Managing Complaints and Concerns about Clinicians

Summary This Policy Directive provides a standard approach for the management of serious complaints and concerns about clinicians working in NSW Health. This Policy and its Procedures are to be used in conjunction with the applicable Policy Directives' provisions relevant to the subject matter of the complaint or concern.

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Personnel/Workforce - Conduct and ethics, Industrial and Employee Relations

Applies to Public Health Units, Local Health Districts, Board Governed Statutory Health Corporations, Chief Executive Governed Statutory Health Corporations, Specialty Network Governed Statutory Health Corporations, Affiliated Health Organisations, NSW Health Pathology, Public Health System Support Division, Cancer Institute, Government Medical Officers, Community Health Centres, NSW Ambulance Service, Dental Schools and Clinics, Public Hospitals

Distributed to Ministry of Health, Public Health System, Divisions of General Practice, Government Medical Officers, NSW Ambulance Service, Environmental Health Officers of Local Councils, Health Associations Unions, Tertiary Education Institutes

Audience Clinical staff, All managers, Workforce, Clinical Governance, Professional standards units, Audit

Secretary, NSW Health

This Policy Directive may be varied, withdrawn or replaced at any time. Compliance with this directive is mandatory for NSW Health and is a condition of subsidy for public health organisations.

POLICY STATEMENT

MANAGING COMPLAINTS AND CONCERNS ABOUT CLINICIANS

PURPOSE

This Policy Directive provides a standard approach for the management of serious complaints and concerns about clinicians working in NSW Health. This Policy and its Procedures are to be used in conjunction with the applicable Policy Directives' provisions relevant to the subject matter of the complaint or concern.

A serious complaint or concern is one that is assessed as alleged misconduct or alleged unsatisfactory performance:

- requiring administrative action against the clinician to manage risks to patient or staff safety pending any findings about the complaint or concern, and/or
- notifications to external agencies, and/or
- a disciplinary response if it were to be substantiated.

This includes cases where the clinician has resigned or stopped working in NSW Health after receipt of the concern or complaint, but had they remained, administrative action, external notifications or a disciplinary response would have been required.

This Policy Directive applies to all health practitioners or health service providers working in NSW Health (whether or not the person is registered or required to be registered under the *Health Practitioner Regulation National Law (NSW)*). This includes clinicians employed, contracted, paid under a fee for service arrangement, on an honorary appointment, engaged under some other arrangement, or as a student on placement.

There is further guidance in managing complaints and concerns in non-mandatory Information Sheets, including flowcharts, checklists and templates, on the NSW Health intranet site.

MANDATORY REQUIREMENTS

The protection and ongoing safety of NSW Health's patients, clients and staff is of primary consideration when managing complaints and concerns about clinicians.

Complaints and concerns must be treated seriously and an initial review must take place without delay to identify risks and the appropriate course of action.

NSW Health organisations must have local procedures for managing complaints and concerns with clear reporting lines, responsibilities and communication requirements that include:

- early notifications to relevant Senior Executives, such as a
    - Director of Clinical Governance or delegate, where there are clinical practice and patient safety concerns and consideration of a notification to AHPRA and/or relevant professional Council, and/or
    - Director of Workforce or delegate, where there is alleged misconduct and administrative action to manage risks or consideration of disciplinary action.

- a panel that includes representatives from the workforce directorate and from the clinical governance area to oversee the governance of complaints or concerns
- where required under the NSW Health policy on Incident Management, notification in the NSW Health Incident Management System for reporting and analysing data
- a process for identifying and sharing potential improvements to practices or systems from information obtained through the management of complaints and concerns

Any risks must be identified, documented, managed and regularly reviewed.

A clinician who is the subject of the complaint or concern must be given adequate opportunity to respond to the concerns, adverse findings and proposed disciplinary action prior to any final decisions being made. They must also be afforded the right to a support person being present at any interviews. Other support may also need to be offered to all affected persons, where appropriate.

Any findings made must be based on relevant available information that is established 'on the balance of probabilities'.

Any action taken/decisions made following misconduct/unsatisfactory performance findings must be proportionate to the nature and seriousness of the findings, and after consideration of any extenuating circumstances, previous work performance and history, and any identified ongoing risks.

Those involved have the right to confidentiality and the responsibility for maintaining confidentiality, subject to the overriding need to be able to undertake any inquiries, investigation or action necessary under this and other relevant Policy Directives.

Any required notifications must be made without delay in accordance with the relevant statutory and/or policy provisions.

A notification to an external agency does not negate the requirement for the NSW Health organisation to complete its own inquiries, make findings and determine any appropriate disciplinary or other action.

Appropriate records of all stages of the process (including the initial review and any investigation) and outcomes must be kept and stored securely.

IMPLEMENTATION

The following have key responsibilities in relation to this Policy Directive:

Chief Executives are required to ensure there is compliance with this Policy Directive.

Directors of Clinical Governance/Directors of Workforce (or equivalent) are required to ensure the systems for managing complaints or concerns function effectively in accordance with this Policy Directive.

All staff are required to identify and report concerns about clinicians whose health, conduct or performance is a potential risk to patient or staff safety.

REVISION HISTORY

Version	Approved by	Amendment notes
September 2018 (PD2018_032)	Deputy Secretary, People Culture and Governance	Incorporates the previous Guidelines. Provides consistency and alignment with Policies on Managing Misconduct and Managing for Performance. Clarifies the threshold for matters to be managed under this Policy Directive, their notification requirements and investigation outcomes.
January 2006 (PD2006_007) (GL2006_002)	Director General, NSW Health	New Policy Directive and Guidelines.

ATTACHMENTS

1. Managing Complaints and Concerns about Clinicians: Procedures

Managing Complaints and Concerns about Clinicians

NSW GOVERNMENT Health

PROCEDURES

Issue date: September-2018

PD2018_032

CONTENTS

1 BACKGROUND

1.1 About this document

Complaints and concerns about clinicians must be managed in accordance with the relevant NSW Health Policy Directive(s) and associated local procedures. This Policy Directive sets out the mandatory requirements for managing **serious** complaints and concerns involving clinicians working in NSW Health.

This Policy Directive is only applicable to those complaints or concerns that are assessed as alleged misconduct or alleged unsatisfactory performance requiring:

- administrative action against the clinician to manage risks to patient or staff safety pending any findings in relation to the complaint or concern and/or
- notifications to external agencies and/or
- a disciplinary response if substantiated.

This includes cases where the clinician has resigned or stopped working in NSW Health after receipt of the concern or complaint, but had they remained, administrative action or a disciplinary response would have been required.

Complaints or concerns requiring action under this Policy Directive include:

- performance related issues (including an incident or incidents of substandard clinical care, poor or adverse clinical outcomes, including higher than expected complication rates, higher than expected mortality rates, a single catastrophic clinical error or a series of significant clinical errors, other competency concerns or conduct that suggests the knowledge, skills or judgment of the clinician are significantly below the standard expected of a person in their position).
- misconduct issues as defined in the NSW Health policy on managing misconduct (this may also including operating outside of their agreed scope of practice or other local protocols).

This Policy Directive and Procedures should be used in conjunction with other NSW Health policies such as those on managing misconduct, managing for performance, incident management, open disclosure and complaint management.

Information Sheets have been developed to provide guidance and support in meeting the requirements of this Policy Directive. These Information Sheets are not mandatory. They are available on the Ministry of Health's Intranet site at http://internal.health.nsw.gov.au/jobs/conduct/index-conduct.html

A summary flowchart of the overall process for managing serious complaints and concerns is provided at Information Sheet 1.

1.2 Complaints and concerns not covered by this Policy Directive

Less serious matters such as low level conduct, behaviour, grievance or performance issues should not be managed under this Policy Directive. This includes complaints or concerns where the identified risks do not require administrative action to manage patient

or staff safety, no external notifications are required and/or there is unlikely to be disciplinary action.

Less serious matters would usually be managed by the clinician's manager or supervisor in line with local performance, conduct or grievance management arrangements, or other local alternative dispute resolution arrangements as applicable.

Where a complaint or concern relates only to alleged or suspected physical or mental impairment, disability, condition or disorder (including substance abuse or dependence), including where self-disclosed by the clinician, it must be managed under the Department of Premier and Cabinet's policies for managing non work related injuries and illnesses and alcohol and other drugs. These policies are available on the website of the NSW Public Service Commission.

Where impairment or alleged impairment is identified as a result of alleged misconduct or unsatisfactory performance, it may be appropriate for the NSW Health organisation to cease its actions under this Policy Directive and to instead manage the matter under the Department of Premier and Cabinet's policies.

In all cases, the ongoing safety of patients is the paramount consideration. Any risks arising from an alleged impairment are required to be assessed and managed. At any stage where there is reasonable belief that the clinician is placing the public at risk of substantial harm in the practice of their profession because the clinician has impairment, a notification must be made to AHPRA.

1.3 Key definitions

AHPRA is the Australian Health Practitioner Regulation Agency. AHPRA is responsible for the National Registration and Accreditation Scheme across Australia.

Clinician refers to any health practitioner or health service provider (whether or not the person is registered or required to be registered under the Health Practitioner Regulation National Law (NSW)) working in NSW Health, whether employed, contracted, paid under a fee for service arrangement, on an honorary appointment or engaged under some other arrangement, including as a student.

Health services as is defined under the *Health Care Complaints Act 1993*

Impairment is defined under the Health Practitioner Regulation National Law (NSW) as a physical or mental impairment, disability, condition or disorder (including substance abuse or dependence) that detrimentally affects or is likely to detrimentally affect the clinician's capacity to practise their profession or for a student, their capacity to undertake clinical training as part of the approved program of study in which the student is enrolled or arranged by an education provider.

Incident is any unplanned event resulting in, or with the potential for, injury, damage or loss; this includes a near miss. An incident may be 'corporate' or 'clinical' and includes events or alleged conduct outside of the workplace, where the alleged event or conduct is relevant to the role of the clinician and there is an associated potential for, or risk of, loss, damage or harm within the workplace.

NSW Health organisation - for the purposes of this Policy Directive, is any public health organisation as defined under the *Health Services Act 1997*, the Ambulance Service of NSW, Health Infrastructure, HealthShare NSW, NSW Health Pathology, any other

administrative unit of the Health Administration Corporation, and Albury-Wodonga Health in respect of staff who are employed in the NSW Health Service.

Patient Safety Incident is any unplanned or unintended event or circumstance which could have resulted, or did result in harm to a patient. This includes harm from an outcome of an illness or its treatment that did not meet the patient's or the clinician's expectation for improvement or cure. Refer to the NSW Health policy on open disclosure.

Relevant professional council refers to a Council established under Section 41B of the *Health Practitioner Regulation National Law (NSW)*

1.4 Responsibilities for managing complaints and concerns about clinicians

Information from complaints and concerns is an important component in improving patient safety and clinical care across NSW Health.

NSW Health organisations must be able to capture and report on complaints and concerns to identify trends, and changes necessary to system or practice issues to improve patient safety and clinical care.

Each NSW Health organisation must have procedures for managing complaints and concerns about clinicians under this Policy Directive. This includes identifying the responsibilities of the various positions involved in their management. Local procedures must include early internal notifications:

- to a senior clinical executive, such as a Director of Clinical Governance/their equivalent or delegate, of any complaints or concerns that relate to clinical practice, clinical performance or clinical outcomes specifically where there are concerns about patient safety or consideration of an AHPRA/relevant professional Council or Health Care Complaints Commission notification.
- to a senior workforce executive, such as a Director of Workforce/their equivalent or delegate, of complaints or concerns that involve misconduct specifically where there is consideration of administrative or disciplinary action to manage risks.
- in the NSW Incident Management System in accordance with the requirements of the NSW Health Policy on incident management.

NSW Health organisations must have a panel of senior staff to oversee the governance of complaints and concerns about clinicians. This panel must include representatives from the functional area of the Director of Workforce or equivalent, and from the functional area of the Director of Clinical Governance or equivalent.

2 INITIAL REVIEW AND RESPONSE

Complaints or concerns about clinicians must be treated seriously with the health and safety of patients being the primary consideration.

To determine the most appropriate action and process to follow, there should always be an initial review of the complaint or concern. This initial review must take place without

delay to determine further action. The initial review is done on the material and details available at the time and prior to information being sought from the clinician.

2.1 Receipt of a complaint or concern

Complaints and concerns about clinicians may be identified via a number of mechanisms including:

- from a patient, a family member of a patient, a person external to the NSW Health system or anonymously.
- from a manager or colleague's observations, including during normal performance or peer review processes of from a review of clinical outcomes or patient records.
- from information received from another NSW Health organisation, including from the NSW Ministry of Health (for example, from the Pharmaceutical Services Unit).
- in a notification to the Chief Executive of suspected professional misconduct, unsatisfactory professional conduct, unsatisfactory performance or possible impairment from a Root Cause Analysis investigation (refer to the current NSW Health policy on incident management).
- from information provided by an external agency (including from the Coroner, Health Care Complaints Commission, Police or Community Services, etc).
- self-disclosure by the clinician.

A complaint or concern may be received verbally or in writing. All verbal complaints or concerns must be documented by the person receiving the information if the person raising the complaint or concern is unable or unwilling to do so.

2.2 Considerations in the initial review

The initial assessment seeks to collate the available information and clarify the specifics of the complaint or concern to:

- identify any immediate risks to the safety and welfare of any alleged victims, patients, visitors, staff, complainant, the clinician, or any other parties that need to be managed immediately.
- determine, as far as possible, the nature and seriousness of the matter. This includes reviewing the available information to identify:
  - what policies, guidelines, standards or protocols may have been, or have been, allegedly breached or not met
  - if patients or other persons have been, may have been or could be affected or harmed
  - any internal and external notifications required (refer to Section 4 and Information Sheet 6)
  - if an investigation is required under this Policy Directive or if the matter needs to be managed under another policy (refer to Section 2.5)

  - if there appears to be evidence of impairment
  - if further clarification is needed to determine the nature and seriousness of the matter.
- consider the timing of the advice to the clinician.
- identify all relevant NSW Health Policy Directives and their process requirements (refer to Section 2.5 and Information Sheet 5) and who needs to manage it.
- identify who is responsible for ensuring appropriate and regular communication with the clinician, the complainant and other affected parties.

2.3 Reviewing a complaint or concern raised anonymously

Anonymous complaints or concerns may still need to be managed in accordance with this or any other relevant policy.

Action taken will depend on the level of detail provided, the ability to obtain further detail and the nature and seriousness of the complaint or concern. Where there is insufficient information or details to make any enquiries or take any action, this should be noted and the complaint or concern filed in a secure and confidential place.

When assessing action to take in response to an anonymous complaint or concern, the following factors should be considered:

- any details that can be confirmed or refuted.
- contact with any external agency to confirm if they have any information in relation to the complaint or concern.
- if the complainant is able to be identified and contacted if further clarification is required.

2.4 Reviewing non work related complaints or concerns about clinicians

A complaint or concern about non-work related conduct or historical conduct still needs to be managed in accordance with this and/or any relevant NSW Health policy where:

- the complaint or concern involves a child related allegation, charge or conviction.
- the clinician has been charged with or convicted or found guilty of a serious offence, such as a sexual, violence or drug related offence.
- other information is received which indicates risk to patient or staff safety, to NSW Health property or to the reputation of NSW Health or is otherwise relevant to their work role.

2.5 Reviewing a complaint or concern involving an alleged assault

Where a complaint or concern involves an alleged physical or sexual assault by a clinician, immediate advice should always be sought from people with expertise in this area, such as from the NSW Health Sexual Assault Services in the case of alleged sexual assault. The relevant Director of Workforce, or equivalent, must always be notified.

A notification to the NSW Police must always be made, and the alleged victim given appropriate support to make their own notification or complaint to the Police.

In these circumstances, advice to the clinician should usually be delayed until after consultation with the NSW Police.

For further information, refer to the NSW Health policies on managing misconduct, sexual safety - responsibilities and minimum requirements for mental health services, child related allegations, charges and convictions against NSW Health staff and on sexual assault services.

2.6 Identifying which Policy Directives apply

All complaints and concerns about clinicians must be managed under the relevant NSW Health policies and associated local procedures as determined by the nature and seriousness of the matter.

The initial review should identify if the complaint or concern meets the threshold for being managed under this Policy Directive and/or if other NSW Health policies need to be consulted:

- the NSW Health policy on incident management must be consulted and adhered to:
  - in determining whether a Root Cause Analysis response is required
  - in relation to any other provisions, including any reporting requirements in IMS and to the Ministry of Health.
- for patient safety incidents, refer to the NSW Health policy on open disclosure.
- for performance issues, local procedures consistent with the requirements of Part 7 of the *Government Sector Employment (General) Rules 2014*, Section 68 of the Government Sector Employment Act 2013, the NSW Public Sector Performance Development Framework and NSW Health policies on managing for performance and patient safety and clinical quality programs must be followed:
  - performance management systems should include procedures and/or guidance for front line managers on managing low risk clinical practice and performance issues that are not required to be managed under this Policy Directive
- for alleged misconduct, the NSW Health policy on managing misconduct must be followed, including:
  - notifying the NSW Police if there is alleged criminal conduct
  - consulting the NSW Health policy on the service check register
  - complying with the NSW Health policy on medication handling in the case of alleged theft or misappropriation of medication, prescription pads, or alleged drug register tampering.
- for child related allegations, charges or convictions (where the matter relates to an under 18 year old) the NSW Health policies on managing child related allegations

charges and convictions in conjunction with managing misconduct must be followed:

  - this includes reporting to the Child Protection Helpline concerns that a child or young person or a class of children is at risk of significant harm.

- for complaints or concerns about alleged misuse of NSW Health devices or communication systems, the NSW Health policies on managing misuse of NSW Health communication systems and misconduct must be followed.
- for bullying allegations, the NSW Health policy on bullying must be followed in conjunction with the NSW Health policy on managing misconduct.
- for complaints or concerns that include information about potential impairment in addition to alleged misconduct or unsatisfactory performance, the following NSW Department of Premier and Cabinet documents should be consulted and adhered to as applicable:
  - "Procedures for Managing Non-Work Related Injuries or Health Conditions
  - "Alcohol and Other Drugs" Policy and Guidelines
- for complaints about clinicians from consumers or patients, refer to the NSW Health policy on complaint management .

For further information about relevant policies, refer to Information Sheet 5.

2.7 Determining further action

The ongoing management of a complaint or concern about a clinician will be governed by the relevant Policy Directive and associated local procedures.

Where the initial review indicates that the complaint or concern does not meet the threshold for management under this Policy Directive (refer to Section 1.1 and 1.2), this outcome is to be documented. The provisions of this Policy Directive are no longer applicable and any further action, appropriate to the circumstances, should be taken in accordance with the relevant policies or local procedures.

The involvement of an external agency, such as the NSW Police or a relevant professional council, does not detract from the NSW Heath organisation's responsibilities as the employer to manage risks, complete its own internal investigation or enquiries, make sound findings and decisions about the clinician's ongoing role in the workplace and to identify any clinical safety or quality issues.

When an external agency is involved in a matter, the NSW Health organisation must liaise with the external agency to ensure that, as far as possible, the NSW Health organisation's actions do not compromise or adversely impact an external investigation. In certain circumstances, this may result in a decision to defer the investigation/enquiries by the NSW Health organisations pending the resolution of criminal or other proceedings. In these circumstances, the NSW Health organisation must still undertake a risk assessment and manage any risk.

An investigation (refer to Section 5) in accordance with this Policy Directive, should only occur where there is uncertainty about the relevant facts (Information Sheet 4). Where the facts are clear and uncontested, findings arising from the initial assessment can be

provided to the decision-maker, who must either accept or reject them, and then decide what action should be taken in response to the findings.

Refer to the NSW Health policies on managing misconduct and child related allegations charges and convictions as appropriate for liaising with the NSW Police or Family and Community Services.

2.8 Advising the clinician

As soon as it is deemed safe and appropriate to do so, the clinician should be informed that an issue has been identified. They should be told about the investigation process and access to support services, such as the Employee Assistance Program. Any verbal advice must be confirmed in writing. Any decision to delay notifying the clinician should be documented.

The timing of advice to the clinician should consider factors such as:

- is immediate risk management action required? If it is, this will necessitate advice being provided to the clinician at the time of the action.
- if the complaint or concern involves alleged criminal conduct (such as an assault) or a child related matter, has a notification been made to the Child Protection Helpline or the NSW Police? If no notification has been made, does this need to be done before advice is provided to the clinician? Refer to the NSW Health policies on misconduct and child related allegations.
- any particular risks, or other information suggesting the timing of the advice needs to be delayed. For example, a statement has not been obtained from the affected patient or alleged victim, further clarification of the complaint or concern is required or other potential evidence needs to be protected before advising the clinician.
- a request from an external agency, such as the Police or Family and Community Services, to delay notifying the clinician. Refer to the NSW Health policies on child related allegations and misconduct for action in these circumstances.
    - if an external agency has requested delaying the advice to the clinician, and there are identified patient safety risks requiring risk management action, this should be conveyed to the external agency, along with a timeframe for when the risk management action needs to start and the associated advice to be provided to the clinician.

Refer to Information Sheet 7 for further guidance on the timing of advice to the clinician.

2.9 What happens if the clinician resigns or leaves prior to the completion of the investigation or enquiries?

The process must still be completed, including making findings and decisions about any action that would have been taken had the clinician still been in their position.

The process must still be fair to the clinician, including providing them with an opportunity to respond to the concerns, any proposed adverse findings and action that would have been taken had they still been in their role. They must also be advised of any final decisions made in response to the complaint or concern.

The NSW Health organisation must still complete any notifications, as required, including to AHPRA/relevant professional council, and the service check register.

3 MANAGING RISKS

A risk assessment must be undertaken, documented and a risk management strategy put in place. The purpose of a risk assessment is not to determine if complaints or concerns are substantiated but to consider any risks requiring action (Information Sheet 8). The need to continue with any immediate risk response put in place at the time of the initial assessment should be reviewed as part of the risk assessment.

A risk assessment template is available on the NSW Health Intranet (Information Sheet 9). The risk assessment template sets out the key factors to be considered in the risk assessment as well as providing guidance on decision making around risk management action.

This includes considering any risks to past patients as well as current or future patients, activating the NSW Health lookback policy.

Any risk management action must be reviewed whenever new information, relevant to the risk management strategy in place, is received or at minimum every 30 days.

In addition to any risk management action in relation to the clinician, the risk assessment should consider:

- how communications to the clinician, affected staff, patients or other parties need to be managed, including the timing of any such communications:
  - for 'patient safety incidents' refer to the NSW Health policy on open disclosure
  - where the alleged conduct involves an under 18 year old or is alleged criminal conduct, refer to the NSW Health policies on managing child related allegations, charges or convictions and/or misconduct.
- the offer and availability of appropriate support to the clinician and to any affected staff, patients or other parties. Appropriate support includes providing the details of the Employee Assistance Program to the clinician and any affected staff and consideration of any referrals for support for patients or other affected parties.
- Any notification requirements – see Section 4.

3.1 Providing advice to the clinician about risk management action

If following a risk assessment, a decision is made that administrative action (including suspension) is required, the clinician must be advised of the decision, the reason for it, and for how long the action will apply.

Advice should be provided in writing at the time the decision is implemented and if not then, it must be within 14 days of the date of making the decision. In the case of alleged misconduct, the advice should also include any requirement for a record in the NSW Health service check register.

At this time, the clinician should also be provided with information about support services, any review options, an appropriate contact person and advice about the investigation process.

3.2 Requests for review of risk management measures

A clinician subject to risk management action may request a review of the risk management measures by application in writing to the relevant manager or person who conducted the risk assessment, on the grounds that:

- The risks have not been identified or assessed appropriately or
- The risks have changed or no longer exist.

3.3 Options for managing risk

Action to manage risk arising from a risk assessment must be specific and proportionate to the risks identified.

The NSW Health organisation must be able to demonstrate that a decision about administrative action, (including suspension) against a clinician or visiting practitioner to manage risk while a matter is being finalised, is based on a documented and robust risk assessment.

The clinician's position must not be permanently filled while that staff member is suspended or on alternative work arrangements as a risk management measure.

3.3.1 Alternative work arrangements

Where risk management action is necessary, consideration should be given to appropriate and available administrative action, such as interim alternative work arrangements.

Interim alternative work arrangements may include suspending or limiting the clinician's rights to provide specific clinical services, procedures or other interventions. This may involve review by a Credentials (Clinical Privileges) Subcommittee. Refer to the Policy on visiting practitioners and staff specialists' delineation of clinical privileges as required.

3.3.2 Suspension

Where the decision is to suspend a clinician, the risk assessment must show that the potential risk posed by the clinician cannot be satisfactorily managed in any other way.

Periods of suspension should be for as short a period as possible. However, as the length of suspensions may vary they must be reviewed at least every 30 days.

Clinicians should be provided with support as appropriate during any period of suspension.

Section 120A (1) of the *Health Service Act 1997* sets out additional circumstances where a clinician may be suspended including where:

- the clinician's registration as a health practitioner is suspended or conditions imposed which prohibit them from providing some or all of the services.
- the HCCC places an interim prohibition order or conditions which prohibit the clinician from providing some or all of the services.

- the clinician is charged with having committed a serious criminal offence (that is, one that attracts a penalty of five years or more imprisonment).

3.3.3 Suspension without pay

Where a clinician is suspended, the payment of salary at the applicable ordinary time rate (ie without shift penalties and other allowances) should usually continue.

Suspension of an employee may be without pay only in the circumstances set out under Section 120A (1) of the Health Services Act 1997 if the Secretary of the Ministry of Health or the Chief Executive of the relevant NSW Health organisation so directs.

A clinician who is suspended without pay must be allowed to access any paid annual or long service leave entitlements accrued prior to the suspension. While accessing such leave entitlements, their employment remains suspended.

For information on salary that has been withheld during suspension without pay, including reimbursement of shift penalties and other allowances, refer to the NSW Health policy on managing misconduct.

3.3.4 Suspension of visiting practitioners

The Visiting Medical Officer Determinations provide that an organisation may suspend the appointment of a visiting practitioner where it is considered necessary in the interests of the hospital to which the visiting practitioner is appointed. The suspension of any visiting practitioner is without pay.

In addition to any internal review processes, Sections 105 and 106, of the Health Services Act 1997 provide for a statutory appeal mechanism for visiting practitioners whose appointment is suspended. Refer to Sections 105 and 106 of the Act for further information.

3.4 Clinicians working elsewhere in NSW Health - sharing information

If the NSW Health organisation identifies that a clinician, subject of risk management action, is engaged elsewhere in NSW Health, they must advise the relevant other NSW Health organisations. This would usually be through the Director of Clinical Governance or Director of Workforce or equivalent. It must include sufficient information for a local risk assessment so that mitigating action can be taken in response to any risks the clinician may pose locally.

4 NOTIFICATIONS

Obligations to notify a complaint or concern about a clinician continue throughout the process. They should be reviewed at the start and at the end of the process as well as whenever relevant new information is received.

Refer to Information Sheet 6 for further information about notification requirements.

4.1 NSW Health internal notifications

NSW Health organisations are subject to a range of internal notification requirements:

- The relevant Senior Executive, such as the Director of Clinical Governance or their equivalent/delegate and/or Director of Workforce or their equivalent/delegate must be notified in accordance with this Policy Directive and as informed by local procedures as soon as is practical.
- The NSW Health organisation's Chief Executive or delegate must be notified in the case of high risk or serious matters, as determined by the relevant NSW Health Policy Directive and informed by local procedures:
    - Where clinician works in another NSW Health organisation, the other employing Chief Executive may also need to be notified.
    - The NSW Health Incident Management System as required under the NSW Health policy on incident management
    - The Service Check Register for alleged misconduct requiring administrative action pending any findings or substantiated misconduct requiring disciplinary or remedial action. Refer to the NSW Health policy on the service check register.
    - The NSW Ministry of Health may be required to be notified via a Reportable Incident Brief or an In-Brief (refer to the NSW Health policy on incident management)
    - Pharmaceutical Services Unit, Ministry of Health must be notified in the case of alleged theft or misappropriation of medication, prescription pads, or alleged drug register tampering, as required by the NSW Health policy on medication handling in NSW Public Health facilities.

4.2 External notifications

NSW Health organisations are subject to a range of external notification obligations:

- The NSW Police must be notified if there is alleged criminal conduct (refer to the NSW Health policy on managing misconduct).
- The Child Protection Helpline must be notified if there is a risk of significant harm relating to a child or a class of children (refer to the NSW Health policy on child protection).
- The NSW Ombudsman must be notified within 30 days of the NSW Health organisation receiving information about child related allegations, charges or convictions involving NSW Health staff (refer to NSW Health policy on child related allegations, charges and convictions).
- The Children's Guardian must be notified of findings of sexual misconduct committed against, with or in the presence of a child, or a serious physical assault of a child.
- AHPRA must be notified at any stage where there is a reasonable belief of notifiable conduct by a registered health practitioner. Notifiable conduct is defined in the *Health Practitioner Regulation National Law (NSW)* to mean:
    - practising their profession while intoxicated by alcohol or drugs

- engaged in sexual misconduct in connection with the practice of their profession
- placing the public at risk of substantial harm because of an impairment or
- placing the public at risk because of a significant departure from accepted professional standards.

Guidelines developed jointly by the National Boards provide direction for employers about the requirements for mandatory notifications under the National Law. These guidelines are available on the National Boards' websites.

- The relevant professional council must be notified at any stage that the Chief Executive of a health organisation suspects on reasonable grounds that the conduct of a NSW Health employee or visiting practitioner may constitute professional misconduct or unsatisfactory professional conduct as defined in the *Health Practitioner Regulation National Law (NSW).* This obligation arises under the Health Services Act 1997.
- Private hospitals where the clinician holds appointments may need to be provided with information.
  - Section 133C of the Health Services Act 1997 permits a public health organisation to share or exchange appointment information about a clinician with a private health facility licensee if the Public Health Organisation reasonably believes that the clinician practices at that facility and reasonably considers the disclosure of that information is necessary because it raises concerns about the safety of patients.
- Consideration may be given to making a complaint to the Health Care Complaints Commission (HCCC):
  - in respect of an unregistered Health Practitioner, if there is an alleged breach of the Code of Conduct for Unregistered Practitioners as contained in Schedule 3 of the Public Health Regulation 2012.
  - in other circumstances where the threshold has not been met for a mandatory notification to AHPRA or the relevant professional council, but the NSW Health organisation has concerns about risks to patient health or safety.

Refer to Information Sheets 6 and 16 for further information about the employers' reporting requirements to AHPRA and the professional councils.

This Policy Directive limits itself to employer notification responsibilities and does not cover the mandatory requirements for registered health practitioners to notify AHPRA of notifiable conduct of other registered health practitioners.

Health Practitioners should refer to AHPRA's website for further information about their individual notification responsibilities.

5 INVESTIGATION

5.1 The purpose of an investigation

The purpose of an investigation is to determine if, on the balance of probabilities:

- the alleged conduct, behaviour or unsatisfactory performance is substantiated and its impact on the clinician's ability to undertake the full responsibilities of their role.
- the substantiated conduct or unsatisfactory performance breached or did not meet expected standards, protocols, relevant policies or legislation.
- there are any extenuating circumstances or contributing factors that may need to be considered (for example, the unsatisfactory performance or misconduct is related to impairment or system or cultural issues within the facility or service).

An investigation precedes, and is separate from, any final decision by a decision-maker about findings and any requirement for further action (disciplinary or other).

An investigation need only occur following an initial review where there is uncertainty about the relevant facts. Even where no investigation is necessary, the decision-making process in Sections 6, 7 and 8 of this Policy Directive should be followed.

Before starting an investigation, its terms of reference should be clearly set out and agreed. The terms of reference establish the focus and set limits on the investigation. To be able to set the terms of reference, the key issues arising out of the complaint or concern should be first clarified and framed in terms of the alleged misconduct or performance issue.

Any investigation or management of a complaint or concern must be completed as expeditiously as possible without compromising procedural fairness, ideally within 12 weeks (60 working days). Where the completion of the process is delayed beyond 12 weeks or any timeframe previously advised, all key parties should be advised of this in writing.

If a matter has been referred to an external investigative or regulatory body, ongoing liaison with that body must occur to coordinate, as appropriate, the timing and conduct of any internal investigation. A referral to AHPRA and/or action by the Health Care Complaints Commission or a relevant professional council should not usually delay the completion of an internal investigation.

For alleged criminal or child related matters, refer to the NSW Health Policies on managing misconduct and child related allegations about liaising with the NSW Police and Family and Community Services.

A flow chart of the investigation process is provided at Information Sheet 10.

5.2 Selecting investigators

Investigators must have suitable skills and experience, including an understanding of the investigation process. They should be objective and impartial, and be seen as such. Any actual or reasonably perceived conflict of interests should be identified and managed.

For information on recognising and managing conflicts of interest, refer to the Ombudsman's fact sheet available on their website.

Where the complaint or concern relates to a clinical incident, clinical practice or issues relating to patient safety, consideration should be given to:

- the lead investigator being a senior clinician with expertise in the practice under question as well as a thorough understanding of this Policy Directive, and/or
- clinical input, as part of the investigation, from a suitably qualified and independent senior clinician with recognised specialty in the clinical practice under review. This may be to consider standards and practices in the context of current professional practice and role delineation of clinical services at the facility.

In most cases, an investigation can be conducted by someone internal to the NSW Health organisation supported by local HR, internal audit, clinical governance, or professional conduct and standards units, as necessary. Refer to the NSW Health policy on managing misconduct for further information regarding external investigators.

5.3 Evidence

Evidence may include site inspections, record reviews, clinical practice or indicator data, variation reports, incidents, complaints, performance data, electronic records, clinical reviews, rosters etc. This is in addition to interviews or statements from relevant parties, including from alleged victims, patients or their relatives.

Evidence considered may also need to include advice from an independent clinician with recognised specialty and authority in the clinical practice or data under review.

In certain cases, evidence may include consideration of whether another individual coming from the same professional group, possessing comparable qualifications and experience would have behaved in the same way in similar circumstances.

Where a complaint or concern indicates there may be commonly affected patients, the 'Lookback' process may need to be triggered. The current NSW Health lookback policy should be consulted.

5.4 Interviews

Before putting the complaint or concern to the clinician for response, the investigator should have reviewed all available evidence, including patient records, other electronic records, interviewed or taken statements from any complainants, alleged victims, witnesses or other parties as relevant.

Reasonable notice of an interview must be given in writing (usually 48 hours). All persons to be interviewed as part of the investigation must be advised that they may have a support person of their choosing present, and that the reasons for the interview and its content must remain confidential.

The support person does not represent the person being interviewed or advocate or make representations on their behalf.

Records of interviews should be taken and kept (Note that under the *Surveillance Devices Act 2007*, electronic / tape recordings can only be made with the agreement of all parties to the interview). Persons interviewed should be provided with a copy of a summary or record of interview for review and signature as soon as possible.

5.5 Providing the clinician with an opportunity to respond to the concerns

The investigator must give the clinician sufficient information about the complaint or concern to allow them to provide a considered response (Information Sheet 7).

Notice to the clinician should state the purpose of the interview and detail the substance of the complaint or concern sufficiently to allow them to provide an informed response. In clinical matters, this may involve providing them with an opportunity to sight relevant clinical documentation.

An investigator may decide to accept receipt of information in a written statement instead of, or in addition to, an interview, although an interview is usually preferable, particularly where additional detail is required or to explore issues in greater detail.

6 MAKING FINDINGS

Following enquiries or an investigation, the NSW Health organisation must make findings about whether:

- any aspects of the alleged conduct, performance or behaviour are substantiated.
- any substantiated conduct, performance or behaviour constitutes misconduct, unsatisfactory performance or something else.
- findings are required in respect of an external agency (such as the Ombudsman's office, Children Guardian, relevant professional council, AHPRA) and any associated reporting requirements.

For further information on making findings, refer to Information Sheet 11.

6.1 Standard of proof

Any adverse finding against a clinician through this process must be proved to the civil standard, that is, "on the balance of probabilities". Based on available evidence, it must be more probable than not that the conduct or unsatisfactory performance occurred.

Consistent with the "Briginshaw v Briginshaw principle", the more serious the conduct or unsatisfactory performance, and therefore the more serious the consequences for the clinician, the stronger the evidence must be to support an adverse finding.

In reaching a finding, information should be assessed in terms of its relevance to the alleged conduct or performance issue, its reliability, its consistency (over time, with other evidence, if it is more or less plausible) and whether it is corroborated or contradicted by other information. The weighting given to information should be documented as part of the investigation report.

6.2 Options for findings

After considering whether the actual alleged conduct or performance is substantiated, the type of finding will depend on the nature of the issue under review or investigation and the requirements of the relevant NSW Health policy:

- for alleged misconduct, the findings must be in accordance with the NSW Health Policy on managing misconduct.

- for child related allegations, charges or convictions, the findings must be in accordance with the NSW Health policy on child related allegations.
- for performance issues, the findings will relate to whether the clinician's performance, in relation to the issues under investigation, was unsatisfactory and/or identified potential gaps in their performance, skills or knowledge affecting their ability to perform the essential requirements of their role.

In all cases, it should be considered if:

- the findings could constitute possible unsatisfactory professional conduct, professional misconduct or notifiable conduct (including where underlying mental health issues, drug or alcohol dependency that may be related to, or have contributed to, the conduct are identified) requiring a notification to AHPRA or to the relevant professional council (refer to Section 4 and to Information Sheet 16).
- there are any mitigating practice or system issues and if they need to be addressed to minimise the risk of the conduct or practice reoccurring.
- there are any aggravating or mitigating factors.

6.3 Investigation findings and investigation report

Following an investigation or other inquiries, a report should be given to the decision maker with findings and the facts supporting them. Refer to Information Sheet 11.

The report should only contain information relevant to the conduct or performance under investigation or review. All supporting documentation should be available to be examined by the decision maker.

6.4 Findings where no investigation has taken place

In limited cases, where the initial review has determined that the facts are clear and uncontested, the findings arising out of the initial review should be set out together with the supporting facts in a report for the decision maker.

6.5 The role of the decision maker

The decision maker should not have any conflict of interest or bias involving the complaint or concern. They must act in an objective and impartial manner and have regard to procedural fairness requirements and risk management. For further information on recognising and managing conflicts of interest, refer to the Ombudsman's fact sheet available on their website.

The decision maker is not to be involved in the investigation. It is the role of the decision maker to:

- accept or reject the findings from the investigation or initial assessment, to ask the investigator to make further enquiries or otherwise to initiate further enquiries where they are concerned that more information is needed to support findings. Any decision to reject a finding must be documented.
- decide on action the NSW Health organisation should take in response to the findings.

- seek a response from the clinician before finalising adverse findings or a decision about disciplinary action.
- ensure the clinician is advised at the earliest opportunity of a non-substantiated finding.

6.6 Seeking a response from the clinician to proposed adverse findings

An adverse finding is one that is unfavourable to the clinician.

Where the decision maker is proposing to support an adverse finding against a clinician, the clinician must be advised and provided with an opportunity to provide any additional information or raise any concerns about the process or the proposed findings. This is even if the clinician has since left the NSW Health organisation.

The clinician has a right to be provided with relevant information that has been taken into consideration by the decision maker. The information should be sufficient to enable the clinician to understand fully the basis for the proposed adverse finding. It need not include all information in the possession of the decision maker, particularly where the material is not relevant to the findings or the interests of other members of staff, clinicians, patients or other parties need to be protected.

In certain circumstances (eg public interest disclosures, in respect of confidential information about third parties, or where there may be a potential risk to the wellbeing of the clinician or others) it may be appropriate to withhold some information. What information is withheld and for what reason should be recorded.

A response from the clinician should be required within a reasonable time period (usually two calendar weeks unless otherwise agreed).

Where the clinician's response provides additional information that has not been raised before and may materially affect the findings, the findings should be reviewed accordingly. In some instances further investigative action may need to take place.

7 MAKING DECISIONS ABOUT ACTION TO BE TAKEN

7.1 Considering an appropriate response to findings

The decision-maker must form a view of the appropriate outcome based on the material available. This must be completed even if the clinician has since left the organisation.

In deciding what outcome is appropriate the decision maker should consider:

- the protection and ongoing safety of NSW Health's patients and clients.
- the health, safety and well-being of NSW Health staff.
- the seriousness of the conduct or performance, including whether there was any harm or injury caused, or potential for harm or injury,
    - this includes consideration of whether it was a pattern of behaviour or an isolated incident

- if appropriate, whether another individual coming from the same professional group, possessing comparable qualifications and experience may have behaved in the same way in similar circumstances.
- the extent to which it constitutes a breach of the NSW Health code of conduct, any other NSW Health policy, any relevant legislation, registration standards or codes of practice.
- any penalties or restrictions prescribed by legislation or relevant policy directives (eg hand hygiene, and misuse of NSW Health communication systems).
- any action taken by external bodies in relation to the clinician.
- the clinician's length of service and previous work history, including the period of time since any similar previous conduct or performance issues:
  - the NSW Health organisation should check the NSW Health service check register for any previously substantiated misconduct matters
  - previous substantiated conduct is not a consideration when making findings about whether the current conduct occurred
  - information about similar previous substantiated conduct may be used to help determine the appropriate response to the current substantiated conduct. The relevance of previous substantiated conduct will depend on not only its similarity but other factors such as how serious and how recent it was and what action was taken in response.
- any factors that may have contributed to the clinician's behaviour or performance, such as an underlying health issue or impairment.
- any matters raised by the clinician about the findings or about the penalty or action that should be taken into account.
- the impact of the conduct or performance on the organisation and other staff.
- any other mitigating or aggravating circumstances, such as workplace cultural issues or identified contributory systemic issues or practices.

7.2 Seeking a response from the clinician about proposed disciplinary or remedial action

The clinician must be provided with an opportunity to respond to any proposed decision about disciplinary or remedial action before any final decision is made, even if they have already left the organisation.

This includes a recommendation or decision that the clinician's scope of practice or clinical privileges be reduced, either temporarily or permanently, after review by the Medical and Dental Appointments Advisory Committee, where applicable.

The response to proposed action may be sought at the same time as the response to proposed adverse findings. However, where the clinician's response affects the findings, the proposed action will need to be reviewed accordingly, and the clinician must be given an opportunity to respond to any revised proposed disciplinary action.

A reasonable period of time (usually two calendar weeks unless otherwise agreed) must be allowed for response. Any such response must be considered by the decision maker before a final decision is made about the action to be taken.

8 OPTIONS FOR ACTION IN RESPONSE TO SUBSTANTIATED FINDINGS

The following options exist for a decision maker following substantiated concerns about a clinician (refer also to Information Sheet 12).

8.1 No further action is warranted

Reasons may include:

- the conduct or performance did not seriously breach or fall below expected standards.
- there are mitigating circumstances.
- low level impairment has been identified but it does not present a risk to patient safety and does not affect the clinician's ability to perform the inherent requirements of their role and/or is being, or has been, addressed or appropriately managed by the clinician.

8.2 Remedial (managerial) action may be relevant

Reasons may include:

- while findings of misconduct or unsatisfactory performance were made, disciplinary action is not warranted or managerial action is required in conjunction with disciplinary action.
- only some or part of the allegations relating to the conduct/performance was substantiated. While the substantiated conduct or performance does not meet the threshold for misconduct/unsatisfactory performance, the clinician's conduct, behaviour or performance still needs to be addressed (eg low level breach of the Code of Conduct, performance issue, behavioural issues, other policy requirements).
- the enquiries have identified that the clinician has impairment. While there are no significant concerns about patient safety, some further action is required to enable the clinician to continue to fulfil the requirements of their role and maintain patient safety.

For remedial action options, refer to Information Sheet 12.

8.3 Disciplinary action

For findings of misconduct:

- a formal warning, stating the improved standard of conduct, behaviour or performance required within a given timeframe, the possible consequences of

failing to reach that standard, and any help available for the clinician to meet the expectations.

- where a clinician is on probation - an annulment of appointment.
- termination of employment of a NSW Health employee or decision to terminate or not re-appoint a Visiting Practitioner.
    - any decision to terminate a clinician must be approved by the Chief Executive, who must be satisfied, as the decision maker, that this action is warranted
    - any decision to appoint, retain, terminate or not reappoint a Visiting Practitioner who has been convicted of a serious sex or violence offence must be confirmed by the Secretary, NSW Health or their delegate (refer section 100 of the *Health Services Act 1997*.
- for staff of the Ambulance Service of NSW only – a reduction of their classification or position.

For findings of unsatisfactory performance only:

- subject to being consistent with and having met the requirements in rule 36 of the *Government Sector Employment (General) Rules 2014*, Section 68 of the *Government Sector Employment Act 2013* provides for termination (after giving the employee the opportunity to resign), reduction in remuneration payable to employee or classification or grade of employee(refer to Information Sheet 17)

Some NSW Health policies (such as those dealing with hand hygiene, and misuse of NSW Health communication systems) also contain provisions for disciplinary action.

8.4 Addressing systems/ organisational issues

This may be appropriate even where allegations have not been substantiated. For further information on options for action following findings, refer to Information Sheet 12.

9 IMPLEMENTING DECISIONS AND FINALISING THE PROCESS

9.1 Advising the clinician of the final findings and decisions

The clinician must be advised in writing of any final findings and decision about disciplinary or remedial action or any other outcome of the process. This includes action the NSW Health organisation would have taken if the clinician was still in their role (if they have left). Advice should include any issues being referred to the relevant line manager for local management and for misconduct matters, the effect of the final decision on the service check register.

Advice to the clinician should generally also include information about any notifications to external regulatory or oversight bodies.

Where a clinician is required to continue with or resume their role in the organisation, there should be a discussion with them about any support needed.

9.2 Advising other parties of the outcome

Having regard to confidentiality issues, all persons involved must be advised of the outcome of the process in so far as it relates to them. For further information, refer to the NSW Health Policies on open disclosure, complaint management, misconduct and child related allegations, charges and convictions against employees.

It may be necessary to offer support (such as the Employee Assistance Program) to the clinician and other affected staff members, as well as considering any referral for support services, as appropriate, for any other affected persons, such as patients, alleged victims or families of patients.

9.3 Action arising from termination of employment or appointment

Where a clinician's employment is terminated in one part of the NSW Health Service, the termination, subject to a show cause process, will apply to any other employment across the NSW Health Service.

The NSW Health organisation must notify other NSW Health organisations where the clinician is engaged of the termination. A process is available to clinicians to 'show cause' as to why the termination should not apply to their other employment in the NSW Health Service.

The process is outlined in Information Sheet 13 and Information Sheet 14, including advice to be provided to the clinician. Any decision made by the other NSW Health organisation following a show cause application must be endorsed by the Ministry of Health's Executive Director, Workplace Relations before implementation.

Where a visiting practitioner's appointment with one NSW Health organisation is terminated following a complaint or concern, any other NSW Health organisations where the visiting practitioner holds an appointment must be advised of the termination to allow them to assess and manage any risks arising from the findings of the other organisation.

For misconduct, refer also to the NSW Health policy on the service check register

9.4 Record Keeping Requirements

Appropriate and sufficiently adequate records of all stages of the process (including the initial review and any interviews), all communication with the clinician and outcomes must be kept.

All documentation relating to matters managed under this Policy Directive must be kept on a dedicated and confidential file, separate to a staff member's personnel file. They must also be maintained and managed in line with NSW State Records requirements for keeping personnel records (General Retention and Disposal Authority GA28). For details refer to Information Sheet 15.

9.5 Finalising the process

Review and complete any final notifications required (refer to Section 4).

Complete any actions required as part of finalising open disclosures - refer to the NSW Health policy on open disclosures.

As part of finalising a complaint or concern, a final review should be undertaken to identify any issues requiring ongoing management or action, specifically around any local or State-wide patient safety improvements to practices or processes that may assist in preventing a reoccurrence locally or elsewhere in the NSW Health public system.

NSW Health organisations should ensure that they have systems in place to identify any such issues, to report on them and to ensure, where appropriate, that relevant information is shared.

10 LIST OF ATTACHMENTS

Attachment 1: Implementation checklist

NSW Health organisation /Facility:			
Assessed by:		**Date of Assessment:**	
IMPLEMENTATION REQUIREMENTS	**Not commenced**	**Partial compliance**	**Full compliance**
1. An appropriate person has been given identified as having responsibility for implementing this policy	❑	❑	❑
	Notes:		
2. A panel has been established, with terms of reference, to oversee the governance of serious complaints and concerns about clinicians	❑	❑	❑
	Notes:		
3. Local procedures have been implemented in accordance with the requirements of this Policy Directive and Procedures and communicated with relevant managers across the organisation	❑	❑	❑
	Notes:		
A system is in place and is being used for capturing and reporting on issues arising from complaints or concerns managed under this Policy Directive and Procedures and there is a process established for sharing information as required.	❑	❑	❑
	Notes:		
4. Relevant staff understand and apply the record keeping requirements for managing these matters, and files are maintained securely and confidentially.	❑	❑	❑
	Notes:		
5. Complaints and concerns about clinicians are being managed in accordance with the requirements of this Policy Directive and Procedures	❑	❑	❑
	Notes:		