



## PROVIDING PERFORMANCE REVIEW PANEL DECISIONS TO THIRD PARTIES - POSITION STATEMENT

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**Summary:** This Position Statement sets out the Council's view that:

- Panellists should consider what health information should be included in the Performance Review Panel (PRP) decision;
- If health information is included, panellists should consider whether the full or a redacted version of the decision is released to third parties;
- PRP decisions should not ordinarily be provided to Performance Assessors but they should be advised of the outcome.

**Applies to:** Chairs and Members of Performance Review Panels

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**Owner:** Medical Council of NSW

**Related legislation:** Health Practitioner Regulation National Law (NSW)

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## PROVIDING PERFORMANCE REVIEW PANEL DECISIONS TO THIRD PARTIES - POSITION STATEMENT

### PURPOSE

It has been common practice for a Performance Review Panel (PRP) to direct that a copy of its decision be provided to a number of third parties, in addition to the medical practitioner whose professional performance has been reviewed. These third parties typically include the assessors who conducted the practitioner's Performance Assessment and persons involved in ensuring conditions are complied with, such as Council-approved supervisors and if the practitioner is a participant in the Council's Health Program, Council-appointed and treating practitioners.

Recently, an objection was raised to the provision of a full copy of a PRP decision to the supervisors of a practitioner who was participating in both the Health and Performance Programs. The practitioner noted that the decision contained extensive information about personal health and asserted that the full decision should not have been provided to the practitioner's supervisors because the practitioner's health issues were sensitive in nature and not relevant to performance issues.

As a result, the Council has formed the view that if a PRP is dealing with a practitioner who is a current or past participant in the Health Program, the PRP should carefully consider which third parties should be given copies of their decision, how information about the practitioner's health is dealt with in the decision and whether the copy provided should be a full or redacted version of the decision. This Position Statement is intended to assist PRPs in making decisions on these issues.

### KEY PRINCIPLES

It is easy to understand how a practitioner's performance and health issues may be intertwined and therefore, that a PRP will consider it relevant to discuss the practitioner's health in its decision. However, the effective functioning of the Health Program relies on involved practitioners trusting the Council to reveal personal health information to third parties only when there are important reasons for doing so. Disclosure of health information through a PRP decision has the potential to undermine this trust unless the disclosure is well thought through. Section 216 of the Health Practitioner Regulation National Law (NSW) ("the National Law (NSW)") permits the disclosure of information within the Council's knowledge if the disclosure occurs in the exercise of a function under or for the purpose of the National Law (NSW). In addition, section 176F of the National Law (NSW) renders PRP decisions "protected reports" because they invariably contain information drawn from Performance Assessment reports and occasionally, Impaired Registrants Panel reports, which are defined as "protected reports" by section 138. Information contained in a protected report can only be released to the Health Care Complaints Commission or for the purpose of exercising a function under the National Law (NSW) (section 176F(2)).

As the Council is the organisation responsible for distributing PRP decisions at the direction of a PRP, PRPs can assist the Council in balancing the need to exercise its functions effectively against the need to maintain the trust of practitioners who are also participating in the Health Program by carefully considering the content of their decisions and to whom it is appropriate to direct their decision be provided.

## IMPLEMENTATION

In the event the PRP is dealing with a practitioner who is a current or former member of the Health Program, the Council requests that the PRP gives active consideration to whether information about the practitioner's health need be included in the PRP decision and if so, whether that information should be provided to third parties who may receive the PRP decision. Relevant matters to consider are:

- How material are issues concerning the practitioner's health to his or her professional performance? If the linkage is not strong, consider confining discussion of the practitioner's health in the decision to a statement that the practitioner is or has been a participant in the Health Program.
- In providing a decision containing information about a practitioner's health to the third party, would the Council be exercising a function under the National Law (NSW)? For example, in providing a supervisor approved by the Council pursuant to a condition on the practitioner's registration with information about the practitioner, the Council would be exercising such a function because it is enabling the supervisor to carry out his/her duties effectively. However, does the supervisor require sensitive information about the practitioner's health in order to act as an effective supervisor?

After answering this question, consider taking one of the following approaches if you believe that there is a material connection between the practitioner's health and professional performance which requires discussion in the decision:

- If you do think that the third party should be provided with information about the practitioner's health, it is helpful to both the practitioner and the Council to expressly discuss in the decision why you consider this to be the case. For example, you may consider that a supervisor needs to be aware that a practitioner suffers from cognitive deficits in order to effectively monitor his or her work performance.

Consider also imposing a condition by which the practitioner consents to the Council providing the relevant third party/ies with a full copy of the decision. A condition may already be in place permitting the Council to provide Council-appointed and treating practitioners with copies of IRP and other relevant reports, but it is prudent to check that this condition will also permit provision of the PRP decision to these practitioners.

- If you consider that some or all of the third parties to whom you wish a decision to be distributed do not need to be provided with information about the practitioner's health but the Council does, please specify in the decision whether you consider that redactions of certain sections of the decision should be made.

## **Providing PRP Decisions to Performance Assessors**

The Council has formed the view that while providing a PRP decision to the assessors who conducted the practitioner's Performance Assessment is of educational value, to do so may in fact contravene the National Law (NSW). This is because it is difficult to argue that in providing a decision in these circumstances, the Council is exercising a function under the National Law (NSW), a requirement of section 176F. Therefore, the Council has resolved that Performance Assessors will in future be advised of the outcome of PRPs but not provided with a copy of PRP decisions.

4 June 2013