



Health

**Codes of conduct for non-registered health practitioners and
certain health organisations**

Impact assessment statement

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1. Why are there Codes of Conduct?

Non-registered health practitioners are practitioners who are not registered under the Health Practitioner Regulation National Law (NSW) No 86a (National Law), or are registered but provide services unconnected to their registration. The National Law establishes a registration scheme for 16 health professionals, such as medical practitioners, nurses, midwives and dentists, who are subject to the codes and guidelines issued by the relevant National Board, such as the Medical Board of Australia.

However, not all health practitioners are registered health practitioners. Non-registered health practitioners are regulated in NSW via a negative licensing scheme established under the Public Health Act 2010 and the Health Care Complaints Act 1993.

Under the negative licensing scheme, non-registered health practitioners must comply with the Code of Conduct for non-registered practitioners.

The Health Care Complaints Commission (HCCC) is empowered to investigate a complaint that a non-registered practitioner has breached the code of conduct and is a risk to public health and safety. The HCCC can make an order to either prohibit the person or organisation from practice or place conditions on the practice (a prohibition order) if satisfied that a complaint has been substantiated and the practitioner represents a risk to the health or safety of members of the public. During an investigation of a non-registered health practitioner or relevant health organisation, the HCCC also has the power to make an interim prohibition order where it is necessary to do so to protect the public from serious risks of harm.

In 2020, the legislation was amended to extend the regime to relevant health organisations. That is, relevant health organisations must comply with a code of conduct and the HCCC can investigate and take action, including issuing a prohibition order, against a relevant health organisation who breaches the code and poses a risk to the public.

The code of conduct for non-registered health practitioners and relevant health organisations are an important tool to ensure that non-registered health practitioners and relevant health organisations provide health services in a responsible and ethical manner. Likewise, the powers of the HCCC to investigate complaints and ban non-registered health practitioners and relevant health organisations from practising are an important consumer safeguard.

There is a current code in place for non-registered health practitioners which has been in place since 2012. There is no existing code in place for relevant health organisations.

In order to ensure the code of conduct for non-practitioners continues to operate to protect the public the Ministry seeks feedback on the proposed consultation draft Code of conduct for non-registered health Practitioners. Further the Ministry seeks feedback on the new draft Code of conduct for health organisations to ensure that this code is appropriate for relevant health organisations. The codes of conduct will be incorporated into the remade Public Health Regulation which operates under the Public Health Act. This impact assessment statement details the principles in the draft codes of conduct.

Submissions about the draft code of conduct can be made to:

Legal and Regulatory Services Branch
NSW Ministry of Health
Locked Bag 2030
St Leonards NSW 1590

Submissions may also be made via email to NSWH-legalmail@health.nsw.gov.au.

Submissions must be received by **22 April 2022**.

2. Approach taken in this impact assessment statement

The term *non-registered health practitioner* refers to any person who provides a health service and who is not registered under the National Law. In addition, the code of conduct is expressed to apply to a registered health practitioner who provides health care treatment that is unrelated to their registration. In this impact assessment statement, the terms “practitioner” and “non-registered health practitioner” are used to refer to both non-registered health practitioners and registered health practitioners who are providing treatments that are unrelated to the area of their registration.

A *relevant health organisation* has the same meaning as in the Health Care Complaints Act, being a person that is a health organisation other than the following—

- (a) a public health organisation within the meaning of the Health Services Act 1997,
- (b) a public hospital within the meaning of the Health Services Act 1997,
- (c) a private health facility licensed under the Private Health Facilities Act 2007,
- (d) an organisation or class of organisation prescribed by the regulations for the purposes of this definition.¹

The impact assessment statement considers the nature of complaints about non-registered health practitioners and relevant health organisations. The statement then considers the objectives of the proposed code of conduct for non-registered health practitioners and relevant health organisations, and the basis and rationale for each of the matters contained in the draft code of conduct. The impact assessment statement is calling for submissions on the question of whether the matters included in the draft code of conduct are appropriate, as well as submissions on any other matters that should be included in the code of conduct.

It is intended for the finalised codes of conduct to be set out in the Schedules of the remade Public Health Regulation².

¹ There are no Regulations under the Health Care Complaints Act

² Due to occur in 2022.

3. Non-registered health practitioners and relevant health organisations

3.1 Regulation of Non-registered Health Practitioners

Non-registered health practitioners are health practitioners who provide a health service but are not required to be registered or registered health practitioners who provide a health service unrelated to their area of registration. A health service is broadly defined as including the following services³:

- medical, hospital, nursing and midwifery services,
- dental services,
- mental health services,
- pharmaceutical services,
- ambulance services,
- community health services,
- health education services,
- welfare services necessary to implement any services referred to above,
- services provided in connection with Aboriginal and Torres Strait Islander health practices and medical radiation practices,
- Chinese medicine, chiropractic, occupational therapy, optometry, osteopathy, physiotherapy, podiatry and psychology services,
- optical dispensing, dietitian, massage therapy, naturopathy, acupuncture, speech therapy, audiology and audiometry services,
- services provided in other alternative health care fields,
- forensic pathology services,
- a service prescribed by the regulations as a health service for the purposes of the Health Care Complaints Act 1993.⁴

Some of the above types of health services will not apply to non-registered health practitioners as certain services can only be provided by registered health practitioners, for example medical or dental services. Nonetheless, non-registered health practitioners provide a large range of health services and many include counsellors, massage therapists, naturopaths and herbalists, as well as reiki therapists, and homeopaths. As with registered health professionals, most non-registered practitioners are honest, competent and caring. However, there will always be a limited number of practitioners who represent a risk to the public because of a lack of competence, impairment, or dishonesty.

Complaints about non-registered health practitioners can be made to the HCCC. The HCCC has powers to take interim and permanent action against a non-registered health practitioner.

The HCCC can make a prohibition order to either ban the person from practice, or place conditions on his or her practice (a prohibition order). An order can be made:

- On an interim basis if the HCCC:
 - has a reasonable belief that the health practitioner has breached the code of conduct for non-registered health practitioners, and

³ Section 5 of the Public Health Act 2010 and section 4 of the Health Care Complaints Commission Act 1993

⁴ No services have been prescribed at this time.

- is of the opinion that the health practitioner poses a serious risk to the health or safety of members of the public and the making of an interim prohibition order is necessary to protect the health or safety of members of the public.
- On a permanent basis if the HCCC has completed its investigation and:
 - Finds that the practitioner has breached the code of conduct or has been convicted of an offence under Part 7 of the Public Health Act, or an offence under the Fair Trading Act 1987 or the Competition and Consumer Act 2010 (Cth) that relates to the provision of health services, and
 - Is of the opinion that the practitioner poses a risk to the health or safety of the members of the public.

The maintenance of a code of conduct is essential to ensure that the HCCC can take required action to protect the community from the small number of non-registered practitioners who pose a risk to their clients.

3.2 Regulation of Relevant Health Organisations

In 2020, a range of changes were made to the Public Health Act and the Health Care Complaints Act to increase the regulation of relevant health organisations. The changes arose in response to the recommendations of the 2018 Report into Cosmetic Health Service Complaints in NSW by the Joint Parliamentary Committee on the Health Care Complaints Commission (JPC report)⁵. The JPC report followed the Committee's inquiry into cosmetic health service complaints which stemmed from increasing community concerns about the safety of cosmetic health procedures. The JPC report made a number of recommendations in relation to regulating health organisations, and powers of the HCCC. In particular, it recommended that the HCCC have the power to issue warnings about specific health service providers and organisations and the ability to issue prohibition orders against health service organisations. The Government accepted these recommendations, which resulted in the 2020 changes to the Public Health Act and the Health Care Complaints Act⁶.

As a result, the HCCC now has a range of powers in relation to relevant health organisations. These include:

- the power to receive, assess and investigate complaints against a relevant health organisation which is alleged to have breached the code
- the power to issue public warnings
- the power to issue prohibition orders against relevant health organisations
- the power to issue public warnings against treatments or health services provided by relevant health organisations.

As with the framework for individual non-registered health practitioners, there is a power to issue interim prohibition orders and the organisation the subject of such an order will have a right of review in the NSW Civil and Administrative Tribunal.

⁵ <https://www.parliament.nsw.gov.au/committees/inquiries/Pages/inquiry-details.aspx?pk=2476#tab-reportsandgovernmentresponses>

⁶ Health Legislation (Miscellaneous Amendments) Act 2020 (NSW)

As is currently the case with individuals, it is an offence under the Public Health Act to breach a prohibition order made against a relevant health organisation.

3.2 The Extent of the Problem

Complaints to the Health Care Complaints Commission

The HCCC has the power under the Health Care Complaints Act to investigate complaints about health practitioners and organisations that provide health services.

In 2019-20, 34.3% of complaints were about health organisations (2018-19: 34.9%); and 2.1% were about non-registered health practitioners (2018-19: 2.3%).

The HCCC's 2019-20 annual report stated that *"...as with recent years the consistent presence in the number of unregistered practitioners is noteworthy and will continue to warrant close monitoring. While unregistered practitioners currently make up only a small percentage of the total number of complaints, the complaints are extremely diverse in nature and far more likely to raise novel and challenging regulatory questions. Many of them relate to criminal actions."*⁷

The number of complaints about non-registered practitioners in 2019-20 is still a reasonably small proportion of complaints received overall. The primary issues raised in complaints about non-registered health practitioners tend to follow a different pattern to those raised in complaints about registered health practitioners. Non-registered health practitioners continue to be far more likely to be the subject of a complaint about professional conduct issues (2019-2020 46.0%; 2018-19: 49.5%).

Treatment issues were the second most common area complained about.

In 2019-20, the Commission received 2,695 complaints about all types of health organisations. A material number of these were complaints about relevant health organisations (as defined under the Health Care Complaints Act).

Treatment remains the primary issue raised in complaints about health organisations. A significant increase in complaints about treatment was observed in complaints about medical centres (2019-2020: 43.0%; 2018-19: 31.6%; 2017-18: 21.5%).

As these figures just represent complaints raised with the HCCC, it is possible that these figures understate the size of the problem and that there are in fact many more consumers who are dissatisfied with the service they receive from non-registered health practitioners and organisations.

4. Objectives for the Code of Conduct

The codes of conduct for non-registered health practitioners and relevant health organisations are designed to provide standards of conduct and practice by non-registered health practitioners and relevant health organisations, as well as the basis for the effective enforcement of such standards. The codes of conduct will ensure that the HCCC has a set of standards against which to objectively assess the conduct of practitioners and organisations, and that practitioners and organisations are

⁷ <https://www.hccc.nsw.gov.au/ArticleDocuments/75/HCCCAnnualReport2019-2020completepluserata.pdf.aspx>

able to be aware of those standards. In turn, where the standards in the code of conduct have been breached, the HCCC can take appropriate action to protect the public.

Details about the draft code of non-registered health practitioners and the draft code for organisation are set out further below.

5. The Draft Code of Conduct for non-registered health practitioners

The code for non-registered health practitioners is based on the current code of conduct. There are some minor changes to the current code, including:

- Definitions of terms used in the code and, who each code applies to, have moved from the code to the body of the Public Health Regulation
- A new provision in the code that requires a health practitioner to practise in accordance with accepted professional standards, (clause 1(2)(b))
- Clarifying what is relevant advice in relation to infectious medical conditions (clause 2(3))
- Adding an express requirement not to financially exploit a client (clauses 8(1))
- Including a requirement to display the code on a health service's website (clauses 14(3))

Further information about these changes is discussed further below.

5.1 Practitioners must provide health services in a safe and ethical manner

Clause 1 of the draft code provides that practitioners must provide health services in a safe and ethical manner. The basis for this item is clear; that is practitioners are to provide health services in a manner that does not harm their patients and in a manner that accords with the standards of behaviour that both their colleagues and the broader community regard as acceptable.

Clause 1 goes on to provide further details about what constitutes practising a health service in a safe and ethical manner.

- *A health practitioner must maintain the necessary competence in his or her field of practice.*
Patients consult health practitioners because of their expertise in treating illnesses and other conditions. It is therefore essential that practitioners maintain competence in their field.
- *A health practitioner must practise in accordance with accepted professional standards.*
The principle follows on directly from the first principle. A practitioner must not only maintain the necessary competence in a field, but must also practice in accordance with professional standards of the field. This important principle is to ensure that services are provided in a safe and consistent manner.
- *A health practitioner must not provide health care of a type that is outside his or her experience or training.*

This principle also follows on from the first principle. Along with maintaining competence in their professional field, each practitioner must recognise the limits of their competence.

- *A health practitioner must not provide services that he or she is not qualified to provide.*
- *A health practitioner must not use his or her possession of particular qualifications to mislead or deceive his or her clients as to his or her competence in his or her field of practice or ability to provide treatment.*

These two principles are designed to ensure that services are only provided to patients of non-registered health practitioners where that practitioner is qualified to provide the service and that patients can be assured that the practitioner has those qualifications.

- *A health practitioner must prescribe only treatments or appliances that serve the needs of the client.*

This principle is designed to ensure that non-registered health practitioners will place the interests and health care needs of their patients ahead of their own financial interests.

- *A health practitioner must recognise the limitations of the treatment he or she can provide and refer clients to other competent health practitioners in appropriate circumstances.*

This principle is designed to ensure that non-registered practitioners refer patients on to other appropriate practitioners, both registered and non-registered, in circumstances where they are unable to treat the patient's complaint or in circumstances where the treatment they are providing proves ineffective.

- *A health practitioner must recommend to his or her clients that additional opinions and services be sought, where appropriate.*

This principle simply recognises that a patient's best interests may be served by obtaining alternate opinions from other practitioners, be they registered or non-registered health practitioners.

- *A health practitioner must assist his or her clients to find other appropriate health care professionals, if required and practicable.*

Again, this principle recognises that in circumstances where a practitioner is unable to treat a patient due to lack of skills or expertise, or other ethical matters they should assist the patient in finding an alternative competent registered or non-registered practitioner.

- *A health practitioner must encourage his or her clients to inform their treating medical practitioner, if any, of the treatments they are receiving.*

There are concerns that people who are under the regular care of medical practitioners for serious and chronic complaints who are also receiving other forms of treatment from non-registered practitioners do not always disclose that fact to their treating medical practitioner. Non-disclosure can result in harm as there may be adverse interactions between some types of alternative treatment and the unorthodox medicines or treatments provided. It is clear that the risks of adverse

interactions will be reduced if patients make their treating medical practitioners aware of any other treatments they are receiving.

Whilst non-registered practitioners cannot ensure that their patients do inform their treating medical practitioner (if any) of the alternative treatments they are receiving they can encourage their patients to do so. Many patients may not consider it necessary or important to tell their treating medical practitioner about other treatments that they are receiving but encouragement from the practitioner providing those treatments combined with an explanation of the importance of avoiding adverse reactions is an important step in overcoming any reluctance that the patient may have.

- *A health practitioner must have a sound understanding of any adverse interactions between the therapies and treatments he or she provides or prescribes and any other medications or treatments, whether prescribed or not, that the health practitioner is aware the client is taking or receiving.*

This principle follows on from the previous principle and relates to practitioners taking responsibility for informing themselves of any other treatments a patient may be taking and any adverse interactions that those treatments may have with any treatment they prescribe.

- *A health practitioner must ensure that appropriate first aid is available to deal with any misadventure during a client consultation.*
- *A health practitioner must obtain appropriate emergency assistance (for example, from the Ambulance Service) in the event of any serious misadventure during a client consultation.*

These principles require practitioners to recognise that there may be situations where patients suffer misadventure at their hands or in their practices and ensure that appropriate arrangements are in place to deal with that misadventure.

5.2 Health practitioners diagnosed with infectious medical condition

Clause 2 of the draft code requires practitioners who have an infectious medical condition to ensure that they practise in a manner that does not place their clients at risk of contracting the infectious condition.

Clause 2 also requires practitioners who have a medical condition that can be passed on to clients to take and follow advice from an appropriate medical practitioner on the steps to be taken to modify his or her practice to avoid the possibility of transmitting that condition to clients. The draft code includes additional advice to practitioners about the advice that this principle is referring, being the steps to be taken to modify a health practitioner's practice to avoid the possibility of transmitting the practitioner's medical condition to clients.

Both principles are aimed at minimising the risk of infection by ensuring that practitioners with infectious diseases are made aware of, and follow, actions they should take to minimise any risk to their patients.

5.3 Practitioners must not make claims to cure certain serious illnesses

Historically a number of complaints to the HCCC are in relation to alternative health practitioners advertising products or treatments that are claimed to cure cancer and other terminal or incurable illnesses. There are existing mechanisms in place that address this conduct, namely fair trading legislation, and provisions in the Public Health Act dealing with false, misleading or deceptive advertising, which can be used to address individual instances of this type of advertising. There are also some circumstances in which this conduct is appropriately dealt with by the HCCC.

As such, clause 3 of the draft code of conduct contains a prohibition against practitioners making claims to cure cancer or other terminal or incurable illnesses. Further, incorporating this provision in the draft code of conduct gives practitioners clear guidance that advertising cures for cancer and other terminal or incurable illnesses is unacceptable and will allow the HCCC to take effective action to prevent a practitioner from continuing to do so.

Clause 3 also includes a principle that claims to treat or alleviate the symptoms of cancer or other terminal or incurable illnesses should only be made if that claim can be substantiated.

This principle acknowledges that practitioners may legitimately make claims as to their ability to treat or alleviate the symptoms of cancer and other terminal or incurable illnesses. As with all claims made by health care practitioners any claim to be able to treat and alleviate the symptoms of such an illness must be able to be substantiated.

5.4 Health practitioners to adopt standard precautions for infection control

Clause 4 of the draft code for non-registered health practitioners requires health practitioners to adopt standard precautions for the control of infection. This principle is designed to remind all practitioners of the need to adopt standard infection control precautions in their practices. The adoption of standard infection control precautions is an effective method of preventing the transmission of infectious disease between patient and practitioner and between patients.

Clause 4 also includes provisions designed to expressly remind practitioners who engage in skin penetration activities, such as acupuncture or tattooing, of their obligation to comply with the requirements of the Public Health Act in so far as it relates to skin penetration. Furthermore, including this item in the Code allows the HCCC to take effective action to prevent a practitioner who engages in skin penetration activities in an unsafe manner from continuing to practice.

5.5 Appropriate conduct in relation to treatment advice

Clause 5(1) of the draft code states that practitioners must not attempt to dissuade clients from seeking or continuing with treatment by a medical practitioner and is designed to ensure that practitioners do not undermine the health care treatment that patients are receiving from their medical practitioners.

All health practitioners must accept the right of patients to make informed choices about their own health care. Practitioners should not improperly interfere with patient autonomy in this respect.

There may be instances where a practitioner has genuine concern that the medical treatment a patient is receiving is not in the patient's best interests. In these circumstances it may be appropriate for the practitioner to contact the treating medical practitioner to discuss their

concerns. In some extreme cases the concern may be so great as to warrant the practitioner contacting the HCCC to discuss their concerns.

There are also a number of other subclauses within this principle:

- *A health practitioner must not attempt to dissuade a client from seeking or continuing with treatment by a registered medical practitioner.*

Where a patient is receiving treatment from a registered medical practitioner, a health practitioner must respect that, act appropriately and not make any attempt to dissuade the patient from continuing to receive treatment from the registered medical practitioner.

- *A health practitioner must accept the rights of his or her client to make informed choices in relation to their health care.*

All health practitioners must accept the right of patients to make informed choices about their own health care. Patients must be provided with enough information about their condition, treatment options and prognosis in order to enable them to make decisions relating to their health care, including regarding risks, limitations, length of treatment and costs.

- *A health practitioner should communicate and co-operate with colleagues and other health care practitioners and agencies in the best interests of their clients.*

Where a practitioner has concerns that the treatment a patient is receiving from another health care practitioner is not in the patient's best interests the practitioner should communicate those concerns with that other practitioner.

- *A health practitioner who has serious concerns about the treatment provided to a client by another practitioner, it is appropriate that those concerns are referred to the Health Care Complaints Commission.*

Any instance where a practitioner has serious concerns about the treatment being provided to a patient by another practitioner, for example about the safety of the treatment, they should refer those concerns to the HCCC.

5.6 Practitioners must not practise under the influence of alcohol or other drugs

Clause 6(1) of the draft code states that health practitioners must not practise under the influence of alcohol or other unlawful drugs and is intended to ensure that practitioners do not place their patients at risk of harm.

Clause 6(2) of the draft code states:

A health practitioner who is taking prescribed medication must—

(a) obtain advice from the prescribing health practitioner on the impact of the medication on the practitioner's ability to practice, and

(b) refrain from treating a client in circumstances where the practitioner's ability is or may be impaired.

There are a number of prescription and over the counter medications that may individually or in combination with other medications impair the ability of a health practitioner to safely provide

services to their patients. Practitioners should seek advice from their prescribing practitioner and/or pharmacist on any side effects of those medications.

5.7 A practitioner must not practise whilst suffering from certain physical or mental conditions

Clause 7 of the draft code states:

A health practitioner must not practise while suffering from a physical or mental impairment, disability, condition or disorder, including an addiction to alcohol or a drug, whether or not prescribed, that—

(a) detrimentally affects, or is likely to detrimentally affect, the practitioner's ability to practise, or

(b) places clients at risk of harm.

Clause 7 is intended to ensure that non-registered health practitioners only provide services to clients when it is safe and ethical to do so and that clients are not placed at risk by practitioners providing services while impaired by a physical or mental condition. Clause 7 is based on similar principles governing the provisions of health services by registered health practitioners under the Health Practitioner Regulation National Law (NSW) whereby an impaired practitioner's registration can be suspended or cancelled⁸.

5.8 Practitioners must not financially exploit their clients

Clause 8 contains a number of provisions designed to ensure that those practitioners who exploit the trust that patients place in them, in order to defraud those patients, may be disciplined and where necessary excluded from practice.

- *A health practitioner must not financially exploit a client.*

The draft code now expressly provides that practitioners must not financially exploit their clients. This principle clarifies that there is a broad obligation to not financially exploit clients.

- *A health practitioner must not accept financial inducements or gifts for referring clients to other health practitioners or to the suppliers of medications or therapeutic goods or devices.*
- *A health practitioner must not offer financial inducements or gifts in return for client referrals from other practitioners.*

Accepting financial inducements for referring patients to particular practitioners or suppliers of goods or medications may indicate that a practitioner is motivated by self-interest in making those recommendations or referrals. Likewise offering financial inducements to other practitioners for the referral of patients may induce those practitioners to place their own financial self-interest above the best interest of their patients.

It is noted that the Health Practitioner Regulation National Law (NSW) provides that it is unsatisfactory professional conduct for a registered health practitioner to accept a benefit for a referral or recommendation⁹.

⁸ See Part 8 of the Health Practitioner Regulation National Law (NSW)

⁹ See s139B of the Health Practitioner Regulation National Law (NSW)

- *A health practitioner must not provide services and treatment to clients unless they are designed to maintain or improve the client’s health or wellbeing.*

This principle is designed to ensure that clients are not provided with services that are designed to financially benefit practitioners over the needs of clients.

5.9 Practitioners required to have a clinical basis for treatments

Clause 9 of the draft code of conduct states that:

A health practitioner must not diagnose or treat an illness or condition without an adequate clinical basis.

This principle requires practitioners to have a sound basis for diagnosing and treating illnesses and conditions before providing such services to clients and is designed to ensure that services are not provided, and paid for by clients, where there is no clinical basis for doing so. In addition, this principle is designed to ensure that clients are not provided with, and charged for, services that have no clinical benefit.

5.10 Practitioners not to misinform their clients

Clause 10 of the draft code of conduct is designed to ensure that practitioners do not mislead or misinform their patients about their services or the products they supply or about their education, qualifications and professional memberships.

Patients are often at a disadvantage in establishing the legitimacy of claims made by practitioners as to the training and qualifications they have. Patients are also at a disadvantage in determining the validity of claims that may be made as to the registration or listing of products or medications with the Therapeutic Goods Administration (TGA). Furthermore, patients are in most cases unlikely to understand the distinction between a product/medication that has been registered with the TGA and one that has been listed. Practitioners must not exploit this lack of knowledge to gain a financial advantage. As such, clause 10 contains the following principles:

A health practitioner must not engage in misinformation or misrepresentation about—
(a) the products or services the practitioner provides, or
(b) the practitioner’s qualifications, training or professional affiliations.

A health practitioner must provide truthful information about the practitioner’s qualifications, training or professional affiliations if asked for information about those matters by a client.

A health practitioner must not make claims, directly or in advertising or promotional material, about the efficacy of treatment or services provided if the claims cannot be substantiated.

Many patients, in determining whether to obtain health care services, request information about training, qualifications and other matters from prospective practitioners. Practitioners should provide factual information that can be substantiated.

5.11 Practitioners must not engage in sexual or close relationships with a client

Clause 11 of the draft code prohibits health practitioners from engaging in a sexual or other close personal relationship with a client and places restrictions on engaging in a sexual or other personal relationship with a former client.

This clause is based on similar standards required of other professionals, such as medical practitioners under the *Good Medical Practice: A code of conduct for Doctors in Australia*¹⁰ and the Guidelines on Sexual Boundaries in the doctor-patient relationship¹¹ and psychologists under the Australian Psychological Society's *Code of Ethics*¹². The bases for a strict approach to sexual relationships with patients include that:

- the professional relationship relies on a high degree of trust between practitioner and patient,
- practitioners and patients are often in close physical and emotional proximity,
- patients are often in a vulnerable position and there may be a significant power imbalance between a patient and their health practitioner,
- the community expects high levels of integrity from health practitioners,
- personal involvement with a patient may cloud a practitioner's judgement, and
- the detrimental impact on a patient from any such relationship may be significant

The community is entitled to expect a similarly high level of integrity and conduct from non-registered health practitioners.

In respect of the issue of former clients, it is not possible to specify a particular period of time that must elapse between the end of a therapeutic/professional relationship and the commencement of a personal or sexual relationship. Practitioners who find themselves contemplating personal relationships with former patients should seek the advice of senior colleagues in addressing any concerns in this area.

5.12 Practitioners must keep appropriate records

The health care record is the basic vehicle for communication among members of the health care team. Records are also kept for a variety of purposes, many unrelated to the care of the individual patient, for example, to satisfy accreditation standards, legal requirements, or for accounting and tax purposes.

These non-patient purposes may distract practitioners from the primary purposes of the patient record, which are:

- to provide access to relevant information about the patient's care, history, test results and the like,
- to ensure continuity of care as responsibility for the patient is transferred between carers, and

¹⁰ <https://www.medicalboard.gov.au/codes-guidelines-policies/code-of-conduct.aspx>

¹¹ <https://www.medicalboard.gov.au/codes-guidelines-policies/sexual-boundaries-guidelines.aspx>

¹² <https://psychology.org.au/getmedia/d873e0db-7490-46de-bb57-c31bb1553025/18APS-Code-of-Ethics.pdf>

- as an audit tool to monitor quality of care.

Accurate, legible and contemporaneous records are also an extremely valuable tool for a practitioner to use in addressing patient concerns about their treatment or in defending themselves against allegations of negligence. As such, clause 12 of the draft code of conduct states:

A health practitioner must maintain accurate, legible and contemporaneous clinical records for each client consultation.

The patient record should fully document the patient's course of care and provide all relevant information necessary to ensure the safe and effective delivery of health care. It should include:

- the identity of the practitioner who made the record, and the patient it relates to,
- complete, legible notes of relevant patient history, treatment and care given, any medications recommended or provided, tests ordered and test results,
- accurate statements of fact, or statements of clinical judgement or inquiry, made contemporaneously with the patient consultation,
- relevant dates, and the content of consultations, discussions, and advice or information given to the patient,
- no material rendered unreadable, or erasures,
- diagnoses, details of any treatment plan or ongoing course of care,
- details of any allergies, adverse events, and relevant patient history of any of these,
- copies or other record of consents to treatment given by the patient, and
- sufficient information in a form that enables other practitioners to deliver health care, safely and promptly.

The amount of detail contained in the record should be appropriate to the complexity and significance of the patient's case. Obviously, a record that contains abbreviations or cryptic notations that can only be subsequently deciphered by the practitioner who made them is of limited use.

5.13 Practitioners to keep appropriate insurance

Appropriate indemnity insurance ensures that patients who are injured as a result of misadventure associated with health care are able to receive fair and sustainable compensation. The costs to a seriously injured patient can be substantial. In the absence of adequate compensation through insurance arrangements these costs are born by the individual and their family and by society as a whole due to additional calls on the social security system, the public health care system and other government services.

The practitioner concerned may also bear significant, possibly financially crippling costs, associated with defending legal action and paying compensation to an injured patient. As such, there is a compelling need to ensure that all health practitioners have appropriate indemnity insurance and clause 13 of the draft code of conduct reflects this.

The range of health care practitioners covered by the code of conduct is too broad for the code to specify a level of cover that should be held. Therefore, practitioners should seek their own advice on this matter and relevant professional and industry associations may be able to assist.

5.14 Health practitioners must ensure confidentiality and privacy of client health information

Patient privacy is a fundamental for the delivery of health services. Clause 14 of the draft code of conduct requires health practitioners to ensure they have appropriate policies and procedures in place to ensure client health information and confidentiality are sufficiently protected, including by complying with State or Commonwealth privacy law.

Compliance with privacy laws is required by such acts as the Health Records and Information Privacy Act 2002 and the Commonwealth Privacy Act 1988, and this is reflected in the clause. However the proposed clause goes further than just compliance, requiring the health practitioner to have policies and procedures to ensure that patient confidentiality is appropriately maintained.

Adopting this matter in the code of conduct will allow the HCCC to investigate complaints that privacy laws have been breached, or confidentiality of patients has not been maintained, and if the HCCC is satisfied that the complaint has been substantiated and the practitioner poses a risk to the health or safety of members of the public, to take action to protect the public from further breaches.¹³

5.15 Certain practitioners to display the code and other information

Clause 15 of the draft code requires practitioners to display, in a manner easily visible to clients:

- a copy of the code of conduct, and
- a document approved by the Secretary of Health that gives clients information about how to make a complaint to the HCCC.

The rationale for this principle is that clients need to be made aware not only of the standards that are expected of practitioners under the code of practice but also how to make a complaint to the HCCC if a client feels that a practitioner has breached the code.

The draft code now also requires that the code be publicly available on the practitioner's website, as websites are common sources of information for clients.

It is noted that this requirement does not apply to all premises, such as public and private hospitals.

5.16 Sale and supply of optical appliances

Clause 16 of the draft code relates to the sale and supply of optical appliances and states:

- *A health practitioner must not sell or supply an optical appliance, other than cosmetic contact lenses, to a person unless the practitioner does so in accordance with a prescription from a person lawfully authorised to prescribe the optical appliance.*
- *A health practitioner must not sell or supply contact lenses to a person unless he or she:*
 - *was licensed under the Optical Dispensers Act 1963 immediately before its repeal, or*
 - *has a Certificate IV in optical dispensing or an equivalent qualification.*

¹³ It is noted that the HCCC's role is not to be an investigative body for privacy breaches in general, as these matters are appropriately dealt with by existing bodies, such as the Information and Privacy Commissioner, under existing powers.

- *A health practitioner who sells or supplies contact lenses to a person must provide the person with written information about the care, handling and wearing of contact lenses, including advice about possible adverse reactions to wearing contact lenses.*

Clause 16 does not apply to the sale or supply of the following:

- hand-held magnifiers,
- corrective lenses designed for use only in diving masks or swimming goggles,
- ready made spectacles that:
 - are designed to alleviate the effects of presbyopia only, and
 - comprise 2 lenses of equal power, being a power of plus one dioptre or more but not exceeding plus 3.5 dioptries.

Clause 16 was included in the current code of conduct as there are restrictions in the National Law restricting any person other than an optometrists or medical practitioners from prescribing optical appliances¹⁴. In order to give meaning to the restriction on the prescription of optical appliances, clause 16 places restrictions on the sale and supply of optical appliances without a prescription.

The restriction on the sale and supply of contact lenses, except by practitioners with qualifications in optical dispensing, has also been included in the draft code following the commencement of the national registration and accreditation scheme. Prior to the commencement of the National Law, the Optical Dispensers Act 1963 contained provisions restricting the sale and supply of contract lenses. The Optical Dispensers Act was repealed on the commencement of the national registration and accreditation scheme, but the rationale for retaining restrictions relating to the sale and supply of contact lenses remain. The rationale is that such restrictions are designed to protect health and safety as there have been a number of cases, both here and overseas, where people have suffered serious eye injuries (up to and including blindness) due to the mishandling/sharing of contact lenses. Likewise, the requirement that practitioners who supply contact lenses must provide their clients with written information about the care, handling and wearing of contact lenses, including advice about possible adverse reactions to wearing contact lenses is designed to minimise the potential serious risks associated with contact lenses.

5.16 Questions for consideration

The Ministry considers that, in general, the requirement for there to be a code continues to be necessary. However, the Ministry would like feedback on whether the principles in the draft code are appropriate, including whether there should be additional principles added to the code.

The Ministry wishes to ensure that there are effective and proportionate requirements for non-registered health practitioners. The Ministry does not consider that it is necessary to include detailed and complicated requirements for these practitioners. However, the Ministry is interested in whether there should be other principles included in the code to ensure public safety.

Is the code of conduct for non-registered health practitioners appropriate?

Are there any other principles that should be included in the code?

¹⁴ Section 122 Health Practitioner Regulation National Law (NSW)

6. The Draft Code of Conduct for relevant health organisations

The purpose of the code for relevant health organisations is to ensure that an organisation has appropriate practices to ensure patient safety, reflecting that organisations as well as individual practitioners need to ensure the safety of clients.

The code for relevant health organisations adopts relevant principles from the code for non-registered health practitioners. There is also an additional clause in relation to management of poisons.

6.1 Organisations that the Code applies to

The draft code applies to “relevant health organisations” which has a broad meaning under the Health Care Complaints Act. It means: a person that is a health organisation other than the following-

- a public health organisation within the meaning of the Health Services Act 1997,
- a public hospital within the meaning of the Health Services Act 1997,
- a private health facility licensed under the Private Health Facilities Act 2007,
- an organisation or class of organisation prescribed by the regulations for the purposes of this definition.

A health organisation is defined as a body that provides a health service (not being a health practitioner).¹⁵

The definition excludes public hospitals, public health organisations, such as Local Health Districts, and licenced private health facilities, which are subject to other regulation. All other health organisations are caught by the definition, regardless of whether the services provided by the organisation are provided by registered or non-registered health practitioners. This will include GP and dental clinics, cosmetic clinics that provide health services, physiotherapy clinics, naturopath clinics, clinics that provide assisted reproductive technology services, health education and advocacy bodies, private telehealth assessment services, wellness services, and counselling clinics.

The Ministry is interested in whether any particular type of organisation should be excluded from the definition of a relevant health organisation. For example, should an organisation be excluded where they are subject to a separate extensive regulatory regime? Aged care facilities are subject to extensive regulation by the Commonwealth and there are public health entities, such as the Ambulance Service of NSW or NSW Health Pathology. The Ministry is of the preliminary view that aged care facilities and public health entities such as the Ambulance Service of NSW should be excluded from the operation of the Code. The Ministry would like to hear views on this and whether any other organisations should be excluded from the operation of the Code.

¹⁵ See section 4 of the Health Care Complaints Act

6.2 Compliance with code of conduct for health practitioners

Consistent with the objectives of introducing the code, clause 2 of the draft code requires that the relevant health organisation ensures its employees complies with the code of conduct for non-registered health practitioners, where relevant. It is expected that an organisation would take steps where it became aware that an employee that had to comply with the code was not doing so. Including this principle in the draft code emphasises the expectation that organisations operate responsibly and appropriately, including ensuring their staff comply with requirements of the code of conduct for non-registered health practitioners, as appropriate.

6.3 Health services to be provided in safe and ethical manner

Clause 3 of the draft code includes the similar principles to the code for non-registered health practitioners in relation to providing services in a safe and ethical manner. As with the other code, the basis for this item is obvious. That is, organisations are to practise in a manner that does not harm their patients and in a manner that accords with the standards of behaviour that both their colleagues and the broader community regard as acceptable.

Clause 3 goes on to provide further details about what constitutes practising a health service in a safe and ethical manner.

- *A relevant health organisation must ensure its employees maintain the necessary competence in the relevant field of practice.*

Patients consult health practitioners because of their expertise in treating illnesses and other conditions. It is therefore essential that practitioners maintain competence in their field. An organisation should ensure its employees have the training and qualifications that they purport to have and maintain the necessary competency.

- *A relevant health organisation must provide health services in accordance with accepted professional standards.*

This important principle is to ensure that services are provided in a safe and consistent manner, and that services are conducted with the latest information regarding safety and efficacy.

- *A relevant health organisation must assist his or her clients to find other appropriate health care professionals, if required and practicable.*

This principle recognises that in circumstances where an organisation is unable to treat a patient due to lack of skills or expertise, or other ethical matters, or it is apparent that the patient needs additional care, they should assist the patient in finding an alternative or additional competent registered or non-registered practitioner.

- *A relevant health organisation must encourage a client to inform their treating medical practitioner, if any, of the treatments they are receiving.*

The rationale for this principle is the same for the code for non-registered health practitioners. There are concerns that many people who are under the regular care of medical practitioners for serious and chronic complaints, who are also receiving other forms of treatment from health service organisations, do not always disclose that fact to their treating medical practitioner. Non-disclosure can result in harm as there may be adverse interactions between some types of alternative treatment and the unorthodox medicines or treatments provided. It is clear that the risks of adverse

interactions will be reduced if patients make their treating medical practitioners aware of any other treatments they are receiving.

Whilst organisations cannot ensure that their patients do inform their treating medical practitioner (if any) of the alternative treatments they are receiving, they can encourage their patients to do so. Many patients may not consider it necessary or important to tell their treating medical practitioner about other treatments that they are receiving but encouragement from the practitioner providing those treatments combined with an explanation of the importance of avoiding adverse reactions is an important step in overcoming any reluctance that the patient may have.

- *A relevant health organisation must ensure that appropriate first aid is available to deal with any misadventure during a client consultation.*
- *A relevant health organisation must obtain appropriate emergency assistance (for example, from NSW Ambulance) in the event of any serious misadventure during a client consultation.*

This sensible principle requires organisations to recognise that there may be situations where patients suffer misadventure while receiving services and ensure that appropriate arrangements are in place to deal with that misadventure.

6.4 Standard precautions for infection control are to be adopted

Clause 4 of the draft code for relevant health organisations requires organisations to adopt standard precautions for the control of infection. This principle is designed to ensure that adoption of standard infection control precautions in an organisation is broader than just the individual practitioner providing the service. The adoption of standard infection control precautions is an effective method of preventing the transmission of infectious disease between patient and employees and between patients.

Clause 4 also includes provisions designed to make it clear for organisations where skin penetration activities are carried out, such as acupuncture, of the obligation to comply with the requirements of the Public Health Act in relation to skin penetration. Furthermore, including this item in the code allows the HCCC to take effective action to prevent an organisation that engages in skin penetration activities in an unsafe manner from continuing to practice. This is intended to address the circumstance where the organisation has poor practice, rather than a specific practitioner.

6.5 Appropriate conduct in relation to treatment advice

Clause 5(1) of the draft code states that organisations must not attempt to dissuade clients from seeking or continuing with treatment by a medical practitioner and is designed to ensure that organisations do not undermine the health care treatment that patients are receiving from their medical practitioners.

The code recognises that patients have the right to make informed choices about their own health care. Organisations should not improperly interfere with patient autonomy in this respect. There may be instances where an organisation, or its employee, has genuine concern that the medical treatment a patient is receiving is not in the patient's best interests. In these circumstances it may be appropriate for the practitioner to contact the treating medical practitioner to discuss their concerns. In some extreme cases the concern may be so great as to warrant the organisation contacting the HCCC to discuss their concerns.

There are also a number of other subclauses within this principle:

- *A relevant health organisation must not attempt to dissuade a client from seeking or continuing with treatment by a registered medical practitioner.*

Where a patient is receiving treatment from a registered medical practitioner, a relevant health organisation must ensure that this relationship is respected, and that employees act appropriately and not make any attempt to dissuade the patient from continuing to receive treatment from the registered medical practitioner.

- *A relevant health organisation must accept the rights of his or her client to make informed choices in relation to their health care.*

All relevant health organisations must accept the right of patients to make informed choices about their own health care. Patients must be provided with enough information about their condition, treatment options and prognosis in order to enable them to make decisions relating to their health care, including regarding risks, limitations, length of treatment and costs.

- *A relevant health organisation should communicate and co-operate with colleagues and other health care practitioners and agencies in the best interests of their clients.*

Relevant health organisations should meaningfully engage, and co-operate, with other treating professionals and health care practitioners, as appropriate communication and co-operation between those treating a patient, including appropriate sharing of health records, can be important to ensure that the patient is receiving the best treatment, and also is receiving treatment that is complementary and appropriate. Where an organisation has concerns that the treatment a patient is receiving from another health care practitioner or organisation is not in the patient's best interests the practitioner should communicate those concerns with that other practitioner or organisation.

- *A relevant health organisation who has serious concerns about the treatment provided to a client by another practitioner or organisation, it is appropriate that those concerns are referred to the Health Care Complaints Commission.*

Any instance where an organisation has serious concerns about the treatment being provided to a patient by another practitioner or organisation, for example about the safety of the treatment, they should refer those concerns to the HCCC.

6.6 Organisations must not financially exploit their clients

Clause 6 contains a number of provisions designed to ensure that those organisations who exploit the trust that patients place in them, in order to defraud those patients, may be disciplined and where necessary excluded from practice.

- *A relevant health organisation must not financially exploit a client.*
- *A relevant health organisation must not accept financial inducements or gifts for referring clients to other health practitioners or organisations, or to the suppliers of medications or therapeutic goods or devices.*
- *A relevant health organisation must not offer financial inducements or gifts in return for client referrals from other practitioners or organisations.*

Accepting financial inducements for referring patients to particular practitioners or organisations, or suppliers of goods or medications may indicate that an organisation is motivated by self-interest in making those recommendations or referrals. Likewise offering financial inducements to other

practitioners or organisations for the referral of patients may induce those practitioners or organisations to place their own financial self-interest above the best interest of their patients.

It is noted that the National Law provides that it is unsatisfactory professional conduct for a registered health practitioner to accept a benefit for a referral or recommendation.

- *A relevant health organisation must not provide services and treatment to clients unless they are designed to maintain or improve the client's health or wellbeing.*

This principle is designed to ensure that clients are not provided with services that are designed to financially benefit organisations over the needs of clients.

6.7 Organisations not to misinform their clients

Clause 7 of the draft code is designed to ensure that organisations do not mislead or misinform their patients about their services or the products they supply or about their education, qualifications and professional memberships.

Patients are often at a disadvantage in verifying claims made by organisations, or their employees, as to the training and qualifications they have. Patients are also at a disadvantage in determining the validity of claims that may be made as to the registration or listing of products or medications with the Therapeutic Goods Administration (TGA). Furthermore, patients are in most cases unlikely to understand the distinction between a product/medication that has been registered with the TGA and one that has been listed. Organisations must not exploit this lack of knowledge to provide services that are not evidence-based or consistent with accepted professional standards, or that overstate their benefits/understate the risks, or to gain a financial advantage. As such, clause 7 contains the following principles:

- *A relevant health organisation must not engage in misinformation or misrepresentation about—
(a) the products or services the organisation provides, or
(b) the qualifications, training or professional affiliations of the organisation's employees.*
- *A relevant health organisation must provide truthful information about the qualifications, training or professional affiliations of the organisation's employees if asked for information about those matters by a client*
- *A relevant health organisation must not make claims, directly or in advertising or promotional material, about the efficacy of treatment or services provided if the claims cannot be substantiated.*

Many patients, in determining whether to obtain health care services, request information about training, qualifications and other matters from prospective organisations. Organisations, and their employees, should provide factual information that can be substantiated and should positively communicate the nature, and any limitations, of the competency of the persons providing treatment.

6.8 Confidentiality of client health information

Clause 8 of the draft code requires relevant health organisations to have appropriate policies and procedures in place to ensure the health information of the organisation's clients is kept confidential and the privacy of the organisation's clients is protected, including by complying with relevant legislation. This reflects the importance of client confidentiality when delivering health services.

Adopting this matter in the code of conduct will allow the HCCC to investigate complaints that patient confidentiality has been breached and if the HCCC is satisfied that the complaint has been substantiated and the organisation represents a substantial risk to the health of members of the public, to take action to protect the public from further breaches.¹⁶

6.9 Storage and supply of medicines

Appropriate management of poisons is an important requirement to protect the public. A number of tragic outcomes have arisen from misuse of poisons. The Code requires that a relevant health organisation has appropriate policies and procedures in place to ensure that storage, supply, and record keeping in relation to medicines is undertaken to comply with relevant legislation, including the Poisons and Therapeutics Goods Act. Including this principle in the code will enable the HCCC to take action where there are dangerous practices relating to medicines, including serious or repeated breaches of the Poisons and Therapeutic Goods Act.

6.10 Display of code of conduct and other information

Clause 10 of the draft code requires organisations to display, in a manner easily visible to clients:

- a copy of the code of conduct, and
- a document approved by the Secretary of Health that gives clients information about how to make a complaint to the HCCC.

The rationale for this principle is that clients need to be made aware not only of the standards that are expected of practitioners and organisations under the codes of conduct, but also how to make a complaint to the HCCC if a client feels that a practitioner or organisation has breached one of the codes.

As with the code for practitioners, there is an obligation for the organisation to make the code available on its website.

6.11 Questions for consideration

As noted above, the draft code for relevant health organisations includes a number of principles that are consistent with the code for non-registered health practitioners, as well as principles that are appropriate for organisations. The Ministry is interested in whether the principles in the draft code are appropriate, including whether there should be additional principles added to the code.

The draft code currently applies to a broad range of health organisations. However public health organisations, public hospitals and private health facilities are subject to significant amounts of monitoring and control. As such it is not considered necessary to require these entities be subject to the code. The Ministry is interested as to whether there are other organisations that should be excluded from being required to comply with the code. The Ambulance Service of NSW, similar public health entities, and aged care facilities are subject to significant monitoring and control. While these are not excluded, the Ministry is considering exempting these organisations. The Ministry is interested in whether any other types of organisations should be excluded from the code.

¹⁶ It is noted that the HCCC's role is not to be an investigative body for privacy breaches in general, as these matters are appropriately dealt with by existing bodies, such as the Information and Privacy Commissioner, under existing powers.

Is the code of conduct for relevant health organisations appropriate?

Should aged care facilities and public health entities such as the Ambulance Service of NSW be excluded from the operation of the code?

Should any other organisations be excluded from the operation of the code?

7. Consultation

This impact assessment statement and the draft codes of conduct will be placed on public display for a period of 21 days to allow submissions to be made. Submissions can be made for a further period of 21 days. Any submissions on any issues arising from the draft code should be made to:

Legal and Legislative Services Branch
NSW Ministry of Health
Locked Bag 961
NORTH SYDNEY 2059

Submissions may also be made via email to NSWH-legalmail@health.nsw.gov.au.

Submissions must be received by [date] 2022.

Individuals and organisations should be aware that generally submissions made in respect of this Impact Assessment Statement may be made publicly available under the *Government Information (Public Access) Act 2009* (NSW). The Ministry of Health, in considering its response to the Impact Assessment Statement, may also circulate submissions for further comment to other interested parties or publish parts of submissions. If you wish your submission (or any part of it) to remain confidential, subject to the *Government Information (Public Access) Act*, this should be stated clearly and marked.

8. Attachment

Code of conduct for non-registered health practitioners

Code of conduct for relevant health organisations