



**MEDICAL SCIENCES COUNCIL
OF NEW ZEALAND**

TE KAUNIHERA PŪTAIAO HAUORA O AOTEAROA

**POLICY AND GUIDELINES:
PUBLICATION OF PRACTITIONERS
SUBJECT TO AN ORDER OR DIRECTION**

FEBRUARY 2020

Policy Title		Publication of Practitioners Subject to an Order or Direction
Reference Number	2020-Feb-V1-MSC Naming Policy	
Scope	This policy applies to any person who is currently, or has previously been registered with the Medical Sciences Council under the Health Practitioners Competence Assurance Act 2003	

Associated Policy Documents	
Code of Ethics	
Competence Standards for Anaesthetic Technicians in Aotearoa New Zealand	
Competence Standards for Medical Laboratory Science Practitioners in Aotearoa New Zealand	

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Policy Overview

The Medical Sciences Council (the Council) is a statutory authority established under the Health Practitioners Competence Assurance Act 2003 (the Act). The Council is legislatively obliged to protect the health and safety of the public through regulating anaesthetic technology and medical laboratory science practitioners in Aotearoa New Zealand. This includes an obligation to receive information from any person about the practice, conduct, or competence of health practitioners and, if it is appropriate to do so, to act on that information (s118 [f]).

The Council may, under section 157 of the Act publish in any publication, a notice setting out the effect of an order, or a direction it has made in respect of a registered:

- anaesthetic technician
- medical laboratory scientist (provisional registration)
- medical laboratory scientist (full registration)
- medical laboratory technician (provisional registration)
- medical laboratory technician (full registration)
- medical laboratory pre-analytical technician (provisional registration)
- medical laboratory pre-analytical technician (full registration)

Section 157B of the Act mandates that the Council must publish a naming policy in respect of matters relating to the naming of a practitioner in a notice published by the Council under section 157.

This policy document articulates the principles and processes the Council will follow when considering whether to publish the name of a practitioner about whom an order or direction has been made.

Legislative Context

The Council may issue an order to a registered anaesthetic technician or registered medical laboratory science practitioner under various sections of the Act. Those orders may be related to competence, to fitness to practise, or to conduct.

Provisions allowing the Council to make a direction to a registered health practitioner are also set out in the Act.

A summary of the types of orders and directions the Council may make under the Act are provided in Appendix 1.

The provisions for the naming of a registered anaesthetic technician or registered medical laboratory science practitioner are set out in sections 157 and 157A to 157I of the Act.

Purpose of Naming Policy

HPCA Act 2003 Section 157B (2): the purpose of the naming policy is to -

The purpose of the Council's naming policy has been set in accordance with S157B (2) of the Act. Specifically, this is to:

- enhance public confidence in the anaesthetic technology and medical laboratory science professions and the Council's disciplinary procedures by providing transparency about its decision-making processes; and
- ensure that anaesthetic technicians and medical laboratory science practitioners whose conduct has not met expected standards may be named where it is in the public interest to do so; and
- improve the safety and quality of health care

Practitioners Subject to the Naming Policy

HPCA Act 2003 Section 157B (3) (a): a naming policy must set out the class or classes of health practitioners in respect of whom the naming policy applies

The Council's naming policy applies to all registered anaesthetic technicians and all registered medical laboratory science practitioners (all scopes of practice). This is inclusive of practitioners currently practising and those whose names remain on the register but are not practising.

Circumstances for Considering Naming of a Practitioner

HPCA Act 2003 Section 157B (3) (b): a naming policy must set out the circumstances in which a health practitioner may be named

Application of the naming policy is limited to registered anaesthetic technology practitioners or medical laboratory science practitioners who are subject to an order or direction made by the Council.

Orders or directions may relate to issues concerning competence, health, or conduct.

Principles Under-Pinning the Decision-Making Process

HPCA Act 2003 Section 157B (3) (c): a naming policy must set out the general principles that will guide the authority's naming decisions

Any decision to publish the name of a practitioner, and the effect of any order or direction made by the Council will be subject to a rigorous decision-making process.

The Council will ensure that decisions made under this policy are compliant with relevant legislation including:

- The Health Practitioners Competence Assurance Act 2003
- The information privacy principles of section 6 in the Privacy Act 1993
- General law, including rights of natural justice

Each decision on naming a practitioner is made on a case-by-case basis.

The Council will apply the following guiding principles to inform its decision-making in respect of publishing the name of the practitioner concerned:

1. The core purpose of the Act is to protect public health and safety. Publication of an order or direction may be necessary to enable the public to make informed decisions in respect of their health care or service.
2. A publication will not disclose information about the matters of another person or someone whose identity could reasonably be ascertained from the information published.
3. The publication must only contain information pertaining to the effect of the order or direction, a summary of any finding made in respect of the practitioner, and the name of the practitioner. Information of any other kind can only be published with the consent of the practitioner concerned.
4. A decision to publish a practitioner's name must not be made for punitive reasons.
5. Publication should not occur if there is a risk of a breach of an identifiable patient's privacy.
6. The Council must have regard to the possible consequences for the practitioner to being named including the likely reputational harm to the individual and practice (where applicable).
7. The practitioner's privacy interests are to be weighed against the public interest and considered on the individual circumstances of the case. Appendix 2 provides a list of considerations the Council will use to help inform their decision as to whether or not the practitioner should be named.
8. Should the practitioner's privacy interests be found to be evenly balanced against the public interest, the public's right to protection of their health and safety and their right to be informed will be given priority.
9. Any publication should be issued in a format and manner that will provide the required level of information to the audiences as identified by the Council.
10. In accordance with the principles of natural justice, the Council must ensure it considers each case objectively and without bias. When deciding whether to publish a notice, the practitioner affected by the publication will be given adequate notice and an opportunity to be heard prior to the Council making a final decision.

Privacy of Information Considerations

When considering the naming of a practitioner under this policy the Council will have regard to its legislative obligations under section 6 (information privacy principles) of the Privacy Act 1993. The privacy principles articulate standards for handling information about an identifiable individual, including that an individual's personal information should not be disclosed to other parties without the individual's authorisation, or in accordance with one of the established exceptions.

A key premise on which information may be used or disclosed without authorisation is where the information is being used for a purpose directly related to a reason why the information was

collected. The Council collects information to protect public health and safety by ensuring registered anaesthetic technicians and medical laboratory science practitioners are competent and fit to practise. Use or disclosure that is consistent with the purpose for which the information was collected would be consistent with the information privacy principles.

Using or disclosing information without authorisation is also permissible when it is necessary to prevent or lessen a serious threat to public health or public safety. A “serious threat” means a threat that the Council reasonably believes to be serious having regard to all the following:

- the likelihood of the threat being realised; and
- the severity of the consequences if the threat is realised; and
- the time at which the threat may be realised

Criteria for Making a Naming Decision

HPCA Act 2003 Section 157 B (3) (d): a naming policy must set out the criteria the authority must apply when making a naming decision

Decisions Relating to Competence Orders (Sections 38 and 48)

A practitioner who has been issued an order under section 38 (failure to meet the required standard of competence) or section 43 (unsatisfactory results of a competence programme or a recertification programme) will generally not be named under this policy. This will not apply if the Council considers there is an overriding risk to public health and safety which cannot be effectively mitigated by other means.

The above does not restrict the publication in the public register of any related or consequential order involving the suspension of the practitioner’s practising certificate or imposition of conditions on their practice.

Furthermore, it does not restrict the Council notifying the terms of the order to third parties including:

- any person to whom the Registrar must give a copy of the order under section 156A(2)
- any person who notified the Council of competence concerns in respect of the named practitioner, whether that was through a complaint, a notice given under section 34, or other means
- any person engaged by the Council to conduct a competence review or otherwise to advise the Council in relation to the practitioner’s competence
- any educational institution that places medical laboratory science students at the department or practice where the practitioner is practising

Decisions Relating to Health/Fitness to Practice Orders (Sections 48 to 50)

Orders made under section 48-50 relate to interventions where there are concerns about a practitioner’s health or fitness to practice and may include interim orders in that regard (s48).

In these cases the Council will give regard to the sensitive nature of the practitioner's personal information and will generally not name the practitioner concerned. This will not apply if the Council considers there is an overriding risk to public health and safety that cannot be effectively mitigated by other means.

Decisions Relating to Interim Orders (other than interim orders relating to health/fitness to practise) (Sections 39, 69/69A)

Interim orders are normally used as a mechanism to ensure the protection of public safety while the Council gathers information to help determine whether the practitioner does in fact pose a risk to the public, and the extent of any such risk, or pending the outcome of an investigation into the practitioner's alleged conduct.

When considering whether to name a practitioner subject to an interim order, the Council will give due consideration to the unsubstantiated nature of the matter, and the extent to which it can be satisfied that any perceived risk can be mitigated by the interim order.

Decisions Relating to Ordering the Revocation of Orders

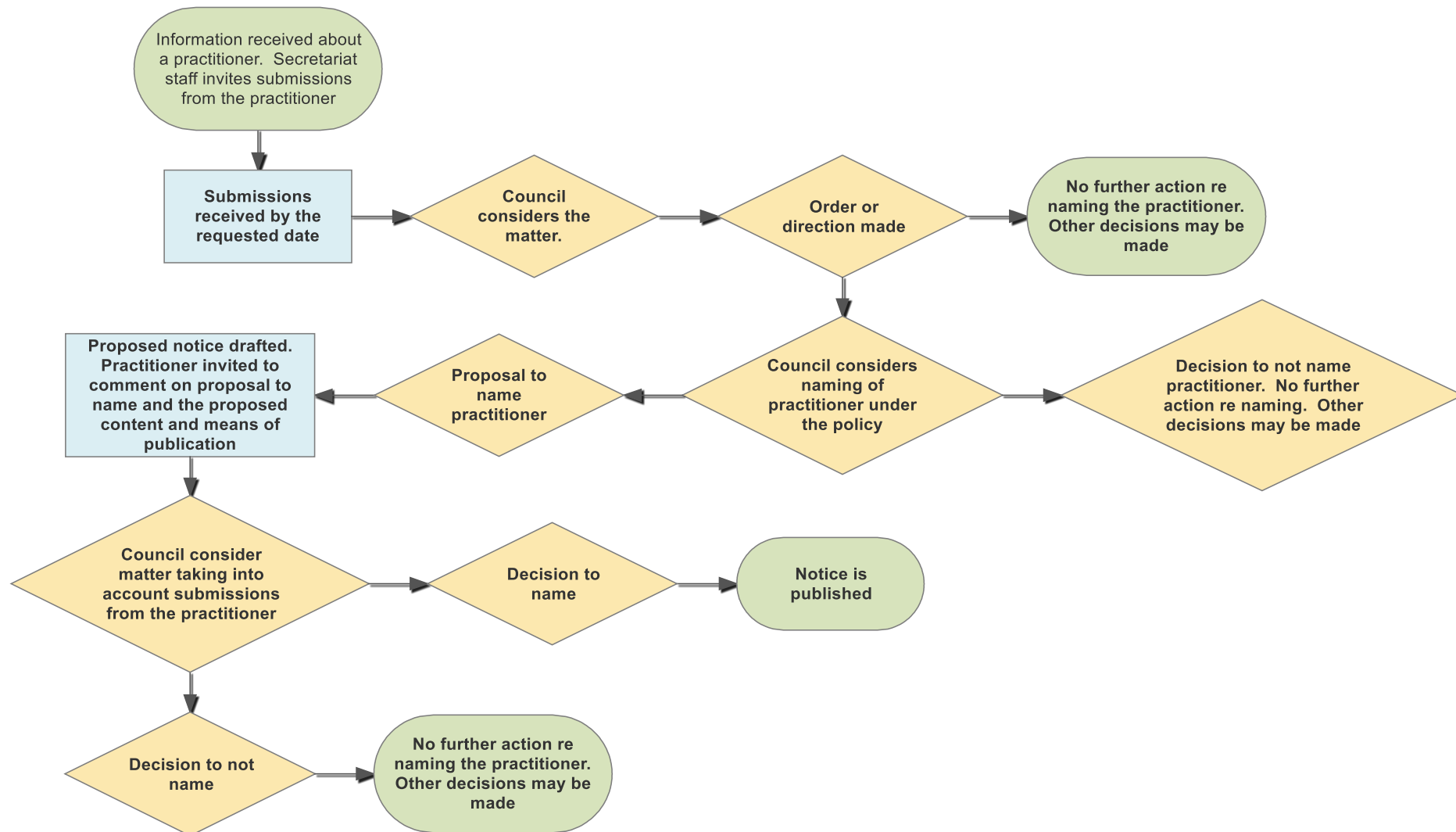
Under section 51 the Council may make an order revoking any suspension or any conditions as imposed under sections 39, 48, 50, 67A. The Council may also revoke any order varying a condition imposed under sections 39, 48, 50, 67A, or 69A.

The Council is unlikely to name the practitioner when revoking or amending the order if the practitioner was not named when the original order was made.

If the practitioner was named at the time of the original order, the Council may publish a notice advising the order has been revoked or varied. While the Council will apply the principles as set out in this policy to its decision, it will give regard to the potential impact a second notice may have in terms of a reputational interest to the practitioner concerned. The practitioner's views on whether the publication of an order of revocation is likely to have a positive or negative effect on their reputation, will be taken into account.

Decision-Making Procedure

HPCA Act 2003 Section 157B (3) (f): a naming policy must set out the procedures that the authority must follow when making a naming decision



Content of Publication Information

HPCA Act 2003 Section 157B (3) (g): a naming policy must set out the information the authority may disclose when naming a health practitioner

The Council is not required to publish the order and reasons for it in full, but rather is required to include the effect of an order and a summary of any finding in respect of a named practitioner. The Council will consider the most appropriate wording and summary to best inform the reader while ensuring no more of the practitioner's personal information is disclosed than that required to achieve that.

The effect of an order should be sufficient to provide a lay reader with a reasonable understanding of the consequences of the order.

The summary of any finding should be sufficient to provide the reader with an understanding of the reasons for the decision, including any key finding relevant to the decision. This will be based on reasons for the order and modified as appropriate.

Publication Media

HPCA Act 2003 Section 157B (3) (h): a naming policy must set out the means by which a health practitioner may be named

The Council may use a variety of media to publish a notice including (without limitation):

- websites
- newsletters
- news media
- online publications
- social media

When considering the most appropriate publication media the Council will give regard to the options that are most likely to reach the audiences who will benefit from publication of the naming notice.

Those audiences may include (without limitation):

- patients or former patients of the practitioner
- members of the anaesthetic technology and medical laboratory science professions
- colleagues from other associated health professions as appropriate
- accredited educational institutions and anaesthetic technician trainees/medical laboratory science students
- members of the public in general

Appendix 1: Orders Permissible under the Act

Section	Order or Direction
31(4)	Cancel interim practising certificate
38(1)	Where the Authority has reason to believe the practitioner fails to meet the required standard of competence, it may order one or more of the following: <ul style="list-style-type: none"> - competence programme - conditions on practice - examination or assessment - counselling or assistance
39	Interim suspension of practising certificate or imposition of conditions pending the outcomes of a competence review, where there are reasonable grounds for believing the practitioner poses a risk of serious harm
43	Where a practitioner does not satisfy the requirements of a competence or recertification programme the Authority may: <ul style="list-style-type: none"> - change permitted health services the practitioner can practise - impose conditions on practice - suspend registration
48(2)	When the Authority <i>suspects</i> a practitioner is unable to perform required functions due to a physical or mental condition it may: <ul style="list-style-type: none"> - order interim suspension - change the permitted health services the practitioner can practise - impose conditions on practice
48(3)	Extension of s48(2) – order may be extended for 20 more days
50	When the Authority is satisfied the practitioner is unable to perform the required functions due to a physical or mental condition it may order: <ul style="list-style-type: none"> - suspension of registration - imposition of conditions on practice
51	Revocation of suspension or conditions imposed under sections 39, 48, 50, 67A Order to vary conditions imposed under sections 39, 48, 50, 67A, 69A
67A(2)	Upon receipt of notice of conviction the Authority may order: <ul style="list-style-type: none"> - a medical examination or treatment - a psychiatric or psychological assessment - a course of treatment or therapy for alcohol or drug abuse
67A(6)(b)	Following 67A orders, the Authority may order conditions
69	Interim action if appropriateness of the practitioner’s conduct is in doubt. Orders are given with notice: <ul style="list-style-type: none"> - suspension of practising certificate - imposition of conditions on practice

Section	Order or Direction
69(4)	Revocation of 'with notice' orders for suspension or conditions
69A	Without notice interim suspension of practising certificate where there is a conduct or criminal proceeding and the Authority believes the practitioner poses a risk of serious harm to the public
69A(5)	Revoking 'without notice' suspension
69A(6)	Authority may include conditions when revoking without notice suspension
142	Health practitioner requests cancellation – Authority may direct Registrar to cancel registration
143	Health practitioner dies – Authority may direct Registrar to cancel registration
144(5)	Authority may direct Registrar to cancel an entry in the register
146	<p>Authority may direct Registrar to cancel registration if a practitioner:</p> <ul style="list-style-type: none"> - gives false information - is not entitled to registration <p>Authority may direct Registrar to notify cancellation in any publications it so directs</p>
147(5)	Authority may review the registration of a practitioner where their qualification is cancelled or suspended by the issuing educational institution or an overseas authority removes, cancels, or suspends the practitioner's registration. Authority may suspend or cancel the practitioner's registration

Appendix 2: Considerations of Practitioner's Privacy Interest vs Public Interest

HPCA Act 2003 Section 157B (3) (e): a naming policy must set out the requirement to have regard to the consequences for the health practitioner of being named, including the likely harm to the health practitioner's reputation

When considering the naming of a practitioner the Council will apply the following criteria whereby the practitioner's privacy interests are weighed against the public interest and considered on the individual circumstances of the case. Should the practitioner's privacy interests be found to be evenly balanced against the public interest, the public's right to be informed will be given priority.

Considerations of the Practitioner's Privacy Interests

What is the extent to which the information is already known to the notifier and/or in the public domain?	The privacy interest for the practitioner may be less due to prior knowledge and/or public availability of the information.
Consider the age and relevance of the information	If the matter is historical and of no current relevance the privacy interest for the practitioner may be higher especially as the disclosure of personal information may be unfair.
Is the matter substantiated or unsubstantiated?	<p>If the matter is unsubstantiated the privacy interest of the practitioner will be higher as the allegation has not been formally upheld.</p> <p>The practitioner's expectation for privacy may be lower when the matter has been substantiated such as through a competence review or a Tribunal decision.</p>
What is the status of the investigation?	The practitioner's privacy interest will be higher where investigation of the matter is ongoing. Disclosure of information while an investigation is ongoing may unfairly suggest there is substance to the matter.
What is the likelihood of any harm arising from disclosure?	The practitioner's privacy interest will be higher if there are factors that may increase the risk of personal or professional reputational damage. For example, the physical or mental health of the practitioner, or the size of the community in which they practise.
Information must be put in context so as to minimise harm	Could any potential harm from disclosure be mitigated by issuing summary information with appropriate context?

Consideration of the Public Interest

Public safety	Ensuring the safety and quality of anaesthetic technology or medical laboratory science services. Non-disclosure in a particular case may run a risk of harm to future patients. Disclosure may elicit other complaints or concerns about the practitioner's competence or conduct.
"Reasonable patient" test	The reasonable patient test will weigh in favour of name publication. A 'reasonable' patient would expect to know about the order or direction so that they can make an informed choice in respect of receiving anaesthetic technology or medical laboratory science services from that practitioner.
Accountability	<p>Health practitioners are accustomed to being held to account for the standard of interventions and treatment they provide. It is reasonable for them to expect that some information about their practice needs to be disclosed if serious accountability or health and safety concerns are raised.</p> <p>An agency that receives any notification about registered health practitioner is accountable for the proper discharge of its responsibilities in the assessment and investigation of those matters and taking any necessary remedial action.</p>
Nature of information	<p>Does the information raise serious safety or competence concerns? Does non-disclosure raise a risk of harm to future patients?</p> <p>Complaints of a serious nature (as opposed to a trivial or inconsequential nature) will raise stronger public interest considerations in favour of name disclosure.</p>
Number of notifications	Where the practitioner has been the subject of a high frequency of notifications, and/or notifications that raise recurring themes, this may indicate wider issues and disclosure of information could be justified in the public interest.
Practitioner's position and level of responsibility	<i>"The competing public interest is also high, particularly where the employee in question held a position of responsibility in respect of particularly vulnerable members of society"</i> (former Ombudsman David McGee in relation to a DHB psychiatrist).
Action taken	Where a complaint has been investigated and substantiated the public interest in disclosure may be higher.
Extent to which information is already in the public domain	If information about the matter is already in the public domain, the public interest in disclosure may be higher in respect of a summary about the outcome of the matter. Disclosure in this instance would demonstrate that appropriate action has been taken to investigate and institute any required protective measures or remedial action.
Age of the information	If the issues raised are historical and have minimal relevance the public interest in disclosure may be lower.

Public Interest Considerations Against Naming

Risk of harm or serious harm	Where the Council has formed a view that the practitioner poses a risk of harm or a risk of serious harm (as per the relevant sections of the Act), that may weigh in favour of name disclosure.
Open disclosure	Routine naming of individual practitioners should be avoided as it may undermine a culture of open disclosure to improve the quality of safe care.
Early resolution may hinder improved practice	Practitioners may seek early resolution to complaints to avoid the risk of being named. There is a risk any underlying issues may not be addressed thereby risking repeat, and an ultimate failure to properly ensure the public is protected.
Reputational harm for colleagues	Registered health practitioners notifying of concerns about a colleague's competence may be less inclined to do so if they fear this will unfairly impact on the colleague's reputation.
