Picking the next Commissioner

For those who have not caught up with the news, after 10 years I depart the office of Health and Disability Commissioner on 31 March 2010, to take up a chair in law at the University of Auckland on 1 May. There will be time for reflections on a decade as Commissioner in a future column (or at the HDC Medico-Legal Conference in Wellington on 24 March 2010 — see the flier on www.hdc.org.nz). But for now, I thought readers might be interested in the answer to the first question that most people have asked me when hearing my news (after, "Good grief, how did you last that long?): "So, how do they pick the next Commissioner?"

Who picks?

The process for appointment of the Commissioner is stipulated under the Crown Entities Act 2004 (the CEA). HDC is an "independent Crown entity" (known to insiders as an ICE), in the same category as other agencies such as the Human Rights Commission, the Privacy Commissioner and the Commerce Commission (the full list appears in part 3 of schedule 1 of the CEA). According to section 7(1) of the CEA, ICEs are "generally independent of government policy". (This provision is news to me — apart from taking into account key health and disability strategies and DHB objectives, and complying with the usual accountability documents and requirements to report to the Ministry of Health and ensure "no surprises" for the Minister, I had always thought that HDC was totally independent of government policy!)

One key feature of this independence is that appointments are made "by the Governor-General, on the recommendation of the responsible Minister, in the case of a member of an independent Crown entity" (s 28(1)(b) CEA). So it is ultimately the Governor-General who appoints the Health and Disability Commissioner, but the Minister of Health who recommends an individual for appointment.

What this means in practice is that the Minister of Health recommends someone for appointment, and the recommendation goes to the Cabinet Appointments and Honours Committee, and ultimately to Cabinet, for sign-off, before the papers go to the Governor-General to formally make the appointment.

There is no requirement for the position to be advertised and formal interviews to be held, but both in 1994 (when Health Minister Jenny Shipley recommended Robyn Stent) and 2000 (when Health Minister Annette King recommended me) the position was advertised, applicants were short-listed by the Ministry, and the Minister approved a final list of interviewees.

Sometimes it is left to senior bureaucrats to interview and recommend a candidate for statutory office. But in January 2000 new Minister Annette King chaired the interviews for HDC, with a panel of four comprising herself, Associate Minister Tariana Turia, the Director-General of Health and a retired Court of Appeal judge. This signified to the sector that the appointment was seen as important. It is also notable that no health professional or consumer representative sat on the interview panel.

Qualifications for appointment

The Health and Disability Commissioner Act 1994 specifies the required qualifications for appointment as Commissioner in section 10(1), which states:

"No person shall be recommended for appointment as the Commissioner unless, in the opinion of the Minister, the person is qualified for appointment, having regard to the following matters:

(a) The functions and powers of the Commissioner:
(b) The person's personal attributes:
(c) The person's knowledge of, or experience in,—
    (i) The New Zealand health care system:
    (ii) The New Zealand disability services system:
    (iii) The resolution of disputes, including mediation and arbitration:
(d) The person's understanding of the various needs of health consumers:
(e) The person's understanding of the various needs of disability services consumers:
(f) The person's knowledge and recognition of the aims and aspirations of Māori:
(g) The person's recognition of the social, cultural, and religious values of different cultural and ethnic groups in New Zealand."

Several comments spring to mind. First, there is no requirement that the Commissioner be a lawyer, and the first Commissioner, Robyn Stent, was not. There are pros and cons to the appointment of a lawyer. On the one hand, HDC exercises statutory powers of decision-making on a daily basis, and the "functions and powers of the Commissioner" (mandatory consideration (a) above) include ensuring that complaints are appropriately dealt with, investigating apparent breaches of the Code, and making referrals to the Director of Proceedings — all actions with important legal consequences, which are frequently subject to intense submissions from parties and their lawyers. So a law degree is an advantage — but Parliament obviously did not consider it a prerequisite. The role calls for skills beyond the repertoire of a traditional lawyer. A non-legally qualified Commissioner can obviously function capably so long as the officeholder is guided by first class legal advice.

Secondly, there is no express disqualification on a health professional, or indeed a health care or disability services provider, from serving as Commissioner. Judging from the letters I have received over the years, there is no shortage of doctors who believe they could make a good fist of the job. But independence is an important qualification for any quasi-judicial office. The Commissioner must be seen to be independent of the interests of provider and consumer groups.

A third observation is that, unlike a judge who enjoys relative anonymity, the Commissioner is both a decision-maker and a readily accessible educator. Indeed, making "public statements … in relation to any matter affecting the rights of health consumers or disability services consumers" is a key statutory function of the Commissioner. The public nature of the role is obviously a relevant consideration for the appointment.

The statutory job specification does require some other essential attributes, summarised as follows:

1) knowledge or experience of the sector (health *and* disability)
2) knowledge or experience of dispute resolution

3) understanding of consumers' needs (health *and* disability)
4) recognition of the aspirations of Māori and the needs of different cultures.

Each factor can be seen as integral to the Commissioner's ability to further the overall purpose of the legislation, "to promote and protect the rights of … consumers, and, to that end, to facilitate the fair, simple, speedy, and efficient resolution of complaints" (HDC Act, s 6).

Conclusion

No doubt the appointment of the third Commissioner will be keenly scrutinised by the medical profession (still the group subject to the most complaints to HDC), other provider groups, consumer groups, and the media. The term of office is for 5 years or less, and an individual may be reappointed. I look forward to handing over the reins to a well qualified successor who will continue the important work of HDC.

Ron Paterson
Health and Disability Commissioner

NZ Doctor, 16 December 2009