Report of the Health Committee

Petition of Renate Schütte: A right to appeal decisions made by the Health and Disability Commissioner

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Petition of Renate Schütte

Recommendation

The Health Committee has considered the petition of Renate Schütte—A right to appeal decisions made by the Health and Disability Commissioner—and recommends that the House take note of its report.

Request for the right to appeal decisions made by the Health and Disability Commissioner

The petition was presented to the House on 22 June 2020. It requests:

> That the House of Representatives amend the Health and Disability Commissioner Act 1994 to give complainants, and those that are the subject of complaints, the right to appeal decisions made by the Health and Disability Commissioner.

The Health Committee of the 52nd Parliament began considering the petition. We resumed consideration in the 53rd Parliament.

About the Health and Disability Commissioner

The Health and Disability Commissioner (HDC) is an independent Crown entity, established by the Health and Disability Commissioner Act 1994. Its purpose is to promote and protect the rights of health and disability consumers and, to that end, facilitate the fair, simple, speedy, and efficient resolution of complaints. The Code of Health and Disability Services Consumers' Rights sets out the rights of people who use health and disability services.

Comments from the petitioner

The petitioner, Renate Schütte, is a patient advocate who experienced a treatment injury in the New Zealand healthcare system. She noted that the HDC is the only recourse for patients to lodge complaints, so it is vital that it provides robust decisions. The petitioner believes a right of appeal would provide assurance that decisions are fair and transparent. It would also lead to improvements in the protection of consumers' rights, the identification of patterns of harm, and standards of care.

The petitioner provided case studies detailing three women's experiences (including her own) of lodging a complaint with the HDC and receiving a "no further action" (NFA) decision.[1] This was even when the three complainants "had all suffered serious physical injury". The petitioner considers that these cases illustrate the "gross unfairness" of the current complaints system. She pointed out that the cases all relate to surgical mesh.

[1] Section 38 of the HDC Act enables the Commissioner, at any time after completing a preliminary assessment of a complaint, to decide to take no action or no further action on a complaint.

However, her submission and the issue of a lack of a right to appeal decisions is not limited to surgical mesh cases.

The petitioner's experience of a "no further action" decision

Background to the petitioner's complaint

The petitioner explained that she was implanted with pelvic surgical mesh during a gynaecological operation in 2012. She told us that she was advised that the procedure was low risk and had been the subject of many randomised trials. The petitioner said that she was not advised that the procedure was permanent or had the potential to result in the development of chronic pain. She said that she was also not offered alternative surgical procedures that did not use surgical mesh. We heard that the petitioner's decision about the procedure was ultimately based on "incorrect" verbal advice that the mesh could easily be fully removed in a "simple thirty-minute procedure".

The petitioner told us that she developed a range of health issues, including chronic pain, neurological symptoms, and auto-immune disorders between 2014 and 2017. In late 2017, she consulted her surgeon about having the mesh fully removed because she suspected that her health issues were related to it. The petitioner said her surgeon offered to remove the mesh in the "simple thirty-minute procedure" that had been alluded to before implantation. The petitioner was assured that no significant risks were associated with full mesh removal. The petitioner also asserts that her repeated requests about the number of full mesh removals undertaken by her surgeon, and how successful they had been, were not responded to.

The petitioner referred to international literature that describes the removal of surgical mesh as a complex procedure.[2] She therefore believes that the assertion that a full pelvic mesh removal could be completed in 30 minutes and without significant risk was "simply incorrect".

We heard that the petitioner was not confident that the surgeon intended to fully remove the mesh or had the skills to do so. She was subsequently offered and underwent a full removal by a "world-renowned surgeon" in the United States who had performed thousands of mesh-removal surgeries. The petitioner described the surgery as "highly successful" and said her chronic pelvic pain was immediately resolved.

The petitioner's complaint to the HDC

In July 2018, the petitioner lodged a complaint with the HDC on the basis that she believed she had been given incorrect information and that important information had been withheld. She told us that she would never have agreed to the procedure if she had known this information. The petitioner submits that the formal and informal documentation of her surgical consultations was "factually incorrect" at times. The petitioner also complained on the basis that she believed several of her rights under the Code of Health and Disability Services Consumers' Rights were contravened.[3]

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2 First Do No Harm: The report of the Independent Medicines and Medical Devices Safety Review. Retrieved from: https://www.immdsreview.org.uk/downloads/IMMDSReview_Web.pdf.

3 Specifically, they were the rights to be fully informed (Right 6) and to make an informed choice and give informed consent (Right 7).

The petitioner told us that she asked the Commissioner to undertake a full investigation to ensure that future patients would be treated appropriately.[4]

The petitioner said she received a draft HDC provisional opinion, which was to take no further action on her complaint, in May 2019. The petitioner noted that advice to the HDC from a clinical specialist was that the implanting surgeon was an expert in his field. She maintains that the HDC's evaluation largely relied on the surgeon's documentation, and, as an expert, the surgeon's word was accepted over hers when their points differed. The HDC found that the petitioner had been adequately informed of the risks that were known at the time and had signed a consent form. The surgery and documentation were also said to be of an acceptable standard. The petitioner was advised to contact the Privacy Commissioner about correcting her clinical notes if she considered that they did not accurately reflect her consultations. The petitioner told us that her main concern about the advice she received—that the mesh could be easily and fully removed in 30 minutes—was not addressed.

The petitioner said she responded with what she considered "irrefutable" further evidence to support her complaint and asked that the draft decision be reconsidered. We heard that she also received informal independent legal advice that her complaint was "clear-cut and worthy of action".

The petitioner told us that the HDC's final decision, which she received a few months later, remained NFA—no further action. The HDC recommended that the clinician maintain better consultation notes and clearly explain the details of procedures to patients. The petitioner said that the HDC maintained that it was unable to prefer one version of events over the other, despite her clear evidence. The petitioner asserts that the HDC uses this as a "frequent excuse" to dismiss complaints with an NFA decision. She believes that resolving factual differences between a consumer and provider is one of the main purposes of a full investigation. The petitioner suggests that the HDC could undertake formal investigations to resolve these differences.

We heard that the petitioner again requested that her concern about the "misinformation" regarding mesh removal be addressed. According to the petitioner, the HDC told her that the informed consent process was suspended because she had chosen to go overseas. It said the process would have been completed if she had chosen to proceed with her original surgeon. The petitioner believes this reasoning is incorrect because it deprives her of her rights to a second opinion and to seek treatment elsewhere.

The petitioner's complaint to the Ombudsman

The petitioner told us that she lodged a complaint with the Ombudsman. She noted that the Ombudsman's provisional opinion stated:

> There is no doubt that your complaint was well-presented, articulate, and detailed. However, it was for the HDC to establish whether there were grounds to sanction Dr X in any way, via an independent assessment of your complaint. It appears that an appropriate process was undertaken by

[4] Section 40 of the HDC Act provides that the Commissioner may investigate any action of a health care or disability services provider if the action is, or appears to be, in breach of the Code.

the HDC in this respect, which complied with its standard operating practice.

We heard that the Ombudsman's final opinion was that the HDC's actions in response to the petitioner's complaint "were not unreasonable". The petitioner said that one of her main complaints was that the HDC had not sought expert medical advice about a specific matter before deciding to take no further action. Given this, she questioned the Ombudsman's statement that the HDC's actions were "not unreasonable".

The petitioner said she has reached the "end of the road" regarding her complaint, with no satisfactory resolution. We were told that she spent a substantial amount of time presenting and justifying her case to the HDC. This was not for an apology, but rather to prevent other women from harm and from having to experience what she did. She considers that she would be more prepared to accept a decision, even if it went against her, if she had received a full hearing and careful, respectful consideration of the evidence.

The petitioner told us that she would have appealed the decision if she had the right to do so. She submits that she would have had a very good chance of having the decision overturned and the surgeon sanctioned, thus protecting future women. According to the petitioner, other women have since been harmed. In her opinion, this demonstrates that the complaints system is not working as intended and has failed these women.

Other examples of "no further action" decisions

The petitioner provided two other case studies—"Jane", who had surgical mesh implanted in 2013 after being referred to a gynaecologist for bladder prolapse and incontinence, and "Amy", who had a number of pelvic surgical mesh procedures between 2012 and 2015.[5]

Jane's experiences of receiving a no further action decision

The petitioner explained that Jane developed chronic pelvic pain and dyspareunia (painful sexual intercourse) in the four years following her surgery. In 2017, she was referred to a urologist, and Jane underwent full mesh removal surgery in an eight-and-a-half hour procedure. The petitioner said that the removing surgeon documented in the operative report that the mesh was "mal-placed" causing damage to the groin and nerves.

In 2019, Jane lodged a complaint with the HDC based on her belief in the following matters:

- She was not fully informed of the risks before mesh implantation.
- She was not provided with surgical services of an appropriate standard.
- Her concerns about the potential risks, such as mesh erosion, were downplayed.
- She was not provided with the option of an alternative non-mesh surgical procedure.

The petitioner said that the HDC made a decision to take no further action on Jane's complaint. In making the decision, the HDC found that the implanting surgeon was unaware of the risks of surgical mesh at the time of the surgery in 2013. The petitioner pointed out, however, that Jane had informed the HDC of a 2007 statement by the Royal Australian and

[5] The petitioner noted that these names have been changed for reasons of privacy.

New Zealand College of Obstetricians and Gynaecologists.[6] That statement noted the potential for major complications when mesh was used to manage pelvic organ prolapse.

The petitioner told us that the HDC also found no fault with the quality of the mesh implantation procedure. However, she submits that there was no evidence that the HDC considered the post-operative evaluation from Jane's mesh removal specialist, which stated that the mesh had been "mal-placed". The petitioner maintains that, despite Jane's request to include this evidence, the HDC relied on reports from numerous independent specialists who had never met Jane.

According to the petitioner, Jane's surgical mesh injury has severely affected her quality of life and her mental health and wellbeing. She remains unable to have penetrative sexual intercourse, is increasingly more incontinent, and has nerve damage and significant chronic pelvic pain, causing mobility issues. Jane has also developed anxiety when dealing with medical professionals, making her afraid to seek further help.

We heard that Jane's experience of dealing with the HDC has left her feeling "despair and utter sadness that there is no avenue for my voice to be heard".

Amy's experiences of a no further action decision

The petitioner explained that Amy had her first pelvic surgical mesh procedures in 2012 and had numerous procedures between 2012 and 2015 due to complications. Despite undergoing extensive and lengthy mesh removal procedures, some mesh cannot be removed because of the significant surgical risks.

The petitioner said that Amy now has a range of permanent and debilitating health issues. They include nerve damage, severe chronic pelvic pain, mobility impairment, auto-immune disorders, dyspareunia, and mental health issues. She has been unable to return to work and describes her quality of life as "extremely poor".

We heard that Amy lodged a complaint with the HDC, based on her belief that her rights to be fully informed and to make an informed choice had been contravened. Amy believed the surgeons involved should take responsibility for providing misleading information, not offering alternative treatment, and for their lack of care. She also hoped to prevent other women from being harmed in the future.

The petitioner told us that the HDC's provisional decision was to take no further action. The HDC noted that it was unable to make a conclusive finding about the sufficiency of the informed consent process. This was due to the differing versions of events between the complainant and one of her surgeons. The HDC stated that it intended to conclude the assessment with a recommendation to the surgeon about the importance of clear communication and documentation.

We heard that Amy was unable to respond to the HDC's provisional decision in the required time frame due to an accident. When she had recovered, Amy was advised that the HDC had closed her complaint. The petitioner said that Amy was "emotionally traumatised" by the

[6] RANZCOG July 2007, The Use of Mesh in Gynaecological Surgery, Ref C-Gyn 20, cited by Medsafe November 2008, Surgical Mesh for Uro-Genital Report Adverse Event Reports.

HDC experience. She has chosen not to make a complaint to the Ombudsman due to ongoing poor physical and mental health.

According to the petitioner, Amy said, "The way I see it they believed the surgeons and did not believe me." Amy noted that she wanted to "save other people from being injured like I was".

The petitioner maintains that, when versions of the facts vary, the HDC assumes that the provider's version is correct. Alternatively, it makes an NFA decision when it cannot say who is correct.

Data about "no further action" decisions

The petitioner provided data on the number of investigations closed as a proportion of the number of complaints closed between 2001 and 2019. She said that "very few" complaints are formally investigated and the number of investigations is declining. For example, 538 (40 percent) of the 1,338 complaints that were closed in 2001 were investigated. In comparison, only 102 (4 percent) of the 2,392 complaints that were closed in 2019 were investigated.

We heard that the HDC's decision is to take no further action after a preliminary assessment for the majority of complaints. The petitioner, the Cartwright Collective, and the Auckland Women's Health Council all referred to data that found that the HDC took no further action on 55 percent of the complaints received between 2014 and 2017.[7] This equates to about 1,072 of the approximate 2,000 complaints received each year.

The petitioner noted that only 2 of 68 surgical mesh complaints submitted to the HDC have reached the formal investigation stage. She submits that data provided to her by the HDC indicated that 74 percent of the closed complaints have had an NFA decision. In the petitioner's view, this results in providers having nothing to fear and no incentive to change dangerous practices.

The petitioner's concerns about the complaints process

The petitioner considers that the case studies highlight some common themes, which are set out below.

Lack of options for challenging decisions

The petitioner is concerned that once the HDC finally decides to take no further action on a complaint, a complainant has no viable recourse to challenge the decision. She maintains that a complainant has nowhere else to turn if the decision is unsatisfactory to them, leaving them feeling "powerless".

The petitioner acknowledged that a complaint can be lodged with the Ombudsman. However, this process does not cover the substantive fairness or correctness of a decision. Instead, it only covers procedural matters, such as whether a person received a fair hearing.

The petitioner also recognised the option of a judicial review, but pointed out that high legal costs mean that this is not accessible to most complainants. It, too, only focuses on whether

[7] Manning J, 2018: "Fair, Simple, Speedy and Efficient"? Barriers to Access to Justice in the Health and Disability Commissioner's Complaints Process in New Zealand, New Zealand Law Review, 2018 Issue 4.

the HDC handled the complaint fairly, and not whether the decision was fair on the merits of the case. The petitioner describes this process as "grossly unfair, inequitable and a clear denial of natural justice".

The petitioner observed that civil litigation would be possible in other jurisdictions. However, this is not possible due to New Zealand's no-fault accident compensation legislation. Given that the HDC is a patient's only recourse to lodge a complaint, the petitioner believes it is only fair that there is a way to challenge its decisions.

Role of complaints in preventing further harm

The petitioner explained that a primary motivation for laying a complaint is to prevent further harm. She said that patients who lay complaints provide an opportunity to improve patient safety and health outcomes. The petitioner therefore considers that these patients should be regarded as a valuable asset to the health system.

In the petitioner's opinion, complaints are a missed opportunity to protect future patients and promote a safer culture within the health system. We heard that the petitioner recently learnt of a patient who had a similar experience to hers. The petitioner considers that there may have been the opportunity to prevent harm to other patients if she had been able to appeal her NFA decision. This is because the HDC may have made a different decision and taken action.

Lack of trust in the HDC complaints process

The petitioner considers that her case studies are evidence of a "wider distinct lack of trust" of the HDC by many others who have experienced harm in the medical system. She believes this mistrust was clearly evidenced in the final report, *Hearing and Responding to the Stories of Survivors of Surgical Mesh,* published after the surgical mesh restorative justice process in 2019.[8]

Charlotte Korte is a patient advocate who was injured by surgical mesh and has personal experience of the HDC complaints process. She made an oral submission in support of the petitioner. Ms Korte submits that people injured by mesh are boycotting the HDC because they have lost trust in the complaints process. The petitioner believes this demonstrates that the current system is not working.

The petitioner considers that a significant power imbalance exists between the Commissioner and complainants. She said that many complainants and potential complainants feel that the HDC "takes the word of the surgeon" over the complainant. The petitioner believes the right to appeal decisions would provide a "checking mechanism". It would also provide more assurance to complainants that their complaints will be treated fairly and result in the necessary accountability.

The petitioner's proposed solutions

The petitioner considers that a non-medical Commissioner has been given a significant mandate to make subjective decisions about important medical safety issues. She submits

[8] The report is available here.

that this subjectivity warrants a framework that takes into account variation between Commissioners and incorporates accountability and more transparency.

The petitioner believes there would be more breach findings and decisions to take corrective action if more complaints were investigated or if NFA decisions could be appealed. This could result in an improved safety culture. Also, provider performance could improve because of a greater likelihood of consequences for breaches of patient rights and inadequate performance. The petitioner also considers that complainants would feel that their complaint had received a fair hearing.

The petitioner noted that the HDC does not publish the reasons for NFA decisions on its website or in its annual reports; it only publishes the reasons and outcomes of decisions for cases that have been investigated. Consequently, it is not possible to know the extent of any problems. The petitioner believes the reasons for NFA decisions could be published in an anonymised form, as they are for HDC opinions after an investigation.

Submission from the Cartwright Collective

The Cartwright Collective describes itself as a group committed to monitoring the implementation of *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* (known as the Cartwright Report). The Collective noted that the recommendations for a health commissioner, a complaints regime, and a code of rights for consumers and patients originated from the Cartwright Report.

The Collective told us that it supported the incoming Commissioner, Morag McDowell (who began her term in September 2020). It is also encouraged by initiatives she is considering to improve the complaints process. However, the Collective supports the petition because it is committed to ensuring that the Commissioner provides fair and just outcomes to consumers' complaints. The Collective believes a right of appeal is an important part of achieving this.

Barriers to access to justice in the HDC complaints process

The Collective's submission was written by Professor Joanna Manning, a member of the Collective and Professor of Law at the Auckland Law School, University of Auckland. Professor Manning specialises in medical law, policy, and ethics.

In 2018, Professor Manning published "*Fair, simple, speedy and efficient"? Barriers to access to justice in the Health and Disability Complaints Process in New Zealand.* She concluded that complainants and consumers who used the complaints process faced unacceptable barriers to accessing fair and just outcomes. Professor Manning described this as "particularly acute" in New Zealand because people have no alternative avenue for resolution. She identified three main barriers to access to justice:

- An internal review is the only way a complainant or consumer can challenge the substantive merits, correctness, or fairness of a Commissioner's NFA decision. Professor Manning submits that an internal review is not independent, unlike an appeal or external review, and is not an adequate substitute for a right of appeal.
- A complainant or provider cannot challenge by appeal the substantive merits, correctness, or fairness of a Commissioner's decision after an investigation.

- The complaints process established by the HDC Act is "lengthy and attenuated". This leads to substantial delays in resolving complaints, particularly in serious cases where the public interest in health and safety is at its highest.

The Collective's concerns about NFA decisions

The Collective observed that the HDC's policy is that investigations are appropriate for potentially serious breaches of ethical and professional boundaries. They are also appropriate for major lapses in standards of care resulting in death or severe disability. However, the Collective maintains that there is evidence that NFA decisions are made in serious complaints. It provided an example of an NFA decision for a complaint involving the death of an eight-year-old boy.

The Collective noted that the proportion of NFA decisions made on serious complaints is unknown because the HDC does not publish them. It pointed out, however, that details of some cases are in the public domain. The Collective provided examples of six cases involving NFA decisions on serious complaints. It also observed that 74 percent of the surgical mesh complaints submitted to the HDC received NFA decisions. It believes these cases suggest that the complaint mentioned in the previous paragraph is not an isolated incident.

The Collective believes NFA decisions risk adding "insult to injury" to complainants. It said that the damage is exacerbated when complainants have nowhere else to turn. We heard that research shows that people are much more likely to accept a decision, even if it is adverse, if they believe they have been heard and listened to with respect and dignity.

Decrease in the number of investigations

The Collective reiterated the petitioner's concern that the number of formal investigations has "dramatically declined" in the past 20 years. This is despite complaint volumes almost doubling.

We heard that the HDC Office has performance expectations that include a target for the number of investigations it will undertake and close each year. The Collective said that data from recent years shows a close correlation between the HDC's target and the number of investigations actually carried out. It submits that the increased proportion of NFA decisions and the decrease in formal investigations is a "deliberate decision" to ration scarce resources. The Collective pointed out that the Chief Ombudsman indicated in his recent decision (discussed below) that rationing was not a legitimate reason for avoiding an investigation, when one is warranted.

The Ombudsman's criticisms of several NFA decisions

The Collective noted that the Chief Ombudsman released a decision in 2020 about three complaints on which the HDC had made NFA decisions. It said that the Ombudsman strongly criticised the HDC's practice of undertaking lengthy and detailed preliminary assessments and making NFA decisions for complaints that should have been formally investigated. The Ombudsman's recommendations and the HDC's response to them are discussed in more detail later in our report.

The Collective considers that the Ombudsman's criticism will prompt the Commissioner to shift its activities and resources from preliminary assessments to carrying out more investigations. However, it believes the Commissioner's resources to undertake investigations will always be constrained. Given that more than 1,000 complaints receive NFA decisions each year, it submits that many complainants will still receive NFA decisions with which they are dissatisfied. The Collective therefore considers that complainants still need a way of challenging these decisions.

Appeal rights for other disputes

The Collective observed that an appeal right is "the norm" in other disputes if a person is dissatisfied with the relevant decision-maker's finding. Examples where there is a right to appeal a decision or have it independently reviewed include tenancy matters, ACC cover or compensation, police misconduct, and personal grievances in employment matters.

The Collective noted that three complaints processes were established in the 1990s: the Health and Disability Commissioner, the Privacy Commissioner, and the Human Rights Commission. The Collective pointed out that complainants and those complained about can appeal to the Human Rights Review Tribunal for privacy and anti-discrimination complaints. However, appeal rights for complaints about health and disability services are much more limited.[9]

The Collective considers that this is "seriously unbalanced" and unfair, and results in the Commissioner having too much unaccountable power under the Health and Disability Commissioner Act (the HDC Act).

Review of the Health and Disability Commissioner Act

Section 18 of the HDC Act requires the Commissioner to review the operation of the Act every five years. The Commissioner must consider whether any amendments are necessary or desirable and report their findings to the Minister.

The Collective submits that the matters raised in this petition should not be referred back to the HDC to address in the next review of the HDC Act. It noted that submissions arguing for a right of appeal have been made in the last three reviews of the Act and Code. However, they have never been supported by the Commissioner. The Collective likened asking the Commissioner to advocate for an appeal right from their decisions to "asking turkeys to vote for Christmas".

How a right of appeal could be created

The Collective said it supports the reforms being introduced by the new Commissioner to address some of the concerns raised by the petition. It recognises that legislation cannot change everything and culture is crucial. However, the Collective noted that an appeal right cannot be provided through operational changes; it can only exist if Parliament legislates for one.

[9] Section 51 of the HDC Act sets out the limited circumstances when an aggrieved person can bring proceedings before the Tribunal. For both of these options, the Commissioner must have determined that there was a breach of the Code following a formal investigation.

The Collective provided several examples of how a right of appeal could be created against NFA decisions and adverse decisions after a formal investigation. They include:

- amending section 51 of the HDC Act to enable complainants, consumers, and providers to take proceedings in the Human Rights Review Tribunal
- creating a right to an external review that is independent from the HDC and funded separately
- establishing a separate appellate tribunal to deal with health and disability matters
- enabling appeal to a court
- broadening the jurisdiction of the Health Practitioners Disciplinary Tribunal to include appeal from HDC decisions.

Comments from the Auckland Women's Health Council

The Auckland Women's Health Council (AWHC) was founded 33 years ago and has a long-standing role in advocating for patient and consumer rights. AWHC made submissions on the HDC Act before it was enacted in 1994 and participated in consultation meetings in the development of the Code of Rights.

AWHC supports the petitioner's request. It submits that a process for appealing HDC decisions or enabling independent review is the only way to ensure that the complaints system is consumer-centred and that justice is served.

AWHC considers that appeal rights would ensure that complainants and defendants had the opportunity to correct errors that might have been made in the original decision. It noted that the HDC reaches a decision after a "paper" assessment or investigation. AWHC argues that this process is more prone to error than hearings held in public where witnesses give oral evidence and are subject to cross-examination. It believes appeal rights would recognise that all humans are "fallible" and give all parties the chance to review decisions with or without new information being provided.

According to AWHC, lack of appeal rights also affects "whistle-blower" health professionals who may have cause to lodge a complaint about providers that they work with. It considers that health professionals who speak up about harmful practices or breaches of patient rights must be reassured that they will be treated fairly and justly. This includes being able to appeal a decision.

AWHC also shares a number of the petitioner's concerns, including about the:

- limited options (internal review, complaint to the Ombudsman, or judicial review) available to a complainant who is dissatisfied with an HDC decision
- role of a robust complaints process in contributing to improvements in culture and safety for consumers and practitioners
- "extraordinary" increase in the number of NFA decisions, which it considers makes a right of appeal more important
- risk that dissatisfied complainants will boycott the complaint regime, resulting in providers not being held to account and their shortcomings not being addressed.

Comments from the Federation of Women's Health Councils

The Federation of Women's Health Councils (FWHC) endorsed the key matters raised by the petitioner. It shares the petitioner's concerns about several matters, which include the following:

- "No further action" decisions are the most common method of "resolution" following assessment, and it believes the decisions lack transparency. FWHC is particularly concerned that cases involving multiple and similar complaints have received NFA decisions.
- The pathway for complainants dissatisfied with NFA decisions is extremely limited.
- Under section 51 of the HDC Act, dissatisfied complainants do not have the right to appeal NFA and "no breach" decisions to the Human Rights Review Tribunal. FWHC submits that the initial proposal for a Health Commissioner provided for wide access to an appeal process. However, the HDC Act that was passed contained an extremely limited right to appeal. FWHC noted that the first Commissioner, Robyn Stent, expressed concerns about this in her review of the HDC Act and Code in 1999. Although access to the Tribunal was extended in 2003, it was still limited.

FWHC said it accepts that a number of the issues identified in its submission could be resolved by improved operational processes within the HDC. However, it believes there is a "compelling case" to extend the existing right of appeal to include "no breach" and NFA decisions. FWHC considers that a lack of appeal rights for these decisions is "simply unfair" and should be addressed.

Comments from Emeritus Professor Ron Paterson

Professor Ron Paterson is Emeritus Professor of Law at the University of Auckland, teaching Health Law. He served as the Health and Disability Commissioner between 2000 and 2010 and as the Parliamentary Ombudsman from 2013 to 2016.

According to Professor Paterson, the matters raised by the petition make it clear that the complaints system is not working as intended. Also, he believes some complainants have been denied access to justice in situations where there appear to have been clear breaches of the Code.

Professor Paterson noted that the 1994 HDC Act gave the Commissioner limited options—referral to advocacy or investigation (except for narrow circumstances where the Commissioner could choose to take no action, such as frivolous or vexatious complaints). He said that the changes introduced by the Health and Disability Commissioner Amendment Act 2003 were intended to give the Commissioner more flexibility. Professor Paterson submits that the changes were not intended to lead to only 5 percent of complaints being investigated, and "protracted" assessment processes resulting in no further action.

We heard that section 40(3) of the HDC Act empowers the Commissioner to investigate breaches on their own initiative. Professor Paterson maintains that this type of inquiry is particularly appropriate where many complainants raise similar serious issues, such as in the surgical mesh cases. In Professor Paterson's opinion, this power has been underused in recent years and is a missed opportunity to promote and protect consumers' rights.

Professor Paterson told us that he does not support introducing a right of appeal for HDC decisions. He observed that the HDC complaints system is intended to be fair, simple, speedy, and efficient. He believes a right of appeal would lead to protracted litigation. Professor Paterson considers that the new Commissioner will be "conscientiously" seeking to address the matters raised in the petition. However, he believes access to justice considerations require more than new initiatives from the HDC.

Professor Paterson's proposed solutions

Professor Paterson proposes two solutions that could be achieved by changes to the HDC's practices. He would like the HDC to publish guidelines about the relevant factors in deciding whether to investigate a complaint. This would be consistent with a December 2020 opinion of the Chief Ombudsman.

Professor Paterson also strongly encourages the Commissioner to publish NFA decisions to provide more transparency about the reasons why cases are not being investigated. He acknowledged that it would not be sensible to publish every NFA decision. However, Professor Paterson noted that, in some cases, the HDC gathers information, receives expert advice, and sets out the reasons for the decision in a letter to the complainant and provider. He believes that decisions that include any reasoning or that might have broader implications should be seen more widely.

Professor Paterson proposes two additional solutions that would require amendments to the HDC Act. He requests that complainants be allowed to bring a claim before the Human Rights Review Tribunal when a complaint is not investigated or when an investigated complaint results in a "no breach" decision. Professor Paterson also suggests that a right to an internal review of an HDC decision for complainants should be formalised in legislation and publicised. This right could be similar to provisions in the Health Care Complaints Commission Act 1993 (NSW).

We sought further information from Professor Paterson about what a right to internal review would entail. Professor Paterson explained that he introduced internal reviews when he was Commissioner. The review involves a person who has not been involved in the original decision examining the file with a "fresh set of eyes". He acknowledged, however, that an internal review is not a right of appeal.

Comments from the Office of the Ombudsman

The Chief Ombudsman described his power as "broad and wide". He noted that section 22(1) and (2) of the Ombudsmen Act 1975 enables him to inquire into all aspects of a decision. After doing so, he may form an opinion that the decision:

- appears to have been contrary to law
- was unreasonable, unjust, oppressive, or improperly discriminatory, or was in accordance with a law or practice that is or may be unreasonable, unjust, oppressive, or improperly discriminatory
- was based wholly or partly on a mistake of law or fact
- was wrong.

The Ombudsman may also form an opinion that a power has been exercised for an improper purpose, on irrelevant grounds, or that reasons should have been given. He pointed out, however, that if he finds that a process is not acceptable he will send the decision back for reconsideration. He does not have the power to state that an agency is wrong and substitute their decision with another.

The Ombudsman's investigation into the HDC's assessment of three complaints

In 2020, the Ombudsman completed an investigation into the HDC's complaint-handling processes, particularly about the discretion to take no further action on complaints. The Ombudsman issued his opinion about the investigation on 1 December 2020.[10]

The complaints related to the length of time the HDC had taken to complete a preliminary assessment for three complaints (by two individuals and one provider). Because the complaints had not been formally investigated, the complainants believed the health providers were not appropriately held to account. The complainants were also denied the ability to bring proceedings before the Human Rights Review Tribunal (if the circumstances allowed).

The Ombudsman considered that these assessments appeared to be at the same level as a formal investigation. However, the Ombudsman formed the opinion that the former Commissioner's handling of the three separate complaints was unreasonable. He considered that the HDC's preliminary assessment processes in these cases went beyond what Parliament envisaged a preliminary assessment should entail under section 33 of the HDC Act.

The Ombudsman also determined that the HDC's decision to take no further action under section 38(1) of the Act was unreasonable in two of the cases. He said that the HDC had not persuaded him that it considered all the relevant factors when reaching this decision. The Ombudsman also considered that the HDC had made these decisions without an adequate complaint-handling policy.

The Ombudsman recommended that the HDC apologise to the complainants about its handling of the complaints. He also recommended that the HDC reconsider its decision to take no further action in two of the cases, and develop a more comprehensive complaint-handling policy.

Comments from the Health and Disability Commissioner

The current Commissioner, Morag McDowell, began her term in September 2020. She acknowledged the experience of the petitioner and other complainants, and their criticisms of the HDC's processes. The Commissioner told us that she has heard their concerns and empathises greatly. She said she is very mindful that legal and regulatory processes can potentially have harmful consequences on participants and regrets that the petitioner and others have been adversely affected.

[10] A copy of the opinion is available on the Ombudsman website.

Complaints resolution processes

The HDC explained that each complaint it receives is carefully assessed and the pathway for resolution is determined taking into account the issues raised and the available evidence. The HDC Act enables the HDC to use the following complaint-resolution pathways:

- The HDC can refer the complaint to the National Advocacy Service or the provider for direct resolution between the parties. The service and providers are required to report back to the HDC about the outcome of these referrals so the HDC can ensure that people's concerns have been appropriately addressed. The HDC noted that this is one of the most common resolution methods that it uses, with about 38 percent of complaints resolved in this way.
- The HDC can refer the complaint to other agencies where the issues raised are more appropriately dealt with by that agency.
- The HDC can call for mediation or a hui involving the parties in the complaint. The HDC told us that this resolution pathway is used infrequently but it is exploring how it can be used to better effect.
- The HDC can take no further action on a complaint where the preliminary assessment indicates that a formal investigation is not warranted. This pathway can also include educational comment or recommendations.
- The HDC can conduct a formal investigation. This can result in the provider being found in breach of the Code, as well as recommendations and educational comment.
- The HDC can refer a provider to the Director of Proceedings where the Commissioner has determined the Code has been breached.[11] The Director can then take legal proceedings against the provider in the Health Practitioners Disciplinary Tribunal or the Human Rights Review Tribunal. The HDC noted that this pathway is usually reserved for the most serious breaches of the Code.

The HDC told us that the preliminary assessment may involve gathering and assessing information from numerous sources before deciding the pathway. This can include seeking independent clinical advice about the standard of care. The HDC also considers the provider's history of complaints and may seek information from other agencies.

The HDC described its process when assessing a person's care as "quasi-judicial but inquisitorial". It assesses every side of the argument, weighs up the evidence, reaches conclusions about the facts, applies the Code, and makes an impartial decision.

Increase in the number of complaints

We were told that complaints to the HDC are substantially increasing in volume and complexity. In 2020/21, the number of complaints received increased by 14 percent compared with the previous year. In its written submission in November 2021, the HDC said it was experiencing an "unprecedented" increase in volume. In the first four months of 2021/22 the number of complaints increased by 41 percent. It attributed this to a range of

[11] Section 15 of the HDC Act enables the Commissioner to designate one of their employees as the Director of Proceedings.

reasons, including consumers feeling more empowered to raise their concerns, pressure within the healthcare system, and issues relating to the COVID-19 pandemic.

Proportion of "no further action" decisions and investigations

We heard that the HDC agrees that a substantial proportion of complaints are closed without further action. However, it considers that it is important to understand the breadth of these complaints. About a third of complaints in this category are early resolution NFAs, which are complaints that are low level. The complaints may raise issues that are outside the HDC's jurisdiction, better managed by other agencies, or vexatious or frivolous. The time that has passed may also make it impractical to proceed.

The HDC acknowledged the Ombudsman's recent criticisms about the HDC's preliminary assessment process and the relationship between taking no further action and the threshold for investigation. The Commissioner said she accepted and has implemented the Ombudsman's recommendations. The HDC has apologised to the consumers and providers concerned and has reconsidered the two complaints that needed reassessment. It has reviewed the preliminary assessment process and lowered the threshold for investigation. The HDC has also developed decision-making criteria that set out the factors relevant to decisions under section 38 (NFA) and section 40 (investigation).

The HDC referred to submitters' concerns about the low proportion of complaints that are investigated. However, it pointed out that the number of investigations closed is a "poor proxy" for the number of investigations that the HDC undertakes. This is because an investigation can take about two years to complete.

The HDC noted that the number of complaints referred to the HDC's investigations team increased by 130 percent in 2020/21. As at 5 November 2021, the HDC had 436 complaints with its investigations team. The HDC partly attributed this growth to the increasing complexity and volume of complaints and the lowered threshold for notifying an investigation.

The HDC's work to improve its processes

The HDC explained that it is working to improve its processes, which it expects will address other issues raised by the petition. Work that the HDC is planning or has under way includes:

- starting a quarterly survey about complainants' experiences, with feedback from the survey and other sources informing the HDC's review of complaints processes
- targeting resources at reducing delays to investigations
- reviewing its approach to publishing decisions, including publishing case notes of "no further action" and "no breach" decisions more frequently.

The HDC is also embarking on a redesign of its complaint-handling processes to ensure that they are more people-centred and timely. It is exploring how it can focus more on early resolution and restorative justice. The HDC is also focusing on how it communicates with consumers and complainants. The redesign is being undertaken in consultation with consumers to ensure that the HDC's processes are accessible, responsive, flexible, and

equitable. The HDC is particularly focused on consumers who experience poorer health outcomes.

Closed file reviews

The HDC noted that complainants regularly raise concerns about decisions. When it receives those concerns, the HDC reassesses the complaint. It determines whether more information might be needed or whether new information raises concerns about the decision reached. The HDC also reconsiders the decision to see whether it was appropriately made. The HDC calls this process a "closed file review".[12]

The HDC acknowledged that work is needed to improve the closed file review process. It said it is working to do so, including ensuring that the process is accessible to all consumers.

The HDC's views about the right to appeal

The HDC said it is not opposed to the right to appeal but the matter is complex and requires careful consideration. It observed that its operational changes are relevant considerations that can broaden access to justice for consumers and address some of the petitioner's concerns.

We heard that the HDC supports broad public, health sector, and stakeholder consultation to ensure that all options are considered and the effects of any changes are well understood. The consultation is also needed to prevent unintended consequences, particularly for consumers, providers, and the wider sector.

The HDC said that any changes to introduce a right of appeal would need to take into account a range of factors:

- They would need to be consistent with the HDC's purpose, be people-centred, and balance the four statutory factors for complaints resolution (fair, simple, speedy, and efficient).
- They could not add unnecessary complexity, fragmentation, or undue delays for people.
- The threshold for appeal would need to be considered. The HDC pointed out that extending the right to appeal for all NFA decisions, including lower-level complaints, could have significant unintended consequences for all parties.
- They would need to reflect commitments under Te Tiriti o Waitangi, be accessible, and not worsen existing inequities.

We asked whether the Commissioner feels her office has sufficient powers to address the complaints it receives. The Commissioner said that she does and that the options she has for complaint resolution provide "great flexibility". However, she believes the HDC needs to consider how it focuses its powers. The Commissioner described herself as a "firm believer" in early resolution in certain situations. This is when it meets the needs of the consumer and provider and when necessary quality improvement measures will be more effective closer to the event of concern. The Commissioner also considers that there are opportunities for

[12] Other submitters refer to this process as an "internal review".

restorative processes to be more widely used. She recognises, however, that some complaints warrant investigation and holding providers and systems to account.

Review of the HDC Act and the Code

The HDC explained that it plans to undertake a review of the Act and Code in late 2022 or 2023. It told us that it would be possible to include the right to appeal as part of the review. The HDC said it does not accept that its self-interest would impede a review and it would be committed to full consultation with the sector. We heard that the HDC could consider options to provide a level of independence to the review, if necessary.

Our response to the petition

We commend the petitioner for her work as a patient advocate on behalf of people who have made complaints to the Health and Disability Commissioner. We would particularly like to acknowledge that this work is motivated by a desire to prevent harm and improve patient safety.

We were pleased to hear that the HDC is working to improve its processes and that it expects that this work will address some of the matters raised in the petition. This includes work to include the closed file review process. We encourage the HDC to consider how this process could be better publicised and made more accessible. We acknowledge submitters' concerns that the closed file review is not an independent review.

We note that the Commissioner is required to review the Act and Code at least every five years and report their findings back to the Minister of Health. We also note that the Commissioner has indicated that she intends to review the Act and Code in late 2022 or 2023. As part of this review, we strongly encourage the HDC to publish:

- guidelines about the relevant factors in deciding whether to investigate a complaint
- NFA decisions that include any reasoning or have broader implications.

We note that several submitters requested legislative change to introduce a right of appeal. We agree with the Commissioner that a right of appeal is a matter that is complex and requires careful consideration. We encourage the Commissioner, as part of the review, to address the complexities of creating a right of appeal.

We intend to monitor the progress of the review and we look forward to seeing the Commissioner's report to the Minister on the findings from the review.

Appendix

Committee procedure

The petition was referred to the Health Committee of the 52nd Parliament on 22 June 2020. On 26 November 2020, the petition was reinstated with the Health Committee of the 53rd Parliament. We met between 3 December 2020 and 11 May 2022 to consider it.

We received written submissions and heard oral submissions from the petitioner, the Cartwright Collective, the Auckland Women's Health Council, Emeritus Professor Ron Paterson, the Office of the Ombudsmen, and the Health and Disability Commissioner. We also received written evidence from the Ministry of Health and the Federation of Women's Health Councils, and heard oral evidence from Charlotte Korte.

Committee members

Tangi Utikere (Chairperson from 4 May 2022)
Dr Liz Craig (Chairperson and member until 4 May 2022)
Matt Doocey
Dr Elizabeth Kerekere
Dr Anae Neru Leavasa
Dr Tracey McLellan
Debbie Ngarewa-Packer
Sarah Pallett
Dr Shane Reti
Dr Gaurav Sharma
Brooke van Velden

Evidence received

The documents we received as evidence in relation to this petition are available on the Parliament website, www.parliament.nz.