

Medical Law

The HPCSA process of inquiry into professional misconduct complaints

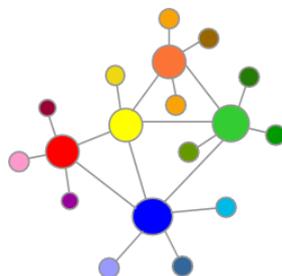


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1 hour (2 CEUs)

Level 2



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Introduction

The *Medical, Dental and Supplementary Health Service Professions Act 56 of 1974*, subsequently renamed the *Health Professions Act*, created the [Health Professions Council of South Africa](#) (HPCSA).

The mandate of the HPCSA is to protect the public and to guide the professions. Members of the public are encouraged to report transgressions including unauthorised advertising, incompetence in treating patients, over-servicing, charging excessive fees, criminal convictions and insufficient care of patients to the HPCSA.

Who can complain?



A complaint may be lodged by

- Any natural/ juristic person (e.g. a patient or a medical aid)
- group,
- professional association (e.g. the SA Optometric Association or SA Dental Association), or
- training institution.

How do I lodge a complaint?

Regulations relating to the conduct of inquiries into alleged unprofessional conduct under the *Health Professions Act* were amended and/ or described by Regulation 102, gazetted on 6 February 2009. (Regulation 102 can be downloaded at www.greengazette.co.za)

Lodging of complaints

Regulation 102

Lodging of complaints

2. (1) A complaint must be lodged in writing and be addressed to the registrar, the council or a professional board.

(2) When a complaint is addressed to the council or a professional board, it must be submitted to the registrar.

(3) The registrar must —

(a) peruse and analyse all complaints received;

(b) categorise them according to their significance and seriousness;

(c) record each complaint against the name of the respondent concerned as it appears in the register kept in terms of section 18 of the Act; and

(d) refer complaints of minor transgressions and matters not falling under the jurisdiction of the council to the

ombudsman for mediation or referral to the relevant authorities, respectively.



Complaints must be sent in writing to the HPCSA Registrar, either by

Post: P O Box 205, Pretoria 0001;

Hand: 553 Vermeulen Street (Corner Hamilton and Vermeulen Street), Arcadia, Pretoria;

Fax: (+27) 12 328 4895, or

e-mail: legalmed@hpcsa.co.za

What is the correct format for a complaint?

A [complaint form](#) can be downloaded from the site. To be acted upon by HPCSA's legal department, your complaint must

- State clearly that you wish to complain against a health-care professional and that the HPCSA should investigate your complaint;
- Identify the healthcare professional against whom the complaint lodged, by including his/her surname, initials, practice address and practice registration number;
- Detail the nature of the complaint, including all relevant dates and facts as well as supporting documentation where available;
- Be signed by you, your legal representative or any other person lodging the complaint on your behalf; and
- Include full contact details for correspondence purposes (such as requesting additional information regarding your complaint). Anonymous complaints are not ordinarily entertained. An exception arises when a complaint can be validated by a report or example. A respondent has a right to test allegations and to respond to the complainant.

If the complaint is about a non-registered person?

The mandate of the Health Professions Council is to protect the public and guide the professions. It has jurisdiction over registered practitioners only, but certainly can't turn a blind eye when it receives complaints about non-registered persons. Non-registered persons fall into 2 categories:

- A person qualified to register for that profession but not (currently) registered
- A layperson who is neither qualified nor registered to perform acts within the scope of that profession

Registration with HPCSA is a pre-requisite for professional practice in terms of section 17 of [HPCSA act of 1974](#).

It does happen that administrative errors lead to inadvertent non-registration of a practising professional. During such a

period of non-registration, the HPCSA does not have jurisdiction over the practitioner but as custodian of the professional register (section 17, [HPCSA Act of 1974](#)) it may still specify what it would [require for restoration](#):

Restoration

- Penalty for restoration within a period of 6 months after the erasure date is equivalent to twice the current annual fee, plus the outstanding annual fee(s)
- Restoration after a period of more than 6 months since the erasure date but within a year is equivalent to 4 times the current annual fee, plus the outstanding fee(s)
- Restoration after a period of 12 months since the erasure date is equivalent to 5 times the current annual fee, plus the outstanding fee(s).

Practitioners who have been off the register for more than 24 months (e.g. to practice abroad) will need to repeat some of the written/ practical exams. They will also require:

- Proof of CPD attended during the preceding 24 months
- Proof of practising your profession during the period of erasure/suspension.

Complaint against a lay-person

A layperson performing any act within the scope of practice of optometry is guilty of a criminal offence. If contact lenses are sold by a non-registered person without suitable fitting or instruction, or spectacles are sold online by a retail or commercial entity, this can be reported to Council which should (in fulfilling its mandate of protecting the public) ensure that the police take the case over. Alternatively, it can be reported directly to SAPS at a police station, but the complainant will have to explain to the police why such a complaint is lodged with them

The complaints process

If the complaint relates to a registered HPCSA member

- The Registrar will forward the complaint to the practitioner concerned (now called the respondent) within seven (7) days of receiving it, requesting a written explanation. (The practitioner may refuse or be advised not to provide an explanation, as an explanation may be used as evidence later.)
- Your letter of complaint together with the respondent's explanation (if submitted) is referred to the Professional Board concerned, specifically to its Preliminary Committee of Inquiry (Prelim Committee), for consideration.

What is the Prelim Committee?



Preliminary committees of inquiry into alleged unprofessional conduct under the *Health Professions Act* are called Prelim Committees for short. Each Board has at least one Prelim Committee made up of legal officers, healthcare professionals from the relevant board and community representatives. The Prelim Committee hears matters first after the legal officers have investigated the complaint. If the misconduct is a minor transgression, the Prelim Committee may (as of 1 August 2008) ...

- Ask the practitioner to attend a consultation to clarify issues)
- Caution the practitioner
- Reprimand the practitioner, or
- Set a fine.

Should the Prelim Committee consider the alleged offence serious, or that its nature warrants a full enquiry, it will be referred to a Professional Conduct Committee for enquiry. The Prelim Committee is responsible for listing the points of enquiry. No other points can be found on by the Professional Conduct Committee. This suggests that (following the Roux case (2011)) a practitioner inadvertently implicating him/herself at the professional conduct hearing cannot be investigated if the (new) offence is not a point of enquiry. Once the Prelim Committee approves the points of enquiry, the respondent has 60 working days to prepare for the pre-trial hearing of the Professional Conduct Enquiry.

In the Prelim Committee, the role of legal officers is similar to that of the police in the criminal justice system. They contact the respondent, giving him/ her 40 working days to respond. S/he can ask for an extension, or must give an explanation. Failure by the respondent to respond within the 40 working days can result in their being held in contempt of Council, with a possible fine of R10 000. Proof of a letter from the Prelim Committee to the respondent practitioner's *domicillium* is all that is required, which is why practitioners have to report a change of address to Council within 21 working days of their move. A 2012 Constitutional Court judgment sets a new precedent which will probably require such letters to be registered in future. When the legal officers have concluded their investigations and collated the evidence, the matter is presented to the Prelim Committee.

What is a Professional Conduct Enquiry?



If a fine is given, it must be accepted or rejected within 14 days. If it is accepted, it becomes a previous conviction. If there is no response, the matter is automatically referred for a Professional Conduct Committee enquiry.

A Professional Conduct Committee will hold an enquiry during which oral evidence is presented, often including independent, expert witnesses. (Note: Professional conduct enquiries are generally open to the public and the media, unless closed at the discretion of the chairperson.)

A healthcare professional found guilty of professional misconduct may be subject to the following penalties:

- A caution or a reprimand;
- A fine;
- Suspension for a specified period from practising his/her profession;
- Erasure from the relevant register;
- A compulsory period of professional service;
- Payment of the costs of the proceedings;
- A performance assessment*, or
- A combination of the above

*A performance assessment is conducted by a performance assessment committee which inquires into and makes a determination on the clinical or related performance of a practitioner against whom a professional conduct committee found evidence of poor clinical or related performance, or of a pattern of such performance, at an inquiry.

The cost of all enquiries are borne entirely by the Boards, which are funded by members. Costs vary depending on the nature of the case, but run to around R15 000 per day, with simple cases taking 2-3 days and complicated cases longer. The professional conduct enquiry committee's decision may be appealed by either party. The appeal must reach the Registrar within 21 days of the decision of the professional conduct enquiry committee.

Appeals

An appeals committee is chaired by a legal officer and has 4 members. An appeal does not result in the re-opening of a case to hear new evidence but rather a re-examination of the legal processes applied.

A summary of the process appears on page 8.

Conclusion

The process may appear highly legalistic, but it is important to remember that the purpose is peer review and that the profession has not only the right, but also the obligation to discipline its own. Legal assessors do not comment on the clinical merits of cases, but advise only on points of law.

Important information



- Pharmacists, nurses, chiropractors, homeopaths, dental technicians and healthcare institutions (like hospitals and clinics) are not registered with HPCSA.
- Complaints regarding treatment at a public hospital should be directed to the provincial Department of Health:

Eastern Cape - 0800 032 364

Free State - 0800 535 554

Gauteng - 0800 203 886

KwaZulu Natal - 033 395 2009

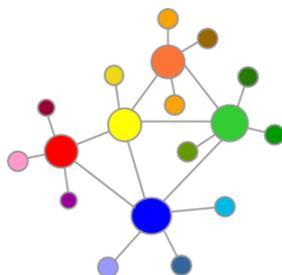
Limpopo - 0800 919 191

Mpumalanga - 0800 204 098

Northern Cape - 018 387 5778

Western Cape - 021 483 5624

- Complaints regarding treatment at a private hospital should be directed to the [Hospital Association of South Africa](#).
- Individual nurses can be reported to the [South African Nursing Council \(SANC\)](#) for investigation.
- Complaints about alternative healthcare practitioners (e.g. natural healers, homeopaths, chiropractors) should be directed to the [Allied Health Professions Council of South Africa \(AHPCSA\)](#) for investigation.



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HPCSA legal department process for inquiries after complaints

Complaint received via legalmed@hpcsa.co.za
Acknowledge receipt in 7 working days

To HPCSA ombudsman for mediation. If mediation fails, back to Legal. If succeeds, matter finalised

Preliminary Inquiry registrar

Refer for an inspection ito S41A (Get warrant from judge/ magistrate in jurisdiction of respondent practitioner. Inspection by legal officer & expert)

Legal services to request explanation/ docs e.g records (Have 40 working days to furnish) Explanation received/ not received → to Prelim

Refer to chair of Preliminary committee of inquiry

Serious complaint

To ad hoc committee

Suspension hearing

Refer to Prelim Committee

Suspend pending inquiry

Refer to prelim commit-

Consultation ito S41(2) for clarification & information

Request additional info eg documents, records (Legal Service - 40 days)

Accept explanation, notify both parties re reasons ito PAJA, 2000

Refer for inquiry with/ without the option of

Draw up charge sheet. NB to stipulate points of inquiry. Chair signs, respondent gets 60 days to inquiry.

Refer for inspection

For minor offence, convict & impose fine ito S42(1)(a&d)

Proceed to hearing/ inquiry

Accept fine within 14 days, pay → finalised

Reject fine within 14 days of receiving the charge sheet, proceed to hearing

Guilty

Not guilty

Performance assessment committee

Appeal (notice in 21 days)

Complaint may be lodged by

- Any natural/ juristic person
- Group
- Professional Association
- Training institution

Examples

- Ethical transgressions eg advertising and supersession
- Pecuniary eg fraud
- Competence eg scope
- Clinical procedure eg negligence
- Improper relations
- Breach in confidentiality
- Criminal convictions

Prelim Committee (PBODO currently consists of...)

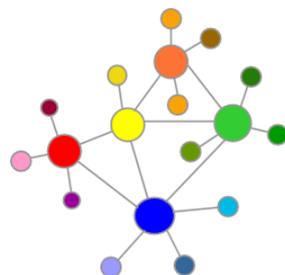
- Community representatives (1)
- Members of the board (3—1 chairing)
- Legal (2 or more, as required)

Professional Conduct Committees

- Community representatives (2—1 chairing)
- Members of the board/ profession (3)
- Legal assessor (1) for procedure.
- Respondent usually has legal representative, similar to court of law.

Questions True/ False

1. Healthcare professionals may lodge complaints against colleagues only via their professional associations.
2. Members of the public may lodge complaints by calling the HPCSA's toll free number: 0800 1234 911.
3. On receipt of a complaint, the HPCSA forwards the complaint to the relevant practitioner who may then decide to ignore it so as not to give incriminating evidence in his/ her explanation.
4. Anonymous complaints are processed by the legal department at the HPCSA, rather than by the Registrar.
5. Preliminary Committees may only ask the respondent practitioner to attend for a consultation to clarify issues; or they may caution, reprimand or fine the practitioner.
6. When a respondent practitioner does not accept a fine imposed by the Prelim Committee, there is a re-examination of the legal process followed, but the facts of the case are not reviewed.
7. A professional conduct committee may decide to erase, suspend, caution or fine a practitioner, order payment of the cost of proceedings, a compulsory period of professional service or a performance assessment.
8. Performance assessments are generally more appropriate penalties for clinical transgressions.
9. Legal assessors at the HPCSA are also well-versed in clinical matters relevant to their particular board and ensure that the legalistic process required for self-regulation is consistently applied.
10. Complaints about treatment at public hospitals should be directed to the appropriate provincial Department of Health.



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