

# **Review of the Health and Disability Commissioner Act 1994 and the Code of Health and Disability Services Consumers' Rights**

Consultation document April 2024

## **Submissions on select issues on behalf of Anthony Harper**

### **Topic 1 – Supporting better and equitable complaint resolution**

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

The discussion paper notes feedback from providers that complaints could have been better resolved directly, and from consumers that providers' complaints processes are invisible or unclear. The Retirement Villages Code of Practice 2008 includes processes for resolution of complaints and has a similar aim to the HDC of enabling complaints to be resolved in a way that is resident-appropriate, objective and fair, quick and cost-effective for the operator and the resident. As part of this complaints facility, retirement village operators must have a complaints policy which:

1. Must be written in plain English;
2. Provides separate processes for issues or concerns raised informally and for formal complaints;
3. Includes both an outline of the process for resolving complaints and information regarding the right to bring alleged breaches of the Code of Residents' Rights to the attention of certain other organisations and agencies;
4. Must be published on the operator's website and available on request; and
5. A copy must be offered to any resident who indicates that they wish to make a formal complaint, and the operator must offer to explain the steps in the complaints facility.

The Retirement Villages Act 2003 also requires that residents must have first made a formal complaint to the operator, and that this remain unresolved after 20 Working Days, before they can issue a dispute notice, although residents are not required to issue a dispute notice and may continue through the alternative dispute resolution processes set out in the complaints policy.

If a similar approach were applied to health and disability service providers it may enable many more complaints to be resolved directly by ensuring that consumers are informed of the processes for complaint resolution and that providers have the opportunity to consider and respond to complaints before they are escalated to the HDC. This has the potential to significantly reduce the number of complaints the HDC receives, allowing the HDC to focus on more complex complaints.

### **Topic 4 – Considering options for a right to appeal HDC decisions**

#### **4.1 Did we cover the main issues for considering options for a right of appeal of HDC decisions?**

As noted in the discussion paper, "it's a principle of good law that where an agency such as the HDC makes a decision affecting a person's rights or interest, that person should generally be able to have the decision reviewed in some way." Decisions of the HDC have a significant effect the rights and interests of providers, particularly:

1. The HDC's naming policy provides that group providers will be named in decisions if their systems are found to be in breach unless it would not be in the public interest or would unfairly compromise the privacy interest of an individual provider or consumer. The HDC's justification for naming group providers is that consumers have a right to know whether private facilities/primary care providers are meeting their obligations and offering a reliable and competent service as this may affect their choice of provider. A breach finding may, therefore, impact on a group provider's reputation and business.

2. Individual service providers are typically asked whether they have been the subject of a breach finding or adverse comment by the HDC as part of recruitment processes. Disclosing a breach finding or adverse comment may negatively impact on an individual service provider's employment prospects.
3. Registered health practitioners are typically required to disclose whether they have been the subject of a breach finding when renewing their annual practising certificate. Disclosing a breach finding may impact on the health practitioner's fitness to practice or this information may be recorded on their practising certificate
4. A breach finding opens the possibility of the aggrieved person (and potentially in future a complainant) commencing proceedings in the HRRT.

Given this significant impact, providers should have a right to have decisions reviewed which is at least equal to any appeal or review process available to consumers. Currently the only avenue for providers to have the substance of decisions reviewed is to request a review at the discretion of the HDC. Alternative avenues for review through the Ombudsman or judicial review will only consider if the decision was made in accordance with law. This leaves providers with very little recourse if they consider that a decision against them was made unfairly, took into account irrelevant information or gave inadequate weight to factors affecting what was reasonable in the circumstances.

Proceedings in the HRRT are not properly characterised as an appeal. These proceedings can only be brought by the Director of Proceedings or by the aggrieved person, and although the HRRT hears the complaint fresh, the powers of the HRRT do not include any ability to overturn a decision of the HDC should the HRRT form the view that the decision was incorrect. The presumption in the Act is that the breach decision is correct and the role of the HRRT is to determine whether damages or another enforceable order for relief is appropriate. The HRRT is better characterised as an escalation point for serious breaches of the Code rather than a process for appeal. Widening the right of aggrieved persons and/or complainants to commence proceedings in the HRRT would create an imbalance between consumers and providers, where consumers have a right to appeal a no breach decision by the HDC without creating a corresponding right for providers to appeal a breach decision or adverse comment.

The right to review or appeal needs to be balanced against the benefit in providing finality to all parties and the potential delays of review/appeal processes. Unlike other complaints procedures and litigation, the Act does not place any time limit on complainants to make a complaint, either to the provider or through the HDC. Time is only one consideration which the HDC may take into account when determining whether to take no action, or no further action. There is also currently no limitation period on requests for the HDC to review decisions.

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

### **a. Introduce a statutory requirement for review of HDC decisions**

A right of review seems the fairest and simplest process for challenging decisions of the HDC. However, the review process provided in section 41(3) of the Health Care Complaints Commission Act 1993 (NSW) would not be an appropriate model for several key reasons:

1. The purpose of investigations under the Health Care Complaints Commission Act 1993 is to obtain information to determine what action should be taken in respect of the complaint. The actions that can be taken include:
  - (a) referral to the Director of Proceedings,
  - (b) referral to the appropriate professional council,
  - (c) make comments to the health practitioner (without making any determination as to the proof of the complaint),
  - (d) refer the matter to the Director of Public Prosecutions,

- (e) where the Commission finds that a non-registered health practitioner has breached a Code of Conduct and poses a risk to the health or safety of members of the public, make a prohibition order or issue a public statement giving warnings about the health practitioner,
- (f) where the Commission finds that a health organisation has breach a code of conduct relevant for health organisation or has been convicted of a relevant offence, and the health organisation poses a risk to the health or safety of members of the public, make a prohibition order or public statement,
- (g) terminate the matter.

Unlike the HDC, the Commission's role in investigation is primarily to determine whether proceedings are appropriate and, if so, whether these should be through the Director of Proceedings, the appropriate professional council, or the Director of Public Prosecutions. The Commissioner does not typically make the final determination as to whether the allegations made in the complaint have been proved, particularly where the subject of the complaint is a registered health practitioner. This process means that decisions against health practitioners are inherently reviewed and, if proceedings are commenced, the evidence for the complaint is tested in accordance with the procedures and evidentiary requirements of the relevant court, tribunal or committee. This limits the need for a right of review for providers.

2. The Commission's decisions in relation to individual complaints are confidential and not made public. The outcome of complaints is only published if the investigation resulted in proceedings. This differs from the HDC which typically publishes decisions following investigation and has a policy of naming group providers where the HDC determines that a breach has occurred. Even where providers are not named, breach decisions may have a lasting impact on both the individual, by impacting their future employment prospects, and their professions, by casting a shadow of doubt across those working in similar roles or specialties.

Given the potential impact on the rights and interests of providers, a right of review should apply equally to the complainant and the provider. We propose:

1. Both the complainant and provider should have the right to require review of a final decision following investigation, in whole or in part.
2. The time for requiring review should be limited to provide certainty to all parties, e.g. 30 days.
3. The party requiring review of a decision should state the basis on which they require the decision to be reviewed, e.g.:
  - (a) Challenging the Commissioner/Deputy Commissioner's interpretation of the Code or the weight given to certain factors;
  - (b) Challenging the Commissioner/Deputy Commissioner's determination on facts; or
  - (c) Challenging the fairness of the procedure followed by the Commissioner/Deputy Commissioner.
4. The review should be carried out by a person who was not involved in the original investigation.
5. Decisions should not be published until either the period for requiring review has passed and no review has been requested or the review is completed.

In the interests of providing all parties certainty, we also propose that there should be a limitation on the revision of preliminary assessments in accordance with section 33(3) of the Act. We understand that revision of preliminary assessments to take no action or no further action have at times occurred at the request of the complainant. This acts as an appeal process for complainants and has the effect of giving more weight to complainants who are either particularly angry or who are more familiar with the complaint process.

## **b. Lower the threshold for access to the HRRT**

For the reasons set out above, we do not support the proposed lowering of the threshold for access to the HRRT.

The discussion paper indicates that lowering the threshold would allow greater challenge of HDC decisions for both complainants and providers, however, it is unclear how providers would benefit from this change. A suggestion put forward in the paper is to lower the threshold so that it is consistent with the Privacy Act 2020, i.e. that an investigation has been completed but there is no requirement that the HDC determine that a breach has occurred. The paper notes that lowering the threshold in this way could result in an additional 40 complaints per year being eligible for proceedings in the HRRT, calculated as the difference between the total investigations completed and the number of investigations resulting in a breach decision. The assumption in this example appears to be that there would not be any expansion of provider's rights to appeal adverse decisions.

Appeal to the HRRT is not a realistic avenue of appeal for providers, even if the option was made available to providers. Decisions of the HRRT are typically public and providers are named in the decisions. The HRRT would also have the power to award damages and/or costs in the event that an appeal is unsuccessful. These factors, along with the costs involved in taking proceedings in the HRRT, would likely have such a cooling effect on providers that very few providers would utilise the appeal process even if a serious injustice may have occurred.

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

We agree with the position of the LDAC that the decision of specialist statutory office holders should be relied on rather than creating new jurisdictions, unless there are good reasons not to. Ideally the HDC would be able to review its own decisions, reducing the need for further specialist jurisdictions. However, there are currently only a very small number of individuals able to investigate complaints and make decisions on behalf of the HDC. There may be instances where it would not be possible for a review to be conducted by a person who has no prior involvement with an investigation. It may be appropriate to consider alternative review processes in these instances, such as a specific process to enable the Chairperson or a Deputy Chairperson of the HRRT to conduct a review of an HDC decision where the Commissioner and Deputy Commissioners are considered unsuitable to conduct such review for any reason. The Chairperson or Deputy Chairperson conducting the review might have powers either to replace the HDC decision with a fresh decision, or to determine a specific matter and refer the decision back to the HDC for further consideration. This process should be separate and distinct from proceedings in the HRRT and the Chairperson or Deputy Chairperson should have the same powers as the HDC in conducting a review of a decision.

## **Topic 5 – Minor and technical improvements**

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

Issue c proposes giving the Director of Proceedings the power to require any person to provide information up until the Director decides to issue proceedings. Any power to require information should be subject to the protections and privileges set out in section 63 of the Act.

Issue f proposes an amendment to the Act to require secrecy in respect of all matters, with an ability for the Commissioner to disclose any matter that they consider necessary for the purpose of giving effect to the Act. Given the significant impact that HDC decisions have on providers, it is essential that providers know and are adequately able to respond to allegations made against them. Any amendment to the Act should balance any ability to maintain secrecy against the provider's right to understand the allegations made against them. If the complaint is not sufficiently clear then the provider should also be given information on the potential breaches being considered by the HDC.