Health and Disability Commissioner
*Te Toihau Hauora, Hauātanga*



# Standard Operating Procedure

## A living document containing administrative guidelines for the purpose of assisting HDC staff

**Version:** **Under review**

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# PART 1: INTRODUCTION

## 1.1 PURPOSE OF THE MANUAL

The role of the Health and Disability Commissioner (the Commissioner) is:

> "[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."

The overriding strategic intent of the Commissioner is to promote and protect the rights of consumers as set out in the Code of Health and Disability Services Consumers' Rights (the Code) (see Reference: Code of Health and Disability Consumers' Rights). Four strategic objectives support this overriding strategic intent:

1. Protect the rights of health and disability services consumers under the legislation.
2. Support quality improvement within the health and disability sectors.
3. Hold providers to account appropriately.
4. Promote, through education and publicity, respect for, and observance of, the rights of health and disability services consumers.

The statutory purpose and strategic intent inform the decisions made under the Health and Disability Commissioner Act 1994 (the Act) concerning the appropriate paths for resolution of complaints. This manual is the Standard Operating Procedure (SOP) for staff employed by the Office of the Health and Disability Commissioner (HDC) involved in the complaints resolution process. Its purpose is to provide guidance for carrying out the complaints resolution function of the Commissioner.

Throughout the document, the terms "the Commissioner" and "delegate" refer to the Commissioner him/herself and the people to whom the Commissioner has delegated the power to make certain decisions (see 1.4 Delegation, Reference: Statutory Delegations for Complaints Assessment and Investigation Decisions and Processes, and Reference: Delegations Chart for Commissioner and Deputies).

The SOP is a guide only; it does not replace the Act and the Code (see Reference: Code of Health and Disability Consumers' Rights). All actions taken in respect of complaints must comply with the Act and the Code. It is also necessary to be aware of natural justice principles (see PART 14: GENERAL LEGAL PRINCIPLES) and other relevant legislation, such as the Privacy Act (see 14.4 Privacy and Reference: Privacy Policy).

## 1.2 ENGAGEMENT WITH CONSUMERS AND PROVIDERS

The events leading to a complaint and involvement in a complaint can be stressful for everyone involved. Therefore, regular communication about the progress of the complaint is essential. This enables consumer and provider involvement and is key to ensuring that all relevant information is obtained from the parties.

Staff are required to engage with the parties to a complaint throughout the complaint resolution process. In practical terms, this will involve updating consumers and providers on the progress of the

complaint at least every eight weeks. Wherever possible, verbal contact is preferred. However, if this is not possible or practicable, then contact by email or letter can be made.

## 1.3 ROLE OF TEAMS IN HDC

The Complaints Assessment, Investigation, and Legal Teams all play important roles in the complaints resolution process. It is important that these teams work together effectively to achieve appropriate and timely outcomes.

### 1.3.1 The Complaints Assessment Team

The Complaints Assessment Team assists the Commissioner and Deputy Commissioners to gather relevant information in order to make a preliminary assessment of a complaint received by the Commissioner, to decide what action to take as required by s 33 of the Act.

### 1.3.2 The Investigations Team

The Investigations Team investigates complaints and works with the Commissioner and Deputy Commissioners to draft opinions under s 40 to s 46 of the Act.

### 1.3.3 The Legal Team

The in-house Legal Team provides legal advice to the Commissioner, Deputy Commissioners, Complaints Assessment Team, and the Investigations Team.

## 1.4 DELEGATION

Delegation is the formal process of authorising someone to perform a statutory function not originally granted to that person. Under the Crown Entities Act 2004 and the Act, the Commissioner has the power to delegate his statutory functions to certain people, and this must be done in writing. There is a comprehensive list that sets out the powers and functions delegated to HDC staff. (See Reference: Statutory Delegations for Complaints Assessment and Investigation Decisions and Processesand Reference: Delegations Chart for Commissioner and Deputies.) Individuals cannot delegate to other staff statutory functions that they have been delegated by the Commissioner.

### 1.4.1 Additional information

This manual and its application, including in relation to individual complaints, may be revised from time to time at the discretion of the Commissioner.

Recommendations for amendments of this manual or templates should be made to the staff member's manager, who will bring it to the attention of the SOP & Template Committee, who will refer to the Executive Leadership Team (ELT) as appropriate.

# PART 2: INITIAL CONTACT

## 2.1 INTRODUCTION: WAYS IN WHICH A PERSON CAN COMPLAIN

Any person may make a complaint to the Commissioner. The complainant may be the consumer of the services complained about or a third party (see 17.1 Third-party complaints). In addition, complaints may be referred to the Commissioner from the the Nationwide Health and Disability Advocacy Service (Advocacy Service)[1] or another body such as the Coroner or a regulatory authority under the Health Practitioners Competency Assurance Act 2003 (HPCAA) (see 16.1 Regulatory authorities).

While there is nothing in the Act requiring a complaint to be in writing, there is a strong preference for written complaints, to help avoid any misunderstandings or ambiguities. On rare occasions, complaints will be taken over the telephone or during face-to-face contact with a complainant. If this occurs, a copy of the file note or filled-in complaint form should be sent to the complainant, in order to confirm that it is an accurate summary of the complaint. The complainant should be advised that a copy of the complaint may be sent to the provider.

Initial contact can be made through:

### 2.1.1 Telephone

The Complaints Assessment Team has a dedicated Enquiries Line Administrator, as well as rostered Complaints Assessors, who are responsible for answering HDC's 0800 number. A large number of initial contacts to HDC are made through this number.

All contact must be loaded on ECDS.

### 2.1.2 Email/online

HDC receives information through emails or the online complaint form contained on its website (www.hdc.org.nz). These are received into the HDC inbox. Access to the HDC inbox is available to the Team Leaders and Senior Complaints Assessors. New complaints or enquiries received into the HDC inbox are dealt with by the Team Leader or Senior Complaints Assessor responsible for processing new complaints that day.

### 2.1.3 Post

Incoming mail to HDC is processed by an Administrator, who identifies new complaints or enquiries and passes them to the Team Leader or Senior Complaints Assessor responsible for processing new complaints that day.

### 2.1.4 Unscheduled visitor to either the Auckland or Wellington Office

From time to time, a member of the public may visit either the Auckland or Wellington offices without a prior appointment.

The safety of HDC staff is paramount with any face-to-face contact. For this reason, the processes set out in the Health and Safety Policy should be followed in all cases where visitors arrive without appointments. It is essential that all members of the HDC staff have read and are familiar with the Health and Safety Policy, the Emergency Procedures Information Pack

[1] For further discussion of the Advocacy Service, see 4.5.2 Referral to the Advocacy Service.

and the Unsafe Visitor Process (see Reference: Health and Safety Policy, Reference: Emergency Procedures Information Pack and Reference: Unsafe visitor process).

Any face-to-face contact must be recorded in the Enquiries and Complaints Database System (ECDS).

## 2.2 FACTORS TO CONSIDER WHEN ASSESSING A CONTACT

Once an enquiry or complaint is received, the Team Leader or Senior Complaints Assessor responsible for processing new complaints that day will assess the information received.

### 2.2.1 Complaint or enquiry?

Any contact with HDC must be assessed to determine whether it should be treated as a new complaint or an enquiry.

### 2.2.2 Types of enquiry

Once a decision is made that a contact with HDC should be treated as an enquiry, consideration needs to be given to whether the enquiry should be loaded in ECDS as a "**simple enquiry**" or an "**extended enquiry**".

### 2.2.3 Has the person requested information from HDC?

Consider whether this information should be provided directly or whether the request should be treated as an Official Information Act (OIA) or Privacy Act (PA) request (refer to 17.3 External requests for information from HDC).

### 2.2.4 Jurisdiction

For the Commissioner to have jurisdiction to consider a complaint, the following factors must be present:

- A health or disability service consumer; and
- A health or disability service provider; and
- The provision of a health or disability service

HDC receives contacts about a variety of issues, and jurisdiction is assessed on a case-by-case basis. Where the issue of jurisdiction is not clear, legal advice may be sought after consultation with a Team Leader (see PART 15: LEGAL ADVICE).

**OJ letters**

*Relevant template:*

- OJ letter_complainant and provider

See Reference: Statutory Delegations for Complaints Assessment and Investigation Decisions and Processesand Reference: Delegations Chart for Commissioner and Deputies.

*ECDS action:*

- Change complaint type to *Outside Jurisdiction.*
- Set stage to *Drafting early resolution letter*_CAT

### 2.2.5 How long ago did the events complained of occur?

There is no statutory time limit within which a complaint must be lodged. However, while the Act provides jurisdiction over the provision of health or disability services from the commencement of the Act and the Health and Disability Commissioner (Code of Health and Disability Services Consumers' Rights) Regulations July 1996, the Act provides only limited jurisdiction prior to July 1996.

Complaints about events that occurred prior to 1996
Section 31(2) of the Act provides that the Commissioner has jurisdiction over complaints about events that occurred prior to 1 July 1996 only where:

- the action was by a health practitioner (registered under the precursor Acts to the HPCAA); and
- the action was a ground for bringing disciplinary proceedings at the time it occurred; and
- the matter was not referred to the body that at the time had jurisdiction to consider disciplinary proceedings.

Complaints about events that occurred a significant time before the complaint is made
Even where jurisdiction is established, it may be that after having regard to all the circumstances of the case, action is unnecessary or inappropriate because of the length of time that has elapsed since the events complained of.

## 2.3 NOTIFICATIONS FROM OTHER AGENCIES

### 2.3.1 Advocacy Service Referrals under s 30(k)

Under s 30(k) of the Act, one function of the advocate's role is to report to the Commissioner from time to time on any matter relating to the rights of health services consumers or disability services consumers or both that, in the advocate's opinion, should be drawn to the attention of the Commissioner.

The s 30(k) process is as follows:

- The referral is addressed to the Commissioner and emailed to the Team Leader.
- The Team Leader promptly organises a meeting with the Complaints Assessor, the Commissioner, Deputy Commissioner, Chief Legal Advisor, and Director of Advocacy to triage the referral.
- A decision is made about how to progress the referral (who will manage it, what information is needed, etc).
- The Complaints Assessor drafts a letter to the appropriate Advocacy Services Regional Manager from the Commissioner (copying in the Director of Advocacy) advising on the planned action in response to the referral.
- The Complaints Assessor advises the appropriate Advocacy Services Regional Manager of the final outcome of the referral at the end of the assessment/investigation process.
- Note that advocates may in some circumstances assist a complainant to write a complaint to HDC — while this is sometimes called a "referral", it is not a s 30(k) referral.

### 2.3.2 Section 35(1) notifications under the HPCAA

Section 35(1) of the HPCAA requires regulatory authorities to notify the Commissioner promptly where there is reason to believe that a health practitioner registered with them may pose a risk of harm to the public.

When the Commissioner receives such a notification, it is passed to the Recommendations Analyst, who makes a note of it under the individual provider details on ECDS. The correspondence is then filed in the folder of notifications from various councils.

### 2.3.3 Section 64(1) referrals under the HPCAA

Section 64(1) of the HPCAA requires regulatory authorities to promptly forward to the Commissioner any complaint the authority receives alleging that the practice or conduct of a health practitioner has affected a health consumer (see 16.1.1: Section 64(1) of the HPCAA).

# PART 3: ASSESSMENT OF COMPLAINT

Complaints received by HDC are carefully assessed and resolved in the most appropriate manner, taking into account the issues raised and the evidence available. The preliminary assessment process can involve a number of steps to assist in determining the most appropriate way to resolve a complaint. This process can include obtaining further information from the complainant, seeking a response from the provider concerned, and obtaining independent advice. The decision regarding which option to undertake under s 33 is made having regard to the particular facts and circumstances of the individual complaint and with the statutory purpose and strategic intent in mind (see 1.1 Purpose of the Manual).

All complaints received are subject to an initial triage process to determine appropriate next steps. Triage meetings are usually attended by a Deputy Commissioner, Senior Complaints Assessor or Team Leader, and the Complaints Assessors who have been assigned the complaints.

This section looks at the process of assessing a complaint, including the gathering of information in order for the Commissioner or delegate to decide how best to resolve the complaint.

Parts 6 to 9 deal specifically with the different process for gathering information on complaints where the parties have been notified of the Commissioner's intention to investigate under s 41 of the Act.

Complaints Assessors should be aware that the preliminary assessment decisions set out in PART 4: PRELIMINARY ASSESSMENT DECISIONS can be made at any time during the assessment of the complaint, including the information gathering process. Further, Complaints Assessors and Investigators should keep in mind the mandatory referral obligations discussed in PART 12: OTHER REFERRALS at all times.

## 3.1 COMPLAINTS — INITIAL REVIEW

All complaints received will be reviewed initially by the Senior Complaints Assessor or a Team Leader, and will be presented at a Triage meeting to decide the next step.

Process

Once allocated a new complaint, the Complaints Assessor must:

- Review the complaint and complete a summary on the triage form (see Reference: Triage and closure form).
- Save the triage form to the folder X:\Complaints Resolution — new file plan\Complaints assessment work\Completed triage forms and give to the relevant Complaints Administrator, who will load the complaint and generate a complaint number (see Reference: ECDS training manual (NB: under review)).
- Where appropriate, contact the complainant and introduce himself or herself and the role of HDC (see 13.6 Communication with parties). This is also an opportunity to seek clarification of any matter, including any issues regarding third party complaints (see 17.1 Third-party complaints).

  In cases where complaints are sent by post and email rather than through the HDC website, where practicable, a Complaints Assessor should contact the complainant to advise that HDC will be sending a copy of the complaint to the provider and seek consent from the complainant to do so.

- Attend triage and record the outcome, attendees, and date of triage, on the triage form and discuss complexity of the complaint.
- Where appropriate, all complaints should be acknowledged within three working days of receipt.

**Contact with relevant parties**

- Updates are to be given every two months, and the preference is for telephone or email communication.

**Acknowledgement letters**

*Relevant template:*

- Acknowledgement letter to complainant.

*ECDS action:*

- Load as complaint.

### 3.1.1 Withdrawn complaints

Discussion

There are a variety of reasons why a complainant may seek to withdraw a complaint.

Process

- A complaint that is withdrawn may be closed after discussion with a Team Leader, taking into consideration the stage of the complaint assessment process. Where the complaint has been withdrawn prior to any preliminary assessment taking place, it may not be necessary to advise the provider. The Complaints Assessor should raise this issue with his or her Team Leader, who will consider seeking legal advice.
- In any case where the provider is not advised about a complaint, this fact and the complaint should not be linked to the provider on ECDS, and should be excluded from any reporting on the provider.
- If the withdrawn complaint concerns a DHB, the Complaints Assessor must inform the Senior Advisor — Education & Research before any change is made to ECDS, as it affects data that is collected and reported on.

**Complaint Withdrawn letters**

*Relevant template:*

- Withdrawn complaint

See Reference: Statutory Delegations for Complaints Assessment and Investigation Decisions and Processesand Reference: Delegations Chart for Commissioner and Deputies

*ECDS action:*

- Set stage to *Drafting early resolution letter_CAT*.

#### 3.1.2 Withdrawn and reinstated complaints

If a complainant withdraws his or her complaint and later wishes to reinstate it, there are many issues to consider, and the reinstatement should be discussed with a Team Leader and consideration given to seeking legal advice as appropriate.

When new issues have been raised, or if the complainant wishes to expand the scope of the complaint, consideration should be given as to whether it is more appropriate to load it as a new complaint.

## 3.2 GATHERING INFORMATION: COMPLAINTS ASSESSMENT TEAM

#### 3.2.1 Section 14(1)(m) requests

Section 14(1)(m) of the Act states that one of the Commissioner's functions is "to gather such information as in the Commissioner's opinion will assist the Commissioner in carrying out the Commissioner's functions under this Act".

Further information is often gathered in order to make a preliminary assessment of a complaint (referred to as s 14(1)(m) request). Information should be gathered from providers who are subject to the complaint as well as those who may hold information relevant to our assessment.

Process

Relevant points to note when drafting a s 14(1)(m) letter are:

- Check that we are writing to the correct provider (and to a named individual wherever possible) at the correct address.
- Although in some situations it may be appropriate to send the letter to the individual (for example, GPs), typically these letters are addressed to the organisation rather than the individual provider. In these situations it is essential to request that the individual provider is informed and provides input into the response. If the individual provider no longer works for the organisation, ask the organisation to co-ordinate an individual response in the first instance, and forward HDC the provider's contact details.
- Focussed questions should be asked in relation to the issues identified during assessment of the complaint, but the provider should also be asked to respond to the entire complaint.

- It is best to be specific about the type of clinical notes and the time period rather than stating "all relevant clinical notes" (see Reference: In-house advisor guidance for obtaining clinical notes and information (NB: under review) which lists useful documentation to request), or speak with the in-house clinical advisors.
- If multiple providers from different organisations have been complained about, the complaint should be redacted to protect their privacy, and a copy of the redacted complaint kept on a file (see 14.4 Privacy).
- In the case of third party complaints, redact the complainant's personal information from the complaint and any other correspondence sent to the provider/s, and keep a copy of the redacted information on file (see 14.4 Privacy).
- If the consumer has written directly to HDC (i.e: the complaint has not come through the HDC website or through the Advocacy Service), the complainant may not be aware that we are going to provide their complaint to the provider. In those circumstances, consider whether it is appropriate to contact the complainant and explain the process before providing any information to the provider.
- Providers/agencies that are not the subject of the complaint should not be given copies of the complaint or the name of the provider(s) complained about, unless it is absolutely necessary.
- The time frame given for a response is three weeks or, in the case of DHBs, four weeks. Extensions are sometimes granted on request from the provider.
- Always consider whether it is necessary to obtain information from ACC when a treatment injury claim has been lodged.[2] In this case, the s 14(1)(m) letter needs to be accompanied by an ACC form, which includes check boxes for the information required. In most cases, copies of ACC's decision letter and any clinical or external independent advice are requested. Information requests to ACC should be sent by email only and copied to the Team Leader.
- The Complaints Administrator should set a reminder as to when the s 14 responses are due. The reminder is also assigned to the Complaints Administrator to assist with the monitoring and chasing up of the due responses. It is expected that the provider is reminded of the due date for responses approximately five days prior by a Complaints Assessor.
- Please note that the process for making s 14(1)(m) requests to the Advocacy Service is a separate process as set out in section 3.2.2 below.



[2] A treatment injury claim is applicable only if the injury has been caused by a registered health professional. However, a "Personal Injury Caused by Accident" claim may be possible in some other circumstances.

**Section 14 letters**

*Relevant templates:*

- Section 14 request for information
- Section 14 letter to ACC

— *See points above regarding preparation of s 14 letters.*

### 3.2.2 Section 14(1)(m) requests to the Advocacy Service

Option One: If information is required from the consumer, and cannot be gathered by HDC in the usual way, it may be appropriate to make a s 14(1)(m) request to the Advocacy Service to gather that information and report back to HDC. This may be where it is difficult to clarify issues with the consumer/complainant (for example, due to impediment or disability), or where it is necessary to speak to many consumers, such as in a rest home situation. The Advocacy Service is often able to respond with a s 14(1)(m) report within two weeks of the request.

Option Two: In some circumstances it may also be appropriate for the Commissioner or delegate to ask the Advocacy Service to establish with the consumer whether the complaint may be resolved by advocacy at the time of seeking information. If that is not possible then the Advocacy Service will just send a s 14(1)(m) report. However, if the advocacy process is considered to be appropriate by the advocate and the consumer, then the Advocacy Service will send an email to the CAT Team Leaders marked "URGENT — Section 37 referral required". All section 37 referral correspondence should then be sent out as soon as possible (see 4.5.2 Referral to the Advocacy Service) and a s 14(1)(m) report will not be provided by the Advocacy Service.

- Please note: If the consumer has written directly to HDC (i.e., the complaint has not come through the HDC website), the complainant may not be aware that we are going to provide his or her complaint to the Advocacy Service. In those circumstances, you should contact the complainant, explain the process, and discuss the information that will be provided to the advocate (usually the original complaint and any further communication with the complainant, including file notes of any telephone conversations, and any provider responses received. You should not provide clinical notes to the advocate).
- If requesting that an advocate visit a residential home, it is important to advise the provider that a complaint has been received and that the advocate will be visiting the facility to speak with the residents in the first instance.

**Section 14(1)(m) requests to the Advocacy Service**

*Relevant templates:*

- Section 14 request for information to Advocacy_with options.

— *See points above regarding the two options for s 14 information requests to the Advocacy Service.*

— *Usually signed by a Team Leader or Complaints Assessor.*

*ECDS action:*

- Prior to s 14 letter being drafted, set stage to *Awaiting s14 letter preparation*.
- Set stages appropriately to reflect *Drafting* and *With Team Leader/Senior for review* stages.
- Once s 14 letter is sent, set stage to *s14 letter_awaiting response*.
- Reminder set in Complaints Assessor's and Complaints Administrator's name.

## 3.3 INFORMATION RECEIVED

In the Complaints Assessment Team, administrators are responsible for gathering together all the information requested under s 14(1)(m), placing it on the relevant file, and entering it on ECDS.

Process

- The Complaints Administrator assists the Complaints Assessor in checking that any requests for information are received within the expected time period.
- Once all response(s) have been received, the Complaints Administrator passes this to the relevant Complaints Assessor.
- The Complaints Assessor reviews the complaint, the s 14(1)(m) letter, and the received response, to ensure that the provider has provided all the information requested.
- At this stage, the Complaints Assessor completes a written file review and discusses possible courses of action with their Team Leader and the Commissioner or delegate if appropriate.

## 3.4 STEER MEETING

A steer meeting is usually attended by relevant ELT members, the Team Leaders, and the Complaints Assessor and/or Investigator, who have files to present. The purpose of this meeting is for a steer to be given on the direction and/or management of these files.

Process

Those presenting files at the steer meeting draft a memo authorised by their Team Leader and/or Deputy Commissioner, summarising the complaint background and independent advice, and making a recommendation. A link to the memo is sent to the Commissioner's Executive Assistant, who organises the meeting. Steer meetings are held approximately every two weeks.

**Steer memo**

*Relevant template*:

- File steer committee memo — This is generated on ECDS under a File Document action note.

*ECDS action:*

- When a steer committee memo has been sent to the Commissioner's EA, set file stage to *Awaiting steer meeting_CAT*.
- After the steer meeting, change file stage to the relevant stage for the next course of action.

# PART 4: PRELIMINARY ASSESSMENT DECISIONS

## 4.1 PRELIMINARY ASSESSMENT DECISIONS AVAILABLE

The decisions available to the Commissioner under s 33 of the Act are set out below.

- Referral to an agency or person in accordance with s 34 or s 36 (s 33(1)(a)(i)):
  - *Appropriate authority — s 34(1)(a) (see 4.2 Referral to a regulatory authority)*
  - *ACC — s 34(1)(b) (see 4.3 Referral to ACC )*
  - *Director-General of Health — s 34(1)(c) (see 4.4 Referral to the Director-General of Health)*
  - *The provider — s 34(1)(d) (see 11.2 Section 34(1)(d) responses)*
  - *Human Rights Commissioner, Ombudsman or Privacy Commissioner — s 36 (see 4.6 Referral to certain statutory officers)*
- Referral to an advocate under s 37 (s 33(1)(a)(ii)) (see 4.5.2 Referral to the Advocacy Service)
- Call a mediation conference under s 61 (s 33(1)(a)(iii)) (see 4.7 Mediation)
- Decision to investigate under s 40 (s 33(1)(a)(iv)).(see PART 7: NOTIFICATION OF INVESTIGATION).
- Take no action (s 33(1)(b)) (see 4.9 No action and 4.10 NO ACTION AFTER FURTHER INFORMATION OBTAINED)

Section 33(2) requires that the Commissioner promptly notify the complainant and provider of the preliminary assessment.

Section 33(3) allows the Commissioner to revise a preliminary assessment decision and to subsequently exercise one or more of his or her other powers in relation to the complaint.

More than one decision can be made at the same time in relation to a complaint. Where this may be the best path, the Complaints Assessor should discuss the matter with his or her Team Leader or a Senior Complaints Assessor.

Following a referral under s 33(1) the complaint may be closed at HDC if no other action is being taken.

The Complaints Assessor should consider whether a referral under s 59(4) to any other person is warranted (see 12.2 Section 59(4)) or, where there is a risk of harm, whether a mandatory referral is required (see 12.1 Risk of harm).

## 4.2 REFERRAL TO A REGULATORY AUTHORITY

(See also PART 12: OTHER REFERRALS and Reference: Referrals and notifications).

Under s 34(1)(a) of the Act, the Commissioner may refer the complaint (in whole or in part) to a regulatory authority if it appears from the complaint that there may be doubt about the practitioner's competence, fitness to practise, or conduct.

Discussion

- In deciding whether to make a referral under s 34(1)(a), it is not appropriate to take into account other unrelated information or historical complaints about a provider; the complaint must be capable of justifying the referral in isolation.
- It may be appropriate to refer a complaint to a regulatory authority where it involves the care provided to a number of unnamed consumers (for example, several alleged errors made by a nurse in a rest home).
- In certain situations a referral to another agency (including a regulatory authority) is mandatory (see PART 12: OTHER REFERRALS).

Note: Referrals may also be made to regulatory authorities under s 59(4) and s 39(1).

Process

- Normally a referral to a regulatory authority would be done after gathering further information.
- If a referral under this section is being considered, the provider should be given the opportunity to comment on the proposed referral before it is made. Occasionally, where issues of competence are raised as part of a broader complaint, we may refer the complaint "in part" to the regulatory authority, but continue to look into the broader issues. This must be communicated clearly to all parties.

The letter to the regulatory authority should be accompanied by sufficient information to enable the authority to assess the complaint (see Reference: Information to be sent to Regulatory Authorities). Under s 35 of the Act, a regulatory authority is required to report back to the Commissioner on the results of the referral. Generally the regulatory authority is given three months to do this.

Note: Where the referral has been sent to HDC under s 64 of the Health Practitioners Competence Assurance Act 2003 (HPCAA) from the regulatory authority and where the concerns are best addressed by that authority, it may be appropriate for HDC to not take action and to advise the regulatory authority to take whatever action it deems necessary.

**Section 34(1)(a) letters**

*Relevant template:*

- 34(1)(a) referral to professional body

See Reference: Statutory Delegations for Complaints Assessment and Investigation Decisions and Processesand Reference: Delegations Chart for Commissioner and Deputies.

*ECDS action:*

- Set file stage to *Drafting early resolution letter_CAT*
- Once the draft letter is appropriate for review, set the file stage as appropriate.
- Once the letters have been sent, set a reminder for the date indicated in the letter, in the name of the Recommendations Officer and give the file to the Senior/Team Leader to close the file.

## 4.3 REFERRAL TO ACC

See Reference: Referrals and notifications.

Under section 34(1)(b) of the Act, the Commissioner may make a referral to ACC where it appears from the complaint that the aggrieved person may be entitled to cover under the ACC Act.

In practice, this is used by the Complaints Assessment Team only rarely, as typically the complaint will contain other issues that the Commissioner can address. The preferred approach is to advise the complainant orally, in the acknowledgement letter, or in a s 38(1) No Action letter, that he or she may wish to lodge a claim with ACC.

## 4.4 REFERRAL TO THE DIRECTOR-GENERAL OF HEALTH

See Reference: Referrals and notifications.

Under s 34(1)(c) of the Act, the Commissioner may refer a complaint to the Director-General of Health where it appears from the complaint that failures or inadequacies in the systems or practices of the provider concerned may harm the health or safety of members of the public.

The complaint may continue to be assessed following the referral, or it may be closed.

Process

- Where the provider has not already been provided with a copy of the complaint, copies of the complaint should be sent to the provider. The provider should be made aware of the action taken.
- A copy of the complaint and the letter to the complainant should also be sent to the Director-General of Health.
- Under s 35 of the Act, the Director-General must report back to the Commissioner on any steps taken as a result of the referral.

Note: Referrals may also be made to regulatory authorities under s 59(4) and s 39(2).

**Section 34(1)(c) letters**

*Relevant templates:*

- s34(1)(c) referral to MOH risk of harm to public and write to consumer, provider, and Director-General of Health.

See Reference: Statutory Delegations for Complaints Assessment and Investigation Decisions and Processesand Reference: Delegations Chart for Commissioner and Deputies.

*ECDS action:*

- Set file stage to *Drafting early resolution letter_CAT*.
- Once the draft letter is appropriate for review, set the file stage as appropriate.
- Once the letters have been sent, give the file to the Senior/Team Leader for closing.

## 4.5 REFERRAL FOR RESOLUTION BETWEEN THE PARTIES — PROVIDER OR ADVOCACY SERVICE REFERRALS

Many complaints may be suitable for resolution between the parties. This is a decision that may be reached at triage or after further information has been gathered.

- Under s 34(1)(d) of the Act, the Commissioner may refer a complaint to the provider being complained about for resolution if the complaint does not raise questions about the health or safety of members of the public, and, in the Commissioner's opinion, the complaint can be resolved appropriately by the provider; or
- Under s 37(1), the Commissioner may refer a complaint to the Advocacy Service for the purpose of resolving the matter by agreement between the parties.

### 4.5.1 Provider referral

- The provider can be asked to meet with the complainant or to provide the complainant with a written response.
- Use of a support person may be suggested where a referral results in a meeting between the parties.
- The letter to the provider should include a copy of the complaint and other relevant correspondence.
- Section 35 of the Act requires the provider to report back to the Commissioner on any steps taken to resolve the complaint, including minutes of any meetings or a copy of the provider's written response to the complainant. Usually the provider is given four weeks within which to do this.
- The response should be addressed to the Recommendations Officer. The quality of the response is assessed by the Recommendations Analyst.
- As a final step, the Recommendations Officer should acknowledge the provider's response.

Note: If the complaint has not been progressed through the HDC website then the complainant should be advised of HDC's intention to send the complaint to the provider.

**Section 34(1)(d) letters**

*Relevant templates:*

- s34(1)(d) referral to provider

See Reference: Statutory Delegations for Complaints Assessment and Investigation Decisions and Processesand Reference: Delegations Chart for Commissioner and Deputies.

*ECDS action:*

- Set file stage to *Drafting early resolution letters_CAT*
- Once the draft letter is appropriate for review, set the file stage as appropriate.
- Once the letters have been sent, set a reminder for the date indicated in the letter, in the name of the Recommendations Officer, and give the file to a Senior/Team Leader for closing.

### 4.5.2 Referral to the Advocacy Service

**Communication with the complainant**

- Prior to making a referral to the Advocacy Service under s 37(1), the Complaints Assessor should normally contact the consumer to ascertain his or her willingness to work with an advocate. (The information sheet on the intranet "Reference: Suggested discussion points for CAT telephone conversations about referring to Advocacy Service" provides information to consider).
- Please note that the advocacy resolution process is mainly a written process. A decision as to whether a meeting would or would not be appropriate can be made only following discussion between the advocate and the complainant.
- The Complaints Assessor must establish the area where the consumer lives and two methods of contact for the consumer. An exception to the requirement for two contacts is where the consumer is in prison.
- In the case of third party complaints (see 17.1 Third-party complaints), prior to making the referral it is necessary to obtain the consumer's contact details (two methods required) and confirm his or her willingness to work with an advocate. Advocates do not usually work with third party complainants without the involvement of the consumer. Check with the appropriate Regional Manager (contact list is on the intranet) whether referral is appropriate if it is a third party complaint without consumer support (e.g., lack of capacity or consumer deceased).
- If the consumer does not agree to a referral to advocacy, or is unable to be contacted, then the complaint should be referred to the provider under s 34 (1)(d).

**Communication with the Advocacy Service**

- The formal referral to advocacy is emailed directly to the Regional Manager for the relevant area and should include copies of the complaint, the letters to the consumer and provider, and copies of any file notes recording discussions with the consumer and/or provider, including the consumer's agreement to the Advocacy Service referral.

- Please scan all information together as one document. Ensure that any personal contact details for the provider are redacted. No clinical notes should be sent to the Advocacy Service. There is no need to send a hard copy. The Advocacy Service will email confirmation of receipt of the referral.
- All referrals and initial contacts with the Advocacy Service are made through the Regional Managers. If agreed by the Regional Manager, further contact may be made directly with an individual advocate, with the Regional Manager copied into all communications (this is to ensure that all such communication is managed in a timely way if staff are part time or on leave).
- The letter to the provider should enclose a copy of the complaint and a copy of the Advocacy Service s 37 provider leaflet "What happens next …". The letter to the consumer should enclose a copy of the **Error! Reference source not found.**.
- Under s 37(2)(b) of the Act, the Advocacy Service is required to report back to the Commissioner on the results of the referral. Once the letters have been sent, a reminder should be put in the Recommendations Officer's name for the date on which the Advocacy Service's response is due — by agreement this is usually 12 weeks from the date of referral.
- The Recommendations Officer follows up on s 37 referrals and acknowledges the receipt of the final report from the Advocacy Service (see Reference: 11.4 Section 37 reports.
- In some cases it may be appropriate to request that the Advocacy Service contact a consumer to gather information and establish whether the advocacy process would be suitable. This can be done under s 14(1)(m) (see 3.2.2 Section 14(1)(m) requests to the Advocacy Service).

**Formal referral to Advocacy letters**

*Relevant template:*

- s 37 Formal referral to advocacy

See Reference: Statutory Delegations for Complaints Assessment and Investigation Decisions and Processesand Reference: Delegations Chart for Commissioner and Deputies.

*ECDS action:*

- Set file stage to *Drafting early resolution letter_CAT*
- Once the draft letter is appropriate for review, set the file stage as appropriate.
- Once the letters have been sent, set a reminder for the date indicated in letter, in the name of the Recommendations Officer.
- When appropriate, give file to Senior/Team Leader to close.
- The Recommendations Officer follows up on s 37 referrals and acknowledges the receipt of the final report from the Advocacy Service.

## 4.6 REFERRAL TO CERTAIN STATUTORY OFFICERS

See Referrals and notifications.

If the Commissioner considers that a complaint is more properly within the scope of the Human Rights Commission, the Chief Ombudsman, or the Privacy Commissioner, he or she must consult with one of these agencies under s 36 of the Act in order to determine the appropriate means of dealing with the complaint.

On some occasions it may be appropriate to direct the complainant to the relevant statutory officer in an OJ letter.

Process

- Prior to making any referral under s 36, the Commissioner (through his or her staff) must consult with the relevant statutory officer.
- After consultation, the Commissioner must determine whether the complaint should be dealt with in whole or part by the Commissioner or by the relevant statutory officer, and must then promptly refer the complaint in part or as a whole to that statutory officer.
- If the complaint is to be dealt with in whole by the relevant statutory officer, the provider and complainant must be notified of the referral and advised that the complaint is now closed at HDC.
- A referral under s 36 may also form part of a s 38(1) No Action decision if there are other matters to consider that are not dealt with by the referral.
- If formally referring to a statutory officer under s 36, a copy of the complaint and letter to the complainant should also be sent to that statutory officer.

**Section 36 letters**

*Relevant templates:*

- s 36 referral to PC_HRC_Ombudsman and write to consumer, provider, and relevant statutory officer.
- If closing but advising complainant to contact another office use

— *S 38 letter_No action_no further info gathered (early resolution) or*

— *OJ letter as appropriate and write to consumer and provider.*

See Reference: Statutory Delegations for Complaints Assessment and Investigation Decisions and Processesand Reference: Delegations Chart for Commissioner and Deputies.

*ECDS action:*

- Set file stage to *Drafting early resolution letter_CAT.*
- Once the draft letter is appropriate for review, set the file stage as appropriate, e.g., *With Team Leader/senior for review_CAT* or W*ith decision-maker for steer/review_CAT* or W*ith decision-maker for signing_CAT* or *Early resolution letters with Team Leader for signing_CAT*.
- Once the letters have been sent, give file to Senior/Team Leader for closing.

## 4.7 MEDIATION

Under s 61 of the Act, the Commissioner may call a conference of the parties concerned in an endeavour to resolve the matter by agreement between those parties.

- The Act does not stipulate what form the conference should take. Mediation is not often used.

## 4.8 INVESTIGATION

Under s 33(1)(a)(iv) and s 40 of the Act, the Commissioner may decide to investigate any action of a healthcare provider or a disability services provider if the action is, or appears to be, in breach of the Code. This means that the Commissioner may investigate either following a complaint or on his/her own initiative (that is, without a complainant).

*ECDS action*

- When transferred to Investigations, change file stage to *Initial assessment/awaiting allocation — INV Manager*

## 4.9 NO ACTION

Section 33(1)(b) allows the Commissioner to make a preliminary assessment decision to take no action on a complaint. Such decisions must be carried out in accordance with the considerations and requirements set out in s 38(1).

Note that s 38(1) also provides for the Commissioner to take "No Further Action" in the circumstances where the Commissioner has made a decision under s 33(1) and then later revises or reviews that decision under s 33(3) (see PART 5: REVIEW AND REVISION OF PRELIMINARY DECISIONS).

While it is more usual first to seek a response from the provider under s 14, a complaint can be closed under s 33(1)(b) and s 38(1) No Action without doing so, if it is considered that any action is unnecessary or inappropriate (see 4.10 NO ACTION AFTER FURTHER INFORMATION OBTAINED).

The letter to the provider should enclose a copy of the complaint and the closure letter to the consumer (both redacted if more than one provider).

**Early resolution s 38 letters**

*Relevant template:*

- s 38 letter_No action_no further info gathered (early resolution).

See Reference: Statutory Delegations for Complaints Assessment and Investigation Decisions and Processesand Reference: Delegations Chart for Commissioner and Deputies.

*ECDS action:*

- Set file stage to *Drafting early resolution letters_CAT*.
- Once the draft letter is appropriate for review, set the file stage as appropriate.

## 4.10 NO ACTION AFTER FURTHER INFORMATION OBTAINED

### 4.10.1 Decision to take no action

A s 38(1) letter after further information has been gathered sets out the decision to take "No Action". This terminology can be misleading, as often the Commissioner has taken substantial "action" in the way of seeking independent advice, further responses, etc, before closing under s 38 No Action. However, this is the wording of s 33(1)(b) of the Act and should be used when specific reference is made to the Act. A s 38(1) letter may also contain education and recommendations/follow-up.

The wording "No Further Action" in s 38(1) can be used after the Commissioner has revised a preliminary decision under s 33(3) and chooses to close the complaint under s 38(1) rather than exercise another power under s 33(1).

In general, s 38 allows the Commissioner (or delegate), at his or her discretion, to take "No Action" on the complaint if the Commissioner considers that having regard to all the

circumstances of the case, any action is unnecessary or inappropriate. This decision may take into account the following matters:

- The length of time that has elapsed between the date when the subject matter of the complaint arose and the date when the complaint was made;
- Whether the subject matter of the complaint is trivial;
- Whether the complaint is frivolous or vexatious, or is not made in good faith;
- Whether the person alleged to be aggrieved does not want any action taken or, as the case may be, continued;
- Whether there is in all the circumstances an adequate remedy or right of appeal other than the right to petition Parliament or complain to the Ombudsman, that it would be reasonable for the person alleged to be aggrieved to exercise;
- After liaison with the Coroner, it has been agreed that the Coroner will conduct an inquiry (see 7.3.1 Coroner).

Process

- On occasion, the complainant/consumer or provider may provide an alternative clinical submission from their own independent clinical advisor as part of his/her/its complaint or submission to HDC. Consideration should always be given to providing that opinion to HDC's Advisor for comment. This is for reasons of natural justice (see 14.1 Natural justice) and to test the evidence. However, reference to the alternative opinion **must be included in the decision**. Reasons for preference of one opinion over another must be explained.
- If a s 38(1) letter contains recommendations/follow-up, the provider is given a reasonable time in which to respond, depending on the nature of the recommendations/follow-up actions required.

### 4.10.2 Provisional s 38 letter to the provider

Process

- A provisional s 38(1) letter to the provider is necessary where the draft provisional s 38(1) letter to the complainant contains any proposed criticisms, educative comments, recommendations, and referrals. The letter to the provider will set out those proposed comments, as well as the provisional decision to take No Action, and will enclose the draft provisional decision letter to the consumer.
- A copy of any independent advice obtained is also enclosed if the provider has not been given this previously.
- The provider should be given a reasonable timeframe in which to comment, and asked to send his or her comments to the Complaints Assessor.
- The Complaints Assessor must update the complainant.
- When sending a provisional s 38(1) letter to multiple providers, consider redacting those parts of the letter relating to other providers to protect the privacy of each provider (see 14.4 Privacy).
- Redact personal information about the complainant contained in the complaint or other correspondence before sending to other parties (see 14.4 Privacy).

**Provisional s 38(1) letters to provider**

*Relevant template:*

- Non standard letter to provider

See Reference: Statutory Delegations for Complaints Assessment and Investigation Decisions and Processesand Reference: Delegations Chart for Commissioner and Deputies.

*ECDS action:*

- When drafting letter, set file stage to *s 38_drafting provisional_CAT*.
- Update stages appropriately to reflect when letters are at review and signing stages.
- When sent, set file stage to s *38_awaiting responses to provisional_CAT*
- Reminders should be set in the name of the Complaints Assessor to whom the file is allocated.

### 4.10.3 Provisional s 38 letter to the complainant

Discussion

A provisional decision letter should always be sent to the complainant unless there are exceptional circumstances, in which case this should be discussed with your Team Leader and the Commissioner or delegate.

Process

- A provisional s 38(1) letter summarises relevant information gathered and sets out the reasons for the provisional decision to take No Action. The complainant is then given an opportunity to comment and/or provide further information relevant to the proposed decision. The complainant should be given a reasonable timeframe in which to comment.

**Provisional s 38(1) letters to complainant**

*Relevant template:*

- s 38 letter — provisional to complainant

See Reference: Statutory Delegations for Complaints Assessment and Investigation Decisions and Processesand Reference: Delegations Chart for Commissioner and Deputies.

*ECDS action:*

- When drafting letter, set file stage to *s 38_drafting provisional_CAT.*
- Update stages appropriately to reflect when letters are at review and signing stages.
- When sent, set file stage to *s 38_awaiting responses to provisional_CAT*.

- Reminders should be set for 3 weeks in the name of the Complaints Assessor to whom the file is allocated.

### 4.10.4 Analysis of responses to provisional s 38(1)

The Complaints Assessor carefully assesses the responses provided and makes a recommendation to the Commissioner or delegate.

### 4.10.5 Final s 38(1) letter

Discussion

If the Commissioner or delegate decides to proceed with a provisional decision to take No Action, a final decision letter must be sent.

Process

- The final s 38(1) letter must acknowledge any comments made in response to the provisional letter, and respond to any issues raised.
- The final s 38(1) letter does not need to repeat the information contained in the provisional decision letter if the basis for the decision has not changed. If it has changed, full reasons for the decision will need to be set out in the final letter.
- A copy of any comments made by the complainant and any non-critical independent advice obtained should be enclosed in the letter to the provider, if the provider has not been given this information previously.
- All providers need to be informed of the decision to take No Action, including individual practitioners and their employers/former employers.
- When sending a s 38(1) letter to multiple providers, those parts of the letter relating to other providers may need to be redacted to protect the privacy of each provider (see 14.4 Privacy).
- In the case of third party complaints, redact the complainant's personal information from the complaint and any other correspondence sent to the provider/s, and keep a copy of the redacted information on file (see 14.4 Privacy).
- It may be appropriate to redact the provider's personal information from correspondence when sending to other parties.
- Other relevant parties, such as the Coroner, the Advocacy Service (if the referral came from the Advocacy Service), and the relevant regulatory authority where the complaint has been forwarded to the Commissioner from the party, should also be informed of the decision (see PART 16: RELATIONSHIPS WITH OTHER AGENCIES). Consideration should also be given to whether a referral under s 59(4) is appropriate (see 12.2 Section 59(4) and PART 16: RELATIONSHIPS WITH OTHER AGENCIES).

**Final s 38(1) letters**

*Relevant template:*

- s 38 letter — Final_after provisional to complainant_provider

See Reference: Statutory Delegations for Complaints Assessment and Investigation Decisions and Processesand Reference: Delegations Chart for Commissioner and Deputies.

*ECDS action:*

- When a decision has been made to take No Action, set file stage to s 38_ready to draft final letters_CAT.
- When the letter has been commenced, set file stage to *s 38_drafting final letters_CAT*.
- Update stages appropriately to reflect when letters are at review and signing stages.
- Once the letters have been sent, give file to Senior/Team Leader to close the file.

# PART 5: REVIEW AND REVISION OF PRELIMINARY DECISIONS

## 5.1 DISCUSSION

Section 33(3) allows the Commissioner to revise a preliminary assessment decision and subsequently to exercise one or more of his or her other powers in relation to the complaint.

Following a referral under s 33(1)(a), the complaint is usually closed at HDC. However, when closing in those circumstances the provider should usually have been advised that HDC may revise that preliminary decision under s 33(3) of the Act (see 4.9 No action).

Following a decision to take no action under s 33(1)(b), the complaint is closed at HDC.

**Revision of preliminary decision letters**

- Use a non-standard template drafted on a case-by-case basis.

# PART 6: INDEPENDENT ADVICE

## 6.1 INDEPENDENT ADVICE

Independent advice on clinical issues may be sought from advisors for the purpose of assisting the Commissioner or delegate at any stage of the process. It is not the role of the advisor to determine the facts of the complaint. The Commissioner or delegate may disagree with the advisor's opinion, in which case the reasons for this decision must be clearly set out in the Commissioner or delegate's opinion.

HDC has external advisors and in-house advisors. HDC requires all advisors to adhere to the Guidelines for Independent Advisors (see Reference: Guidelines for Independent advisors).

HDC's in-house independent clinical advisors ("in-house advisors") — a vocationally registered GP, a registered nurse, and a midwife — are employed part time.

HDC has a panel of external independent Advisors ("Advisors"). These Advisors have been nominated by relevant professional bodies and are vocationally registered, currently practising in their area of expertise, respected in their specialty, and of good standing.

### 6.1.1 Process for requesting independent advice

ECDS includes a database of Advisors. Each Advisor's curriculum vitae can be found under the details tab.

When identifying an appropriate Advisor, the following must be considered:

- Does the Advisor have the appropriate expertise both at the time of the event, as well as currently?
- Does the Advisor have a conflict of interest as set out in the Guidelines for Independent Advisors?

Before an Advisor is engaged to provide advice on a particular complaint, he or she should be contacted and provided with the names of the parties involved to check for any conflicts of interest. If a conflict exists, the Complaints Assessor/Investigator should discuss that with their Team Leader. Any decision to continue to use an advisor after a "minor" conflict has been identified should be discussed with the Commissioner or delegate. If there is a risk of bias or perceived bias then the matter should be brought to the Commissioner's attention.

- Is the Advisor the subject of any current complaint? If so, the Complaints Assessor/ Investigator should discuss this with their Team Leader and the matter should be brought to the attention of the Commissioner to decide whether it is appropriate to continue to take advice from this Advisor.
- Is the Advisor available and able to provide the advice in a timely manner?

**Request for formal in-house independent advice**

*Relevant templates:*

- Independent advice request to inhouse advisor.

*ECDS action:*

- When approval granted, set file stage to *Inhouse clinical review — (medical/nursing/midwifery/aged care)*
- All informal advice discussions should be noted by the Complaints Assessor or Team Leader as a file note in ECDS, with the printed copy signed by the in-house clinical advisor and placed on the physical file.

**Request for external independent advice**

*Relevant templates:*

- Independent advice request update — complainant/provider.
- Independent advice request to external independent advisor.
- In the Complaints Assessment Team, letters are signed by the Team Leader who is responsible for the Complaints Assessor who drafted the request. Investigators sign their own letters after peer review and approval by a Team Leader.

*ECDS action*:

- Use the file stages appropriately, e.g., *Expert advice_drafting advice request_CAT* or *With Team Leader/Senior for review_CAT.*
- External Advisors need to be added to the Independent Advisors tab for the particular complaint on ECDS.
- Set file stage:

— *CA Team*

— *While locating an Advisor: Expert advice_seeking advisor_CAT*

— *Once independent advice request is sent: Expert advice_awaiting advice_CAT*

— *Investigations*

— *Seeking & waiting for external expert advice pre-notification*

— *Seeking & waiting for external expert advice post-notification*

- Reminders should be set for 3 or 4 weeks following the date on which the instructions are sent, and be in the name of the Complaints Assessor/ Investigator to whom the file is allocated.

## 6.2 INDEPENDENT ADVICE RECEIVED

When independent advice is received, the Complaints Assessor/Investigator must review the report to:

- Ensure that the Advisor has answered all of the questions asked and indicated the seriousness of any departures identified.
- Ensure that the Advisor based his or her advice on factual evidence and, if there are differing versions of events, that the Advisor has advised on the alternative factual scenarios.
- In cases where advice is given in the alternative, request final advice from the Advisor once facts have been established.
- Consider whether there are any aspects of the advice that require further clarification.
- Consider whether further factual information from the provider, the complainant, or another party is needed. Does the Advisor state that any information is missing and/or requires clarification?

*ECDS action:*

- Reminder closed
- Set file stage:
  - *Expert advice_reviewing advice_CAT*
  - *Expert advice_awaiting advice_CAT*

## 6.3 OPPORTUNITY FOR PROVIDER TO COMMENT ON INDEPENDENT ADVICE

For Complaints Assessment files, where independent advice contains explicit or implicit criticism of a provider it is important that the provider is given a copy of the independent advice and asked to comment prior to a final decision being made (see 14.1 Natural justice).

In investigations, usually all independent advice received is given to the provider at notification, for his or her response or further response if the provider has already received a copy of the advice.

Once the provider's comments have been received, consideration must then be given to whether the comments may change the Advisor's view of the matter. The provider's comments may need to be sent to the Advisor for the opportunity to provide any additional comment.

**Request for Comment letters**

Relevant template:

- Non-Standard Letters are usually signed by the Complaints Assessor/Investigator, Team Leader, or Senior Complaints Assessor.
- This approach should not be adopted where there is any indication that the Commissioner or delegate is minded to accept the criticisms. In those circumstances, the non-standard letter must be signed by the Commissioner or delegate.

*ECDS action:*

- For Complaints Assessment files, set file stage to *Awaiting information from provider*.
- Reminders should reflect the due date on the letter (which is decided on a case-by-case basis, but approximately 10–14 days, and be in the name of the allocated Complaints Assessor/Investigator.

## 6.4 ALTERNATIVE CLINICAL OPINION

For guidance on seeking independent advice, see 6.1 independent Advice.

On occasion, the complainant/consumer or provider may provide an alternative clinical opinion as part of their complaint or submission to the Commissioner (this includes any ACC advice). The Investigator should consider whether, and when in the process, the opinion should be given to HDC's Advisor for comment. This is for reasons of natural justice (see 14.1 Natural justice) and to test the evidence. The Commissioner must include a reference to the alternative opinion in the decision and explain the reasons for preference of one opinion over another.

**Contact with relevant parties**

- Updates are to be given every 2 months, and the preference is for telephone or email communication. Holding letters are to be used when telephone/email contact is not possible/appropriate.

**Letters**

Relevant template:

- Ask for provider to comment on further information/expert advice.

*ECDS action:*

- Set file stage to *Seeking & waiting for external independent advice post-notification*.
- Set reminder for independent advice due date in the Investigator's name.

- Once further independent advice is received, set file stage to *Reviewing expert advice*.

### 6.4.1 Opportunity for provider to comment

In accordance with the principles of natural justice, it is appropriate for the Investigator to give the provider a copy of the independent advice directly relevant to him/her/it, and provide an opportunity to comment.

The Investigator must consider whether any new material information has been provided. If so, send this to the independent advisor to allow the advisor to consider whether it alters his or her opinion in any way.

# PART 7: NOTIFICATION OF INVESTIGATION

## 7.1 INVESTIGATOR'S INITIAL REVIEW

Once allocated a file, the Investigator reviews the file for the following:

- If the complainant is a third party, whether the consumer (or the consumer's personal representative) supports the complaint and/or has given permission for his/her private health information to be shared with the complainant;
- The complainant's primary concerns;
- The providers involved; and
- The information that has already been gathered.

The following information may already have been obtained by the Complaints Assessment Team:

- Provider's response(s) to the complaint
- Clinical records
- Independent advice

**Contact with relevant parties**

- Updates are to be given every 2 months, and the preference is for telephone or email communication. Holding letters are to be used when telephone/email contact is not possible/appropriate.

*ECDS action:*

- Set file stage to *File review/assessment memo_INV*.

## 7.2 INVESTIGATION ASSESSMENT MEMO

The Investigator is responsible for drafting an investigation assessment memo. The memo should include the following:

- A summary of the complaint;
- A summary of any responses received;
- Key points from any independent advice obtained;
- Outline of factual and legal issues identified to date;
- Reference to relevant precedents;
- Recommendations regarding notification (including explanation of any parties that may be vicariously liable);
- Any previous complaints of a similar nature or involving the same parties;

- Any potential systemic issues or priority issues; and
- Any other matters the Investigator considers should be brought to the Commissioner's or delegate's attention (for example, possible extension of notification, risks that may impact on progress, gaps in evidence, evidential issues, complainant's desired outcomes).

In addition to addressing these matters, the memo should set out *what* further evidence is required, from *where* it will be obtained, and by *when* it will be obtained. The Investigator should consider using a chronology and/or table of evidence in appropriate cases.

The Investigator provides the investigation assessment memo to the Associate Commissioner, Investigations, Investigations Team Leader, or Investigations Project Leader for review before discussion with, and approval by, the Commissioner or delegate.

Notification letters can also be sent to the Commissioner or delegate at the same time.

*ECDS action/Relevant template:*

- The memo template is generated on ECDS under *File Document*.

## 7.3 CONTACT WITH OTHER AGENCIES

### 7.3.1 Coroner

If the case involves a death, the Investigator must identify whether the Coroner has already been involved, and whether HDC has advised the Coroner of the complaint and consulted in accordance with the MOU (See 16.2 Coroner). If this has not been confirmed already by the Complaints Assessment Team, the Investigator should ask the Team Leader to do so.

If the complaint involves an injury that is the result of treatment, the Investigator should consider whether to make a request to ACC to check its involvement.

### 7.3.2 Other agencies — immediate public safety

The Investigator must always consider whether there are any immediate public safety concerns and/or whether consideration needs to be given to referring the matter to another agency if this has not been done already (see PART 12: OTHER REFERRALS and 4.2 Referral to a regulatory authority).

## 7.4 WHO IS TO BE NOTIFIED?

Following approval of the investigation assessment memo by the Commissioner or delegate, or concurrently, the Investigator prepares notification letters.

Under s 41 and s 42 of the Act, the Commissioner **must notify in writing** the following bodies of the intention to investigate:

- The complainant;
- Any person alleged to be aggrieved (i.e., the consumer);
- The provider to whom the investigation relates; and
- The registration authority (where a registered health practitioner is the subject of the complaint — see 7.7.2 Registered health practitioners).

If any party is legally represented, the Investigator should send the notification (and any further correspondence) to that party's legal representative.

*ECDS stages*

- Once drafting of the notification letter begins, change the file stage to *Notification_drafting*.
- Once the memo and notification letters are with the Investigations Team Leader, Investigations Project Leader, or Associate Commissioner, Investigations, change the file stage to *Notification_check by INV Manager*.
- Once the memo and notification letters are with the Commissioner or delegate for sign-out, change the file stage to *Notification — with* decision-maker for signing or *Notification_with INV Manager for signing*.

## 7.5 NOTIFYING ORGANISATIONS

When the Commissioner notifies a group provider (an organisation such as a DHB, medical centre, or rest home) that it is to be the subject of an investigation, it may not be immediately clear to whom the notification letter should be addressed. There are a number of ways in which organisations are formed, which lead to different responsibilities for those involved. Accordingly, the notification processes vary for each.

For a group provider, it is important to ensure that the following checks are made:

- Has the correct legal entity been notified?
- Is there any other individual or body that must be notified formally?
- Does the case involve issues of vicarious liability?

## 7.6 NOTIFYING INDIVIDUALS

Where an individual is to be the subject of an investigation, the Commissioner must notify that individual directly. Investigators can obtain addresses from the registration authority, a current or former employer, the White Pages, the Police, IRD, etc. If an individual's address cannot be ascertained, the Investigator should discuss this with the Team Leader, who may authorise the use of a process server/private investigator to assist with service of the notification documents.

### 7.6.1 "Sole trader"

Sometimes an individual operates a business under a trading name, for example a pharmacist may run a business under the name "Corner Pharmacy", but in fact there is no company (or other legal entity) or partnership behind the name. In this situation, the pharmacy has no separate legal personality, and so the Commissioner must notify the individual pharmacist of the investigation either as the provider of the service, or as an "employing authority"**Error! Reference source not found.**.

## 7.7 OTHER REQUIREMENTS WHEN NOTIFYING

### 7.7.1 Rest homes

The Commissioner must notify the certified person. The certified person can be found by searching the Ministry of Health's website (http://www.health.govt.nz/your-health/certified-providers/aged-care) or contacting HealthCERT (Ministry of Health). If the certified person is not an individual (i.e., is a company) then the Commissioner must notify the company.

The Investigator should always consider notifying both the rest home and clinical manager individually as the person responsible for the residents.

Because rest homes are audited and certified by the Ministry of Health (HealthCERT), it is the practice to let the Ministry know about the investigation. This is not mandatory, but is done under s 59(4) of the Act (that it is necessary or desirable in the public interest that a matter is brought to the attention of another party). Similarly, because the DHBs fund much of the care provided in rest homes, through the government subsidy, the Commissioner informs the relevant DHB; the Commissioner copies the notification letter to the relevant bodies.

### 7.7.2 Registered health practitioners

Section 42(1) provides that where an investigation "directly concerns a health practitioner, the Commissioner must promptly give notice of the investigation to the appropriate authority". Therefore, when the Commissioner notifies a registered practitioner, the authority must also be informed (see Reference: Information to be sent to Regulatory Authorities).

When informing a regulatory authority of an investigation into a health practitioner, the investigator must provide the following information, if available, to the regulatory authority at the time of notification:

- The letter of complaint;
- The health practitioner's response to the complaint, if any;[3]
- Any relevant preliminary independent advice;[4] and

[3] If there is no provider response, the regulatory authority should be advised of this together with any relevant context that it is appropriate to provide, for example, that a response has been sought and the date on which it is expected.

[4] If preliminary independent advice has been obtained but the health practitioner has not yet had an opportunity to respond and comment on that advice, HDC will not usually provide the regulatory authority with the preliminary independent advice at the time of notification, but will instead advise the regulatory authority that preliminary independent advice has been sent to the health practitioner for comment, and that the preliminary independent advice and the health practitioner's response to that advice will be forwarded to the regulatory authority when it is received. That advice should also indicate to the regulatory authority the date on which the health practitioner's response is expected.

- The name and contact details of the Investigator managing the investigation.

Consider whether any redactions are necessary, e.g., the names of other providers involved. If redactions are made, the Investigator should consider explaining to the regulatory authority the reason for the redactions.

## 7.8 NOTIFICATION LETTERS

### 7.8.1 Overview

There are notification letter templates in ECDS for each delegation (including where the Associate Commissioner, Investigations signs out a notification letter for the Commissioner), and also for a Commissioner's initiated investigation (see 7.4 Who is to be notified?).

Section 41(1)(b) provides that the Commissioner must inform the provider of:

- The details of the complaint or the subject matter of the investigation; and
- The right to submit a response within 15 working days.

The same process for notification applies to Commissioner-initiated investigations.

Discussion

In most cases, the Commissioner satisfies the requirement to inform the provider of the complaint/subject matter by enclosing a copy of the complaint with the notification letter. Where there is more than one provider, the Investigator must redact the parts that relate to other individual providers (unless a provider's employer is being notified). This is to comply with privacy requirements and ensure fairness. In some circumstances, it may be appropriate for the Commissioner not to send a copy of the complaint, but to summarise it instead (for example, for privacy reasons). The provider must know what is being alleged so that he/she/it can respond.

The Commissioner or delegate or the Associate Commissioner, Investigations signs out notification letters. The Associate Commissioner, Investigations only has the delegation to sign out notification letters for the Commissioner. The Investigator must ensure that all addresses are checked prior to sending out notification letters (see Privacy Policy).

The Investigator will check what information has already been sent by the Complaints Assessment Team, and ensure that the following is included with the notification letter where appropriate:

- A copy of the complaint or a summary of the complaint. The Investigator should consider whether personal details need to be redacted;
- Independent advice if available. The Investigator should check whether any adverse comment about another provider needs to be redacted;
- The relevant investigations brochure;
- The issues being notified;
- Notification to the regulatory authority if the practitioner being notified is registered;

- The correct legal entity (where notifying an organisation);
- Notification of individuals where appropriate (e.g., nurse, clinical manager, facility manager);
- Any information already obtained;
- Any additional information being sought (see PART 8: INVESTIGATION);
- Request for names of the relevant individuals if not known;
- Notification of HealthCERT if necessary; and
- Notification of relevant DHB if necessary.

#### 7.8.2 Scope of the investigation

The scope of the investigation should reflect the apparent breach of the Code that has been identified (i.e., standard of care, sexual exploitation, informed consent, etc).

Common notifications include "the appropriateness of the care provided by [provider's name] to [consumer's name] between [date] and [date]" and "the adequacy of the information provided by [provider] to [consumer] about …"

#### 7.8.3 Questions

The Commissioner can request further information from the provider in the notification letter. (see PART 8: INVESTIGATION).

**Contact with relevant parties**

- Updates are to be given every 2 months, and the preference is for telephone or email communication. Holding letters are to be used when telephone/email contact is not possible/appropriate.

**Notification letters**

*Relevant templates:*

- Notification of investigation_by Commissioner or Deputy.
- Notification of investigation_not by Commissioner or Deputy.

*ECDS action*:

- Set file stage to *Notified_seeking responses*.
- Set a reminder for the response due date in the Investigator's name.
- Change Complaint Type to *Investigation* and add *Date of notification*.

The Investigator sends an email to "Investigations Updates" with the file name and number notified, the date on which it was opened, and the date on which responses to the notification are due.

## 7.9 EXTENDING OR AMENDING NOTIFICATION

During the course of an investigation, the Investigator may become aware that:

- Other providers are directly involved and their actions are in apparent breach of the Code; and/or
- Some of the events/issues occurred outside the time period notified.

The Investigator should discuss this with the Investigations Team Leader, Investigations Project Leader, or Associate Commissioner, Investigations. The Commissioner or delegate may make a decision to extend/amend the notification. The Legal Advisor assigned to the file should be included in any such discussions.

To extend/amend a notification, the Investigator should:

- Notify any new parties being investigated of the Commissioner's intention to investigate, and provide them with the opportunity to respond to the complaint; and
- Inform the complainant, and any party who could be vicariously liable for the actions of the provider now being notified, of the amended/extended investigation.

**Letters**

*Relevant templates:*

- Investigation extended_by Commissioner or Deputy.
- Investigation extended _not signed by Commissioner or Deputy.

## 7.10 LEGAL BUDDY ASSIGNMENT

Once notification letters are sent out, the Investigator must send an email to "Investigations updates" for the purpose of keeping the Investigations spreadsheet up to date (see 13.3.2 Investigations internal updates).

The Deputy Chief Legal Advisor will then assign a "legal buddy" to the investigation file, and the Legal Team Administrator will record the buddy in the "Details" section of ECDS as the "File Colleague". The Senior Investigator/Investigator may request a legal buddy prior to notification if legal issues need to be resolved.

If there is a legal issue on an investigation file, the Investigator should contact the assigned legal buddy in the first instance.

**Communication with the relevant parties**

- Updates are to be given at least every 2 months, and the preference is for telephone or email communication. Holding letters are to be used when telephone/email contact is not possible/appropriate.

# PART 8: INVESTIGATION

The purpose of an investigation is to gather sufficient evidence to establish what occurred and whether the actions taken by providers amount to a breach of the Code. An Investigator undertaking an investigation gathers all relevant information and robustly analyses the evidence.

## 8.1 SOURCES OF EVIDENCE

The Investigator should consider obtaining evidence from a range of sources, including the following:

- The complainant
- The provider
- All witnesses to the events
- Providers not notified
- Registration authority
- Other agencies, for example, ACC, Coroner, Police, Worksafe, Ministry of Health
- Independent Advisor in a relevant field (see 6.1 independent Advice).

## 8.2 EVIDENCE TO OBTAIN

Usually the initial notification letter is used to obtain relevant information from providers. Depending on what information has already been obtained, the Investigator may usefully request the provider to provide an outline of events, then ask more specific questions in relation to the issues identified, including information on any relevant changes made to his/her/its practice since the complaint.

The Investigator should request any other relevant information at this stage. For example:

- A copy of the relevant clinical records and relevant correspondence. Ensure that the relevant time period is specified;
- A copy of any care plans or other documentation guiding service delivery;
- A copy of any relevant policies or guidelines (in place at the time of the events complained of, as well as updated policies). Be specific about what is required and for what time period;
- A copy of any internal investigation, including any adverse event report to HQSC, that has already been completed (particularly relevant for DHBs), including any completed incident form; or terms of reference and expected completion dates of any investigations underway;
- Details of any previous complaints and any recommendations or resulting changes to practice;
- Statements from parties involved that have not been notified, e.g., witnesses;
- The names of any providers that it has not been possible to identify;
- Information about the provider's employment relationship, i.e., is he or she an employee, contractor, etc;

- Details of registered providers' professional body registration, CV, and their credentialling information;
- For rest homes and disability services, details of who funds the service, and any service level agreements; and
- Any information held by other agencies relevant to the complaint (e.g., Coroner, Police, WorkSafe, ACC).

**NB:** The Investigator should consider carefully whether all the relevant material has been obtained, and whether it is in sufficient detail to enable the Commissioner to determine whether a breach of the Code has occurred, and potentially whether the complaint should be referred to the Director of Proceedings.

## 8.3 OBTAINING AND ANALYSING EVIDENCE

### 8.3.1 Obtaining evidence

Section 62 enables the Commissioner to require the production of information in relation to an investigation. Under s 73(b), it is an offence to refuse, or fail to comply with, any lawful requirement of the Commissioner under the Act (see 8.3.1 Obtaining evidence).

The Investigator may obtain additional evidence by requesting information under s 62 either orally (including through formal interview — see PART 9: INTERVIEWS) or in writing. The Investigator should include a timeframe in all written requests for response. Extensions will be granted only in appropriate circumstances. All extensions of longer than one week must be authorised by the Investigations Team Leader or Investigations Project Leader. Further delay may require referral to the Associate Commissioner, Investigations or the Commissioner or delegate.

**Letters**

*Relevant template:*

- s 62 request for information during investigation.

*ECDS action:*

- Change stage to *Notified_gathering further information*.
- Set a reminder for the response due date in the Investigator's name.

### 8.3.2 Analysis of evidence

The Investigator must analyse all evidence received and consider what information to provide to the parties for comment and whether further clarification is required.

When collecting and analysing evidence, it is useful to consider the following:

- Always using the most direct source of evidence.

- Are there any inconsistencies in any statements? If so, can they be explained (e.g., by the author of the statement or by other documentation)?
- Are there any other people who may have witnessed events?
- Is there any additional documentation that may assist (telephone records, staff rosters, diaries, etc)?
- If there is a conflict in the evidence, the standard applied when preferring certain evidence is the balance of probabilities — "Is it *more likely than not* that X happened?" (Note that in the disciplinary setting the standard is applied flexibly — the more serious the allegation, the stronger the evidence required to establish the events that occurred (see *Z v Complaints Assessment Committee* [208] NZSC 55.)
- What are the reasons for finding it more likely? Is there material that corroborates one version of events over the other (e.g., a document that supports one witness's account over another's)?

## 8.4 DISCLOSURE OF EVIDENCE TO THE PARTIES

It is important that the parties receive all the relevant information to enable them to respond to the issues being investigated. Often this would involve providing all responses and clinical advice to all parties, as appropriate, taking into account the relevant legislation and principles of natural justice.

# PART 9: INTERVIEWS

## 9.1 WHY INTERVIEW?

Interviews are a good way of obtaining more detailed information from the parties, and are particularly useful when trying to clarify a specific factual issue or incident, or resolve conflicting information. As part of an investigation into a complaint, Investigators may be required to interview witnesses, including complainants or providers. Before requesting that someone be interviewed, Investigators should consider carefully the purpose of the interview.

Some examples of situations where interviews may be considered are:

- The allegations are largely about non-clinical matters (e.g., sexual relationship, financial exploitation, boundary breaches).
- Parties have different versions of events and the facts need to be determined in order to make a finding that a Code right has been breached (e.g., conversations about the provision of information).
- A key witness (including a complainant) is likely to be unavailable during the course of the investigation.

Interviews are usually done by agreement with the parties (that is, on a voluntary basis). However, the Commissioner has the power to summon before him or her a party who, in the Commissioner's opinion, is able to give information relating to a matter under investigation, and examine that party under oath (s 62(2)). The Investigator must seek legal advice before issuing a summons for an interview.

## 9.2 PREPARATION

### 9.2.1 Communication

Prior to organising interviews, Investigators must seek approval from the Investigations Team Leader, Investigations Project Leader, or Associate Commissioner, Investigations. Investigators should conduct interviews in accordance with the process for off-site interviews (see Reference: Process for off-site interviews. See also the Health and Safety Policy (see Reference: Health and Safety Policy). Prior to an interview commencing, the Investigator should arrange the following with interviewees, confirmed in writing, formally documented on file, and a copy provided to the Investigations Team Leader, Investigations Project Leader, or Associate Commissioner, Investigations:

- Approximate scope of interview (outline of complaint, and any other areas for discussion);
- Timelines (start and finish time — no more than two hours);
- Venue (see below);
- Attendees (including, where appropriate, details of any support person/legal representative as approved by Investigator in advance). To avoid any allegations of collusion, parties should not be interviewed in the presence of other witnesses who could also provide evidence. Where someone requires a support person, it should be someone

who is not providing any evidence to the Commissioner in the matter. There should also be two investigators attending interviews;

- Information that the interview will be recorded;
- Outline of risks identified and management plan for those risks.

The Investigator should consider as part of the interview planning other issues such as the need for interpreters, appropriate gender of interviewers (in cases that are potentially embarrassing or sensitive), and special needs of the interviewees.

### 9.2.2 Questions

The Investigator should prepare questions in advance. The questions should reflect the key points to be covered during the interview, and are best used as a guide.

The purpose of an interview is to gather facts, and the Investigator needs to ensure that the appropriate level of detail is obtained, e.g., if the complainant is discussing a specific incident, ask the date, time, where it took place, who else was present, etc. Follow-up questions may also be required (e.g., in the event that the interviewee is not particularly forthcoming with responses, or to examine a particular issue in more detail, or if an incidental issue is uncovered during the course of the interview). It is important that all possible questions are open ended and not leading.

Prior to interview, the Investigator should meet with his or her file buddy (or whoever will take notes during the interview) to discuss the approach and review the prepared questions.

## 9.3 CONDUCTING AN INTERVIEW

At the beginning of the interview, the Investigator must cover the following points:

- Confirm that the interviewee has consented to the interview being recorded, and tell the interviewee when recording is commenced. If the interviewee does not consent, explain that the interview cannot proceed.
- The interview is voluntary unless the interviewee has been served with a notice under s 62(2).
- The interviewee is not obliged to answer any of the questions.
- The interviewee is free to leave or end the interview at any stage.
- The interviewee may ask for a break at any stage.
- The interviewee may refer to notes or records during the interview.
- Ensure that a note is made if the person has chosen not to have a support person present or, if a support person is present, who that person is.
- Advise that the purpose of a support person is to provide support, not to answer questions on behalf of the interviewee. Note that the support person may add any additional information at the end of the interview.

Before starting questioning, all parties should introduce themselves. The Investigator should record the venue, date, and start time of the interview.

During the interview process, the Investigator should:

- Ask open questions rather than leading questions (i.e., questions that suggest a particular answer — e.g., "You told her about the risks, didn't you?).
- Listen very carefully.
- Not interrupt but be prepared to guide the interviewee if he or she goes off track.
- Not voice an opinion.
- Headline the questions (e.g., "I'm now going to ask you some questions about the clinical notes").
- Finish off the section of questions (e.g., "Is there anything else you want to tell me about the first appointment?").
- Allow the interviewee time to think and answer the question before moving on.
- Address any inconsistencies in the information being provided during the interview.
- Follow up on any questions that have not been answered.

At the completion of the interview, the Investigator should ask the interviewee if there is anything he or she would like to add or clarify. Ensure that the interviewee understands the process from this point.

## 9.4 RECORDING THE INTERVIEW

### 9.4.1 Audio recording

In order to have a complete, accurate record of the interview, it is always recorded using a digital recorder (that has been checked to ensure that it is in good working order). Written notes should also be taken.

### 9.4.2 Storage

The Investigator should download all audio files from the recorder and save those files in the document repository under the relevant file number. The file should be linked to the ECDS file.

### 9.4.3 Transcribing

Interviews should be transcribed. This is done in house.

Occasionally where the quality of the information obtained is poor or the interview is excessively long, it may be more sensible to create a summary of the interview. However, the recording is still retained.

The Investigator sends the transcript (or summary if no transcript) to the interviewee for review, and invites the interviewee to make any amendments or additions, and to send a signed copy to HDC. That signed copy is retained on the file.

Where there are problems with audibility, it may be necessary to send to the interviewee a copy of the audio recording, along with a transcript of as much as could be captured.

**Letters**

*Relevant template:*

- Interview request.

*ECDS action*:

- When preparing for the interview, set the file stage to *Interview preparation & follow-up*.
- When having transcript written and confirming transcript with the interviewed party, set file stage to *Interview preparation & follow-up*.
- The interview summary and transcript must be attached to the file and on ECDS.

# PART 10: COMMISSIONER'S REPORT

At the conclusion of an investigation, the Investigator will prepare a draft report for the Commissioner's or delegate's consideration, setting out the relevant evidence, whether or not the evidence supports a breach of the Code, and, if so, which rights have been breached. The Commissioner or delegate will consider this and issue a provisional report.

## 10.1 PROVISIONAL REPORT

The first report will take the form of a provisional opinion (PO). This is to ensure that the rules of natural justice and the provisions of s 67 are complied with and give the parties the opportunity to comment on the facts set out in the opinion (see 14.1 Natural justice and 14.3 Adverse comment — s 67). The PO should:

- Be clear and easy to read;
- Contain well reasoned analysis; and
- Result in a decision supported by evidence.

**Contact with relevant parties**

- Updates are to be given every 2 months, and the preference is for telephone or email communication. Holding letters are to be used when telephone/email contact is not possible/appropriate.

*ECDS action/Relevant templates:*

- Select the action "Complaint Report" and sub-action "Complaint Report" (as the first report generated on the file, it will automatically become a "Draft Provisional Opinion".
- Set stage to *PO/2nd PO_drafting*.

### 10.1.1 Cover page

The cover page should include the provider(s) being investigated and the case number (as per template).

### 10.1.2 Table of contents

The table of contents is generated automatically by links to the headings. There is no need to type this separately.

### 10.1.3 Executive summary

The executive summary should be short (1–2 pages). This is drafted at the final opinion stage.

### 10.1.4 Complaint and investigation

This section should list the issues being investigated (as per the notification), and the delegation (if it is a Deputy Commissioner's PO).

This section should also list all the parties involved in the complaint, and the parties who have provided information during the investigation. It may be appropriate to divide this into two lists of the parties directly involved in the complaint (e.g., consumer, providers) and the parties who have provided information (e.g., complainant, other providers/witnesses present or indirectly involved).

### 10.1.5 Information gathered

This section summarises the most relevant parts of our investigation and sets out the facts that are material to decision-making. It does not necessarily set out in detail everything that was done as part of the investigation.

This section should include background information (a summary of the events giving rise to the complaint), and other evidence, including action taken since the events. This can be done chronologically, person based, or issue based depending on the content of the PO. The Investigator should discuss this structure with peers prior to writing.

### 10.1.6 Opinion section

Content

The opinion section of the PO must be based on the facts outlined in the "information gathered" section of the report, and take into account independent advice, the rights outlined in the Code, and other relevant standards.

The Commissioner or delegate may make the following decisions in respect of a notified provider (discussed further below):

- Direct breach of the Code
- Vicarious liability for breach of the Code
- No breach
- Adverse comment (may also be made about non-notified providers)
- Other comment (may also be made about non-notified providers)

The opinion section should explain how the Commissioner or delegate came to his/her decision and give reasons for those conclusions, which are linked back to the facts presented in the "information gathered" section. No new information should be introduced at this stage. Refer to precedent cases to support an opinion where appropriate (see **Precedent database** on X:\Education (Current)\Material for the Website\Opinion and case note log\Precedents for HDC reports.xlsx).

The Investigator should remember the following when drafting an opinion section of a PO:

- Answer the "questions" raised by the notification (i.e., address all issues).
- Ensure that the opinion is limited to the scope of the investigation. Refer to the relevant standard(s) that has/have been breached.

- Consider previous decisions on similar issues.
- When more than one provider is under investigation, the opinion for each provider should be addressed separately. In some cases, it may be appropriate to include an "Adverse comment" or "Other comment" about a non-notified provider.

Conflicting evidence and making a factual finding

In a situation where the parties are not in agreement over the facts, the Commissioner may make a finding, and outline which evidence was preferred and why, e.g., the clinical records support the provider's version of events. If there is a factual dispute that is relevant to the opinion, the opinion must address this. Sometimes it is not possible to make a factual finding. If this is the case, this should be stated.

Independent clinical advice

Where the independent clinical advice is material to the Commissioner's or delegate's decision, the PO should refer to the relevant advice in the opinion section. The Commissioner or delegate may disagree with the independent clinical advice, in which case the reasons for this decision must be clearly set out in the PO.

Adverse comment or other comment

In cases where a breach is not found, the Investigator should consider whether to recommend that the Commissioner or delegate include an adverse comment about a provider if there are remaining concerns about the care provided. The Investigator will consider whether to include another section entitled "Other comment" where the comments made are not criticism, but there are some issues arising that need to be addressed or concluded, or there are wider sector learnings.

### 10.1.7 Recommendations

This section should include any recommendations made by the Commissioner or delegate.

Recommendations vary from case to case, but in drafting them the Investigator should consider the provisional findings and issues from the case, and formulate recommendations that address those matters. Where possible, the Investigator should consider drafting recommendations that speak into the sector or bring about change. The Investigator may want to discuss recommendations with the Policy and Strategy Team.

Examples of recommendations include:

- Undertaking specific training;
- Implementing and reviewing systems to improve the quality of the care provided and to prevent further breaches of the Code;
- Sector-wide/systemic improvements; and
- A written apology to the consumer/complainant.

Where the Commissioner or delegate makes recommendations for improvements to services or an individual provider's practice, those recommendations (see Reference: Recommendations clause bank) should:

- Be reasonable and appropriate;
- Be measurable; and
- Stipulate time frames for response.

#### 10.1.8 Follow-up actions

This section should include any further actions the Commissioner or delegate intends taking at the conclusion of the investigation. These include:

- Naming of any providers (see 10.2 Naming).
- Referral to the Director of Proceedings (see 10.3 Referral to Director of Proceedings).
- Advising any regulatory authority previously given notice of the investigation, of the results of the investigation and any further action the Commissioner proposes to take, as required by s 43(1).
- Distribution to other bodies such as:

— *Unions and professional associations to which the report may be of interest, such as NZNO, NZCOM, NZMA*

— *Any professional college with registration oversight and any other college to which the report may be relevant*

— *Other DHBs if it is a public hospital report with lessons for other hospitals*

— *Other provider groups, e.g., the NZ Private Hospitals Association*

— *Relevant consumer groups, e.g., Women's Health Action or Federation of Women's Health Councils Aotearoa, or disease-specific groups*

— *Director-General of Health if the report has identified issues regarding DHB system failures or inequitable access to resources (e.g., specialist investigative tests) across comparable sized DHBs or concerns about a group provider that is funded by the MOH*

— *HQSC if the report discusses issues that are the basis of primary HQSC work programmes (e.g., current programmes include: medication safety, reducing harm from falls, safe surgery).*

- Publication on the HDC website.

## 10.2 NAMING

The naming policy is published in full on the website (see Reference: Naming Policy). However, in general terms, it means:

#### 10.2.1 Group providers

DHBs and public hospitals

Under the naming policy, generally the Commissioner will name DHBs and public hospitals found in breach of the Code unless it would not be in the public interest or would unfairly compromise the privacy interests of an individual provider or a consumer.

There may also be cases where it is appropriate to name DHBs and public hospitals even if they have not been found in breach of the Code. For example:

- If there are other DHBs and public hospitals involved in an investigation, it may be necessary to name those other DHBs in the final opinion to avoid confusion.
- It may be appropriate for the Commissioner to name DHBs and public hospitals in a "no breach" opinion if the opinion has educational value for other DHBs.
- The matter is already in the public domain. That is, there has been publicity and it would be artificial not to name.

Other group providers

Under the naming policy, generally the Commissioner will name rest homes, residential facilities, private hospitals, medical centres, pharmacies, and other group providers where their systems are found to be in breach of the Code, unless it would not be in the public interest or would unfairly compromise the privacy interests of an individual provider or a consumer.

#### 10.2.2 Individual providers

Generally the Commissioner does not name individual providers found in breach of the Code, but may do so if:

- The conduct of the provider demonstrates a flagrant disregard for the rights of the consumer, or there has been a severe departure from an acceptable standard of care, such that the provider poses a risk of harm to the public; or
- The provider has refused to comply with the Commissioner's recommendations; or
- The provider has been found in breach of the Code in relation to three episodes of care within the past five years where each breach involved at least a moderate departure from appropriate standards.

#### 10.2.3 Right to respond

The Commissioner outlines his or her intention to name a party, and the party's right to comment on the proposed action, in the cover letter and the provisional opinion. The Commissioner should consider and respond to all comments in the cover letter to the final opinion.

## 10.3 REFERRAL TO DIRECTOR OF PROCEEDINGS

### 10.3.1 Role of Director of Proceedings

The role of the Director of Proceedings (DP) is to decide, on referral from the Commissioner, whether to issue:

- Disciplinary proceedings before the Health Practitioners Disciplinary Tribunal (HPDT); and/or
- The Human Rights Review Tribunal (HRRT); and/or

- Any other proceedings or provide representation or assistance in any other proceedings before any tribunal, court, or inquiry.[5]

The DP exercises discretionary decision-making independently of the Commissioner (s 15).

The HPDT is established under the HPCA Act, and it hears disciplinary charges brought against registered health practitioners. There is no provision to pay any money to the consumer. The penalties available are:

- Cancellation of registration
- Suspension
- Conditions on practice
- Censure
- Fine up to $30,000
- Costs

The DP can bring proceedings before the HRRT against registered health professionals and unregistered providers, including individuals and organisations.[6] The HRRT is established under the Human Rights Act 1993, and it may hear proceedings concerning any provider against whom the Commissioner has formed an opinion that a consumer's rights have been breached. The remedies available are:

- A declaration that the provider breached the Code.
- A restraining order (not to continue the acts or omissions that are in breach of the consumer's rights).
- Damages (including for financial loss, humiliation, loss of dignity and injury to feelings, as well as punitive damages).
- An order that the provider perform acts to redress the balance.
- Any other relief the HRRT thinks fit.

Damages (other than exemplary damages) are unlikely where there is ACC cover in place. Please seek legal advice if this discussion becomes necessary.

### 10.3.2 Grounds for referral

Where, following an investigation, a breach of the Code is found, s 45(2)(f) allows the Commissioner to refer one or more providers to the DP.

Section 44(2) provides that the Commissioner must have regard to the following factors of the kind found in s 44(3):



[5] Section 47 of the Act.
[6] Where HDC has found a breach of the Code following an investigation but has not referred the matter to the DP, consumers may be able to take their own case to the HRRT if they fit the definition under the Act of an "aggrieved" person.

- The wishes of the complainant and consumer.
- The response by the provider to the proposed referral.
- The need to ensure that appropriate proceedings are instituted in any case where the public interest (whether for reasons of public health or public safety or for any other reason) so requires.

The types of case considered for referral of a registered health practitioner are those involving:

- Serious negligence or recklessness (Right 4)
- Sexual misconduct or other boundary breaches (Right 4(2) or Right 2)
- Sexual or financial exploitation or any other Right 2 breach
- Physical assault
- Significant informed consent issues

#### 10.3.3 Process to follow

Under s 44(1), the Commissioner can refer a provider to the DP only if the Commissioner has given that person an opportunity to comment on the proposed referral. Therefore, the Investigator must include the proposal to refer a provider to the DP at the PO stage, allowing the provider the opportunity to respond to the proposed referral. The proposed referral and the provider's right to respond to this is outlined in the cover letter to the PO.

In consulting the complainant, the Investigator must be clear that the Commissioner will consider the complainant's views carefully, but it will be the Commissioner's decision whether to refer the provider to the DP.

## 10.4 APPENDICES

Appendices should include any documents referred to in the report, including a full copy of the independent advice report and relevant exhibits.

#### 10.4.1 Independent Advisor's opinion

If appropriate, the Appendices may include a full copy of the Advisor's report. If multiple reports have been issued by an Advisor, the Investigator should ask the Advisor to amalgamate the reports.

**NB:** It is acceptable to correct any spelling and minor grammatical errors in the independent advice report; however, any other changes must first be approved by the Advisor.

If any sections of the report have been removed, this should be stated clearly in the text of the report, giving reasons why. (For example, "At this point the independent advisor summarises the complaint; this has been removed to avoid replication", or "for brevity".) If material needs to be removed because the Advisor has gone outside the terms of reference, the Investigator should seek legal advice.

## 10.5 PROVISIONAL OPINIONS — REVIEW AND SIGN-OFF

—

**Provisional Opinion**

*Relevant templates:*

- PO cover letters_breach or adverse comment.
- PO cover letters_no breach and no adverse comment.

*ECDS action:*

- Once the PO report has been created in ECDS, select "Attach Cover Letter" from the PO report action note.

### 10.5.1 Peer review

Before the draft PO is signed out of the Investigations Team, a peer review must be carried out. This involves:

- Proof-reading

— *Check accuracy of evidence presented, such as quotes, dates, paraphrasing, etc. Quotes and relevant evidence should be tagged in the file for ease of reference.*

— *Check spelling, grammar, punctuation, etc.*

- Evidence

— *Review all the source documents and check:*

  - Has the evidence been clearly and fairly set out and discussed?
  - Where appropriate, have factual findings been made?
  - Has all the evidence relied on by the Advisor been included?

- Breaches

— *Are the breaches supported by the evidence?*

— *Is the reasoning clear?*

— *Is all the factual information being referred to in the "information gathered" section?*

— *Have the main points of the complaint/independent criticism been addressed (either in the PO or proposed for the cover letter)?*

*ECDS action:*

- Set file stage to *PO/2nd PO_peer review by investigator*.

### 10.5.2 PO sign out

The Investigations Team Leader, Investigations Project Leader, or Associate Commissioner, Investigations signs out the draft PO as ready for legal review, or in appropriate cases, the Commissioner or delegate.

*ECDS action:*

- Set file stage to *PO/2nd PO_check by INV Manager*.

### 10.5.3 Legal review

The Investigator must request a legal review of draft POs where breaches of the Code are proposed, and may request a review in other circumstances. The following must be included with the request for legal advice:

- The complaint
- The draft PO
- Draft cover letters, only if there are specific points being covered off that require legal advice
- Key responses from providers.

The Investigator sends the documents listed above to the Legal Team for review. The Legal Advisor who is the legal buddy will review the PO as follows:

(a) The Legal Advisor reviews the draft PO and provides advice on all issues as tracked changes and/or comments. When finalised, the Legal Advisor puts the legal advice and comments on the file and emails them to the Investigator, and an Investigations Leader (Associate Commissioner, Investigations, Investigations Team Leader, or Investigations Project Leader).

(b) The Legal Advisor and Investigator discuss the legal advice and, if unresolved issues remain, the issues are discussed with the Associate Commissioner, Legal and an Investigations Leader (Associate Commissioner, Investigations, Investigations Team Leader, or Investigations Project Leader) and, if still unresolved, direction will be sought from the Commissioner or delegate.

(c) The Investigator then finalises the draft PO and gives the draft PO to the Legal Advisor for sign-off by the Associate Commissioner, Legal. The Legal Advisor then emails the Investigator confirming that the draft PO has been signed out of legal.

(d) The Legal Advisor ensures that a copy of the legal advice, incorporating any comments from the Associate Commissioner, Legal, is saved on ECDS and a document link sent to the Investigator.

*ECDS action:*

- The first request for legal advice on a PO (and FO) should be formally requested using the "Legal advice — general" template on ECDS.
- The legal advice request should be emailed to the Legal Team Administrator and the Deputy Chief Legal advisor should be copied in. All the review documents and the advice request should be provided to the Legal Team Administrator.
- Set file stage to *PO/2nd PO_Legal review*.
- When draft PO has been returned to Investigator for comment, set file stage to *PO/2ndPO_review after legal advice*.

### 10.5.4 Editing of draft PO

The Investigator sends a link to the draft PO to the editor by email for editing prior to distribution to the parties. The Investigator will include in the email to the editor the file number, ECDS link to the document, and the requested time frame for editing.

*ECDS action:*

- Set file stage to *File with Editor*.

Once the draft PO is returned from the editor with tracked changes, the Investigator checks/makes any relevant changes and accepts all the changes.

### 10.5.5 Review of draft PO by Commissioner or delegate

The Investigator provides a memo and cover letters to the Commissioner or delegate for review with the draft PO.

The memo should highlight any conflicts of interest, risks, and/or any other matters that should be drawn to the Commissioner's or delegate's attention (including a proposed DP referral or a non-standard recommendation or follow-up action).

The Investigator should check the addresses on cover letters with parties before the cover letters are presented to the Commissioner or delegate.

*Relevant template:*

- File document — Memo.

*ECDS action:*

- Set file stage to *PO/2nd PO_with decision maker for signing.*

### 10.5.6 Meeting with Commissioner or delegate

The Commissioner or delegate may wish to discuss the draft PO and request amendments or further information before signing off on the report. Where necessary, the Commissioner or delegate will call a meeting with the Investigator and Legal Advisor before reaching a decision.

*ECDS action:*

- File notes of decisions/discussions on key points (e.g., breach or adverse comment, which Code rights, DP referral, emailing report to parties) are made, and the Commissioner or delegate is given the chance to see/comment on the file note.

The Investigator will make any changes as directed by the Commissioner or delegate and then return the draft PO and cover letters to the Commissioner or delegate for final sign-off. If significant changes are made by the Commissioner or delegate, the Investigator should seek direction from the Commissioner or delegate as to whether a further legal review of the draft PO is required.

### 10.5.7 Distribution of PO

Prior to sending out a PO, Investigators should contact consumers/complainants and providers to advise that the PO is about to be issued. The Investigator then sends the PO to the relevant parties by the method they prefer (e.g., by CourierPost or by email).

A PO may concern more than one provider, or include adverse comment about a third party. In these cases, usually the provider should receive only the "information gathered" and "opinion" section of the PO (including the recommendations, follow-up actions, and independent advice) that relates directly to that provider. The complainant should receive only a copy of the "information gathered" section. Generally, the Commissioner gives all parties 15 working days to respond to the PO.

Where the PO is to be sent via email, the Investigator must confirm the email address with the recipient in advance, and the PO must be password protected, with the password sent by separate correspondence and noted on ECDS (see Reference: Privacy Policy).

*ECDS action:*

- Set file stage to *PO/2nd PO_Awaiting responses*.
- Set reminder for response due date in Investigator's name.
- Promote the report from "Draft Provisional" to "Provisional Opinion", then from "Provisional Opinion" to "Draft Final". Once the report has been promoted, check that the Provisional Opinion issue date is correct.
- If PO is sent electronically, password to be noted on system.

The Investigator sends an email to "Investigations Update" with the file name and number of the PO that has been distributed and the due date of the response to the PO.

## 10.6 FINAL REPORTS

### 10.6.1 Time frame

The Investigator must actively pursue overdue responses.

Extensions will be granted in appropriate circumstances. All extensions of longer than one week must be authorised by the Investigations Team Leader or Investigations Project Leader. Further delay may require referral to the Associate Commissioner, Investigations or the Commissioner or delegate.

### 10.6.2 Executive summary

The executive summary should be short (1–2 pages) and set out in the executive summary template. It should include an introductory paragraph, key facts and findings, and the recommendations made.

### 10.6.3 Response to PO

In light of the responses to the PO, the Commissioner or delegate may amend the PO. The Investigator analyses the responses and recommends:

- Whether the comments provided be included in the "information gathered" section of the report or be included in a separate section entitled "Response to provisional opinion";
- Whether further clarification is required on any relevant matter (e.g., from parties, or an independent advisor);
- Whether the submissions require reconsideration of findings or conclusions in the PO; and
- Whether the submission requires formal acknowledgement in the PO.

### 10.6.4 Recommendations

Where a provider has completed a recommendation proposed in the PO, the Commissioner or delegate must acknowledge that in the "recommendations" section of the final opinion (FO)

by stating: "In accordance with the proposed recommendation[s] in my provisional opinion, [X] has …" (see Reference: Recommendations clause bank).

*Relevant templates:*

- FO cover letters_breach or adverse comment.
- FO cover letters_no breach and no adverse comment.

*ECDS action:*

- Track in changes arising from the responses to the PO in the "Draft Final" report on ECDS.
- Attach cover letters.
- When reviewing responses to the PO, change file stage to *PO/2nd PO_reviewing responses.*
- When drafting the FO, change file stage to *FO_drafting.*

### 10.6.5 Second PO

In a case where, following receipt of comments on the PO, the Commissioner or delegate proposes to make any new adverse comments about a party, the Commissioner or delegate may issue a second PO or provide an opportunity for relevant parties to comment on a proposed minor amendment.

If in doubt about the need to provide a further opportunity to comment, the Investigator should seek legal advice.

If the decision is made to issue a second PO, the Investigator/other relevant persons must follow the investigations and legal review processes as for a PO.

*ECDS action:*

- Create a copy of the provisional opinion to be worked on as the "Second Provisional Opinion".

### 10.6.6 Review process for a final opinion

Investigations review

All final opinions (FOs) should be peer reviewed by another investigator before it goes to the Investigations Team Leader, Investigations Project Leader, or Associate Commissioner, Investigations.

The peer reviewer:

- Reads and considers the responses to the PO;

- Reviews the executive summary;
- Reviews the "Responses to provisional opinion" section;
- Reviews the cover letters; and
- Ensures that all "provisional" language has been removed from the FO.

The Investigations Team Leader, Investigations Project Leader, or Associate Commissioner, Investigations then reviews the FO before it goes to the Legal Team or the Commissioner or delegate.

Legal review

A draft FO does not require legal review if:

- All the providers agree with the findings, conclusions, and recommendations in the PO and make no submission in response to the PO other than a simple restatement of fact that does not need to be incorporated;
- The complainant's response relates to facts that are not material to the findings or conclusions in the PO and does not include any new information;
- The opinion section of the draft FO is not amended from the PO; and
- The recommendations section of the draft FO is not amended from the PO, other than where the provider has requested amendments or has accepted the recommendations and the recommendations section is amended to reflect that.

Otherwise, the process for reviewing a draft FO is the same as for a PO (see 10.5 Provisional opinions — review and sign-off). The Investigator will include with the request for legal advice:

- The draft FO.
- Copies of the parties' responses to the PO, including annotations where the responses have been incorporated into the draft FO or a brief comment why that response has not been included.
- Draft cover letters, only if there are specific points being covered off that require legal advice.

*ECDS action:*

- Create legal advice request — General on ECDS.
- Update file stages with the relevant FO stages through d*rafting, peer review, check by INV Manager*, and *legal review*.

### 10.6.7 Editing

The Investigator should ensure that the FO is edited again before it is distributed.

### 10.6.8 Review and sign-out of draft FO by Commissioner or delegate

The Investigator provides a memo and cover letters to the Commissioner or delegate for review with the draft FO (with any changes tracked). The Investigator drafts a covering memo to the Commissioner or delegate to accompany the draft FO if there are other matters that should be drawn to the Commissioner's or delegate's attention arising from the responses to the PO.

The Investigator should check the addresses on cover letters with parties before the cover letters are presented to the Commissioner or delegate.

The Commissioner or delegate may want to meet with the Investigator and/or Legal Advisor before reaching a decision on the FO, or else will return the draft FO to the Investigator with comments/amendments, or with sign-out. A meeting may not be necessary in all cases.

### 10.6.9 Pre-distribution process for a final opinion

- If the FO is to be published, the Investigator will seek a publication date from the Investigations Project Leader.
- The Investigator will send the FO to the editor as per process for PO.
- The Investigator will prepare the FO for the Commissioner or delegate.
- If there is a DP referral, the Investigator must complete the formal referral document and give it to the Commissioner or delegate to sign off.
- To allow for preparation of an anonymised report (AO), the Investigator will courier a hard copy of the final opinion to the Website Administrator along with emailing a link to the FO. The email to the Website Administrator should include details regarding circulation and publication (see 10.7 Anonymised opinion and media alert).
- The Investigator closes the file (see 10.6.11 Closing the file).

*Relevant template:*

- Referral to Director of Proceedings.

### 10.6.10 Distribution process for FO

Under s 43(1) of the Act, the Commissioner must advise the following parties of the results of the investigation and any proposed action:

- The complainant;
- The aggrieved person;
- The provider; and
- The regulatory authority.

The Investigator distributes the FO and advice of the decision in the following ways:

1. The Investigator sends a full copy of the FO to:
   - the complainant;

- each notified provider;[7] and
- the Coroner (if necessary in accordance with the MOU).

2. The Website Administrator sends the AO naming only the independent advisor (and group provider if appropriate), with the provider being identified in the cover email, to:
   - the provider's regulatory body;
   - the relevant professional college (only if the provider has been found in breach of the Code). This applies only to colleges where the provider is vocationally registered, e.g., RANZCOG, RNZCGP;
   - the relevant DHB (even when the provider is not an employee of that DHB); and
   - the independent advisor.
3. The Website Administrator advises the parties that the provider will be named in the cover letter.
4. The Website Administrator sends the AO, naming only the Advisor (and group provider if appropriate), to the Advisor(s) (including internal independent advisors) who advised on the case.
5. The Website Administrator can send the AO, naming only the Advisor (and group provider if appropriate), to the parties listed in the follow-up actions section of the FO. If provided for in that section, the AO will also be published on the HDC website.

### 10.6.11 Closing the file

Before a file is given to an investigations staff member with authority to close files, the Investigator must:

- Complete relevant fields of ECDS to close including:

— *"Overall outcome" on front page of ECDS.*

— *Issues and Recommendations page. NB: When entering a recommendation, if multiple recommendations these should be loaded individually.*

— *Final decision page (only relevant if the investigation is a DP referral).*

— *Review and update of complaint key words as necessary.*

- If referring to the DP, provide a hard copy of the report together with the completed and signed referral form (template found on ECDS) and investigation file to the DP. An electronic copy of the report (Word format) should also be emailed to the DP's Executive Assistant.
- Send an email to "Investigations Update" with the file name and number that has closed, and the date on which it was opened, and ensure that a Senior Investigator, Investigations Team Leader, or Investigations Project Leader with administration rights on ECDS closes the file on ECDS.
- The file is retained by the Investigator (unless a DP referral) until the recommendations have been satisfied.

[7] The exception to this is when the opinion sections are totally separate from one another, e.g., 11HDC00712.

### 10.6.12 Correspondence received on closed investigation file

Discuss with the Investigations Team Leader, Investigations Project Leader, or Associate Commissioner, Investigations as appropriate.

## 10.7 ANONYMISED OPINION AND MEDIA ALERT

### 10.7.1 Anonymised opinion

Various staff members have responsibilities in the production and review of AOs, and media alerts, but the Investigator on the file has overall responsibility for ensuring that these documents are ready for publication.

Website Administrator

- The Website Administrator anonymises the AO according to the Anonymisation Guidelines (see Reference: Guidelines for anonymising opinionsGuidelines for anonymising opinions).
- The Website Administrator emails the AO to the Investigator, Investigations Project Leader, and Senior Communications Advisor. In that email, the Website Administrator also includes any particular queries about the anonymisation. Ideally this will be four weeks before the publication date, but will depend on the date on which the documents are received by the Website Administrator.

Senior Communications Advisor

- The Senior Communications Advisor will provide the draft media alert to the Investigator for review and approval 15 days prior to the publication date. If the Investigator accepts the media alert, he or she should mark it as final on ECDS. Any questions should be directed to the Senior Communications Advisor before marking it as final.

Investigations Team

- The Investigations Project Leader will assign a "fresh eyes" investigator (2nd Investigator) to review the AO. This 2nd Investigator will review the AO, checking for compliance with the Anonymisation Guidelines (see Reference: Guidelines for anonymising opinions), and for any additional identifying details that should be removed. Any changes recommended to the AO are made in tracked changes or included as comment boxes as necessary.
- The 2nd Investigator will complete the review by the due date set by the Investigations Project Leader and will provide the AO to the Investigator.
- With consideration of the 2nd investigator's review, the Investigator reviews the AO to make sure that it is accurate and does not contain any inappropriate identifying information. The Investigator then accepts any tracked changes.
- If there are any legal concerns or significant changes these should be discussed in the first instance with the file legal buddy by the Investigator. If it is agreed that formal legal advice is required, the legal advisor will prioritise that request (the Senior Communications Advisor should be advised of any significant changes so that they can be reflected in the media alert).
- The AO should then be emailed to the Editor for a "final check". Any proposed changes should be accepted by the Investigator or discussed with the Editor.
- The Investigator then provides the AO (with the media alert) to the Commissioner or delegate, advising that the documents are ready for publication. Ideally this will be **two weeks** before the publication date.

### 10.7.2 Media alert

The media alert is drafted by the Senior Communications Advisor.

*Relevant template:*

- Media Alert

# PART 11: POST-CLOSURE ACTIONS

Recommendations are an important part of the Commissioner's work, and lead to systemic changes. The Recommendations Analyst follows up on the compliance of the recommendations made.

## 11.1 RECOMMENDATIONS AND INVESTIGATIONS FOLLOW-UP ACTIONS

Responses to recommendations

On Complaints Assessment Team files and Investigations Team files, the respective team enters the recommendations individually on the database with the corresponding due date, and the Recommendations Analyst follows up on the recommendations. Once a response to a recommendation has been received, the Recommendations Analyst should review it and ensure that what was asked for has been addressed/answered. Further information may be required from the provider.

If the response is a clinical issue, it may be appropriate for the Recommendations Analyst to ask the Independent Advisor to comment, although this would be rare.

Discussion

A case-by-case approach applies in determining whether a recommendation has been met.

Process

- If the recommendations response is adequate, the Recommendations Analyst signs out a final letter to the provider acknowledging the actions taken. This letter is drafted by the Recommendations Analyst.
- If the recommendations response from the provider is assessed as inadequate, or if there is any uncertainty, the Recommendations Analyst will liaise with the provider as necessary and seek input from others, including the in-house clinical advisors as appropriate. These letters are drafted by the Recommendations Analyst.

If the provider refuses to comply with the recommendation, it may be appropriate for the Recommendations Analyst to draft a letter to the provider, proposing to escalate to an appropriate authority to be considered by the Commissioner or delegate.

*ECDS action:*

- Update the recommendations tab on ECDS — done by the relevant Complaints Assessment staff, Investigator, Recommendations Analyst, and Recommendations Officer as required.
- Use "Not yet due" as the default for each recommendation stage; then use "Non-compliant" if you mean that the provider has not complied.
- Set due date reminders to be sent to the Recommendations Analyst.

Investigations follow-up actions

Final Opinions contain follow-up actions. Other than the standard follow-up actions that the Website Administrator completes, the Investigator is responsible for carrying out all other follow-up actions.

Referral to DP

If the provider has been referred to the DP, the Recommendations Analyst must ensure that the DP is sent a copy of any responses to recommendations.

## 11.2 SECTION 34(1)(D) RESPONSES

Section 34(1)(d) responses are managed by the Recommendations Team, which consists of a Recommendations Officer and a Recommendations Analyst. Following an assessment of the response, the Recommendations Analyst makes a recommendation to the Team Leader if there are concerns about the adequacy of the provider response.

Process

- The Recommendations Officer documents his or her review of the response and any recommendation. If the Recommendations Analyst agrees that the response is satisfactory, the Recommendations Officer will send a final letter/email to the provider acknowledging the actions taken. If the Recommendations Analyst is unsure about the response, he or she will discuss this with the Team Leader and decide on any further steps that need to be taken.
- If the provider's response is not appropriate, a member of the Recommendations Team contacts the provider to provide guidance on the further action required. This may be in the form of a telephone call, email, or letter.
- If the complainant is dissatisfied with the outcome of the provider referral, the Recommendations Officer will discuss with the Team Leader the next steps to be taken, in particular whether the preliminary decision should be revised (see PART 5: REVIEW AND REVISION OF PRELIMINARY DECISIONS).

## 11.3 SECTION 34(1)(A) REPORTS

Section 35 of the Act provides that regulatory authorities must report back to the Commissioner on any action taken in response to a referral made under s 34(1)(a). The Recommendations Analyst manages such reports. No final letter is required, although the Commissioner or delegate has the discretion to revise the preliminary decision to refer under s 33(3), if there are any outstanding concerns.

## 11.4 SECTION 37 REPORTS

Section 37(2)(b) requires the Advocacy Service to report back to the Commissioner on the outcome of all Advocacy Service referrals made under s 37 of the Act (s 37 Report). A time frame of approximately 12 weeks has been agreed with the Advocacy Service. The Recommendations Officer manages s 37 reports.

Process

- The Recommendations Officer will acknowledge receipt of a s 37 Report by email, and will file the report on ECDS and in hard copy on the file in the closed file room.
- Section 37 Reports will have the status:
  - *Resolved*
  - *Not resolved*
  - *Withdrawn*
- If a complaint is not resolved, the Advocacy Service consumer letter to the provider, the response from the provider, and any other relevant information about the process, will be attached to the advocate's email to HDC with the s 37 Report.
- If the complaint is not resolved, the s 37 Report will clearly set out the reason why. The options are:
  - *The matters being raised are more serious than understood at the time of the HDC referral, and the advocate does not consider that the complaint is suitable for resolution between the parties*
  - *The provider did not engage effectively in the advocacy process*
  - *The full advocacy process has been completed and the consumer's resolution targets were substantially met by the provider, but the consumer does not accept that the complaint has been resolved*
  - *Other.*
- The Recommendations Officer will remove the reminders in ECDS and on the hard file.
- For those s 37 Reports with the status "not resolved", the file is returned to the Recommendations Analyst for further assessment as necessary.
- Please note that when a s 37 Report is sent to HDC, this has not been provided to the complainant or provider by the advocate. The advocate has advised the complainant and the provider only that the complaint is resolved/not resolved/withdrawn, and that a report has been sent to HDC. The Recommendations Officer should send a copy of the report to the provider and the complainant if requested (s 37(4)).

*Relevant templates:*

- Generate final letter if appropriate (s 38 letter) or further information letter (s 14 letter request for information).

*ECDS action:*

- Remove reminders.

## 11.5 CORRESPONDENCE RECEIVED ON FILES CLOSED UNDER S 33(1)

Complainants who are dissatisfied with a s 33(1) decision are usually asked to put their concerns into writing. Any such correspondence is reviewed by a CAT member and discussed with their Team Leader (see PART 5: REVIEW AND REVISION OF PRELIMINARY DECISIONS).

# PART 12: OTHER REFERRALS

## 12.1 RISK OF HARM

The table in Reference: Referrals and notifications sets out mandatory and discretionary referrals and notifications.

Section 39 of the Act and s 34(2) of the HPCAA apply where there is a risk of harm. These cases are not common, but because they are mandatory and aimed at the protection of the public, any such referral should be made in a timely manner. Sometimes the risk of harm may become evident only after further information is gathered.

In the interests of fairness, normally the Commissioner will notify the provider that a s 39 referral has been made.

### 12.1.1 Poses a risk of harm — s 39(1)

The Commissioner is required to notify the appropriate regulatory authority promptly if the Commissioner has "*reason to believe that the practice of a health practitioner may pose a risk of harm to the public*". This can relate to a practitioner's fitness to practise or unethical conduct.

### 12.1.2 Are harming or likely to harm — s 39(2)

The Commissioner must notify the Director-General of Health if he or she has "reason to believe that failures or inadequacies in the systems or practices of a health provider or disability [services] provider are *harming or likely to harm* the health or safety of members of the public".

### 12.1.3 Significant breach of duty or misconduct — s 39(3)

Section 39(3) requires the Commissioner to refer a matter to an appropriate person or authority where the Commissioner considers that *"there is evidence of a significant breach of duty or misconduct"* on the part of a provider, or an officer, employee, or member of a provider organisation. This obligation exists only during or after an investigation.

**Mandatory referral letters**

*Relevant template:*

- Non Standard Letter

See Reference: Statutory Delegations for Complaints Assessment and Investigation Decisions and Processesand Reference: Delegations Chart for Commissioner and Deputies.

*ECDS action:*

- If any of the above referrals are made, ensure ECDS is flagged and update the "provider actions" drop-down list on the complaint summary page in ECDS.

## 12.2 SECTION 59(4)

Section 59 of the Act outlines the Commissioner's broad discretionary procedural powers. In particular, s 59(4) allows the Commissioner to bring a matter to the attention of any person or authority at any time, where it is considered necessary or desirable in the public interest to do so for public health or public safety or for any other reason. These referrals may be done at any stage during the assessment of a complaint, or during an investigation.

Discussion

- Unlike the other statutory referrals, this is not a referral of the complaint.
- While "the public interest" may include matters of public health or public safety, it is not limited to those issues.
- Section 59(4) referrals may be made to any person or authority. This provision is commonly used to refer matters to:
  - *a regulatory authority when, for example, the Commissioner has received a number of complaints about one provider and is concerned about the cumulative picture (see Reference: Information to be sent to Regulatory Authorities and see PART 16: RELATIONSHIPS WITH OTHER AGENCIES)*
  - *the Ministry of Health when, for example, the Commissioner has received a number of complaints about one provider and is concerned about the cumulative picture (see PART 16: RELATIONSHIPS WITH OTHER AGENCIES)*
  - *Medsafe when, for example, concerns exist about dangerous or inappropriate prescribing*
  - *HealthCert or the funding DHB when concerns exist about a residential care facility (see 16.3 HealthCERT and other funding agencies )*
  - *the District Inspector when concerns exist about a consumer subject to compulsory assessment and treatment under the Mental Health (Compulsory Assessment and Treatment) Act 1992 (see 16.5 District Inspectors (Mental Health)).*

Process

There is no requirement for the agency to report back on the steps taken in response to this referral; however, notification of any action taken is often requested.

**Section 59(4) letters**

*Relevant templates:*

- S59(4) referral_in public interest
- S59(4) referral_number of complaints received
- S59(4) referral_rest home complaints
- Referral to District Inspector

See Reference: Statutory Delegations for Complaints Assessment and Investigation Decisions and Processesand Reference: Delegations Chart for Commissioner and Deputies.

Copies of the complaint, provider response, any independent advice, and the decision letters to the parties involved, where available, should be sent to the agency if required under the relevant MOU or if appropriate.

If the referral also relates to past complaints, the complaint numbers and summaries for each complaint, together with copies of each decision letter, should be provided.

*ECDS action:*

- If any of the above referrals are made, update the "provider actions" drop-down list on the complaint summary page in ECDS.

# PART 13: FILE MANAGEMENT

## 13.1 INTRODUCTION

For each complaint,[8] there are two files — paper and electronic. The electronic record is contained in HDC's complaints management system, ECDS. There is a manual on using ECDS (see Reference: ECDS training manual (NB: under review)). The process for creating the physical and electronic files is covered in 3.1 Complaints — initial review.

It is important that actions on an enquiry/complaint are recorded on ECDS and on the file. From a practical point of view, this is so that, at any time, the Commissioner (or other staff who need to) may ascertain what communication has been entered into, and what actions have been taken or are planned.

There are also legal reasons for keeping accurate and current records (see PART 14: GENERAL LEGAL PRINCIPLES, 13.4 Filing, and 13.5 File notes).

## 13.2 INVESTIGATIONS PHYSICAL FILE SET-UP

As part of the initial assessment when a file is received by an Investigator, the Investigator should consider reorganising the file under the following tabs:

- Admin
- Complaint
- Notification letters
- Parties — all parties are then allocated a separate tab under this section
- Independent advice[9]
- Legal advice
- Provisional opinion
- Response (to provisional opinion)
- Final opinion
- AO (Anonomysed Opinion)
- File notes



[8] Enquiries may be managed purely in ECDS, but in some rare instances it is also necessary to maintain a physical file. Enquiries and complaints are discussed in PART 2: INITIAL CONTACT.
[9] Please note that "experts" are usually referred to as independent advisors in all correspondence.

## 13.3 INTERNAL UPDATES

### 13.3.1 Updating ECDS

ECDS stages should be kept current. Each time an action is undertaken, the Investigator/Complaints Assessor should consider whether the stage on ECDS needs to be altered (see Reference: ECDS training manual (NB: under review)). When an investigation is notified, the Investigator must change the Complaint Type from Non-investigation to Investigation and complete the date of notification field.

Throughout the investigation process, the Investigator should amend key words as appropriate.

### 13.3.2 Investigations internal updates

With the purpose of keeping relevant internal parties (i.e., Team Leader and Legal) the Investigator must send an email to "Investigations updates" when:

- A complaint has been notified
- A PO has been circulated
- An investigation has closed

## 13.4 FILING

It is important that all information is kept on both ECDS and physical files (see PART 13: FILE MANAGEMENT).

### 13.4.1 Paper filing

Any paper material received in relation to the file must be filed in the physical file under the correct tab. This must also be scanned into ECDS (see 13.4.2 Scanning correspondence and documents).

### 13.4.2 Scanning correspondence and documents

All material received must be scanned by the recipient and inserted into the relevant action note.

### 13.4.3 Clinical records

Where a large bundle of clinical records is received, the Investigator/Complaints Assessor files it in a separate hard copy folder, and clearly marks it with the complaint number. It should also be annotated so that it is clear how many physical files there are, e.g., "Smith Clinical Records, File 2 of 3".

Where clinical records are received from a number of different providers, the Investigator/Complaints Assessor should make sure that it is clear which records have been provided by which provider.

When clinical records are received, the Investigator/Complaints Assessor must check them to ensure that they are complete, in a logical and chronological order, and are legible. If the records are not legible, the Investigator/Complaints Assessor should request that the relevant provider transcribe them.

## 13.5 FILE NOTES

The Investigator/Complaints Assessor or other relevant person should ensure that all actions taken on the file are recorded with a file note. This includes telephone conversations and meetings with external people (including the complainant or provider), as well as internal discussions where a course of action has been agreed on.

As a general rule, under the Privacy Act, anyone is entitled to information HDC holds about them. In addition, the Commissioner is subject to the OIA, and so third parties may also be entitled to obtain information from HDC (see 14.4 Privacy and Reference: Privacy Policy and Reference: Reportable Events Policy). A file note should be an accurate, professional summary of discussions or actions. It should avoid comment or speculation.

## 13.6 COMMUNICATION WITH PARTIES

### 13.6.1 Unreasonable conduct

In some situations, parties may exhibit unreasonable conduct in interactions with staff at HDC, such as persistent contact, abusive communication, or threats of self-harm. These communications may be encountered in writing, or verbal via telephone or face to face. It is important that the Investigator/Complaints Assessor or other relevant person record all verbal communications — including those with parties exhibiting unreasonable conduct — objectively and accurately. Staff should refer to the Health and Safety Policy for guidance and the process on managing unreasonable complainant conduct (see Reference: Health and Safety Policy).

Where an individual makes a threat to harm himself/herself or another person, then the matter should be escalated by the Investigator/Complaints Assessor or other relevant person in accordance with HDC's reporting process (see Reference: Reportable Events Policy).

## 13.7 CHECKLIST BEFORE CLOSING A FILE

### 13.7.1 Complaints Assessment Team

Before a Complaints Assesor gives a file to a Senior Complaints Assessor or Team Leader to close, the Complaints Assessor should complete the closing checklist.

### 13.7.2 Investigations

(See 10.6.11Closing the file.)

# PART 14: GENERAL LEGAL PRINCIPLES

## 14.1 NATURAL JUSTICE

All decisions of the Commissioner must comply with the requirements of the Act, as well as the rules of natural justice.

### 14.1.1 Right to be heard

The most fundamental rule of natural justice is the right to be heard before decisions are made adverse to one's interests. This means, in short, that people or organisations must have the opportunity to present evidence to answer the case against them before a decision is made. This requires those parties to be given adequate notice of the case against them, including the legal and factual issues being considered, the consequences that may follow from an adverse decision, and what will happen if they do not participate (i.e., the Commissioner may consider the matter in the absence of response).

### 14.1.2 Proper consideration of the evidence

Natural justice requires that the Commissioner properly consider the evidence in making any decision. In particular, the evidence must be:

- logical (make sense);
- reliable (can be trusted); and
- logically probative (answers the allegation or counter allegation in a way that makes sense).

Evidence should be discounted if it is:

- irrelevant; or
- unreliable.

### 14.1.3 Unbiased consideration

Natural justice also requires that a person be heard by an unbiased impartial body. The appearance of impartiality is also important. Impartiality may be compromised by:

- Pecuniary interest — a person should not be involved if he or she stands to gain or lose financially.
- Personal interest — a person should not be involved if a member of his or her reasonably immediate family has an interest in the outcome.
- Personal involvement — a person should not be involved if he or she has personal ties of friendship or kinship to a party.
- Personal animosity — a person should not be involved if he or she has come across a party previously and has animosity towards that party.
- Pre-judgement — a person should not be involved if he or she has pre-conceived opinions about a case or holds a rigid opinion prior to hearing all of the evidence.

## 14.2 CONFLICTS OF INTEREST

The Commissioner acknowledges his/her obligations under the State Services Code of Conduct, which requires employees and other workers to act with impartiality and neutrality in carrying out the Commissioner's functions.

In order to ensure that these obligations are met continually, employees and other workers are required to disclose any personal interests that may compromise or appear to compromise the Commissioner's impartiality and/or neutrality.

Human Resources (HR) Policy documents set out the expectations on staff regarding disclosure of personal interests (see Reference: Conflicts of Interest Policy). The Conflicts of Interest Policy contains the process where a staff member has a personal interest relating to a particular complaint.

## 14.3 ADVERSE COMMENT — S 67

Section 67 of the Act provides that the Commissioner may not make any comment that is adverse to any person in any report or recommendation made under s 14, s 45 or s 46(2)(b) of the Act, unless:

- That person has been given a reasonable opportunity to be heard and to provide a written statement in response to the adverse comment; and
- The written statement, or a fair and accurate summary of that statement, is included in the report or recommendation.

This requirement applies only to comments made by the Commissioner rather than comments made by others to the Commissioner, for example, as part of independent advice or other responses.

## 14.4 PRIVACY

All staff must be mindful about the sensitive nature of the information that is handled on a day-to-day basis at HDC, as the proper management of confidential information is critical to the operation and reputation of HDC.

Before any confidential information is communicated to any recipient, the HDC employee or other worker responsible must ensure that there is a legal basis to release that information to that recipient. Particular care must be taken in releasing confidential information to third parties.

HR Policy documents (see Reference: Privacy Policy and Reference: Computer Use and IT Security Policies) set out the requirements in relation to privacy and confidential information, protecting that information within and outside HDC's offices, sending confidential information, and accessing confidential information. It is essential that all HDC staff have a comprehensive understanding of the detailed processes set out in those policies.

In addition to the more general expectations set out in the Privacy Policy:

- When a complainant or provider updates his/her/its address, this should be amended on ECDS immediately, with a note made that this has been done, by whom, and on what date.

- Letters should be generated using ECDS and template letters rather than copying previous letters. Before letters are sent, they should be checked to ensure that they are addressed to the correct person.
- When sending a copy of a complaint or a s 38(1) letter to multiple providers, those parts of the document relating to other providers may need to be redacted to protect the privacy of each provider.
- It may be appropriate to redact the provider's personal information from the complaint or correspondence before sending to other parties.
- In the case of third-party complaints, redact the complainant's personal information from the complaint and any other correspondence sent to the provider/s and keep a copy of the redacted information on file.
- Consideration should be given to redacting personal information about the consumer if sending information to a complainant who is not the consumer.
- When sending by courier, all correspondence should be placed in an addressed plain envelope and then put into a CourierPost bag. Both must be stamped "private and confidential" and "To be opened by addressee only", with the exception of when the correspondence is being sent to the CEO of a DHB.
- Scanned documents must be given an appropriate and meaningful name before being sent or saved on ECDS.

HDC's Reportable Events Policy (see Reference: Reportable Events Policy) sets out the process for reporting "Reportable Events", which are defined as any event that results in an increased risk for HDC, or that highlights an area of potential risk for HDC, including an event where there may be a risk of harm to an individual. Examples of such events are set out in the Policy, and include where an individual's or organisation's confidential information has been, or appears likely to have been, provided to someone other than that individual or organisation without lawful authority for that disclosure.

**Reportable Events**

*Relevant template:*

- Legal Advice Request/Reportable Events — Privacy

# PART 15: LEGAL ADVICE

## 15.1 THE LEGAL TEAM

HDC has an in-house Legal Team based in Wellington. The Legal Team is available to give immediate advice in person, over the phone, by email, or through formal requests for legal advice. Simple advice requests are managed by the "duty legal advisor", who is the first contact point for any "informal" legal queries from the CA Team.

Any requests for advice by the Investigations Team should primarily be made to the legal advisor "buddy" on the particular investigation file. If there is no buddy allocated, the request should be made to the duty legal advisor.

Requests for formal written advice is actioned by using one of the templates provided in ECDS. The formal advice request should be sent to a legal Team Adminstrator at hdclegal@hdc.org.nz. The request will then be allocated to a legal advisor, who will contact the requestor to discuss the request and/or provide a response within the agreed time frames.

## 15.2 WHEN TO SEEK LEGAL ADVICE

### 15.2.1 Complaints Assessment Team

Formal legal advice should always be sought in the following circumstances:

- Requests for information from HDC that are to be considered under the Official Information Act or Privacy Act. These must be sent to the Legal Team (hdclegal@hdc.org.nz) as OIA or PA requests (see 17.3 External requests for information from HDC). The OIA/PA Legal advice request should be completed, to include the request and the information requested. Requests do **not** need to be sent to the Legal Team where:
  - *the information requested has already been provided to a party to the complaint by HDC (for example, a copy of the Commissioner's decision letter that was sent previously); or*
  - *the person requesting the information provided it to HDC initially (for example, a copy of the original complaint may be provided to the complainant on request); or*
  - *the file holder believes the information is necessary for the requestor to participate in the complaints process.*
- Complaints that may be considered under the Protected Disclosures Act (i.e., from an employee or ex-employee about the actions of his or her employer; see 17.1.4 Protected Disclosures Act ). The Legal Team can be contacted to discuss these situations.
- Correspondence from the Ombudsman or Privacy Commissioner relating to one of the Commissioner's decisions.

In addition, formal legal advice may be sought on a number of other issues, for example:

- Third-party complaints (see 17.1 Third-party complaints).
- Jurisdictional issues, including pre-1996 complaints.

- Threats or other matters that make it necessary to liaise with another agency (e.g., the Police, Oranga Tamariki — Ministry for Children).
- Correspondence containing a serious threat of legal action.
- Correspondence from Members of Parliament.
- Matters with media involvement.
- Conflict of interest allegations.

Process

The template legal advice request on ECDS should be completed before referring a file to the Legal Team for consideration. All formal written requests for legal advice should be sent to the Legal Team Administrator at the email hdclegal@hdc.org.nz.

**Requesting legal advice**

*Relevant Legal Advice Requests templates:*

- Review of file
- Jurisdiction query
- OIA /PA request
- Pre-1996 complaint
- General

*ECDS action:*

- When legal advice is sought (other than OIA/PA request), set file stage to *Legal advice_awaiting advice_CAT* or *Awaiting legal advice_INV.*
- If appropriate, add adminstrative note — File in overnight bag.

### 15.2.2 Investigations

Legal advice or review must be sought as per the review process set out in 10.5.3 Legal review (provisional opinions) and 10.6.6 Review process for a final opinion (Legal review).

All FOs should be peer reviewed by another investigator before being sent to the Investigations Team Leader, Investigations Project Leader, or Associate Commissioner, Investigations.

The peer reviewer:

- Reads and considers the responses to the PO;
- Reviews the executive summary;
- Reviews the "Responses to provisional opinion" section;
- Reviews the cover letters; and
- Ensures that all "provisional" language has been removed from the FO.

The Investigations Team Leader, Investigations Project Leader, or Associate Commissioner, Investigations then reviews the FO before it goes to the Legal Team or the Commissioner or delegate.

Legal review (final opinions)

(See 10.6.6 Review process for a final opinion (Legal review).)

Consideration of obtaining legal advice or review should also take place where there is doubt as to the legal entity to be notified. (see PART 7: NOTIFICATION OF INVESTIGATION).

# PART 16: RELATIONSHIPS WITH OTHER AGENCIES

## 16.1 REGULATORY AUTHORITIES

Regulatory authorities under the HPCAA include:

- Chiropractic Board
- Dental Council (regulates dentists, dental specialists, dental therapists, dental hygienists, clinical dental technicians, and orthodontic auxiliaries)
- Dieticians Board
- Medical Council
- Medical Radiation Technologists Board
- Medical Sciences Council (regulates laboratory technicians)
- Midwifery Council
- Nursing Council
- Occupational Therapists Board
- Optometrists and Dispensing Opticians Board
- Osteopathic Council
- Pharmacy Council
- Physiotherapy Board
- Podiatrists Board
- Psychologists Board
- Psychotherapy Board.

While regulatory authorities for other providers may be introduced, currently there are common providers of health services that are not regulated. These include audiologists, acupuncturists, practitioners of traditional Chinese medicine, and counsellors. Some social workers provide counselling, and so are registered under the Social Workers Registration Board. See the MOH website for an updated list of regulatory bodies.

### 16.1.1 Section 64(1) of the HPCAA

Some complaints are received from the regulatory authority, under the statutory obligation to forward some complaints to the Commissioner. Section 64(1) of the HPCAA states:

> "Whenever *the responsible authority receives a complaint alleging that the practice or conduct of a health practitioner has affected a health consumer, the authority must promptly forward the complaint to the Health* and Disability Commissioner."

Process

- The regulatory authority should be copied into the acknowledgement letter to the complainant.

- The regulatory authority is notified of the results of the referral at the end of the assessment process. This involves sending the regulatory authority:
  - *A letter to notify the regulatory authority of the Commissioner's decision, noting that it may now take any action it deems appropriate*
  - *Copies of the decision letters to the provider and complainant*
  - *A copy of any independent clinical advice received*
- Where the regulatory authority refers a complaint after the Commissioner has assessed and closed the complaint, it is appropriate to provide it with a copy of the decision letter.

### 16.1.2 Memoranda of understanding

The Commissioner has entered into memoranda of understanding (MOU) with various regulatory authorities (see Reference: Memoranda of Understanding (MOU)). The purpose of these is to guide the interaction between those regulatory authorities and the Commissioner and record how complaints and concerns about the competence of individual providers should be dealt with.

The most relevant provisions relate to the Commissioner's agreement to notify the relevant authority where the Commissioner becomes aware of three or more "similar low level" incidents relating to the same practitioner within the previous five years (see 12.2 Section 59(4)). The letter to the regulatory authority should include a full summary of the matters being referred in the letter and/or copies of the Commissioner's decision letter of each complaint that led to the referral (see Reference: Information to be sent to Regulatory Authorities). If possible, the regulatory authority should be provided with the complaint letter, and the provider responses for each complaint included in the referral. Any personal information relating to other parties that is not relevant to the referral must be redacted.

In order to facilitate this, where a complaint involving a medication error has been closed under s 38(1) No Action, the Pharmacy Council should be informed via s 59(4) letters and provided with a copy of the complaint, decision letters, and the pharmacy's relevant standard operating procedures. The MOU notes that the Pharmacy Council should review the standard operating procedures to ensure that they are appropriate. The Pharmacy Council will provide the Commissioner with a copy of its review and the letter to the pharmacist when asked by the Commissioner to report on what action was taken.

## 16.2 CORONER

### 16.2.1 Memorandum of understanding

The Commissioner has an MOU with the Office of the Chief Coroner (see Reference: Memoranda of Understanding (MOU).

The purpose of the MOU is to improve information sharing between Coroners and the Commissioner, and to facilitate the coordination of investigations where a person has died in circumstances involving a health or disability service, to avoid unnecessary duplication of processes.

Discussion

The MOU requires the Commissioner to inform the Office of the Chief Coroner when a complaint relates to a death that occurred:

- During or as a result of medical or surgical or dental treatment (such as allegations that medication, treatment, or rest home care caused death).
- As a result of anaesthetic or medicine.
- As a result of pregnancy or birth (including babies born alive then dying allegedly as a result of poor care but not still births).
- During compulsory care or treatment, i.e., the consumer was under the Mental Health (Compulsory Assessment and Treatment) Act 1992 (the MHA) or the Intellectual Disability (Compulsory Care and Rehabilitation) Act (2003).

The MOU requires the Office of the Chief Coroner to notify the Commissioner of reported deaths where the Commissioner is already involved or where the death appears to involve issues about the care and treatment of a health or disability services consumer.

Where the Office of the Chief Coroner and HDC have been notified of the same matter, the Coroner's inquiry generally takes precedence where the Coroner is required to conduct an inquiry (if the death appears to have been self-inflicted or a death in official custody or care), or the cause and circumstances of death are the key issues, or when the circumstances of death span the jurisdiction of two or more investigating agencies. The Commissioner's process should take precedence when the quality of health or disability services is the key concern.

Process

Where the Commissioner has received a complaint involving a death in any of the circumstances outlined above, the Team Leader — Complaints Assessment will provide the nominated contact person at the Office of the Chief Coroner with the name of the consumer and the circumstances of his or her death.

If the Office of the Chief Coroner informs HDC of a death that relates to an existing complaint, the notification is placed on the complaint file. If there is no existing complaint, it is is discussed with a Team Leader.

The following procedure applies where a complaint has had coronial involvement:

- The Complaints Assessment Administrator contacts the Judicial Support Manager at the Coroner's Office for further information.
- The Complaints Assessment Administrator then adds the complaint to the Coroner Contact spreadsheet and assigns the file to the Team Leader.
- The Team Leader contacts the Judicial Support Manager or the Personal Assistant to the Chief Coroner to discuss which of the two agencies will take the lead in assessing the issues raised.

Where it is agreed that the Coroner's investigation will take precedence, the complaint should be closed in accordance with s 38(1) No Action (see 4.9 No action). The complainant should be advised that he or she can write to HDC again if dissatisfied with the outcome of the coronial process. Under the MOU, where HDC is or has been involved, or where the death involved

issues about the care and treatment of a health or disability services consumer, or where the inquiry raises issues about the quality of a health or disability service, the Coroner will forward a copy of his or her findings to HDC when available. If a new complaint is opened, the provider should be removed from the original complaint and a handling matter made noting the provider's name.

In some cases, the Coroner and the Commissioner will assess the complaint concurrently.

### 16.2.2 Assessment of complaint

The following procedure applies where the Commissioner looks into the complaint:

- The Coroner may have indicated if the family of the deceased consumer wish to be involved in the complaint, or whether the Coroner has advised the family that s/he will be sending the complaint to HDC. Where family contact details have been provided, the Complaints Assessor should contact the family to confirm that HDC has received the complaint from the Coroner.
- If there is no indication of family involvement or contact details have not been provided, the Team Leader will contact the Coroner and ask the Coroner to invite the family to contact HDC if they wish to be involved in the complaint.
- Lack of family involvement or support for the complaint (either by the family or the consumer's personal representative) does not mean that HDC cannot assess the complaint.
- The complaint is assessed in accordance with the usual processes.
- The Complaints Assessment Administrator is responsible for ensuring that the relevant Coroner is updated on the progress of the complaint every two months, and for recording this on the spreadsheet. Once the complaint is allocated to a Complaints Assessor, the Complaints Assessor should liaise with the Complaints Assessment Administrator regarding this.
- On completion of the Commissioner's assessment process or investigation, the relevant Coroner and the Office of the Chief Coroner must be sent a copy of the decision (via email to the Coroner's Case Manager). If the family has been involved in the complaint, then consideration must be given to sending a copy of the decision to the family involved (see 17.1.1 Disclosure of information to complainant).

## 16.3 HEALTHCERT AND OTHER FUNDING AGENCIES

It is HDC's practice to inform funding agencies (DHBs, ACC, MSD) and/or HealthCERT of complaints about aged care and other residential care facilities. These agencies are notified under s 59(4) once the Commissioner has made a decision to close the complaint (see 12.2 Section 59(4)). HealthCERT can ask the service provider's designated auditing agency to review standards related to the complaint at the time of the next audit of the facility. The Complaints Assessor should consider whether to notify HealthCERT at an earlier stage if the aged-care facility has an upcoming audit, or where similar concerns have been made about the provider.

Process

- The Complaints Assessor sends cover letters to the funding agency and HealthCERT, along with copies of the complaint and, if relevant, the decision letter.

- Both the complainant and provider are to be informed of the s 59(4) referral.

*Relevant template:*

- s 59(4) Referral_in public interest.

*ECDS action:*

- Update the "provider actions" drop-down list on the complaint summary page in ECDS.

## 16.4 COMPLAINTS INVOLVING ACC/WINZ

The Commissioner receives many complaints involving ACC. Principally these take one of two forms:

- Complaints about ACC's decisions, processes, or the actions of a case manager or other ACC employee. As ACC is not considered to be a provider of health or disability services, these complaints are outside jurisdiction (see 2.2.4 Jurisdiction).
- Complaints about an assessment conducted by a health or disability service provider for the purposes of an ACC decision may be in jurisdiction, but may be more appropriately dealt with by another body.

Similar considerations apply to complaints involving WINZ.

- Decisions made by WINZ on medical grounds can be reviewed by the Medical Appeals Board. Although members of the Medical Appeals Board are usually health or disability services providers, complaints about their conduct or decision-making as a member of the Medical Appeals Board are outside the Commissioner's jurisdiction, as there is no health or disability service.

## 16.5 DISTRICT INSPECTORS (MENTAL HEALTH)

District Inspectors are lawyers appointed by the Minister of Health under the MHA. Their role is to receive and investigate complaints by people subject to compulsory assessment and treatment about alleged breaches of their rights under the MHA and other matters relating to their care and treatment under the MHA.

District Inspectors provide an important safeguard of the rights of patients being treated under the MHA, regardless of whether treatment is within an inpatient unit, a forensic unit, or the community.

If there are questions about jurisdication, the Mental Health Commissioner and the Director of Mental Health will consult. Consideration should be given to discussing the complaint with the relevant District Inspector if the Commissioner decides to refer the complaint to the District Inspector. That referral will be made under s 59(4) (see 12.2 Section 59(4)).

*Relevant template:*

- s 59(4) referral_to District Inspector

# PART 17: MISCELLANEOUS INFORMATION

## 17.1 THIRD-PARTY COMPLAINTS

Often complaints are lodged by a friend, relative, or spouse of a consumer, or another agency, for example the Coroner or a regulatory authority.

If the complainant is a third party, it is necessary to ascertain:

- Whether or not the complainant is entitled to the consumer's personal health information.
- Whether or not the consumer supports the complaint.

If the complaint is received from the Coroner, it may be appropriate to contact the deceased consumer's family (see 16.2 Coroner).

### 17.1.1 Disclosure of information to complainant

Personal health information or any other confidential information provided to HDC should not be disclosed to anyone without the authority to receive that information. However, if the complainant is already aware of the information, usually it can be disclosed to the complainant.

The following table sets out the general approach to be taken in relation to sharing information with third parties. If you are unsure, seek legal advice.

| Situation | General approach regarding disclosure to third parties |
|---|---|
| Competent consumer over age 16 years | • May disclose only if consumer gives authority. |
| Consumer under age 16 years | • May disclose to parent or legal guardian.<br>• Note: in some circumstances it will not be appropriate to disclose health information to a parent even when a consumer is under the age of 16 years. If this issue arises, seek legal advice.<br>• May disclose to another third party with the parent's, legal guardian's or (where appropriate) child's authority. In this case, ask for confirmation of this authority. |
| Deceased consumer | • May disclose to executor or administrator of estate (personal representative) where one exists. In this situation, it is important to confirm who the personal representative is. Depending on the situation, it may also be necessary to request a copy of the will or letters of administration showing who the personal representative is.<br>• May disclose to another third party with the personal representative's authority. In this case, it is necessary to confirm that the person giving authority is the personal representative. |

| | |
|---|---|
| | • If there is no personal representative, the information may be disclosed on the ground that it is directly related to one of the purposes in connection with which the information was obtained. |
| Consumer who has been assessed as incompetent | • If the consumer has been assessed to be incompetent under the terms of the Protection of Personal and Property Rights Act 1988, information may be disclosed to an EPA or Welfare Guardian. Confirmation of both the appointment of that person as EPA or Welfare Guardian and, in the case of EPA, the assessment of the consumer as incompetent should be obtained.<br>• Information may be disclosed to a third party with the EPA's or Welfare Guardian's authority. In this case it is necessary to confirm that the person giving authority is the EPA or Welfare Guardian. |
| Consumer who appears to be incompetent | • There is a legal presumption that a consumer is competent and therefore able to give authority. Where the consumer is clearly unable to give his or her authority to disclosure, the information may be given to a person "appearing to be lawfully acting on the individual's behalf or in his or her best interests". In this situation, consider seeking legal advice. |

### 17.1.2 Whether the consumer supports the complaint

While consumer support is not always determinative, it is an important factor that is taken into account when deciding whether or not to take any action on a complaint. From a practical perspective, a lack of consumer support may make it difficult to gather the information needed to assess the complaint properly, and, without input from the consumer him/herself, there may be insufficient supporting evidence to establish exactly what occurred.

It is more likely that the Commissioner will proceed with a complaint without consumer support if the complaint raises serious issues.

*ECDS action:*

- Where consumer support is required on a file and the consumer has been asked to contact the Office, the file owner should create a handling matter on ECDS noting that this information is needed, in case the consumer contacts the Office.

### 17.1.3 Complainant anonymity/confidentiality

Dealing with anonymous/confidential complaints

Occasionally the Commissioner receives complaints where the complainant has either not revealed his or her name or requested that his or her identity not be disclosed to the provider.

It can be difficult to assess such complaints, and the principles of natural justice require that the provider be given an opportunity to respond to the complaint. If the provider is unaware of the complainant's identity, this may limit the provider's ability to address the issues raised. As a result, usually the Commissioner progresses such complaints only where:

- There is independent evidence of the concerns raised (for example, clinical notes or another witness).
- There are sufficient public safety concerns.
- The Protected Disclosures Act 2000 applies (see 17.1.4 Protected Disclosures Act).

If a decision is made to proceed with an assessment of the complaint, the complainant must be made aware of the possibility that the provider will identify him or her from the details of the complaint.

If the complaint is about a hospital or rest home, and involves a number of consumers, or suggests that statutory obligations have not been met, generally it will be appropriate to notify HealthCERT and the funding DHB, in accordance with s 59(4) of the Act (see 12.2 Section 59(4)).

### 17.1.4 Protected Disclosures Act

Some complaints to the Commissioner are made by employees or former employees about their employer. The Protected Disclosures Act 2000 (PDA) sets out certain criteria which, if met, require the Commissioner to keep the complainant's identity confidential.

If a complainant complains about his or her employer or former employer and indicates that he/she wants his/her name to remain confidential, legal advice should be requested to establish whether the complaint can be managed under the PDA.

Process

If following legal advice it is established that the complaint attracts the protections of the PDA, then the file should be allocated to a named complaints assessor:

- The named complaints assessor is the only person permitted to contact the complainant.
- The named complaints assessor should encourage the complainant to send all details of the complaint in writing. If the complainant makes an oral complaint, the named complaints assessor should send a follow-up letter setting out the details of the complaint to the complainant at a secure address.
- The named complaints assessor must arrange for the removal from HDC's database the name of, and all correspondence with, the complainant. That information must be stored in an electronic folder that is accessible only to the named complaints assessor and the Associate Commissioner, Legal.
- The named complaints assessor must include on ECDS a handling matter that this complaint is a protected disclosure.
- Any electronic information related to the complaint stored on ECDS must be recorded under "unknown" (note: the complaint summary should not contain any identifying details of the complainant).
- All physical information related to the complaint must be stored in a designated locked safe whenever it is not being used.

- The named complaints assessor must ask the complainant for a secure address to which correspondence can be sent.
- Any physical correspondence to the complainant must be sent in a plain envelope.
- Any information related to the complaint that is to be transferred between HDC's offices should be transferred in a locked overnight bag.

Once all information is received in relation to the complaint, the named complaints assessor must consider with legal advice whether the complaint falls within the Commissioner's jurisdiction and whether HDC is the most suitable agency to assess the matters disclosed, and then should discuss the matter and any appropriate action with the Commissioner or Deputy Commissioner as soon as possible.

**Transfer:**

If the complaint falls outside the Commissioner's jurisdiction or HDC is not the most suitable agency to assess it, the complaint can be transferred to another "appropriate authority". The named complaints assessor should discuss the matter and any appropriate action with the Commissioner or Deputy Commissioner as soon as possible.

Process

If the matter is to be transferred to another authority:

- Before providing any information about the complaint to the authority, the named complaints assessor must determine who at that authority is authorised to receive a protected complaint in accordance with that authority's internal procedures;
- The named complaints assessor must send a copy of the original physical information held by HDC to the authority by courier in a package marked as confidential. Receipt of the information should be confirmed; and
- The complainant must be informed that the complaint has been transferred, and the reason for transfer.

**Investigation:**

If the Commissioner decides to investigate the complaint:

- A Commissioner's own initiative investigation is commenced;
- The named complaints assessor will provide the Investigator with relevant information to enable the matter to be investigated, and will ensure that any information provided has the complainant's name redacted (for example, complaint summary and responses from provider); and
- The Investigator will then be the only person permitted to liaise with the complainant and to process any requests for information in relation to the complaint. A separate physical file must be maintained by the Investigator for this purpose.

## 17.2 COMPLAINTS FROM PRISONERS

Process

- All correspondence to prisoners must be put in a sealed envelope, which is sent with a covering letter to the prison manager.
- A list of Department of Corrections contacts is available in the Useful Contacts List, which is stored on the X drive. (See X:/Complaints Resolution — new file plan/Complaints Assessment Work/Contacts/Master CAT Team — contacts list. NB: This list is updated by the CA Team and CA Team should have a shortcut to this file on their desktop.)

**Letters to Prisoners**

*Relevant template*:

- Cover Letter to Prison Manager enclosing letter to prisoner.

## 17.3 EXTERNAL REQUESTS FOR INFORMATION FROM HDC

The Commissioner has obligations under both the OIA and PA. This means that any and all information held by HDC may be requested and/or disclosed under those Acts. An individual is entitled to receive their personal information, and official information must be made available unless there is a good reason for withholding it. However, both Acts provide a number of reasons for withholding information in particular circumstances.

Discussion

Requests may be made verbally or in writing, and may or may not specifically refer to the OIA or PA. When a request for information held by HDC is received from any person or agency, consider the different ways of disclosure (e.g., HDC Act, other legislation, information-sharing agreement, formal OIA/PA response, the request is for another copy of information previously provided). If you have any questions, contact the Legal Team as soon as possible.

Requests for statistics or information about HDC's internal procedures should be treated as formal OIA requests to ensure that responses are complete, accurate, and reviewed by all relevant areas of HDC.

Process

- The person who received the request should consider clarifying the scope of the request if it is too broad or unclear.
- If the request is to be considered as a formal OIA/PA, the template for legal advice for a PA/OIA request should be completed.
- A link to the legal advice request should be sent to the Legal Team promptly, including electronic copies or ECDS links to the information requested.

*Relevant template:*

- Legal advice request — OIA PA request.

*ECDS action:*

- Record relevant details of request on ECDS.

# PART 18: REFERENCE DOCUMENTS

| References: Click on description for link to document | Location |
|---|---|
| HDC website | hdc.org.nz |
| Code of Health and Disability Consumers' Rights | hdc.org.nz/your-rights/about the code |
| Statutory Delegations for Complaints Assessment and Investigation Decisions and Processes | Intranet |
| Delegations Chart for Commissioner and Deputies | Intranet |
| 9.0 Conflicts of Interest Policy | Intranet |
| 15.0 Privacy Policy | Intranet |
| 12.0 Health and Safety Policy | Intranet |
| 16.0 Computer Use and IT Security Policies | Intranet |
| 20.0 Reportable Events Policy | Intranet |
| Emergency Procedures Information Pack | Intranet |
| Unsafe visitor process | Intranet |
| Triage and closure form | Intranet |
| ECDS training manual (NB: under review) | Intranet |
| In-house advisor guidance for obtaining clinical notes and information (NB: under review) | Intranet |
| Referrals and notifications | Intranet |
| Information to be sent to Regulatory Authorities | Intranet |
| Suggested discussion points for CAT telephone conversations about referring to Advocacy Service | Intranet/Advocacy Service Information |
| Advocacy Service s 37 provider leaflet "What happens next …" | Intranet/Advocacy Service Information |
| Guidelines for Independent advisors | hdc.org.nz/news & Resources |
| Process for off-site interviews | Intranet |
| Recommendations clause bank | Intranet |
| Naming Policy | hdc.org.nz/decisions/naming-policy |
| Guidelines for anonymising opinions | Intranet |
| Memoranda of Understanding (MOU) | Intranet |