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A Guide for Psychologists Under Investigation by a Professional Conduct Committee

**Health Practitioners Competence Assurance Act 2003
Reference Sections 65-83**

PLEASE READ THIS DOCUMENT CAREFULLY

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A Guide for Psychologists Under Investigation by a Professional Conduct Committee

Health Practitioners Competence Assurance Act 2003 Reference Sections 65 - 83

PART 1 INTRODUCTION

This guide has been written by the Board to assist psychologists in the event of undergoing investigation by a Professional Conduct Committee. It should always be read in conjunction with the relevant sections of the Act (sections 65-83). Further clarification should be sought from the Board's Secretariat and/or your lawyer.

The New Zealand Psychologists Board recognises that undergoing an investigation of any kind is likely to be very stressful for the psychologist concerned and would recommend that appropriate collegial support is sought at this time.

PART 2 BACKGROUND

The Health Practitioners Competence Assurance Act (the **Act**) superseded the Psychologists Act 1981 and came into effect on 18 September 2004. The principal purpose of the Act is to protect the health and safety of members of the public by providing mechanisms to ensure that health practitioners are competent and fit to practise their professions.

Formal complaints made against psychologists after 18 September 2004 are dealt with under the provisions of Part 4 of the Act.

The Act provides the Psychologists Board with the option to refer a complaint matter to a Professional Conduct Committee (**PCC**). In accordance with the Act, PCCs are required to investigate the circumstances of certain offences committed by psychologists. The investigation is to the point of making "recommendations" and/or "determinations" as set out in section 80 of the Act. (Refer Part 18)

Some matters will only require a short investigation, while others may necessitate enquiries that are more extensive. Psychologists (and PCCs) should bear in mind that it is the responsibility of the Health Practitioners Disciplinary Tribunal (**HPDT**) to determine the outcome if charges are brought against a psychologist.

The PCC must adopt and follow procedures that will ensure that, in relation to each matter referred to the PCC, the psychologist who is the subject of the reference, the Psychologists Board, and any complainant are each kept informed about progress of the investigation.

COMPLAINT AND DISCIPLINE PROVISIONS SET OUT IN PART 4 - SECTIONS 71 - 83:

- S 71 Provides for the appointment of a PCC by the Board.
- S 72 A PCC may regulate its own procedures as it thinks fit. PCCs are subject to the rules of natural justice (refer Part 12) and any regulations made under the Act.
- S 73 A PCC may appoint a Legal Advisor to advise it on matters of law, procedure, and evidence, and an Investigator to collect information required by the PCC.
- S 74 The Board must ensure that the psychologist is informed about the complaint and ensure that the psychologist and any complainant are notified of the proposed membership of the PCC.
- S 75 The psychologist and complainant(s) may write to the Board requesting a change to the proposed PCC members.
- S 76 The PCC may receive evidence (e.g., statements, documents, or information that may assist in the investigation) from the psychologist, the psychologist's employer, any person in association with whom the psychologist practises, any complainant, and any clinical expert.

Note: The PCC must give the psychologist and any complainant (and with the PCC's permission any person supporting the complainant) a reasonable opportunity (and amount of time) to present their evidence on any matter before the Committee. This is often referred to as a 'PCC hearing' or 'right to be heard meeting'.

- S 77 The Act gives the PCC powers to require any person to produce to the PCC any papers, documents, records, or things within a reasonable time frame.
- S 78 The Act states a person must comply with section 77 (noted above). A person who fails or refuses to comply with such a request commits an offence under the Act and may be liable (on conviction) to a fine up to \$10,000.
- S 79 If a PCC believes that the practice of the psychologist they are investigating poses a serious risk of harm to the public they may recommend to the Board that the psychologist's practising certificate be suspended.
- S 80 Sets out the recommendations and/or determinations the PCC must make at the conclusion of their investigation. (Refer Part 18)
- S 81 Outlines the procedures followed after a PCC makes any recommendation(s) or a determination.
- S 82 Provides for settlement of a complaint via conciliation.

S 83 Requires that information obtained by a PCC (or former PCC) member or by a person who assists or who has assisted a PCC only be used or disclosed for the purposes of the Act.

PART 3 INTERPRETATION

Complainant means the person or persons who submitted a formal complaint against a psychologist.

Health Practitioner or Practitioner means a person who is, or is deemed to be, registered with an authority as a practitioner of a particular profession. This guide applies to all psychologists including Counselling Psychologists, Clinical Psychologists, Educational Psychologists, Intern Psychologists, and Trainee Psychologists.

Layperson means a person who is neither registered nor qualified to be registered as a health practitioner.

Notice means instrument conveying the PCC's decision (e.g., a letter or report, depending on the context).

PCC or Committee means a Professional Conduct Committee appointed by the Board (unless otherwise defined in this guide).

PCC Report (as referred to in this guide) means the final report prepared by the PCC at the conclusion of their investigation. It is referred to as a "Notice" under section 81 of the Act.

Psychologist means the psychologist who is the subject of the complaint.

Required standard of competence means the standard of competence reasonably to be expected of a health practitioner practising within that health practitioner's scope of practice.

HPDT or Tribunal means the Health Practitioners Disciplinary Tribunal.

PART 4 INITIAL COMPLAINTS PROCESS

COMPLAINTS AND THE HEALTH AND DISABILITY COMMISSIONER

Whenever the Board receives a formal complaint alleging that the practice or conduct of a psychologist has affected a health consumer, the Board must promptly forward the complaint to the office of the Health and Disability Commissioner (**HDC**). In fairness to the psychologist, the Secretariat will also send a copy of the letter of complaint to him/her. This is in accordance with the Board's procedure for processing complaints. The Board cannot take any action on a complaint when it is with the HDC.

The Commissioner has various options when a complaint is received. He may decide to take no action (e.g., where the passage of time makes it impracticable to take any action, or where a complaint is made by someone other than the consumer and the consumer does not wish the matter to proceed); he may

investigate the complaint; or he may refer the matter to advocacy. The Commissioner has a discretion to refer matters to another person or to the Psychologists Board where he considers it in the public interest to do so.

After an investigation, the HDC may refer a complaint to the Psychologists Board. The HDC will write to the psychologist and complainant to inform them of what action he will be taking, e.g. referring the complaint back to the Board.

In the case where the HDC refers the complaint matter back to the Psychologists Board, the Board must promptly assess the complaint and consider, in light of the nature and circumstances of the complaint, the action or actions that it should take to respond to the complaint.

For more information on how the HDC investigates complaints, go to www.hdc.org.nz/complaints.php

COMPLAINTS AGAINST FAMILY COURT APPOINTED PSYCHOLOGISTS

Complaints against Family Court appointed psychologists are processed in accordance with section 16 of the Family Court's *Practice Note – Specialist Report Writers* (2010).

Typically, the Board will consider complaint matters that go beyond the process of the Court and raise questions about professional conduct or ethics. This may include matters such as inappropriate relationships between the report writer and the parties, breaches of privacy, and incompetence.

PART 5 REQUIREMENTS OF A PCC

PCCs are required to investigate complaints referred to it by the Board. If it is decided that a matter will be referred to a PCC, then the process to identify and appoint members of a PCC will commence as soon as practicable.

Note: Not all complaints to the Board result in an investigation by a PCC. Some may result in referral to the competence review procedures set out in Part 3 of the Act, and others may result in no further action being taken (e.g., if it falls outside the jurisdiction of the Board). For more details on the possible outcomes of formal complaints against psychologists please refer to the Board's information document on how complaints are processed, which is available on the Board's website.

PCCs are also required to investigate the circumstances of certain offences committed by psychologists (Refer Part 8). The investigation is to the point of making recommendation(s) and/or a determination as provided by section 80 of the Act. (Refer Part 18) Some matters will only require a short investigation (2-6 months), while others may necessitate enquiries that are more extensive (6-12 months or longer).

PART 6 APPOINTMENT OF A PCC

REFER SECTION 71

When a complaint against a psychologist is referred to a PCC, the Secretariat will write to the psychologist and any complainant informing them that the matter has been considered and referred to a PCC (in accordance with sections 65(2) or 68 of the Act).

Two psychologists and one layperson will then be identified and appointed by the Board as members of the PCC. The Board may, if in any particular case it considers it appropriate to do so, appoint a psychologist or a layperson who is a member of the Board.

The Board must appoint one member of the PCC to preside as Chairperson at PCC meetings.

The appointment of members to a PCC is done in consultation with the Board and approval for the appointment of each of the proposed PCC members must be given by a majority of Board members (including one layperson).

PART 7 LAYPERSON MEMBER OF THE PCC

The layperson is a critical member of the PCC "team". They can be seen as the "check" or "balance" in the work of the Committee. The layperson is neither a consumer representative nor an advocate for the complainant.

The psychologists appointed to the PCC will have opinions about practice issues before the PCC and these will be discussed freely with the layperson. The layperson will be able to present a "non-health professional" perspective on the matter or matters before the PCC. This is a highly valued perspective.

PART 8 REFERRAL OF COMPLAINTS AND NOTICES OF CONVICTION TO A PCC

REFER SECTIONS 67 - 68

A Registrar of a court in New Zealand who knows that a person convicted in the court is a psychologist must send a notice of the conviction to the Psychologists Board if the conviction is for an offence punishable by imprisonment for a term of three months or longer. When a notice of conviction is given to the Board, the notice must be referred to a PCC.

If the Board considers that information in its possession raises one or more questions about the appropriateness of the conduct or safety of the practice of a psychologist, it may refer any or all of those questions to a PCC.

If at any time, while a matter concerning a psychologist is under consideration by a PCC, the Psychologists Board thinks that a further matter concerning that psychologist should form part of the PCC's consideration, the Board may refer the further matter to the PCC.

PART 9 REQUEST TO CHANGE MEMBERSHIP AND CONFIRMATION OF A PCC

REFER SECTION 75

When the PCC members have been nominated, the Secretariat will write to the psychologist and any complainant to inform them of the proposed PCC membership.

A copy of a 'client profile' from the Register of Psychologists for each psychologist appointed to the PCC and a brief curriculum vitae of the layperson will also be provided so that the psychologist and complainant can know a little more about each PCC member.

At this stage, the Secretariat will advise both parties that within five days after being informed of the proposed membership of the PCC, each may give the Board written notice requesting that any or all of the PCC members not be appointed as, or not act as, members of that committee; and stating their reasons for the request. In the past, reasons have included having a close pre-existing personal or professional relationship with proposed PCC members, or other clear conflicts of interest. The Board must have regard to such a request but need not comply with it.

If no notice requesting any change is received within the five days, or confirmation of acceptance of the proposed PCC is given by the psychologist and any complainant to the Registrar, then membership of the PCC will be confirmed. The Secretariat will then write to the psychologist, any complainant and the PCC members confirming the appointment of the committee. A copy of the letter of complaint and any other relevant documentation provided by either party will be forwarded to the PCC so that they may commence their investigation. It is at this stage that communications with the Board regarding the complaint matter will cease and each party is asked to direct any further communications about the complaint matter to the PCC Chairperson.

Note: The Secretariat is available to both the psychologist and any complainant to update them on the progress of the PCC's investigation.

PART 10 PCC CHAIRPERSON'S ROLE

GOAL OF THE PCC CHAIRPERSON

To lead the PCC 'team' and to ensure that it undertakes its responsibilities under the Health Practitioners Competence Assurance (HPCA) Act in a fair, efficient, and cost-effective manner, and that its work is completed as soon as practicable.

The Chairperson's role is critical to the functioning of the PCC. They will be the primary point of contact for the psychologist and any complainant throughout the investigation process. The PCC Chair usually makes a courtesy introductory telephone call to the psychologist and any complainant to inform them that the PCC's investigation has commenced. Each party should use this opportunity to

establish his or her preferred method of communication (e.g., telephone, email, letter).

PART 11 PCCs MAY REGULATE THEIR OWN PROCEDURES

REFER SECTION 72

The Act stipulates that a PCC appointed by the Psychologist Board may regulate its own procedures as it thinks fit. However, the PCC must adopt and follow procedures that will ensure that, in relation to the matter referred to the PCC, the psychologist (who is the subject of the investigation), the Psychologists Board, and any complainant are each kept informed about the progress of the investigation. The PCC is subject to the rules of natural justice and to any regulations made under the Act.

PART 12 NATURAL JUSTICE

"**Natural justice**" is a well-defined concept that can be substituted by the expression "duty to act fairly."

Common law and the HPCA Act require decision-making bodies to act in good faith and fairly listen to both sides. There are two fundamental principles:

- a) that the parties be given adequate time and opportunity to be heard; and
- b) that the decision-maker(s) be disinterested in the outcome, and unbiased.

The procedures set out in the Act and in this guide have been developed with the concepts of natural justice squarely in mind.

PART 13 EVIDENCE FOR PCCs

REFER SECTION 76

The PCC 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.

The touchstone for the PCC will always be relevance. The PCC will consider whether "the proposed evidence is relevant, directly or indirectly, to the subject of an investigation."

PCCs may receive written statements and submissions and hear oral evidence from any or all of the following persons:

- the psychologist who is the subject of the PCC's investigation;
- any employer of the psychologist;
- any person in association with whom the psychologist practises (e.g., supervisor, colleague, associate, partner, manager);

- any complainant - if the matter referred to the PCC is a complaint;
- any clinical expert.

The PCC must give the psychologist who is the subject of the PCC's investigation a reasonable opportunity to be heard on each matter, including any further matter, that is referred to the PCC under section 68 of the Act and that forms part of the PCC's investigation. PCCs are not subject to the Privacy Act, but in accordance with the principles of Administrative Law, practitioners should be given the opportunity to see all documents upon which the PCC has relied in coming to their decision. Therefore PCCs should provide copies of all documents *upon which it relies* to the practitioner.

The psychologist and/or the complainant (if any) may nominate a person to support them and that person may, with the leave of the PCC, be heard at any hearing.

Evidence given in good faith will protect a person from civil or disciplinary proceedings.

The PCC 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. (Refer section 76(5))

PART 14 POWERS TO CALL FOR INFORMATION OR DOCUMENTS

REFER SECTION 77

If the conditions stated below are satisfied, a PCC may, by written notice, require any person to produce to the committee any papers, documents, records, or things.

CONDITIONS

The conditions referred to above are that:

- a) the PCC believes on reasonable grounds that the exercise of the powers conferred on it (i.e., to call for information or documents) is necessary to enable the PCC to carry out its investigation; and
- b) the person to whom a notice 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 PCC believes on reasonable grounds, that –
 - it is not reasonably practicable to obtain the information required by the committee from another source; or
 - for the purpose of the investigation, it is necessary to obtain the papers, documents, records or things to verify or refute information obtained by another source.

PART 15 COMPLIANCE WITH REQUIREMENT TO PROVIDE INFORMATION

REFER SECTION 78

A psychologist, complainant, or any other person who receives a notice from the PCC to provide information or documents (as described in Part 14 above), must without charge, comply with the requirement stated in the notice within 10 working days after the notice is received. This does not include a requirement for that person to provide any information or produce any document that would be privileged in a court of law.

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

Please note - section 78(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 refuses or fails without reasonable excuse to comply with the notice; or knowingly or recklessly provides information that is false or misleading in any material particular." Also refer to section 172 of the Act.

A PCC member or former member of the Committee or a person who assists or has assisted the PCC may **only** use and disclose any information obtained in the course of the performance of the PCC's functions only for the purposes of the Act.

PART 16 APPOINTMENT OF AN INVESTIGATOR

REFER SECTION 73(2)

The PCC may engage the services of an Investigator to collect information and to investigate complaints. Appointing an Investigator may sometimes be the most efficient way for a matter to be dealt with. The PCC must have a sound rationale for wanting to appoint an Investigator.

Any person appointed as Investigator must not be present during the deliberations of the PCC.

PART 17 SUSPENSION OF PRACTISING CERTIFICATE IF PUBLIC IS AT RISK

REFER SECTION 79

If at anytime in the course of investigating a matter the PCC has reason to believe that the psychologist's practice poses a serious risk of harm to the public, the PCC Chair must notify the Psychologists Board of its reasons for that belief and may present an opinion that those reasons justify the suspension of the psychologist's practising certificate.

Suspension under sections 39(2) and 69(2)

If the Board orders that a practising certificate be suspended under section 39(2) or section 69(2) of the Act, it will inform the psychologist concerned as to why it is considering making the order and will give the psychologist reasonable opportunity to make written submissions and/or to be heard on the question, either personally or by his or her representative.

Any order made under these sections takes effect from the day on which the psychologist receives a copy of the order or from any later date stated in the order.

Suspension under 48(2)

If the Board orders that a practising certificate be suspended under section 48(2) of the Act, the period of suspension will be not more than 20 working days from the date that a copy of the order is given to the psychologist. The Board is not obliged to give the psychologist notice that it intends to make an order under this section.

The Board may order that the suspension period be extended by a further period of not more than 20 working days (if that extension is necessary for any examination or testing required under section 49).

PART 18 RECOMMENDATIONS AND DETERMINATIONS OF PCCS

REFER SECTION 80

The PCC must within 14 working days after completing its investigation, make one or more of the following recommendations or one of the determinations or both.

RECOMMENDATIONS

- 1) that the Board review the competence of the psychologist to practise his or her profession;
- 2) that the Board review the fitness of the psychologist to practise his or her profession;
- 3) that the Board review the psychologist's scope of practice;
- 4) that the Board refer the subject matter of the investigation to the police;
- 5) that the Board counsels the psychologist.

DETERMINATIONS

- 1) that no further steps are taken under the Act in relation to the subject matter of the investigation;
- 2) that a charge be brought against the psychologist before the HPDT;
- 3) in the case of a complaint, that the complaint be submitted to conciliation.

The PCC may not make a recommendation or determination unless the psychologist concerned and any complainant have had a reasonable opportunity to make written submissions and/or be heard on the matter under investigation, either personally or by a representative. In effect the PCC must give the psychologist and any complainant written notice of:

- the latest date by which the PCC will receive written submissions from the psychologist and any complainant; and
- the date on which the PCC will hear persons who are entitled to be heard and wish to be heard.

PART 19 PROCEDURE AFTER RECOMMENDATION OR DETERMINATION IS MADE

The PCC must give written notice (section 81 Notice or PCC Final Report) of any recommendation(s) or determination in respect of the psychologist and the reason for it, to the Board, the psychologist, and any complainant.

The information in the PCC's report is private and confidential, and should not be disclosed to persons other than those involved in the investigation nor used for any other purposes not connected with the matter.

On receipt of the PCC's final report, the Registrar will forward it to the Board's Parts 3 & 4 (**P3&4**) Committee¹ for their consideration. If the P3&4 Committee resolves to accept the PCC's report and recommendation(s), the Secretariat will write to the psychologist and complainant informing them of this and of any process to follow.

PART 20 MANAGEMENT OF PCC RECOMMENDATION(S) AND/OR DETERMINATION

If the PCC determines that no further steps be taken in relation to the matter, then the PCC will notify the psychologist, any complainant, and the Board of that determination. The Board must accept this outcome and will also write to the psychologist and any complainant confirming that the matter is at an end (and the complaint file has been closed).

The Board will consider and may follow through on any of the following recommendations made by the PCC:

- a review of the psychologist's competence or fitness to practise his or her profession.
- a review of the practitioner's scope of practice.
- referral of the complaint to the police.
- counselling the practitioner.

The Secretariat will inform the psychologist of what is required of them in completing any of the above recommendations.

If the PCC decides to lay a charge against the psychologist before the HPDT, the PCC must formulate an appropriate charge and lay it before the HPDT. Psychologists should bear in mind that it is the responsibility of the HPDT to determine the outcome if any charges are brought.

¹ Parts 3&4 Committee is the committee delegated by the Board to deal with complaints and competence matters.

If the PCC determines that the complaint matter should be submitted to conciliation, the process outlined in Part 21 below will be followed.

PART 21 SETTLEMENT OF COMPLAINT BY CONCILIATION

REFER SECTION 82

If the PCC determines that the complaint matter should be submitted to conciliation, the Board must appoint a Conciliator to assist the psychologist and any complainant concerned to resolve the complaint by agreement.

The Conciliator's role is not to investigate or validate the complaint. The Conciliator will need to listen to both sides of the complaint and use the conciliation process to help resolve the issues of concern to the satisfaction of both parties.

The Conciliator will contact the PCC Chairperson to discuss:

- the background to the complaint (basic outline);
- what the PCC expects to achieve through conciliation;
- what the parties agree on, if anything;
- what needs to be achieved to resolve the matter by conciliation;
- timeframes; and
- what the Conciliator needs to report back to the PCC.

The Board has also published guides to assist Conciliators, psychologists and complainants going through the conciliation process.

If the PCC thinks that the complaint has been successfully resolved by agreement, it must promptly (within 14 working days of the agreement being reached) inform the Psychologists Board in writing.

If the PCC thinks that the complaint has not been successfully resolved by agreement, it must promptly decide whether:

- a) the PCC should lay a charge against the psychologist before the HPDT; or
- b) the PCC should make one or more of the recommendations specified under section 80(2); or
- c) no further steps be taken in relation to the complaint.

If the PCC decides to lay a charge before the HPDT (Refer Part 23) the PCC Chair must inform the Prosecutor drafting the Notice of Charge of the matters on which the psychologist and complainant reached agreement during conciliation and the matters on which they did not reach agreement during conciliation.

PART 22 DETERMINATION THAT NO FURTHER STEPS BE TAKEN

REFER SECTION 80(3)

If the PCC makes the determination that no further steps be taken in relation to the complaint, then no further steps may be taken under the Act in relation to the complaint. The PCC must give the psychologist, the Psychologists Board, and any complainant written notice of the determination and the PCC's reasons.

On receipt of such notice, the Secretariat will write to the psychologist and complainant confirming that the matter is at an end and that no further communications regarding the matter will be entered into.

PART 23 LAYING A CHARGE AGAINST THE PSYCHOLOGIST

REFER SECTIONS 81 & 91

In the event of the PCC deciding to lay a charge or charges before the HPDT, it will formulate an appropriate Notice of Charge.

Every charge laid must include a statement to the effect that the PCC has reason to believe that a ground(s) exists entitling the HPDT to exercise its powers. A copy of the Notice of Charge should be given to the psychologist, the Board, and any complainant.

Typically a charge will notify the psychologist that the PCC has reason to believe that grounds exist for a HPDT Hearing of a charge (or charges) and also informs the psychologist of the:

- substance of the grounds of the charge(s);
- the particulars of the charge(s);
- date on which the HPDT intends to hear the matter.

The lawyer chosen to formulate the Notice of Charge for the PCC will also prosecute the charge before the HPDT.

For further information about the HPDT go to www.hpdt.org.nz.

PART 24 APPEAL AGAINST A FINDING OR DECISION OF THE HPDT

REFER SECTION 106(2)

A psychologist that has had a charge or charges laid against them by the PCC may appeal to the High Court against a finding or decision or order of the HPDT that relates to the charge(s).

An appeal -

- a) must be brought to the appropriate court by way of notice of appeal in accordance with rules of court; and

- b) must be lodged within 20 working days after notice of the decision or order is communicated to the psychologist (appellant) or within any further time a High Court Judge allows on application made before or after the period expires.

Refer Part 5 of the Act for more information about appeals.

PART 25 RESTRICTION ON INFORMATION OBTAINED

PCC members, former members of a PCC, and any person who assists or has assisted the PCC may use or disclose any information obtained in the course of the PCC's work only for the purposes set out in the Act.

PART 26 LEGAL ASSISTANCE

The Board suggests that psychologists under investigation by a PCC engage the services of a reputable lawyer.

PART 27 CONTACT DETAILS

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