

Consultation Review Report —

Summary of Consultation on HDC Naming Policy

Introduction

In January 2008, the Health and Disability Commissioner (HDC/ the Commissioner) published a public consultation document seeking comments from consumers, providers and representative agencies about the Commissioner's proposed policy to name providers found in breach of the Code of Health and Disability Services Consumers' Rights (the Code). The Commissioner received comment from 64 submitters. The majority of submitters broadly supported the policy (with some commenting that the policy should be expanded to allow the Commissioner to name providers in a wider range of cases) and expressed confidence that HDC would apply it fairly and consistently. A minority of submitters raised concerns, both about the introduction of the policy itself and about the proposed criteria for naming.

This report focuses on the key issues that were raised in opposition to the policy and sets out HDC's response to those concerns.

1. Effect on the sector

Some submitters were concerned that naming providers would create a "name, shame and blame" environment which could undermine the focus in recent years on quality improvement and education.

HDC response: This is a legitimate concern, particularly in a small country, although it primarily relates to naming individual practitioners. At a systems level, HDC has been promoting a culture of openness and transparency so that events can be freely disclosed. This supports naming of group providers whose systems are found to be substandard.

2. Naming in "no breach" opinions

A number of submitters supported naming in 'no breach' opinions, arguing that the Commissioner should highlight examples of good health care. However, others were concerned that this would result in negative publicity and would be a breach of natural justice.

HDC response: Naming will generally only be considered where the provider has breached the Code. Providers will not be named in "no breach" opinions unless the Commissioner considers it is in the public interest to do so. There may, however, be occasions where it is appropriate for the Commissioner to name a DHB, for example case studies of complaints resolved without formal investigation or "no breach" opinions that may be educational for other DHBs.

3. Other jurisdictions are not comparable

The consultation document discussed a number of other jurisdictions where healthcare providers are named as a result of investigations. Some submitters argued that the legal, social and policy environment in the jurisdictions that name practitioners is too dissimilar to allow a meaningful comparison and that naming in those countries takes

place as the result of processes similar to those of the Health Practitioners Disciplinary Tribunal (HPDT), not HDC.

HDC response: The Commissioner accepts that disciplinary decisions released by foreign registration and disciplinary bodies generally come from tribunals akin to the HPDT, in relation to serious misconduct.

However, there are some regulatory bodies that do name healthcare providers in the absence of disciplinary proceedings. For example, the Investigation Committees of the General Medical Council and the General Dental Council in the United Kingdom issue publicly accessible warnings naming providers for any conduct that represents a departure from expected standards. Such warnings are issued when the conduct falls short of the threshold for disciplinary proceedings, and are similar to an opinion that there has been a breach of the Code.

In any event, the Commissioner believes that the exercise of his functions under the Health and Disability Commissioner Act 1994 (HDC Act) should not be restricted as a result of policy choices in other jurisdictions, given the unique regulatory environment in New Zealand.

4. Case-by-case approach

Many submitters argued that the Commissioner cannot set out prescriptive rules for naming and must consider each case on its own merits.

HDC response: The Commissioner accepts the need to consider each case on its own merits and will consult the parties on the pros and cons of naming each time a decision is made, even when applying general principles. The purpose of the policy is to set out the general principles and the relevant factors that the Commissioner will consider in relation to naming. However, the list is neither prescriptive nor exhaustive. Any naming issues raised by the parties in a particular investigation will be considered on their own merits.

5. Issues to be identified

Some submitters queried how naming would be canvassed in the Commissioner's opinions and argued that the opinion should clearly identify the provider, the nature and gravity of the breach and the measures taken to remedy it.

HDC response: Agreed. The Commissioner's opinions already record the nature and gravity of the breach, and any measures taken by the provider to remedy it. If the Commissioner's decision to name is contested, the opinion will set out the factors weighed in the naming decision and will record any key submissions in opposition to naming.

6. Lack of appeal or review

Some submitters argued that, given the potentially grave consequences of naming, it is a breach of natural justice to name given there is no mechanism of appeal or review.

HDC response: The Office of the Ombudsmen and the High Court provide opportunities for review of HDC opinions. No provider would be named while the

decision to name and/or the Commissioner's substantive decision is being challenged in such review processes.

7. Rationale for treating individuals and groups differently

Several group providers queried the rationale for treating individuals and group providers differently under the draft policy. In their view, group providers (including managers and Board members) have the same reputational and commercial interests at stake as individuals. Some accepted that organisations could be named, but only if there was some degree of ongoing systemic risk or the breach was a serious departure from accepted standards. Others argued that systemic errors put consumers at less risk as organisations have a far greater interest in self-improvement than individual providers.

HDC response: The Commissioner accepts that all providers have reputational interests that could be affected if they are named in an HDC breach opinion, but believes that there is a principled basis for differentiating between individuals and groups.

It is well recognised that individuals have greater privacy interests than organisations, both at common law and in legislation. Only the privacy of individuals has been given statutory recognition (in the Official Information Act 1982 (OIA) and the Privacy Act 1993). In the Commissioner's view, more weight should be given to an individual's reputational interest, given the potentially significant impact on his or her career opportunities and professional standing.

8. Commercial and privacy interests in the OIA

Some submitters argued that the OIA gives equal recognition to an organisation's commercial interests and an individual's privacy interests.

HDC response: The Commissioner does not accept that the privacy and commercial position provisions in the OIA protect the same interests. An organisation's reputational and commercial interest is largely profit driven — a poor reputation will result in less income. However, an individual's privacy interest goes further. In addition to financial repercussions, individuals may also face exclusion from their community, stress leading to poor health, and damage to relationships with friends and family. These affect an individual in a profound way.

In summary, while a person's privacy interest will also protect his or her commercial position, it goes much further than that. As a consequence, all things being equal, an individual's privacy interest (which for present purposes is taken to include commercial interests) will generally be given more weight than an organisation's commercial interests.

9. Rationale for treating public and private providers differently

Private providers thought they should be treated differently to public providers, and that the threshold for naming should be higher in their case. The main argument put forward was that private groups do not need to be "shamed" into action — competition in the marketplace provides an incentive to improve. Public institutions, lacking a profit motive and having a guaranteed source of funding, require this incentive.

HDC response: The Commissioner accepts that a public institution does not face the same financial repercussions for the loss of reputation as a private institution.

The threat of bad publicity should motivate private organisations to improve the quality of their services. In any event, private providers can hardly rely on one principle of a market economy (competition), while ignoring another (consumers having full information when making a decision).

It is accepted that public institutions have a different level of accountability. They are accountable to the public both as providers of health or disability services and as recipients of taxpayer funding. Private institutions are only accountable as service providers. However, the Commissioner is only interested in an organisation's accountability for providing appropriate services under the Code, not the way it uses its resources. Private and public providers are equally accountable under the Code.

In summary, the Commissioner recognises that private and public institutions may make improvements for different reasons, but there is no principled basis for treating the two groups differently in relation to potential naming. A decision to name can have an impact on any institution, private or public, and an assessment of that impact will occur on a case-by-case basis.

10. Issues for small group providers

Individual providers and smaller organisations were concerned that individuals will be identified if a small group provider is named. Larger organisations felt it was unfair that smaller providers will escape the repercussions that flow from naming simply because of their size.

HDC response: In each case, the Commissioner will consider the facts, the factors set out in the policy, any issues raised by the parties, the likely impact on providers (including both the organisation and any individuals) and the public interest. There will be no presumption for or against naming small organisations.

11. Threshold for naming

Naming should only be considered for the most serious breaches of the Code.

HDC response: As discussed above, the Commissioner has a range of options for resolving complaints, and investigation is usually only exercised if the apparent breach of the Code is serious and/or there is significant risk to the public. Naming will only be considered in cases that have been referred for investigation and a breach opinion has been released.

It is recognised that future Commissioners may adopt a lower threshold for investigating a complaint, thus removing the de facto threshold before the possibility of naming could arise. A future Commissioner would no doubt consider the impact such changes would have on the naming policy.

12. Naming should not occur if the breach has been remedied

The public interest is not advanced by the public being told of problems that have already been remedied.

HDC response: The Commissioner recognises that breaches may be remedied before an opinion is issued. However, the public still has a strong interest in knowing who breached the Code and what quality improvement steps have been undertaken.

13. Degree of fault

Several submitters argued that the repercussions of naming should fairly reflect fault. For example, if the fault lies mainly with an individual, and only partly with an organisation, it is unfair to name the organisation and not the individual.

HDC response: Fault is an important factor in determining whether an organisation is vicariously liable for an individual's breach of the Code. A finding that the organisation breached the Code indicates a degree of fault on the part of the organisation. This will be relevant when determining whether there is any unfair prejudice resulting from the naming decision.

14. Naming for vicarious liability

A similar line of argument was raised in relation to vicarious liability; that the Commissioner should not name for vicarious liability.

HDC response: Naming may be considered in any case where liability for a breach arises, whether directly or vicariously. The public interest in naming is no less when the liability is vicarious.

Under the HDC Act a provider is vicariously liable for the Code breaches of an employee, irrespective of a lack of authority (s 72(2)), unless the provider proves that it "took such steps as were reasonably practicable to prevent the employee from doing or omitting to do" the relevant actions: s 72(5). This means that an organisation can still be liable for the actions of an individual if it failed to take preventative action.

One private hospital was concerned that it would be liable for the Code breaches of visiting practitioners and independent specialists. Whether a hospital can be held vicariously liable for the actions of an independent specialist involves complex legal issues that would need to be resolved before naming the hospital becomes an issue.

15. Providers referred to the HPDT or the HRRT

Several submitters argued that providers referred to the HPDT or the Human Rights Review Tribunal (HRRT) should not be named as their right to a fair hearing may be prejudiced and any application for name suppression will be rendered nugatory.

HDC response: In relation to the HPDT, naming will not happen until any Director of Proceedings and HPDT processes (including any appeals) arising from the particular breach report have been completed. The provider is entitled to ask that the Commissioner's opinion include details of the outcome of such proceedings. In relation to the HRRT, since all providers found in breach may face an aggrieved consumer's claim before the HRRT (although few arise in practice), no providers would be named if this possibility was treated as a "de facto" bar. Accordingly, potential HRRT claims are not seen as a legitimate reason for withholding names.

16. Inconsistency between OIA and naming policy

Some submitters were concerned that names could be released under the OIA when they would not be released under the policy.

HDC response: The legal processes for deciding whether to release names in response to an OIA request and deciding whether to name a provider under the naming policy are quite different. When an OIA request is received, the Commissioner *must* comply with his statutory obligations under the OIA. The public interest in making official information available must be weighed against the withholding grounds set out in the OIA. If the public interest in disclosing the information outweighs the withholding grounds in the OIA, the Commissioner is required to release the name of the provider to the requester.

17. Administrative law obligations

Some submitters alleged the timing of the policy was unfair and amounted to an abuse of power.

HDC response: When the Commissioner decides to name a provider, he is exercising public powers. Those powers must be exercised fairly, reasonably and lawfully. As part of this obligation, the Commissioner will consider any alleged unfairness said to arise from the operation of the policy, and will consult with practitioners individually before a naming decision is made.

18. Passage of time

Some submitters queried whether naming was appropriate if there had been a significant passage of time since the events in question. Others thought the passage of time was not particularly relevant.

HDC response: Passage of time is one of the factors that the Commissioner may consider in deciding whether it is appropriate to take any action on a complaint. If significant time has elapsed, it can make witnesses' recall unreliable and investigation impracticable. Such issues are carefully considered as part of the Commissioner's complaints assessment process. Once the complaint is identified as being suitable for investigation, the usual process is followed and naming may be considered if the investigation results in a breach opinion. However, the passage of time will still be taken into account as a relevant factor in weighing the public interest in naming.

19. Authority to name for failure to comply with HDC recommendations

Some submitters argued that naming for recalcitrance is an attempt by HDC to enforce compliance with recommendations, a power not contained in the HDC Act.

HDC response: Section 45(2)(b)(iii) of the HDC Act gives the Commissioner the discretion to report the opinion (with reasons and recommendations) to "any other person the Commissioner considers appropriate". Moreover, s 14(1)(d) gives the Commissioner the power to make statements that promote "compliance with" the Code.

The Commissioner considers that where there are no ongoing legal challenges, the fact of non-compliance is a matter that should be brought to the public's attention.

20. Exceptions to naming for non-compliance with recommendations

Some providers argued that they may have good reasons for not following recommendations: for example, if the recommendations are out of step with best practice, or the provider is seeking to have the opinion reviewed.

HDC response: Providers have an opportunity to make submissions on the appropriateness of the Commissioner's recommendations in their response to the provisional breach opinion. It would be unreasonable for a provider to pass up the opportunity to comment on provisional recommendations but later refuse to comply with the final recommendation on the grounds that it is not appropriate. Providers will not be named while the process of reviewing the appropriateness of any recommendation is under way.

21. Subsequent acquittal by HPDT

Practitioners found guilty of Code breaches might be subsequently acquitted in the HPDT, but this is unlikely to be reported resulting in unfair prejudice to the provider.

HDC response: HDC and the HPDT have quite different roles. The Commissioner's role is to determine whether there has been a breach of the Code whereas the HPDT determines whether or not a charge of misconduct has been established. Some health practitioners believe they should only be judged by their peers. However, the Commissioner's office was set up as a result of the Cartwright Inquiry to provide an independent system of review.

Naming will not happen until any Director of Proceedings and Health Practitioners Disciplinary Tribunal (HPDT) processes (including any appeals) arising from the particular breach report have been completed. The provider is entitled to ask that the Commissioner's opinion record (as an addendum) details of the outcome of such proceedings.

22. Identifying Board members

Some submitters noted that DHB Board members and management might be identified if DHBs are named.

HDC response: DHB Board and management members should expect public scrutiny by virtue of their roles.

23. Reporting colleagues

Given the significant repercussions of naming, the policy might make providers more reluctant to report their colleagues.

HDC response: The Commissioner appreciates that there will be some suspicion surrounding the naming policy initially but trusts that, with time, providers will see that HDC applies the policy fairly and consistently. It is unlikely that naming will impact on reports made under s 34(1) of the HPCAA.

24. Reduced co-operation

Naming might result in practitioners becoming less co-operative with HDC and Director of Proceedings' processes.

HDC response: The Commissioner is confident that professionalism will prevail. In the event that providers do not co-operate, the HDC Act gives the Commissioner powers to require information from persons.

25. Privacy Act

The Privacy Act 1993 prevents the Commissioner from releasing an individual's name in a report.

HDC response: The release of personal information such as names is justified under the exceptions to Information Principle 11. Specifically, the public release of information is a purpose for which the information was obtained, or a related purpose, given the Commissioner's broad functions under s 14(1) of the HDC Act.

26. Effect of the HDC Act

Several submitters raised issues with the Commissioner's legal power to name, including:

- a) the Commissioner was giving too broad an interpretation to the relevant HDC Act provisions;
- b) comparison to the HPCAA is inappropriate as:
 - i) there is a statutory presumption that HPDT hearings will be in public;
 - ii) the HPDT deals with "more serious" offending;
 - iii) no right of appeal exists in relation to HDC naming decisions; and
 - iv) the HPDT lacks the educational role of HDC, which requires a close and amicable working relationship with providers;
- c) the Code is being transposed into an inappropriate context — some rights in the Code cannot apply to the provision of health services generally; and
- d) it is a breach of natural justice to allow the Commissioner to act as judge, jury and executioner.

Ancillary concerns included that not enough weight was being given to protection of the public, and that while the media has a right to report "fairly" (*R v Liddell* [1995] 1 NZLR 546–547 (CA) Cooke P), they rarely do so.

HDC response:

Statutory interpretation

The following provisions of the HDC Act support the Commissioner naming providers found in breach of the Code. Under s 14(1)(c) of the HDC Act, one of the Commissioner's functions is "to promote, by education and publicity, respect for and observance of the rights of health consumers and disability services consumers". Section 14(1)(d) allows the Commissioner:

To make public statements and publish reports in relation to any matter affecting the rights of health consumers or disability services consumers or both, including statements and reports that promote an understanding of, and compliance with, the Code or the provisions of this Act.

Section 45(2)(b)(iii) also permits the Commissioner to report his opinion, with reasons, to any person he considers appropriate.

Section 59(1) of the HDC Act clearly allows a hearing to be in public (where names would be available).

Inappropriate comparison to the HPDT

The Commissioner does not agree that the differences identified by the submitters are significant. Some key points are:

(i) While the HDC Act does not contain a statutory presumption that hearings should be public (found in s 95(1) of the HPCAA), this is not of controlling significance. There is no presumption either way — rather the Commissioner has the power to choose under s 59(1) of the HDC Act.

(ii) The HDC must also investigate the “more serious” offending subsequently transferred to the HPDT, and in any event investigates only potentially more serious Code breaches.

(iii) There is a specific right to appeal naming decisions made by the HPDT. Section 106(2)(d) of the HPCAA Act provides a right of appeal against any name suppression orders made under that Act. However, the parties also have rights to challenge a decision to name by the Commissioner — it is an exercise of discretionary decision-making and is subject to judicial review and to review by the Ombudsmen.

(iv) The Commissioner is not convinced that naming in accordance with the proposed policy will have a significant impact on the relationship between HDC and the sector, nor that the educative and investigatory functions of the Commissioner will be harmed.

Transposing the Code into an inappropriate context

If a Code obligation cannot properly be applied to an individual or group, then it cannot be breached and naming will not follow.

Breach of natural justice

There is nothing to stop the Commissioner making separate breach opinions and naming decisions. They are independent of each other and involve different criteria.

Concerns about the media

Media attention will be a factor considered by the Commissioner when deciding whether naming will unfairly prejudice a practitioner. In some cases, one of the parties to the complaint will already have placed the details of the case in the public arena, in which case the Commissioner may choose to publish the opinion in an attempt to ensure that the outcome of the case and the reasoning is accurately reported. However, the Commissioner is not ultimately responsible for the actions of the media.