

30 July 2024

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Tēnā koe Morag

## Feedback on the HDC Act and Code Review

1. Thank you for the opportunity to provide comments on the review of the Health and Disability Commissioner Act 1994 (Act) and the Code of Health and Disability Services Consumers' Rights (the Code), as set out in the consultation document.
2. My feedback draws from:
  - a. My complaint-handling and investigations role in respect of the administrative conduct of public sector agencies.
  - b. My role under the United Nations Convention on the Rights of Persons with Disabilities (Disability Convention) as part of the Independent Monitoring Mechanism (IMM) to protect and monitor disability rights in New Zealand.<sup>1</sup>
  - c. My function as a National Preventative Mechanism (NPM) with the designation for monitoring and examining the conditions and treatment experienced by people in places of detention.<sup>2</sup>
3. The Health and Disability Commissioner's (HDC) consultation document poses a number of questions separated by five topics.<sup>3</sup> I am broadly supportive of the proposals in the consultation document. I have included feedback which may also be helpful to inform HDC's practice, noting that HDC have asked for feedback on both legislative and non-legislative changes. I make the following general comments which inform my more specific feedback:
  - a. Incorporation of Te Tiriti o Waitangi/Treaty of Waitangi (Te Tiriti)<sup>4</sup> and tikanga are essential if the Act and Code are to reflect contemporary developments in key areas affecting people's rights.

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<sup>1</sup> Constituted under Article 33(2) of the Disability Convention.

<sup>2</sup> This function comes from the United Nations Optional Protocol to the Convention against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment (OPCAT).

<sup>3</sup> I have structured my feedback adopting the order of topics in the document but note that the topics overlap with each other.

<sup>4</sup> I acknowledge there are two texts with different meanings.

- b. Similarly, the Act and Code should uphold New Zealand's international human rights obligations, particularly in respect of the Disability Convention. Much of the language of the current Act and Code comes from the medical model of disability, where disability is considered a deficit to be treated or addressed. I endorse engagement with the disability sector on updating the definitions and language used through the Act and Code to better reflect the social model of disability - being the understanding that people are disabled by their interactions with barriers in their environment.
- c. The concept of reasonable accommodation is central to the Disability Convention but it is not explicitly referred to within the consultation document. While there are references to the need for accessibility, a more explicit commitment to the importance of the availability of reasonable accommodations for those accessing HDC services and processes would be an important step in reducing many of the barriers that tāngata whaikaha | disabled people face in these situations. This could be reflected in any Act and Code amendments.

### **Supporting better and equitable complaint resolution – Te tautoko kia pai ake te whakatatū amuamu, kia mana taurite hoki (Topic 1)**

- 4. I support broadening the purpose statement of the Act to include a focus on outcomes for people.<sup>5</sup> I agree that the suggested concept of upholding mana is fitting to reflect this purpose. I also support the suggested Code changes in this topic section and topic 3 (I discuss Right 7 in Topic 3), particularly:
  - a. Clarifying that Right 1(3) (Respect) sets expectations of cultural responsiveness to support all communities to understand their rights. I suggest that 'strengths' could be added in from a disability perspective in terms of people being provided with services that take a strengths-based and affirming approach in their delivery.
  - b. Explicitly reference accessibility in Right 5 (Effective Communication) and Right 10 (Right to Complain) to affirm the right to accessible services in the Code. I also suggest that, in terms of wording, the right to effective communication relate to 'format' rather than 'form' (as currently provided for in the Code).
  - c. Removing the words 'and reasonably practicable' in Right 5(1) in relation to the right to a competent interpreter.
  - d. Clarifying Right 8 (Support) to include the right to have whānau involved even where they cannot be physically present, and Right 10 (Right to Complain) to explicitly allow for complaints to be made by support people (who may or may not be whānau) on a person's behalf, and include a formalised process for this within the Code.
  - e. Simplify Right 10 to set clearer expectations for the process of pursuing a complaint against a provider, including promoting the right to complain.

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<sup>5</sup> I note that the consultation document acknowledges that some people do not prefer the existing term 'consumer'. HDC may wish to consider whether the term 'people' could be used instead to support its call for people-centred processes, although I understand that consumer and services are complementary.

- f. Ensuring gender-inclusive language in the Code.
5. In my previous 2020 investigation into HDC's exercise of its discretion to take 'no further action' on three complaints, as provided for in section 38 of the Act, I cautioned the HDC to take care to ensure its 'preliminary assessment' (provided for in section 33 of the Act) does not resemble a quasi-investigation. I recommended that HDC developed guidance in respect of the:
- a. appropriate extent and duration of preliminary enquiries; and
  - b. factors considered when deciding when to take no further action and when to instigate an investigation.
6. I wish to make the following further observations in respect of this topic (to support better and equitable complaint resolution):
- a. Incorporating Te Tiriti and tikanga into the Act and Code may be a helpful starting point for the present topic (discussed in Topic 2). Promoting and providing resolution processes informed by tikanga, where appropriate, may be beneficial for all people who seek to access HDC's services, particularly as a way to ensure culturally appropriate, and disability appropriate and accessible services. While the Act and Code should reflect such principles, it is important that this is 'operationalised' by HDC and ensure that information about the complaint resolution processes is accessible.
  - b. The key terms section of the consultation document notes that a complaint is different from feedback or raising concerns as a complaint 'requires a resolution as set out in the Code and the Act'.<sup>6</sup> I understand that the HDC has recently implemented initiatives to strengthen its triage process. As I noted in my initial comments to the HDC on the scope of this review,<sup>7</sup> I have observed instances where potentially significant concerns about treatment have been triaged as 'feedback' at a service level, due to the manner in which concerns were raised, as opposed to being triaged as a 'complaint'. In such cases, there may be a risk about ensuring concerns raised are dealt with in the most appropriate manner. I encourage the HDC to further consider how its processes ensure the underlying issue or problem raised by a person is appropriately handled.
  - c. In light of my previous investigation, I note that the HDC has published some further guidance about its complaint process, and information on when it decides to take no action/further action, and notify an investigation.<sup>8</sup> While I understand the proposal in the consultation document is to improve the language/reword some of these pathway

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<sup>6</sup> At page 8.

<sup>7</sup> Letter from Chief Ombudsman to Acting Health and Disability Commissioner dated 22 March 2023 in response to invitation to provide early input on the scope of the Act and Code review.

<sup>8</sup> In particular, HDC's [factors relevant to taking no further action on a complaint](#), and [factors that may warrant an investigation](#).

descriptions in the Act,<sup>9</sup> I continue to encourage HDC to develop accessible and plain language information about its processes including how a person's complaint will be considered, and how a person will be included in that process.<sup>10</sup>

- d. Complaints I receive about the HDC generally relate to delays in responding to a complaint, the adequacy of a response to a complaint, the decision not to investigate, or the adequacy of an investigation. While legislative change may not necessarily be the appropriate vehicle to consider some of these issues, I acknowledge recent initiatives introduced by HDC, as noted in the consultation document, such as introducing clinical navigators to help guide people in the complaint process.

## **Making the Act and the Code effective for, and responsive to, the needs of Māori – Ka whakaritea Te Ture me Te Tikanga kia mauritau atu, kia urupare atu hoki ki ngā matea o te Māori (Topic 2)**

7. I welcome the discussion in the consultation document on Te Tiriti and tikanga. As part of setting my strategic intentions for 2023-2028, I acknowledged the fundamental constitutional status of Te Tiriti and tikanga as a source of law in New Zealand. I have also undertaken to ensure that the Crown is acting consistently with Te Tiriti and tikanga when carrying out my oversight functions.<sup>11</sup>
8. I support the HDC's proposals on making the Act and the Code more effective for, and responsive to, the needs of Māori, particularly HDC's consideration of giving practical effect to Te Tiriti in the Act and introducing tikanga into the Code. I welcome the consideration given to enabling Māori to see rights expressed in a way that is meaningful to Māori, and to enable all New Zealanders to benefit from a Te Ao Māori understanding of rights. I emphasise the importance of ensuring that information about the Act and Code, and HDC's processes are in plain language and accessible for Māori.
9. In terms of the general approach for the Act to be updated to uphold the Crown's obligations under Te Tiriti / Treaty principles, I note that section 6 of the Oversight of Oranga Tamariki Act 2022 may also be a helpful example of existing legislation, as well as section 6 of the Pae Ora (Healthy Futures) Act 2022 (noting this Act is already referred to in the consultation document). Translating legislative changes into education and guidance (ie, into practice) is of fundamental importance as well, and HDC has already noted it will ensure partnership in its design.

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<sup>9</sup> HDC's consultation document comments that this term 'no further action' is a disempowering description and not reflective of the work that is undertaken to assess and resolve the complaint (and, as a result, HDC is looking at updating the wording in the Act).

<sup>10</sup> I note that there may be different information on HDC's website regarding whether a complainant has an opportunity to review a provisional opinion on an investigation file. The [HDC investigation process guide](#) suggests that this will be the case, whereas the [formal investigation information](#) explains that the complainant will only receive the final opinion (not the provisional).

<sup>11</sup> See the [Ombudsman's Strategic Intentions 2023 – 2028](#).

10. I note HDC's suggestion about reviewing and amending the process for assessing complaints to enable and better align processes with tikanga, particularly in respect of decisions related to preliminary assessment, taking no action/no further action, and investigation. I encourage that this work connects with Topic 1 and Topic 3 (below), including to ensure consideration of how these processes impact tāngata whaikaha | disabled people.

### **Making the Act and the Code work for tāngata whaikaha | disabled people – Kia tika Te Ture me Te Tikanga mō ngā tāngata whaikaha (Topic 3)**

11. I acknowledge that HDC has heard from tāngata whaikaha | disabled people (tāngata whaikaha) that the language relating to disability in the Act and Code is outdated, and the promotion of the Code and the HDC's complaints processes are not always accessible. I want to reiterate the importance of not only making the Act and Code work, but also ensuring that the Act, Code and HDC's processes are accessible (ie, available in a number of alternate formats) and in plain language.<sup>12</sup>
12. I support the outcomes sought by making the Act and Code work for tāngata whaikaha, including more equitable outcomes for tāngata whaikaha.<sup>13</sup> I also support reinforcing the disability functions within the Act. I suggest including, as part of this, that the Commissioner should also have an understanding of contemporary issues faced by tāngata whaikaha (as part of the qualification of appointment to the role).

### **Supported decision-making**

13. My other main comments for this topic relate to Right 7 of the Code – the right to make an informed choice and give informed consent.<sup>14</sup> As an exception to this Right, a health or disability provider is permitted to provide services without the consent of the recipient where they have reasonable grounds to believe that the person is not competent to make their own decisions (Right 7(4)). HDC propose to:
- a. Update the language in Right 7 relating to 'competence' to 'decision-making capacity' and 'affected decision-making' in line with the approach of the Law Commission's review of adult decision-making capacity law.
  - b. Strengthen Right 7(3) to reference the right to receive support to make decisions.

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<sup>12</sup> See the Plain Language Act 2022, section 5. Plain language is defined as language appropriate to the intended audience, and clear, concise, and well-organised.

<sup>13</sup> In response to HDC's question regarding how the Act's definitions relating to disability could be changed, I note that reviewing the current definitions in the Act relating to disability services, disability service providers, and disability services consumer may be a potentially significant piece of work. This may be an opportunity for engagement with the wider disability sector as a targeted piece of work.

<sup>14</sup> I note that it may have been appropriate for this right to be highlighted as its own topic.

- c. Update the language in Right 7(4) from people's 'views' to 'will and preferences' in alignment with the language of the Disability Convention.<sup>15</sup>
  - d. Strengthen Right 7(4)(c)(ii) to ensure that the rights, will and preferences of people who 'will never have' legal decision-making capacity are taken into account, alongside their right to be as engaged in decision-making as is possible at all stages.
14. Article 12 of the Disability Convention recognises disabled people's right to exercise legal capacity on an equal basis with others. All measures must be taken to respect a disabled person's rights, will and preferences, and to prevent abuses, conflicts of interest, or undue influence over the exercise of legal capacity. Accordingly, I endorse the proposals at paragraph 13.b. and 13.c. above.
15. In both my role as a member of the IMM, and in my submission to the Committee against Torture (2023),<sup>16</sup> I have stated that genuine fulfilment of Article 12 of the Disability Convention requires a transformational shift in domestic legislation and practice. This includes moving from substitute decision-making to supported decision-making, fully respecting disabled people's autonomy, and their right to appropriate decision-making support. I acknowledge that supported decision-making is an evolving practice, and encourage HDC to consider good practice guidance, education and resourcing in this space.
16. I encourage HDC to ensure that decision-making capacity is not viewed as binary, as something people 'have' or 'do not have' (or 'never have'). Decision-making capacity must be understood as being decision and time-specific in nature, and should not be interpreted in a way that could result in discrimination of tāngata whaikaha. I encourage HDC to further consider processes and mechanisms which may be required in terms of individual assessment of decision-making capacity, the scope of application for the individual and decision in question, and documentation necessary to support this determination.
17. I would like to highlight what I consider to be the unintended use of Right 7(4) in decisions as an area of concern for my OPCAT functions, particularly in aged residential care facilities. I do not believe the extent of reliance on Right 7(4) was intended, but I understand this may have become the case in certain circumstances due to the complexity of processes under the Protection of Personal and Property Rights 1988 (PPPR Act).<sup>17</sup> I encourage the HDC to consider further whether there are adequate safeguards in place to ensure that any decision to engage the exception in Right 7(4) is properly exercised and that any risk of arbitrary detention or unconsented treatment is minimised.

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<sup>15</sup> Article 12(4) of the Disability Convention.

<sup>16</sup> Office of the Ombudsman [\*Submission to 77<sup>th</sup> session of the Committee against Torture, for consideration of the Seventh periodic report submitted by New Zealand.\*](#)

<sup>17</sup> I have also observed in my role as a NPM, a lack of clarity and understanding of the relationship between legislation related to compulsory care such as the Mental Health (Compulsory Assessment and Treatment) Act 1992, and the PPPR Act.

## Considering options for a right of appeal to HDC decisions – Kia whakaaro kōwhiringa mō tētahi mōtika hei pira i ngā whakatau a te HDC (Topic 4)

18. The consultation document refers to three existing options where a person is not satisfied with the HDC's decision: ask the HDC to review the decision (a 'closed file review'/internal review), make a complaint to the Ombudsman,<sup>18</sup> or judicial review.
19. The two proposals in the consultation document are to introduce a statutory requirement for an internal review of a HDC decision to formalise existing processes,<sup>19</sup> and to lower the threshold for people to take a complaint/claim to the Human Rights Review Tribunal (HRRT).
20. As I understand, the purpose of creating a statutory requirement for internal review is to formalise this administrative review option. The Ombudsman's view is that agencies should generally provide an effective complaints process allowing for review of decisions that affect people, either in legislation or operational policy. If the internal review process is formalised in legislation, the Ombudsman will still have jurisdiction to consider complaints received about HDC but the Ombudsman will generally not investigate the decision in question until that right of review has been exercised.<sup>20</sup>
21. My other comments in relation to this topic are as follows:
  - a. In terms of introducing a statutory requirement for an internal review of HDC's decision, any review process should be accessible and the process explained in plain language. I agree that any internal review option should ensure that the original decision-maker is not part of the review.<sup>21</sup>
  - b. Relatedly, I encourage the HDC to provide accessible information on its closed file review/internal review processes, regardless of whether the Act is to be amended. I understand that HDC are working on reviewing and improving these processes. I encourage HDC to communicate the results of this review and improvements to complaints processes to the public and disability sector when ready, including ensuring people are aware of this right.

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<sup>18</sup> The consultation document says that the Ombudsman '*would not substitute a fresh decision or remake findings of fact or law. However, the Ombudsman can make recommendations to the HDC for reconsideration of the matter.*' I wish to add for clarity that while the Ombudsman generally would not make a fresh decision on a matter in place of the HDC, the Ombudsman does have jurisdiction to investigate any aspect of a decision by the HDC (including the merits) and make any recommendation they see fit.

<sup>19</sup> I note that the Health Select Committee, in response to a 2022 petition requesting that the House amend the Act to give consumers the right to appeal decisions made by the HDC, encouraged the HDC to '*address the complexities of creating a right of appeal*' (among other matters) as part of the next review of the Act and Code.

<sup>20</sup> Ombudsmen Act 1975, section 17(1)(a). I note that if the ability for people to bring proceedings before the HRRT is widened, then, depending on what the proposal looks like, the bar in section 13(7)(a) of the Ombudsmen Act may apply. This bar prevents the Ombudsman from investigating any decision, recommendation, act, or omission if there is a right of appeal or objection, or a right to apply for a review available to the complainant on the merits of the case to a court or tribunal.

<sup>21</sup> See further the Ombudsman's guide on [Effective complaint handling](#).

- c. I encourage further consideration of the rationale underlying the higher threshold for people to access the HRRT after making a complaint to the HDC, compared to the thresholds contained in the Human Rights Act and Privacy Act.<sup>22</sup>
- d. In my 2020 investigation (discussed at paragraph 5 above), I noted that HDC's approach may have deprived some complainants the potential ability to bring proceedings before the HRRT because the HDC's assessment was couched in terms of it being a preliminary assessment, and therefore the Commissioner had not made a formal finding of a Code breach. This in itself may be seen as a barrier to access to the HRRT when adverse comment has been made by the HDC, although I acknowledge that the HDC has developed more guidelines regarding preliminary assessments.
- e. I also noted in my preliminary comments to the HDC on the scope of this review (on 22 March 2023) that the approach taken by HDC on the complaints that I investigated in 2020 may have arisen due to the Act's requirement to notify the Medical Council on the commencement of an investigation in certain cases, as a means to avoid what the HDC saw as disproportionately adverse effects on a medical practitioner. It may be worth considering as part of this review whether this mandatory notification requirement is working as well it could be, in terms of the potential for any amendments to be made regarding the notification threshold.

## **Minor and technical improvements – He whakapai itinga, mea hangarau hoki (Topic 5)**

- 22. My comments regarding the proposals in this topic are confined to the application of the Official Information Act 1982 (OIA). I note that some of the proposed amendments in this topic section (including in respect of the OIA) do not necessarily appear to be minor or technical in nature, and may engage some fundamental rights.<sup>23</sup>
- 23. HDC have noted that responding to requests for information held by it is a complex and time-consuming task, and that releasing information during the early stages of an investigation tends to favour providers who may seek tactical advantages through their greater familiarity with HDC's processes.
- 24. The Privacy Commissioner has suggested that HDC should have a similar ability to the Privacy Commissioner to withhold information during the course of an investigation while the investigation is ongoing, as this is an important safeguard for the integrity of a complaint investigation process.<sup>24</sup> The consultation document references section 206 of the Privacy Act 2020 which requires the Privacy Commissioner and its staff to maintain secrecy

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<sup>22</sup> Presently under the Act, for a complainant to bring proceedings before the HRRT, the Commissioner needs to have found a breach of the Code and not referred the matter to the Director of Proceedings, or the Director of Proceedings must have declined or failed to take proceedings (section 51). For access to the HRRT under the Human Rights Act, a person is required to first make a complaint to the Human Rights Commission. Under the Privacy Act, the Privacy Commissioner must have first investigated the complaint before a person can bring proceedings in the HRRT.

<sup>23</sup> For example, the proposed power for the Director of Proceedings to require information.

<sup>24</sup> Page 49 of HDC's consultation document.



in respect of all matters that come to their knowledge in the exercise of their functions under the Privacy Act, unless the Commissioner is of the opinion that a matter ought to be disclosed for the purpose of giving effect to the Privacy Act. HDC have noted that it supports an amendment being made to its Act.

25. I appreciate HDC's potential concern that early release of information may undermine an investigation process. However, I note that amendment of the Act to include a similar provision contained in section 206 of the Privacy Act may not be the appropriate way to achieve the outcome sought by HDC. Both the Ombudsman<sup>25</sup> and Privacy Commissioner are subject to strict statutory secrecy obligations given the nature of information received from agencies during their investigations. The secrecy obligation under the Privacy Act (and Ombudsmen Act) is broad and applies in perpetuity unless disclosure is required to give effect to the Privacy Act (and Ombudsmen Act). I therefore query the appropriateness and necessity of a similar secrecy obligation applying to the HDC, which has different functions to the Privacy Commissioner and Ombudsman, as the effect of such an obligation would be much wider than what is needed to address the policy issue articulated in the discussion document (ie, an apparent need to ensure the integrity of an investigation while the investigation is ongoing).
26. If HDC's concern is that the existing withholding grounds in section 9 of the OIA are not engaged, I note that the Law Commission previously recommended in 2012 that a new time-limited withholding ground should be added to the OIA. This proposed ground would be to protect information supplied in the course of an investigation, for investigations or inquiries authorised by or under statute, and covering information supplied to, generated, or obtained by the agency.<sup>26</sup> The Law Commission considered that proposed ground should not apply once the investigation or inquiry had been determined. The rationale for the proposed ground was to protect orderly decision-making, with the Law Commission noting that some of the information sought in these situations may likely be protected from disclosure under existing grounds in section 9 of the OIA.
27. The Ombudsman's submission to the Law Commission, at that time, was that in considering whether an additional withholding ground was required, or what form it should take, it was important to consider precisely what agencies were concerned to protect over and above the interests already protected by existing withholding grounds (relevantly, sections 9(2)(ba) and 9(2)(g)(i) of the OIA).<sup>27</sup> Further, the Ombudsman considered it important the relevant withholding ground (if recommended to be added) be subject to the public interest test.

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<sup>25</sup> Ombudsmen Act 1975, section 21.

<sup>26</sup> Law Commission [\*The Public's Right to Know – Review of the Official Information\*](#) (NZLC R125, 2012) at [7.14] - [7.36].

<sup>27</sup> Section 9(2)(ba) of the OIA relates to protecting information received in circumstances imposing an obligation of confidence on an agency, where release would prejudice the ongoing supply of that information, or otherwise damage the public interest (which would include the effective conduct of investigations and inquiries). Section 9(2)(g)(i) relates to protecting information the disclosure of which would prejudice the free and frank expression of opinions necessary for the effective conduct of public affairs, including the effective conduct of investigations and inquiries.

28. If the HDC's proposal on this topic were to progress to draft legislation, as the proposal may restrict the application of the OIA, the Ombudsman would expect to be consulted in accordance with the Cabinet Manual and Legislation Design Advisory Committee's guidelines.<sup>28</sup>

## Concluding comments

29. If other options are considered appropriate in terms of a right of review and/or appeal against HDC's decision (ie, other than the two options in Topic 4), I would invite the HDC to consult with my Office regarding such options, as well as if any changes are considered in respect of the OIA.
30. HDC have noted in the consultation document that it is undertaking a thematic analysis of people's experiences in disability support services and opioid substitution treatment arising from complaints. If that analysis is in a shareable form, the Ombudsman would welcome receiving a copy for further understanding.
31. I hope my comments are helpful and I look forward to being consulted on any future work as a result of this review.

Nāku noa, nā



Peter Boshier  
Chief Ombudsman

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<sup>28</sup> Legislation Design and Advisory Committee [Legislation Guidelines](#) at [18.2], [20.5], [21.5] and [28.9].