

MEMORANDUM

To: Dr David Kibblewhite, New Zealand Society of Anaesthetists

From: Dr Jonathan Coates / Catey Boyce

26 July 2017

Options for challenging an HDC opinion

1. You have asked for an outline of the HDC process and options available to a member if they disagree with a decision of the Health and Disability Commissioner (“HDC”). We set out our comments below.

Overview of HDC process

2. Although the Code of Health and Disability Services Consumers’ Rights focuses on consumers’ rights, a provider facing an HDC investigation also has rights. The stated purpose of the Health and Disability Commissioner Act 1994 (“HDC Act”) includes the facilitation of “*the fair, simple, speedy, and efficient resolution of complaints relating to infringements of [consumers’] rights*”.
3. As part of its obligation to act fairly in the course of an investigation, a provider is given a number of opportunities to comment on the subject matter of a complaint and the HDC’s proposed findings and courses of actions. Most notably:
 - (a) In the event that the Commissioner forms a provisional opinion that the Code of Rights was breached, or the Commissioner otherwise intends to make adverse comment in relation to a provider, the provider is entitled to a reasonable opportunity to respond before the Commissioner finalises an opinion. The HDC’s usual practice is to send a covering letter with the provisional breach opinion inviting comment on the findings and recommendations. This is the provider’s key opportunity to clarify any factual errors and to respond to the Commissioner’s provisional findings/proposed courses of action.

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- (b) If, in serious cases, the Commissioner proposes to refer the provider to the Director of Proceedings for a decision as to whether or not civil or disciplinary proceedings should be commenced against the provider, the Commissioner must give the provider an opportunity to comment on the proposed referral.
4. The HDC must take the provider's comments into account before finalising the opinion and/or making the relevant referral.

Options to challenge final HDC report

5. There is no right of appeal provided in the HDC Act in relation to the HDC's final opinion or referral to the Director of Proceedings.
6. However, if a provider remains unhappy with the HDC's final report, there are three main avenues through which the provider can challenge that report:
- (a) Make a complaint to the HDC, through its internal review process;
 - (b) Make a complaint to the Office of the Ombudsmen; or
 - (c) Apply to the High Court for a judicial review of the HDC's report.

Internal review

7. The HDC has an internal review process through which disaffected providers may challenge the findings of the HDC. This process comprises a two-stage inquiry, as follows:¹
- (a) Has the HDC made an error – either procedural or substantive?
 - (b) What is the significance of the error – does the overall justice require the matter to be reopened?
8. One possible outcome of such an internal review is that the HDC may re-open an investigation and look at the matter afresh. However, the HDC has indicated that a “high threshold” is required to re-open an investigation (for example, compelling new information has come to light).²

¹ Nicola Sladden (Chief Legal Advisor, HDC) “The inner workings of HDC: Legal and evidential issues”.

² Ibid.

Ombudsman review

9. The second option is to make a complaint to the Ombudsman. Under section 13(1) of the Ombudsmen Act 1975, the Ombudsman has the authority to investigate the administrative acts, decisions, omissions and recommendations of the HDC. Following an investigation, the Ombudsman may recommend (among other things) that the HDC's opinion be cancelled or varied or that the HDC should reconsider any aspect of its opinion.³
10. Note that the role of the Ombudsman in such reviews is to consider the administrative conduct of the HDC, and to form an independent opinion on whether that conduct was fair and reasonable. In doing so, the Ombudsman has previously made it clear that its investigation is not an appeal process.⁴ This means that the Ombudsman would not generally substitute its own judgment for that of a specialist decision-maker such as the HDC. Rather, it considers the substance of the act or decision and the procedure followed by the HDC, and then forms an opinion as to whether the act or decision was properly arrived at and was one that HDC could reasonably make.

Judicial review

11. Finally, a provider may apply to the court for a judicial review of the HDC's opinion. While arguably not a "decision" amenable to judicial review, the High Court has previously proceeded on the basis that an expression of an opinion by the HDC (that a provider has breached the Code) can be challenged in a judicial review proceeding.⁵
12. Generally speaking, the court in a judicial review proceeding will review the matter to determine whether the particular decision/finding was made in accordance with the law, or if it was within the range of reasonable decisions that could have been made. However, for a specialist-decision making body such as the HDC, there is a high degree of deference afforded by the Court to the HDC's expertise. In addition, in a recent challenge to an HDC breach finding, the court emphasised that the Commissioner's opinion is "*just that, an opinion not directly affecting the legal rights or liabilities of the health care provider*"; and that "*the report of the Commissioner is an opinion albeit well informed but where*

³ See section 22 of the Ombudsman Act 1975.

⁴ See for example the Chief Ombudsman's opinion on a complaint about Health and Disability Commissioner assessment process (No. 310944, October 2013).

⁵ *Stubbs v Health and Disability Commissioner* HC Wellington, CIV 2009-485-2146, 29 January 2010.

there may be genuine scope for disagreement."⁶ Accordingly, a high threshold must be satisfied before a successful challenge to an HDC opinion could be mounted in the High Court.

Urgent interim action if final report is adverse

13. One of the practical issues that presents in these types of cases is that there is typically only a small window of opportunity following receipt of the final report to initiate action prior to the final report being made public (with the inevitable damage to reputation occurring). An urgent assessment of the final report needs to be made so as to ascertain whether there are any legal errors that could be successfully challenged.
14. If the assessment is that there ought to be a legal challenge, there are two possibilities:
 - (a) The first is that the HDC, having been put on notice, agrees not to release the report publicly until the legal challenge has been allowed to run its course.
 - (b) The second possibility is that the HDC refuses to agree not to release the report pending any legal challenge. At that point, the option open to a provider would be to seek urgent, interim orders from the High Court, asking the Court to prevent the HDC from releasing the final report pending the substantive legal challenge. Obviously the likelihood of success will depend on the particular facts of the case; however, if there are clear and obvious errors in the HDC's report or process, and evidence that the release of the final report would damage the reputation of the provider, we would be hopeful that the High Court would agree to directing the HDC not to release the final report pending the full legal challenge.

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⁶ Stubbs, above n 6, at [35].