



## **HEALTH PRACTITIONERS COMPETENCE ASSURANCE ACT 2003**

### **COMPLAINTS INVESTIGATION PROCESS**

#### **Introduction**

This document explains, in detail, the investigation process for complaints made or conduct that is investigated under the Health Practitioners Competence Assurance Act 2003 (the Act).

The Osteopathic Council of New Zealand (the Council) is a statutory body under the Act. The Act sets out several functions concerning the registration, continuing competence and fitness to practise of osteopaths, and includes the investigation of complaints against osteopaths.

#### **Complaints/Investigations**

The Council accepts written complaints from any person, whether they be a member of the public or a health practitioner. A complaint should contain enough information to enable the Registrar of the Osteopathic Council (the Registrar) to decide what action, if any, should be taken about the complaint. If the complaint does not include sufficient detail, further information may be requested. The Council provides an online form for complaints on its website, but it will accept written complaints in any clear and legible form.

If the Council has information that raises questions about an osteopath's conduct or safety to practise, it may also refer a matter to a Professional Conduct Committee (PCC) for investigation without a complaint having been made.

#### **Health and Disability Commissioner**

All complaints that allege an osteopath's practice or conduct has affected a health consumer must be referred to the Health and Disability Commissioner (the Commissioner), but Council may impose interim protective measures (e.g., conditions on practice) if it believes these are needed while the complaint is with the Commissioner.

If the Commissioner believes the competence of a health practitioner, their fitness to practise or the appropriateness of their conduct may be in doubt, it may refer a complaint to the Council to investigate (including complaints that were referred to it by the Council).

A complaint about an osteopath's practice or conduct that does not affect a health consumer may be dealt with by the Council without being referred to the Commissioner.

#### **Initial assessment**

The Council will make an initial assessment and decide whether the matter is a health, conduct or competence issue. If the Commissioner has provided any opinion on this, the Council will take these views into account. However, the Council holds a different lens to the complaint than that

of the Commissioner. While the Commissioner considers matters from the perspective of patient rights, Council's role is to consider patient safety.

### **Initial inquiry**

The Council will make further inquiries about a complaint, or any information it has received regarding the conduct of an osteopath. The osteopath will be given the opportunity to respond to any information the Council holds.

A decision will then be made on how to proceed. Options include:

- Referral to a Professional Conduct Committee (PCC) for investigation
- Referral for a competence review
- Referral for an assessment of the osteopath's health
- Other, non-regulatory measures, such as an educational letter, or suggestions for future focus on professional development; or
- No further action.

***The rest of this document sets out the process if the matter is referred to a PCC. Competence reviews and health assessments are processes that do not involved the complainant (if any). For more information on these processes, please see our website.***

### **Referral to a PCC**

#### *Grounds for referral*

If the osteopath's conduct is in question, the matter will be referred to a PCC. Issues between an osteopath and his or her employer or colleagues, or complaints that do not involve an osteopath's professional conduct will generally be outside the Council's jurisdiction.

#### *Interim suspension pending investigation*

If an osteopath is alleged to have engaged in conduct which has led to a pending criminal proceeding, or an investigation by the Commissioner or a PCC, and if the Council believes this casts doubt on their professional capacity, the Council may suspend their practising certificate or include conditions on their scope of practice. The osteopath will be given the opportunity to make oral and written submissions before this occurs.

#### *Early advice letter*

Once a decision has been made to refer a complaint to a PCC, the osteopath (and complainant if there is one) will be informed (within 14 days of the decision) and provided with a copy of the information to be referred to the PCC. Both parties will be given the name and contact details of the legal advisor at the Council who will provide information on the progress of the complaint.

The osteopath may choose, and is encouraged, to seek the representation or support of a legal representative, professional advisor or support person through this process.

#### *Appointment of a PCC*

All parties to the complaint will be consulted on the proposed membership of a PCC. The osteopath and complainant may make a written request for changes to the PCC membership, and should outline their reasons for this. They must make this request within five working days of

being informed of the proposed PCC membership. The Council must consider the request but is not obliged to comply with it.

After the conflict check, a PCC is appointed by the Council, from a panel of osteopaths and laypersons. PCCs are separate from, and independent of the Council, but a PCC may have a Council member appointed when this is appropriate. Each PCC comprises two osteopaths, one of whom has experience in the same general area of practice as the osteopath under investigation, and a layperson. Where possible the osteopath's cultural and demographic background will be reflected in the PCC membership. One of the PCC members chairs the meeting.

#### *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 provides legal advice to the PCC on matters of law, procedure and evidence.

The legal advisor is the contact person for the osteopath and complainant for information about the PCC process.

### **PCC process**

#### *Investigation*

The appointed PCC investigator contacts the complainant to organise interviews with witnesses and to collect other information. The investigation involves taking statements and collecting clinical notes and any other information relevant to the complaint. These interviews generally take one or two days to complete and are undertaken at the place where the alleged conduct occurred. The interviews are usually conducted in person but are occasionally carried out by telephone. Statements are then prepared and sent to the witnesses for amendment, approval and signature.

A PCC does not just accept as fact statements and allegations made by the complainant about the osteopath. It will also need to ascertain whether there is any evidence to corroborate the allegations, and if so, to consider the veracity of this evidence.

#### *Notice to provide information*

A PCC also has significant powers to gather information. It may ask any person to produce papers, documents, records, or other items it believes are relevant to 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 will be sent. Non-compliance with this notice without reasonable excuse may result in a summary conviction and fine of up to \$10,000.

#### *Disclosure of information*

Any information gathered by the PCC during the investigation remains confidential. A PCC does not make any public comment during an investigation and strongly recommends the parties involved do the same throughout the process.

#### *Interim suspension during an investigation*

If, during the investigation, the PCC believes the osteopath'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 osteopath's suspension of practice, it may recommend that the Council take appropriate action.

The osteopath will be given an opportunity to make written and/or oral submissions to the Council before it decides whether to suspend the osteopath from practice or include conditions in their scope of practice.

If a PCC notifies the Council of health concerns, interim suspension of the osteopath's practising certificate may occur without notice until a medical assessment has been completed.

#### *PCC meeting date*

When the PCC has completed the initial stages of its investigation, the osteopath will be provided with all the information gathered by the PCC. The PCC will then arrange to meet with the osteopath and their legal representative. It may also meet with the complainant.

#### *PCC meeting times and venues*

PCCs generally meet in towns or cities close to where the alleged conduct took place. In special circumstances, the meeting may be held in a different centre as agreed by the PCC, osteopath and complainant. Generally, the meeting will take place in a hotel conference room and usually takes two hours.

#### **PCC meeting**

As the PCC must make a range of important decisions regarding a conduct complaint, the meeting requires a certain level of formality.

The osteopath is invited to provide any information they would like the PCC to consider in advance, but this may also be submitted at the meeting. The meeting is recorded, and an electronic copy and transcript can be provided to the osteopath on request.

#### *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 also be heard at the meeting.

The PCC may call on other people to address it.

The osteopath does not sit in while the complainant or any other witnesses speak to the PCC, but a recording is taken and the osteopath is given the opportunity to listen before meeting the PCC.

If questions arise that the complainant may be able to answer, the PCC may ask them or any other witness to provide additional information. This information must then be given to the osteopath for a response before any decision is made.

#### *Osteopath's response*

The osteopath 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 osteopath responds but may be asked to be available for any further questions the PCC may have after hearing from the osteopath.

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

If the osteopath 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 deliberates at the conclusion of its meeting and, if it is satisfied it has all the information it requires, may provide an oral decision shortly after the meeting. Alternatively, it may need to defer a deliberation meeting if further information is required, or if members want more time to consider the issues. When the PCC has completed its investigation, it must make recommendations and/or determinations in relation to the complaint within 14 days.

A PCC must give written notice of any recommendations or its determination, to the Registrar, osteopath and complainant.

A PCC does not decide whether an osteopath is guilty of professional misconduct. That is a matter for the 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; and
- these allegations reach a threshold of seriousness to frame a charge of professional misconduct.

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, and if so, 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 osteopath
- reviews the osteopath's fitness to practise (health)
- reviews the osteopath's scope of practice
- refers the subject matter of the investigation to the police

- counsels the osteopath.

Any recommendations are referred to the Council to decide what action, if any, it will take. The Council must consider the recommendations promptly but does not need to follow them. This role has been delegated to the Registrar and the osteopath will be provided with an opportunity to make submissions on those recommendations before a decision is made.

#### *Review of competence*

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

#### *Referral to the Health Committee*

If the osteopath is referred to this process, they may be required to have a medical examination (paid for by the Council) and meet with the Health Committee. The Health Committee may include conditions in an osteopath's scope of practice or suspend an osteopath if they are unable to practise because of a mental or physical condition.

#### *Letter of counsel*

A recommendation that the Council counsels an osteopath generally means an education letter is sent to the osteopath recommending an improvement in their practice or behaviour.

#### *Review of scope of practice*

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

### **PCC determinations**

A PCC may also determine that:

- no further steps be taken in relation to the matter of the investigation
- a charge of professional misconduct be brought against the osteopath before the Tribunal
- the complaint be referred for conciliation.

#### *No further action*

If a PCC determines that no further action be taken in relation to the matter, the matter is formally and finally concluded and the parties will be advised.

#### *Conciliation*

A PCC determine that the complaint be submitted to conciliation. If the PCC chooses this approach, it may appoint a conciliator to assist an osteopath 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, it will decide whether to:

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

#### *Charges before the Tribunal*

If a PCC decides to lay a charge against an osteopath, it must frame an appropriate charge and lay it before the Tribunal. If the charge is being laid after conciliation has failed, the PCC must provide a copy of the charge to the osteopath, Council and complainant.

Charges must not contain allegations that the osteopath 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 an osteopath, the Tribunal will comprise a chair, who is a lawyer, three osteopaths and a layperson.

The hearings are in public, unless there are compelling reasons for a private hearing, and are usually held either in the town where the alleged conduct took place, or the nearest main centre.

The Tribunal will decide whether the alleged conduct is proven, whether that conduct amounts to professional misconduct and if so, 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).

#### **Natural justice**

The PCC process must comply with the rules of natural justice, which means 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 during the investigation.

It also means a PCC must not:

- act outside the scope of its power
- be motivated by an improper purpose
- take account of irrelevant matters or fail to take account of relevant matters
- be influenced by wrong facts
- use a pre-determined policy
- act under dictation
- act under an invalid delegation
- act unfairly
- be biased
- act unreasonably

## **Appeal**

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

## **Judicial review**

Decisions of PCCs may be judicially reviewed in the High Court. The purpose of a judicial review is to decide whether the decision-maker followed a fair and reasonable process, resulting in a fair and reasonable outcome.

## **Timeframes**

Although PCCs conduct their investigations as quickly as they reasonably can, investigations may take some time to complete. The length of time taken will depend on the complexity of the complaint and the ease of access to necessary evidence.

## **Enquiries**

Any enquiries about the complaints process should be addressed to the Registrar.

## **Legislation**

The relevant legislation is set out under Part 4 (sections 64 to 105) of the Health Practitioners Competence Assurance Act, which can be accessed for free online at [www.legislation.govt.nz](http://www.legislation.govt.nz)



