

## POLICY ON COMPETENCE REVIEWS

### 1. Background

- 1.1 The Optometrists and Dispensing Opticians Board recognises its responsibility to protect the health and safety of members of the public. The Board has a strong focus on assuring the competence of practitioners. From time to time, whether as a result of a notification under section 34 of the Health Practitioners Competence Assurance Act (“HPCA Act”) or otherwise, the Board may require a practitioner who holds a current practising certificate to undergo a competence review under section 36 of the HPCA Act. When conducting a competence review the Board must consider whether a practitioner’s practice of the profession meets the required standard of competence.
- 1.2 A competence review is not a disciplinary process. Instead, a competence review is an assessment of a practitioner’s competence taking into account any relevant standards of practice. A practitioner may not meet the required standard of competence because of a failing in any one area of their practice.
- 1.3 If, after conducting a competence review, the Board has reason to believe that a practitioner fails to meet the required standard of competence it must make one or more of the orders set out at section 38 of the HPCA Act. The orders are intended to be educative and rehabilitative, but when making orders the Board must also consider the principal purpose of the HPCA Act which is to protect the health and safety of the public.

### 2. Purpose

- 2.1 The purpose of this policy is to provide guidance to the Board, competence reviewers, and practitioners who are or may be undergoing a competence review. This policy should be read in conjunction with the Board’s *Policy on Risk of Harm*, and for competence reviewers, in conjunction with the competence reviewers’ handbook.

### 3. Competence

- 3.1 Sections 34 – 44 of the HPCA Act relate to competence and competence reviews. Competence is not defined by the HPCA Act<sup>1</sup>, although the High Court has confirmed that the standard of competence reasonably to be expected of a practitioner is a matter for the relevant regulatory authority<sup>2</sup>.

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<sup>1</sup> Note that the ‘required standard of competence’ is defined at section 5 as meaning the standard of competence reasonably to be expected of a health practitioner practising within that health practitioner’s scope of practice.

<sup>2</sup> *D v Physiotherapy Board* HC Wellington CIV-2006-485-1980, 15 October 2007 at [27].

- 3.2 The Board's view is that a competent practitioner is one who applies knowledge, skills, attitudes, communication and judgement to the delivery of health services in accordance with the expected standards of a practitioner within that scope of practice, including but not limited to any standards of clinical and cultural competence as set by the Board from time to time. The Board's current standards of clinical and cultural competence can be found at [www.odob.health.nz](http://www.odob.health.nz).

#### **4. Notification of competence concerns**

- 4.1 Under section 34, section 80, or section 79 of the HPCA Act the Board may receive a notification from another health practitioner, the Health and Disability Commissioner, an employer, or a Professional Conduct Committee if there is reason to believe that a practitioner's practice falls below the required standard of competence.
- 4.2 If the Board receives such a notification it must make inquiries into the practitioner's competence, and (having done so) it may review the practitioner's competence.
- 4.3 Competence notifications undergo an initial risk assessment by the Board's professional standards advisor. The notification is then referred to the Board's Professional Standards Committee ("PSC").
- 4.4 The PSC holds a delegation from the Board to make decisions relating to competence reviews. Reference to the Board in this policy includes reference to the PSC. A practitioner who is adversely affected by a decision made by the PSC under delegation may request that the Board review the PSC's decision<sup>3</sup>.
- 4.5 The Board makes inquiries into the competence notification, including (without limitation):
- (a) Contacting the practitioner to inform them of the notification, providing information about the notification, and asking for a response to the notification
  - (b) Seeking further information from the person or organisation making the notification as needed or appropriate, including whether there are any concerns that the practitioner poses a risk of serious harm by practising below the required standard of competence
- 4.6 The Board will consider the available information and decide whether the practitioner is required to undergo a competence review. The following factors may be relevant to consideration of whether a competence review is necessary:
- (a) Whether there is a pattern of a poor practice over a period of time, or an instance of poor practice that may suggest underlying competence concerns
  - (b) The nature of the competence concern, including the degree to which there appears to be a departure from any standards of clinical or cultural competence

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<sup>3</sup> Clause 18, Schedule 3, HPCA Act

- (c) Whether the practitioner appears to be working in isolation or without peer support

## **5. Competence reviews**

- 5.1 The Board may review the competence of a practitioner who holds a current practising certificate at any time whether or not there is reason to believe that the practitioner's competence may be deficient.
- 5.2 If a decision is made to review a practitioner's competence the practitioner must be given:
  - (a) a notice informing the practitioner clearly of the grounds on which the Board has decided to carry out the review
  - (b) any information held by the Board that is relevant to the practitioner's competence
  - (c) a reasonable opportunity to make submissions and be heard on the matter, either personally or by a representative
- 5.3 The way that the competence review is carried out is at the Board's discretion.
- 5.4 The Board has determined that competence reviews will be conducted by a competence review committee ("CRC") made up of two practitioners and one lay member. Where possible, the practitioner members of the CRC will include a practitioner who practices in the same scope of practice as the practitioner under review and a practitioner with experience in peer review. In exceptional cases the Board may determine that the composition of the CRC will differ to that described above (including, but not limited to, fewer or more members), or that a competence review will be carried out in another way, as determined by the Board having regard to the particular circumstances of the case.
- 5.5 When appointing practitioners as CRC members the Board needs to be satisfied that the practitioner is competent and has good interpersonal and organisational skills. A practitioner will not be appointed as a CRC member if he or she has, or has had proven, complaints against them or if they have been or are undergoing a competence review or competence programme.

## **6. Terms of reference**

- 6.1 The CRC conducts the review on the Board's behalf in accordance with terms of reference. The CRC will be asked to review a practitioner's competence generally, and may be asked to have particular regard to specific areas of practice or domains of competence. The terms of reference may, among other things, specify:
  - (a) The reasons for the review

- (b) The process to be followed
  - (c) The assessment tools to be used
  - (d) The domains of competence or areas of practice to be assessed
  - (e) Expected timeframes
  - (f) Possible outcomes of the review process
- 6.2 The terms of reference will include a requirement that the CRC must immediately inform the Board if, at any time, it believes that the practitioner under review may pose a risk of harm to the public by practising below the required standards of competence. The CRC must provide reasons for its belief.
- 6.3 The practitioner who is to be reviewed will be provided with a copy of the draft terms of reference, including the intended membership of the CRC, for comment before they are finalised.

## **7. Conducting the Competence Review**

- 7.1 The CRC will conduct the competence review in accordance with the terms of reference. The CRC will liaise with the practitioner about the timing of the review.
- 7.2 Wherever possible, the competence review will take place on-site at the practitioner's place of work. This is because it is important to assess a practitioner's practice within his or her own practice setting. Without limitation, the competence review may include any one or all of the following:
- (a) a practice visit
  - (b) interviews with the practitioner under review
  - (c) interviews with colleagues and/or other relevant individuals (including colleagues, supervisors, peers, and under limited circumstances, patients)
  - (d) observation in a clinical setting
  - (e) clinical file reviews
  - (f) a review of continuing professional development records
- 7.3 These activities are not exhaustive and the CRC will have discretion to use any other methods it considers appropriate to undertake the competence review, after consultation with the Board.
- 7.4 The practitioner under review will be given an opportunity to put any information before the CRC, including written statements or relevant documentation.

- 7.5 The practitioner under review is entitled to have a support person present during the review. The role of the support person is to focus on supporting the practitioner under review. While the support person may ask questions about the review process, it is not his or her role to answer questions on behalf of the practitioner under review or to intrude upon the review process. The support person is required to abide by any reasonable rules set by the CRC.

## **8. Written report from CRC**

- 8.1 The CRC will prepare a written report for the Board that will, among other things, identify the scope of the competence review, the domains of competence that were assessed, the assessment tools used, and the CRC's opinion on whether or not the practitioner's practice meets the required standard of competence. The CRC will set out its reasons for its opinion.
- 8.2 If the CRC's opinion is that the practitioner *does* meet the required standard of competence, the Board will consider this opinion, along with any comment from the practitioner, at its next meeting. The Board will then make a final decision, taking into account all information in the Board's possession, on whether the practitioner does meet the required standard of competence and will notify the practitioner of its decision accordingly.
- 8.3 If the CRC's opinion is that the practitioner *does not* meet the required standard of competence, the report is to specify the particular skill area or areas in which the practitioner is deficient, and should suggest how the deficiency/deficiencies may be overcome. The report may also include any other general recommendations that would be of assistance to the practitioner in maintaining his or her competence.
- 8.4 The CRC's draft report will be provided to the Board's professional standards advisor for review, to ensure accuracy with Board standards, statements and guideline documents.
- 8.5 The CRC's draft report will then be provided to the practitioner under review for comment before it is finalised. The CRC will consider any comments received on the draft report before it is finalised and provided to the Board.

**NOTE:** *while the CRC is asked to comment on whether the practitioner meets the required standard of competence, ultimately this is a decision for the Board (or the PSC under delegation).*

## **9. Following the competence review**

- 9.1 If, after conducting a competence review, the Board has reason to believe that a health practitioner fails to meet the required standard of competence it must make one or more of the orders set out at section 38 HPCA Act.
- 9.2 In making orders under section 38 the Board will consider the particular circumstances of the practitioner in question including, without limitation, any

identified deficiencies in the practitioner's practice. The order(s) imposed under section 38 of the HPCA Act will be the orders that are, in the Board's opinion, best suited to assist the practitioner to improve his or her competence to the required standard while also ensuring that the health and safety of the public is protected.

9.3 Commonly, the Board will require practitioners to complete a competence programme comprising:

- (a) Competency objectives to be met, usually in direct alignment with areas of the practitioner's practice that the CRC has identified as deficient.
- (b) Suggestions as to how the practitioner, and a Board-appointed supervisor, may go about meeting the listed objectives.
- (c) The outcome expected of each objective by the Board.
- (d) A follow-up competence review to examine whether the identified deficiencies have been remedied and the practitioner is now practising at the required standard of competence.

9.4 However, in every case where the Board is making orders under section 38 it will consider whether the imposition of one or more conditions is necessary to ensure that there is appropriate monitoring, guidance, or assistance to return the practitioner to the required standard of competence without posing a risk of harm to the public. In making a decision about imposing conditions under section 38(1)(b) the Board will maintain a focus on protecting the health and safety of the public. It will also consider, without limitation:

- (a) that any condition must be one that the Board considers is necessary to achieve the purpose of improving competence and protecting the health and safety of the public
- (b) the fact that conditions are a matter of public record. This would enable members of the public to make an informed choice about their treatment provider, but may also impact on employment prospects and/or rehabilitation of the practitioner
- (c) the extent to which any other orders under section 38 are able to adequately address the areas of competence that require improvement, while also protecting the health and safety of the public

9.5 Without limitation, the types of condition that may be imposed include:

- (a) a condition that the practitioner practise subject to the supervision of an approved supervisor
- (b) a condition that the practitioner practise with the direct oversight of an approved practitioner

- (c) a condition that the practitioner not perform stated tasks, or performs stated tasks only in stated circumstances
- (d) a condition that the practitioner practise only in a stated capacity (e.g. as the employee of a stated person)
- (e) any condition that the Board considers necessary to protect the health and safety of the public

**NOTE:** *There is a statutory right of appeal against a decision to impose conditions on a practitioner's scope of practice<sup>4</sup>.*

## 10. Interim orders

- 10.1 Under section 39 of the HPCA Act, the Board may make interim orders if a practitioner has been or is to be reviewed under section 36 and the Board has reason to believe that the practitioner may pose of risk of **serious** harm by practising below the required standard of competence. The interim orders available to the Board include suspension of a practitioner's practising certificate or imposing conditions.
- 10.2 Information about any possible risk of serious harm will be sought as part of initial inquiries into the practitioner's competence under section 36(1) of the HPCA Act.
- 10.3 In every case where a practitioner is required to undergo a competence review the Board will consider whether interim orders are necessary under section 39 to protect the health and safety of the public.
- 10.4 Before considering making an interim order the Board must be satisfied that:
- (a) the practitioner has been or is to be reviewed under section 36 of the HPCA Act; and
  - (b) there are reasonable grounds for believing that the practitioner poses a risk of serious harm to the public by practising below the required standard of competence.
- 10.5 The first requirement is a matter of fact, but it is important that the Board has made a decision to require a practitioner to undergo a competence review *before* it turns its mind to interim orders under section 39 of the HPCA Act.
- 10.6 Having reasonable grounds for believing that there is a risk of serious harm requires the Board to have regard to the information before it, and to base its decisions on relevant information and not speculation. In the context of interim orders it is not necessary to await the outcome of the competence review in order to have

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<sup>4</sup> Section 106(1)(f); see also the obligation at section 107 of the HPCA Act to notify the practitioner of appeal rights

reasonable grounds for a belief. The question is whether the Board has adequate information to fairly conclude that there are reasonable grounds for the belief.

- 10.7 In making a decision about an interim order the Board will maintain a focus on protecting the health and safety of the public. It will also consider, without limitation:
- (a) the information that it holds at that time about the practitioner's competence and/or the concerns about the practitioner's competence;
  - (b) any information relevant to whether the practitioner poses a risk of serious harm, including:
    - (i) whether a patient has been or may be seriously harmed by the practitioner's ongoing practice;
    - (ii) whether the practitioner may pose a threat to more than one patient such that, collectively, the risk of harm is considered serious.
  - (c) any information about whether the possible risk of serious harm is, or can be, managed in any other way, including:
    - (i) whether the practitioner is currently working, or intending to work;
    - (ii) the practitioner's practice environment, including whether the practitioner is in sole practice, group practice, an employee, or a locum, and what (if any) support is available in the practice environment (such as the availability or assistance of a trusted professional peer); and
    - (iii) the practitioner's obligations and/or responsibilities in the practice environment (for example, case load, supervision of others, practice management etc.).
- 10.8 The Board will only make an order for interim suspension of a practitioner's practising certificate where it is satisfied that the imposition of conditions is insufficient to protect the health and safety of the public.
- 10.9 The Board will ensure that it follows the statutory process under section 39(3) of the HPCA Act before making an interim order<sup>5</sup>.
- 10.10 The Board may reconsider making interim orders if it receives information that raises concerns about the safety of the practitioner's practice before or during a competence review.
- 10.11 The Board will ensure that the CRC is aware that it must keep the Board informed of any concerns about the safety of a practitioner's practice before or during a competence review.

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<sup>5</sup> Section 39(3) of the HPCA Act



**NOTE:** An interim order ceases to have effect on completion of the competence review, or on the attainment of a pass in any examination or assessment ordered under section 38(1)(c) of the HPCA Act<sup>6</sup>. There is a statutory right of appeal against any decision to suspend a practitioner's practising certificate or to include conditions on a practitioner's scope of practice<sup>7</sup>.

## **11. Interim suspension following a competence review**

- 11.1 Subject to the following, if after conducting a competence review the Board has serious concerns about the practitioner's practice of the profession it may propose interim suspension of the practitioner's practising certificate under section 39 of the HPCA Act.
- 11.2 Before considering making an interim order the Board must be satisfied that:
- (a) the practitioner has been reviewed under section 36 of the HPCA Act; and
  - (b) there are reasonable grounds for believing that the practitioner poses a risk of serious harm to the public by practising below the required standard of competence; and
  - (c) the Board has made an order under section 38(1)(c) of the HPCA Act requiring the practitioner to sit an examination or to undertake a specified assessment.
- 11.3 Before making an interim order the Board must have reasonable grounds for believing that the practitioner may pose a risk of serious harm by practising below the required standard of competence, and it must be satisfied that the imposition of conditions would be insufficient to protect the health and safety of the public.
- 11.4 The Board will have regard to the guidance on interim orders set out above.

*Approved by the Board: February 2015*  
*Date reviewed: August 2018*  
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<sup>6</sup> Section 39(5) of the HPCA Act

<sup>7</sup> Section 106(1)(d) and (f); see also the obligations under section 107 of the HPCA Act to notify the practitioner of appeal rights