

Response ID BHLF-C5F6-7W11-4

Submitted to About the Act and Code Review  
Submitted on 2024-09-04 14:35:23

Your details

1 What is your name?

Name:  
Gloria Ashton

2 What is your email address?

Email:  
[REDACTED]

3 Are you submitting as an individual, or on behalf of an organisation or group?

I am submitting as an individual

4 How did you hear about this consultation?

Select from the following options:

If you selected other, please specify below:

Questions for individuals

1 Which of these services do you engage with the most?

If you selected other, please specify below:

2 What is your gender?

Not Answered

If you selected another gender, please specify below:

3 How old are you?

Select from the following options:

4 What is your ethnicity? (Please select all that apply)

If you selected other, please specify below:

5 Do you identify as having a disability?

Not Answered

Questions for organisations/groups

1 Name of your organisation or group (if applicable)

Organisation:

2 Type of organisation/group (if applicable)

Organisation - type of organisation/group/ropū :

Please feel free to provide any further detail below:

Share 'one big thing' or upload a file

5 Are you here to tell us your 'one big thing'?

Your one big thing::

It's about trauma informed approach. I think the HDC needs to understand that many people complaining have experienced physical or psychological trauma from their experience and are in a vulnerable position because of that. HDC staff should be well trained on how to communicate in these situations to avoid causing additional harm to the complainant. My experience with the HDC causes a lot of additional psychological distress, not just because it was not progressed to an investigation, but also because of the way the HDC communicated with me. The language the HDC used on its decision letters was unnecessary. There is not reason to tell a complainant that they were "well aware of and accepted the risks associated with the treatment" in a situation where the complainant is saying they were not informed of a risk, for example. It felt at times like the HDC were arguing like lawyers on the side of the doctor. I also had a phone conversation with a team leader where the communication lacked empathy to the point where I felt she was being sarcastic toward me and belittling me, such as saying "it's just semantics though, isn't it Gloria, it's just semantics" about the use of a term to describe a risk on the consent form.

Proper training on trauma informed approach to avoid this unnecessary extra harm to the complainant is essential.

My second thing is I think the HDC need to be more clear and transparent on how they weigh evidence. In the code there are words to the effect that the onus is on the provider to show they took reasonable actions to give effect to the rights in the code. Yet I felt during my complaint that the onus was on me to prove they did not. For example there was no documentation by the doctor that a risk was discussed with me in the consult, yet the HDC said they could not make a determination on what was said in the consult room because my own and the doctors accounts differed. Also it would be useful to clarify how the evidence is assessed to make a decision, for example is the threshold that it is "more likely than not" that something was or was not done.

## 6 Upload a file

File upload:

No file uploaded

Not Answered

## Topic 1: Supporting better and equitable complaint resolution

### 1.1 Did we cover the main issues about supporting better and equitable complaints resolution?

Please add your response below:

### 1.2 What do you think of our suggestions for supporting better and equitable complaint resolution, and what impacts could they have?

Please add your response below:

### 1.3 What other changes, both legislative and non-legislative, should we consider for supporting better and equitable complaint resolution?

1.3 changes - supporting better and equitable complaint resolution:

## Topic 2: Making the Act and the Code more effective for, and responsive to, the needs of Māori

### 2.1 Did we cover the main issues about making the Act and Code more effective for, and responsive to, the needs of Māori?

Please add your response below:

### 2.2 What do you think about our suggestions for making the Act and the Code effective for, and responsive to, the needs of Māori, and what impacts could they have?

Please add your response below:

### 2.3 What other changes, both legislative and non-legislative, should we consider for making the Act and the Code effective for, and responsive to, the needs of Māori?

Please add your response below:

## Topic 3: Making the Act and the Code work better for tāngata whaikaha | disabled people

### 3.1 Did we cover the main issues about making the Act and the Code work better for tāngata whaikaha | disabled people?

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Please add your response below:

#### Topic 4: Considering options for a right of appeal of HDC decisions

4.1 Have we covered the main issues about considering options for a right of appeal of HDC decisions?

Please add your response below:

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Please add your response below:

4.3 What other options for a right of appeal of HDC decisions, both legislative and non-legislative, should we consider?

Please add your response below:

#### Topic 5: Minor and technical improvements

5.1 What do you think about the issues and our suggestions for minor and technical improvements, and what impacts could they have?

Please add your response below:

5.2 What other minor and technical improvements, both legislative and non-legislative, should we consider?

Please add your response below:

5.3 What are your main concerns about advancing technology and its impact on the rights of people accessing health and disability services?

Please add your response below:

5.4 What changes, both legislative and non-legislative, should we consider to respond to advancing technology?

Please add your response below:

#### Publishing and data protection

May we publish your submission?

Yes, you may publish my submission

Please note any part(s) of your submission you do not want published::

Reasons to withhold parts of your submission

Yes, I would like HDC to consider withholding parts of my submission from responses to OIA requests.:

No

I think these parts of my submission should be withheld, for these reasons: :

If needed, can we to contact you to follow up for more detail on your submission?

Yes, you can contact me

Would you like to receive updates about the review?

Submitted to About the Act and Code Review  
Submitted on 2024-07-28 10:50:43

Your details

1 What is your name?

Name:  
Gloria Ashton

2 What is your email address?

Email:  
[REDACTED]

3 Are you submitting as an individual, or on behalf of an organisation or group?

I am submitting as an individual

4 How did you hear about this consultation?

Select from the following options:  
HDC website

If you selected other, please specify below:

Questions for individuals

1 Which of these services do you engage with the most?

- [REDACTED]
- [REDACTED]
- [REDACTED]
- [REDACTED]
- [REDACTED]
- [REDACTED]
- [REDACTED]
- [REDACTED]
- [REDACTED]
- [REDACTED]
- [REDACTED]
- [REDACTED]

Questions for organisations/groups

1 Name of your organisation or group (if applicable)

Organisation:  
NA

2 Type of organisation/group (if applicable)

Organisation - type of organisation/group/ropū :

Please feel free to provide any further detail below:

NA

Share 'one big thing' or upload a file

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Your one big thing::

NA

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## Topic 1: Supporting better and equitable complaint resolution

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1.3 changes - supporting better and equitable complaint resolution:

I think it could be beneficial to include the commissioner's ability to seek expert advice on a complaint within the Act. Expert advice is essential to complaint assessment and resolution in most cases and the outcome of a complaint often turns on the expert advice, yet there is no mention of experts in the Act. This could include reference to some important characteristics of expert advice - such as that the expert must have expertise in the relevant area, where possible the expert should be a peer of the provider (this may require further definition e.g. regarding qualifications/specialisation) however there may be exceptional circumstances, and possibly that the expert should be considered to be in good standing within their profession.

I think that there should be more clarity within the Act regarding the role of referral of complaints to registration authorities (i.e. medical council, nursing council etc).

My understanding about the formation of the HDC coming out of the Cartwright Inquiry includes that there was a lack of public faith in the handling of patients complaints by registration bodies such as the Medical Council. The Medical Council, for example, was seen to be funded by, and made up of, doctors, and therefore could be seen to be 'protecting their own'. While some aspects of how the councils are made up may have changed, I understand that they are still funded through registration fees paid for by the relevant healthcare providers, and that the members of the Medical Council are still majority doctors - and these are the people who would be making decisions on any complaints processed by the council.

If a complaint is referred from the HDC to a registration authority, the law and the lens through which that complaint is being examined changes. The complainant is no longer having their complaint considered under the HDC Act or directly through the lens of the Code of Rights. This is a substantial shift for the complainant. The complaint processes between the HDC and the Medical Council are also very different of course.

Another difference is that the Medical Council does not fall under the Ombudsman and therefore the complainant is unable to request the Ombudsman to review Medical Council decisions - this goes directly to the issue of right of appeal which is a large focus of this consultation.

There are many potential issues if a complaint is preliminarily assessed and closed by the HDC and then referred to a registration authority, and that registration authority considers and makes decisions on parts of the complaint that the HDC has already considered and drawn conclusions on. For example, the registration authority could draw different conclusions from the HDC on the same issues or the registration authority could draw the same conclusions on the same issues in a way that is not completely independent (in other words they have taken the HDC's conclusions into consideration). These sorts of issues could result in complainants/providers going through 2 different protracted processes through 2 different organisations looking at the same issues, and also could result in problems if the complainant/provider is considering challenging an HDC decision through Ombudsman review, Judicial Review, or appeal through the HRRT.

I think the indications for referral to a registration authority should more clearly defined, as should the processes for this. For example where a complaint raises concerns about immediate safety of the public in regards to the practicing provider (competency or conduct -wise) a referral in part could be made to the registration authority to ensure that this aspect is addressed promptly, while other aspects of the complaint can continue to be assessed/investigated by the HDC.

## Topic 2: Making the Act and the Code more effective for, and responsive to, the needs of Māori

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Please add your response below:

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## Topic 4: Considering options for a right of appeal of HDC decisions

### 4.1 Have we covered the main issues about considering options for a right of appeal of HDC decisions?

Please add your response below:

NA

### 4.2 What do you think about our suggestions for considering options for a right of appeal of HDC decisions, and what impact could they have?

Please add your response below:

I think it would be reasonable to include a legislative requirement to internally review closed complaints where a consumer or provider requests this. I think it is essential that internal reviews are conducted by a decision-maker (i.e. commissioner or deputy commissioner) who was not directly involved in making the original decision on the complaint. It is difficult to see that a decision-maker who made the original decision would, on undertaking an internal review of a complaint that they closed, admit their original decision was not correct and form a different decision. I could only imagine this happening in a situation where there is significant new evidence that was not available at the time of the original decision - however I do not believe that this should be a requirement for the instigation of an internal review.

I have a lot of uncertainty about the benefits of an independent review panel. What type of expertise would the panel members have? How would independence from the HDC be ensured? Regarding independence - there have been previous concerns that ACC review hearings may not have been truly independent as the reviewer was contracted by ACC and ACC provided feedback on reviews.

Neither the inclusion of a requirement for internal reviews nor the creation of an independent review panel would be adequate substitutes for a legislative right to appeal HDC decisions in a tribunal or court. A tribunal or court appeal will provide transparency, independence, authority, and accountability.

Judicial review and the Ombudsman Act are also insufficient.

Judicial review is difficult, limited in scope, and expensive. I've only been able to find 3 judicial reviews against the HDC in the "Judicial Reviews Online" search engine. Only one of those 3 judicial reviews was brought by a consumer/complainant, he represented himself and suffered from severe mental health problems. The other 2 were brought by doctors who had legal representation.

The Office of the Ombudsman only publishes decisions on a very small proportion of complaints about the HDC under the Ombudsman Act. The Ombudsman Annual Report 2022/23 shows that they received 60 complaints about HDC decisions under the OA in 2022/23, and 41 the year prior. I am unable to find any published Ombudsman opinions regarding complaints made about HDC decisions under the OA from 2021-23. My understanding is that the Ombudsman is more likely to look matters of process rather than the weighing of evidence and whether the decision was correct. I have previously tried to have my HDC complaint (which was closed with no further action) reviewed by the Ombudsman and was unsuccessful - during that time I received an email from a senior investigator at the Office of the Ombudsman that reads "The Ombudsman's authority to investigate complaints about an agency, such as the HDC, is confined to the consideration of the HDC's administrative practices".

I agree that appeal through the Human Rights Review tribunal seems like a good option.

It would be important that the threshold to access the HRRT is lowered to that of complainants to the Human Rights Commission, in other words that any complainant to the HDC (falling within their jurisdiction) is able to access the HRRT regardless of whether or not their complaint has been formally investigated by the HDC. In my own experience I was unable to get my complaint formally investigated by the HDC and I absolutely believe this was an error on the HDC's part which I would have wanted reviewed by the HRRT if such an option was available at the time. The HDC only formally investigates a very small proportion of the complaints that they receive (around 5%). This percentage is likely to fluctuate depending on their resourcing, the volume of complaints they receive, and the organisational culture. It is unclear how the HDC makes decisions about which complaints should or should not be formally investigated, it seems that there is a lot of subjectivity involved and therefore inconsistency. It would be patently unfair if only those whose complaints were formally investigated were able to appeal HDC decisions to the HRRT, and it would go no where to addressing the public's concerns about HDC's decision-making regarding the "no further action" closed files.

I think it is unreasonable to suggest that access to the HRRT should not be lower because of potential frivolous complaints - these will presumably make up a very small proportion of all complaints, most of which are based on genuine concern and grievance, and could surely be dismissed by the HRRT. It also seems unlikely that thousands of people will bring claims to the HRRT - many will not have the energy, time, or drive to continue to pursue their complaint beyond the HDC.

I do have a lot of questions about how a right of appeal of HDC decisions through the HRRT would function in practice and I would like for there to be opportunity for further consultation when there are proposed methods for this. I would like clarification about whether an appeal is brought directly against the HDC, or whether the complainant is expected to bring a claim against the provider (as I understand is currently the system for privacy and human rights complaints).

Some issues and things I would like clarification on, regarding appeal through the HRRT, are:

- Complainants will usually be self-representing and have limited resources
- The above can lead to access and equity issues
- Many complaints are complex in the sense that they involve technical medical information, care provided over a long duration of time, care provided by multiple providers
- Many complaints are closed without investigation at varying degrees of preliminary assessment with varying amounts of information collected
- There would be potential for significant amounts of new information/evidence emerging during tribunal review if the design was such that new information can be introduced, and it could be difficult for a self-representing complainant to process and respond to this during the tribunal process
- If the system required a complainant to bring a claim against the provider the system would be putting the work on to the complainant to take the claim to the tribunal afresh in order to correct the HDC's decision which is unfair considering that the concern from which this question of appeal has arisen is a result of poor HDC decision-making
- If new information is introduced, or preexisting information is being contested, whose role is it to obtain expert witness review of the information?
- If a new claim in the form of consumer versus provider is brought to the HRRT then there is the possibility to claim for damages (although due to ACC legislation this will be applicable in very few instances) which would not be available in a claim against the HDC
- If the claim is against the HDC then what is the providers role in the process?
- If the claim is against the HDC then to what is extent is it "on the papers"? Can new evidence/information be introduced and how would it be handled?
- If the claim is against the HDC then what are the options for the HRRT? Would their role be limited to advising a decision to close a complaint is incorrect and that certain further actions must be taken? It may be difficult to arrive at a "breach" or "no breach" decision without introducing new information as the preliminary assessment of the HDC may not include all necessary information to arrive at such a decision.

It has been mentioned several times that the right of appeal will also apply to providers but there has been no mention of how this would work in practice. I do have some concerns about what the role of the complainant would be in such a situation as complainants are often in a vulnerable position and don't have access to the legal advice and expert information that many providers will have.

4.3 What other options for a right of appeal of HDC decisions, both legislative and non-legislative, should we consider?

Please add your response below:

NA

Topic 5: Minor and technical improvements

5.1 What do you think about the issues and our suggestions for minor and technical improvements, and what impacts could they have?

Please add your response below:

NA

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