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Breach Management Guidelines

Dealing with breaches of registration conditions – a guide for health service providers and other stakeholders in New South Wales

The Health Professional Councils Authority (**HPCA**) is the administrative body that supports the health professional Councils in NSW (**Councils**). The Councils are statutory bodies established to protect the public under the *Health Practitioner Regulation National Law (NSW)* (**the National Law**). The Councils and the HPCA work with the NSW Health Care Complaints Commission (**HCCC**) as co-regulators, to manage complaints about health professionals and students.

The Councils are given powers under the National Law to take action to protect the health and safety of the public, including ensuring that practitioners and students comply with any conditions on their registration that restrict their practice or clinical training. Legislative references in this guidance refer to sections of the National Law unless otherwise stated.

This document is publicly available for stakeholders, such as health professionals, legal representatives and professional organisations and is designed to inform stakeholders of the process that Councils follow when a possible breach of a condition on a health professional's or student's registration surfaces.

It is the responsibility of registered health practitioners to comply with any conditions imposed on their registration, to keep good and legible records and to engage with the relevant health professional Council regulator in a timely manner when a possible breach of registration conditions is being examined.

The Breach Management Guidelines have been prepared by the Health Professional Councils Authority and are to be read in conjunction with the applicable legislation and any relevant case law. The content is information, not advice, and is not a substitute for the provisions of the legislation or relevant case law. Appropriate legal advice relevant to your own circumstances should be obtained before taking any action on the basis of the information contained in this document.

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1. Introduction

One of the responsibilities of the 15 Councils is to monitor and enforce health practitioners' compliance with the requirements of conditions imposed under the [National Law](#). Practitioners and students (herein after referred to as practitioner/s) are expected to comply strictly with their registration conditions as the primary purpose of the conditions are to protect public health and safety.

These guidelines focus on conditions that are imposed on the registration of practitioners by a Council or other regulatory panel such as a Tribunal or Professional Standards Committee or a Performance Review Panel, and are intended to ensure that the Councils and the HPCA staff manage a breach of conditions in a timely, consistent and transparent manner. They are not intended to provide legal advice and practitioners should seek legal advice, as required.

All breaches of conditions require consideration by the relevant Council. Where a serious risk is identified flowing from a breach of conditions, the Council can proceed straight to urgent action under [s. 150](#) of the National Law, without applying this breach management guidance. The risk assessment process should also continually occur during this breach management phase when new information is obtained or received.

As is the case with all regulatory action in NSW, the Councils are guided by and obliged to observe [s. 3A](#) of the National Law in exercising regulatory functions:

3A Objective and guiding principle

In the exercise of functions under a NSW provision, the protection of the health and safety of the public must be the paramount consideration.

2. Identifying breach

Information may be received that suggests that a practitioner breached conditions on their registration. For example, a practitioner's procedure log may show that they are performing certain procedures, which might be in breach of conditions restricting or prohibiting specified clinical procedures. Alternatively, staff may also obtain information from a third party to verify the practitioner's compliance with conditions, e.g. Medicare

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prescribing data may be obtained to check compliance with prescribing restrictions or an audit of clinical records scheduled.

The process of identifying a possible breach of conditions involves assessing information indicating a breach against the requirements of the condition as expressed in the language of the practitioner's registration conditions.

3. Recording and reporting

Where a possible breach is identified, this will be recorded in the practitioner's file. All possible breaches are recorded, regardless of severity and whether or not the Council decides to take action.

Reports regarding compliance with condition will be run by staff on a regular basis and be submitted to the relevant Council for consideration.

4. Assessment

All possible breaches will undergo an initial risk assessment to determine whether further information is required or whether the possible breach can be resolved without obtaining further information, for example following clarification by the practitioner.

The outcome of the initial risk assessment will be recorded in the practitioner's file. If no action is taken in relation to the possible breach, the matter will be recorded as resolved in the practitioner's file and the practitioner may be advised of this in writing.

5. Information gathering

Where a decision is made to obtain more information, further inquiries will be made to obtain relevant information to determine:

- whether a breach has occurred;
- the facts surrounding the possible breach;
- whether any regulatory action is required, and if so,
- what form the action should take.

The Council will only take into account information that is relevant and reliable.

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5.1. Making inquiries

A practitioner will always be contacted and told of the possible breach and asked to provide an explanation. This includes providing the practitioner with all the information that the Council has to suggest a possible breach, unless there is a reason some information should not be disclosed, such as where the complainant requests their identity is not disclosed. This is the practitioner's opportunity to make a full and frank disclosure to Council, which may affect whether or not and the type of regulatory response taken by the Council. The Council may, if the risk is assessed as high, go straight to a s. 150 process rather than through this process.

Information may be requested from other regulatory agencies, such as the Commonwealth Department of Health to obtain Medicare data, the Pharmaceutical Regulatory Unit of the Ministry of Health (**PRU**), the HCCC or the Australian Health Practitioner Regulation Agency (**Ahpra**), where appropriate.

5.2. Section 164G notices

A Council may issue a written notice under [s. 164G](#) of the National Law to a practitioner, requiring them to give further information about any complaint or other matter concerning the practitioner. It is an offence for a practitioner to fail to comply with a s. 164G notice without reasonable excuse or to provide information knowing it to be false or misleading in a material particular: See section 164G(2).

5.3. Enforcement powers

A Council may approve an authorised person's use of the enforcement powers under Part 8, Division 9 of the National Law, which are summarised below.

Who may exercise enforcement powers?	Only a person appointed as an authorised person by the Secretary (this has been delegated to the Director of the HPCA). Authorised persons must have a certificate of authority, which must be shown to the person in charge of the place at which their enforcement powers are being exercised. Sections 164 and 164E
When can enforcement powers be used?	When a Council approves entry and inspection of premises which are reasonably believed to be used for the carrying out of the

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	<p>practice of the health profession. This approval is for a particular occasion and at a reasonable time.</p> <p style="text-align: right;">Section 164A(2)</p>
For what purposes can enforcement powers be used?	<p>To ascertain whether the NSW provisions of the National Law are being complied with or have been contravened.</p> <p>To investigate a complaint made or intended to be made.</p> <p style="text-align: right;">Section 164A(1)</p>
What can be done?	<p>An authorised person may enter premises and:</p> <ul style="list-style-type: none"> • require any person on the premises to produce any records in that person's possession or control relating to the carrying on of the practice of the health profession. • inspect, take copies of, or extracts or notes from, the records and, if the authorised person considers it necessary to do so for the purpose of obtaining evidence, seize the records; • examine and inspect any apparatus or equipment used or apparently used in the course of practising the health profession; • take photographs, films and audio, video and other recordings as the authorised person considers necessary; • require any person on the premises to answer questions or otherwise furnish information in relation to the practice of the health profession or a contravention of a NSW provision; • require the owner or occupier of the premises to give the authorised person the assistance and facilities as reasonably necessary to enable the person to exercise their functions. <p style="text-align: right;">Section 164A(3)</p>
What cannot be done?	<p>An authorised person cannot enter a part of premises used for residential purposes, except with the occupier's consent or under the authority of a search warrant.</p> <p style="text-align: right;">Section 164A(4)</p>

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When can a search warrant be issued?	<p>An authorised person may apply to an authorised officer under the Law Enforcement (Powers and Responsibilities) Act 2002 for a search warrant to be issued for premises, where the authorised person believes a NSW provision is being contravened or there is evidence of contravention on the premises.</p> <p style="text-align: right;">Section 164B(1)</p>
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5.3.1. Self-incrimination

The possibility of self-incrimination¹ is not an excuse for a person to refuse to answer a question asked by an authorised person. However, any information provided by a person to an authorised officer is not admissible in criminal proceedings² if the person either objected on the grounds of self-incrimination or the person was not warned about the right of objection. See section [164D](#).

5.3.2. Offences

Under section [164C](#) of the National Law, it is an offence for a person to:

- prevent an authorised person from exercising any enforcement powers,
- hinder or obstruct an authorised person in exercising any enforcement powers,
- without reasonable excuse, refuse or fail to comply with any requirement made or to answer any question asked by an authorised person, or
- give an authorised person information knowing it to be false or misleading in a material particular.

6. Sufficient evidence

Once all relevant information is obtained, a further risk assessment is performed to see whether there is sufficient relevant information to establish that a practitioner has breached a registration condition.

Sufficient evidence is objective, primary evidence. For example, if it is suspected that a practitioner did not attend a urine drug screen as required by their registration condition,

¹ Self-incrimination is where an answer might tend to incriminate the person.

² The exception is prosecution of any offence in s. 164C of the National Law.

evidence of non-attendance includes where no result is received by the testing facility, non-attendance is confirmed with the pathology collector, and confirmation and/or explanation from the practitioner that they didn't attend and why. Where there is a possible breach of a condition concerning supervision, written evidence from the practitioner's supervisor may be required.

The evidence does not have to conclusively prove the circumstances that give rise to a breach. All that is required is relevant and reliable information to support Council taking a regulatory response.

7. Regulatory response

The Council will then consider what sort of regulatory response, if any, is warranted which is determined in the circumstances of the practitioner and the alleged breach. For example, if a practitioner has given a reasonable explanation for an alleged breach, the Council may choose not to take any regulatory action. Conversely, where the alleged breach involves a risk to public health and safety, the Council may refer a complaint to the HCCC for investigation.

7.1. Relevant considerations

The considerations relevant to the seriousness of the breach and deciding whether to take a regulatory response include:

- that the Council, in exercising its functions, must make the protection of public health and safety the paramount consideration (see s. [3A](#)).
- the seriousness or the trivial nature of the alleged breach
 - risk to public health and safety
 - degree of actual harm
 - age of any alleged breach
 - the reasonableness of any explanation for the breach
 - any history of breach
 - repeated or wilful breach
 - knowingly continuing to practise whilst in breach
 - the practitioner's frankness in dealing with Council (or otherwise)
 - complaints history
 - time since conditions were imposed and most recent regulatory action
- the need to maintain public confidence in the regulatory system

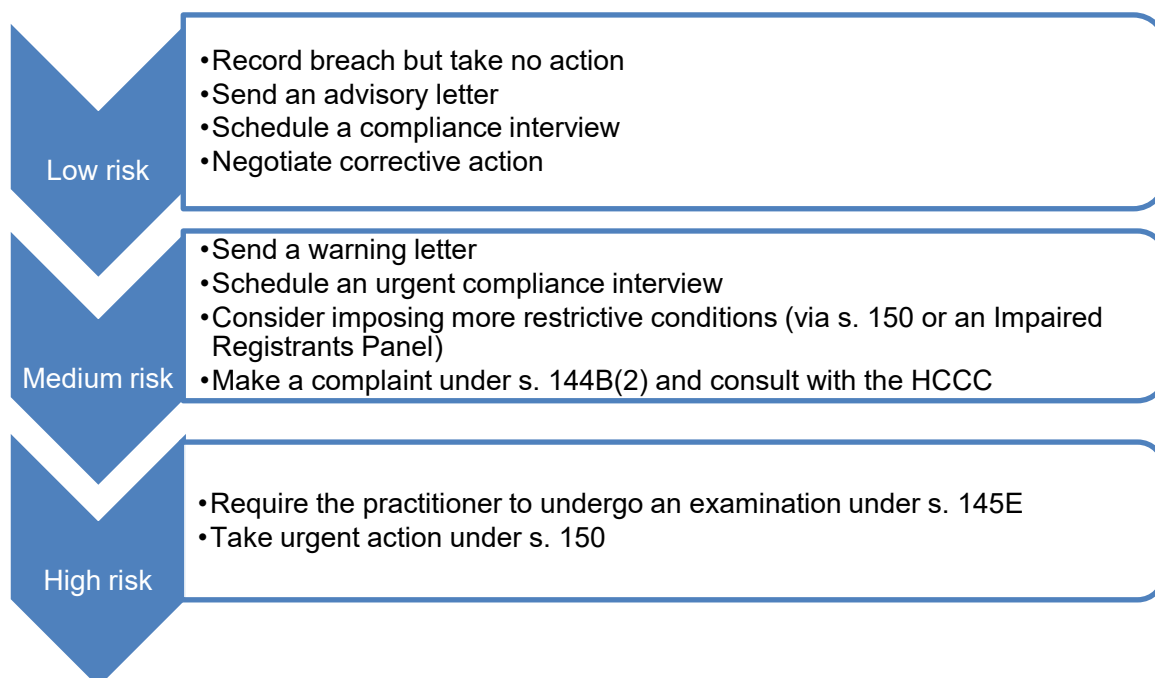
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- the integrity of the regulatory system
- the need for deterrence of the practitioner and profession³
- any mitigating circumstances.

The decision whether to respond to an alleged breach is a matter for the Council to decide, in its discretion, noting that the definition of “unsatisfactory professional conduct” under s. [139B\(1\)\(b\)](#) includes a breach of a registration condition.

7.2. Available regulatory responses

Where there is sufficient evidence of breach, the Council has a range of regulatory responses available, including:



7.3. Mandatory action on breach

In certain circumstances, the Council has no discretion but to respond to breaches of registration conditions:

1. **Critical impairment conditions** — if a Council is satisfied that a practitioner has contravened a critical impairment condition, it must refer the matter to the

³ In *Prakash v Health Care Complaints Commission* [2006] NSWCA 153 at [91], the Court of Appeal observed that there was a deterrence element in disciplinary action: “There is also an element of deterrence or, to put it more positively, encouragement to other practitioners to recognise the importance of complying with professional standards and the risks of failing to do so.”

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HCCC, which may deal with the matter as a complaint: s. [150FA](#). (See [HPCA Practice Note](#)).

2. **Critical compliance conditions** — if a Council is satisfied that a practitioner or student has contravened a critical compliance condition, it must suspend the practitioner's registration under s.150 and refer the matter to the Tribunal as a complaint: s. [150\(3\)](#). If the Tribunal is also satisfied as to the breach it must cancel the practitioner's registration under s. [149C\(3\)](#); the only discretion that may be exercised is to determine the preclusion period (ie. the period before an application for review of the cancellation order may be made). (See [HPCA Practice Note](#)).

8. Recording and communication following Council's regulatory response

All breaches of conditions by a practitioner will be recorded in the practitioner's file, regardless of the Council's regulatory response.

Where a Council decides to respond to an alleged breach, the decision will be recorded in the practitioner's file, and the practitioner will be advised of the Council's written reasons of decision.

The National Law outlines that Councils may give written notice to employers/accreditors of breaches of conditions ([s. 176BB\(2\)](#)). This is a discretionary notification which can be made by Councils, should they determine it is appropriate to do so. That discretion will be exercised having regard to such matters as the degree of seriousness of the breach, the practitioner's history of compliance or non-compliance with conditions on their registration and the practitioner's response to Council requests for an explanation.

9. Referral to the HCCC

If it is determined that a breach will be referred to the HCCC, the following information must be provided by the Council to the HCCC at the time of referral for investigation.

9.1. Details of the breach by the practitioner

- Identifying clearly the condition/s that has been contravened, and the timeline showing when the breach/es occurred.

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- A summary of the monitoring process used and how the breach was detected.
- Copies of communications with the practitioner and any other relevant party about the monitoring and the breach, including HPCA staff or the Council's last contact with the practitioner.

9.2. Evidence of the breach

- The referral needs to be supported by the relevant information on the nature and extent of the breach/es. Examples include:

Health conditions	
Type of condition	Type of information and evidence
Failure to attend urine drug screening and/or other screening	Written evidence by the testing facility that the practitioner failed to attend or a written admission of failure to attend testing
Positive drug testing	Urine drug screening results and/or other pathology results
Failure to attend a health assessment	Written evidence from the assessor's practice that the practitioner failed to attend
Failure to attend regular reviews with treating health practitioners	Contact details of the treating health practitioners. Written correspondence confirming the practitioner's failure to attend and a number of occasions of non-attendance
Self-prescribing	Summary of Medicare and PBS data obtained by the Council
Practice conditions	
Type of condition	Type of information and evidence
Failure to adhere to supervision	Contact details of the Council approved supervisor. Written correspondence confirming the practitioner's failure to attend supervision meetings and the number of occasions of non-attendance. Evidence the practitioner practising in breach of their level of supervision.
Failure to attend mentoring session	Contact details of the Council approved mentor. Written correspondence between the practitioner/mentor and the Council and any evidence of the practitioner failing to comply with their mentoring sessions.

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Prohibited treatment of a certain class of patients (e.g. children, females)	Audit report of the Council and contact details of the auditors
Prescribing to others	Summary of Medicare and PBS data obtained by the Council
Failure to undertake education	Detail of the courses approved by the Council as well as the practitioner's failure to provide evidence that the course was completed by the due date as specified by the conditions or written evidence confirming the course was not completed by the practitioner
Practising whilst suspended and not informing employer of conditions	Contact details of employer and correspondence between the employer and the Council

9.3. Contact details of the monitoring officer/s

An email address and contact phone number of the HPCA monitoring officer/s or any other relevant staff member who can address questions regarding the matter.

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