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Review of the HDC Act and Code
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Review of the Health and Disability Commissioner Act 1994 and Code of Health and Disability Consumers' Rights

Introduction

1. The New Zealand Law Society (Law Society) appreciates the opportunity to comment on the review of the Health and Disability Commissioner Act 1994 (Act) and Code of Health and Disability Consumers' Rights (Code). This submission has been prepared with assistance from the Law Society's Health Law Committee and ACC Committee.

The consultation process

2. The Law Society notes that:
   - 2.1. The review covers both the Act and the Code.
   - 2.2. The Commissioner's consultation document:
     - 2.2.1. sets out specific proposals from the 2009 review which the Commissioner has indicated he will continue to support; and
     - 2.2.2. requests feedback on the following questions:
       - Do you think that the Act should be amended in any way? If so, please detail which section(s) of the Act and reasons for that amendment.
       - Do you think that the Code should be amended? If so, please detail which Code right(s) and reasons for that amendment.
       - Do you have any comments on the operation of the Act and Code in general?

3. The consultation document produced for this Review of both the Act and the Code is significantly less detailed than that produced for the 2009 Review.

4. The 2009 review and consultation process included preliminary consultation by the Commissioner with representative bodies and persons, which led to a consultation document providing discussion on key provisions in the Act and Code and proposed areas for change. The former Commissioner received 122 submissions on the consultation document and wrote a 60 page report to the Minister of Health, including recommendations for change.

5. The process for reviewing the Code is different from, and more prescriptive than, that for reviewing the Act. Sections 21(3) and 22 appear to contemplate that recommendations to the Minister for changes to the Code will not be made until the Commissioner has given public notice of his intention to forward recommendations to the Minister, which must contain a statement that the "details" of proposed recommendations, including a copy of the proposed recommendations, may be obtained from the Commissioner and that submissions on the proposed recommendations may be made in writing.

6. The current review requests "thoughts and feedback" on open-ended questions, and in the Law Society's view does not comply with the requirements of the Act. It may not be considered a "review" as envisaged under section 18 nor meet the required functions of the Commissioner in relation to the Code under section 14(1)(b). In practical terms, this approach is less conducive to producing well-tested and robust recommendations for changes to the Code: not having specific proposals to comment on is likely to reduce the level of public engagement, and is more likely to give rise to surprises in that the Commissioner may decide to adopt an unexpected proposal from a submitter on which other submitters have not had an opportunity to comment. (While this possibility cannot be excluded where submitters are all commenting on the same proposals, it is less likely to happen.)

7. In relation to the part of the review relating to the Act, section 18 is less prescriptive as to the process the Commissioner may adopt. However, the Law Society queries whether the approach adopted in the current review (compared with the two-stage approach taken in 2009) complies with the spirit of section 14(2). The effectiveness of the Commissioner's links with the persons referred to in section 14(2)(a), and consultation and co-operation with those in section 14(2)(b), are likely to be enhanced by a consultation process that encourages public participation and reduces the likelihood of recommendations for changes to the Act that have not been tested by debate.

Matters arising from the 2009 Review

Changes supported by the Commissioner

8. The previous Commissioner made a number of recommendations in the course of the 2009 review. As the current Commissioner notes, a number of those are included in the Statutes Amendment Bill which is before Parliament. The Law Society makes no comment on those.

9. Of the remaining recommendations, the current Commissioner has indicated his support for the following:
   9.1. to require review of the Act and Code only every ten years, with the option of an earlier review if desirable;
   9.2. to increase the maximum fine for an offence under the Act from $3,000 to $10,000;
   9.3. to substitute the phrase "aggrieved person" for the phrase "the complainant (if any) or the aggrieved person(s) (if not the complainant)"; and
   9.4. to enable the Director of Proceedings to require any person to provide information relating to a matter under consideration, until a decision has been made to issue proceedings, subject to section 63 of the Act.

Change to review periods

10. The Law Society has no comment on the proposals at sub-paragraphs 9.2 and 9.4, but disagrees with the proposal to require a review of the Act and Code only every ten years. In view of the Law Society's concerns about the robustness of the review process set out in paragraphs 3 – 7 above, the Law Society considers that the period between reviews should remain unchanged. Some of the recommendations from the 2009 review have not been discussed or endorsed by the current Commissioner (as set out at paragraphs 18 and 20 below). The Law Society is concerned that by extending the review period a further five years, those previous recommendations (which followed extensive consultation) will not be given due consideration.

11. Altering the period between reviews for the Act and the Code would require legislative changes (to s 18 for the Act and to s 21 for the Code). The current more frequent period of every three years for review of the Code (compared with every five years for the Act) reflects the statutory intent of protecting and promoting the rights of consumers by allowing the Code to develop a flexible and relevant framework for health and disability consumer complaints.

"Aggrieved person"

12. The Law Society agrees with the expanded definition of "aggrieved person" in paragraph 9.3 above. The Court of Appeal decision in *Marks v Director of Health and Disability Proceedings* [2009] NZCA 151 makes access to the Human Rights Review Tribunal overly restrictive, so the Law Society supports the proposed expanded definition of "aggrieved person".

13. The Law Society notes that the former Commissioner supported this change to promote accountability and quality improvement, and did not consider that it would lead to a flood of claims.[1] The number of investigations carried out by the Commissioner has an effect on the legal rights and liabilities of consumers and providers.[2]

14. Regarding the importance of the role of the Human Rights Review Tribunal, Commissioner Paterson stated in his 2009 report:[3]

> Claims before the Tribunal may support improved public safety through vindication of the rights in the Code, enhancing professional accountability, and preventing and deterring breaches of the Code. An important aspect of professional accountability is that, for unregistered providers, claims to the Tribunal act as a substitute for disciplinary proceedings.

15. In support of these comments, the Law Society also recommends a review of the operation of the Commissioner's power to investigate breaches of the Code under Part 4 of the Act. We note that it is only when the Commissioner has carried out a formal investigation into whether there have been breaches of the Code under section 40, and concluded a breach opinion, that a consumer has the legal right to sue the provider for breaches of the Code in the Human Rights Review Tribunal. Unless, following a breach opinion, the Commissioner refers the provider to the Director of Proceedings, the Director cannot institute disciplinary or civil proceedings against the provider: section 49(1)(a). If the Director of Proceedings does not initiate a claim in the Human Rights Review Tribunal there is a residual right for an "aggrieved person" to bring a claim under section 51. In deciding whether or not to refer the matter to the Director of Proceedings the Commissioner must consult with providers and complainants, and also:[4]

> … ensure that appropriate proceedings are instituted where in any case the public interest (whether for reasons of public health or public safety or for any other reason) so requires.

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1 Health and Disability Commissioner Report to the Minister of Health, June 2009, pages 11-13.

2 See comments made by Professor PDG Skegg in *A Fortunate Experiment? New Zealand's Experience with a Legislated Code of Patients' Rights*, Medical Law Review 19, Spring 2011, pp 235-236 in reference to *Stubbs v Health and Disability* Commissioner, HC Wellington CIV-2009-485-2146, 8 February 2010, at [33], per Ronald Young J.

3 At page 12.

4 Section 44(3)(c).

16. In 2013 the Commissioner received 1,619 complaints and completed 60 investigations, resulting in 42 breach opinions.[5] Of these breach opinions only 16 providers were referred to the Director of Proceedings for consideration of further Tribunal proceedings. The Commissioner's powers of investigation have a gatekeeper effect whereby the resulting pool of potential claims to the Human Rights Review Tribunal is very small.

17. The Law Society recommends that the Commissioner review the operation of the Commissioner's discretion to investigate under section 40 of the Act to avoid undue restriction of access to the Human Rights Review Tribunal.

Changes not supported by the Commissioner

18. The changes to the Act recommended by the Commissioner in 2009 that are neither included in the Statutes Amendment Bill, nor expressly supported by the current Commissioner in the 2014 review, are as follows:
    18.1. amend the definition of "disability services consumer" to ensure consistency with the New Zealand Disability Strategy and the United Nations Convention on the Rights of Persons with Disabilities;
    18.2. amend the definition of "disability services" to include needs assessment and service coordination services;
    18.3. amend the sections relating to the purchase of advocacy services to enable advocates to become employees of the Health and Disability Commissioner;
    18.4. amend section 20(1)(c)(i) to remove the restricted definition of the "matters of privacy" that can be included in the Code;
    18.5. insert a new section to allow information obtained during an investigation to be withheld, while the investigation is ongoing; and
    18.6. provide expert advisors contracted by HDC with the same degree of immunity enjoyed by employees under the Crown Entities Act

19. The Law Society supports all of the above changes, subject to the proviso that the suggested amendment to allow the withholding of information obtained while an investigation is ongoing should only proceed if natural justice requirements are met (an issue canvassed in the Commissioner's June 2009 review report at pages 16 – 17).

[5] 2013 Annual Report, Health and Disability Commissioner.

Changes to the Code

20. In 2009 the Commissioner recommended a number of changes to the Code which the present Commissioner has not mentioned in the current consultation document. The Law Society supports these changes, which are as follows:

    20.1. amend Right 4(3) to give disability services consumers the right to timely access to disability services they have been assessed as needing following a needs assessment;

    20.2. add a definition of "assessed as needing" to clause 4 of the Code;

    20.3. amend Right 1(2) to read: "Every consumer has the right to have services provided in a manner that respects the privacy of the individual", and remove the definition of "privacy" in clause 4 of the Code;

    20.4. amend Right 7(4) to read: "It is in the best interests of the consumer or, in the case of research, is not known to be contrary to the best interests of the consumer and has received the approval of an ethics committee"; and

    20.5. amend Right 7(6)(c) by adding the words: "… or sedation that has a similar effect."

Right 9 and Research Participants

21. The Cartwright Report[6] intended that research participants should have access to a Health Commissioner. The Code creates rights which extend to health and disability research. Right 9 states:

> The rights in this Code extend to those occasions when a consumer is participating in, or it is proposed that a consumer participate in, teaching or research.

22. The Code defines "research" as "health research or disability research". However, the extent to which the Code protects the interests of research participants is unclear because "health research" and "disability research" are not defined in the Code or the Act. The Code does not apply to all health and disability research, for example observational research, or non-therapeutic health and disability research carried out by people other than healthcare practitioners.[7] The Law Society considers that an expanded definition of "health and disability research" should include research regardless of whether or not it has been reviewed by an ethics committee.

23. The Law Society recommends that the Commissioner review Right 9 with a view to changing the law to provide certainty that all forms of therapeutic and non-therapeutic research will come under the Code.

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6 *The Report of the Committee of Inquiry into allegations concerning the treatment of Cervical Cancer at National Women's Hospital and into other related matters*, Judge Silvia Cartwright, 1988.

7 *Rights and Research: An Examination of Research under New Zealand's Code of Health and Disability Services Consumers' Rights*, Lydia Wadsworth (2013) 21 JLM 187.

Operational Matters

Section 67 – Duty in relation to adverse comment

24. The Law Society considers that there are some problems with the interpretation of section 67, which may have a bearing on the way the complaints process is conducted with health professionals facing complaints.

25. Section 67 of the Act states:

> The Commissioner shall not, in any report or recommendation made or published under any of sections 14, … 45, and 46(2)(b) of this Act or its annual report under Part 4 of the Crown Entities Act 2004, make any comment that is adverse to any person unless—
>
> (a) That person has been given a reasonable opportunity—
> (i) To be heard; and
> (ii) To make a written statement in answer to the adverse comment; and
>
> (b) Where that person so requires, there is included in or appended to the report or recommendation either—
> (i) The written statement referred to in paragraph (a)(ii) of this section; or
> (ii) A fair and accurate summary of that statement,—
>
> whichever the Commissioner considers is more appropriate in the circumstances.

26. The obligation to provide a person with an opportunity to be heard or to respond in writing to an adverse comment arises from a number of situations, including following an investigation by the Commissioner under section 45. We are informed that the word "investigation" has been interpreted narrowly by the HDC's office to refer only to formal investigations. The Law Society considers that the duty of decision makers to inform parties of proposed adverse comment should not be so limited.

27. The Law Society has been informed of situations in which adverse comment has been made about an individual practitioner without that practitioner being provided with an opportunity to be heard or make a written statement. We are informed that those situations have occurred where no formal investigation has been undertaken. Although the HDC's office may take no further action on the complaint, we are told that the HDC's office has on occasion criticised health practitioners and recommended further action be taken by or against the health practitioner.

28. We are informed that the adverse comments can be in the form of criticism of a health practitioner's actions with a recommendation that the health provider: apologise; review some aspects of his or her practice; make specific changes to his or her practice; or undergo further training. Referral to registration bodies has also occurred in the context of decisions to take no further action on

complaints. Such implicit criticism should be disclosed to the health practitioner for response (see section 22.3.8, *Medical Law in New Zealand*, Skegg & Patterson 2006).

29. Further, where an adverse comment is to be made about a health care practitioner who is employed, the requirement to provide the right to respond under section 67 may be interpreted narrowly by the HDC's office as being satisfied if the employer, rather than the health care practitioner concerned, is provided with the opportunity to respond to an adverse comment. The Law Society has received reports that it is a common practice for the HDC's office to communicate an adverse comment about a health care practitioner to that practitioner's employer only.

30. The Law Society recommends review of the adverse comment provisions in section 67 to ensure all providers, whether employers or employees, have the opportunity to be heard in relation to adverse comments. Any amendment resulting from such a review should clarify that any adverse comment about any person (whether an organisation or an individual health practitioner) cannot be made in any form without seeking specific comment from that person.

The right of reply and delays during the investigation process

31. One of the main purposes of the Act is to "secure the fair, simple, speedy and efficient resolution of complaints".

32. The Law Society submits that there should be a reconsideration of whether the Act should provide timeframes for the Commissioner's investigations. In the 2009 Review it was not recommended that there should be prescribed timeframes as the majority of investigations were being completed within 12 months, with a handful taking 18 – 23 months. (All 109 investigations were concluded within 2 years, with 57% within 12 months – see page 21 of the 2009 Review and 2009 HDC Annual Report to the Minister.)

33. The number of investigations completed annually since 2010 suggests that there is an increasing number taking longer to complete. There were 89 investigations completed in 2006/7, 100 in 2007/8 and 109 in 2008/9; compared to 51 in 2009/10, 27 in 2010/11, 44 in 2011/12 and 60 in 2012/13.[8] The number of complaints has reportedly increased each year and there is no reported decrease in investigations being undertaken.

[8] (Relevant year Annual Reports on pages 3, 6, 7 and 12 respectively).

34. The impact of delays in completing investigations cannot be over-stated. Complainants, health professionals and provider organisations alike are all adversely affected by delays. Clear statutory timeframes for the Commissioner's investigations would assist in providing everyone involved in the process with greater certainty. There are examples in other legislation where the public interest requires that statutory timeframes be in place.[9]

Complaints about expert witnesses engaged by ACC

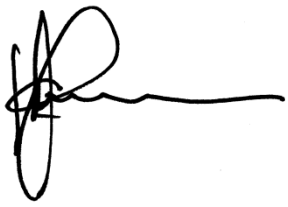
35. The Law Society has been alerted to difficulties experienced by some ACC claimants who are examined by medical specialists engaged by the Accident Compensation Corporation, for the purpose of reports prepared for the Corporation. It is reported that the Commissioner's practice is to decline to consider any complaints from the ACC claimant about the behaviour or conduct of these medical specialists, because the contract to provide the report is between the Corporation and the medical specialists.[10]

36. If these reports are accurate (and the complaint in question is that the actions of a health care provider are or appear to be in breach of the Code, as required by section 31 of the Act), it would seem that the Commissioner is not complying with the section 33 duty to consider a complaint, decide what action to take and to notify the complainant and the health care provider.

Conclusion

37. If you wish to discuss this submission further, please do not hesitate to contact the convenor of the Law Society's Health Law Committee, Alison Douglass, through the committee secretary Jo Holland (04 463 2967, jo.holland@lawsociety.org.nz).

Yours sincerely



Chris Moore
President

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[9] For example: sections 54 and 55 of the Accident Compensation Act 2001, which place an obligation on the ACC to make decisions in a timely manner; sections 15 and 15A of the Official Information Act 1982, which specify timeframes for decisions on requests made under the Act.

[10] A health examination is a "health care procedure" as defined in the code, and a "consumer" is defined in section 2 of the HDC Act as "any person in respect of whom any health care procedure is carried out". It would appear from this that an ACC claimant who is examined by a medical specialist is a "consumer" for the purposes of the Code, regardless of who has commissioned the report requiring such an examination.