



**Health and Disability Commissioner
Te Toihau Hauora Hauātanga**

**Guidelines for
Independent Advisors**



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Introduction

Thank you for agreeing to provide independent clinical advice to the Office of the Health and Disability Commissioner (HDC). As an independent advisor, you play an essential role in assisting HDC to ensure that those who provide 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 Code).

HDC 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 is crucial in providing public confidence in the delivery of health and disability services in New Zealand.

These guidelines provide a brief description of HDC's processes, and guidance in the writing of clinical advice reports. Please follow the guidelines so that the standard required of reports can be maintained.

The Health and Disability Commissioner Act

Background

The landmark report from Judge Silvia Cartwright (now Dame Silvia Cartwright) on the cervical cancer inquiry in 1988 changed the consumer–provider relationship landscape 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 implementing a Code of Rights and establishing a complaints process, and by the ongoing education of consumers and providers.

Code of Rights

The Code is a regulation under the Act and became law on 1 July 1996. The Code grants 10 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 [rights](#) include the right to be treated with respect, 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.

HDC process

On receipt of a complaint within HDC's jurisdiction, several options are available to the decision-maker (the Health and Disability Commissioner or a Deputy Commissioner). After assessing a complaint, the decision-maker will decide on one of the following options:

1. Refer the complaint back to the provider to resolve. The provider must report back to HDC on the outcome.
2. Refer the complaint to the Nationwide Health and Disability Advocacy Service (the Advocacy Service) to support the consumer to achieve a resolution with the provider(s). The Advocacy Service must report back to HDC on the outcome.
3. Refer the complaint to another body, such as a regulatory authority.
4. Call a mediation conference.
5. Commence a formal investigation to decide whether the consumer's rights have been breached under the Code.
6. Close the complaint with or without an educational comment or recommendations.

Often HDC gathers further information before deciding which option to choose. Usually, a response from the provider will be obtained, and often independent clinical advice will be sought. The opinion of an independent advisor assists HDC's resolution process by, for example, clarifying issues, reassuring the complainant about the quality of the care provided, or informing the decision-maker as to the exact nature of any clinical concerns.

Most complaints are not investigated formally 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 investigated formally, the independent advisor may be asked to provide further comment, clarification, and advice throughout the investigation process.

Timeframes

HDC's usual timeframe is for advice to be completed within a month, although it is possible for extensions to be granted. Ideally, advisors will agree to provide advice only if this can be done in a timely manner and will notify us up-front if any delays are anticipated or as soon as they arise. If advice is delayed significantly, we may need to seek alternative advice to avoid undue delay in our complaints process.

Role of independent advisor

Nature of advice

The role of an independent advisor is to provide HDC with clinical advice on professional and ethical standards and issues. The decision-maker will consider your advice together with all other information gathered during the assessment of the complaint and during the investigation process. Clinical advice assists the decision-maker in deciding how 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.

HDC's usual practice is to seek advice from a peer of the provider involved in the complaint. Sometimes, an acknowledged expert in a practice field will be asked to advise on more complex investigations. In controversial cases or cases involving multiple services or areas of health care, advice may be sought from more than one advisor.

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 on which you rely. Please provide the full title and publication date of any documents to which you refer, and ensure that the document was current at the time of the events. If you use a web-based reference, please include the URL and the date on which it was accessed.

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

In most cases, a copy of your report(s) will be sent to the provider for comment before the completion of HDC's assessment of the complaint or investigation. 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 HDC are impartial and independent. It is essential that anyone who provides independent advice to HDC for the purpose of resolving a complaint is 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 independent advisor may 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 actual bias.

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

- A personal relationship with someone involved in the 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 or executive body of which parties to the complaint are also members
- A working or other professional relationship with, or knowledge of, a party to the complaint at any time (eg, you once worked at the same hospital as the provider, or you have some prior knowledge of the provider or the consumer).

Any such situations must be disclosed to HDC when advice is sought. The decision-maker will then determine whether there is a potential conflict of interest that could exclude the advisor. Please do not hesitate to contact the HDC staff member requesting advice to discuss whether a particular connection does require disclosure.

Complaint against independent advisor on unrelated matter

Occasionally, an independent advisor may be the subject of a complaint about quality of care issues. It may not be appropriate for that advisor to be advising HDC simultaneously, albeit on a separate matter, on quality of care.

In such cases, the decision-maker will consider the circumstances surrounding the complaint and the advice requested and will decide whether to seek a different advisor. This policy ensures that HDC is seen as impartial and independent, and that an independent advisor does not attract unwarranted criticism. Policy decisions do 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 consumers involved. Independent advisors must sign a confidentiality statement when they agree to be included on HDC's register of independent advisors. The confidentiality agreement extends to any staff member of the advisor who assists with completing the report. It is the advisor's responsibility to ensure that all assisting staff are fully aware of the importance and extent of the confidentiality agreement. This requirement extends to not acknowledging or confirming that a complaint has been made against a particular individual.

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 when there is a specific professional issue on 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 you require further information, it should be sought from the complaints assessor or investigator responsible for the case. If you are approached by any of the parties or their representatives

— or anyone other than HDC staff — about the complaint or investigation, you must not discuss the matter. Please refer such queries to HDC.

All material that HDC sends to independent advisors as part of providing advice must be kept confidential and returned to HDC upon completion of the advice.

If you have concerns about the advice process or the safety of consumers at any time, it is essential that you bring those concerns to HDC's attention in the first instance. The decision-maker can take action at any time to notify the relevant region or district of Te Whatu Ora or refer the provider to the regulatory authority during the complaint assessment or investigation process.

Disclosure of name of independent advisor

HDC's policy is to name independent 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. Usually, a copy is sent to both the provider and complainant at the final stage of decision-making. A copy may also be sent to the provider's regulatory authority and/or professional body.

Following a formal investigation, a copy of the decision-maker's opinion may be published on the HDC website. The names of most parties are anonymised, but the name and qualifications of the independent advisor are not anonymised. Usually, a complete copy of the clinical advice will be attached to the report and published on the website.

At any time, a complainant, provider or a third party may ask HDC for information under the Official Information Act 1982 or the Privacy Act 2020. This information may include the independent advisor's report and any communication between the advisor and HDC. The decision-maker will consider any Official Information Act requests and weigh up any individual privacy interests involved against any public interests before making information available to the requestor.

Independent advisor's report

Relevant principles

The following principles are relevant when providing advice:

Code of conduct

Independent advisors have an overriding duty to assist HDC impartially on relevant matters within their area of expertise, and they must not be an advocate for any party. Please note the conflict of interest section above and consider whether there are any matters that should be brought to the attention of HDC.

As a potential expert witness, ultimately you may be asked to provide your opinion to a tribunal or court. Such witnesses must abide by certain rules of conduct so that the court can be sure that the opinion is objective and expert. In short, the rules amount to an agreement

that the expert advising the court is not an advocate for any party and has an overriding duty to assist the court impartially. The Commissioner expects the same of an independent advisor.

For the reasons detailed above, and for your protection and the protection of HDC, you will be required to state in your report that you have read these guidelines and agree to follow them.

The 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 you must remember that you benefit from hindsight in your analysis.

Standard at the time services were provided

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

Findings of fact

You are expected to give an independent, objective opinion on the questions posed by HDC within your expertise. It is not the role of the advisor to make findings of fact — that is for the decision-maker. You can point out contradictory factual evidence or facts you believe could be erroneous based on your knowledge and experience. However, in doing so, you should not judge the witness's credibility. Where there are conflicting versions of events, you should provide your opinion on the alternative version.

For example: 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 severe departure from accepted practice for the above reasons. If observations were undertaken but not documented, 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 HDC any concerns about other aspects of the case that, in your opinion, should be considered as part of the complaint assessment or investigation).

Template for independent advice

You will be provided with a clinical advisor report template to aid the focus and structure of your report and give guidance on what should be included in the report.

The template will contain a list of the information supplied. Usually this includes the complaint, the provider's response, and supporting documentation. You may, of course, source further professional information, such as relevant standards and relevant web-based references and research. Please reference all further sources of information reviewed and liaise with the complaints assessor or investigator about any factual or evidential material you need that has not been supplied. Any incomplete material can also be noted in your report. It is important that you do not make any contact with witnesses, complainants, or providers to obtain further information.

Guidance in writing objective clinical advice

Your report should be objective, fair, and free from bias. A good starting point to ground any case review is to put yourself into both the complainant's position (How would you feel if it was you, your wife/husband/sister/friend, etc?) and the position of the provider (Was this a complex presentation on a busy day, external factors influencing judgement, etc?).

For your reference, HDC has prepared two clinical reports with incorporated comment boxes as good exemplars of the expected content and style.

Your referral instructions from HDC will be included in the template. These instructions are vital to provide the purpose and focus of your report. The reader must understand at the outset what questions have been posed, and your answers should cover all the relevant information.

Summary of events

The template asks for a brief summary of the clinical events. The summary should be in chronological order and may incorporate comments from the provider's response (which may clarify the content of the notes or provide additional information not immediately apparent from the notes) and comments from the complainant, particularly where there are disputed facts.

Conflicting information

Matters of fact and opinion must be 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 another version proven. Instead, please give your opinion on each of the differing factual scenarios. Although you should not make a factual finding, you may point to factors that are relevant in determining which scenario is likely to be correct; however, keep an open mind for the purposes of your opinion.

Specific questions

The template will set out the specific questions asked by HDC. Please identify and comment on issues where:

- there may be a departure of care from accepted practice;
- there is a discrepancy between the recollections of the patient and provider; or
- there is evidence (such as contemporaneous clinical notes or absence of notes) that may support one version of events over the other.

Please acknowledge any limitations to your opinion — for example, because the information was lacking or there is conflicting information.

Although you will be asked to respond to HDC's specific questions, you should not feel constrained by them. You should comment on all aspects of the care given to the consumer (within your expertise) or any other relevant issues unless specifically directed not to do so. For example, it may be appropriate to comment on the quality of the provider's records or lack of them. Please do not comment on issues outside your area of expertise.

Departure from accepted practice

If you identify that the standard of care does not meet accepted practice, you will be required to quantify the degree to which care may have departed from accepted practice — mild, moderate or severe.

The following questions may help with this process:

- When considering whether a departure is mild, moderate or severe, a good question to ask is, ‘How would most of my peers regard this aspect of management?’
- What information was available at the time of the management event being criticised?
 - It is also important to ensure that the ‘departure’ statement is based on information available at the time of the management event being criticised rather than on subsequent events, eg, a failure to measure vital signs in a patient at a point in time as a ‘xxx’ departure from accepted practice (depending entirely on the preceding and current circumstances) whether or not the patient died from sepsis three days later or recovered from pneumonia after a week.
- Were there mitigating factors, and to what extent should they influence the quantification?

To determine that there has been a departure from the accepted practice, you will need to document what was accepted practice at the time of events to support your comments.

- Cite any local evidence-based guidance or standards — remembering to use those that were current at the time of the events.
- If there are no local guidelines and it is appropriate, consider using:
 - international guidance;
 - individual journal articles (preferably Cochrane meta-analyses or other meta-analyses/literature reviews); or
 - robust sources such as bpac^{nz}.

Often it is necessary to differentiate the accepted practice from best practice. It is not appropriate to criticise providers against a best practice standard, but they should be providing services in accordance with accepted practice. If the events in question occurred some time ago, please refer only to the accepted standard applicable at the time of the events (remembering that this may be different from the current accepted practice).

Remember that often there will be more than one appropriate action for a provider in a given set of circumstances. Your advice concerns whether the provider’s conduct met the relevant standard, and there may be more than one way to achieve this.

No departure from accepted practice

If you consider that there has been no departure from accepted practice, it may still be worthwhile to cite the medical literature to emphasise a point for the complainant (eg, 80% of patients diagnosed with pancreatic cancer will have an advanced inoperable disease at the

time of diagnosis, not because of omissions by the clinician but because of the nature and behaviour of the tumour).

Facility systems and policies

As part of your advice, you may be required to look at facility systems and policies and compare those with published standards. You may also be asked to review the adequacy of remedial measures undertaken by the provider and/or to recommend other remedial measures.

Additional considerations

Breach of the Code

You are not required to decide whether or not the Code of Rights has been breached — that is the responsibility of the decision-maker to whom you provide the clinical advice.

Hindsight bias

It is essential to avoid hindsight bias, and the outcome of events should not influence your analysis of preceding events.

For example:

- If the patient died of sepsis on Day 3, the patient must have appeared unwell on Day 1, even if the clinical notes do not suggest this was the case.
- If a patient was not harmed when given penicillin when this was listed as an allergy, the error may be regarded as mild, whereas if the error caused death, it may be regarded as severe.

We are looking at the action, not the outcome.

Mitigating factors

Recognition and weighting of mitigating factors can be difficult. For example:

- Should identifying a common cognitive error leading to misdiagnosis or delayed diagnosis, ie, anchoring or premature closure in the medical context, be regarded as a mitigating factor because it is common? Alternatively, should a surgical error such as bowel perforation during colonoscopy be regarded as a departure from accepted practice when it is a recognised procedure complication (albeit uncommon)?

Consenting process

The issue related to the consenting process is defining what information a ‘reasonable consumer, in that consumer’s circumstances, needs to make an informed choice’.

Style guidelines

- Remember that the reader of your report may have limited medical knowledge. Where possible, please explain in plain English technical terms or jargon specific to your expertise.
- The use of short sentences usually assists in clarity of reasoning and layout. Headings and subheadings may also be helpful.

- Present factual and clinical data in the past tense, and your opinion in the present tense.
- Please avoid:
 - vague language
 - explaining how you would have treated the consumer
 - using terms such as ‘negligent’, ‘grossly negligent’, or any other legal conclusions with specific meanings
 - making personal comments about the parties or any of the witnesses
 - expressing whether the Code has been breached or how the decision-maker should deal with the matter.

HDC in-house clinical advisor team

HDC has in-house clinical advisors in the areas of general practice, midwifery, aged care and nursing. If you require feedback on a specific professional issue, please contact:

- Dr Dave Maplesden — Medical clinical advisor

David.Maplesden@hdc.org.nz

Conclusion of a formal investigation

Reports and recommendations

If, after considering all the information gathered during an investigation, the decision-maker considers that there has been a breach of the Code, there are several options under the Act. These include making reports and recommendations to the provider, a health professional body, the Minister of Health, or any other appropriate person. The recommendations may include a written apology, staff training, implementation and review of systems to prevent further breaches, and confirmation from the providers that recommendations have been implemented.

Proceedings

In addition, where a breach of the Code has been identified, the decision-maker may refer the matter to the Director of Proceedings (an independent statutory officer appointed under the Act).

The functions and powers of the Director include assisting or representing a complainant or taking action in their own right 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. The independent advisor’s 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

If you are required to give evidence, you will be assisted by the Director and their team. Your report will form the basis of your brief of evidence for the hearing, and you will be assisted with this.

During cross-examination, you may be questioned by the provider's lawyer or the Tribunal on various aspects of your evidence. The importance of answering questions truthfully, openly, and non-defensively cannot be overstated. It is important to remember that your role is to assist the Tribunal, rather than to be an advocate for the HDC or the Director.

The lawyer for the Director of Proceedings can answer any procedural or other concerns you may have.

Preparing 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

HDC has the task of undertaking independent investigations of registered health practitioners and other health and disability service providers. Section 64 of the Health Practitioners Competence Assurance Act 2003 requires that whenever a responsible authority receives a complaint alleging that the practice or conduct of a health practitioner has affected a health consumer, the authority must forward the complaint to HDC promptly. Any complaint made to a regulatory authority must be referred to HDC.

HDC must notify the relevant authority when an investigation is commenced against a registered health practitioner and may consult with the provider's regulatory authority on the most appropriate way of dealing with the complaint. 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 decision-maker's opinion report (including any expert advice) is also sent to the authority.

If HDC gives notice of an investigation to the regulatory authority, no disciplinary action can be taken by the regulatory authority until the decision-maker 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 up the matter itself, should it wish to do so. It is only disciplinary action that is suspended. Regulatory authorities are not prevented from considering the registered practitioner's fitness to practise because of a mental or physical condition or competence issues. Nor are they prevented from suspending a practitioner's practising certificate or putting conditions on their scope of practice.

If on finding a breach of the Code, the decision-maker 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 decision-maker 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 HDC's decision-maker (which was to ascertain whether there was a breach of the Code of Rights).

Fees

HDC sets an hourly rate to calculate the fees for independent advisors. HDC recognises that the rate may not meet the true cost of the time spent in preparing a report and appreciates advisors' contributions as a professional responsibility and public service.

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

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