

BY-LAW 4 ESSA Complaints and Disciplinary Procedures

Version 1.1
(By-Law Made Pursuant to Clauses 22 of the Constitution)

October 2014

PART 4 COMPLAINTS AND DISCIPLINARY PROCEDURES

(By-law Made Pursuant to Clauses 22 of the *Constitution*)

Purpose of Part 4

This By-law has three main purposes:

- To provide a fair and transparent process for the review of ESSA Member and accredited/qualified individuals conduct and
- To provide a fair and transparent complaint management and disciplinary process.
- To satisfy members and the public that the professional standards ESSA aspires to are being upheld by its members.

Membership of and accreditation/qualification with ESSA, binds acceptance of the ESSA Code of Professional Conduct and Ethical Practice (the "**Code**"). The Code establishes a standard against which professional behaviour of ESSA Members may be evaluated. Behaviour contrary to the terms and spirit of the Code amounts to behaviour against the best advice and interests of ESSA.

The Code has been used in establishing work protocols, the making of decisions and in determining appropriate courses of action regarding complaints concerning the professional conduct and ethical behaviour of ESSA Members and accredited/qualified individuals. This By-law outlines how those courses of action are to be taken.

To give effect to the intent and purposes of this By-law, and the processes prescribed hereunder, each member of ESSA shall at all times, co-operate with the Chief Executive Officer and the Ethics Committee in providing any response to any complaint and all information and documentation sought within any reasonable time requested. It may be a breach of a Member's professional obligations and the Code of Conduct to refuse or neglect to respond or respond truthfully, properly, or in a timely manner to any request for a response or any information or documentation sought.

Definitions

For the purposes of this By-law the following words shall have the meanings set out hereunder:

"**Board**" means the duly appointed ESSA Board from time to time.

"Ethics and Disciplinary Committee" means the Ethics Committee/Review Panel appointed by the Board from time to time.

"Chief Executive Officer" means the Chief Executive Officer of ESSA appointed by the Board from time to time.

"Member" shall mean and include ESSA Members and accredited or qualified individuals.

Important Notice

ESSA has no legal jurisdiction over any exercise and sports scientists in Australia, however by acceptance of membership or by seeking and obtaining accreditation with ESSA, a person agrees to accept and be bound by the Code of Conduct and to the By-laws.

ESSA does:

- Accept complaints against ESSA Members or individuals who hold an ESSA accreditation or qualification from fellow members or accredited/qualified individuals, healthcare professionals and the general public/clients;
- Record all complaints for review by ESSA on a monthly basis;
- Submit complaints for review in detail by the delegated ESSA Ethics Committee as appropriate;
- Assist in resolution of difficulties between ESSA Members or ESSA accredited/qualified individuals and the general public/clients;
- Request ESSA Members or ESSA accredited/qualified individuals to present evidence for consideration of complaints of ethical or professional misconduct against them;
- Counsel and educate ESSA Members or ESSA accredited/qualified individuals in respect of standards, ethics and appropriate behaviour; and
- Discipline ESSA Members by revoking their membership or accreditation/qualification and taking appropriate action to ensure that non-members cannot hold themselves out as being members of or otherwise affiliated with ESSA.

What this By-law does not cover

ESSA does not:

- Assist in the resolution of disputes between members or ESSA accredited/qualified individuals, arising from commercial or contractual obligations such as employment relationships or principal/contractor disputes, or business matters.
- Deal with complaints involving criminal activity (which may be referred to the Police for investigation).

- Deal with any civil disputes until any civil proceedings are finally resolved.
- Deal with any statutory or regulatory compliance issues unrelated to professional conduct and standards.

ESSA Ethics Committee

The Board of ESSA has appointed and established an Ethics Committee to deal with matters arising under By-law 4 regarding Complaints and Disciplinary Procedures.

The Ethics Committee shall comprise of:

- A Chairman
- A member of the public
- The ESSA legal representative
- Health and medical practitioner
- Up to 2 ESSA members

This committee will be approved by the ESSA Board.

The quorum for the committee meeting is 4 members.

Conflicts

No Member of the Ethics Committee, who is personally concerned in any complaint or disciplinary process under By-law 4, shall take part in any aspect of the process. Any Member of the Ethics Committee who has any actual or potential personal concern must notify the Chair as soon as possible, before any process commences if possible and withdraw from any such process.

For the purposes of this By-law, a person is personally concerned where they have a relationship by blood or by reason of any contractual arrangement or agreement with any party to any complaint under consideration.

Roles and Responsibilities

Chair

The Chair of the Ethics Committee:

1. Shall be appointed by the Board.
2. Takes overall responsibility for the process of management of complaints and disciplinary process with the vested authority of the Board.
3. Shall chair all Hearing and Assessment Panels and

4. Shall be an ESSA Member with significant professional and complaints handling experience.

Chief Executive Officer

The Chief Executive Officer shall:

1. Act as the secretariat to the process.
2. Receive and respond to a complaint.
3. Require any complaint to be put in writing and contain full particulars and details and copies of any relevant documentation.
4. Advise the Complainant that the complaint must be provided to the Member to allow a response to be given.
5. Upon receipt of a written complaint, provide a copy to the Member or Members in respect of whom the complaint is made and request that a written response is provided within a set time.
6. Where appropriate, attempt to resolve any minor dispute between the parties which does not involve any breach of the ESSA Code of Conduct.
7. Investigate the complaint, receive all evidence and present that evidence to the Chair of the Ethics Committee and or the Hearing and Assessment Panel as required.
8. Recommend the commencement of a disciplinary process against a member.

The Chief Executive Officer may upon receipt of information which may indicate a breach of these By-laws by a Member, initiate enquiries and may bring a complaint against the individual Member to the Ethics Committee. Such a complaint may be brought, notwithstanding that there has been no written complaint made by any member of the public, nor any actual loss or damage suffered by any such member of the public.

The Ethics Committee will review all evidence presented by the Chief Executive Officer. The Ethics Committee shall make a finding about the complaint and then make a recommendation to the Board regarding the penalties against the member for further action.

Structure of Complaints and Disciplinary Process

The following process is designed to ensure that all complaints regarding ESSA Members or ESSA accredited/qualified individuals, are handled promptly, with due regard, with transparency and fairness and recognition of both the Complainants' and the identified members' rights and responsibilities.

ESSA Complaints Procedure

1. General requirements

- 1.1 All complaints made against ESSA Members shall be received in writing by the Chief Executive Officer and directed to the Chair of the Ethics Committee.
- 1.2 Any person making a complaint will be requested to provide full details, including any relevant and supporting documentation, and provide consent to full disclosure of the complaint made to the individual member.
- 1.3 Written complaints guidelines should be provided to the Complainant, including that, any statements by the Complainant and any witnesses, should be in the form of a statutory declaration.
- 1.4 The Chief Executive Officer shall keep and maintain a Complaints Register in which shall be recorded details of all written complaints received and the outcome of consideration of such complaints.

2. Initial Recognition of Complaint

- 2.1 Upon receipt of an initial complaint, the Chief Executive Officer shall formally acknowledge receipt of the complaint, confirming that the person or persons in respect of whom the complaint is made are ESSA Members, and inform the Complainant that all relevant details must be disclosed to the Member for response
- 2.2 The Chief Executive Officer may upon consideration of the complaint, determine if the issues arise from matters other than any breach of the Code of Conduct or ethical matters, such as miscommunication or misunderstanding, and seek to resolve the complaint between the parties.
- 2.3 Where the complaint cannot proceed because the conduct complained of is by a person or persons who are not ESSA Members, the Chief Executive Officer shall inform the Complainant that ESSA cannot assist them. In such cases, the complaint against a non-member may be finalised by the Chief Executive Officer by provision to the Complainant of a letter in the form of **Item 1** and put them on the ESSA register in case they become a member.
- 2.4 The Chief Executive Officer may refer any issues arising from the complaint, such as misrepresentation as to a person holding ESSA membership and or accreditation to the ESSA Legal Officer for action.
- 2.5 If the Complainant does not in fact wish to proceed, an appropriate letter should also be forwarded to the Complainant in the form of **Item 2**.

2.6 Upon receipt of a complaint, and whether it proceeds or not, the Chief Executive Officer should also notify the Respondent member of the complaint, so that the Member can give notice of the complaint at their own discretion, to their professional indemnity insurer in the form of **Item 3**.

2.7 **Seeking the Respondent's Response submissions**

2.7.1 Where the Chief Executive Officer has confirmed that the Complainant does wish to pursue a formal complaint and a written complaint form has been received, the Chief Executive Officer shall send an acknowledgement to the Complainant in the form of **Item 4**.

2.7.2 Once the Complainant has provided a signed permission/authorisation, the Respondent shall be notified in writing and informed of the complaint and the process involved in dealing with the complaint, a copy of the complaint and this By-law, and with a request for a formal response by the Respondent to be made within a stipulated time frame of 14 days, from the date of the notification letter. The notification to the Respondent shall be in the form of **Item 5**.

3. **Complainant's final submissions**

3.1 The Chief Executive Officer, upon receipt of the Respondent's response submissions shall notify and consult with the ESSA's Legal Officer as to the complaint and response and then forward to the Complainant (in the form of **Item 6**) for 1 final written response or for the Complainant to advise whether the response satisfies their complaint such that there is no need for the Committee/to consider the complaint further

3.2 If the Complainant does not wish to proceed further, and the complaint is resolved, the Chief Executive Officer may notify the Complainant by forwarding a letter in the form of **Item 7**).

4. **Respondent's final submissions**

4.1 A copy of the Complainant's final submissions shall be provided to the Respondent for a final response and any supporting information or documentation, supported by statutory declaration in the form of a letter contained in **Item 8**.

5. **Committee/ Review Panel Deliberations**

5.1 Upon receipt of all final submissions from the Complainant and the Respondent, the Chief Executive Officer shall notify the Ethics Committee members and

provide copies of all material received and convene a meeting within 4 weeks, to consider and review the matter. (The “**Review Meeting**”).

5.2 At the Review Meeting the Legal Officer will provide a summary of the complaint responses and issues for the Committees consideration. After considering the material, the Committee and or Panel will make the following decisions: -

5.2.1 Is the complaint made out?

5.2.2 If “no” to 1, then does the Committee/ Panel send the letter in **Items 9 & 10** or a variation thereof?

5.2.3 If “yes” to 1, does the established conduct constitute Minor Misconduct, Significant Misconduct or Substantial Misconduct or Aggravated Misconduct Level 1, Level 2 or Level 3, by reference to the following definitions:

5.3 “**Minor Misconduct**” occurs where:

5.3.1 There has been a literal breach of the Code in circumstances where a member in the Respondent’s position, ought to have reasonably known that such conduct would amount to a breach and in hindsight would have acted differently;

5.4 “**Significant Misconduct**” occurs where:

5.4.1 There has been a clear breach of the Code in circumstances where a member in the Respondent’s position, would have reasonably known that such conduct would amount to a breach; or

5.4.2 Such conduct also constitutes, on the advice of the Legal Officer, a breach of a statute or regulation, including but not limited to the *Privacy Act* and the *Competition and Consumer Act 2010* or

5.4.3 Where the member's conduct is such as may in the opinion of the Ethics Committee, damage or is likely to damage the reputation and standing of ESSA, or its members

5.4.4 A member fails to respond to any notification of complaint within the time required.

5.5 “**Substantial Misconduct**” occurs where:

5.5.1 There is Minor, or Significant Misconduct by the Respondent; and

5.5.2 ESSA’s records show that there has been previous complaint/s against the Respondent including, in similar circumstances or for similar reasons, or,

- 5.5.3 The misconduct is such that in the reasonable opinion of the Ethics Committee, it brings or has the capacity to bring the good reputation and standing of the general membership and profession into disrepute.
- 5.6 **Level 1 Substantial Misconduct** occurs where the similar conduct involves a combination of established Minor Misconducts.
- 5.7 **Level 2 Substantial Misconduct** occurs where the similar conduct involves an instance of Significant Misconduct.
- 5.8 **Level 3 Substantial Misconduct** occurs where the similar conduct involves an instance of Substantial Misconduct.
- 5.9 If the Ethics Committee agrees by simple majority that the Respondent has been found to have committed Minor Misconduct, the Ethics Committee may authorise the Chief Executive Officer to issue letters in the substantial form of **Items 11 & 12**.
- 5.10 If the Ethics Committee agrees by simple majority that the Respondent has been found to have committed Significant Misconduct, the Ethics Committee may authorise the Chief Executive Officer to issue letters in the substantial form of **Items 13 & 14**.
- 5.11 If the Ethics Committee agrees by unanimous decision that the Respondent has been found to have committed Significant Misconduct, the Ethics Committee may authorise the Chief Executive Officer to issue a letters in the substantial form of **Items 15 & 16**.
- 5.12 If the Ethics Committee agrees by unanimous decision that the Respondent has been found to have committed Substantial Misconduct, the Ethics Committee shall:
- 5.12.1 Determine by simple majority what level of Substantial Misconduct is proven and
- 5.12.2 May authorise the Chief Executive Officer to issue a letter in the substantial form of **Items 17 & 18**.

6. Consequences of Proven Complaints

- 6.1 **Minor Misconduct:** A Respondent who has been found by the Ethics Committee to have committed **Minor Misconduct:**
- a) Shall have a corresponding notation made in ESSA's Complaints Register and,
 - b) Must confer with a member of the Ethics Committee about appropriate conduct and procedure changes to ensure no further similar complaints are made.

Failure of the member to confer with an Ethics Committee member/s within 3 months of complaint finalization is to be duly noted in the committee minutes and on the Complaints Register.

6.2 **Significant Misconduct:** A Respondent who has been found by the Ethics Committee to have committed **Significant Misconduct:**

- a) Shall have a corresponding notation made in ESSA's Complaints Register and
- b) Shall be given notice to attend before the Ethics Committee to make submissions as to why their membership should not be suspended for a set period or revoked. The Member may attend with a support person (but not an advocate) to make submissions and to tender supporting material.

Upon conclusion of the hearing of any submissions the Ethics Committee shall then reserve its decision and consider the submissions and material.

The Ethics Committee may on a finding of **Significant Misconduct:**

- a) By simple majority vote, decide that the Member should be disciplined, by suspension of membership for a period up to 12 months.
- b) By unanimous vote decide that the Member's membership shall be revoked, with the Member having the opportunity to reapply on the merits after 2 years.
- c) If no revocation of membership is decided, require that the Member attends such courses and training as the Ethics Committee considers appropriate. Should the Member fail to comply with the imposed conditions without reasonable cause, such failure shall be deemed a fresh instance of Significant Misconduct and the Member shall be again required to attend before the Ethics Committee to show cause as to why their membership should be suspended or revoked.

6.3 **Substantial Misconduct:** A Respondent who has been found by the Ethics Committee to have committed **Substantial Misconduct:**

- a) Shall have a corresponding notation made in ESSA's Complaints Register,
- b) Shall be given notice to attend before the Ethics Committee to make submissions as to why their membership should not be suspended for a set period or revoked.
- c) The Member may attend with a support person (but not an advocate) to make submissions and to tender supporting material.

Upon conclusion of the hearing, the Ethics Committee shall reserve its decision and consider the submissions and material.

The Ethics Committee may on a finding of Substantial Misconduct:

- a) By simple majority decide that for a Level 1 Substantial Misconduct, suspend the Member's membership and/or accreditation/qualification for 12 months
 - b) By simple majority decide that for a Level 2 Substantial Misconduct; revoke the Member's membership and/or accreditation/qualification with the individual having the opportunity to reapply on the merits after 3 years.
- 6.4 The presumption is that if the Ethics Committee votes by simple majority that the individual should be disciplined for a Level 2 Substantial Misconduct, then the Member's membership and/or accreditation/qualification shall be revoked with the individual having the opportunity to reapply on the merits after 6 years.

All decisions made by the Ethics Committee as to any findings of Misconduct by a Member, shall be notified to the individual by the Chief Executive Officer in the substantial form of **Items 19 or 20**.

7. Procedural Fairness & Natural Justice

- 7.1 The Ethics Committee shall at all times be guided by and apply principles of procedural fairness and natural justice in its decision making.
- 7.2 To protect the Ethics Committee, the National Executive and ESSA as much as possible, information on which the Ethics Committee proposes to rely, should be provided by individuals in writing, preferably in the form of a Statutory Declaration. This will also enable the Ethics Committee more easily to provide information where decisions are challenged in whatever forum.

8. Mediation Process

Steps before Mediation:

- 8.1 If the Chief Executive Officer determines that a complaint should be referred to the Mediation and Conciliation Process the Chief Executive Officer or a nominee will speak separately to the Complainant and the Respondent to arrange a suitable process.
- 8.2 Unless otherwise agreed, the Complainant and the Respondent shall equally pay the costs of and incidentals to such mediation process.
- 8.3 Both Complainant and Respondent must be willing to engage in the mediation process for any mediation to proceed and shall sign a Mediation Agreement before the mediation may commence. If either party refuses then the complaint will be dealt with in the normal course contained herein.

- 8.4 If either party refuses then the complaint will be referred back to a Hearing and Assessment Panel.
- 8.5 If a suitable process is agreed upon by the Complainant and Respondent, then the Chief Executive Officer will notify the Chairperson of the Complaints Committee who is to appoint a qualified and professionally accredited person to act as a Mediator. The Mediator is to act as an independent facilitator of the mediation between the Complainant and the Respondent, with the aim to resolve the complaint in a manner agreed to by both the Complainant and the Respondent. This may include an agreed withdrawal of the complaint or any other outcome agreed.

Resolution at Mediation:

- 8.6 If the complaint can be resolved at the mediation, then the terms of the agreed resolution are to be written down and signed by the Complainant, Respondent and Mediator. A copy of the agreed resolution will be sent to the Board with a summary of the complaint. The Board is to keep this as a record only and is not required to make a determination on the matter, as the complaint is taken to have been resolved.
- 8.7 If resolution cannot be reached and the complaint is not resolved at the mediation, then the Mediator will notify the Chief Executive Officer that the complaint could not be resolved.

Confidentiality of Mediation Process:

- 8.8 All matters discussed during mediation, including any offers made by either the Complainant or the Respondent at the mediation, are not to be referred to by either party or used by either party in the Hearing.
- 8.9 The Mediator may seek assistance if required from ESSA's Legal Officer.

9. Confidentiality

- 9.1 All activities surrounding the processing of a complaint, including proceedings of the Board, the Hearing and Assessment Panel and the Ethics Committee are held in confidence.
- 9.2 The members of the Ethics Committee shall not disclose confidential information in relation to the complaints against members of which they become aware by reason of their membership of the Committee.

- 9.3 The Ethics Committee must not disclose confidential information to anyone (except the Committee) or use confidential information for any purpose except considering a complaint and reporting to the National Board.
- 9.4 The Respondent is not permitted to contact the Complainant/s directly regarding the complaint, unless specifically required to do so under this By-law.
- 9.5 The Respondent must not approach any Director of the Board in relation to the complaint, until the complaint process set out by this By-law is finalised.
- 9.6 Should the Respondent attempt to make any contact as described in clause 9.4 or 9.5, then that behaviour can be included in the complaint, or dealt with as a new complaint under this By-law.
- 9.7 Once a determination of the Board has been made, then this determination may be published or released as determined by the Board.

10. Costs

- 10.1 The Complainant shall pay all their own costs of and incidentals to any complaint process.
- 10.2 The Respondent is responsible for all their own costs associated with the complaint and any procedure under this By-law.
- 10.3 Where a complaint is dealt with and determined pursuant to these By-laws and results in a finding that an ESSA Member has committed a breach of these By-laws or any other lawful or statutory requirement and as a result has their membership cancelled or suspended, the ESSA Member shall, in the sole discretion of the Board, be required to pay the costs of the Ethics Committee and incidentals to the investigation and hearing and determination of the complaint fixed in the sum of \$500 per hour .

11. Failure to Engage

- 11.1 If the Respondent fails to comply with any requests made by the Chief Executive Officer or the Ethics Committee under this By-law, then the Chief Executive Officer may serve the Respondent with a written notice which:
 - a) Particularises the request which has been not been complied with by the Respondent;
 - b) Advises the Respondent that their failure to comply is a breach of their undertakings as a Member of ESSA;
 - c) Advises the Respondent that they have 14 days from the date the notice was served to rectify the breach; and
 - d) Advises the Respondent that failure to rectify the breach within the time

allowed, may result in immediate suspension of their ESSA Membership status until they rectify the breach.

- 11.2 If the Respondent does not rectify the Breach within the time provided, then their ESSA Membership status may be immediately suspended. This suspension will not be listed on the ESSA website, but may be disclosed to persons who make direct enquiries about the Respondent's status.
- 11.3 If the Respondent resigns or allows their ESSA Membership status to lapse whilst the subject of a complaint under this By-law, then:
- a) The complaint made while they were an ESSA Member will remain active and will be pursued should they wish to rejoin ESSA.
 - b) Their name may be added to the list of names on the ESSA website as a person not permitted to use their post nominal, as they have rendered themselves ineligible for reinstatement until the complaint has been resolved.

By-laws Modification History

| Date: | Version no. | Details: |
|--------------|--------------------|----------------------------|
| Oct 14 | 1 | Approval date |
| July 15 | 1.1 | Update Constitution number |
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