



Hearing members professional development



Acting fairly

Quick reference guide

About this guide

This guide outlines principles that underpin fair, ethical and respectful processes that involve people. It includes:

- The impact of proceedings on people involved in the process.
- Principles that underpin a protective jurisdiction.
- Principles of procedural fairness across different contexts.

Note: This guide is focused on non-disciplinary proceedings. For information relating to disciplinary proceedings, contact your council to access the Health Professional Council Authority (HPCA) Bench book.



The impact of proceedings on people

As a professional or community member, you are making decisions about people that could have a big impact on their lives. It is a unique role that involves assessing evidence in a neutral way and giving adequate reasons for your decisions. You have been selected because you have the skills to do the job. Do what you think is fair, ask for help from one of the council officers or lawyers need to, and don't be afraid.

The process can be distressing for a practitioner. It can be helpful to acknowledge this. Part of respecting the person is helping them understand the context of the proceedings, that it is a protective process.

Tips:

- Keep an open mind and be careful not to make any decisions prior to the proceedings starting.
- If you do form a view, be prepared to change that view as you can get a completely different picture once proceedings have started.
- At the outset of the proceedings, explain the context that it is a protective process and public safety is paramount.

Protective Jurisdiction

The primary objective of the Health Practitioner Regulation National Law (NSW) (the National Law) is the protection of the health and safety of the public. Accordingly, hearing members work within a 'protective jurisdiction'. The purpose of which is to protect the public from misconduct, poor professional performance or impairment (mental and physical) of health professionals which may put the public at risk of harm.

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Under a protective jurisdiction the context of the incident, including the practitioner's behaviour following it, is of the utmost significance. In other words, the fact that an adverse incident occurred does not determine the action that should be taken. A key principle of a protective jurisdiction is to ensure that all relevant factors which contribute to the risk of potential or actual harm are addressed. This minimises future risk and protects patient safety and public trust and confidence in the professional.

If similar complaints are made about two practitioners, the outcomes do not need to be the same as other variables must be considered in addition to the original complaint. For example two complaints about the performance of two practitioners in similar scenarios may result in different outcomes if one practitioner demonstrates insight into how their actions fell short of relevant standards and has taken remedial action, but the second practitioner maintains they acted correctly. In the latter case it is likely that action may be required to address any ongoing performance concerns for the practitioner, but these safeguards may not be necessary for the first practitioner. Such differential treatment reflects the fact that the primary purpose of actions taken by the council is to protect the public, rather than to punish the practitioner.

The context of the case includes exploration of:

Performance Review Panel	<ul style="list-style-type: none">• What are the issues of concern about the practitioner's performance and the contributing factors?• What are the practitioner's reflections on their practice, the performance assessment results and the practice context?• What has the practitioner done, or is planning to do, to address these factors and improve their practice?• What level of professional integrity (including insight and engagement in the process) has the practitioner demonstrated? <p>What independent evidence is there that the practitioner's practice has improved, and potential for harm minimised?</p>
Impaired Registrants Panel	<p>IRP inquiries are held in private.</p> <ul style="list-style-type: none">• The Panel may obtain reports and/or other information concerning the matter from any source it considers appropriate.• Asking the practitioner or student to attend the IRP for the purpose of providing information and to help the Panel make an assessment. <p>An IRP has no power to compel the attendance of the practitioner or student</p>

Section 150 proceedings

During preparation and over the course of the proceedings, hearing members must:

- Identify the main and sub-issues of a case
- Establish what they know about these issues from the available documents
- Identify gaps in information and areas that require clarification or confirmation
- Consider factors relating to a practitioner's characteristics, professional integrity, or actions taken, that may mitigate or increase levels of concern

Protection of the public is the paramount concern: Section 3A of the *National Law* provides that “in the exercise of functions under a NSW provision, the protection of the health and safety of the public must be the paramount consideration.”

Conditions or orders may be imposed to a practitioner's registration as part of protecting the public and profession.

Procedural Fairness

Every aspect of the document needs to be correct as it will be referred to for years to come. Nothing in this document should come as a surprise to the practitioner if you have communicated with them fully during the proceedings.

- Refer to the questions that come from the complaint or notification.
- Review notes captured during the proceedings and think about what will mitigate the identified risks.
- Speak with the Council Officer about writing the conditions.

Hearing rule

A key principle of procedural fairness is that practitioners have the opportunity to put their case to the panel before a decision is made. This includes ensuring a person has reasonable time to prepare a written or verbal response. Proceedings can be distressing for practitioners involved in the process. To acknowledge and respond to their distress appropriately can improve the experience for everyone involved.

In very urgent cases where safety requires immediate action, it may not be possible to allow the practitioner to make written submissions or to appear before the panel in person. In such a case, proceedings could be conducted by telephone for example.

Procedural fairness informs what processes are followed, but if there are significant and immediate concerns, the council can act first and provide the practitioner with an opportunity to review at a later date. Failing to take action could put public safety at risk. The amount of notice provided across proceedings may differ because of the urgency and level of risk. Under circumstances where the Panel feels there is a legitimate reason for non-attendance and there is not a high risk to public safety, it is fair to consider postponement.

Bias rule

Confidentiality

Under the National Law (NSW) there is a duty of confidentiality. This relates to protected information that comes to panel members in the course of proceedings and determining a case. It is expected that members appointed to panels understand and demonstrate the standards expected within the profession to enable them to evaluate these standards.

Discussing the matter with colleagues, or anyone outside the process is a breach of confidentiality. Any private investigations undertaken by the panel member would not be fair to the practitioner. It can damage the practitioner's faith in the process and also have reputational damage for the council. When all members prepare with the same background information, it allows for everyone, including the practitioner to review the same materials.

For example, you are a registered nurse who has been appointed to sit as a hearing member on section 150 proceedings. The registered nurse who is the subject of the proceedings is a clinical nurse specialist (CNS) at a hospital at which an old friend of yours is the Director of Nursing. You telephone your friend, indicate that you are about to sit on section 150 proceedings concerning the CNS and seek her views about the practitioner's performance of their hospital duties.

This would amount to a breach of confidentiality.

Bias rule

The bias rule requires the decision-maker has no 'actual' or 'apprehended' bias that might influence or be seen as influencing their decision-making. Using a statement rather than a question could imply the panel member has made up their mind without considering the evidence.

A **perception of bias** can exist where it could be perceived, or appears, that a member's private interests could influence the performance of their duties – whether or not this is in fact the case. This may arise due to the member's private interests or strongly held views, or due to some previous interaction between the member and the subject practitioner. A perception of bias does not require actual bias just a reasonable apprehension.

For example, you are a practising Catholic and believe that a pregnancy should not be terminated unless the circumstances are exceptional. Due to your conscientious objection you are known to request not to participate in providing care to woman having a termination. You are asked to sit upon a Professional Standards Committee inquiry which is considering a complaint against a practitioner who provided poor care to someone who had a termination, which led to serious complications for the woman.

	<p>In these circumstances, the practitioner may have a reasonable apprehension that you will be biased in your decision-making.</p>
Innate bias	<p>Innate bias happens when we make judgements of people and situations without realising. Our biases are influenced by our background, cultural environment and personal experiences. We may not even be aware of these views or the impact this has on our decisions and actions.</p> <p>Everyone has innate biases, recognise what yours are and notify the council if it will influence decision-making.</p> <p>Avoid innate bias by following a structured decision-making process when participating in proceedings. Do not feel pressured to make and convey your decision on the spot. A careful process of decision-making and writing will ensure that the reasons lead to the outcome rather than being retrofitted on to a hurriedly made decision which may be influenced by innate biases. This will help ensure you are impartial in the process.</p> <p>For example, you are a community member asked to sit as a hearing member on a hearing concerning a senior practitioner who is accused of bullying staff leading to unsafe practice. During your own employment, you have been bullied by your supervisor.</p> <p>Carefully consider whether your experience may have resulted in you having an innate bias against a practitioner who is accused of bullying. Consider whether, notwithstanding your own experience, you are able to bring an open and impartial mind to determination of the issues based on the facts.</p>
Conflict of interest	<p>A conflict of interest exists when a person is influenced or perceived to be influenced, by a business, professional or personal interest in their decision-making, such that they lack impartiality. There must be a connection between the business, professional or personal interests of the decision maker and the matter for determination.</p> <p>A conflict of interest does not automatically exist because you know or have had interactions with the subject practitioner. The specific circumstances of the dealings or relationship must be considered, along with how this impacts your ability to make important judgements about the practitioner.</p> <p>To assess a conflict of interest well, first consider the nature of your relationship, then assess whether you can be impartial. Also, the possibility that an objective observer might consider that your ability to make an impartial decision could be affected. In any case, a previous interaction must be disclosed to the council. Such information, even if it does not constitute a conflict, should be flagged at the outset of the proceedings by the Chair.</p>

Questions to ask yourself:

- What is the nature of my relationship, dealings or interactions with the person? How long ago?
- Do I have a social relationship with this person?
- Have our past dealings or interactions been personal or professional?
- Do I have any pre-conceived views about this person?
- Have I ever been involved in judging their character?
- How would a member of the public view my role as a panel member with the knowledge of my relationship, dealings or interactions?

Always err on the side of doubt and contact the council as early as possible to discuss a potential conflict of interest.

For example, you are one of a number registered nurses who practise in a chain of cosmetic treatment clinics across NSW. You and the other nurses employed by the organisation each hold shares in the company which operates the clinics. You are asked to sit on proceedings concerning the conduct of one of the other registered nurses working for the organisation. This practitioner works in one of the group's country clinics, while you are based in Sydney. You see each other occasionally at in-service sessions but do not have a close relationship with the practitioner and do not have a view about her standard of practice prior to the hearing.

Nevertheless, in this situation, you could be perceived to have a conflict of interest, as action taken against the other practitioner could adversely affect your shareholdings of the organisation.

After the proceedings and before writing the report, it is important to keep a separation from the subject of the complaint and any witnesses.

If unsure or you need assistance, always seek advice from the council.

Summary

Proceedings can be distressing for practitioners involved in the process. To acknowledge and respond to their distress appropriately can improve the experience for everyone involved.

Under a protective jurisdiction the context of the conduct, including the practitioner's behaviour following the conduct in question is of the utmost significance.

Whilst procedural fairness is very important and must be considered, it occurs within the statutory framework of the Council's primary obligation to protect public health and safety.

Remember that procedural fairness is filtered through the notion of urgency and necessity.

Further resources

- [Health Care Complaints Commission v Gregorio \(No. 1\) \[2009\], viewed 31 July 2012,](#)
This case deals with apparent (or 'apprehended') bias.
- [Health Practitioner Regulation National Law \(NSW\) Part 8. Viewed 13 July 2012,](#)
See in particular the following:
 - 41O (other matters to be taken into account)
 - 150-150J (powers of a Council for protection of public)
 - 152G, H, J, K. (impairment)
 - 155A, Schedule 5B (performance assessment)
 - 156 (Performance review panel)
 - Division 6, 7,8 (appeals to Tribunal and reviews)
- [Nursing and Midwifery Board of Australia, Codes of Conduct for nurses and for midwives](#)
- Nursing and Midwifery Council website
 - [How we manage complaints](#)
 - [Our policies](#)
 - [Legal information](#)
 - [Glossary](#)
 - [Fact sheets](#)