

Guidelines for Independent Advisors

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Guidelines for Independent Advisors

1. Introduction

Thank you for agreeing to provide independent clinical advice to the Health and Disability Commissioner (the Commissioner). As an independent clinical advisor you play an important role in assisting the Commissioner to ensure that those providing health and disability services to the public deliver an appropriate standard of care in accordance with the Code of Health and Disability Services Consumers' Rights.

The Commissioner recognises that you are busy and have many demands on your time. The efforts you put in as an advisor are appreciated. The importance of professional involvement in maintaining standards cannot be underestimated, and your assistance as an advisor is crucial to the maintenance of public confidence in the delivery of health and disability services in New Zealand.

These guidelines are designed to briefly describe the Commissioner's processes and assist you in the task of writing your clinical advice report. In order to maintain the high standard required of reports, it is important that the guidelines are followed.

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2. The Health and Disability Commissioner Act

Background

The landmark report from Dame Silvia Cartwright (then Judge Silvia Cartwright) on the cervical cancer inquiry changed the landscape of the consumer–provider relationship in New Zealand. As a result, the Health and Disability Commissioner Act 1994 (the Act) established HDC as an independent Crown entity to promote and protect the rights of consumers of health and disability services. The Act also provided for a legally enforceable code of rights.

Purpose of the Act

The purpose of the Act is stated in section 6 as being:

“[T]o 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.”

This purpose has been achieved through implementation of a Code of Rights, establishment of a complaints process, and ongoing education of consumers and providers.

Code of Rights

The Code of Health and Disability Services Consumers’ Rights (the Code) became law on 1 July 1996. It grants a number of rights to all consumers of health and disability services in New Zealand, and places corresponding obligations on providers of those services. Compliance with the Code is a legal requirement for all providers of health and disability services in New Zealand. This includes, but extends beyond, providers of regulated health and disability services.

The Code sets out 10 rights, including the right to be treated with respect, to be free from discrimination or exploitation, to dignity and independence, to services of an appropriate standard, to give informed consent, and to complain. Most of the rights reflect standards of good practice already required of health and disability service providers, for example the right to have services provided with reasonable care and skill and in compliance with legal, professional, ethical and other relevant standards.

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The Commissioner's Process

On receipt of a complaint that is within the Commissioner's jurisdiction, there are a number of options available to the Commissioner. Following an assessment, the Commissioner may decide to:

- refer the complaint back to the provider to resolve (in which case the provider must report back to the Commissioner on the outcome);
- refer it to the Nationwide Health and Disability Advocacy Service to support the consumer to achieve resolution with the provider(s) (the Advocacy Service must report back to the Commissioner on the outcome);;
- refer it to another body (such as a regulatory authority);
- call a mediation conference;
- commence a formal investigation to decide whether the consumer's rights have been breached under the Code; or
- close the complaint with or without educational comment or recommendations as appropriate.

The Commissioner often gathers further information before making one of the assessment decisions set out above. This further information usually includes a response from the provider, and often independent clinical advice. The opinion of an independent clinical advisor (Independent Advisor) may assist the Commissioner's resolution process by, for example, clarifying issues, reassuring the complainant about the quality of the care provided or informing the Commissioner as to the exact nature of any clinical concerns.

After seeking independent clinical advice on the complaint made; the initial provider response; and the clinical notes, the Commissioner may, in some circumstances, request further advice and provide more information for the Independent Advisor's comment. Often this further information includes provider responses to the initial independent advice and to any further information gathered.

The majority of complaints are not formally investigated and are closed within six months. However, some complaints may take a year or more to close; this is especially likely when a formal investigation has been notified. When a complaint is formally investigated the Independent Advisor may be asked to provide further comment, clarification and advice throughout the investigation process.

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3. Role of the Advisor

Nature of Advice

The role of an Independent Advisor is to provide independent clinical advice to the Commissioner on issues of professional and ethical standards. The Commissioner will consider your advice together with all other information gathered during the complaint assessment or the investigation process. Clinical advice provides important assistance to the Commissioner when deciding how best to resolve a complaint, or in the circumstances of an investigation, when deciding whether there has been a breach of the Code. Your advice may also inform the nature of any recommendations made to change systems and practices.

The Commissioner's normal practice is to seek advice from a peer of the provider complained about. Sometimes, in more complex investigations, an acknowledged expert in a practice field will be asked to give advice; in controversial cases, advice may be sought from more than one advisor. You will likely be required to state your opinion as to whether the services provided to the consumer were consistent with accepted standards of practice. In doing so you should refer to any relevant written standards, guidelines and practices you are relying on. Please provide the full title and publication date of the document you are relying on and ensure the document was current at the time of the events.

When asked to provide your opinion on a specific case, the Commissioner will usually provide you with copies of clinical records and statements from the parties together with any other relevant material obtained by HDC.

In most cases a copy of your report(s) will be sent to the provider for comment before completion of the Commissioner's assessment of the complaint or investigation, and you may then be asked for further comment on any response obtained. The consumer will also be provided with a copy of your report.

Conflict of Interest

All complaint assessments and investigations carried out by the Commissioner are impartial and independent. It is essential that all persons providing independent advice to the Commissioner for the purpose of resolving a complaint are free from any conflicting interests that may create bias or any appearance of bias.

The test for bias is whether there is any risk, or perceivable risk, that the advisor might unfairly regard with favour or disfavour the case of any party involved in the investigation. A perception of bias can be as significant an issue as any real bias.

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The following situations are some examples of conflicts, or potential conflicts, of interest which may lead to bias or a perception of bias:

A personal relationship with someone involved in a complaint, or where you are, or have a close family member or friend who is, involved with a party in one of the capacities below;

- Ownership of, or investment in an organisation involved in the complaint (eg., owning shares in a rest home);
- Being an employee, advisor or volunteer in an organisation involved in the complaint;
- Membership of a governing body of which parties to the complaint are also members;
- A working and/or other professional relationship with, or knowledge of, a party to the complaint at any time (eg the advisor once worked at the same hospital as the provider or the advisor has some prior-knowledge of the provider or the consumer).

Any such situations must be disclosed to the Commissioner at the time advice is sought. The Commissioner will then determine whether a potential conflict of interest arises which could exclude the advisor. Please do not hesitate to discuss with the HDC staff member requesting advice whether a particular connection does require disclosure.

Complaint against Advisor on Unrelated Matter

From time to time, an independent advisor may be the subject of a complaint about quality of care issues. It may not be appropriate for that advisor to simultaneously be advising HDC, albeit on a separate matter, on quality of care. In such cases the Commissioner will consider the circumstances surrounding the complaint and on the advice requested, and make a decision on whether to seek an alternative advisor. This policy approach is designed to both ensure that HDC is seen to be impartial and independent, and to ensure that an advisor does not attract unwarranted criticism. Any policy decisions made does not imply any element of pre-judgement as to the care provided by, or the professional conduct of, the advisor.

Confidentiality

Confidentiality is essential in the complaint assessment process to protect the privacy of the providers and the consumers involved. Independent Advisors are required to sign a confidentiality statement when they agree to be entered on the Commissioner's register of Independent Advisors. The confidentiality agreement extends to any staff member of the advisor who assists with completion of the report. It is the advisor's responsibility to ensure that all assisting staff are made fully aware of the importance and extent of the confidentiality agreement. Clearly, this requirement extends to not acknowledging or confirming that a complaint has been made against a particular individual.

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It is, however, acceptable to discuss the issues raised by the complaint with a professional colleague, provided that the colleague has no connection to the case and no identifying details are revealed. Such discussions may be helpful where there is a specific professional issue about which there may be doubt about what is acceptable practice. Where such input forms a basis for your opinion, it should be referenced in your report (including the qualifications of the colleague).

The complaint must never be discussed with any of the parties involved at any point. If the advisor requires further information it should be sought from the complaint assessor or investigator responsible for that file. If the advisor is approached by any of the parties or their representatives the advisor must not discuss the matter and should refer the person to the Commissioner.

All material that Independent Advisors are sent by the Commissioner as part of providing advice must be kept completely confidential, and returned to the Commissioner upon completion of the advice.

If at any time the advisor has concerns about the advice process or the safety of consumers it is essential that the advisor brings those concerns to the Commissioner's attention in the first instance. The Commissioner can take action at any time to notify the relevant district health board or refer the provider to the regulatory authority during the complaint assessment or investigation process.

If the Independent Advisor is contacted by any person other than the Commissioner's staff, in relation to the complaint or investigation, the advisor must not provide comment but refer such queries to the Commissioner's Office.

Disclosure of the name of the advisor

The Commissioner's policy is to name his advisors where their advice is relied upon in making a decision. Before finalising a decision (including a decision to take no action), a copy of the advice may be sent to the provider or another party for comment. At the final stage, a copy is usually sent to the provider and complainant. A copy may also be sent to the provider's regulatory authority and/or professional body.

Following a formal investigation, a copy of the Commissioner's opinion is usually published on the HDC website. The names of some parties are anonymised, but the name and qualifications of the advisor will be included in that report. A full copy of the clinical opinion will usually be attached to the report and published on the website.

At any time, a complainant, provider or a third party can make a request to the Commissioner for information under the Official Information Act 1982 or the Privacy Act 1993. This information may include the advisor's report and any communication between the advisor and the Commissioner. Any Official Information Act requests will be considered by the Commissioner weighing any individual privacy interests involved against any public interests in making that information available to the requestor.

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4. The Independent Advisor's Report

Relevant Principles

The following principles are relevant when giving advice:

Code of conduct

Independent Advisors must not be advocates for any party and have an overriding duty to assist the Commissioner impartially on relevant matters within their area of expertise. You should carefully read the “conflict” section of these guidelines and consider if there are any matters which should be brought to the Commissioner’s attention.

You should always state in your report that you have read these guidelines and agree to follow them.

As a potential expert witness, you may ultimately be in the position of giving a Tribunal or Court your opinion. So that the Court can be sure the opinion is objective and expert, such witnesses have to abide by certain rules of conduct. In short, the rules amount to an agreement that the expert is not an advocate for any party and has an overriding duty to assist the Court impartially on relevant matters within the expert’s area of expertise. The Commissioner expects the same of the independent advisor. For your protection and the protection of the Commissioner you should state in your report that you have read these guidelines and agree to follow them.

Outcome of the care or treatment is irrelevant

The outcome of the care or treatment is irrelevant in determining whether there was a departure from the accepted standard. However, most complaints involve some adverse outcome and it is important that you remind yourself that you have the benefit of hindsight in your analysis.

Standard at the time services were provided

The care should be assessed against the accepted standard at the time the services were provided, not the standard existing at the time of the complaint.

Findings of facts

You are expected to give an independent, objective opinion on the questions posed by the Commissioner within your expertise. It is not the role of the advisor to make findings of fact. That is for the Commissioner. You can point out factual evidence that is contradictory, or you believe could be erroneous based on your knowledge and experience, but in doing so you should not judge the credibility of the witness(es). Where there are conflicting versions of events, you should provide your opinion in the alternative. For example:

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There is no record of any neurological observations being recorded between 10.00pm and 7.00am. A failure to undertake these observations in a patient with this history would be a serious departure from accepted practice, for the reasons outlined above. If they were undertaken, but not documented, my view is that would be a (moderate) departure from the required standard of documentation.

You should give opinions only on matters within your area of expertise (although you may raise with the Commissioner's staff any concerns about other aspects of the case that in your opinion should be considered as part of the complaint assessment or investigation).

Your report should include:

- a statement that you have read and agreed to follow these guidelines;
- your qualifications, training and experience relevant to the area of expertise involved;
- your instructions from the Commissioner;
- the facts and assumptions on which your opinion is based;
- your opinion and the reasons for it;
- details as to any literature or other material relied upon in support of the opinions you express – this material must be referenced and retrievable by others (and should include any confidential and anonymous discussion with colleagues, as noted above);
- a description of any examinations, tests, or other investigations on which you have relied (including details of who conducted them).

If your opinion or any part of it would be inaccurate or incomplete without some qualification, that qualification must be contained in your report.

If you are lacking any information necessary to complete your report, please contact the Commissioner's staff to obtain any missing information or get an explanation for its absence. If that information is not available and you cannot complete your report because of insufficient information or research or for any other reason, that should be stated in the report.

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Guidance in Writing Reports

Structure and Content

The following guidelines may assist in structuring your report:

- State that you have been asked to provide an opinion to the Commissioner on case number [], and that you have read and agree to follow the Commissioner's Guidelines for Independent Advisors, and that you are not aware of any conflicts of interest.
- Document your qualifications, training, and experience relevant to the area of expertise to be called upon in compiling the report.
- Document your referral instructions from the Commissioner in full (it may be simplest to obtain these electronically and insert the exact text). This is vital as it must be the purpose and focus of the entire report. The reader must understand at the outset what questions have been posed. Your report should cover all the information relevant to answering the questions posed.
- List all sources of information reviewed, including documents and records, x-rays, witness statements, literature and other information relied upon. The instructions from the Commissioner should contain a list of the information supplied. Do not make any further inquiries of witnesses. You may of course source further professional information. Any incomplete material can also be noted in your report. You should liaise with the investigator about factual or evidential material which you need and which has not been supplied.
- Include a brief factual summary in chronological order at the start of the body of your report (this will often have been provided by the investigator and, if appropriate, can be used as the factual summary). It is important that matters of fact and opinion are kept separate. The factual material contained in the body of your report will generally not be contentious, and should be presented in an objective, factual fashion. Where there are conflicting facts, set them out but do not attempt to resolve the conflict or find one or other version proven.
- If there are differing accounts of events. Please give your opinion on each of the differing factual scenarios. Although you should not make a factual finding, you may point to factors which are relevant in determining which scenario is likely to be correct, but keep an open mind for the purposes of your opinion.
- State your opinion on the specific questions posed by the Commissioner. If necessary, separate each question into a sub-heading so that the reader is clear about your opinion on each separate issue.

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- Set out clearly your reasoning in reaching your opinion. This should include, where possible, the standard of care, or accepted practice in New Zealand at the time of the events under review. It should be logical and based upon information presented or referred to earlier in your report.
- Acknowledge any limitations to your opinion, for example, because information was lacking or there is conflicting information.
- Ensure that your report is consistent throughout and that your conclusions are supported by your analysis.
- Where possible, cite references in support of your opinion about the standards that apply in the circumstances (eg, guidelines, systematic reviews, or studies from research, professional bodies, Colleges, etc). You should consider the currency and acceptance of such material before deciding whether to rely upon it. In addition, if events occurred some time ago, please only refer to the applicable standard at the time of the events.
- You may be asked to evaluate the overall performance of the provider, noting whether there is any:
 - evidence of a lack of skill, judgement, knowledge or care;
 - abrogation of the provider's responsibility to the consumer, despite sufficient knowledge and skill;
 - possible breach of ethical duties.
- You will be asked to state your opinion as to whether the services provided to the consumer were consistent with accepted standards of practice. In doing so you should refer to any relevant written standards, guidelines and practices you are relying on. In relation to each issue, it would be helpful if you could advise:
 - What is the standard of care/accepted practice?
 - If there has been a departure from the standard of care or accepted practice, how significant a departure do you consider it is?
 - How would it be viewed by your peers?
- Remember that there will often be more than one appropriate action for a provider in a given set of circumstances. Your advice is concerned with whether the conduct of the provider met the relevant standard – there may be more than one way to achieve it.
- Although you will be asked to respond to specific questions posed by the Commissioner, you should not feel constrained by them and should comment on all aspects of the care that was given to the consumer (within your expertise) or any other relevant issues. For example, it may be appropriate to comment on the quality of the provider's records, or lack of them.

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Style Guidelines

- Remember that the reader of your report may have limited medical knowledge. Where possible, explain technical terms, or jargon specific to your area of expertise.
 - The use of short sentences and titles usually assists in clarity of reasoning and layout.
 - All pages should be numbered and include the HDC case number as a footer.
 - If the report is particularly long, a table of contents may assist the reader.
 - Present factual and clinical data in the past tense, and your opinion in the present tense.
 - Sign and date your report.
 - AVOID:
 - Use of vague language.
 - Explaining how you would have treated the consumer.
 - Using terms such as negligent, grossly negligent, or any other legal conclusions which have specific meanings.
 - Making personal comments about the parties or any of the witnesses.
 - Expressing a view on whether the Code has been breached or how the Commissioner should deal with the matter.
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5. At the end of a formal Investigation

Reports and Recommendations

If, after considering all the information gathered during an investigation, the Commissioner considers there has been a breach of the Code, there are a number of options under the Act, including the making of reports and recommendations to the provider, a health professional body, the Minister of Health, or any other appropriate person. Recommendations may include a written apology, undertaking staff training, and implementing and reviewing systems to prevent further breaches. The Commissioner seeks confirmation from the providers that recommendations have been implemented.

Proceedings

In addition, where there has been a finding of a breach of the Code, the Commissioner may refer this matter to the Director of Proceedings, who is an independent statutory officer appointed under the Act. The functions and powers of the Director include assisting or representing a complainant, or taking action on the Director's own behalf, in disciplinary or other proceedings. On referral to the Director, proceedings may be brought before the Human Rights Review Tribunal and/or the Health Practitioners Disciplinary Tribunal or both. It is possible therefore, that the report may be used in future disciplinary proceedings or before the Human Rights Review Tribunal and you may be required to give expert evidence at a hearing.

Guidance in Giving Expert Evidence

- You may be required to give expert evidence at a hearing (disciplinary or Human Rights Review Tribunal proceedings). Your report will form the basis of your brief of evidence for the hearing. You will be given assistance in the preparation of the brief of evidence.
- If required to give evidence, you will be assisted through the process by a lawyer representing the Director of Proceedings. You may be challenged on various aspects of your evidence by the provider's lawyer in cross-examination.
- The importance of answering questions truthfully, openly, and non-defensively cannot be overstated. You will be required to abide by the same rules of conduct (independence, objectivity, not advocating for any party) as in providing your report.
- The lawyer for the Director of Proceedings can answer any procedural or other concerns you may have. You should always keep in mind that your duty as an expert witness is to the Court or tribunal, so that while you are expected to maintain your opinion as originally given, you are entitled to change it where new information justifies that.

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- The preparation of a logically constructed, thoughtful report, focused on the questions relevant to the case can dramatically simplify the preparation of a brief of evidence, and the giving of expert testimony.

Relationships with Regulatory/Responsible Authorities

The Commissioner has the task of undertaking independent investigations of registered health practitioners as well as other health and disability service providers. Whenever a responsible authority receives a complaint alleging that the practice or conduct of a health practitioner has affected a health consumer, s64 of the Health Practitioners Competence Assurance Act 2003 requires the authority to promptly forward the complaint to the Health and Disability Commissioner. Any complaint made to a regulatory authority must be referred to the Commissioner.

When dealing with a complaint the Commissioner may consult with the provider's regulatory authority at any time on the most appropriate way of dealing with a complaint and must notify the relevant authority when an investigation is commenced against a registered health practitioner. At this point, if the Commissioner has already obtained an independent advisor's report, a copy of it will be sent to the authority. At the end of an investigation, a copy of the Commissioner's decision (including any expert advice) is also sent to the authority.

If the Commissioner gives notice of an investigation to the regulatory authority no disciplinary action can be taken by the regulatory authority until the Commissioner, or Director of Proceedings, has dealt with the matter and decided to take no further action. Only at this point can the regulatory authority take the matter up itself, should it wish to do so. It is only disciplinary action which is suspended. The regulatory authorities are not prevented from considering a member's practitioner's competence or their fitness to practise because of a mental or physical condition, or competence.

The Commissioner may consult with the regulatory authority at any time on the most appropriate way of dealing with a complaint and must notify the relevant authority when an investigation is commenced against a registered health practitioner. At this point, if the Commissioner has already obtained an independent advisor's report, a copy of it will be sent to the authority. At the end of an investigation, a copy of the Commissioner's decision (including any expert advice) is also sent to the authority.

If, on finding a breach of the Code, the Commissioner refers the matter to the Director of Proceedings, one of the Director's options is to lay disciplinary charges. The Director therefore acts as the gateway to the disciplinary tribunal.

If the Commissioner or Director of Proceedings decides not to take the matter further, the regulatory authority has the option of appointing a Professional Conduct Committee (PCC), to investigate the complaint and lay disciplinary charges. However, any disciplinary action, whether initiated by the Director of Proceedings or the PCC, has a different focus from the earlier investigation and opinion by the Commissioner (which was to ascertain whether there has been a breach of the Code of Rights).

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6. Fees

The Commissioner sets an hourly rate to be used in calculating the fees for Independent Advisors. The Commissioner recognises that the rate may not meet the true cost of the time which may be spent in preparing a report and appreciates advisors' contributions as a professional responsibility and public service.

Independent Advisors will normally be informed about the level of fees payable prior to entry on the Commissioner's register of advisors. If there is doubt about the rate to be paid, advisors should contact the complaints assessor or investigator prior to accepting the file for review.

When requesting advice the complaints assessor or investigator should advise a proposed limit on how many hours the advice might take. In the event that the advisor considers that the advice request (reviewing the documentation and drafting the report) will exceed that limit, the advisor must seek prior approval from the complaints assessor or investigator before proceeding with the task. All claims for payment should be made on the **attached** invoice stipulating the matter reviewed, the file number and the date on which the report was forwarded to the Commissioner.