



Disciplinary policy

Health Practitioners (Professional Standards) Act 1999

Date approved: 26 May 2009

Table of contents

1. PURPOSE.....	3
2. SCOPE	3
3. BOARD’S ROLE AND RESPONSIBILITIES	3
4. GUIDING PRINCIPLES	4
5. LEGISLATIVE PROVISIONS	4
Grounds for disciplinary action	4
6. LEGAL AND PUBLIC INTEREST ISSUES	6
6.1 SUFFICIENT EVIDENCE TEST.....	6
6.2 THE PUBLIC INTEREST TEST	7
7. DECIDING THE DISCIPLINARY BODY.....	9
8. CONCLUSION	10

1. PURPOSE

The purpose of this policy is to ensure decisions made by the Medical Board of Queensland about whether or not to commence disciplinary proceedings against persons registered under the *Medical Practitioners Registration Act 2001* in the practice of their profession in Queensland (registrants), are made consistently, transparently and fairly.

The policy outlines the relevant factors and considerations, which may be taken into account by the Board when exercising its discretion relevant to its compliance functions under the *Health Practitioners (Professional Standards) Act 1999* (the Act).

The policy is also designed to inform the staff of the Office of the Medical Board, its legal advisors, the Commission, registrants and members of the public of the principles, which guide the decisions made by the Board.

This policy is not intended to be prescriptive and does not have force of law.

2. SCOPE

2.1 This policy is intended to guide the Medical Board of Queensland about whether or not to commence disciplinary action against registrants.

3. BOARD'S ROLE AND RESPONSIBILITIES

One of the Board's major functions under the Act is to receive and deal with complaints about registrants. The objectives of the Act are:¹

- i. to protect the public by ensuring health care is delivered by registrants in a professional, safe and competent way;
- ii. to uphold the standards of practice within the health professions;
- iii. to maintain public confidence in the health professions;
- iv. to provide a uniform system to deal with complaints, investigations and disciplinary proceedings relating to registrants, and the management of impaired registrants;
- v. to provide a system to deal with complaints about registrants that is complementary to the *Health Quality and Complaints Commission Act 2006*.

The Board has a specific role and powers to act in matters where it believes there is a need to protect the public, i.e. matters where restrictions on practice, or suspension or cancellation of registration may be necessary.

The Board is one of a number of organisations in registrants' operating environment, which is concerned with the regulation, conduct and performance of registrants.

The Board must consider the operating environment and roles of other organisations when considering how a complaint should be managed. Coordination and liaison between the organisations should be encouraged wherever possible to achieve optimum outcomes for patient safety and improvement of standards.

¹ Section 6 of the Act

4. GUIDING PRINCIPLES

Some essential guiding principles form the basis of the Board's strategies in managing all complaints. They are:

- a) It is well established that the objectives of formal disciplinary action against registrants is not to exact retribution. Rather, the purpose of these actions is to protect the public, improve professional standards and maintain public confidence in the profession. The Board's goals in managing complaints must therefore be aligned with these objectives. Complaints should be dealt with in a manner that focuses on changing registrants' behaviour, improving performance and deterring non-compliance, rather than on punishment or retribution.
- b) The Board's resources are finite and a risk-based approach should be taken when considering how to deal with a complaint, based on the specific circumstances of a case.
- c) The Board's overall regulatory response to complaints should be proportionate with the circumstances of the alleged conduct at issue.
- d) While protecting the public is the primary focus, the Board should endeavour to positively and cooperatively engage with registrants to improve their performance.

5. LEGISLATIVE PROVISIONS

Grounds for disciplinary action

- a) The Act requires that the Board, upon receipt of a complaint about a registrant will investigate, and where appropriate, discipline a registrant where the contents of the complaint appear to provide 'grounds for disciplinary action'².
- b) The Act also provides the Board discretion to commence investigations and/ or disciplinary proceedings in the absence of a complaint where the Board receives information that appears to provide 'grounds for disciplinary action'.
- c) The term 'grounds for disciplinary action'³ is defined in the Act as:
 - i. the registrant has behaved in a way that constitutes 'unsatisfactory professional conduct';
 - ii. the registrant has failed to comply with a condition of practice imposed under the Act or the *Medical Practitioners Registration Act 2001*;
 - iii. the registrant has failed to comply with an undertaking entered into under the Act;
 - iv. the registrant has failed to comply with a lawful demand of the Board, an investigator, an investigation committee, a disciplinary committee, panel, health assessment committee, inspector or the Health Practitioners

² Section 48 of the Act.

³ Section 124 of the Act.

Tribunal or another entity authorised to make the demand under the Act or under the *Medical Practitioners Registration Act 2001*;

- v. the registrant does not meet, or no longer meets, the criteria for registration under the *Medical Practitioners Registration Act 2001*;
 - vi. the registrant has failed to comply with a provision of this Act or the health practitioner registration Act under which the registrant is registered;
 - vii. the registrant has been convicted of an offence against an Act of the State, the Commonwealth or another state related to the practise of the registrant's profession, including, for example—
 - the Act or the *Medical Practitioners Registration Act 2001*; or
 - the *Health Act 1937*; or
 - the *Fair Trading Act 1989*; or
 - the *Health Insurance Act 1973*.
 - viii. a finding has been made under the *Health Insurance Act 1973* that the registrant engaged in inappropriate practice within the meaning of that Act;
 - ix. the registrant has been convicted of an indictable offence; and
 - x. if a registrant is impaired, the registrant's impairment is taken to be a ground for disciplinary action against the registrant.
- d) Many complaints received by the Board relate to allegations that a registrant's conduct constitutes '*unsatisfactory professional conduct*' which is defined in the Act as:
- i. professional conduct that is of a lesser standard than that which might reasonably be expected of the registrant by the public or the registrant's professional peers;
 - ii. professional conduct that demonstrates incompetence, or a lack of adequate knowledge, skill, judgment or care, in the practise of the registrant's profession;
 - iii. infamous conduct in a professional respect;
 - iv. misconduct in a professional respect;
 - v. conduct discreditable to the registrant's profession;
 - vi. providing a person with health services of a kind that are excessive, unnecessary or not reasonably required for the person's wellbeing;
 - vii. influencing, or attempting to influence, the conduct of another registrant in a way that may compromise patient care;
 - viii. fraudulent or dishonest behaviour in the practise of the registrant's profession; and

- ix. other improper or unethical conduct.
- e) When performing its functions under the Act, the Board aims to achieve best practice, meeting high standards of fairness, transparency, consistency, accountability and efficiency in commencing and undertaking disciplinary proceedings against registrants. In meeting these standards the Board believes it will maintain the confidence of registrants, their associated professional bodies and members of the public.

6. LEGAL AND PUBLIC INTEREST ISSUES

- a) The Board acknowledges that when deciding whether to commence disciplinary proceedings against a registrant it must meet the common law 'sufficient evidence test' in relation to evidence available in the case. That is to say:
 - i. There is sufficient evidence to commence disciplinary proceedings; and
 - ii. There are reasonable prospects that, upon hearing the evidence, the relevant disciplinary body will reach a finding of guilt against the registrant.
- b) The Board acknowledges however that even when there may be sufficient evidence to commence disciplinary proceedings it must consider, as a matter of public policy, whether it is in the public interest to commence the proceedings or whether some alternative action would be more appropriate given all the circumstances of the case. This is referred to as the '*public interest test*'.

6.1 SUFFICIENT EVIDENCE TEST

- a) Common law requires that, before commencing disciplinary action, the Board must be satisfied it can prove the allegations in the disciplinary proceedings on 'the balance of probabilities'. It is a well established common law principle in Australia that in cases where there are serious accusations, or where the effect of an adverse finding against the respondent would be permanent and damaging to their future, the evidence in these cases warrant closer scrutiny before a decision adverse to the respondent is made⁴.
- b) Accordingly, the sufficient evidence test requires the Board will not commence disciplinary proceedings unless there is reliable evidence capable of supporting a finding of guilt by the relevant disciplinary body, on 'the balance of probabilities'.
- c) The Board will assess the evidence in each case in its totality having regard to:
 - i. whether the evidence, given previous findings by the Board, tribunals, courts and other disciplinary bodies in relation to the same or similar facts, establishes a reasonable prospect of a finding by a disciplinary body that the registrant's conduct falls within the statutory definitions of a 'ground for disciplinary action' defined by the Act;
 - ii. the strength of the evidence and whether it establishes a reasonable prospect of a finding of guilt, or whether there are competing versions of events such that the decision 'could go either way';

⁴ *Briginshaw v Briginshaw (1938) 60 CLR 336 and Medical Board of Qld v Ali No. 4 1997*

- iii. whether some evidence might be excluded bearing in mind the principles of admissibility at common law and under the Act;
 - iv. whether there are lines of defence that have been indicated by or are plainly open to the respondent registrant;
 - v. whether witnesses are willing and available to give evidence;
 - vi. whether witnesses are likely to make a good impression; whether there are matters that might properly be put to them by the registrant to attack their credibility; and how they are likely to stand up to cross examination;
 - vii. the possibility that witnesses might have a faulty memory or be exaggerating or have a motivation to tell less than the whole truth or otherwise be unreliable;
 - viii. any other factors the Board believes in all the circumstances might impact on the findings by a disciplinary body.
- d) The Board stresses however that:
- i. even if it is confident of the likelihood of a finding of guilt by a disciplinary body, it is not in a position, except in uncontested matters, to assure complainants or other interested parties that a disciplinary action will succeed; and
 - ii. a decision not to commence disciplinary proceedings in circumstances where it is 'one person's word against another's' does not mean that the Board believes one person over the other, rather that it does not believe the evidence in its totality is sufficient to support a reasonable likelihood that a disciplinary body will find one person's version of events to be proved over the other's.

6.2. THE PUBLIC INTEREST TEST

- a) The Board does not believe the public interest requires it to commence disciplinary proceedings in every case where it is satisfied the sufficient evidence test can be met, and will exercise its discretion accordingly.
- b) It is well established in law that the objectives in disciplinary proceedings against registrants is not to exact retribution, the purpose of these proceedings are to protect the public, improve professional standards and maintain public confidence in the profession⁵. The Board recognises sometimes there are equally effective and more cost-efficient ways to achieve these objectives than by formally disciplining a registrant in the expectation the registrant will be punished for his or her conduct.

⁵ *High Court in Clyne v The New South Wales Bar Association (1960) 104 CLR.*,. *Medical Board of Queensland v Martin [2001] MAT*

- c) On that basis the Board will exercise its discretion in deciding whether or not to commence disciplinary proceedings by also considering whether it is in the public interest to do so by having regard to:⁶
- i. whether the behaviour causing the incident was intentional or unintentional;
 - ii. whether the incident was an error in professional judgment or a culpable, premeditated or criminal act;
 - iii. whether the registrant has acknowledged the conduct and shown remorse;
 - iv. whether the registrant has made efforts to rehabilitate, or indicated a willingness to do so;
 - v. whether there is potential for rehabilitation, as opposed to recalcitrance.
 - vi. the seriousness of the alleged conduct by the registrant;
 - vii. any information the Board has regarding any history of complaints or previous disciplinary findings against the registrant that may suggest a pattern of conduct or practice⁷;
 - viii. mitigating or aggravating circumstances impacting on the appropriateness or otherwise of commencing disciplinary proceedings;
 - ix. the passage of time since the alleged conduct and when the conduct was discovered;
 - x. the likely prejudice to public confidence in the integrity of the disciplinary process and to the reputation of the profession if the Board exercises its discretion not to commence disciplinary proceedings;
 - xi. the apparent prevalence of the conduct and any need to 'send a message' to deter other registrants from engaging in similar conduct;
 - xii. whether the conduct involved dishonesty or taking advantage of vulnerable persons;
 - xiii. whether the registrant has co-operated fully and frankly during the investigation into his or her conduct;
 - xiv. the registrant's age, health or infirmity;
 - xv. the likely length and expense of the disciplinary proceedings;
 - xvi. the availability and efficacy of any alternatives to commencing disciplinary proceedings;

⁶ *The Board has adopted, with appropriate modifications, the list of considerations the Commonwealth and Queensland Directors of Public Prosecution take into account when considering whether it is in the public interest to commence litigation in criminal cases.*

⁷ *Section 125(2)(b) and 402 of the Act*

For example, the likely disciplinary outcome if a matter was to proceed, and whether the registrant agrees to initiate the same or similar outcome him or herself by one or more of the following;

- *entering an undertaking with the Board to complete a relevant course to improve the registrant's clinical competence;*
- *entering an undertaking with the Board to be subjected to an appropriate period of supervision by a relevant person approved by the Board;*
- *entering an undertaking with the Board to be subjected to an appropriate period of practicing the profession with appropriate restrictions whilst the registrant undergoes appropriate retraining by way of formal courses and/ or appropriate supervision, or assessment for example under the CliPSS program;*
- *agreeing to take advice from a person approved by the Board in relation to the management of his or her practice.*

xvii. any other relevant consideration.

- d) Some of these considerations (e.g. the need to send a message) tend to weigh in favour of commencing disciplinary proceedings. Others (e.g. the respondent's acknowledgement of his or her error, or agreement to undertake further medical education or to change his or her practices or systems) tend to weigh in favour of dismissing the complaint or investigation matter in the public interest. Generally, the more serious the alleged conduct, the less likely the Board will exercise its discretion not to commence disciplinary proceedings.
- e) In coming to a decision to commence disciplinary proceedings, or to otherwise deal with a complaint, the Board will not allow itself to be influenced by:
- i. the race, religion, sex or political association, activities or beliefs or any other personal characteristic of the registrant involved;
 - ii. the Board member's personal feelings or the personal feelings of the staff of the Board about the alleged conduct, the complainant, the registrant or any other person or persons who may be involved;
 - iii. any possible political disadvantage to the government of the day or other political party or any possible media or community reaction to the decision; or
 - iv. the possible impacts of the decision on the personal or professional circumstances of a Board member, Board staff, members of the disciplinary bodies or any other person or persons who may be, or perceived to be, responsible for the conduct and outcome of the disciplinary proceedings.

7. DECIDING THE DISCIPLINARY BODY

- a) The Act establishes three disciplinary bodies who may deal with disciplinary proceedings commenced by the Board:
- i. The Board**
One of the functions of the Board is to conduct hearings and make decisions relating to disciplinary matters about a registrant. The Board conducts hearings in person or by way of correspondence. The Board has

the power to enter into undertakings with a registrant, or advise, caution or reprimand a registrant.

ii. The Professional Conduct Review Panel

The Panel is established after the Board refers a matter to it for disciplinary action. The Panel usually consists of three medical practitioners, two of whom are members of the registrant's professional peers and one from the registrant's profession. The Panel has the same powers as the Board but also has the power to impose conditions on a registrant's registration.

iii. The Health Practitioners Tribunal

The function of the Tribunal is to conduct hearings and make decisions relating to disciplinary matters about registrants. The Tribunal consists of a District Court Judge, who is advised by two members of the registrant's professional peers and one from the registrant's profession.

The Tribunal has the same powers provided to the Board and the Panel. In addition to that the Tribunal has the power to suspend or cancel a registrant's registration and impose a fine.

- b) If the Board decides to commence disciplinary proceedings against a registrant it will choose to do so with the relevant disciplinary body by having regard to the adequacy of the powers given to each of the disciplinary bodies under the Act and with reference to the circumstances of the case, including:
- i. Whether the circumstances of a case demonstrate a willingness on the part of the registrant to enter into undertakings with the Board or whether there may be a need to impose conditions on the registrant's registration;
 - ii. Whether the circumstances of a case may provide grounds for suspending or cancelling the registrant's registration.

The Act allows a registrant to elect to have disciplinary proceedings heard by the Health Practitioners Tribunal rather than by the Board or the Panel.

However, if the Board reasonably believes the subject matter of an investigation may provide a ground for suspending or cancelling a registrant's registration, the Board must decide to refer the matter to the Tribunal.

8. CONCLUSION

- a) The Board will endeavour to apply this policy consistently, fairly and transparently. It will deal with complaints and investigation matters on a case by case basis on their individual merits having regard to the evidence in its totality and to:
- i. the broad purposes and specific requirements of the Act;
 - ii. the well established principle that professional discipline should be directed primarily to the protection of the public rather than the punishment of registrants;
 - iii. the desirability of maintaining and enforcing high standards of profession and public confidence in the profession.