

19 November 2004

Mr A  
Chief Executive Officer  
A District Health Board

Dear Mr A

**Complaint: Ms B**  
**Our Ref: 04/16677/WS**

I have recently received a complaint from Ms B, regarding services provided to her by the District Health Board (the DHB). In particular, Ms B has complained that, following an operation to remove a breast prosthesis from her right breast, the prosthesis was disposed of without her consent.

Having assessed Ms B's complaint I am of the view that there has been a *prima facie* breach of the Code of Health and Disability Services Consumers' Rights (the Code) by the DHB. However, Ms B's primary concern is that she be reimbursed for the cost of the prosthesis.

### ***Background***

On 5 January 2004, Ms B had a breast prosthesis removed at a public hospital, due to a breast infection. The surgical staff destroyed the prosthesis after it was removed. Ms B complains that she was not told that it would be destroyed – and she had anticipated its return so that it could be re-implanted, at a later date, at a private hospital.

### ***Factual background***

Ms B does not appear to have expressed any concern or made any enquiries of DHB staff, prior to entering the public hospital, about the return of her prosthesis. However, she had discussed the matter with her surgeon at the private hospital. It is not clear whether the surgeon at the public hospital was aware of her specific plans for further surgery and re-implantation.

Ms B has advised me that when she was completing the consent form for her surgery, she discussed with a nurse the meaning of the questions “Do you have any special requests regarding your operation?” or “regarding the return or disposal of any tissue/body parts that are removed?”. The nurse confirmed her understanding that “body parts” meant organic parts.

During the surgery, after the prosthesis was removed, there was a discussion between the staff in the theatre about whether the prosthesis should be kept. Staff checked Ms B's consent form and, noting that she had not make any special requests regarding her surgery, they decided to dispose of the prosthesis, in line with the hospital's general policy of disposing of any item removed from an infected wound site.

Some weeks after Ms B was discharged from the public hospital, she was contacted by the private hospital. The private hospital asked Ms B to send them the prosthesis so that they could prepare it for re-implantation. Ms B contacted the public hospital to enquire when the prosthesis would be returned to her.

According to Ms B, she was advised by a nurse that the prosthesis was destroyed because she did not indicate on the consent form that she had any special requests “regarding her operation” or “regarding the return or disposal of any tissue/body parts that are removed”. The nurse also stated that it is hospital policy not to ask patients if they wanted such items returned and that, in any event, it was likely that it would have been “unsafe” to return the prosthesis as it was the site of the infection.

#### *Complaint background*

On 4 March 2004, Ms B wrote to the DHB complaining about the disposal of the prosthesis. In her letter she noted that she had interpreted the “tissue/body parts” section of the consent form as referring only to biological body parts. She also advised that she was aware that other hospitals (such as the private hospital) offer to return prostheses and that, in fact, the private hospital had asked her to return the prosthesis for sterilising. In Ms B’s view this made a nonsense of the DHB’s claim that it was unsafe to return the prosthesis. Ms B requested that the DHB reimburse her the cost of the prosthesis (\$1,050).

On 16 March, Mr C (on behalf of the DHB) responded to Ms B’s complaint. He advised Ms B that, at the time of the operation, staff had checked her consent form to see if she had left any instructions about the prosthesis. He advised that as they could not find any such instructions, the staff decided to dispose of the prosthesis, in line with the hospital’s policy of not returning material taken from an infected wound.

Following further correspondence, which did not progress the matter, Ms B sought the assistance of an advocate. On 25 August 2004, Mr D (advocate) wrote to the DHB requesting that it reconsider its decision not to reimburse Ms B. However, it declined to do so.

Based on the information available to me, it appears that prostheses such as Ms B’s can be sterilized and re-used.

#### *Apparent breach of the Code*

##### *Right 6(1) – Right to be fully informed*

Under Right 6(1) of the Code consumers have the right to receive the information that “a reasonable consumer, in that consumer’s circumstances, would expect to receive”. In my view, a consumer in Ms B’s circumstances could reasonably have expected to be told that her prosthesis would be disposed of unless she requested otherwise. I take this view for three reasons.

First, it appears reasonably obvious that Ms B would be having further surgery on her breast once the infection resolved. Thus, the outcome of the surgery at the public hospital (which would affect that later surgery) was clearly a live issue. Second, re-using the prosthesis was clinically possible, thus its retention was of considerable

value to Ms B. Third, it appears from the information provided by the DHB, that staff are aware that this can be a contentious issue. I note that the DHB has a relevant policy, that (according to Mr C) staff adhere to the policy *unless the consumer requests otherwise*, and that the question was discussed by the theatre staff in this particular case.

In the circumstances, given that the issue should have been apparent to staff before the surgery and that the decision to dispose of the prosthesis would affect Ms B's future treatment, I consider that it would have been reasonable to expect that staff would discuss this matter with Ms B prior to the surgery.

#### *Right 7(9) – “Body part”*

I note that the consent form asks consumers to document any “special request(s) regarding the return or disposal of any tissue/body parts that are removed, as acceptable under New Zealand legislation”.

This broadly reflects Right 7(9) of the Code, which states:

“every consumer has the right to make a decision about the return or disposal of any body parts or bodily substances removed or obtained in the course of a health care procedure”.

However, in my view, a breast prosthesis is not a “body part” or “bodily substance” under Right 7(9) of the Code.

#### ***No Action***

As noted in my letter to Ms B, it appears that misunderstanding in this case arose from DHB staff misunderstanding the scope of Right 7(9) of the Code and relying too heavily on Ms B's comments on the consent form, rather than discussing the issues with her directly to ascertain her wishes.

While I consider that Ms B's complaint raises concerns about the care provided by staff at the public hospital/, I do not intend to take any further action on this matter. Ms B's primary concern is financial compensation. The decision to offer compensation rests with the District Health Board. I note that you have responded to Ms B on more than one occasion and confirmed that you will not be covering the cost of the prosthesis. I would encourage you to reconsider your decision.

#### ***Recommendations***

While I do not intend to take any action on this complaint, I recommend that the DHB take this opportunity to:

- ensure that its staff are aware of the scope of Right 7(9) of the Code;
- review the information that it provides to patients about the disposal of prostheses removed during surgery; and
- review the information provided on the consent form.

I trust that, by taking this action, the DHB will minimise the chances of this problem (and further possible breaches of the Code) occurring again in the future.

Thank you for your assistance with this matter.

Yours sincerely

Ron Paterson  
**Health and Disability Commissioner**

Enc: Letter to Ms B