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Tēnā kōe Morag

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

### Introduction

- 1 This is a joint submission on behalf of the Dental Council and Pharmacy Council. We appreciate the opportunity to comment on the review of the Health and Disability Commissioner Act 1994 (the **Act**) and Code of Health and Disability Consumers' Rights (the **Code**).
- 2 Responsible authorities under the Health Practitioners Competence Assurance Act (**HPCAA**), such as the Pharmacy Council and Dental Council, work closely with the HDC and have a unique perspective on the HDC and its impact on both providers and consumers of health and disability services in Aotearoa. As you know, there is often significant cross over and interaction between our agencies.
- 3 The Dental and Pharmacy Councils have carefully reviewed the Health and Disability Commissioner (**HDC**) consultation document dated April 2024. We note this covers five topics where the HDC thinks the Act and Code can be improved:
  - a Supporting better and equitable complaint resolution;
  - b Making the Act and the Code more effective for, and responsive to the needs of, Māori;
  - c Making the Act and the Code work better for tāngata whaikaha | disabled people;
  - d Considering options for a right of appeal of HDC decisions; and
  - e Minor and technical improvements.
- 4 These topics undoubtedly cover some important issues for the HDC and consumers. We are generally supportive of the changes proposed in the consultation document, particularly those which encourage efficiency, and make some more specific remarks below. However, we were disappointed to see that the consultation document in general reflects a light touch review, proposing only small changes to the Act and Code, rather than attempting to address some of the more significant issues with the Act, the Code, and the operation of the HDC.
- 5 It is no secret that, like much of the sector, the HDC is facing significantly increased complaint numbers and resource constraints. We appreciate that the HDC is facing significant workload and resource pressures, and reduced funding of \$2.9m allocated to HDC through Vote Health.
- 6 The purpose of the Act is to promote and protect the rights of health consumers and disability services consumers, and, to that end, to facilitate the fair, simple, speedy, and efficient resolution of complaints relating to infringements of those rights. The review acknowledges that these principles are not being met as well as they could be. We think it likely most stakeholders would agree that, despite its best efforts, the HDC is not facilitating the fair, simple, speedy, and efficient resolution of complaints.
- 7 The review also acknowledges that increased complaint numbers are impacting timeliness and that delays can lead to increased stress for all parties and diminish the effectiveness of HDC's recommendations.

- 8      Whilst responsible authorities can be sympathetic to the increasing complaint numbers and resourcing issues at the HDC, the time it is taking the HDC to consider complaints creates significant issues and legal risk for responsible authorities. Responsible authorities are often waiting a number of years for the HDC to finish its initial consideration of a complaint before they can take or continue disciplinary processes under the HPCAA. This can have a significant impact on responsible authorities, the professionals they regulate – and of course the consumers and/or complainants.
- 9      The impact of these delays is compounded by the duplication inherent in the current model. If a consumer makes a complaint about the care provided by a health practitioner, there could be two completely separate processes which cover the same facts. Patient complaints must be referred to HDC first, so HDC is sometimes investigating matters which might then become professional disciplinary matters (sometimes several years later). Once a matter is referred back to a responsible authority, they must complete their necessary processes under the HPCAA, which can also take some time. These delays and complications disadvantage everyone involved, including consumers, providers, responsible authorities, and the HDC. There are also potential safety risks to consumers/the public if these delays are not addressed.
- 10     The impact of delays in completing investigations cannot be over-stated. Consumers, health professionals, and provider organisations alike are all adversely impacted by delays. If the HDC is not meeting its stated purpose of facilitating the fair, simple, speedy, and efficient resolution of complaints, this raises significant natural justice concerns for health practitioners who are the subject of such complaints and may be under investigation for a number of years. These delays can have a profound impact on their practice, as well as causing considerable personal stress.
- 11     There will of course be instances where the conduct of a health practitioner falls below the required standard, and professional disciplinary proceedings are necessary. However, even in these instances, the practitioner is entitled to have an investigation conducted without undue delay. An individual's right to an investigation being conducted in a reasonable timeframe is recognised by the right to natural justice as set out in section 27(1) of the NZ Bill of Rights Act. Delays in progressing investigations of the type risk interfering with this right.
- 12     Although these matters are not included in the scope of the current review, we note that in your foreword you state that in addition to feedback on the consultation document, you also welcome any other thoughts on how the HDC can improve the Act and the Code and how they are applied. The HDC is obviously best placed to identify the issues and roadblocks within its own organisation, and we do not propose to have all the solutions to these problems. However, we think all parties would agree that the current outcomes are not what anyone is hoping to achieve, and we are keen to work together to find a collaborative solution.
- 13     Essentially, we urge the HDC to take the opportunity to consider the efficiency and effectiveness of the complaint resolution experience for consumers and also how Aotearoa compares internationally. There are several benefits in having one organisation managing health complaints in comparison to profession-specific processes (e.g., minimising inter-professional variability, system focus and advocating for consumer's rights). We are not challenging this model but consider that the overlap, and sometimes competing interests, between the two systems may diminish the benefits of the HDC's model. We do not pretend to have all the answers but encourage the HDC to undertake a 'fuller diagnosis' rather than 'symptoms management', and a review that addresses the challenges at a more fundamental level, such as the multi-layered formal processes that detract from consumer engagement. Furthermore, some obvious differences between the HDC and responsible authorities which warrant further discussion are:
- a      Individual professional focus vs. a more systems-based focus;
  - b      Managing interim risk vs. resolving a complaint; and
  - c      Professional funding (APC fee) vs. Crown funding.
- 14     Therefore, we take this opportunity to start what we hope will be a constructive dialogue with the HDC and all responsible authorities on how we can all work together to facilitate better outcomes for both consumers and providers.

## **Topic one - Supporting better and equitable complaint resolution**

- 15 Question 1.1 of the review asks whether the HDC has covered the main issues for supporting better and equitable complaint resolution. Whilst there are a number of issues identified, there are a number of further ways in which the HDC could support better and equitable complaint resolution. Question 1.3 then asks what other changes, both legislative and non-legislative, should be considered to support better and equitable complaint processes.

### *The different frameworks under the HDC and HPCAA*

- 16 There is considerable overlap between the HDC and responsible authorities under the HPCAA. Both may receive complaints or notifications regarding provision of health services in New Zealand, both can investigate concerns about health practitioners, and both may lay charges before the Health Practitioners Disciplinary Tribunal (through other committees or persons). However, these frameworks do not always work well together. The HDC's investigation process into complaints takes precedence over investigations under the HPCAA. This means that delays in the HDC's process have flow on effects for processes under the HPCAA.
- 17 Whilst the HDC's purpose is protecting the rights of health consumers and facilitating the resolution of complaints, the principal purpose of the HPCAA is to protect the health and safety of members of the public by providing for mechanisms to ensure that health practitioners are competent and fit to practise their professions. There is clear value in an entity which focuses on the consumer, managing complaints, and consumer rights. And, importantly, one which is distinct from responsible authorities which focus on the regulation of professions and protecting the public. The HDC is clearly best placed to investigate systematic issues which are broader than one health practitioner, because responsible authorities do not necessarily have visibility over systematic issues in certain environments or locations. The HDC also has more established systems and processes to explore alternative resolution of complaints and restorative practices. In contrast responsible authorities are more constrained under part 4 of the HPCAA (compared to other parts of the HPCAA) to consider restorative practices when the notifier is a consumer e.g. competence.
- 18 Despite these differences, there is considerable cross over and overlap between the HDC and responsible authorities. While the HDC's focus is rightly on complaint resolution, in many instances the HDC is also making findings on the accountability of providers if it finds there has been a breach of the Code. In our view, better clarification of roles and responsibilities between the HDC and responsible authorities under the HPCAA is a significant way in which the HDC could support better and equitable complaint resolution. Given the interwoven nature of complaints across HDC and responsible authorities, we question whether the HDC should be required to notify the relevant responsible authority when complaints about individual health practitioners registered with that authority are made, . Again, we would welcome a discussion with the HDC about these matters in an attempt to find solutions that benefit all.

### *What other changes, both legislative and non-legislative, should be considered to support better and equitable complaint processes?*

- 19 There are a number of changes which could be considered to support better and equitable complaint processes.
- 20 In the current legislative framework, statutory priority is given to the Commissioner, and the fact that the Commissioner is often taking so long to investigate concerns is consequently creating significant issues for responsible authorities. When a complaint is being considered by the HDC, a responsible authority may take no action under Part 4 of the HPCAA (aside from interim action) until the HDC notifies the authority that the complaint has been resolved or is not being investigated further. This means that a responsible authority could be waiting several years before it is able to continue its own investigations under the HPCAA which by their very nature can also take some time. This creates

not only a risk of harm to the public, if there are concerns about a practitioner's conduct which cannot be addressed, but also exposes the responsible authority to legal risk.

- 21 In relation to interim action, section 69 of the HPCAA allows a responsible authority to order that a health practitioner's practising certificate be suspended, or conditions imposed, if an investigation is pending under the HDC Act. Where the HDC's investigation takes considerable time, this means that the practitioner may be suspended (or subject to conditions) for an extended period of time. The delays within the HDC can have the effect of exposing the responsible authority to legal risk – as the time out of practice for the practitioner can become difficult to justify if it is for an extended period of time.
- 22 More generally, it can be unfair on both the complainant and the practitioner for the matter to be so significantly delayed. By way of example only:
  - a In one complaint involving one of the Councils, a complaint alleging a sexual relationship and other inappropriate conduct was referred to the HDC – but, over two years later, the HDC has neither commenced or progressed the investigation nor referred the matter back to the responsible authority.
  - b In another case, one of the Councils referred a complaint to the HDC. The HDC concluded its assessment of the information and referred the matter back to Council 15 months later, only as the complainant had, by this time, withdrawn her complaint.
- 23 We are also concerned that there sometimes appears to be an inconsistency in the HDC's assessment of complaints, where rather than addressing the backlog (from oldest to newest) newer complaints are being referred back faster. Whilst we are grateful to receive complaints referred back at a much earlier stage, we are concerned about consistency and what this means for older complaints becoming more and more delayed. We are also concerned about the flow on effect and ability of responsible authorities to effectively manage their workloads.
- 24 The creation of realistic timeframes in which the Commissioner must consider complaints which concern a health practitioner could address many of these issues and provide everyone involved with greater certainty. Whilst all HDC complainants deserve the fair, simple, speedy, and efficient resolution of their complaints, when a health practitioner is involved there are serious natural justice concerns to be considered, as set out above. In addition, the sooner a complaint regarding a health practitioner receives initial consideration by the HDC, the sooner the relevant responsible authority can become involved, and if necessary, lend their resources. Working together will help share knowledge, efficiently share scarce resources, and hopefully provide quicker resolutions.
- 25 We would like the HDC to update responsible authorities on progress when considering complaints – including at the initial assessment stage and before the HDC has made a formal decision on whether an investigation is to be undertaken. We propose that HDC reports to the relevant responsible authority at least quarterly with a full list of all complaints that are before the HDC that involve practitioners from the particular responsible authority. This will help both the responsible authority and the HDC maintain oversight of current issues involving their health practitioners.
- 26 There are a number of other changes which should be considered to support better and equitable complaint processes, and facilitate different agencies working together more effectively. By way of example, we are supportive of restorative practices and want to work more closely with the HDC in this important area. One Council has facilitated successful restorative processes – one example being a tikanga-based process involving a practitioner and complainants which was highly successful in ensuring all involved understood the issues and the remedial action required to address the concerns. Also, we have begun the conversation and our journey with the HDC's Director Māori and are eager to continue these conversations and explore further ways to work together. Facilitating discussions with practitioners and consumers might form part of the restorative process, and crucially might reduce the time it takes for the HDC to determine whether a complaint

could be resolved, or whether there are serious professional disciplinary concerns which need to be investigated further.

- 27 We also think there is scope for a further conversation with all responsible authorities on who should be responsible for the resolution of complaints and professional disciplinary matters. We are aware of some recent commentary which suggests the HDC should focus on complaint resolution, not carrying out formal investigations.<sup>1</sup> Working together will help provide clarity and certainty to all parties. We would encourage a conversation between the HDC and all responsible authorities on whether there should be a shift in who is responsible for considering professional disciplinary matters.

#### **Topic two – Making the Act and the Code more effective for, and responsive to the needs of, Māori**

- 28 The second section of the review suggests ways to make the Act and Code more effective for, and responsive to the needs of, Māori. We agree that changes should be considered to make the Act and Code work better for Māori. In particular, we support more culturally responsive restorative processes for all the reasons outlined in the consultation document, for the benefit of both consumers and health professionals. As outlined earlier, we also acknowledge our journey and the opportunity to work more closely together. We think much could be achieved by linking and sharing expertise through regular engagement and joint work with the cultural teams at the responsible authorities.
- 29 If it has not already done so we would recommend conferring with expert advisors to critically assess HDC's proposals and what else could be done to support Māori consumers of health services.

#### **Topic three – Making the Act and the Code work better for tāngata whaikaha | disabled people**

- 30 The third section of the review considers ways to make the Act and Code better for tāngata whaikaha | disabled people. In response, we are generally supportive of the proposals and defer to the expertise of the HDC.
- 31 We would recommend that further enquiries are made to help providers understand that impacts on Māori and disabled persons could be worse (despite their best intentions), and what might need to be adjusted to prevent this. We would also welcome further engagement from the HDC on this issue, so that we as responsible authorities, can understand how to better support practitioners who fall within this definition.

#### **Topic four – Considering options for a right of appeal of HDC decisions**

- 32 The fourth section of the review considers options for appealing and challenging HDC decisions. We found the language used under this heading confusing. First, as we understand the statutory framework the HDC does not reach a 'decision', it forms a statutory opinion which is not as easily amenable to an appeal. Secondly, from our reading of the consultation document the review does not propose an appeal, rather it proposes introducing a statutory requirement for review of HDC decisions and lowering the threshold for access to the Human Rights Review Tribunal.
- 33 With this in mind, whilst responsible authorities want the HDC to reach the right decision, we are concerned about the potential for further delay if HDC opinions can be appealed or reviewed to the HRRT (which is also suffering from significant delays). We are concerned that this will not actually address the problem, and that more time will be spent arguing and relitigating a case instead of resolving the matter in the interests of both the consumer and provider. We would recommend resources are spent trying to resolve complaints faster, bringing in other parties, such as responsible authorities earlier, to try and reach the best outcome for both consumers and providers.

#### **Topic five – Minor and technical improvements**

- 34 The final section of the review suggests a number of minor and technical amendments to the Act and the Code. In response, we make the following discrete submissions.
- 35 We are in favour of the Director of Proceedings gaining the power to require information. The HDC Act does not currently provide the Director of Proceedings with the power to require information in

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<sup>1</sup> For example, Ben Gray *Should the HDC continue to perform formal investigations?* (NZ Doctor 22 May 2024)

inform decisions about whether or not to issue proceedings. Instead they are reliant on information being freely given, or information gathered during HDC's investigation phase. This can be contrasted with PCCs who have broad information gathering powers under section 77 of the HPCAA. This information can be invaluable when it comes to making an assessment as to whether concerns be progressed further. However, we are concerned that the gathering of information will cause further delays and would encourage safeguards to be imposed to control this. The fact that PCCs have this power, and the Director of Proceedings does not, may be relevant in our future conversation on whether there should be a shift in who should be responsible for considering professional disciplinary matters.

- 36 Finally, we are in favour of expanding the requirement for written consent. The Code currently requires that informed consent be in writing for general anaesthetic, but not other forms of sedation that may have substantially similar impacts. If sedation is being provided, it is generally good practice to obtain consent in writing, and this is already required by Dental Council standards. We therefore support a proposal that written informed consent be required when sedation is at a level approaching general anaesthetic.

### Conclusion

- 37 In summary, whilst we are sympathetic to the pressures faced by the HDC, the delays in the HDC's processes are having a fundamental impact on the ability of responsible authorities to do their job. Under the current system, responsible authorities are delayed in pursuing disciplinary matters, which raises real concerns and also causes disruption and stress to practitioners, their ability to regulate their profession, and their ability to protect the public. This exposes responsible authorities to legal and other significant risks. We wanted to take this opportunity to make clear our concerns, and hope this can be the start of a constructive dialogue between the HDC and all responsible authorities.
- 38 Thank you in advance for consideration of this submission. If you wish to discuss this submission further, please do not hesitate to contact us. We look forward to hearing from you.

Nāku, noa



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