may appeal against 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 assess the process that the PCC used to come to a decision and to 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.

## Timeframes

Although PCCs conduct their investigations as quickly as they reasonably can, investigations may take some month to complete.

## Enquiries

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

