

11 November 2011

Rachel Mahony  
Project Administrator  
Standards New Zealand

Dear Ms Mahony

### **Draft Home and Community Support Sector Standard**

Thank you for the opportunity to comment on the draft Home and Community Support Sector Standard (the Draft Standard). I commend Standards New Zealand for recognising the shift towards consumer-centred care in New Zealand's health and disability system, and developing this comprehensive document to incorporate consumer-centred care principles into the provision of home and community support services.

#### **The Health and Disability Commissioner's role**

Under the Health and Disability Commissioner Act 1994 (the HDC Act), the Commissioner is charged with the role of promoting and protecting the rights of health and disability services consumers, as set out in the Code of Health and Disability Services Consumers' Rights (the Code of Rights). Under section 14(1)(d) of the HDC Act, one of his functions is to make public statements in relation to any matter affecting the rights of health or disability services consumers.

Right 4(2) of the Code of Rights provides that every consumer has the right to have services provided that comply with legal, professional, ethical and other relevant standards. In accordance with Right 4(2), the Draft Standard, when finalised, will be a relevant standard the Commissioner may refer to as a guide when assessing complaints about home and community support providers.

Please note that the existence of such a standard will not in any way diminish the duties owed under the Code of Rights. I suggest this is made explicit in the Draft Standard.

#### **Comments on the Draft Standard**

You have asked for comments on the content, wording and general arrangement of the Draft Standard, as well as specific feedback on the definitions of "organisation" and "service provider". I have drafted my comments accordingly.

Please note that I have not commented on all sections of the Draft Standard, just those that I consider to be of particular relevance to the Code of Rights.

*Application and scope*

I consider that the definitions of “organisation” and “service provider” may contribute to the lack of clarity around the scope and application of the Draft Standard. As currently drafted, the terms appear to overlap to some degree and it is not clear why two separate terms are necessary as “provider” more intuitively applies to both. In the HDC Act and Code of Rights, health or disability service provider encompasses both organisations and individuals. In my view, one definition throughout the document would solve the problem of using “organisation” to apply to individuals and organisations. I suggest that “organisation” be replaced with “provider” throughout the document.

#### *General arrangement*

I note that section 1 is intended to cover consumer rights. However, in my view, the section does not comprehensively reflect the full range of consumer rights as set out in the Code of Rights. As currently drafted, it relates to Rights 1, 3, 5, 6, 7 and 8 only. Matters relating to Rights 2, 4 and 10 are found in the “Organisational Management” section of the Draft Standard. In my view, if section 1 is intended to encompass “consumer rights”, it should do so comprehensively. I consider that this arrangement of the document would make it more accessible to providers.

#### *Section 0.4 - Definitions*

##### “Competent”

The Draft Standard defines “competent” as “demonstrating the required ability, knowledge, and authority”. It is not clear what “authority” means and why “authority” is relevant to a person’s competency. In law, the fundamental element of competency is a person’s capacity to understand the nature of their decision. The Protection of Personal and Property Rights Act 1988 (the PPPR Act) defines competency as the capacity to:

- understand the nature, and to foresee the consequences, of decisions in respect of matters relating to his or her personal care and welfare; and
- communicate decisions in respect of those matters.

Competency under the PPPR Act is broad and does not require a person to have the relevant “knowledge”, or the “ability”, to be competent to make decisions about their care and welfare. I suggest that the definition of competent be amended to reflect the definition in the PPPR Act.

I would also like to take this opportunity to highlight to you that under the PPPR Act and Right 7(2) of the Code of Rights, every person must be presumed competent to make an informed choice unless proven otherwise. Furthermore, Right 7(3) of the Code of Rights provides that where a consumer has diminished competence, that consumer retains the right to make informed choices and give informed consent, to the extent appropriate to his or her level of competence.

##### “Consumer”

The Draft Standard defines “consumer” as “a person who uses/receives a health or disability service”. The Draft Standard does not however define what “health or disability services” means. Furthermore, the Draft Standard refers to other types of services such as, “care and support services” and “home and community support services”. This raises the question as to whether those services are included within the meaning of “health or disability services” in the Draft Standard. If not, a person who is receiving “support services”, for instance, will not

be a consumer for the purpose of the Draft Standard, but is still a “consumer” for the purposes of the Code of Rights.

In my view, “health or disability services” needs to be defined; alternatively, an umbrella definition of “services” could be included to determine the types of services a person must use or receive to bring them within the definition of “consumer” under the Draft Standard.

#### “Representative”

I note that the current definition of “representative” only includes representatives nominated by the consumer to act on their behalf and not legal representatives, such as a welfare guardian or an enduring power of attorney. I suggest that the definition include both legal and non-legal representatives.

#### “Accountable” (as used in the definitions of service providers and organisations)

In my view, this term is ambiguous. Under the HDC Act, an organisation can be held directly or vicariously liable for breaches of the Code of Rights. Direct liability is where a provider organisation has failed to discharge its organisational duty of care to the consumer, while vicarious liability, under the HDC Act, is where the organisation has failed to take reasonable steps to prevent anticipatable breaches by its employee or agent. I suggest that the definitions be amended with a view to clarifying what “accountability” means within the context of the definitions and the overall scheme of the Draft Standard.

### *Section 1 – Consumer Rights*

#### Clause G1.1.1

I suggest that the purpose of each piece of legislation be provided in the Draft Standard as they will not all be directly relevant to the provision of services. Consumer rights with respect to the health and disability services generally are specified in the Code of Rights. The Privacy Act 1993 and the Health Information Privacy Code are in relation to the collection, storage and disclosure of personal information. The Human Rights Act 1993 is about unlawful discrimination, and the United Nations Convention on the Rights of Persons with Disabilities is about state recognition of the human rights of persons with disabilities.

#### Clause 1.1.4

Clause 1.1.4 provides that consumers have rights to an advocate. Right 10(6)(b)(i) of the Code of Rights states that providers must inform consumers of the availability of advocates in the event a complaint is made. The Code of Rights does not specifically provide for a right to an advocate. I suggest that the clause be amended to be consistent with Right 10(6).

#### Clause 1.1.6 and 1.1.7

I note that clause 1.1.6 and 1.1.7 are the only substantive clauses that deal with informed consent. The clauses characterise informed consent as the provision of information and the obtaining of written or verbal consent. In my view, this simplifies the concept and does not sufficiently recognise that informed consent is a process which comprises a number of components including effective communication, competence, disclosure, understanding, voluntariness and consent. The process of informed consent is embodied in three essential elements under the Code of Rights:

- Effective communication between the parties (Right 5);
- Provision of all necessary information to the consumer, including information about options, risks and benefits (Right 6); and
- The consumer's freely given and competent consent (Right 7).

I suggest that clauses 1.1.6 and 1.1.7 be amended to reflect the informed consent process as found in the Code of Rights.

I also note that clause G1.1.7(d) provide "consumers who are unable to consent". As explained above, a consumer cannot give valid consent if they are not competent, rather than being "unable" to consent. I suggest that the clause be amended.

#### Clause 1.3

Clause 1.3 provides that consumers receive "culturally safe services". As stated above, "culturally safe" is not defined in the Draft Standard. I am also concerned that the term may conflict with Right 1(3) of the Code of Rights, which requires service providers to "take into account" the beliefs of different cultural, religious, social and ethnic groups, including Maori. I suggest that "culturally safe" be either defined or replaced with a term or phrase that is consistent with Right 1(3).

#### Clause 1.6

It appears that clause 1.6 is drafted to reflect the wording of Right 5 of the Code of Rights. However, as currently drafted, clause 1.6 could be interpreted to mean that the consumer has the duty to facilitate effective communication, which is inconsistent with Right 5(1). Right 5(1) provides that the consumer has the right to effective communication, the corollary being that the provider must facilitate effective communication. I recommend that clause 1.6 is amended to be consistent with Right 5.

#### **Conclusion**

I trust that these comments are of assistance. Please do not hesitate to contact Legal Advisor, Tina Liu, on (04) 494 7920 or [tinal@hdc.org.nz](mailto:tinal@hdc.org.nz) if you have any questions regarding these comments.

Yours sincerely

Katie Elkin  
**Chief Legal Advisor**