



NZPB Decision Guidelines Relating To Parts 3 & 4 Of The HPCA Act

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With thanks to the Pharmacy Council, whose work provided the foundation of this document.

Preamble (And Guiding Principles)

The following decision guidelines have been developed to capture experience and legal opinion gained and to assist the Psychologists Board and its delegates make fair, reasonable, and lawful decisions. The guidelines cover the decision options available and provide generalised, agreed decision criteria and defined thresholds where applicable. The guidelines can be applied to assist in determining what should be recommended in an individual case, but (in keeping with the requirements of Administrative Law) they should not be applied inflexibly or without proper consideration of the merits of each unique case.

Key requirements

Decision makers should:

- Communicate these guidelines (in an appropriate manner and to the extent necessary) to the person(s) concerned, at his or her request, whether before or after (preferably before) the taking of an action concerning that person.
- Proactively consult and communicate with those who may be affected by a decision.
- Provide the opportunity for adversely affected persons to be heard and/or make submissions regarding a proposed (adverse) decision, and fully consider what they have to say before making a final decision.
- Provide reasonable information about decisions (including reasons, factors considered, and material relied upon).

A recipient is less likely to feel aggrieved if it is clear that his or her arguments were considered, and reasons are provided.

What benefits will result from applying these decision guidelines?

- Decisions will be more fair, consistent, and reasonable;
- Decision-making processes will be more transparent;
- Decisions will be well-positioned to withstand judicial review;
- Decision makers who have certain limited statutory powers will make their decisions knowing the context of those decisions in terms of the entire HPCA Act;
- The legislation will be more consistently applied;
- More efficient and cost effective processes will be employed;
- It will be easier to achieve a consensus where differing views exist within committees and/or the Board;
- Despite varying membership, committees and the Board will have the benefit of previous committee/Board decisions;
- Decisions will fit the practice of psychology;
- Remedies will be consistent with the psychology profession and psychology practice.

On-going development of the decision guidelines

The Health Practitioners Competence Assurance (HPCA) Act 2003 is still relatively new and the legal precedents, case law, and body of experience for decisions are still emerging. Our experience is still limited to a relatively small number of cases. These decision guidelines will therefore be revisited on a regular basis to expand them and refine them as additional experience is gained.

What decisions will these guidelines cover, and what won't they cover?

HPCA Act Sections which apply:

Part 3 Competence, fitness to practise sections 34 to 51.

Part 4 Complaints sections 64 to 83.

Decision makers whose decisions will be covered:

The Board's secretariat.

The Board's Parts 3&4 (P3&4) Committee.

All Professional Conduct Committees (PCC).

The Psychologists Board (governance body).

What won't the decision guidelines cover?

These guidelines are for use by Board decision makers only. Practitioners seeking guidance in determining when they should notify the Board of situations involving the practice of a psychologist posing a risk of harm should refer to the separate set of guidelines published for that purpose.

Guidelines can only provide general considerations and some specific criteria to assist in decision making. They cannot be expected to cover the full range of complexity that will exist in actual cases.

The HPCA Act allows for a number of referral points for a complaint or notification and a variety of processes that the complaint or notification may follow. These guidelines do not go into referral points or processes - this has been captured in previous work (refer to the Act and/or to the flowcharts developed by the secretariat). These guidelines simply aim to facilitate good decision-making at key points through the process.

Note: The P3&4 Committee also have delegated authority to consider a psychologist's inability to perform required functions due to a mental or physical condition. Decision guidelines may not be needed as the clauses of the Act that apply, 45 to 51, are reasonably straight forward. Experience may change this view.

General Considerations For All Decision Makers

Decision-making should be viewed in the context of the entire HPCA Act. The HPCA Act separates competence and fitness to practise from discipline and penalties imposed. It is the role of the Board (and its delegates) to deal with competence and fitness to practise and it is the role of the Health Practitioners Disciplinary Tribunal (HPDT) to deal with discipline and penalties.

Decision makers should ask themselves:

- What decisions have already been made about this complaint or notification?
- What are the likely consequences as a result of the decision being considered?
- Who has responsibility for subsequent decisions?

Those decisions which have gone before are relevant. For example the P3&4 Committee should take into account the decisions made by the Health and Disability Commissioner (HDC) when considering a case that comes to them following an HDC consideration or investigation. Similarly those decisions that will follow are relevant. For example, a PCC making a recommendation after completing their investigation must be aware that while they may have a view on what the next steps should be, it is for the Board and not for the PCC to decide what the Board will do (if anything) with the recommendation.

Decisions must at all times:

- Focus on protecting the health and safety of members of the public;
- Be consistent with the requirements of the HPCA Act;
- Be in accordance with the Board's statutory authority (where an express statutory power is being exercised);
- Be within the decision maker's powers (either expressed or implied);
- Observe the rules of natural justice;
- Be reasonable, properly considered, and based on relevant and reliable information;
- Be in accordance with any relevant Board policy, unless there are compelling reasons for departing from the policy (in which case extreme caution is necessary);
- Be consistent with previous decisions where that is possible and appropriate. If the decision is a departure from a previous approach, there should be a good reason for that deviation;
- Be made in a way that is fair to all parties;
- Be reasonable for the purpose of achieving the desired outcome (least intrusive, but ensures safety of public);
- Balance the purpose (protection of the public) with any disadvantage caused;
- Avoid irrelevant considerations;
- At all times be made by decision-makers who are impartial, and have no interest in the decision being made;

- Be made only after all relevant information is before the decision-maker. There must be no pre-determination;
- Be backed up with reasons that must be supplied to the affected parties;
- Contain sufficient detail to enable those affected by the decision to properly understand it;
- Be consistent with what can reasonably be expected of a competent psychologist engaged in the practice of psychology (and within the relevant scope of practice);
- Be made within a time which is reasonable having regard to the matters at stake.

"Risk of serious harm"

At all stages of a fitness, competence, or complaint/discipline matter, members of the secretariat, Board, and committees must consider whether or not they have "reason to believe" (see definition below) that a psychologist's actions cross the threshold of posing a risk of serious harm to the public. The questions to consider in regard to believing that there is a risk of serious harm are:

- Are there reasonable grounds for believing that the psychologist poses a risk of serious harm?
- If there is a risk of harm, why is it 'serious'?
- What is the evidence that the practitioner is consistently practising below the required standard of competence?
- Is there sufficient reliable evidence to establish a belief?
- Is the alleged error or conduct significant?
- Has a client been seriously harmed?
- Is the harm considered 'collectively serious' (involving more than one client)?
- Is there an apparent pattern of conduct over time?

How to define "reason to believe"

There are both subjective and objective aspects to legally defining "reason to believe".

- Subjectively, the belief must be a genuine one. (See next section for questions that will help establish if a belief is "genuine");
- Objectively, there must be reasonable grounds for the belief. This will always hinge on the provision of adequate information. Enquiries may be needed to obtain further information over and above the information provided on the receipt of a notification of a belief of a risk of harm;
- The belief must relate to a risk of harm over and above the inherent nature of a psychologist's practice;
- The risk must be to a member or members of the public.

Questions that should be posed to establish a genuine belief

- Is the risk fanciful?
- Is the belief arrived at on the basis of adequate information or is further investigation required?
- Can you be satisfied that the risk of harm is more than the acceptable risk of the psychologist simply practising the profession?
- Has the context and circumstances of the psychologist and his/her practice been taken into consideration?

Interim suspension or the imposition of conditions: Are the steps taken solely for the purpose of protection of public health and safety?

When a PCC notifies the Board (or P3&4 Committee) that it has reason to believe that a practitioner's practice poses a risk of serious harm to the public, the PCC may recommend that the Board (or P3&4 Committee) suspend the psychologist's practising certificate. [Refer s 79] The Board (or P3&4 Committee) may then consider action under s 39(2), s 48(2) or (Board only) s 69(2) which may include interim suspension of the psychologist's practising certificate or placing conditions on the psychologist's scope of practice pending prosecution or investigation. The consideration of these issues by the PCC, the P3&4 Committee, and/or the Board must be solely for the protection of the health and safety of members of the public. *There is no ability for this consideration to be punitive.* These sections allow significant action to be taken before allegations can be properly investigated. Therefore these powers must be applied carefully and reasonably with the sole purpose of protecting the health and safety of members of the public.

Guidelines For The Secretariat (Screening Function)

In accordance with s 64 of the Act, whenever the secretariat receives a complaint alleging that the practice or conduct of a psychologist has affected a health consumer, the authority must promptly forward the complaint to the HDC.

Questions to Apply:

Is the information received a formal complaint?

Where a concern has been raised in regard to a practitioner, the secretariat should discuss with the person supplying the information the options/pathways available for addressing their concerns. If, after those discussions, the information is to be taken as a complaint, then it should immediately be forwarded to the HDC (unless no health consumer has been affected, in which case it can instead be progressed by the Board).

Has the *identity of the psychologist(s)* who is the subject of the complaint or notification been established? If no, care needs to be taken in handling the complaint or notification. It is likely that more information will be required before any decision can be made.

Guidelines For The Parts 3&4 Committee

Upon receiving a complaint from the Commissioner, the Board is required, under section 65 of the Act, to assess that complaint and respond appropriately, taking into account the nature and circumstances of the complaint.

Prescribed actions

If there has been a **conviction of an offence** described in section 67 then under section 68(2) this must be referred to a PCC.

If at any time the P3&4 Committee has reason to believe that the psychologist may pose a **risk of serious harm** to the public, the committee must immediately inform the Board. *Considerations for 'risk of serious harm' are outlined elsewhere in this document.*

The Board has adopted the **Family Court's "Practice Note – Specialist Report Writers"** (and in particular section 16 of that document) as its preferred approach to dealing with complaints that arise from Family Court proceedings. The P3&4 Committee should consult the full Note whenever dealing with a Family Court related complaint, but (in brief) the Note explains that:

- The Family Court will generally consider all complaints in the first instance.
- The Family Court should deal with most complaints involving psychologists as part of its jurisdiction to regulate its own process, and exercise the powers and functions conferred upon the Court by statute.
- In addition, the Board will typically deal with matters that go beyond the process of the Court and raise questions about professional competence, conduct or ethics. This may include matters such as inappropriate relationships between the report writer and the parties, breaches of privacy, and incompetence.
- Any complaint referred by the Board to the Family Court shall be directed to the Registrar of the Family Court at which the report was requested. The Registrar will refer the complaint to the presiding Judge, or Regional Administrative Family Court Judge, to consider.
- The Board will deal with complaints according to its own procedures and the requirements of the HPCA Act and is not bound by any decision of the Court.

Optional actions

When a complaint or notification has been sent to the P3&4 Committee for consideration, the Committee may take **one or more** of the following steps;

- **Request more information**

If the Committee cannot make a determination because they do not have sufficient information they should request more information in order to proceed;

- **(Where s 69 applies) refer a complaint matter to the Board** with a recommendation to consider whether the psychologist should have their practising certificate suspended or should have conditions included on their scope of practice.

- **Refer to a PCC**

There is a discretion as to whether or not to refer a complaint to a PCC. The complaint should not be referred to a PCC if one of the other options set out below (i.e., competence review, fitness review, letter of education, refer to another agency, or take no further action) is clearly more warranted. The only route to discipline, however, is through a PCC so matters which may require discipline will all be referred to a PCC.

If the answer to any of the following questions is 'yes', it is likely that the matter should be referred to a PCC:

- Is it possible that the psychologist brought, or is likely to have brought, discredit to the profession?
- Is it possible that the conduct warrants censure or discipline?
- Is there evidence of wilful and reckless behaviour?
- Does the conduct appear to be careless to the point of malpractice or negligence?
- Are there proven breaches of legislation?
- Do there appear to be significant breaches of professional standards and/or of the Code of Ethics?

- Are there key facts in need of further investigation before the matter can proceed?
- If the alleged conduct occurred outside of the psychologist's professional role, then when objectively viewed is it of a sufficiently serious nature or is it manifestly incompatible with a person's registration as a psychologist? If so, it can constitute conduct with professional ramifications. That conduct will also be conduct which would tend to bring the profession into public disrepute and to lessen the community's confidence in the profession of psychology.

- **Refer for competence review**

If the answer to any of the following questions is 'yes' it is likely that the matter should be referred for a competence review:

- Is there any evidence that the practitioner may not be consistently practising at the required standard of competence?
- Is there any evidence to suggest that the practitioner's competence may be deficient?
The evidence in both cases above can be gained by applying the Board's adopted "Core Competencies" to the psychologist's practice to evaluate shortcomings.
- Is it more appropriate that the practitioner's overall competence be assessed, rather than determining whether the specific complaint is true or not?

- **Refer for fitness review**

If the answer to the following question is 'yes', it is likely that the matter should be referred for a fitness review:

- Is there any evidence to suggest that the psychologist may be unable to consistently perform the functions required for the practice of psychology because of some mental or physical condition?
- Is the psychologist unable to make safe judgements?
- Is the psychologist unable to demonstrate the level of skill and knowledge required for safe practice?
- Is the psychologist behaving inappropriately?
- Is the psychologist acting in ways that impact adversely on client safety?¹

- **Issue an advisory letter/letter of education**

Where a complaint or notification has some substance, but is clearly not serious enough to warrant referral to a PCC, the P3&4 Committee can send an advisory or educational letter to the practitioner. This serves the purpose of protecting the public, promotes good practice, provides a consequence that is proportional to the concern, and facilitates responsible use of resources.

- **Refer to other agency (with notice)**

(E.g., Police, Privacy Commission.)

- **Take no further action**

If the answer to any of the following questions is "yes", then consideration should be given to taking no further action (or requesting more information);

- Is the complaint/notification frivolous, vexatious, false, or mistaken?
- Is there unlikely to be evidence with a chance of proving the allegations?
- Is there evidence of an abuse of process?
- Does the complaint lack evidential foundation?
- Is there evidence to suggest that the complaint/notification is without substance?

If the answer to all the questions posted under all of the other options above is 'no', it is likely that the P3&4 Committee will conclude that no further action is warranted.

Applications to restore good standing

Applications for restoration to good standing will be considered by the Committee on a case-by-case basis, taking into account the nature and seriousness of the events that lead to good standing being lost and factors such as (but not limited to);

- time passed;
- evidence of rehabilitation;
- character references;
- any history of other adverse events;
- the extent to which the relevant events indicate the applicant may pose a risk to the health and safety of the public.

All applicants will be given the opportunity to make a written submission and to be heard in respect of their application.

¹ The final four questions in this set are based on the test used by the Medical Council of New Zealand for their "fitness to practise" threshold.

Guidelines For Professional Conduct Committees

Note re Risk of Harm: If the PCC at any time in the course of investigating a matter about a health practitioner has reason to believe that the practitioner's practice poses a risk of serious harm to the public, the PCC must immediately notify the Board (or P3&4 Committee) of that belief and the reasons for it, and the PCC may recommend that the Board (or P3&4 Committee) takes action if the PCC considers suspension of the practitioner's APC is justified. [Refer s 79] (Considerations for 'risk of serious harm' are outlined elsewhere in this document.)

Possible outcomes of an investigation

After completing its investigation a PCC must make

- one or more of the recommendations specified in section 80(2) of the HPCA Act, OR
- one (and only one) of the determinations specified in section 80(3) of the Act,
OR
- both.

Exception: If the PCC makes the determination that 'no further steps should be taken' [s 80(3)(a)] then they cannot make any recommendations.

NB: The only recommendations and/or determinations that the PCC can legally make are those set out in section 80 of the HPCA Act. Any other recommendations or determinations will be rejected as unlawful (*ultra vires*). It is for the P3&4 Committee to decide whether or not they will accept and act on a PCC recommendation. The P3&4 Committee cannot substitute or add its own recommendation(s) to those made by a PCC. The P3&4 Committee must accept and act on a PCC determination.

Possible Recommendations

- ("No recommendations" - unless no determination has been made, in which case at least one recommendation is required).
- That the Board **review the competence of the psychologist** to practise the profession.
Is there evidence to suggest that the psychologist may not be consistently practising at the required standard of competence such that a competence review ought to be considered? The evidence can be gained by applying the Board's adopted "Core Competencies" to the psychologist's practice to evaluate shortcomings.
- That the Board **review the fitness of the psychologist** to practise the profession.
Is there evidence that the psychologist may be unable to consistently perform the functions required for the practice of psychology because of some mental or physical condition (including substance abuse)?
- That the Board **review the psychologist's scope of practice**.
Is there evidence to suggest that the psychologist's practice ought to be restricted in some way?
- That the Board **refer the subject matter of the investigation to the police**.
Is there evidence to suggest that the matter may be of interest to the police? Is there evidence of illegal activity (e.g., assault, fraud, theft).
- That the Board **counsel (advise) the psychologist**.
Would the psychologist benefit from targeted advice regarding any identified concerns?

Possible Determinations

- ("No determinations" - unless no recommendations have been made in which case a determination must be made).
- That **no further steps be taken** under the HPCA Act in relation to the subject matter of the investigation.
If the answer to all the questions posted above and below is 'no', or if there is evidence to suggest that the matter before the PCC is frivolous, vexatious, or without (adequate) substance, it is likely that the PCC will determine that no further action is warranted.
- That a **charge be brought** against the psychologist before the Health Practitioners Disciplinary Tribunal (the Tribunal).
If the answer to one or more of the following questions is 'yes' it is likely the PCC will make a determination to bring a charge before the Tribunal.
 - Has the psychologist brought discredit to the profession?

- Has there been malpractice or negligence of the kind that warrants censure or disciplinary action?
- Has the psychologist been convicted of an offence that reflects adversely on the psychologist's fitness to practise?
- Has the psychologist practised psychology without holding a current APC in a manner that warrants censure or disciplinary action?
- Has the psychologist practised outside his or her scope of practice in a manner that warrants censure or disciplinary action?
- Has the psychologist failed to observe conditions in the psychologist's scope of practice in circumstances where the failure warrants censure or disciplinary action?

• (In the case of a complaint) that the **complaint be submitted to conciliation**. Does it seem likely that the parties would engage in and benefit from conciliation? Would this approach be safe for the parties? Would it be likely to produce an outcome satisfactory to the parties, the profession, and the public?