



**Occupational Therapy  
Board of New Zealand**

TE POARI WHAKAORA NGANGAHAU O AOTEAROA

FOSTERING FAITH AND CONFIDENCE IN THE PROFESSION

# COMPLAINT PROCESS OUTLINE

## Appendix (1): Complaint Process Chart

This Complaint Process Outline provides information on how the Occupational Therapy Board of NZ manages complaints of various kinds, as illustrated in the Complaint Process Chart.

## Appendix (2): Good Decision Making

An explanation of good decision making as it relates to Judicial Review of decisions of statutory authorities is also provided.

## **Complaint Process Outline**

### **Introduction**

The Occupational Therapy Board of NZ (OTBNZ) is the statutory authority established under the [Health Practitioners Competence Assurance Act 2003](#) (HPCAA) responsible for the registration and regulation of occupational therapists in NZ. The principal purpose of the HPCAA is to protect the health and safety of members of the public by providing mechanisms to ensure that health practitioners are competent and fit to practise their professions.

This document provides an explanation of the processes applied by the Registrar and the Board to manage complaints received under the provisions of the HPCAA, related OTBNZ policies and other applicable legislation.

### **A. Complaint Categories**

The Registrar receives complaints on behalf of the OTBNZ. The [OTBNZ Complaint Process Chart](#) (**Appendix 1**) categorises complaints received by the OTBNZ into six groups as follows:

1. Practitioner complaint affecting a health consumer;
2. Practitioner complaint as to conduct/competence/fitness;
3. Complaint regarding an unregistered person;
4. Complaint as to OTBNZ processes;
5. Complaint as to decision of a delegate under schedule 3, clause 17;
6. Complaint regarding OTBNZ staff.

Please see below a detailed explanation of the process flow in each of the above mentioned categories, with specific reference to the HPCAA.

### **B. Complaint processes**

#### **1. Practitioner complaint affecting a health consumer;**

[View process chart](#)

[View section 64](#)

- a. If any person wishes to make a complaint about an occupational therapist, he or she may give notice of the complaint to the Office of the Health and Disability Commissioner (HDC), or the Registrar of the Board.
- b. Whenever the Board receives a complaint alleging that the practice or conduct of a practitioner has affected a health consumer, it must promptly forward the complaint to the HDC (section 64). The Registrar has delegated authority to

refer complaints regarding occupational therapists to the HDC (*Delegations to Registrar, clause 3(h) December 2013*).

- c. A **health consumer** includes any person on or in respect of whom any health care procedure is carried out.
- d. When the Registrar has notified the HDC of a complaint, or the HDC has notified the Board of an investigation under the [Health and Disability Commissioner Act 1994](#) the Board/Registrar may not take any action under Part 4 of the HPCAA (other than interim suspension under [section 69](#)) until the Board/Registrar receives a notification from the HDC under [section 70](#).
- e. Upon receipt of a notification under section 70, provided under section 34(1) of the Health and Disability Commissioner Act 1994, the Registrar pursuant to delegation clause 3(i), will undertake a preliminary assessment of the issues raised in the complaint, and may seek a response to matters raised in the complaint from the practitioner. Any preliminary assessment may involve seeking advice from OTBNZ senior staff, such as the Deputy Registrar, Professional Advisor and Senior Solicitor, and reference to the OTBNZ *Competencies for Registration, Code of Ethics* and the provisions of the HPCAA.
- f. The Registrar is to write to the complainant and practitioner and advise of the Registrar's decision made pursuant to section [65\(1\)](#) of the HPCAA, where applicable. Action taken by the Registrar may include sending an educative letter to the practitioner, or suggesting a meeting take place between the practitioner and the complainant to resolve concerns. If minor concerns arise, these may be addressed by voluntary agreement, or by referral to another agency such as the Accident Compensation Corporation or the Privacy Commissioner. If the appropriate action to be taken is outside of the current delegations, the Registrar will determine to refer the matter to the Board to determine next steps.
- g. Options available to the Board include but are not limited to: [section 36](#) to refer the practitioner to a competence review, [section 68](#) to refer the matter to a Professional Conduct Committee (PCC), [section 69](#) to propose to suspend the practitioner's practising certificate or to impose one or more conditions on their scope of practice in the interim pending prosecution or investigation. Options available and appropriate will depend on the circumstances of each case.

## 2. Practitioner complaint as to conduct, competence, fitness to practise;

The Registrar may receive a complaint directly from a practitioner or other person, or the Registrar may receive a complaint via referral from HDC as outlined above at point 1(e).

[View process chart](#)

**2.1 Competence:** [Competencies for Registration](#)

[View section 36;](#)

- a. *Please note this category deals with issues arising from a complaint, not a competence notification under s34.*
- b. The Registrar may first determine to make enquiries into the competence of the practitioner, and undertake a preliminary assessment of the issues raised in the complaint, and may seek a response to matters raised in the complaint from the practitioner.
- c. The Registrar may request that the practitioner enter into a voluntary agreement with the Registrar prior to the Board making any decision under section 36. In all circumstances, the use of a voluntary agreement with the practitioner will be considered only where:
  - The Registrar does not consider that the practitioner poses a risk of harm to the public;
  - The Registrar/Board is considering formal action under the HPCAA and determines a voluntary agreement is appropriate as an interim measure.
  - A voluntary agreement will provide ongoing reports and mitigate risk
- d. The Board has the discretion to determine to review the competence of an occupational therapist who holds a current practising certificate, at any time whether or not there is reason to believe that the practitioner's competence may be deficient ([section 36\(4\)](#)).
- e. Having received a complaint which gives rise to concerns as to a practitioner's competence, it is prudent for the Registrar/Board (or a Committee of the Board with delegated authority) to consider the following:
  - What, if any, further inquiries are required?
  - Should a medical examination be ordered under [section 49](#)?
  - Should a competence review be ordered under [section 36](#)?
  - Is notification under [section 35](#) required?
  - Should the Board order interim conditions or interim suspension under [section 39](#) or [48](#)?

**2.2 Conduct:** [View the Code of Ethics for Occupational Therapists](#)

[View section 69;](#)

- a. Similar to category 2.1 above, following receipt of a complaint under this category, the Registrar may determine to make enquiries and undertake a preliminary assessment of the issues raised in the complaint. This may involve seeking a response to matters raised in the complaint from the practitioner.

- b. Where the complaint raises minor conduct issues which are not considered to pose a risk of harm to the public, the Registrar may consider requesting that the practitioner enter into a voluntary agreement, and/or whether issues can be addressed by way of educative letter. If the complaint raises serious conduct issues, the Registrar will immediately refer the matter to the Board for consideration.
- c. The HPCAA provides for the Board to appoint a PCC in circumstances such as to investigate complaints referred by the HDC; and other information the OTBNZ has that raises one or more questions "*about the appropriateness of the conduct or the safety of the practice of a health practitioner*". [section 68](#)
- d. Referral of a complaint to a PCC is discretionary not mandatory under the HPCAA, however if the full Board decides to refer a complaint to a PCC it must do so as soon as practicable after it makes that decision [section 68\(1\)](#).
- e. Under [section 69](#) the Board may determine to propose to suspend the practitioner's practising certificate or to impose one or more conditions on their scope of practice in the interim pending prosecution or investigation.

### **2.3 Fitness:**

[View section 49;](#)

- a. Similar to category 2.1, and 2.2 above, following receipt of a complaint under this category, the Registrar may determine to make enquiries and undertake a preliminary assessment of the issues raised in the complaint. This may involve seeking a response to matters raised in the complaint from the practitioner.
- b. The Registrar's enquiries will also involve requesting information from the practitioner as per the process outlined in the [OTBNZ Fitness to Practise Policy](#).
- c. Where a practitioner declares that they are affected by a health condition, and the Registrar considers this factor does not give rise to a risk of harm to the public or that the practitioner is prevented from performing the functions required for practice of occupational therapy, the Registrar may consider requesting that the practitioner enter into a voluntary agreement.
- d. In terms of health declarations, voluntary agreements are used to provide supports to a practitioner who may be returning to work following an injury of period of ill health. A voluntary agreement in this circumstance also fulfills the function of enabling the Registrar to monitor the practitioner's return to work in terms of their health to ensure all required supports are in place to be satisfied of public safety.
- e. If the complaint raises serious health issues, and the Registrar considers that the practitioner may be prevented from performing the functions required for practice, the Registrar will refer the matter to the Board for consideration.

- f. Where the Board considers that a practitioner *"may be unable to perform the functions required for the practise of his or her profession because of some mental or physical condition"* the Board can require a practitioner to submit him or herself for an examination or testing by a medical practitioner at the expense of the Board [section 49](#).
- g. Under [section 48](#) the Board may order interim suspension of a practitioner's practising certificate or include conditions in the practitioner's scope of practice. An interim suspension or conditions imposed under section 48 can only apply for up to 20 working days, but the Board may extend this period for a further 20 working days under subsection (3) if a further period is necessary for any examination or testing required under section 49.

### **3. Complaint regarding an unregistered person (Statutory Offence);**

[View process chart](#)

[View section 7;](#)

- a. The Registrar receives complaints alleging that an unregistered person is "holding themselves out" as a NZ registered occupational therapist.
- b. It is a statutory offence under [section 7](#) to practise without registration and a current practising certificate. Section 7 of the HPCAA prohibits an unqualified person from claiming to be a health practitioner, and any person who does not hold a current practising certificate cannot claim to be practising a profession as a health practitioner of a particular kind.
- c. The Ministry of Health is responsible for investigating and prosecuting potential breaches of section 7 of the HPCAA.
- d. The Registrar is to undertake a preliminary investigation into the matter, in order to determine whether a prima facie case exists that a person has committed a statutory offence. In the event that the Registrar believes section 7 may have been breached, the Registrar is then to determine to refer the matter to the Ministry of Health.
- e. Please note other statutory offences include [section 33](#); [sections 44\(1\) and \(3\)](#); and [59](#); [section 77](#); [section 78](#); [section 95](#); [section 98](#); [section 172](#); [schedule 1, clause 12](#); [schedule 1, clause 13](#).

### **4. Complaint as to OTBNZ processes;**

[View process chart](#)

[View clauses 1 - 22;](#)

- a. The Registrar receives complaints as to OTBNZ processes undertaken in the course of making a decision under the HPCAA. Clear legal authority must exist for a decision that adversely affects a person's interests. The Registrar and

Board must ensure compliance with the general administrative provisions and process requirements set out in [schedule 3 of the HPCAA](#).

- b. Upon receipt of such a complaint, the Registrar is to investigate the matter with a view to assessing whether principles of good decision making have been exercised by OTBNZ.
- c. The Registrar may resolve the matter by way of a letter to the practitioner providing an outline of processes used by OTBNZ. The Registrar to consider inviting the practitioner to a meeting to discuss any outstanding concerns, and to follow up with a written record of the meeting to the practitioner.
- d. The Registrar to refer unresolved complaints as to OTBNZ process to the Board as required, and where requested by the complainant.

#### **5. Complaint as to decision of a delegate under schedule 3, clause 17**

[View process chart](#)

[View clause 18:](#)

- a. The Board may by written notice, delegate any of its functions, duties, or powers (other than any power under [section 69](#) or [section 71](#)) to a committee appointed under [clause 16](#) or to its Registrar.
- b. The Registrar may receive a complaint from a person who is adversely affected by a decision made by the Registrar, Deputy Registrar, Fitness Committee or other committee of the Board with delegated authority. In this circumstance, the complaint would be referred to the Board.
- c. A person who is adversely affected by a decision made by a person under a delegation given under [clause 17](#) may, within 20 working days after the communication of the decision to the person, by application in writing, request the Board to review the delegate's decision.
- d. The Board must, as soon as practicable, review the delegate's decision, and must either confirm or revoke that decision.
- e. This option of review is only available if the person has not brought an appeal in the District Court against the decision. (The Board's use of its powers under the HPCAA may be subject to an appeal against the Board's decisions. The right of appeal is limited to the matters set out in [section 106](#)).
- f. Complaints relating to a decision of the Board are referred to the Board for consideration. (A decision by the Board may be challenged by judicial review in the High Court).

#### **6. Complaint regarding OTBNZ staff**

[View process chart](#)

[View the Employment Relations Act 2000;](#)

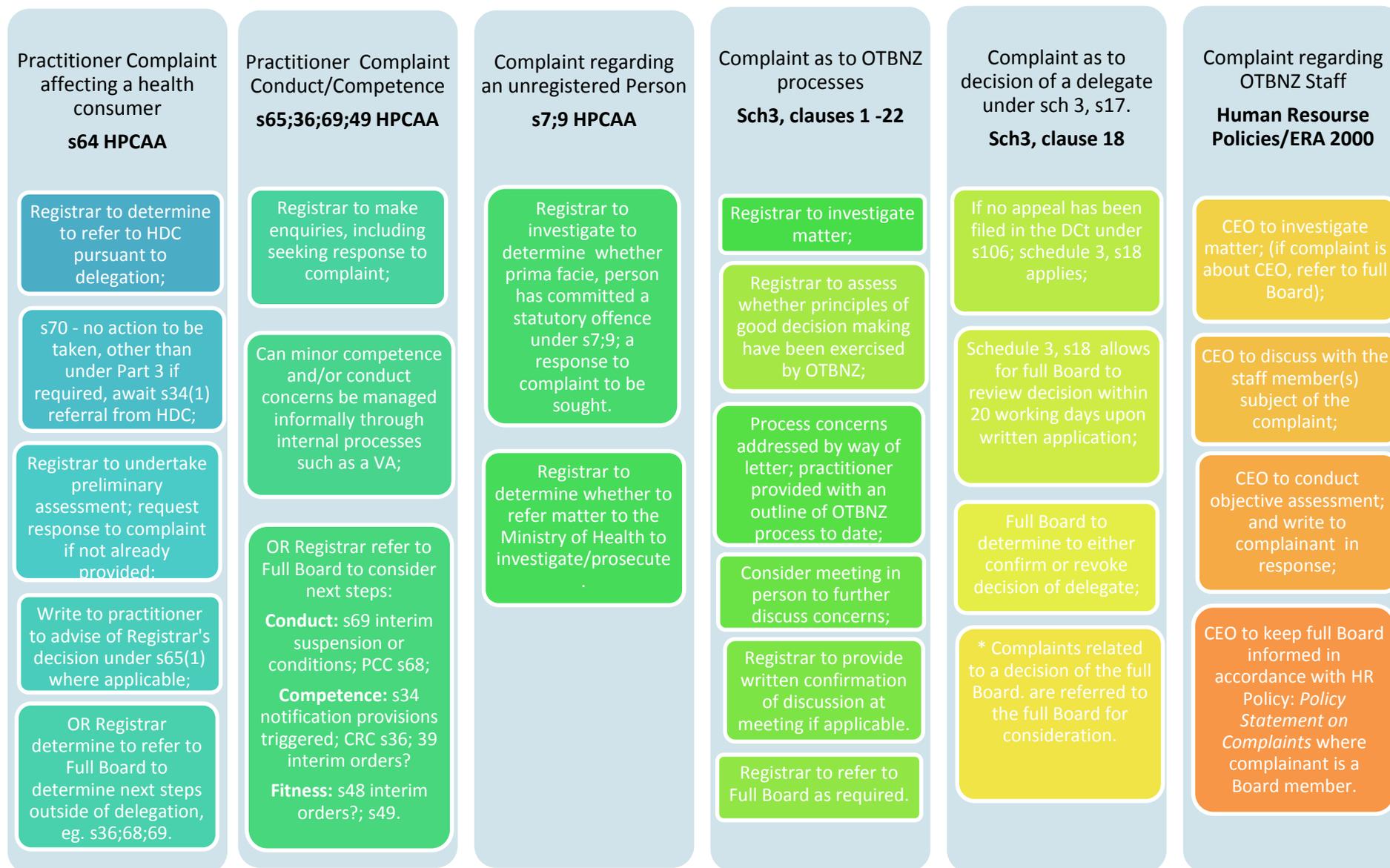
- a. The OTBNZ Human Resource policies: *Employee Complaints and Grievances* and *Protected Disclosures Whistleblowing* establish complaint procedures so that any concerns of staff, concerns of those outside the organisation or a Board member are addressed and resolved as soon as possible.
- b. The CEO is to investigate complaints about staff, bearing in mind the provisions of the Employment Relations Act 2000, individual employees' terms and conditions of employment, and those OTBNZ Human Resource policies mentioned (at point a.) above. The full Board to investigate complaints in respect of the CEO.
- c. The CEO is responsible for reporting back to the complainant on action taken. If the complaint relates to the CEO, the Chair will be responsible for investigating and reporting on the complaint.
- d. The employer must act in a fair and reasonable manner, and in accordance with natural justice when investigating allegations against employees, and before dismissing or taking action against an employee. The CEO/Board must act in a fair and objective manner.
- e. Support from an external human resources and/or legal advisor may be sought.

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## Appendix 1

### OTBNZ Complaint Process Chart

Outline of process for considering complaints



## Appendix 2

### **Good Decision Making**

#### **Introduction**

As the Occupational Therapy Board of NZ (OTBNZ) is a Responsible Authority established by statute, when exercising its powers conferred under the Health Practitioners Competence Assurance Act 2003 ([HPCAA](#)), all decisions must be made in accordance with principles of good decision making. A decision, proposed decision, or the refusal to exercise a power of decision by a statutory authority, such as the OTBNZ, may be challenged by judicial review in the High Court.

#### **Judicial Review of decision making**

The Court has confirmed that a Responsible Authority must exercise its powers in accordance with the purpose of the HPCAA, being to protect the health and safety of the public, and any action taken by the authority must not be unreasonable.<sup>1</sup>

To avoid judicial review, when exercising their powers under the HPCAA Responsible Authorities should bear in mind the principles of good administrative decision making. Judicial review relates to the decision making process, not the decision itself.

Judicial review is the exercise of the High Court's inherent jurisdiction to rule on the legality of public acts.<sup>2</sup> The Judicature Amendment Act 1972 established a statutory procedure for reviewing the exercise of statutory power.<sup>3</sup>

There is a distinct difference between appeal and review. Review is concerned with the legality of the decision and whether it was reached "*in accordance with law, fairly and reasonably*".<sup>4</sup> This means the Court will address the powers and procedures of decision making (the manner in which the decision was made) and ask whether the decision should be allowed to stand. In contrast, rights of appeal are statutory. A person may appeal to a District Court a decision or direction of an Authority on any matter set out in [section 106](#). Appeal entails adjudication on the merits and may involve the court substituting its own decision for that of the decision maker.<sup>5</sup>

In some situations, applicants may be able to choose between by either exercising a right of appeal, or bringing an application for judicial review.<sup>6</sup>

#### **What are the grounds for Judicial Review?**

Those adversely affected by the Board's decisions under the HPCAA can apply for a judicial review of the decision. A decision maker has a threefold duty to act fairly, reasonably and in accordance with the law.<sup>7</sup> The central issue is whether the decisions were lawful, reached by fair process and were reasonable.

The grounds of judicial review can be briefly summarised as illegality, unreasonableness (substantive unfairness) and procedural impropriety or procedural fairness.

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<sup>1</sup> *Wislang v Medical Council of New Zealand* [2004] UKPC 59 (Privy Council); [2002] NZAR 573 (CA);

<sup>2</sup> Joseph, above n2 at 861.

<sup>3</sup> Joseph, above n2 at 861.

<sup>4</sup> Sir Robin Cooke "The struggle for simplicity in administrative law" in M Taggart (ed) *Judicial Review of Administrative Action in the 1980's: Problems and Prospects* (Oxford University Press, Auckland, 1986)

<sup>5</sup> Joseph, above n2 at 863.

<sup>6</sup> Matthew Smith *New Zealand Judicial Review Handbook*, Thompson Reuters, New Zealand 2011, at 85.

<sup>7</sup> Smith, above n6 at 55.

When making a decision under the HPCAA, it is important that decision makers are mindful not to do the following:

1. Act outside of the parameters set by the HPCAA, and any delegations;<sup>8</sup>
2. Abuse a discretionary power, such as exercising a power for an improper purpose;
3. Apply a rigid rule or policy/refuse or fail to act in accordance with decision making responsibility;
4. Commit a reviewable error in making findings of law or fact;<sup>9</sup>
5. Act in bad faith;
6. Fail to take into account relevant considerations, or are influenced by legally irrelevant considerations;<sup>10</sup>
7. Make unreasonable decisions:
  - a. The term "*Wednesbury* unreasonableness" is used to describe a test prescribing that a decision may not be "*so unreasonable that no reasonable authority could have decided that way*"<sup>11</sup>
  - b. Additionally, in *Council of Civil Service Unions v Minister for the Civil Service*, Lord Diplock said in respect of unreasonableness, or "irrationality" that "*It applies to a decision which is so outrageous in its defiance of logic or of accepted moral standards that no sensible person who had applied his mind to the question to be decided could have arrived at it.*"<sup>12</sup>
8. Act in breach of the rules of natural justice/the duty to act fairly.<sup>13</sup> Natural justice requires:
  - a. The parties being given a reasonable opportunity to be heard (the "fair hearing rule"); and
  - b. Having a decision made by a decision maker who is free from actual *bias* or the appearance of bias (the "bias rule"); The rule against bias is fundamental. This requires impartiality in decision making so as to ensure that "*Justice should not only be done, but should manifestly and undoubtedly be seen to be done.*"<sup>14</sup>
  - c. Presumptive bias arises where a decision maker has a direct pecuniary interest in the outcome of the case, apparent bias is where the decision maker has some personal or professional relationship with a party, or a prejudice or preference towards a particular result.<sup>15</sup>
  - d. A decision maker may have an actual bias, or some interest or preference/prejudice that engenders a reasonable apprehension that it may influence the outcome of the case.<sup>16</sup> A fair minded lay observer might reasonably apprehend that the decision maker might not bring an impartial mind to the resolution of the question required to be

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<sup>8</sup> Joseph, above n2 at 939.

<sup>9</sup> Joseph, above n2 at 939.

<sup>10</sup> Joseph, above n2 at 948.

<sup>11</sup>*Associated Provincial Picture Houses v. Wednesbury Corporation* [1947] EWCA Civ 1, [1948] 1 K.B. 223, Court of Appeal (England and Wales).

<sup>12</sup> *Council of Civil Service Unions v Minister for the Civil Service* [1985] AC 374, 410.

<sup>13</sup> Joseph, above n2 at 1023.

<sup>14</sup> Joseph, above n2 at 1076.

<sup>15</sup> Joseph, above n2 at 1076.

<sup>16</sup> Joseph, above n2 at 1077.

decided, as a possibility not probability.<sup>17</sup> [Clauses 11 – 14, Schedule 3](#) of the HPCAA address bias by way of conflicts of interest.

- e. Predetermination compromises the impartiality of the decision maker. Predetermination is concerned with a closed mind decision making, while bias is concerned with public perceptions as to impartial decision making.<sup>18</sup> For the avoidance of any doubt and in line with the above guidance, should information come to the direct attention of the Board, Board members must be mindful not to partake in discussion on the matter, and any such information must be provided to the Registrar in the first instance in order to determine a course of action.

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<sup>17</sup> Joseph, above n2 at 1084.

<sup>18</sup> Joseph, above n2, at 1089.