Health Care Complaints Commission Investigations Procedures Manual

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The purpose of this manual

The procedures manual (the manual) is intended to cover the day-to-day procedures concerning the Investigations Division (the Division). It is expected that Investigation officers (IO) will be familiar with the manuals content and will refer to relevant sections as required. The manual is designed to provide clarity and consistency in regard to the Division's policies and procedures. Compliance with the manual will help to ensure that the Division achieves its key performance objectives and delivers timely and quality investigations and an excellent service to complainants and key stakeholders. Timeframes and directives contained within the manual are to be complied with unless otherwise advised by the Director of Investigations (the Director).

Overview of the Commission's function

1. The Commission's purpose and functions are dictated by the provisions of the *Health Care Complaints Act 1993* (HCCA)

2. The Commission is an independent statutory body charged with the responsibility of receiving, assessing, resolving, investigating and prosecuting complaints relating to health services and health service providers (s3 HCCA).

3. The primary object of the Commission is the protection of the health and safety of the public (s3 (2)).

4. Complaints about registered health practitioners can be made to the Commission, the relevant NSW Professional Council (the Council) and the Australian Health Practitioner Regulation Agency (AHPRA). AHPRA is also referred to as the National Agency. The National Agency was established by s23 of the *Health Practitioner Regulation National Law* (the National Law). The National Agency provides administrative assistance and support to the National Boards and the Boards committees in exercising their functions. The Councils are required to notify both the Commission and the relevant National Board of a complaint it receives as soon as practicable after receiving the complaint. The Council is required to consult on complaints with the Commission about what course of action to take in relation to the complaint. The Commission must also notify the appropriate Council of any complaint it receives about a registered health practitioner (s10 HCCA)

5. Where the Commission has assessed a complaint about a registered health practitioner, it must consult with the relevant Council about the most appropriate way to deal with the complaint (s12 HCCA).Where the Commission and the Council disagree on the appropriate outcome, s13 of the HCCA prescribes that the highest call wins. This means that if one body believes the complaint should be investigated, then it must be investigated. Also, if neither body believes that the complaint should be investigated, but one body believes the complaint should be referred to the Council for their management, then it must be referred to the Council.

6. S13(2A) HCCA states that associated complaints that may have been discontinued earlier can be re-opened at this stage, investigated, or referred to the Council. The aim of the legislation is to enable the Commission and the Councils to act in collaboration with each other. The legislation allows complete information sharing between the bodies, and both bodies retain the ability to refer matters for investigation.

7. A complaint is referred for investigation if, following assessment and consultation it appears to the Commission that the complaint raises a significant issue of public health and safety, a significant question as to the appropriate care or treatment of a client by a health service provider; or which, if substantiated, would provide grounds for disciplinary action against a health practitioner or if substantiated would involve gross negligence on the part of a health practitioner. S23 of the HCCA specifies the circumstances in which a complaint should be investigated.

8. If the subject matter raises the circumstances specified in s23, the Commission must investigate, notwithstanding any agreement the parties to a complaint reach concerning the subject of a complaint, or if the complainant decides to withdraw the complaint.

Types of Investigations

9. The Commission investigates complaints concerning individual health care practitioners, both registered and unregistered, (s28, 28A, 39, 40, 41, 41A, 41B, 41C, 41D) and health organisations, including hospitals, clinics and other health care facilities. (s42, 43, 44, 45). The Commission also has jurisdiction to conduct potentially wide-ranging investigations concerning

health service providers that arise out of one or more complaints (Part 3, Division 6 HCCA).

Investigation of individual health care providers

Registered practitioners

10. The Medical Council of NSW is the professional council with which the Commission has most contact, followed by the Nursing and Midwifery Council of NSW. Pharmacists, Psychologists, Chiropractors, Podiatrists, Optometrists, Dentists, Physiotherapists and Osteopaths also require registration. National Boards are responsible for the registration of health professionals. The National Law established a national registration and accreditation scheme with a number of objectives including the protection of the public by ensuring only suitably trained and qualified health practitioners are registered.

11. Consultation between the professional councils and the Commission also occurs at the end of an investigation prior to deciding what action to take (s39(2)).

12. When a decision has been made to investigate a complaint, the Commission has determined the threshold under s23 has been met. The reasons for investigating a practitioner are wide-ranging. The grounds on which a complaint can later be prosecuted by a disciplinary body are determined by the National Law.

13. Grounds for initiating disciplinary action include the following:
(S144 of the National Law)
    I. The practitioner has had a conviction or criminal finding recorded for an offence.
    II. The practitioner has been guilty of unsatisfactory professional conduct (UPC) or professional misconduct (PM).
    III. The practitioner is not competent to practise the practitioner's profession.
    IV. The practitioner suffers from an impairment that detrimentally affects their ability to practice (includes habitual drunkenness and addiction to drugs).
    V. The practitioner is otherwise not a suitable person to hold registration.

14. The definition of UPC is the same for all individual registered practitioners. When a practitioner is alleged to have treated a patient inadequately, the purpose of the investigation is to determine whether evidence exists to establish that the practitioner has engaged in:

    ' conduct that demonstrates that the knowledge, skill or judgement possessed, or care exercised, by the practitioner in the practice of the practitioner's profession is significantly below the standard reasonably expected of a practitioner of an equivalent level of training or experience.' (s139B (1)(a) of the National Law)

15. The evidence required to substantiate such an allegation includes the facts surrounding the conduct itself and opinion evidence from qualified independent experts as to what a reasonable standard was at the relevant time and whether the practitioner adhered to that standard.

NOTE: the complete definition of UPC is contained in Chapter 7

16. Under s139E of the National Law Professional Misconduct (PM) means:

    (a) UPC of a sufficiently serious nature to justify suspension or cancellation of the practitioner's registration, or
    (b) more than one instance of UPC that, when the instances are considered together, amount to conduct of a sufficiently serious nature to justify suspension or cancellation of the practitioner's registration

17. For practical purposes, an expert opinion that the conduct of a practitioner significantly departs from acceptable standards means it amounts to UPC and if the expert believes that the conduct invites *'*strong criticism' the Director of Proceedings (DP) will consider whether it amounts to PM.

18. If, at the end of an investigation, the evidence is capable of supporting a finding of UPC or PM, the Commission, after consultation with the appropriate professional council, will refer the matter to the DP, who will determine whether disciplinary action should be taken against the practitioner. The Tribunal or the Professional Standards Committee (PSC) must be *'*comfortably satisfied*'* the facts are established by the prosecution case.

19. If the DP determines that disciplinary action should not be taken against the practitioner the DP may refer the matter back to the Commission for action under s39 (1)(c) – (f) of the HCCA.

S39 (1)(c) – (f): Other outcomes for registered practitioners

20. The outcomes of investigations are determined by s39 of the HCCA and if the practitioner is not referred to the DP, another outcome must follow. Comments can be made to the practitioner, or the practitioner can be referred to the appropriate professional council for their consideration of any relevant action, or both. Alternatively, the complaint can be terminated. Finally, the practitioner can be referred to the Office of the Director of Public Prosecutions (ODPP), where the conduct may amount to a criminal offence.

21. It is important to note that there may be occasions where the evidence obtained during an investigation would normally result in the complaint being referred to the DP since there is prima facie evidence of UPC and or PM, but due to other factors, the matter is referred back to the relevant professional council for any relevant action. The reasons for this are varied, but include instances where the practitioner has not been contactable and no responses have been received, particularly s40 submissions, and the practitioner is no longer on the national register and his/her whereabouts is unknown.

22. In such circumstances the prospects of a prosecution in the absence of the respondent is unlikely and the public are protected due to the practitioner no longer being registered. In these circumstances a complaint may be referred to the relevant professional council for their onward referral to AHPRA and the relevant National Board. The National Board can then take into account the Commission's investigation findings and any other information provided by the Council as to the suitability of the practitioner to practice when making a decision on whether or not to register the practitioner should any applications for re-registration be made in the future. In the event of such

circumstance prevailing, the Director is to be informed and advice sought as to the extent of evidence gathering required as soon as possible.

Unregistered health practitioners

23. The Public Health (General) Regulation 2002, schedule 3 prescribes a code of conduct for unregistered practitioners (the Code). Clause 1 of the Code states that a *health practitioner* and a *health service* have the same meaning as in the HCCA. The HCCA defines those terms as follows; ***health practitioner*** means a natural person who provides a health service (whether or not the person is registered under the Health Practitioner National Law)

24. Clause 1 of the Code defines a health service to include the following services, whether provided as public or private services:
(a) Medical, hospital and nursing services,
(b) Dental services,
(c) Mental health services,
(d) Pharmaceutical services,
(e) Ambulance services,
(f) Community health services,
(g) Health education services,
(h) Welfare services necessary to implement any services referred to in paragraphs (a)-(g),
(i) Services provided by podiatrists, chiropractors, osteopaths, optometrists, physiotherapists, and psychologists,
(j) Services provided by optical dispensers, dietitians, masseurs, naturopaths, acupuncturists, occupational therapists, speech therapists, audiologists, audiometrists and radiographers,
(k) Services provided in other alternative health care fields,
(l) forensic pathology services,
(m) a service prescribed by the regulations as a health service for the purposes of the *Health Care Complaints Act 1993*.'

25. Clause 2 of the Code states, 'This code of conduct applies to the provision of health services by:

    (a) health practitioners who are not required to be registered under the Health Practitioner Regulation National Law (including de-registered health practitioners), and
    (b) health practitioners who are registered under the Health Practitioner Regulation National Law who provide health services which are unrelated to their registration.'

26. The Commissioner, after assessing all of the available evidence, determines the outcome of investigations into unregistered practitioners. There is no consultation process since the requirement to consult only applies to practitioners who are registered under the National Law. The possible outcomes of an investigation concerning an unregistered practitioner are termination, comments, referral to the ODPP and/or action under s41A, [s39 (1)(d)(e)(f) & (g)].

27. If the Commission finds that an unregistered practitioner has breached the Code or has been convicted of a 'relevant offence' and is of the opinion that the practitioner poses a risk to the health or safety of members of the public it can take action under s41A. S41A empowers the Commissioner to make a prohibition order and / or issue a public statement.

28. The Commission can issue an interim prohibition order if during an investigation of a complaint against an unregistered health practitioner the Commission has a reasonable belief that the health practitioner has breached the code and is of the opinion that an interim prohibition order is necessary to protect the health or safety of members of the public (s41AA).The threshold for the making of an interim prohibition orders is a "serious risk to public health or safety". Interim orders are only valid for a period of eight weeks, after which they are required to be renewed or the conditions of the interim order cease. Interim orders cannot be made public.

Investigation of health organisations

29. The Commission can investigate private and public health organisations and there are three possible outcomes following the end of the investigation (s42). The investigation can be terminated, comments and/or recommendations can be made to the organisation or the matter can be referred to the ODPP.

30. Investigations concerning facilities usually focus on the systems or processes in place to manage different clinical scenario's. In some instances, adverse outcomes occur because a facility has not implemented a system and or process that is clearly required or has failed to follow guidelines, protocols or directives that emanate from that facility, the Local Health District (LHD) and/or the Ministry of Health (Health). Additionally, existing policies, systems and procedures may not have been fit for purpose so that the issue may not be one of a lack of compliance, but of a lack of adequate existing systems and policies in place to safely manage the particular clinical scenario.

31. If, at the end of an investigation, the Commission makes comments or recommendations to the facility, a report must be sent to the Director – General (DG) of Health and within this report the Commission requests that the DG keep it informed of the progress made in implementing the Commission's recommendations. If the Commission is not satisfied with the implementation, it may, after consultation with the Director- General, make a report to the Minister. If the Commission is not satisfied with the Minister's response, it may make a special report to Parliament.

32. Whilst failure by a private facility to implement recommendations may result in a report to Parliament, NSW Health may have no responsibility to ensure the recommendations made by the Commission are implemented.

S 41 review

33. If complainants are dissatisfied with the outcome of an investigation concerning a practitioner, they may seek a review under s41 of the HCCA. There is no similar provision for a right of review concerning a health organisation.

Chapter 1
Receipt of investigation

Timeframe: The Director and Manager should allocate a new investigation to an IO within five days of receipt in the Division. The official start date is when the investigation process is created on casemate. Investigation plans should be completed within 14 days of the official start date.

1.1 The Commission has a statutory obligation to investigate a complaint *'*as expeditiously as the proper investigation of the complaint permits*.'* (s29). This is especially so if the complainant or subject is ill, if there are conditions on a respondent's registration or the respondent has been suspended by the relevant Council.

1.2 Confidentiality should be maintained. Improper disclosure of information constitutes an offence under s99A.

1.3 The relevant parties should receive regular updates concerning the progress of the investigation and telephone or email updates are acceptable. Monthly contact with complainants is an absolute minimum requirement. Telephone contact must be documented in a Casemate file note setting out the details of the contact including concerns expressed by the complainant and the IOs response. Emails must be linked to the process on casemate and printed and placed in the hard file of the investigation.

Investigative Principles

1.4 When IOs are conducting investigations they must at all times maintain a professional and objective approach. If a respondent is legally represented then their solicitor should be the direct point of contact at all times. When exercising powers under the HCCA IOs should ensure that they act impartially, proportionately and in the public interest, at all times. IOs are to:

- Adopt an inquisitorial approach
- Apply an objective investigation standard to all parties
- Provide a balanced and unprejudiced appraisal of all available evidence
- Ensure investigation findings are based upon sound reasoning and relevant facts.

1.5 IOs are to ensure they comply with the principles of natural justice and procedural fairness. IOs are to be mindful that allegations against a respondent are to be made clear to allow the respondent to address the allegations in a reasonable manner. Careful thought must be exercised when decisions are made on what documents and/or information should be disclosed during investigations. If a decision is made not to provide the respondent with a copy of the complaint, the IO must ensure that the respondent is provided with enough information to enable them to make an initial response to the allegation. Requests will be made by respondents and their legal representatives for the disclosure of certain information during the investigative process. A simple non disclosure default position is not acceptable. All requests for information must be carefully considered and based on individual merits. This means that even when no prior disclosure has been requested, the IO may consider the disclosure of certain material appropriate to ensure that the respondent is in possession of enough facts and information to respond in a thorough manner. Protecting the integrity of the investigation will be an important consideration at all times, but decisions on disclosure of information should be proportionate in the circumstances.

1.6 All decisions on what documentation and information to disclose during the course of an investigation should be discussed with the Manager and if required, the Director prior to any disclosure. All IOs are to be familiar with s99B of the HCCA. Disclosure of information to third parties under s99B must be approved by the Director.

Director, Investigations

1.7 Upon receipt of an investigation into the division the Director will review the investigation file and may determine the general direction to be taken and prepare a file note. The Director may identify significant issues for the IO and any fast track actions. The Director may also determine the general time frame for an investigation. The Director forwards the investigation to a Manager for allocation within a team. Investigations may have the potential to be protracted, highly sensitive, complex in nature or possess risks which require specific management. In such circumstances the Director may table the investigation in the Managers meeting to ascertain the availability of staff and address any issues with the Manager to ensure appropriate staff are allocated to the investigation, taking into account staff experience, skill set and development needs.

1.8 The Director will allocate the file on casemate ensuring the file is allocated to the appropriate Manager and provide the hard file for review and allocation. The Director must ensure new investigation files are allocated to Managers within 3 working days of receipt.

1.9 When a decision is made to allocate a complaint to the Division for Investigation, the Director will review the assessment file and ascertain if the notification to the respondent should be withheld.

1.10 There may be occasions where notice to the parties and subject required by s28(1) and s28A(1) have not been furnished by the Commission following assessment of the complaint for the reasons set out in s28(4) and s28A(6) – where the provision of notice would prejudice the investigation or put the health or safety of a person at risk. In these cases, the Director is required with respect to delaying or not giving notice to comply with the provisions of s28 (4)–(7) and s28A (6)-(9) must ensure that a record which documents the reasoning behind the decision is made.

Manager, Investigations

1.11 Managers will thoroughly review allocated investigations and in collaboration with IOs identify relevant information to be collected and assessed at the outset of the investigation. They will identify specific lines of inquiry; including actions that can be fast tracked and require specific time frames. Managers will ensure that in collaboration with IOs the relevant issues are identified to ensure the investigative parameters are scoped effectively with a clear focus on direction at the outset. Any direction on the assessment sheet from the Commissioner is to be followed and discussed with the Director. In the case of any ambiguity, further discussion with the Commissioner will ensue. The key investigative decisions will be set out in a file note for the IO. Managers allocate the file to an IO, taking into account individual workloads. In some instances particular skills or knowledge of an IO will warrant an investigation being allocated to them. Further consideration should also be given to the development of staff members by the allocation of investigations with the appropriate supervision and guidance during the course of the investigation. The Manager allocates the IO as 'process officer' on Casemate and the process will appear on the IOs Casemate screen.

1.12 Managers assist in preparing the Investigation Plan (IP) on Casemate and certify that the proposed timeframes are appropriate. Once finalised the Manager will approve the IP and place a signed copy on the file.

1.13 The Manager will review investigations on an ongoing informal and more formal basis every 28 days providing support, advice and direction. The Manager should ensure the IO keeps parties regularly apprised of progress.

1.14 If the Manager or IO has concerns they cannot resolve regarding the investigation, they should bring those concerns to the attention of the Director.

Investigation officer.

Initial Contact

1.15 The investigation process can be confronting and upsetting not only for complainants and respondents but also for collateral health care providers that are required to provide information to the Commission. For this reason it is important that correspondence sent by the Commission does not appear overly impersonal and bureaucratic. Templates letters are a useful tool and have the potential to save a lot of time. They are, though, only a skeletal document and must be adapted thoughtfully with the intended recipient in mind at all times.

1.16 Legal terms, medical terminology and jargon should be avoided when writing to lay people and plain English should be utilised at all times. Reference should be made to the Commission's Style Manual available on the intranet. Please see the section in Chapter 3, concerning investigation reports (IR), for more information on this topic.

Notification

1.17 Once an investigation is allocated to the IO, they should check the parties to the complaint have been notified as required by s16 & s28. Complaints assessed for investigation should usually be referred to the Division with notice having been given to the parties to the complaints by the responsible assessment officer.

1.18 Under s16 for notification to be valid the information provided to parties must include, the nature of the complaint and the identity of the complainant to the person against whom the complaint is made. If notification has been withheld, or if there has been some error in the notification, the IO must ensure that notice of the complaint and the assessment decision is provided to the complainant and respondent as soon as possible, (unless, in accordance with s16(4), there is a reason to continue withholding notification). If notification has not been withheld in accordance with s16(4), s28 requires notice to be given within 14 days of the assessment decision. According to s16(4) notification can be withheld, if on reasonable grounds, it appears to the Commission that providing notification would,
'(a) prejudice the investigation of the complaint, or
(b) place the health or safety of a client at risk, or
(c) place the complainant or another person at risk of intimidation or harassment.'

1.19 However s16(5) states 'despite subsection (4), the Commission must give the notice if the Commission considers on reasonable grounds that:
(a) it is essential, having regard to the principles of natural justice, that the notice be given, or
(b) the giving of the notice is necessary to investigate the matter effectively or it is otherwise in the public interest to do so.'

1.20 Under s16(6) 'If the Commission decides that subsection (4) applies to a complaint but that some form of notice could be given of the complaint without affecting the health or safety of a client or putting any person at risk of intimidation or harassment, the Commission may give such a form of notice.'

1.21 Where notification has been withheld, s16(7) provides that, 'on the expiration of each consecutive period of 60 days after the complaint is assessed, the Commission must undertake a review of a decision not to give notice under this section (or to give notice in some other form as referred to in subsection (6)) unless notice under this section has already been given or the Commission has discontinued dealing with the complaint.'

1.22 When reviewing the decision to withhold notification the IO includes the reasons in support of either continuing to withhold the notification or making the notification in the 'file review' on casemate. The Manager discusses the review with the Director and records the discussion in the 'file review'. The Director records the approval whether or not to continue withholding the notification in a file note.

Initial Responses

1.23 Usually a respondent is contacted by letter and asked to provide a response if one has not already been provided at the assessment stage. Where a response has already been provided correspondence should seek clarification of the initial response and request further information and or documents if

required. The initial letter requesting a response is a good opportunity to request a copy of the respondent's curriculum vitae. It is very important for IOs to convey all possible outcomes to all relevant parties in order to ensure that they do not have any misconceptions as to the potential consequences of an investigation or unrealistic expectations. Expectations of complainants and respondents must be appropriately managed with realistic time frames provided as to how the investigation is likely to progress. If a decision is made by the Director that it is no longer valid to withhold notification to the respondent, they should be notified at the first opportunity. Contact with complainants and respondents must take place within 14 days of the IO receiving the complaint.

1.24 Initial responses from providers are an opportunity for the IO to obtain additional information which may not have previously been available to the Commission. Requests for initial responses should be broad whilst information is still being collected and assessed. Respondents are significant witnesses in all investigations and even broad responses can identify at an early stage other witnesses and relevant lines of enquiry which assist in progressing and expediting investigations. Decisions on when to seek responses are for individual IOs and careful consideration should be given. However, IOs should be mindful not to seek to obtain information from all witnesses before seeking an initial response. On occasions more than one response will be required and as the investigation progresses more focused and specific questions can be put to respondents. Decisions will be based on judgment and there are no hard and fast rules, but IOs should be careful not to unduly delay the requests for responses whenever possible.

Notification to employers

1.25 S28(2) provides that the Commission must give notice of the investigation in writing to the employer of an individual health practitioner (at the time the conduct occurred), whether or not the employment is under a contract. It is the responsibility of IOs to ensure that notice of the investigation is provided to the relevant employer, as soon as possible after receiving the complaint. Notifications to employers should include enough information to allow them to identify the nature of the complaint and put them in a position where they can protect the health and safety of the public.

1.26 S28(3) provides that the Commission 'may' notify the current employer of a health practitioner, even though the incident being investigated occurred at the respondent's previous place of employment. There may be cases where it is inappropriate or unduly prejudicial to notify the current employer s28(4)(d). Decisions on whether or not to notify a practitioner's current employer require very careful consideration and will be file noted and approved by the Director.

1.27 All employees in NSW public health organisations are employed by the Ministry of Health (Health). This includes employees of the Local Health Districts (LHD), the Ambulance Service and statutory health corporations. When a respondent is an employee of a facility, notice under s28(2) should be sent to the Director-General (DG) and copied to the Chief Executive of the relevant LHD or other body. Visiting Medical and Dental officers are contractors of the relevant LHD/statutory health corporation so notice regarding such respondents should be sent to the relevant Chief Executive.

1.28 To ensure the DG is aware of the LHD involved, all Commission correspondence to Health should include a copy of the relevant letter to the LHD concerned.

1.29 S28A requires the Commission to 'use its best endeavours to notify clients' (defined as receivers of a health service, including patients) whose treatment is the subject of complaint, that a complaint concerning their treatment has been assessed by the Commission. Assessments staff will notify clients in all complaints except in those assessed for investigation. Notification of clients where a complaint is assessed for investigation is the responsibility of the IO.

1.30 Notice to clients under s28A need not be given where the client is deceased or incapable of understanding the notification. In such cases, the Commission must use its best endeavours to notify 'any person who is associated with [the] client', such as next of kin, legal representative, or the estate of the client. Inquiries to establish who the associate of the client is should be diligent but need not be exhaustive. Hospitals are obliged to co-operate with the Commission in determining who an associate might be. The extent of such inquiries, and the meaning of the Commission's 'best endeavours' will have to be assessed in each complaint. Any difficulties, complications, or potential prejudice to the investigation, should be raised with the Manager.

Initial analysis by IO

1.31 Once the file is allocated, the IO should ensure a casemate case contact priors check has been performed concerning individual complainants and respondents. These checks enable the IO to determine whether a respondent or complainant has had previous contact with the Commission and the nature of that contact. The case contact priors report will include any Legal processes. The DP must be informed via a file note if it is apparent that a further complaint for the respondent is pending a legal determination or a disciplinary hearing.

1.32 When reading the file, the IO will keep an open mind about whom, or what is being investigated. It is sometimes necessary to add respondents or allegations and this should occur as soon as practicable after the investigation commences. The importance of analysing a file with a view to adding respondents is particularly important in investigations concerning facilities and the IO should prioritise identifying possible respondents and obtain responses early in the investigation (see Chapter 2 concerning adding respondents under s20A of the HCCA). Where multiple witnesses are involved and limited information is available it may be more efficient to obtain an initial response from all possible witnesses to establish clarity of the allegations under investigation.

1.33 IOs analyse the complaint and prepare the IP in collaboration with their Manager on casemate. IPs must be completed within 14 days of the official start date. This is an external key performance indicator for the Division and 100% compliance is required. A signed copy of the IP is placed on the file. The signed IP should be placed on the inside cover of the hard file to allow for easy access to review the investigation. The use of evidence matrixes and action sheets may be appropriate where large quantities of information or numerous witnesses are identified. The matrix will aid in identifying which witnesses can provide specific evidence and subsequent lines of inquiry. A copy of an example evidence matrix template can be found on the intranet.

1.34 IOs need to make provision in the IP for the possible need for an expert opinion. The emphases of IPs are the lines of inquiry to be pursued and the information to be gathered. However, notifications required by statute must be included, along with any relevant timeframes in which the notifications must be given.

1.35 The IP is dynamic and can be amended as the investigation proceeds but forms the backbone of the investigation. The IP will form the basis of the information contained within the IR including background, complaint issues and lines of inquiry.

Components of Investigation Plan

Commission resources and investigation timeframes

1.36 Casemate will record in the IP the case number, names of the parties and the subject, the names of the officers involved in the investigation and their respective roles and the date of receipt.

Background

1.37 This section should include a brief factual background and any significant features of the investigation. Any relevant case priors of the complainant or respondent should be included in the background.

1.38 Specific allegations to be investigated should be identified as soon as possible and reference should be made to the Complaint Assessment Sheet received from the Assessments Division. It is important to note that allegations listed on assessment sheets are a guide only, by no means exhaustive and at times may be incorrect. It is the Manager's and IOs' responsibility to ensure that all relevant allegations are identified. Once allegations are identified, the evidence required becomes clear. If an allegation is identified which is not reasonably covered by the complaint it may be necessary to formally add the allegation under s20A (see Chapter 2).

1.39 IOs should keep in mind the allegations that are the focus of the investigation may differ depending on whether the investigation concerns a health organisation, a registered health practitioner or an unregistered health practitioner.

Lines of inquiry and actions

1.40 This section contains information about the actions to be taken during the investigation. The IP should not be seen as strictly linear. It is expected that several actions will be pursued simultaneously in a timely and effective manner.

1.41 Matters under investigation by the Commission are regularly subject to investigation or review by other government and non-government agencies. IOs must ensure that specific stakeholders are identified at an early stage of the investigation as these stakeholders may be an important source of information. Stakeholders include Coroners, Police, LHD, registration boards and Councils, Health investigative units, Private Health Facility reviews, Medicare etc. IOs should be mindful of all available avenues of inquiry to obtain information already obtained by other stakeholders to reduce the timeframes of investigations.

1.42 IOs should give careful consideration as to the best method of obtaining a response. In most instances a respondent will have provided a response during the assessment stage and clarification may be all that is required. In other

circumstances an interview may be necessary that can be formally recorded or a statement of information required which addresses specific questions. The need to formally interview a respondent, either voluntarily or pursuant to a section 34 A notice will be decided upon on a case by case basis. Careful consideration should be given as to whether a s34A notice to produce documents and/or give information or oral evidence is required. Where a response has been sought from a respondent or witness and not received IOs, in consultation with their Manager, should carefully consider whether or not to issue a notice under s34A to obtain the required information.

1.43 IOs must carefully consider when an interview, followed by a detailed file note, will suffice rather than obtaining a formal statement in cases that are not likely to be referred to the Director of Proceedings (DP). Treating medical practitioners can be asked to provide reports.

1.44 In cases involving public hospitals, liaison with the relevant LHD will be necessary. The Clinical Governance Unit (CGU) of the LHD should be contacted and a regular contact person established. However, as far as possible obtain contacts at the actual hospital, as this will avoid delays.

1.45 Identify the documents required and the source of the documents. Documents will usually include a complete copy of medical records, as well as (for example):

- Health directives and guidelines
- Final Root Cause Analysis (RCA) reports (please note there are limitations on the use of RCA documents)
- Minutes, interview notes, reports, statements and correspondence concerning internal interviews
- Medicare records
- Pharmaceutical Benefits Scheme (PBS) records
- Personnel files concerning employed health providers.

1.46 Identify an expert (if necessary) and make contact to gauge their availability to provide a review and advise them when the review is likely to be required. Initial inquiries with a Commission internal medical adviser (IMA) or the internal nurse adviser (INA) may also provide guidance on specialists for specific allegations.

1.47 Identify the timeframe for finalising the investigation.

Unregistered health practitioners

1.48 Complaints about unregistered practitioners are only assessed for investigation if firstly, there is evidence of a breach of the Code and secondly, the breach of the Code is a risk to the public health or safety of members of the public. It is a two stage test. If there is a breach of the Code, but not a risk to public health or safety, a complaint will not be assessed for investigation but disposed of by other means by the Commission.

1.49 When identifying issues that should be investigated in relation to an unregistered practitioner, the IO should consider the Code and identify the specific clauses that may have been breached. A copy of the Code is contained in Appendix A. If it appears that criminal offences have been committed but the police are not investigating the matter, then if appropriate, the police should be informed.

1.50 If relevant, the IO should also consider if there is a conviction of a relevant offence or if there may be evidence which could lead to the conviction of a relevant offence. Under s41A(5) relevant offences means:

'(a) an offence under Part 2A of the *Public Health Act 1991* , or

(b) an offence under the *Fair Trading Act 1987* or the *Trade Practices Act 1974* of the Commonwealth that relates to the provision of health services.'

Appendix B contains further details of relevant offences and legislation.

1.51 NB: The *Trade Practices Act 1974* has been repealed and the relevant legislation is now the *Competition and Consumer Act 2010*. A possible offence under the fair trading or competition and consumer legislation is not a matter that is to be investigated by the Commission. However, evidence of a possible offence may be closely linked to a breach of the Code (eg Clause 12 or 18). If a possible breach of fair trading or competition and consumer legislation is identified the Office of Fair Trading or the Australian Competition and Consumer Commission may be notified.

1.52 The Competition and Consumer Act contains the new Australian Consumer Law (ACL). Offences are set out in numerous sections of this Act. The new ACL also replaces previous State consumer protection legislation in the Fair Trading Act. The law incorporates consumer protection laws into one document including provisions for, misleading and deceptive conduct or representations, not providing a service (including a health service) with due care and skill and providing products which are safe, durable, free from defects and fit for purpose.

1.53 Complaints may be made which allege the breach of a prohibition order made by the Commission in respect of an unregistered health practitioner. S10AK of the Public Health Act provides that the provision of any health service in contravention of a prohibition order is an offence (maximum penalty 50 penalty points or imprisonment for twelve months, or both). It further provides that a health practitioner who is subject of a prohibition order must, before providing a health service to a person, notify the person that the practitioner is subject to the order (maximum penalty 50 penalty points). Section 10AL of the Public Health Act provides that a person must not advertise a health service that is to be provided by a health practitioner who is subject to a prohibition order unless the advertisement specifies that the health practitioner is subject to the order (maximum penalty 50 penalty points).

1.54 Where the matter already involves another agency, (eg where the matter relates to a criminal offence (or charge), an offence under consumer protection legislation or has been referred to the Coroner) the IO should establish contact with the relevant agency and ensure that all relevant evidence is obtained from that agency. Where the complaint is also a criminal matter the IO should contact NSW Police to establish if there are any bail conditions placed on the unregistered practitioner. This is significant as existing bail conditions may restrict the unregistered practitioner from providing health services or there may be opportunity for such bail conditions to be placed on the unregistered practitioner. This information will also be significant when considering whether or not to make an interim prohibition order.

Scoping of Investigation and initial meeting with the Commissioner.

1.55 Within twenty eight days of receiving an investigation into the conduct of an unregistered practitioner the IO, if not already obtained at the assessment stage, will have obtained an initial response from the respondent. All other identified witnesses will also be contacted and information obtained which enables an assessment to be made of the substance and quality of the evidence they can provide to assist the Commission's investigation. This contact will be recorded by way of file notes and at this stage statements need not be obtained. A briefing note will then be prepared for the Commissioner and a meeting arranged, attended by the Commissioner, Director, Manger and IO. At this meeting, agreement will be sought as to whom, if any persons will be required to attend a Commission Hearing (the Hearing). Also, consensus will be sought as to what form witness evidence will be obtained. At times, corroborative information may be recorded via a file note only. At others, a statement or interview may be required.

1.56 On receipt of the investigation the IO must also discuss with the Manager whether or not it is appropriate to issue an IPO on the unregistered practitioner. This analysis and discussion should be recorded in the IP.

1.57 According to s41AA(2) 'The Commission may make an interim prohibition order only if:
(a) it has a reasonable belief that the health practitioner has breached a code of conduct for unregistered health practitioners, and
(b) it is of the opinion that:
(i) the health practitioner poses a serious risk to the health or safety of members of the public, and
(ii) the making of an interim prohibition order is necessary to protect the health or safety of members of the public.'

1.58 S41AA(3) states that, 'an interim prohibition order may do one or both of the following:
(a) prohibit the health practitioner from providing health services or specified health services,
(b) place such conditions as the Commission thinks appropriate on the provision of health services or specified health services by the health practitioner.'

1.59 If the IO and the Manager believe there are grounds for issuing an IPO discussion should take place with the Director and Commissioner as soon as possible. As implied by s41AA(2) the decision to make an IPO will depend on the quality of the evidence available at the time the IPO is proposed and the likelihood of proving that the unregistered practitioner has breached the Code, is a serious risk to public health or safety and the IPO is necessary to protect the public.

1.60 NB: In general interim action may be taken on the basis of prima facie evidence that the conduct occurred; that there is a serious risk to public health or safety and it is necessary to protect the public. In *Lindsay v NSW Medical Board* [2008] NSWSC 40, Hall J described the place of interim orders (under s 66(1) *Medical Practice Act 1992)* as follows:

- *[*142] It is apparent from the statutory scheme that the Board (or its delegates) acting under s 66(1) may be required to act upon limited or incomplete information…… It is an everyday occurrence that in particular circumstances a court may be required to grant interim relief on the basis

of evidence that establishes a matter or matters to a prima facie level only. In the community outside the courtroom, regulators will not infrequently be required to take matters at face value in deciding upon interim protective measures."

- However, in relation to the Medical Board of NSW's powers under s 66 Medical Practice Act 1992 Woolcock v Medical Board [2009] NSWMT 3 states that**,** "Section 66 action is a temporary or emergency measure, designed to protect public health and safety pending full investigation of possible risks to health or safety..... Consistent with s 66 (1) fulfilling a short term and emergency function, the threshold for s 66 (1) action is low: the Board need not be satisfied that action is "necessary", only that it is "appropriate". Having taken temporary action, the Board may decide that its action was, after all, inappropriate, and may unilaterally discontinue the action: s 66A. Alternatively, through the process of a review in which fresh evidence is considered, the affected practitioner may seek to persuade the Board to reverse its action: s 66AB. The facts that s 66(1) action is temporary, ex parte and taken on the basis of limited information suggest that any appeal from such action would have a narrow scope*.*

1.61 It is noted that s41AA(2)(b)(ii) states that the IPO must be 'necessary' to protect public health and safety and not merely appropriate. This suggests that the threshold for s41AA action is generally higher than action under s150 of the National Law.

1.62 If a decision is made to issue an IPO then the IO should draft a written statement of decision, IPO and covering letter to send to the unregistered practitioner. A template for the statement of decision, IPO and covering letter are available.

1.63 As the IPO remains in force for 8 weeks the IO will need to meet with their Manager about 5-6 weeks after the IPO was issued to discuss whether there are grounds to continue with the IPO. This meeting should be file noted by the IO and recorded in the file review.

1.64 If the IO and Manager believe there are grounds for continuing the IPO then he IO should forward a brief to the Commissioner through the Manager and the Director at least 14 days prior to the expiration of the IPO. The brief should outline the evidence and reasons for continuing the IPO. Once a decision is made regarding whether or not the IPO is to continue the IO should draft a letter to the unregistered practitioner for the signature of the Commissioner, advising of the decision regarding continuing or ceasing the IPO.

Chapter 2

Reassessment of complaints (s20A)

2.1 S20A of the HCCA requires the Commission to keep under review its assessment of a complaint while it is dealing with the complaint. At any time while dealing with a complaint (including during or at the end of the investigation of the complaint) and, after consultation with the appropriate professional council, the Commission may revise its assessment of the complaint and take any of the following actions;

- Deal with the complaint under Division 9,(assisted resolution),
- Refer the complaint for conciliation,
- Investigate the complaint\refer the complaint to the Director- General in accordance with s25 or s25A,
- Refer the complaint to another person or body in accordance with s25B or s26,
- Change the person whose conduct appears to be the subject of the complaint or include another person as a person whose conduct appears to be the subject of the complaint,
- Add to, substitute, amend or delete any of the specific allegations comprising the complaint (including add an allegation arising out of an investigation of the complaint that may not be the particular object of the complaint).

2.2 If a complaint is re-assessed and referred for assisted resolution, conciliation or new allegations or respondents are being added to an existing investigation, s28 notifications must be made. Notice in such cases will be furnished by the part of the Commission responsible for dealing with the new process. If the re-assessment is for referral to a professional council under s25B, the IO should make the notification.

Adding respondents and allegations for investigation

2.0 Additional respondents or new allegations are added to complaints if it becomes apparent during the investigation that the criteria under s23 have been met.

2.1 The adding of health practitioners, health facilities and new allegations arising from an existing investigation must be subject to a formal assessment process in order to determine whether the allegation requires investigation. In the case of registered practitioners, consultation occurs between the Commission and the relevant professional council to determine whether the conduct of the practitioner warrants investigation and/or if a new allegation arising concerning an existing

respondent should be investigated. The decision to add a facility or an unregistered health practitioner as a respondent or to add further issues lies with the Commission, there is no consultation.

2.2 Respondents and allegations should be joined to an investigation as close to the initial assessment as possible. It should be kept in mind the NMC and MC prefer to consult concerning multiple respondents at one time to gain an overall view of the complaint. Adding respondents and allegations long after the initial assessment, although in some cases unavoidable, has the inevitable consequence of delaying finalisation of an investigation.

2.3 If, following assessment, a new respondent or new allegation is added to an investigation, the provisions for notification under s16 & s28 apply. The new respondent as well as the complainant must be advised of the assessment result within 14 days of the assessment decision.

2.4 If a respondent is being investigated and a new allegation is added, the respondent should be advised the allegation has been added to the investigation and the respondent should be given an opportunity to respond.

2.5 The addition of new allegations to an existing respondent should not require further notices to employers under s28 unless the new allegations are substantially different from the existing conduct under investigation or there appears to be the prospect of an increased danger to public health and safety.

2.6 It is of critical importance not to embark on investigation of new allegations prior to the assessment process taking place. Should a new allegation arise concerning a facility or a practitioner's conduct, early liaison with a Manager should take place to determine whether the additional allegation is sufficiently removed from the subject matter of the initial complaint to warrant re-assessment. In some cases, the allegation may already be implicit in the original complaint and thus the investigation can progress without any further action required under S20A. Such decisions will be made by the Director.

2.7 Prior to drafting the necessary documents, the IO must discuss the proposed action with their Manager. If there is any doubt about the need to add allegations or respondents then a meeting with the Director should take place. It is important that IOs do not spend valuable time drafting detailed s20A briefs which may not be required. If the IO has formed an opinion without expert assistance it may be necessary to enlist the aid of an IMA or INA to provide an opinion. Once it has been decided that adding a respondent or allegation is warranted, a s20A Assessment Brief should be prepared. A s20A Assessment Brief includes background about the complaint, a summary of evidence which indicates that respondent/allegations should be added and current status of the complaint. Annexures include relevant clinical records, the response (if any), expert/IMA reports and guidelines or protocols.

2.8 Managers should action IOs recommendations under s20A as soon as possible.

2.9 If consultation with the relevant professional council is required this should be done prior to adding a practitioner to an investigation. Two single sided copies of the brief should be provided to the Manager, Assessments for consultation with the relevant professional council as soon as the Commissioner approves the recommended action under s20A.

Referral to another body (s26, s25A and s25B)

2.10 Sometimes during an investigation the conduct of a practitioner is raised because it is questionable, requiring action. However, the substance of the conduct may not be serious enough to meet the s23 threshold and warrant investigation.

2.11 S25A provides that, following assessment, a complaint or part of a complaint can be referred to the DG for the purposes of conducting an inquiry. S 25B provides that, following consultation and assessment, a registered practitioner can be referred to their Professional council for consideration as to whether the Council should take any action under the *Health Practitioner Regulation National Law* (NSW) such as performance assessment or impairment assessment.

2.12 Indications for referral to the Impaired Registrants Programme (IRP) include allegations of substance abuse, addiction or self administration of medication.

2.13 Under s26, a complaint can be referred to a public health organisation if it appears that the complaint (or part) may be capable of resolution at a local level and the public health organisation consents. The complaint can also be referred to any person or body (other than a public health organisation or professional council) if it appears that the complaint (or part) raises issues that require investigation by the other person or body.

2.14 The Commissioner must approve such a referral and again, a s20A brief should be prepared for signing by the IO, Manager, Director and Commissioner. The brief should contain a background of the complaint, a summary of relevant evidence and current status of the investigation.

2.15 Once the recommendation has been approved, different procedures apply depending on the type of referral. If the complaint involves a facility only or an unregistered health practitioner, the brief and annexures should be sent under a covering letter (signed by the Commissioner) to the facility or LHD that is to deal with the complaint at a local level or the agency who will be responsible for managing the complaint against the unregistered practitioner.

2.16 With respect to a registered practitioner, the brief, annexures and a covering letter (to be signed by the Commissioner) should be sent to the executive officer of the relevant professional council.

2.17 The requirements under s20A and the drafting of assessment briefs also apply to investigations into unregistered health practitioners. Where additional respondents or allegations are identified, a S20A brief is required for authorization by the Commissioner. This brief provides the Commission with an audit trail of decision making and after consultation with the Commissioner, the relevant s28 letters must be sent within 14 days to the practitioner and complainant. Risk to public health and safety is something that must be continually assessed when conducting investigations into all practitioners, including unregistered practitioners. The consideration of the need for an IPO will be recorded within file reviews on a monthly basis. The IO should be mindful of the fact that s41AA (2)(b)(i) requires the unregistered health practitioner to pose, 'a serious risk to the health or safety of members of the public'. The reassessment of risk that takes place should be recorded in the 28 day file review with the Manager.

Chapter 3

Progress of investigation

3.1 **Timeframes:** Generally, evidence collection and analysis should take no more than 3 months from the official start date. If required, an expert should be identified within 3 months and an expert report received within 4/5 months of the official start date (depending on the complexity of the Investigation). Officers are to use their skills and experience to gain information as expeditiously as is reasonably practicable. Effective communication and negotiation will ensure that timeframes for the collection of information and evidence are substantially reduced. Immediately after the information or evidence required is identified, liaison with the relevant holder of the information should be undertaken by telephone or email.

3.2 The HCCA stipulates that investigations should proceed expeditiously and it is important to regularly review investigations for a number of reasons. Firstly, to determine whether the investigation is progressing in a timely manner and secondly to assess whether the investigation is on track and lines of inquiry determined when the IP was drafted continue to be relevant. Thirdly, as discussed in Chapter 2, the Commission has a duty to continually reassess an investigation to determine whether an alternative course to investigation is preferable or whether an allegation or respondent should be added.

3.3 Managers are to conduct investigative reviews of their team's case files both informally on an ongoing basis and every month in a more structured setting to ensure actions are being undertaken in a timely manner and identified allegations are addressed expeditiously. If necessary, any additional actions or amended timeframes should be file noted by the Manager.

Investigative Reviews.

3.4 To ensure timeframes are being met and investigations are progressing satisfactory, monthly investigative reviews (every 28 days) of all active and inactive investigations will be conducted. The Manager will ensure that each IOs files are all due for an investigative review on the same day. Reviews are to be conducted in the presence of the relevant IO unless circumstances dictate that this is not possible. Investigative reviews are an opportunity to review all new information obtained over the preceding month and provide opportunities for a focused consideration of all the evidence where additional lines of enquiry, allegations and potential additional respondents are identified. The review process is a collaborative one between Manager and the IO and is

absolutely crucial in ensuring that investigations stay within identified parameters and progress as per agreed time frames.

3.5 All investigative reviews will adhere to the Divisional review template to ensure that minimum standards are addressed. The below is a guide and is by no means exhaustive of what should be addressed during investigative reviews by both Managers and IOs;

- Review of all interviews with respondents and witnesses over past month
- Review of statements/responses obtained over the past month
- No of additional witnesses and/or lines of enquiry identified.
- Reasons if decision is not to follow up on additional lines of enquiry/ witnesses.
- No of outstanding investigative lines of enquiry/actions.
- No of outstanding information requests.
- Any heightened risk to the Public- does the relevant Professional Council require an interim report for the consideration of a section 150 hearing/or further section 150 hearing? Is an interim prohibition order required for Non Registered practitioners?
- Identification of barriers preventing expeditious management of investigation and what is being done to overcome these?
- Reassessment of the complaint as per the requirements of s20 A of the Act. Does this complaint still require investigation? Can it be terminated or action taken under s25B of the Act? Are their new allegations and/or respondents to be added?
- Plan for the coming months, what will be achieved.
- Case mate updated, milestones checked and closed, IRG completed actions closed, experts linked.

3.6 Investigative reviews ensure that a collaborative approach to investigations is embedded and a clear audit trail is available which documents key decisions during an investigation and the reasoning behind such decisions. Statements and interviews are to be reviewed promptly to ensure that there is no delay in identifying additional allegations or additional lines of enquiry. If the basic tenets of investigative reviews are adhered to, the adding of additional allegations and respondents when investigations are close to being finalised will be avoided.

3.7 If an increased risk to public health or safety is identified during the investigation, consideration must be given to preparing a briefing document for the relevant professional council so that the Council may consider the need to invoke their emergency powers under section 150 of the National Law. Any documents which are provided to the relevant professional council and tendered by them during section 150 proceedings must be disclosed and provided to the respondent. Thus, careful consideration must be given to what evidence and information the Commission provides to the relevant Council in support of any section 150 proceedings. Judgment must be exercised to ensure that the investigation is not compromised whilst at the same time ensuring that the Council has enough relevant information to objectively assess the risk posed by the practitioner to public health or safety. No information for the purposes of section 150 proceedings is to be released unless authorised by the Director.

3.8 Seven days prior to each file review becoming due it will be displayed in the IOs smart portal item, ‘All File Reviews in Next 7 Days’.

3.9 If the matter has progressed as planned and there are no significant issues, the Manager will record that it is progressing satisfactorily and place a signed copy of the file review on the file and return the file to the IO.

3.10 If the matter has failed to progress as planned, but the identified delays and proposed timeframes are acceptable the Manager will record it is satisfactory and agree or amend the proposed timeframes.

3.11 If the matter has failed to progress as planned without a reasonable explanation the Manager will record that there has been unsatisfactory progress. The Manager will record corrective or fast-track actions and when they will be achieved. The Manager will return the file to the IO.

3.12 Where issues are identified with actions not having been undertaken in a timely manner, Managers are to note the reason for the delay.

3.13 File notes are an important part of the Commission's file and provide information as to the progress of the investigation, reasons for decisions and relevant contact with involved parties. All contacts and actions undertaken by IOs during the course of an investigation are to be recorded on the case file in casemate.

3.14 When investigating matters the Commission is required to act in an objective, impartial and non-biased manner. This approach should be reflected in the casemate file notes that are created during an investigation.

3.15 File notes are to be recorded throughout the investigation process and can be used to record the substance of phone conversations, to record details of meetings and to record important decisions and actions.

3.16 The language used in a file note should be direct, objective, impartial and show no bias. For meetings or conversations the file note should simply describe the information that was provided. Personal opinion and the use of subjective matter are to be avoided.

Investigation Reporting Group (IRG)

3.17 **Timeframe:** Investigation progress reports (IPR) must be submitted to a Manager on the Thursday preceding the third Tuesday of each month.

3.18 **Report specifications:** Two-page limit. Four double-sided, hole-punched copies of the IPR's are to be given to the Division's Clerical Support Officer (CSO).

3.19 **When is an IRG report required?**

- When a complaint was referred for investigation more than nine months ago
- When the respondent's registration is subject to conditions or suspension
- When the respondent is an unregistered practitioner
- When the matter has been identified as one of public interest or the matter has some other unique feature that requires regular monitoring by the Commission

3.20 IPRs must be completed by the IO in the investigation process and a hard copy submitted for approval and signature of a Manager by no later than the

Thursday preceding the Tuesday IRG meeting. The purpose of an IPR is to inform the IRG of progress of an investigation and any significant issues that require direction

3.21 The IPR will contain the background from the IP, actions taken since last report and proposed actions. The IO should ensure the whole report is up to date for each IRG meeting, obsolete information has been deleted and actions completed closed. When printing an IRG report IOs are to click *'*Generate IRG using Open Actions and Open Recommendations Only*'* to generate a report which is relevant to the IRG.

IRG directions

3.22 If the IRG has decided some action should be taken with respect to a file, the direction will be entered as an 'IRG Recommendation' in the IRG Planner of the investigation process. The direction, reference to the action being taken and the result should be placed on the file and included in the next IPR. Managers will ensure that this is competed for their respective IOs.

Section 34A notices

3.23 If a request for information is refused or unreasonably delayed, a Manager should be consulted and consideration given to issuing a s34A notice. Written reasons for issuing the notice may be required for the commissioner if a verbal update does not suffice. Under s34A, the Commission has the power to require any person to:

- Give oral evidence
- Produce documents
- Provide information;

  if the Commission is of the opinion that the evidence, information or documents would assist its investigation.

3.24 It is an offence for any person not to comply with a notice without reasonable excuse. In addition, failure to comply with a notice without reasonable excuse on the part of a health care practitioner may constitute unsatisfactory professional conduct under the *National Law* [s34A 4)].

3.25 Some practitioners and complainants are obliged to maintain confidentiality and this obligation is expressly affirmed in s34A (3) by specifying they do not have to comply with a s34A notice if the information/documents were obtained by them as:

- Members of Quality Assurance Committees convened under the *Health Administration Act 1982* (HAA s20G)
- Members of a Root Cause Analysis (RCA) team (HAA s20P)
- Participants in a Commission conciliation process (s51 HCCA).

3.26 Examples of s34A notice templates are contained within the investigation templates on the intranet, and on casemate. When constructing notices IOs should be mindful of what specific information they are requesting. Notices should be drafted in a way that clearly specifies what documentation the IO is seeking or what information the IO is seeking.

3.27 When requesting statements of information from respondents, as previously stated, careful consideration must be given as to what information should be disclosed to the individual. It may be appropriate in some circumstances, for

example when investigating a boundary violation of a sexual nature, to disclose the strength of the evidence available when seeking a response. This may ensure a more thorough response to the alleged conduct and early admissions being made. Again, disclosure will be based on the merits of each investigation.

Evidence Seizure

3.28 When IOs obtain evidence whether by means such as written requests / emails, s34A notices, interviews or search warrants they must be mindful of the requirement to ensure that the integrity of the evidence is preserved and maintained;

3.29 Where original evidence is obtained by IOs including

- statements,
- medical records,
- radiology images,
- medication,
- physical evidence
- electronic evidence

An IO is to ensure that the exhibit is preserved in its original form.

3.30 The protocols for the seizure, retention and disposal of evidence are contained within the Exhibit Handling Guidelines within the Division.

Unregistered health practitioners

3.31 The initial meeting with the Commissioner should have identified who the significant witnesses are in the investigation and in what form their evidence should be obtained and if necessary, tested, during a hearing.

3.32 IOs should also ensure that during the investigation information is gathered which relates not only to the complaint but also the question of whether the unregistered practitioner poses a risk to the health or safety of the public. This will include information such as:

- what risk to public health or safety was caused by the conduct;
- Whether the unregistered practitioner was aware of the harm or risk associated with their conduct;
- What the unregistered practitioner did when they became aware of the risk of harm associated with their conduct;
- Whether conduct which created a risk to public health or safety occurred over a sustained period or was an isolated incident;
- How widespread was the conduct which poses a risk to public health or safety;
- Whether there is evidence that the conduct was an error in judgement or whether it is indicative of poor practice or incompetence which exposes the public to a risk to their health or safety;
- Whether there is evidence that the unregistered practitioner is impaired;
- Whether the unregistered practitioner has been the subject of prior complaints and if so how long ago were the complaints made and what was the nature of the complaints;
- If the conduct is admitted by the practitioner, whether there is evidence of contrition and insight;
- has the unregistered practitioner undertaken further training in an area which is likely to mitigate the risk of harm created by their conduct.

- any other mitigating factors in relation to the conduct which created a risk to public health or safety.

Commission Hearings and Determinations

3.33 The Code does not provide guidance as to how the Commission should determine the matters set out in s41A(1) before taking action under s41A(2) of the HCCA. The Commission may determine the matters relevant to s41A (1)(b)&(c) on the papers. Another option is for the unregistered health practitioner, the complainant and other witnesses to give their evidence before the Commissioner where they can make both oral and written submissions at a hearing. Witness evidence during a hearing assists the Commissioner in determining credibility and can also provide assistance in assessing the level of risk posed by the practitioner to public health or safety. With respect to both of these options, at the section 40 stage of investigations into unregistered practitioners, if the proposed outcome is the making of a prohibition order and /or the issuing of a public statement, the respondent must be provided with all key witness statements, a draft copy of the statement of decision (SD) and information as to the type of conditions which may be imposed for the purpose of a prohibition order. The draft SD should also detail the wording of the public statement if proposed, and also whether or not the Commission will be making its statement of decision public under s41B(3)(C).

3.34 There should always be a presumption that the Commissions SD will be made publicly available. This means that all patients and witnesses will need to be de-identified in the SD.

3.35 With respect to both options when making a determination, the Commission's decision making must conform to principles of proper administrative decision making. These principles include that:

- Decision making powers must be exercised in accordance with the relevant legislation, as properly interpreted
- All persons who may be affected by a decision must be afforded procedural fairness/natural justice
- The decision maker must consider all relevant considerations or matters material to the decision in question. Likewise, the decision maker must not take into account irrelevant considerations in making a decision and not take into account matters which are not relevant to making the decision.
- Findings of fact are based on cogent reliable evidence and are reasonable.

3.36 When required to provide oral evidence at a hearing, s34A notices should be issued to the respondent since by doing so they have the opportunity of invoking the protection afforded by s37A of the HCCA. Practitioners do not have the explicit right to be legally represented during hearings, although this will usually be allowed. If exhibits such as documents are tendered as evidence during a hearing, the IO must ensure that a copy is also made available for the Commissioner and the respondent or witness. Decisions as to the retention of such copy exhibits by the respondent or the witness will be made in consultation with the Commissioner. Witnesses may be legally represented. If costs are proposed to be incurred by respondents and witnesses when attending Commission hearings, the Director will be informed and a decision made as to the payment of appropriate expenses before the attendance is arranged.

3.37 IOs should consider whether respondents should have the opportunity to read key statements which have not previously been disclosed to them prior to the commencement of the hearing. This may be an hour or so before the hearing or longer, depending on the number of statements and other documents to be disclosed and the nature of the investigation. Provision of such information can help the hearing to progress without extended interruptions and also ensure the principles of procedural fairness and natural justice are adhered to. Decisions on disclosure will be discussed with the Director and the Commissioner before any previously undisclosed material is released.

3.38 Prior to a Commission hearing the IO will also provide the Director and the Commissioner with a disclosure bundle which will include all relevant statements and a narrative which sets out all of the evidence at that stage clearly, addressing the file notes obtained, allegations and breaches of the code, set out in chronological order. This package is to be prepared at least one week prior to the hearing. An overview of the interview plan is also to be provided and key questions to be raised documented. IOs should be accompanied by their managers during hearings.

3.39 Oral evidence from witnesses will be heard in the level 13 conference room. The ERISP recorder should be operated by the IO. At the conclusion of the interview, the witness will be provided with a copy of the recording, signed and dated by the Officer and witness.

Drafting the Statement of Decision.

3.40 A SD is only required if the Commission proposes to make a prohibition order and or issue a public statement. If a matter is terminated, or if comments are made, a SD is not required. In such circumstances, a letter which sets out the rationale for the Commission's decision will be drafted by the IO.

3.41 When a hearing has taken place and the proposed outcome is the making of a prohibition order and/or the issuing of a public statement, the Commissioner will draft the analysis and findings section of the SD. In cases where a hearing has not taken place, the IO will complete the entire SD. Commission decisions can be appealed to the Administrative Decisions Tribunal (ADT) under s41C of the HCCCA. An application under this section is to be made within 28 days after the day in which the health practitioner is provided with the SD. Consideration of the likelihood of a possible application to the ADT is important. It may be that the Commission on occasion delays the issuing of its public statement pending the expiration of the 28 day period. Although the public statement may be delayed, the prohibition order will be valid during this period. In cases where an appeal is made, advice must be sought from the Director immediately.

3.42 Where there is evidence that the unregistered practitioner may suffer from an impairment the IO may attempt to have the unregistered practitioner examined or assessed by an appropriate medical or psychology professional. The definition of impairment as per the National Law will be adopted. All requests for a health assessment should be approved by the Manager and/or Director first and advice from professional councils as to suitable practitioners to use should be sought. If the unregistered practitioner refuses to comply the Commission has no power to require such an examination or assessment. The medical or psychology professional should also be asked to give an opinion as to whether they believe that the unregistered practitioner's condition creates a risk to public health or safety and if so, explain in what way the practitioner

poses a risk. The question of who pays for the health assessment must be raised with the Director.

Paused investigations

3.43 If a complaint has been referred for investigation which is a criminal matter and under investigation by the police, has been referred to the Coroner, or is being managed by NSW Fair Trading or another government body the investigation may need to be paused pending the outcome of any criminal, coronial or other proceedings. The IO should first attempt to gain all available evidence prior to the investigation being paused. If there is evidence which indicates that a respondent should be added to an investigation this should also be actioned prior to pausing the matter. The involvement of other agencies does not mean that pausing an investigation is the default position. Each decision will be based on its merits.

3.44 If a decision is made to consider pausing an investigation the IOs Manager will send a written request to the Director. If the Director decides to pause the investigation the Director will change the status of the investigation on casemate and allocate it to the Manager. The Clerical Support Officer (CSO) will then obtain monthly updates from the relevant agency about the progress of the matter and file note the updates in the investigation process. Paused matters must still be subjected to an investigative review on a monthly basis. During this review, additional evidence or a consideration of whether the matter should be reactivated due to unacceptable delays by other investigating agencies must be recorded.

3.45 The CSO will notify the Director when the proceedings have concluded. The Director will then reactivate the investigation process and return the file to the IO via their Manager.

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Chapter 4

Internal Medical and Nursing Advisors

4.1 The Commission engages the services of medical practitioners and a nurse to provide advice. These advisors are available to provide advice to IOs. The advisor's availability is detailed on a roster which can be obtained from the Director of Assessments.

4.2 During the assessment process, the advice of an IMA and/or INA may be sought to assist the Commission to make a decision on the standard of care provided and determine whether a complaint should be investigated. The IMA and INA must consider this issue with reference to s23 of the HCCA. The IMA/INA also advises on who, or what (in the case of a facility) should be investigated.

4.3 During assessment, the IMA/INA will often, necessarily only have enough information to make a threshold assessment as to whether a complaint should be investigated. As the investigation progresses and further information is obtained in the form of statements and clinical records, the IMA and INA can offer further advice. In some circumstances, for example when a facility is being investigated and there is no prospect of prosecution of any individual practitioner, the INA/IMA may provide the only expert opinion with respect to a complaint.

4.4 During an investigation, the advice of an IMA/INA is useful in the following circumstances:

- To explain clinical matters
- To clearly define issues to be investigated
- To advise on whether an individual, facility or further allegations should be added to an investigation
- To advise on recommendations that can be made to a facility to improve systems
- To articulate the issues that should be raised with an external expert.

4.5 Usually an advice (IMA/INA) is already on file from the assessment process and merely requires clarification or supplementation following the gathering of additional material. It is preferable to approach the IMA who wrote the original advice for any supplementary advice for the sake of consistency and time management.

4.6 The request is completed on casemate by the IO through the investigation process by adding it as a 'stage'. It should include a factual background, including factual assumptions on which an opinion should be based. The request is then forwarded electronically to the Manager for approval. Once approved the IO forwards the request electronically to the IMA/INA and places the file, with all the

relevant clinical records, statements, reports or other material clearly tabbed, in the IMA cupboard outside the IMAs' office in the Assessments Division. When requests for advice are logged on casemate they are then subject to management by the Director of Assessment. Prioritisation is managed by the Director of Assessment taking into account timeframes on matters. Should an investigation matter be delayed awaiting IMA or INA advice consultation with the Director should be undertaken for further discussions with the Director of Assessments.

4.7 If an advice is required concerning the addition of a respondent (either facility or practitioner) or allegation, the advice will always be in writing. Informal explanations on clinical matters to enhance an IO's knowledge can be obtained orally.

4.8 The Commission often investigates adverse incidents that occur at a facility rather than the conduct of one particular practitioner. The aim of such an investigation is first, to determine the facts of the event and how the event occurred. This will involve analysing relevant processes, procedures and systems at the facility and recommending, if appropriate, improvements to systems to minimise the chance of future adverse events. An IMA or INA can assist in suggesting workable recommendations and in some instances it may not be necessary to approach an independent expert.

Chapter 5

Expert Assistance

5.1 The Commission may engage an expert during an investigation (s30). The expert's purpose is to provide information about subjects requiring specialised knowledge and more importantly, provide opinions concerning acceptable standards of practice and whether a respondent's conduct accorded with accepted standards. An expert's opinion about a respondent's conduct will not, of itself determine the action the Commission will take at the end of the investigation but it will hold considerable weight in investigations that involve complex clinical matters.

5.2 Expert reports obtained by the Commission may be used in disciplinary or registration body proceedings, but unless the expert and the parties consent, the report cannot be used in any other proceedings before a court, tribunal or body [s30(4)].

5.3 A person from whom such a report is obtained, the Commission or the Commissioner may not be compelled to produce the report or to give evidence in relation to the report or its contents in any other proceedings [s30(5)].

Timeframes and fast track action

5.4 An expert report should be requested once all relevant information has been obtained. The expert must be provided with all relevant information [s30(2A)]. When experts are initially identified, IOs should consult with and negotiate timeframes for the finalised report with the expert. Although 28 days is allocated for the process on casemate negotiation with the expert may result in the report being obtained in a reduced timeframe. Furthermore, during the consultation phase the IO may also establish that the expert may be pressed for time and as such a risk of an extension of time may be required for the report. In this situation IOs should seek alternative experts if the risk of extended time periods is high.

Proving unsatisfactory professional conduct

5.5 Generally, expert assistance will be required in complaints involving allegations of unacceptable clinical conduct and breaches of the therapeutic relationship. In clinical matters the IO is gathering evidence to determine whether he respondent's conduct could result in a finding of UPC or PM. UPC is defined in s 139B of the *National Law* and in part states:

(1) 'Unsatisfactory professional conduct' of a registered health practitioner includes each of the following-

(a) Conduct that demonstrates the knowledge, skill or judgment possessed, or care exercised, by the practitioner in the practice of the practitioner's

profession is significantly below the standard reasonably expected of a practitioner of an equivalent level of training or experience.

5.6 The test can be broken down into separate elements. The first question is what is 'the standard'? The standard is that which prevailed at the time the alleged conduct occurred. The requisite standard can be determined by guidelines, protocols or literature in existence at the time as well as by the expert's opinion of what the standard was. The second question is whether the respondent's conduct fell 'significantly' below the standard reasonably expected. If the expert is of the opinion there was a significant departure from reasonable standards of care and evidence exists to establish the factual elements of an allegation, referral to the DP is likely to be warranted. The expert must, in all circumstances where they have found a significant departure in standards, state whether or not this departure invites their strong criticism. If strong criticism is noted, this may mean that a tribunal may be the appropriate disciplinary forum as the expert believes the conduct amounts to professional misconduct.

5.7 S139B(I) of the National Law relates to other improper or unethical conduct relating to the practice or purported practice of the practitioners' profession. If a complaint concerns such conduct, then the expert will be asked to comment on the conduct and provide an opinion as to whether the conduct was unethical or improper and related to the purported practice of the practitioners' profession. The expert, in certain circumstances, may also be asked to comment on whether or not the practitioner is a suitable person to hold registration.

Proving professional misconduct (PM)

5.8 According to s139E of the National Law ***'professional misconduct*** of a registered health practitioner means-

(a) unsatisfactory professional conduct of a sufficiently serious nature to justify suspension or cancellation of the practitioner's registration; or

(b) more than one instance of unsatisfactory professional conduct that, when the instances are considered together, amount to conduct of a sufficiently serious nature to justify suspension or cancellation of the practitioner's registration.'

5.9 The table below summarises proposed action that flows from an expert opinion.

Standard	Proposed action
Was consistent with what is reasonably expected of a practitioner with the same level of training or experience as the practitioner complained about at the time of the events the subject of complaint.	Terminate s39(1)(e)
Was below what is reasonably expected of a practitioner with the same level of training or experience as the practitioner complained about at the time of the events the subject of complaint.	Comments s39(1)(d) or referral to the appropriate professional council s39(1)(c)
Was significantly below what is reasonably	Equates to UPC – refer to

expected of a practitioner with the same level of training or experience as the practitioner complained about at the time of the events the subject of complaint.	DP s39(1)(a)
If the conduct was significantly below what is reasonably expected, and the expert is of the opinion that the departure invites their strong criticism.	Equates to PM - refer to DP s39(1)(a)

5.10 IOs should be thoroughly familiar with the Expert Guidelines and expert report template *(refer to template documents)*. The Guidelines clearly set out the way in which experts should frame any criticism.

Unregistered health practitioners

5.11 An expert may be required where the complaint involves questions of clinical competence, unsafe and unethical practices, whether there is a clinical basis for the treatment or where the unregistered practitioner may be practicing outside their experience and training. Unlike registered health practitioners there is no requirement that the expert express their opinion in terms of *'*significant departure*'* from an acceptable standard. The expert must not be asked to express an opinion as to whether the conduct of the unregistered practitioner breached the Code. This is a matter of law and fact that will be determined by the Commission. If the expert is critical of the practitioner's practice they should be asked whether the practitioner poses a risk to public health or safety.

5.12 In the event that an expert was consulted during the assessment process, this should not affect the decision during the investigation about whether or not to gain an expert report. An expert report should be obtained after all relevant information has been gained and made available to the expert. Unless the expert is considered unsuitable, the IO may use the same expert as was used in the assessment process to gain an expert report during the investigation.

5.13 IOs should be thoroughly familiar with the Expert Guidelines for Unregistered Health Practitioners and the unregistered expert report template. The Guidelines clearly set out the way in which experts should frame any criticism.

Health Organisations (Request for expert assistance)

5.14 Consider in each investigation whether an expert is necessary and the type of expert required. When an investigation concerns systemic issues in a facility, an expert may not be required and the IO may be able to rely on Health, LHD or local directives, guidelines and protocols. Consider whether an IMA and/or INA will suffice.

5.15 The expert does not need to express their opinion in terms of a *'*significant departure*'* and a level of criticism in investigations concerning health organisations. A *'*significant departure' is a legal term that applies to individual registered practitioners. In writing investigation reports (IR) on organisations the term should be avoided. If an expert is involved in such a complaint, their role is to comment on systemic problems and guide the Commission concerning workable recommendations. Any comments which are made to a health organisation and which are attributable to the expert should clearly reflect this.

Which expert?

5.16 Generally an IO should source experts using those experts already appointed to the Commission's panel. These experts are listed on casemate and have been vetted and approved by the Commissioner. An expert does not necessarily need to be of an equivalent level of training and experience as the practitioner they are commenting on. A professor of emergency medicine, for example is well qualified to comment on the standard to be expected of a registrar in an emergency department. However, a professor of emergency medicine practicing in Kings Cross may not be the appropriate person to comment on the conduct of a registrar in Wagga, because of different demands prevalent in a rural environment. Judgement is required in choosing the appropriate expert for the investigation. The expert's CV can be accessed through casemate and other IOs experiences may be helpful.

5.17 As the health services provided by unregistered practitioners are diverse and not determined by the standards set by one recognised body, identifying an appropriate expert may be more complex in relation to unregistered practitioners. Consider firstly whether an expert is required at all. In complaints unrelated to the health treatment, such as sexual misconduct, an expert may not be required to determine the issues. Specific information should be sought from the unregistered practitioner about their training and experience at an early stage as this information is significant to determining an appropriate expert. Where an appropriate expert is not available from the casemate database they may be sought through contact with an association of which the unregistered practitioner is a member or the facility offering the course undertaken by the unregistered practitioner. In some circumstances it may be reasonable to obtain an expert opinion from a person who has expertise in a particular field of health relevant to the complaint but who has had different training to the unregistered practitioner. Where the identification of an appropriate expert is not clear discussion with the Manager and/or the Director will be required. The reasons for the decision in tasking the relevant expert should be file noted by the IO.

5.18 IOs should start to consider an appropriate expert soon after allocation of the file and the choice of expert discussed with and approved by a Manager.

5.19 S30(3) of the HCCA specifies an expert report should not be obtained from a person who has a financial connection with the practitioner against whom a complaint is made.

Letter of instruction to expert

5.20 A Manager signs the letter of instruction to the expert but before being sent, all letters of instruction are reviewed by the Director. The expert should be sent all information that will assist them in arriving at an opinion about the standard of conduct expected and whether there was a significant departure from that standard. The requirement to send the expert all relevant material is common sense, however it is also enshrined in the HCCA in s30(2A).

5.21 The expert's letter of instruction also contains information about the fee they are to be paid, a list of relevant documents included in the brief, the requisite elements for the test for UPC and an assumed set of facts. The assumed set of facts must detail all of the relevant facts that the Commission is relying upon in its investigation. Setting out the relevant points will assist the expert.

5.22 In many cases, there will be factual conflicts between the parties in a complaint. The expert's role is not to determine factual matters and for that reason they should be asked to assume a set of facts provided to them is true and express

their opinion on one version of events and on the alternate version. This may result in vastly different opinions and the expert should be advised that this may be the case. Providing opinions on differing versions of events is at times difficult for experts so they should be advised verbally as to what the Commission's expectations are to ensure that they understand that we are not asking for an opinion as to which version is the more credible, reliable or likely.

5.23 Along with the letter of instruction and relevant complaint documents, the expert should always be sent a blank *Expert tax invoice* and *Statement of personal, financial, professional connection*. The latter document is a requirement under s30(3) of the HCCA.

5.24 In cases that appear to warrant referral to the DP, the material sent to the expert will also be required (amongst other documents) for a brief of evidence for the DP. For that reason the IO should copy documents for the expert twice, one copy will go to the expert and the other will enable the IO to start compiling a brief of evidence (see Chapter 11).

Tips to assist the expert

5.25 The expert's time is precious and the fee paid for a report rarely equates with the time an expert spends writing it. To assist the expert to write a report of good quality the Commission has developed a format for the expert's report (refer to the Division's templates). Consider scanning and sending the material, including the expert report template, by email. Any communication with the expert must also be logged on casemate to ensure a record of all communication and negotiations of fees and alterations of reports are recorded.

5.26 It may be helpful to send the expert a soft copy of the letter of request via email. The expert can then copy and paste the questions in their report. Cross-reference the assumption of facts to the material provided to the expert. This should contain dividers or tabs to enable the expert to find references quickly. Always ensure that the expert is advised and encouraged to offer any comments on any matters not specifically referred to in the Commission's letter that they feel are relevant.

5.27 It is also helpful if the expert can refer to medical literature, guidelines and codes of conduct that underpin their view. If the expert does include such references in their report they should be asked to provide copies of the documents they have referred to.

Expert timetable and fees

5.25 The turnaround time for an expert report is 28 days. IOs should make that clear when engaging the expert in case the expert's commitments render the timeframe impossible. The Commission has a set scale of fees (refer Appendix C) to be paid to an expert, however if a case is unusually complex or has voluminous material, a higher fee may be negotiated with the approval of a Manager and the Director. The Director will determine whether and if so what higher fee should be paid. The fee paid to an expert incorporates any supplementary reports required and that should be made clear to the expert. The schedule fee is exclusive of GST. The expert should be registered for an ABN or applying immediately for an ABN.

Expert problems

5.26 If an IO encounters a problem concerning an expert, for example excessive delay in providing a report, this should be reported to the Manager. Excessive delay may, in exceptional cases, result in cancelling the request and engaging a new

expert. Similarly, if the expert does not answer questions posed to them, report it to the Manager. Experts may be reluctant to express a degree of criticism concerning a respondent, however the expert should be politely pressed on this issue, otherwise the weight of their opinion is considerably reduced. The Commission has no interest in pressing for any particular degree of criticism. Opinions must be clearly expressed and the result of this opinion, such as referral for disciplinary action, should be clearly understood by the expert.

5.27 When an expert has provided a report the IO, in consultation with their Manager, will input a comment in casemate as to the performance of the expert. The comments are to be limited to the;

- timeliness of the expert in providing the report,
- the quality of the report provided by the expert.

5.28 Managers will have access to the expert comments fields in casemate and will enter the details outlining the performance of the expert during the opinion process. Comments are not to include personal comments about the expert but should detail their professional performance. Should an expert's performance be of concern to the IO or Manager, the performance issues must be discussed with the Director for any further actions which may be required.

5.29 IOs are to ensure all experts utilised during the course of an investigation are listed on casemate and linked to the investigation file to which they have commented in 'Other Contacts'. Managers are to ensure the entries are included on Casemate at the time of the final review of the file prior to closure.

Upon receipt of the expert report

5.30 The expert's report should be carefully read and analysed once it is received. It is particularly important to check that the expert has adhered to the expert report template and the Expert Guidelines in the language used to express an opinion.

5.31 A Manager should be consulted prior to any clarification being sought from an expert and the clarification must be obtained in writing as an addendum report. If the expert's opinion is clearly based on a false assumption or the basis of the opinion is unclear, clarification should be sought after consultation with a Manager. An IMA/INA may also be of assistance. Any written request for a further or clarifying report from the expert should be in the form of a letter signed by the Manager.

5.32 If the basis of the expert's opinion remains unclear, is unreasonable in all the circumstances or is still based on false assumptions after clarification has been sought, the IO should consult with their Manager concerning the outcome.

5.33 In some circumstances the expert will express strong criticism, but go on to explain mitigating circumstances that temper their view, which may result in an outcome other than referral to the DP. The report should be carefully analysed to determine the appropriate outcome. Every assistance should be afforded to the expert in explaining the process and ensuring their opinion is clearly expressed.

5.34 Provide feedback via phone (positive and constructive) about the quality of the report to the expert after discussion with your Manager. If the expert has provided an inappropriate report even after clarification and request for clarification of a report, discuss with your Manager whether to place a warning on casemate.

5.35 Once the final investigative outcome is known, the expert should also be informed about this in writing. The IO must also include the feedback previously provided to the expert in the outcome letter.

5.36 The IO should sign a requisition for the expert's invoice and have the Manager approve it. The invoice should then be provided to Corporate Services, who will make arrangements to pay the expert.

Provision of the expert report to the respondent

5.37 If the Commission proposes to make comments to the respondent, refer the respondent to a registration council or the DP, the respondent is entitled to make submissions about the proposed action (s40). When sending what is referred to as 'the s40 letter' to the respondent, a copy of the de-identified expert report should be sent to the respondent as well. The expert's name and biographical material capable of identifying the expert should be expunged in the copy of the report sent to the respondent.

5.38 Occasionally the s40 submissions provided by the respondent or other information gathered subsequent to the expert report may require consideration by the expert, who may or may not change their opinion. Again, any request for a further expert opinion should be approved and signed by a Manager.

Casemate

5.39 Available experts are listed, along with contact details, in casemate and the expert's CV is linked to casemate for reference. Please respect and double-check with the expert their preferred method of communication. If you become aware of any incorrect data (contact details or specialty) recorded in casemate in relation to an expert, please advise your Manager who will access casemate and adjust the records accordingly.

5.40 All correspondence with the expert, including the letter requesting a report, must be scanned and linked to casemate. All documents and emails sent and received must be scanned and linked to the investigation process on casemate and hard copies kept on file.

Recruiting new experts

5.41 If an IO has occasion to require an expert not available from the Commission's panel, the relevant professional council, College or Association should be approached to inquire about a suitable candidate being nominated by the professional body.

5.42 A letter, including a request for a current CV should be drafted to the potential expert enclosing the *Guidelines for Professional Reviewers and Advisors* and an *Expert Contact Details Form*. The Director signs the letter of invitation.

5.43 Once the completed forms and a CV are sent back by the expert, the IO should put together a brief for approval by their Manager. The brief should include any complaints history the expert may have and attach the *Expert Reviewer Form* and CV.

5.44 A complaint history is not necessarily a reason an expert candidate would be declined. When analysing all relevant information, ensure that:

- All complaints against this candidate, their issues and outcomes are listed
- The specialties listed by the candidate are supported by qualifications and/or experience listed in their CV

- Their CV shows evidence of current clinical practice
- They are not older than 70 years (if older, please discuss with your Manager).

5.45 Once the Director has approved the expert, the Executive Assistant of the Commissioner:

- Will retain all documentation
- Draft a letter for the Commissioner's signature, advising the expert they have been added to the expert panel or that their application had been declined
- In case, the expert has been approved, provide the HCCC Code of Conduct to the expert
- Enter the relevant data into casemate
- Advise the IO and Managers about the decision in relation to the expert.

Chapter 6

Advising the respondent of proposed action (ss40 and 43)

Timeframes: Letters advising of proposed action (referred to as s40 or s43 letters) should be faxed or emailed to the respondent. If this is not possible, the letter should be sent by Express Post.

Individual practitioners

6.1 If, at the end of an investigation, the Commission proposes to refer an individual respondent to the DP, their registration body, the ODPP, make comments to the respondent, or take action under s41A the respondent must be advised of the substance of the grounds for the proposed action and given an opportunity to make submissions. Chapter 8 contains more detailed information about the actions that can be taken by the Commission at the end of an investigation (s39).

6.2 S40 enshrines two important factors relating to the fairness of an investigation. First, the right of the respondent to know the substance of the allegations against them and the grounds on which the proposed action is based. Secondly, the right of the respondent to make submissions about the proposed action.

6.4 S40 includes a subsection stipulating that any submissions must be made within 28 days of the respondent being informed of the Commission's proposed action. There is no provision for an extension of time in the HCCA, which reflects the legislative intention that investigations are conducted as expeditiously as a proper investigation permits. [s29(2)].

6.5 At the end of an investigation, when the Commission proposes to take any action against an individual practitioner except termination, the IO should write a letter to the respondent to be signed by the Commissioner. The letter should describe the substance of the allegations against the respondent, the grounds upon which any resultant action proposed by the Commission is based and the proposed action.

Registered practitioners

6.6 The draft investigation report should generally not be sent to individual registered practitioner respondents at the s40 stage. When seeking s40 submissions copies of the de-identified expert report will be provided to respondents. Copies of patient medical records may also be provided where relevant and always in circumstances where the respondent has not had the opportunity to previously review them. In prescribing matters copies of schedules compiled by the Commission will be provided. Any additional material is to be considered on a case by case basis.

6.7 Once the 28-day period for submissions has elapsed, the Commission must consult with the relevant professional council before taking any action. IOs should keep in mind the 'cut off', or deadline, for forwarding the relevant documents for consultations. When the 28-day period expires, the complaint should immediately proceed to consult (see Chapter 8). Similarly, when the 28 days has expired with respect to investigations of health organisations, the complaint should be finalised within five days (see Chapter 9).

6.8 Although the HCCA only allows 28 days for submissions, there may be occasions when it is unfair to proceed. As the Commission must consult with the relevant professional council, the time for submissions may be extended to the next cut-off date for consultation. Any delay beyond this should be approved by the Director.

Unregistered practitioners

6.9 Prior to sending a letter under s40 to an unregistered practitioner, a draft SD should be completed and forwarded to the Commissioner. As stated before, an SD is not required for comments or if no further action is taken.

6.10 The draft SD should generally be sent to the unregistered practitioner at the s40 stage along with copies of all relevant witness statements, a copy of the de-identified expert report (if one was obtained) and other relevant material as required. The section 40 letter should also advise the practitioner of the Commission's intention to make the SD Public s41B (4) and also of their right of appeal to the ADT under s41C. The draft SD should not be provided when the complaint is being referred to the ODPP.

6.11 It is important to note that the HCCA requires that if the unregistered practitioner in respect of whom the Commission proposes to make a prohibition order is registered under the National Law, but was providing health services unrelated to their registration, the Commission must also notify the relevant Council of the proposed order and provide the Council with the opportunity to make a submission (s41A(3)).

Health Organisations: s43

6.12 If the Commission proposes to make comments and/or recommendations concerning a facility, the facility must be given an opportunity to respond. The facility has only 28 days to make submissions and this may present logistical difficulties for the facility. In an investigation concerning a facility, the s43 letter is addressed to the Chief Executive of the relevant LHD. The LHD will then ask the affected facility to provide a response, which is usually vetted by the LHD. This process impinges significantly on the time the affected facility has to draft cogent submissions concerning the proposed action.

6.13 The s43 letter should enclose a copy of the draft investigation report and the de identified expert report if one was obtained to give the organisation a full understanding of the reasons for the decision.

6.14 In order to facilitate a timely response, the IO should liaise with the LHD and with the clinical directors or other appropriate staff at the facility to discuss workable recommendations before the s43 letter and draft investigation report is sent out to the LHD. Effective liaison will not only ensure the affected facility has time to respond to the Commission's proposals but also enables the Commission to draft workable recommendations. A copy of the s43 letter should also be copied to the facility to afford them enough time to respond.

6.15 The respondent has 28 days from receipt of the s43 letter to provide submissions. It is preferable to send the correspondence by fax, Express Post or email to enable the Commission to correctly calculate the 28-day period.

6.16 The s43 letter and draft report is also provided to the DG at Health.

Investigations involving both organisations and individual practitioners

6.17 If the investigation into individual practitioners is incomplete, care should be taken when providing the draft investigation report to an organisation. Evidence or

information that might prejudice the outcome of the investigation into the individual should be excluded or referred to in a very general way in the draft report to the organisation. In rare cases, provision of the draft investigation report to an organisation may be delayed pending conclusion of the investigation(s) into individuals. Consult with your Manager if there are any concerns.

Respondent submissions (s40, s43)

Timeframes: If the respondent provides submissions that require review and further comment by the expert, the submissions should be provided to the expert as soon as possible and at least within 7 days. The expert should be asked to provide a report within 14 days. Similarly, if further inquiries are prompted by submissions, inquiries should be made within 7 days with a 14-day response time. Approval should be sought from a Manager prior to sending s40 submissions to an expert for further comment. Please refer to chapter 5 for further information concerning experts.

6.18 The IO should carefully analyse the submissions and consider whether anything in the submissions warrants revision of the draft IR or proposed action.

Investigation reports

6.19 Once all evidence has been gathered it is necessary to analyse the evidence and consider the possible outcomes. An IR will be necessary in most cases. IRs are in draft form until the outcome of an investigation is known. The first draft is usually completed at the s40/43 stage of an investigation.

6.20 The purpose of an IR is to set out the scope of an investigation, the evidence obtained, an analysis of the relevant evidence and the rationale for reaching the proposed outcome. In broad terms, investigations conducted by the Commission fall into two categories. First, incident investigations concerning a facility, when an adverse incident has occurred and the Commission endeavours to find out how and why it happened and the contributing factors behind it. The second type of investigation concerns specific allegations about an individual practitioner.

6.21 Often an investigation will involve more than one respondent. A combined IR may be written concerning all respondents although on other occasions separate IRs may be more appropriate. Always seek guidance from a Manager or the Director of such circumstances are apparent.

6.22 It is unnecessary to de-identify staff in facilities that are not named as respondents.

The importance of plain English

6.23 It is very important to ensure an IR is comprehensible for the lay reader. Technical jargon and complex medical terminology should be avoided or simplified when possible. Where medication or specific medical conditions are noted in the report, footnoting should be used to aid the reader. Footnoting is to be kept to a minimum whenever possible to maintain the flow of the report when reading. The IO should refer to the Commission's Style Manual, available on the intranet.

The structure of an IR

6.24 All IRs should have the same basic elements. An IR template has been developed and is to be utilised when composing IRs unless otherwise authorised by the Director. Exceptions to the use of the IR template will occur where

significant complex or protracted investigations are conducted and a public report may be required.

6.25 First, the file number and the names of the parties and subject. Secondly, relevant background information, for example whether the complainant and respondent have a complaints history or any unusual features about how the complaint came to be investigated.

6.26 Each paragraph should be numbered for ease of reference. A header and footer should be included on each page, with the file number and respondent or complainant's name and the relevant stage; ie '08/000000: Smith: s40 Investigation Report'. The IR should be signed and dated by the IO and submitted to their Manager for review. The Manager is then to review the report and associated documents to ensure all relevant information has been included in the report and the overall report is an accurate analysis of the evidence collated.

6.27 The facts should be described, including factual conflicts. When there are factual conflicts, the IO should explain whether it is possible to reach a balanced conclusion about a more likely scenario and the reason for that conclusion. Sometimes it is not possible to reach a conclusion. If this is the case, it should be stated explicitly. It should be noted however that, IOs in consultation with their Manager, are to actively seek all available information which may substantiate or negate a version of events by witnesses. Where matters are simply two parties version of events regarding conversations or actions not witnessed or recorded in any form, the IO is to ensure reasonable enquiries to corroborate the relevant versions are undertaken.

6.28 The relevant evidence should be analysed. It is not necessary to describe every piece of information collected during an investigation, however all relevant information should be included in the text of the IR. The purpose of outlining evidence which is relied upon aids the Commission in ensuring all available information has been sourced. It also provides clarity for relevant stakeholders that the Commission's findings and opinions are based on all available and relevant evidence.

6.29 Once the evidence has been analysed, the IO should recommend the proposed outcome and the rationale for it. The summary field will include an analysis of the evidence and the rationale for the proposed action. IOs are to be mindful the IR should be a standalone document which when read by the lay reader clearly explains the evidence obtained and the weight placed upon particular evidence.

6.30 IOs are to ensure that during the investigation and the subsequent compilation of the IR primary, secondary and hearsay evidence is illustrated in the IR appropriately so as not to overweight a particular version of events with possibly inferior quality evidence.

6.31 A coversheet is attached to the IR, which again contains the file number and names of the parties as well as the names of the IO, Manager, Director and Commissioner. A template for the cover sheet has been designed and is to be utilised.

IR-Health organisations

6.32 S42 of the HCCA stipulates if the Commission proposes that comments and/or recommendations should be made to a facility, a report should be prepared for

the DG of Health containing the reasons for the conclusions reached by the Commission as well as the reasons for making the comments and/or recommendations.

6.33 The first draft s43 IR containing proposed comments and/or recommendations is sent to the relevant LHD Chief Executive and the DG after being approved by the Commissioner.

6.34 The final IR, dated by the Commission, is sent to the complainant and the relevant LHD Chief Executive, the DG and the Clinical Excellence Commission. No individual names are to be included as signatories in the final IR or the draft IR. The signature is simply "The Health Care Complaints Commission".

The structure of an IR concerning a facility

6.35 The facts of the incident should be included. The IO should include a description of relevant systems, processes and procedures extant at the facility at the time of the incident. These systems may be articulated in Health Directives, LHD or local guidelines or policies. Alternatively, there may be informal, unwritten systems or no systems at all.

6.36 The factors contributing to the incident should be analysed as well as responses provided by the facility and evidence of witnesses. Finally, the IO should conclude the IR by either proposing comments and/or recommendations for improving/implementing systems. If the evidence dictates, a recommendation for terminating the investigation with no further action should be proposed. When making comments they should articulate, in measured but candid language, what the cause of the adverse outcome for the patient was. IOs are to be mindful at all times to use plain English and be cognisant that the comments made by the Commission are immensely important to the complainant and other interested parties in clearly depicting the failures which led to the poor health outcome.

Statements of Decision

6.37 SDs instead of IRs are drafted where the complaint relates to the conduct of an unregistered practitioner. SDs should follow a similar format and style to IRs and the SD template should be utilised. The summary of evidence included in the SD should include any evidence that the unregistered practitioner breached clause(s) of the Code. It should also include any evidence relevant to the complaint which shows that the unregistered practitioner poses or does not pose a risk to the health or safety of the public. At the end of the summary of evidence the SD should state the 'Investigation Findings'. These findings must be firmly supported by the evidence. As already stated, the presumption is that all SDs will be made public so patient and witness details will be de-identified.

Shorter IRs with Brief for DP referrals

6.38 When a complaint is obviously destined for the DP, for example when a registered practitioner has breached conditions of registration or been convicted of a serious criminal offence, detailed IRs should not be necessary. An abridged IR will be sufficient, noting the allegations, the evidence in support of the allegations and a summary of witness evidence.

6.39 A brief of evidence needs to be compiled and forwarded to the Manager and Director with the s40 letter and IR. Please refer to Chapter 11 for further information concerning briefs.

Casemate

6.40 Final IRs should be linked to casemate along with s40, 43, 41 and 45 correspondence. Draft IRs at s40 stage and consult stage must be recorded and stored on casemate in linked documents to ensure an accurate record is maintained as to what information was provided to parties at each stage. Hard copies of drafts are to be stored on the hard file while electronic copies are to be stored on casemate.

6.41 All documents obtained during the investigation are to be scanned and stored on casemate. Exceptions to this rule are extensive medical files where scanning would create a substantial burden to staff. Originals of exhibits seized including physical evidence are to be lodged, retained and disposed of in accordance with the Division's Exhibit Handling Guidelines. Where exhibits are secured in the Division, details of the lodgement date and associated records are to be placed on casemate for continuity and audit purposes.

6.42 The recording of exhibit movement is to be managed by the Manager in consultation with the IOs. The Director and Managers possess the keys to the Division's secure exhibit facility.

Chapter 7

Possible actions at the end of an investigation (s39, 42)

7.1 The HCCA dictates the actions that can be taken at the end of an investigation.

7.2 Before any action is taken, however, the practitioner or facility has a right to be advised of the proposed action and given an opportunity to make submissions (see Chapter 6).

Health Practitioners

7.3 With respect to a practitioner, the Commission must do one or more of the following:

(a) Refer the complaint to the DP for determination of whether disciplinary proceedings are warranted [s39(1)(a)]
(b) Refer the complaint to the appropriate professional council for consideration of taking action under the National Law [s39(1)(c)]
(c) Make comments to the practitioner [s39(1)(d)]
(d) Terminate the matter [s39(1)(e)]
(e) Refer the matter the subject of the complaint to the ODPP [s39(1)(f)]
(f) take action under s41A

Refer the complaint to the DP

7.4 Any person can make a complaint to the Commission in the first instance and complaints can be resolved in a variety of ways, such as assisted resolution, conciliation, referral to the appropriate professional council or other body or person, or investigation, which in turn generates a variety of results.

7.5 However, there are limited grounds for disciplinary action against individual practitioners. Confusion can arise when using the word *'*complaint*',* as the word signifies both complaints made to the Commission by any person under Division 1 (ss7,8) of the HCCA and what is often termed *'*a big C Complaint*',* which refers to the complaint drafted by the DP to instigate disciplinary action before a tribunal, professional standards committee or other body, the grounds for which appear in the *National Law.*

7.6 A complaint against a registered practitioner must be investigated and consulted upon prior to referral to the DP. The DP's functions (amongst others, see s90B) are to determine whether a complaint should be prosecuted before a disciplinary body and to prosecute the Complaint.

7.7 The grounds on which a Complaint can be made against a registered practitioner are set out in the National Law (s144). A Complaint can be made if a registered practitioner:

(a) has been convicted of or made the subject of a criminal finding for an offence
(b) has been guilty of UPC or PM
(c) is not competent to practise the practitioner's profession
(d) has an impairment
(e) is otherwise not a suitable person.

Criminal conviction or finding

7.8 All registered practitioners can be made subject to a complaint if they have been convicted of or made the subject of a criminal finding for an offence, either in or outside this jurisdiction, and the circumstances of the offence render the practitioner unfit in the public interest to practice the practitioner's profession.

UPC or PM

7.9 The meaning of UPC can be found at s139B, 139C and 139D*of the National Law.* S139B states:

(1) 'Unsatisfactory professional conduct' of a registered health practitioner includes each of the following-

(b) Conduct that demonstrates the knowledge, skill or judgment possessed, or care exercised, by the practitioner in the practice of the practitioner's profession is significantly below the standard reasonably expected of a practitioner of an equivalent level of training or experience.

(c) A contravention by the practitioner (whether by act or omission) of a provision of this Law, or the regulations under this Law or under the NSW regulations, whether or not the practitioner has been prosecuted for or convicted of an offence in respect of the contravention.

(d) A contravention by the practitioner (whether by act or omission) of-
(i) a condition to which the practitioner's registration is subject; or
(ii) an undertaking given to a National Board.

(e) A contravention by the practitioner (whether by act or omission) of a decision or order made by a Committee or Tribunal in relation to the practitioner.

(f) A contravention by the practitioner of section 34A(4) of the Health Care Complaints Act 1993 .

(g) Accepting from a health service provider (or from another person on behalf of the health service provider) a benefit as inducement, consideration or reward for-
(i) referring another person to the health service provider; or
(ii) recommending another person use any health service provided by the health service provider or consult with the health service provider in relation to a health matter

(h) Accepting from a person who supplies a health product (or from another person on behalf of the supplier) a benefit as inducement, consideration or reward for recommending that another person use the health product, but does not include accepting a benefit that consists of ordinary retail conduct.

(i) Offering or giving a person a benefit as inducement, consideration or reward for the person-
(i) Referring another person to the registered health practitioner; or
(ii) Recommending to another person that the person use a health service provided by the practitioner or consult the practitioner in relation to a health matter

(j) Referring a person to, or recommending that a person use or consult-
(i) Another health service provider; or
(ii) A health service; or
(iii) a health product;

(k) if the practitioner has a pecuniary interest in giving that referral or recommendation, unless the practitioner discloses the nature of the interest to the person before or at the time of giving the referral or recommendation.

(l) Engaging in over servicing.

(m) Permitting an assistant employed by the practitioner (in connection with the practitioner's professional practice) who is not a registered health practitioner to attend, treat or perform operations on patients in respect of matters requiring professional discretion or skill.

(n) Any other improper or unethical conduct relating to the practice or purported practice of the practitioner's profession.

(2) For the purposes of subsection (1)(i), a registered health practitioner has a pecuniary interest in giving a referral or recommendation-

(a) If the health service provider, or the supplier of the health product, to which the referral or recommendation relates is a public company and the practitioner holds 5% or more of the issued share capital of the company; or

(b) If the health service provider, or the supplier of the health product, to which the referral or recommendation relates is a private company and the practitioner has any interest in the company; or

(c) If the health service provider, or the supplier of the health product, to whom the referral or recommendation relates is a natural person who is a partner of the practitioner; or

(d) In any circumstances prescribed by the NSW regulations.

(e) For avoidance of doubt, a reference in this section to a referral or recommendation that is given to a person includes a referral or recommendation that is given to more than one person or to persons of a particular class.

(f) In this section-benefit means money, property or anything else of value. recommend a health product includes supply or prescribe the health product. Supply includes sell.

7.10 According to s139C additional matters that constitute UPC of medical practitioners are:
(a) Conduct that results in the medical practitioner being convicted of or being made the subject of a criminal finding for any of the following offences-
(i) an offence under section 102 of the *Mental Health Act 2007* ;
(ii) an offence under section 175 of the *Children and Young Persons (Care and Protection) Act 1998* ;
(iii) an offence under section 35 of the *Guardianship Act 1987* ;

(iv) an offence under section 128A, 128B, 129 or 129AA of the *Health Insurance Act 1973* of the Commonwealth;
(v) an offence under section 58 of the *Private Health Facilities Act 2007* .

(b) By the medical practitioner's presence, countenance, advice, assistance or co-operation, knowingly enable a person who is not a medical practitioner (whether or not that person is described as an assistant) or is not otherwise authorised by a National Board to-

(i) Perform operative surgery (as distinct from manipulative surgery) on a patient in respect of any matter requiring professional discretion or skill; or
(ii) issue or procure the issue of a certificate, notification, report or other like document, or to engage in professional practice, as if the person were a medical practitioner.

(c) Refusing or failing, without reasonable cause, to attend (within a reasonable time after being requested to do so) on a person for the purpose of rendering professional services in the capacity of a medical practitioner if the practitioner has reasonable cause to believe the person is in need of urgent attention by a medical practitioner, unless the practitioner has taken all reasonable steps to ensure that another medical practitioner attends instead within a reasonable time.'

7.11 *Additional matters that constitute UPC of pharmacists are set out in s139D of the National Law.*

7.12 PM is 'unsatisfactory professional conduct of a sufficiently serious nature to justify suspension or cancellation of the practitioner's registration; or more than one instance of unsatisfactory professional conduct that, when the instances are considered together, amount to conduct of a sufficiently serious nature to justify suspension or cancellation of the practitioner's registration.*'* [s139E National Law]

Lack of competence

7.15 To be competent to practice a health profession a person must have:

- sufficient physical capacity, mental capacity, knowledge and skill to practice the profession, and
- Sufficient communication skills for the practice of the profession, including an adequate command of the English language.'

Impairment

7.16 A practitioner can be impaired if they have a physical or mental impairment, disability, condition or disorder (including substance abuse or dependence) that detrimentally affects or is likely to detrimentally affect their ability to practice the profession.

Suitable person

7.17 Being a suitable person is a prerequisite for being registered in the first place. This requirement replaces the previous complaint ground that the practitioner is 'not of good character'. Whilst there may be scope to apply the new requirement more broadly, when determining whether a practitioner is a suitable person, the following elements which are relevant to the previous consideration regarding character should be considered:

(a) Whether the misconduct can be satisfactorily explained as an error of judgment rather than a defect of character
(b) The intrinsic seriousness of the misconduct in relation to fitness to practice
(c) Whether the misconduct should be viewed as an isolated episode and hence atypical or uncharacteristic of the practitioner's normal qualities of character
(d) The motivation that may have given rise to the proven episode of misconduct
(e) The underlying qualities of character shown by previous and other misconduct and
(f) Whether the practitioner's conduct after the proven episode of misconduct demonstrates that public and professional confidence may be reposed in him or her to uphold and observe the high standards of moral rectitude required of a practitioner.

Referring a registered practitioner to the appropriate professional council

7.18 When an expert expresses a view that a registered practitioner's conduct departed from reasonable standards but the departure was not significant, or if there are factors mitigating the practitioner's conduct so as to weigh against referral to the DP for consideration of disciplinary action, referral to the practitioner's professional council may be an outcome to be considered.

7.19 It will be a matter for the appropriate professional council what action is taken once a practitioner is referred and the options include counselling, referral for health or performance assessment or for management under an impaired registrant's panel.

Making comments to the practitioner

7.20 In some instances a practitioner's conduct does not fall short of reasonable standards but some minor issues have been identified which should be addressed. In those cases a comment, pointing out the practitioner's deficiency, is made to the practitioner to illustrate the inadequacy in care and indicate the proper course that should have been taken. Comments should be framed in terms that acknowledge the practitioner's conduct was otherwise good. Comments can be made against registered and unregistered practitioners.

Terminating the matter

7.21 An investigation can be terminated at any time if appropriate and if, once all relevant evidence has been gathered, there is not sufficient evidence of a departure from acceptable standards, no further action is the appropriate outcome. Investigations of registered and unregistered practitioners can be terminated.

Referring the matter the subject of the complaint to the ODPP

7.22 Registered and unregistered practitioners can be referred to the ODPP if there is evidence an offence has been committed.

Unregistered Practitioners. Action under s41A (2)

7.23 The Commission can take action under s41A of the HCCA if it has complied with s40 and finds that an unregistered practitioner has breached the Code or been convicted of a relevant offence and is of the opinion that the practitioner poses a risk to the health or safety of members of the public. The action that the Commission may take under this section is either or both of the following:
Make a prohibition order that does any one or more of the following;

(a) prohibits the health practitioner from providing health services or specified health services for the period specified in the order or permanently'

(b) places such conditions as the Commission thinks appropriate on the provision of health services or specified health services by the health practitioner for the period specified in the order.

(c) cause a public statement to be issued in a manner determined by the Commission identifying and giving warnings or information about the health practitioner and health services provided by the health practitioner. The Commission may revise or revoke a statement.

7.24 If the Commission is aware that a practitioner against whom it intends to make a prohibition order is registered under the National Law the Commission is to notify the relevant professional council of the proposed order and allow that council to make a submission.

7.25 The Commission may revoke or revise a public statement.

Health organisations s42

7.26 At the end of an investigation into a health organisation, the Commission can terminate the matter, make recommendations and/or comments on the subject of the complaint and/or refer the matter the subject of the complaint to the ODPP.

7.27 Recommendations are made if there is evidence that some aspect of the service provided by the health organisation has been inadequate. Recommendations will be made under the following categories:

- Developing guidelines
- Reviewing existing guidelines
- Auditing
- Educating, training and counselling staff
- Providing information
- Defining roles and responsibilities
- Making physical improvements.

Any recommendation made must be linked to the issue investigated. When recording the recommendation on casemate, IOs will have to identify the issue to which it relates and the evidence of implementation that will be required in respect to each recommendation made.

7.28 If the Commission makes comments or recommendations, a report must be prepared for the DG including the reasons for the Commission's conclusions and for any action recommended to be taken (s42 (3)).

7.29 The Commission is responsible for monitoring the facility to ensure recommendations are properly implemented and this function is performed in liaison with Health (see Chapter 10, Monitoring).

Chapter 8

Consultation with the appropriate professional council (s39(2))

8.1 At the end of an investigation, the Commission MUST consult with the appropriate professional council before deciding what action to take. Councils have consultations for this purpose once a month and require relevant documents to be provided before the consult date so they can be collated and disseminated to Council delegates. The deadline for providing documents to a council (is referred to as the 'cut-off' date. Cut off dates for the various councils are available from Managers and the Director.

8.2 Correspondence for consults is drafted by the IO and signed by the Commissioner. For consults with the MC and NMC, documents are couriered to them on the cut-off date. The IR should also be emailed to the MC. Liaison with councils occurs throughout the complaints process, so they will already have a copy of the complaint. Councils will require other documents in order to understand the basis of the Commission's proposed action and to be able to come to an informed decision. The documents that should be sent include:

- All responses and submissions from the respondent (including the s40 response)
- expert reports
- IR

8.3 The MC holds a Conduct Committee meeting in the absence of a representative of the Commission. If the MC agrees with the Commission's proposed action, they will advise the Commission of that agreement in writing after the meeting. If the MC Committee requires further information or does not agree with the Commission's proposed action it will notify the Commission in writing. The matter will then proceed to a meeting between the Commissioner, Director and delegates of the Conduct Committee.

8.4 Once the MC has advised the Commission that it does not agree with the Commission's proposed action, the IO should prepare a brief if required, for the Commissioner attaching the MC's correspondence and an analysis of the response with a recommendation as to whether or not the Commission should change its proposed outcome. The Commissioner will then determine whether to concur with the course recommended by the MC or proceed with the Commission's original proposed action. If the former, the Commissioner may not attend the full Conduct Committee meeting, if the latter the Commissioner and Director will attend to consult about the proposed outcome.

8.5 The final decision about the outcome is made by the Commissioner.

8.6 There will be occasions when, regardless of the outcome proposed at the section 40 stage, the Commission will recommend a number of possible outcomes to the relevant professional council. In the Commission's consult letter to the Council the reasons for such options will be clearly articulated. A number of factors may be taken into account. At all times, advice of the Director must be sought.

Chapter 9

Outcome of an investigation (s41, s41B, s41D & s45)

Timeframes

Registered practitioners: Final correspondence should be signed and sent within five days of notification of consult outcome.

Unregistered practitioners: Final correspondence should be signed and sent within five days of expiration of the 28-day s40 period.

Health organisations: Final correspondence should be signed and sent within five days of expiration of the 28-day s43 period.

Registered practitioners: s41

9.1 After the respondent has been given the opportunity to make submissions about the Commission's proposed action under s39, the complaint proceeds to consultation between the appropriate professional council and the Commission (see chapter 8).

9.2 After consultation, when the final outcome is known, the Commission must, under s41(1), advise the respondent, complainant and the appropriate professional council of the outcome. The IR should be provided to the parties to the complaint at this time, except when the complaint is being referred to the DP or the ODPP. The IR is not provided in these circumstances. Provision of the IR is discretionary and at times it may be appropriate not to provide a copy, in particular if one practitioner is being referred to the Council and another to the DP. Advice must be sought from a Manager in such circumstances. In place of the IR, a more detailed letter should be drafted, or a sanitised version of the IR. The Commission must also include advice to the complainant that they may seek a review of the Commission's decision under s39 of the HCCA. When a registered practitioner is being referred to the DP the facts sheet explaining the role of the DP must be included in the letter. This fact sheet is on the intranet.

9.3 The Commission may also inform other persons and bodies of the outcome s41(2) and the IO should also draft letters, again to be signed by the Commissioner, to such persons and bodies, which may include the expert, subject and employer (in the case when a respondent is employed by a facility).

Unregistered practitioners:s41, s41B & s41D

9.4 After the respondent, and if the practitioner is also registered, the relevant council (s41(a)(3)), has been given the opportunity to make submissions about the Commission's proposed action under s39(1)(d))(f) and a final decision has been made the Commission must under s41(1), advise the respondent and complainant of the outcome. The SD should be provided to the parties to the complaint at this time, except when the complaint is being referred to the ODPP.

9.5 The Commission may also inform other persons and bodies of the outcome s41(2) and the IO should also draft letters, again to be signed by the Commissioner, to such persons and bodies, which may include the expert, subject and an appropriate professional association.

9.6 After the respondent and any relevant professional council has been given the opportunity to make submissions about the Commission's proposed action under s39(1)(g) and a final decision has been made the Commission must under s41B

provide the respondent, complainant and any relevant professional body or association with the final version of the SD.

9.7 The Commission may also make the SD publicly available (s41B(3)). However, the Commission may remove any material it considers confidential from the SD. If confidential information is removed from the statement that fact must be included in the statement (s41B(4)&(5)). S41B(7) of the HCCA states that confidential information is information that;

(a) Has not been previously published or made available to the public when a written statement of decision to which it is or may be relevant is being prepared, and
(b) Relates to the personal or business affairs of a person, other than the person to whom the Commission is required to provide the written statement of decision and
(c) Is information that;
    i) was supplied in confidence, or
    ii) the publication of which would reveal a trade secret
    iii) that was provided in compliance with a duty imposed by or under an Act, or
    iv) the provision of which by the Commission would be in breach of an Act or Law.

9.8 If the Commission makes an interim prohibition order under s41AA or a prohibition order under s41A in respect to the practitioner, the Commission is to provide a copy of the SD to each registration authority and professional council (s41D). A template letter is available to send with the SD.

Health Organisations: s45

9.9 As the Commission has an obligation to advise the parties to a complaint of the result in writing (s45(1)), the IO should draft correspondence to be signed by the Commissioner. The Commission may also advise other persons and bodies of the results s45(2) and the IO should also draft letters, again to be signed by the Commissioner, to such persons and bodies, which may include the expert and subject.

9.10 If the outcome includes comments and/or recommendations, the Commission is obliged to write a report to the DG, explaining the reasons for the decision (s42 (2)(3)). The Commission also provides IRs to the respondent facility via the relevant LHD, the Clinical Excellence Commission and the complainant.

Casemate

9.11 Once final correspondence has been signed and sent, the investigation process can be closed on casemate. Authorisation to close the process falls to a Manager and all steps in the process must be complete before the process can be closed.

9.12 If recommendations have been made, the investigation process is closed and the outcome recorded as monitoring (see Chapter 10).

9.13 All actions and stages should be completed and if comments and/or recommendations have been made, they should be entered in the 'Comments' and 'Recommendations' fields in 'Outcomes'.

9.14 Once a Manager has closed the investigation process, the file will be sent to archives, kept with the IO for a monitoring outcome (see Chapter 10) or sent to

the DP for a determination. If the latter, the file will be accompanied by a Brief of Evidence (see Chapter 11).

Section 41 Review

9.15 The Commission must review a decision made under s39 if asked to do so by the complainant. If an IO receives a request from a complainant for a review they must bring it to the attention of their Manager who will forward it to the Director.

9.16 The Director will allocate any requests for review to a Manager who has not previously been involved in the matter.

9.17 The Manager will contact the complainant, confirm the reasons for the request, explain the process, give a time frame and provide their contact details. If necessary, these details should be confirmed in writing.

9.18 The Manager will review the decision made under s39 and provide a report, based on the IR template, recommending either confirmation of the original decision or that the matter be reopened to further investigation for the approval of the Director and Commissioner. The Manager will also prepare a letter to the complainant setting out how the review was conducted and the outcome for the Commissioner's signature. The letter should provide enough information to enable the complainant to understand the rationale for the decision made.

Chapter 10
Monitoring

10.1 The HCCA requires the Commission to advise the DG of Health of the outcome with respect to any 'Health organisation' (commonly referred to as a 'facility') if the Commission makes recommendations or comments. Whilst the DG liaises with public and private facilities concerning establishment of recommendations, the Commission must satisfy itself that the recommendations are properly implemented.

10.2 The HCCA stipulates recommendations should be implemented within a reasonable time. At the Commission, a monitoring outcome is opened on the investigation process on casemate and the IO must inquire of Health and the facility whether the recommendations have been implemented.

10.3 Dependent on what the agreed time frames were, if Health has not yet advised the Commission of implementation of the recommendations, the IO should draft letters to Health and the facility for the Commissioner's signature to inquire whether or the not the recommendations have been implemented. The letter should ask for details of the implementation and copies of any policies or guidelines that have been produced.

10.4 Where a recommendation is not implemented within agreed time frames the IO should ascertain the reasons for delay. If there is no reasonable excuse for the delay the IO should discuss the matter with their Manager and thereafter prepare a memo setting out the Commission's original recommendations, the lack of implementation and a recommendation for further action. The memo should be prepared for the signatures of the Manager, the Director and the Commissioner.

10.5 Once the recommendations have been implemented, either the facility or Health will advise the Commission in writing that they consider the matter finalised. Occasionally Health will advise the Commission a matter is finalised in circumstances where recommendations are yet to be properly implemented. It is important to scrutinise the actual result against the Commission's recommendations. Obtain copies of the protocols, guidelines or other supporting documents to ensure the recommendations have been properly implemented. If the recommendations have not been implemented satisfactorily, the IO should draft letters, for the Commissioner's signature, to Health and the facility and advise in precise terms of the deficiencies in implementation and ask them to follow up the matter and report back to the Commission.

10.6 Once the Commission's recommendations have been satisfactorily implemented, the IO should prepare a brief for signature of their Manager, the Director and Commissioner. The brief should outline the recommendations, advise the recommendations have been adequately implemented and recommend closure of the monitoring outcome on casemate.

10.7 If the Commission is not satisfied that an organisation has taken sufficient steps within a reasonable time, it may, after consultation with the DG, make a report to the Minister [s44(2)].

10.8 If the Commission is not satisfied that sufficient steps have been taken within a reasonable time as a consequence of its report to the Minister, it may make a special report to Parliament [s44(3)]. If a special report is made, the

Commission may include a recommendation that the report be made public immediately. The requirements concerning special reports to parliament are contained in s63 of the HCCA.

Final correspondence

10.9 The HCCA stipulates the parties to a complaint should be advised of the outcome of an investigation. The outcome in the circumstances of this chapter is the monitoring of recommendations to a facility. The IO should prepare letters to both Health and the facility, for the Commissioner's signature, advising that the Commission is satisfied that the recommendations have been fully implemented and the matter is now finalised. The IO should also draft a letter to the complainant, for the Commissioner's signature. The letter should advise the complainant of the outcome and set out the steps taken by the facility to implement the Commission's recommendations.

Casemate

10.10 Casemate provides three possible outcomes; *'*recommendation implemented, recommendations partially implemented and recommendation not implemented*'.* If the latter two, a note should be included in the 'comment' section of *'*outcomes*'* containing an explanation why the recommendation was not fully implemented and the rationale for the Commission ending its monitoring of the facility.

10.11 Once the Commissioner is satisfied the recommendation have been implemented and has approved closure, casemate should be updated and the file given to the Manager within two working days, who will ensure casemate has been updated and the case closed, if applicable.

Private and Aged Care Facilities

10.12 The Commission notifies Health when monitoring a private facility in the same way it does with a public facility.

10.13 The Commonwealth Department of Health and Ageing administers aged care facilities. When the Commission makes recommendations to an aged care facility, the IO should advise Health. Health forwards the Commission's report containing the recommendations to the Commonwealth Department of Health and Ageing, which will then follow up the facility to check whether recommendations have been implemented and report back to the Commission.

10.14 The Commission should maintain primary contact with the facility directly to ensure the recommendations have been implemented.

Chapter 11

Briefs of Evidence

Overview of Disciplinary Proceedings

11.0 When a respondent is referred to the DP (s39(1)(a)), the IO must prepare a brief of evidence. The role of the DP in this context is to determine whether the conduct of the practitioner warrants disciplinary proceedings before Professional Standards Councils (PSC) and/or Tribunals.

11.1 Tribunals are empowered to make a finding of PM and order that a practitioner's name be removed from the relevant Register for a period of time. If such an order is made, after the period expires, the practitioner can apply to have their name restored to the register. The Tribunal can make a variety of lesser orders, including, amongst others, suspending registration, reprimanding the practitioner, fining the practitioner or placing conditions on the practitioner's registration. A Tribunal can also dismiss the complaint.

11.2 A PSC cannot order that a practitioner be suspended or de-registered, however, the committee can, if it believes suspension or de-registration is warranted, refer the matter to a Tribunal.

11.3 The onus is on the prosecution to prove the practitioner is guilty of UPC or PM. Principles of natural justice and procedural fairness are paramount considerations for the DP. The respondent has a right to see all the evidence that will be used against him or her and that evidence must be served in a timely manner in order to give the respondent an opportunity to respond if they wish. The DP has a duty to disclose all relevant documents on the respondent, as disciplinary inquiries are a search for truth. The documents are served in a brief of evidence on the respondent and later the documents are tendered to a Tribunal or PSC. The principle underpinning the introduction of evidence is fairness. If either the prosecution or respondent wish to rely on information, it must not unfairly prejudice the other party. The information that either party seeks to introduce must also be reliable and relevant.

Standard of proof: The *Briginshaw Test*

11.4 In order to find the prosecution case proven, Tribunals and/ or PSCs must be *'*comfortably satisfied*'* that is, find it more probable than not, the prosecution case is true. The more serious the alleged conduct, the higher the onus is on the prosecution to prove their case. The principles are set out in the High Court Case of Briginshaw v Briginshaw (1938) 60 CLR 336.

11.5 In this chapter, the forums before which disciplinary action is taken will be referred to as the disciplinary body for ease of reference.

Brief preparation

11.6 Where it is likely that an investigation will be referred to the DP, the IO must commence preparing a brief of evidence at the earliest opportunity during the investigation process. To assist the brief preparation, make additional copies of documents that are likely to be included in the brief particularly, the material sent to the expert.

11.7 The brief of evidence must be prepared and provided to the Manager and Director along with the 's40 letter' informing the respondent of the Commission's proposal to take action under s39(1)(a).

Checking briefs of evidence

11.8 It will be necessary for the Manager to check all briefs of evidence submitted to them to ensure that all the issues have been identified in the 'section 40' letter and the expert has articulated the correct test for UPC and PM.

11.9 If records (other than medical records), such as rosters or policy documents, are included in the brief they must be attached to a statement from a witness who can introduce and explain them.

11.10 The IO will need to advise the Manager of material missing from the brief of evidence and a timeframe for when that material will be obtained and submitted.

11.11 The IO and Manager will need to ensure that the material in the brief of evidence will support the alleged complaint and statements have been obtained from all relevant witnesses.

11.12 The IO and Manager will need to ensure that all necessary lines of inquiry and tasks have been conducted before verifying the brief of evidence.

11.13 The IO and Manager will need to ensure that the index is accurate and corresponds to the documents cited.

The purpose of a brief of evidence

11.14 The purpose of a brief is to provide relevant evidence and other information in a succinct way, rather than handing the DP the whole investigation file and having them trawl through irrelevant documents, such as expert invoices, file notes of messages left and letters confirming appointments (for example).

11.15 The elements the DP must take into consideration when determining whether to institute disciplinary proceedings are dictated by s90C of the HCCA and include:

- The protection of the health and safety of the public
- The seriousness of the alleged conduct the subject of the complaint
- The likelihood of proving the alleged conduct
- Any submissions made under section 40 by the health practitioner concerned.

11.16 The Brief is a collection of evidence, some of which may find its way before a disciplinary body, some of which the disciplinary body may never see. In that sense, the information in the brief is proposed evidence and the DP must analyse it to determine whether the prosecution can tender it to a disciplinary body to prove an element of the case.

What should be included in a brief of evidence?

11.17 As a result of the Service Level Agreement (SLA) between Investigations and Legal Divisions a brief checklist was developed and incorporated in the SLA. A brief index and forwarding memo were also agreed (refer to template documents).

11.18 The material in the brief should be tabbed numerically and there should be no sub-tabbing. Group similar evidence together under the relevant category cited in the index, if necessary create a relevant category, but do not duplicate.

11.19 The DP needs to know who the parties and subject of the complaint are, as well as the allegations against the respondent and the information that has been

gathered to prove the allegations. The first document in a brief is the index. The second is the IR. The third document is the letter of instruction to the expert (if applicable), as well as the expert's report, their CV and any documents the expert enclosed with their report. The documents provided to the expert should follow the letter to the expert. Where issues are added under s20A, the s20A brief and note of consultation with the relevant Council should be included.

11.20 The brief should be compiled logically and some thoughtfulness is required concerning the order of documents. If the complainant has provided a statement in addition to the complaint, the statement should be placed after the complaint.

11.21 It is not necessary to include purely administrative documents in the brief, for example, the notification letter the Assessments Division sends to a complainant and respondent once a complaint has been assessed for investigation. However, it is important to include the Commission's letter to the respondent containing notification of the allegations being investigated, along with the respondent's response and supporting documents. Similarly, the Commission's s40 letter to the respondent (along with any submissions) should be included in the brief, as it contains the final allegations and grounds on which the Commission proposes to refer the complaint to the DP. It is useful to group all the complainant's and all the respondent's responses together. That will enable the DP to analyse the totality of each party's evidence easily. If either party has a prior complaint history, the casemate 'Case Priors' report should be included to enable the prosecution to determine whether the circumstances are similar.

11.22 Guidelines, protocols and medical literature should be grouped together.

11.23 Treating doctors' reports (respondent doctors excluded) should be grouped together along with the doctor's clinical records.

11.24 Hospital records should be grouped in chronological order. If there are voluminous medical records, it is unnecessary to copy them for the brief; however the index should contain reference to where the records can be found and the records should be provided to the DP along with the brief. However, critical extracts of records should be copied for ease of reference and to enable the prosecutor to mark the copy with reference notes. If handwritten notes cannot be interpreted easily arrange for them to be transcribed.

11.25 Other documents that should be included are Certificates of Conviction, transcripts, Reasons for Decision emanating from council inquiries (s150 proceedings) and registration certificates if the respondent has conditions on their registration. Please note nurses and midwives may have dual registration as a nurse and a midwife. Check whether this is the case with the AHPRA and if the nurse has dual registration, obtain copies of both registration certificates.

11.26 Matters relating to fraudulent conduct should include financial statements, allegedly false medical certificates, and accountants' reports.

Aide Memoire and schedules

11.27 Schedules in a prescribing complaint are not evidence. They are an important aide to enable the reader to grasp with relative ease the particulars of alleged improper prescribing or dispensing. Following discussions between Investigations and Legal Divisions the headings to be included in a schedule for prescribing matters were agreed (refer to template documents). A statement also

needs to be prepared by the person who compiled the schedule (refer to template documents).

11.28 Chronologies are not evidence either but they allow the reader to have an overview of conduct that occurs over a period of time and provide an easy reference for important dates and times. The same can be said of an evidence matrix. All such helpful documents should be included in a brief of evidence.

11.29 Although not evidence, occasionally it can be helpful to the DP if an IO includes file notes that describe notable incidents with witnesses or legal arguments raised by solicitors for a respondent.

What should not be included in a brief?

11.30 Repetition should be avoided. It is a waste to have multiple copies of documents in a brief of evidence. If, for example, a statement from a Nursing Unit Manager annexes Health directives or LHD guidelines, those documents should not be copied again and placed in the *'*guidelines*'* part of the brief. A note in the index should direct the DP to the statement, with the other documents attached.

11.31 The attachments to a PSB report usually contain relevant evidence in a prescribing complaint, for example the practitioner's patient records, dispensing records and occasionally, statements. It is not necessary to copy the patient notes and place them in a different part of the brief. The index should direct the DP to the attachments to the PSB report.

All briefs should contain the following documents

- Index
- Investigation report
- Previous complaints history of complainant and respondent
- Commission letter to respondent notifying allegations (usually this is the s28 letter)
- Respondent's response
- Section 20A brief (if any) and letter to respondent.
- Commission s40 letter to respondent notifying proposed s39 action, reasons for action and allegations
- Respondent's s40 submissions
- All coercive notices
- Statements including:
  (a) Statements of fact by witnesses
  (b) Statements adopting documents for their production
  (c) Continuity statements of exhibit seizure / location and any subsequent movements
  (d) Expert witness statements including medical and computer evidence
  (e) Complainant statement
- HCCC schedules, chronologies and evidence matrix
- Commission letters of instruction to expert and expert report/s any other contact, including emails. All documents that have been provided to the expert should be included in the brief.

11.32 There is a range of misconduct that may be referred to the DP and each complaint is unique. The following are suggestions for brief inclusions in certain types of complaints in addition to the usual documents listed above. The lists are not meant to be exhaustive and IOs should use discretion when considering inclusions in a brief.

Inappropriate prescribing/dispensing of medication

- PSB report and annexures
- Relevant extracts from MIMs, medical literature
- Patient records. Each patient should have the following information included:
  - HCCC schedule of prescribing/dispensing that has been compiled with reference to various referenced sources
  - Extracts of patient records
  - Medicare claims or PBS history
  - PSB documents which include practitioner's application for s8 drug authorities and the terms of the authority, whether the patient is on the Methadone program. Note, this should be obtained for entire practice, since the authority of one doctor applies to all doctors in the practice if prescribing to the relevant patient.
  - Documents concerning any action taken by a council prior to referral to the Commission including transcripts of s150 proceedings and reasons for decision, medical reports from council appointed practitioners.

Impairment (including drug and alcohol addiction)

- Medical reports concerning practitioner and any accompanying hospital records
- Documents from councils, including s150 proceeding reasons for decision and transcript, council appointed medical reports; i.e. psychiatric and neurology, minutes of impairment/health Committee of Council
- Certificate containing any conditions on registration
- Commission letter to expert reviewer and expert report
- Patient hospital records
- Dispensing records
- Practitioner's Medicare and private health fund claims history
- Employment personnel file
- Incident reports.

Unacceptable clinical practice

- Patient records
- Incident reports
- Root Cause Analysis (RCA) report
- Documents generated during any internal investigation (if incident/s occurred at a facility)
- Guidelines, protocols and directives from Health
- Local Health District and facility policies/procedures/guidelines
- Medical literature and MIMs extracts.

Conviction/Criminal finding

- Certificates of Conviction
- Transcripts of proceedings
- Finalised statement of facts
- Pre sentence reports/psychiatric/psychological reports/assessment.
- Police brief of evidence
- In cases involving pornography, the images should be obtained from police if possible.

Fraudulent conduct

- Bank statements
- Accountant expert reports
- Practitioner's Medicare and private health fund claims
- Allegedly falsified documents, e.g. medical certificates.

Violation of the therapeutic relationship ('boundary violation')

- Registration body Code of Conduct (CC) which existed at the time the alleged conduct occurred (if one exists)
- Any applicable CC's from respondent's place of employment at the time of the alleged incident
- CC's signed by the practitioner
- Patient records, Medicare Australia and private health fund documents
- Any forensic reports concerning electronic communication, including emails, text messages, voicemail
- Telephone records.

Competence, poor English comprehension/communication

- Incident reports
- Reports, statements, minutes and other documents from employer
- Personnel file
- Certificate containing any conditions on registration
- Council reports, results of English exams
- University/course results.

Finalising the brief

11.33 The IO will prepare a short memo for the DP (refer to template documents). It will not be necessary for the memo to provide a background of the alleged conduct, however, it will be necessary for the memo to contain information that would be useful to the DP.

11.34 The brief and investigation file should be provided to the Manager within 10 working days of the investigation being finalised.

11.35 The Manager will need to verify that all the documents are included, complete, sign and date the brief checklist and sign and date the index and brief coversheet.

11.36 The IR, although it may not require extensive explanation as the matter is being forwarded to the DP, it should contain and clearly state the keys issues and evidence obtained which supports the findings to provide an overview of the case to the DP. IOs are to be mindful of the fact the IR is to act as an executive summary of the case to be prosecuted.

Commencing a new Casemate process

11.37 Once the Manager has checked the brief and closed the casemate 'brief preparation' process the brief is forwarded to the Director for review. A letter must be sent to the respondent advising them that the brief has been completed and forwarded to the DP.

11.38 The Director will commence a casemate 'legal' process and deliver the brief of evidence to the DP on the same day.

11.39 If, upon review of the brief of evidence, the Director finds there is insufficient information / evidence or changes are required, the Director will return the brief

to the Manager outlining the reasons for declining the brief. Briefs which are declined will be monitored for quality to identify training and / or performance appraisal aspects of the IO and Manager. Ongoing declining of briefs may result in further performance actions should the Director identify trends or areas of concern.

Obtaining further information for the DP.

11.40 If a brief is returned to the IO for further work, letters must be sent to the respondent, complainant, the relevant professional Council and all relevant parties informing them that there will be a delay in the legal determination. If possible, timeframes for competition of the additional enquiries should be provided. All obtain information requests are to be expedited and completed within the best achievable time frame.

Chapter 12
General matters

File maintenance

12.1 Documents should be placed in an investigation file (blue A4 folder) in chronological order using the document tabs provided.

Template documents

12.2 There are a number of template documents provided on the Commission's intranet under the Division for the use of officers. These documents are provided as a tool and should always be amended to accurately reflect the purpose for which they are being used.

Sample documents

12.3 There are a number of sample documents provided on the Commission's intranet for the use of officers. As with the templates these documents are provided to assist the IO and should always be carefully checked, if used, to ensure they are accurate.

Travel allowance and expenses

12.4 Approval for field trips should be sought from the Manager. The Director approves overnight field trips. Expenses and allowances must also be approved by a Manager and Director prior to the trip.

12.5 The CSO can arrange airline reservations and accommodation.

12.6 Relevant travel and meal allowances and a travel allowance form are available on the Commission's intranet.

Obtaining medical records

12.7 Health care practitioners have a duty of confidentiality concerning the health information of their patients and divulgence of such information without reasonable excuse can expose the practitioner to civil liability and penalties. The legislation governing privacy and health information in NSW is the *Health Records and Information Privacy Act 2002* (HRIPA).

12.8 The Commission can obtain health information by three methods. The Assessments Division obtain signed authorities from complainants during the assessments process and records can be obtained by furnishing a signed authority to the health service provider from whom information is required. The Assessments Division can also issue a notice on a person requiring them to give information or produce documents (s21A HCCA).

12.9 Under the HRIPA, a health service provider may disclose health information of a person to the Commission without the person's written authority if the provider reasonably believes the information is necessary for the proper exercise of the Commission's investigative function [Schedule 1(11)(k)]. However the HRIPA does not compel production to the Commission and the health service provider may still refuse to provide the requested information without a signed authority from the person.

12.10 If health information is required and there is no authority on file, a letter should be sent to the health service provider from whom the information is sought, citing Schedule 1(11)(k) of the HRIPA. The health service provider should be asked to provide the records within 14 days of receipt of the Commission's letter and the letter should be faxed or emailed. Late responses should be followed up initially by telephone and then a file note made of a new agreed deadline for production. If there is a delay or objection to providing information, the IO should consult their Manager with a view to seeking approval from the Commissioner to issue a s34A notice (refer to

templates). S 34A notices are issued at the discretion of the Commissioner and a memo should accompany the notice containing a rationale for issuing the notice.

12.11 If any delay or objection to providing documents can be reasonably anticipated, a s34A notice should be considered at the outset, before an initial request for information has been made.

Medicare Australia

12.12 Information from Medicare can provide useful evidence in a number of circumstances:

- Evidence of consultations
- Evidence of practitioner's income
- Evidence of prescribing/dispensing can be gleaned from Pharmaceutical Benefits Scheme (PBS) information
- Evidence of over-servicing
- Evidence of performing unauthorised procedures.

12.13 The Commission does not require authorities to obtain information from Medicare Australia (s130 *Health Insurance Act 1973*). Information that may be relevant to an investigation includes information about claims by patients for prescribed substances (PBS schedules), patient claims histories or provider claims histories (refer to template documents for letter of request).

12.14 Dissemination of information provided by Medicare is restricted. However, the information provided can be used by the Commission for the purpose of any investigation conducted under the HCCA.

Certificates of Conviction

12.15 When an investigation concerns a conviction, a certificate of conviction is required as proof of the conviction. The certificate should be requested, in writing, from the Court in which the matter was heard. A fee may be payable to the Court for production of the certificates, depending on which Court processes the application. All court proceedings are transcribed by a court reporter and transcripts should also be obtained. The transcript is often valuable because it will contain witness evidence, including that of the respondent if the respondent chooses to give evidence. The transcript will also contain submissions made by the prosecution and defence (refer to template documents for letter of request).

Information from Police

12.16 The Commission has a memorandum of understanding (MOU) with the NSW Police Force (refer to the intranet) to obtain briefs of evidence and other information. The letter requesting records should be addressed to the local area commander (LAC) (refer to template documents for letter of request). It is suggested that initial telephone communication will also aid in clarifying what information is required and the current status of the Police investigation. Communication will also aid in identifying any other sources of information which the IO may not been aware of. Where information is required from Police regarding a coronial investigation, IOs should make initial contact with the coroner to advice them of the Commission's intentions as a matter of courtesy.

Information from the Coroner's office

12.17 The Commission has a MOU with the NSW Coroner (refer to the intranet) to obtain the Coroner's brief and any other relevant information. (refer to template documents for letter of request).

Obtaining telecommunications information

12.18 The Commission has authority, as an 'enforcement agency', to request telecommunications information under the Commonwealth *Telecommunications (Interception and Access) Act 1979* from each telco provider (refer to template documents). The Commission is required to report annually on the number of authorisations made under the Act. If a request for telecommunications information is made under this Act from a telco provider the IO must place a copy of such request together with the authorisation in the 'Telco request' folder situated at the work desk outside of the Director's office.

Authorised person

12.19 An investigation must be conducted by one or more persons who have been appointed as an authorised person under s31 of the HCCA. Authorisation of the person is performed by the Commissioner and a certificate issued.

12.20 The IO must carry this certificate and produce the certificate, if requested, by a person to whom a functioning is being exercised under s33 of the HCCA (Entry, Search and Seizure).

12.21 Managers are to ensure that all staff under their supervision obtain authorisation prior to undertaking any functions which required authorisation.

Identity Cards

12.22 All IOs are to apply for and obtain an identity card displaying their photographic identification and their name clearly marked on the card. IOs are to carry the card to produce when exercising a function or power under the HCCA.

Entry Powers and Protocols

12.23 Power to enter places, search and seize evidence is contained within s33 of the HCCA and sets out the legislative powers afforded to authorised persons. S32 states that an authorised person can only enter a premises and exercise powers under s33 with the consent of the owner or occupier or under the authority of a search warrant.

12.24 When IOs attend premises for the purpose of searching for evidence they are to ascertain the owner / occupier (person in charge) of the premises and communicate directly with them whenever possible. The person in charge is to be informed of the Commission's investigation purpose, the identification of all persons attending the premises on behalf of the Commission action, and produce identity cards in support.

12.25 IOs are to advise the person in charge of the premises of what material they are searching for and seek co-operation to locate the relevant material as quickly as possible.

12.26 IOs must seek authorisation from the person in charge, preferable in writing or have the authorisation verbally recorded to alleviate future contention as to the nature of the authority. IOs should be mindful of the fact that should the

person in charge refuse entry, the risk of evidence loss may increase and as such IOs should analyse the risks of attending premises without warrant.

12.27 IOs should also be mindful of the fact not to simply accept the offerings of evidence from persons if the IO is of the opinion there is additional information relevant to the search which has not been forthcoming and the information is contained within the scope of the investigation.

12.28 The use of entry and search without warrant should only be undertaken in specific low risk circumstances where refusal for entry is highly unlikely. The use of this type of entry method may place a person, the occupier or manager, under significant pressure as they may not be aware of the Commission's legislative guidelines. Wherever possible, in circumstances where a search for information is required, a search warrant should be obtained. IOs must seek authorisation from their respective Manager and Director prior to exercising any entry and search functions.

Search warrants

12.29 The HCCA provides the Commission with the power to obtain and execute search warrants during the investigation of a complaint which, if substantiated, may provide grounds for suspending, disqualifying, or taking disciplinary action against the person against whom the complaint is made or the criminal prosecution of that person. Applications for search warrants have to be approved by the Manager and Director before being made to the Local Court (refer to template documents for application for search warrant and the Commission's search warrant seizure form).

12.30 A search of premises is an examination of the premises with a view to the discovery of evidence, which upon examination may corroborate or negate the allegations under investigation. A search is illegal if it is not authorised by law or the actions of the IOs during the search are considered outside the scope of the search warrant.

12.31 Should an IO believe on reasonable grounds that evidence relating to alleged conduct of an individual or operation of a facility be in existence, and the utilisation of formal written request or the use of s34A powers may be ineffective due to the prospect of loss / destruction or failure of the individual to supply the said evidence, an application for a search warrant may be applicable. Applications for search warrants are outlined in s 34 of the HCCA.

12.32 It should be noted that to apply for a search warrant an IO needs to be an authorised person. Section 34(2) of the HCCA restricts an authorised person from applying for a search warrant to search premises for the purpose of investigating a complaint against a practitioner who was at the relevant time registered under the National Law unless the Chairperson of the appropriate professional council has been notified of the application. An authorised IO may compile an application to ground a search warrant. Further documents being the search warrant and notice to occupier must also be compiled by the IO.

12.33 Once the documents have been prepared they are to be reviewed and approved by the Manager for submission to the Director. The Director will then liaise with the Commissioner for final authorisation prior to the search warrant being applied for.

12.34 The IO is then to arrange a suitable time for presentation of the documents before a magistrate. Search warrants should stipulate that the warrant has seven (7) days to be executed unless otherwise stated. Upon execution of the warrant the IO must present the warrant back before the Magistrate to be endorsed within seven (7) days of execution. It is suggested that a short briefing be supplied to the Magistrate as to the outcome of the search warrant.

Search Warrant Execution Protocols

12.35 When planning a search warrant execution a risk appraisal of the premises to be searched and the person subject of the search will be conducted. The appraisal will consider such things as;

- The reason for the search
- Investigation background
- Details of how the warrant is to be executed and premises searched
- What roles individuals on the search will hold
- Any contingency plans where medium to high risk issues are identified
- The need for Police officers to be present when the warrant is executed.

12.36 Should issues be identified that are considered high risk IOs are to make all relevant inquiries to ascertain alternate methods of obtaining the relevant information. Liaison with the Director and Commissioner may be required to seek alternate methods of information identification.

12.37 The role allocation will assist in a co-ordinated approach to the search process and maximise efficiency. Physical as well as photographic and electronic evidence may be sought during the search. IOs are to be mindful of the evidence which they are seeking and any other evidence they may locate and ensure they are appropriately resourced to search and seize this evidence. Again transport and storage issues should also have been taken into account during the planning stage of the warrant.

12.38 Search warrant execution should be recorded by electronic means including video of the search area, still photographs of evidence in situ and electronic audio recording of all conversations with person's subject of the search. The use of recording equipment must be stated at the commencement of the search. A warning, similar to a record of interview warning, must also be provided to the owner/occupier of the premises to ensure any verbal evidence provided at the scene can be captured and later relied upon for evidentiary purposes.

12.39 The Manager must identify themselves and all members of the team. Identification cards must be displayed to identify officers of the Commission. The occupier is to be given a copy of the search warrant and a notice to occupier. The details of the warrant are to be explained to the occupier. Entry is to occur during business hours or when the premises are open to the general public.

12.40 S33 outlines a series of powers which are provided to an 'authorised person' during the search and seizure phase of a search warrant. S35 provides offences for a person who prevents, hinders or obstructs an authorised person during the execution of their functions under s33. Should an individual fail to comply or obstruct IOs, the individual should be warned regarding their behaviour and the contents of s35 brought to their attention. Where

continued obstruction or failure to comply remains IOs are to seek advice from the Director as to further action. Obstruction or failure to comply should always be an issue addressed during the planning stage of the search warrant and appropriate contingencies should be in place should this arise. Where a search warrant or coercive notice has been served during an investigation, details must be provided to the CSO so that they can be recorded on to a spread sheet by the CSO for audit purposes.

12.41 At the conclusion of the search IOs are to ensure the premises is left in the manner in which it was found. Any damage is to be recorded, photographed and details of the damage provided to the Director as soon as reasonable possible.

12.42 Any items seized as a result of the search warrant must be handled in accordance with the Exhibit Handling Guidelines (refer to the intranet).

Proceedings for Offence against HCCC Act

12.43 S100 of the HCCA states that proceedings for an offence against the HCCA are to be heard summarily before a local court. Where IOs identify possible offences against the HCCA, ie s98, s99, s99A, they are to prepare a briefing note outlining the reasons for the alleged offence. The briefing note must be submitted through their Manager to the Director for approval to the Commissioner. Upon review by the Commissioner he may direct the matter to the DP to instigate action against the alleged respondent.

Exhibit Handling Guidelines

12.44 The Commission has developed Guidelines (available on the intranet) to ensure the proper seizure, retention and security of exhibits.

Record of Interview

12.45 The Commission owns a device for electronically recording interviews with respondents and witnesses. The machine is kept in the Director's office. A transcription service, Sparke and Cannon are available on level 15 of the building and the IO should obtain their Manager's approval prior to utilising these services.

Laptops, Cameras and other equipment

12.46 Laptops, printers etc are available for field trips. An application should be made through the Helpdesk, an icon for which appears on the intranet.

Cars

12.47 If an IO requires a car for a field trip, a request should be made by email to Reception. There is a dedicated email address for reception.

Statements

12.48 Statements noted by IOs should be prepared in the approved format (refer to template documents) and contain the particulars of the witness, (not the address, which should be recorded as 'known to the Commission') an introductory paragraph (jurat) and numbered paragraphs. The first page of any attachment to the statement should be stamped. Stamps are available from the CSO and are also available from Information Technology (IT). If an IO should require a stamp when going into the field to take a statement, please request IT to put a stamp in the laptop bag.

Media inquiries

12.49 If a journalist contacts an IO, they should be directed to the Commission's Executive Officer. The IO should under no circumstances divulge information to the media concerning an investigation and the Manager should be immediately advised of such contact.

Access to Government Information

12.50 On occasion respondents, complainants or others may request documents relating to investigations to be released. The Commission is exempt from the provisions of the *Government Information (Public Access) Act 2009* (Schedule 2) in relation to its complaint handling and investigative functions. Any such requests should be brought to the attention of a Manager. All requests under this Act are dealt with under delegation by the DP.

12.51 The Commission has an 'Information sharing arrangement', under the Ombudsman Act 1974, with a number of relevant agencies.

Subpoena

12.52 All subpoenas for the production of documents should be directed to the Legal Division via a Manager and the Director. The HCCA provides that officers of the Commission may not be compelled to give evidence about or produce documents obtained during an investigation except in limited proceedings (s99A). The Commission does, however, have discretion to produce documents (s99B).

Interpreters

12.53 On occasion it will be necessary to engage interpreters and obtain translations of foreign language documents. If a witness, complainant or respondent does not have an adequate command of the English language, an interpreter must be engaged. It is not acceptable to have a friend or family member of the person act as an interpreter. Approval to engage an interpreter should be sought from a Manager. The Commission utilises the Community Relations Commission's (CRC) interpreting and translation service. The service is available 24 hours a day, seven days a week.

12.54 The request form can be downloaded from www.crc.nsw.gov.au (Ph: 1300 651 500). The invoice at the bottom of the form should be signed by a Manager or the Director and faxed to the CRC. At least 48 hours notice should be given.

12.55 CRC will allocate a job number for any work completed and the job number should be recorded in the file.

12.56 If an interview is cancelled within 48 hours, a cancellation charge will apply.

12.57 CRC can also facilitate a three-way telephone conversation between an IO, interpreter and a person of non-English speaking back ground.

12.58 If an interpreter is used, it is necessary to obtain a statement from the interpreter detailing the following facts:

- Qualifications and experience
- Date and place of service
- Who was present at the interview

- Method of translation; i.e. Commission's questions translated for the interviewee and the answers translated for the Commission
- The resulting statement was read back to the interviewee in their language and the interviewee indicated any amendments and ultimately the accuracy of the statement
- The interpreter witnessed the interviewee sign the statement and witnessed their signature or observed someone else witness the signature.
- The interviewee's statement should be attached to the statement.

Commission's website

12.59 The Commission's internet site is continually being added to and updated. IOs should keep themselves informed of the contents. There is now a section for the Commission's experts, which includes frequently, asked questions and answers. A brochure on 'Investigating Complaints' has recently been prepared for use by the Assessments Division.