



Health and Disability Commissioner  
*Te Toihau Hauora, Hauātanga*

Excerpt of

# Standard Operating Procedure

## 9.5.8 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 CourierPost. 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 expert advice) that relates directly to that provider. The complainant should receive only a copy of the “information gathered” section — the cover letter explains why. The complainant should not receive a copy of the expert advice report at this stage.

Generally, the Commissioner gives all parties 15 working days to respond to the PO.

The Investigator may distribute a PO in electronic form with the approval of the Investigations Manager. 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.

Approved: April 2017

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### 5.2 Provisional Report

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#### Report Subject to Senior Investigation Review

At the conclusion of an investigation the investigation officer shall prepare a draft report for the Commissioner's consideration. Before being sent to the Commissioner the report shall be carefully proof read and reviewed by the Senior Investigation Officer who shall sign the cover sheet to this effect. Facts must be checked as correct and the Senior Investigation Officer must record on the cover sheet whether he or she is in agreement with the report outcome.

After review by the Senior Investigation Officer the draft report and file shall be forwarded to the Legal Division for legal review of its content prior to being sent to the Commissioner. This review will be undertaken with urgency and the report and file forwarded to the Commissioner by the Legal Manager on its completion. Any suggested amendments will be marked up on the report for the Commissioner's consideration.

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#### Commissioner Review

On the basis of the draft report and file the Commissioner shall form a provisional view on whether there has been a breach of the Code. Any amendments made by the Commissioner to the draft report shall be discussed with the investigation officer who will arrange typing and check for accuracy.

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#### Provider Response

In all cases the Commissioner's provisional report shall be sent for comment to the provider against whom there is a finding of breach of the Code prior to its finalisation.

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#### Complainant Response

A provisional report may occasionally be sent for comment to the complainant where no breach of the Code is found. This will depend on the circumstances and will usually occur where the matter is complex, or serious, or the facts are contentious. The letter to the complainant should advise that the report will be finalised if no further relevant information is provided by a set date.

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The general practice is not to advise the complainant that a provisional report has been sent, but if necessary to advise that further comments are being sought. This is to avoid problems which may arise if, for example, a complainant is advised of a provisional breach opinion but that opinion is subsequently altered in light of comments by the provider. (The same principle applies if the provider is informed of a provisional no breach opinion which is later reversed.) However, while the opinion itself should not be sent, the provisional findings of fact may sometimes be sent to the complainant, especially where these are in dispute.

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#### Covering Letters

The party to whom the provisional report is sent shall be advised in a covering letter, using the standard format, that this is an opportunity to provide any further comment, for example, to dispute any findings of fact, before the report is finalised.

At the time of sending the provisional report, any provider subject to investigation who has not been found in breach should be advised by way of a standard letter.

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#### Adverse Comment

The provisional report also provides parties with an opportunity to respond to any adverse comment by the Commissioner in accordance with s67. This entitles anyone exercising their right to make a written statement in answer to adverse comment to require that statement (or a summary of it if the Commissioner considers a summary more appropriate), to be included in, or appended to, the report.

The requirement that an opportunity be given to respond to adverse comment extends beyond the parties to *any person* against whom adverse comment is made in a report or recommendation. Where the Commissioner proposes to make adverse comment about any person who has not previously been heard (for example, because that person was not a party to the complaint), he or she must be given an opportunity to be heard and to make a written statement in answer to the adverse comment before the report is finalised.

To ensure a fair process, providers and others must be given an opportunity to respond to adverse comment about themselves before it is shown to others. Where a provisional report concerns more than one provider, or includes adverse comment about a third party, only that part of the report which relates to the particular individual concerned, plus the findings of fact, should be released to that individual for comment.

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Similarly, only those parts of the provisional report which relate to a direct breach of the Code by an employer, or which relate to a finding of vicarious liability by the employer, should be released to the employer for comment. However, employers have an interest in the wellbeing of their staff and may want to know that a provisional opinion has been sent. For this reason, when employees of a hospital are sent a provisional report, the hospital should be advised that the provisional report has been sent but not of the content of that report.

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#### Recommendations

Where a provisional report contains proposed recommendations or identifies actions the Commissioner is considering taking, the report should not set any date by which the recommendations are to be met. This would be premature, as no breach of the Code has yet been found.

In formatting recommendations, consideration must be given to the educative function of the report. It is important that others are informed of the lessons learnt. Consideration should therefore be given to distribution of the report as well as to the actions necessary to prevent a recurrence of the breach, and recommended actions should be listed even if investigation officers are aware they have already been taken in the particular case. Once confirmation of compliance with the recommendation is provided, this can be acknowledged at final report stage.

In drafting recommendations consideration should be given to whether an agency other than the Commissioner should review their implementation, e.g. the Ministry of Health, the Pharmaceutical Society, etc. The Commissioner has a watchdog role in the sector and should not take over the monitoring function of other agencies.

Depending on the circumstances it may be appropriate to recommend at this stage that the parties try to reach agreement at mediation, especially if the matter is one otherwise likely to be referred to the Director of Proceedings for a decision on whether action should be taken at the Complaints Review Tribunal.

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#### Public Interest

Consideration should always be given at provisional report stage to the public interest in making the report public (i.e. publication beyond distribution to other interested agencies). Investigation officers will need to consider, amongst other things:

- whether the provider has been informed of the possibility of the report being made public (information to this effect is usually included in the standard notification of investigation letter)

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- the public's right to be informed about matters which may impinge on safety
- the frequency of complaints about the particular provider
- the consumer's wishes
- whether disciplinary proceedings are contemplated
- whether the matter is already in the public arena
- any reasons by the provider as to why the matter should not be made public
- whether public confidence in the provider would be affected.

It is important that the Commissioner's intention to make the matter public is set out in the provisional report so that the provider has an opportunity to comment on this as well as on the content of the report.

In all cases where it is intended that the matter be made public there must be coordination with the Education/Communication Division at the time the provisional report is being drafted. Likewise, there must be coordination if a matter becomes public during an investigation. All press clippings will be forwarded by Education/Communications for inclusion on the investigation file.

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#### Time Frames for Response

The time given to respond to the provisional report will vary from case to case – the more complex the investigation, the greater the time which should be allowed. As a general rule, in the majority of cases a response can be expected within a 10-15 working days.

If no response has been received a few days before the set date, a follow up phone call should be made. The investigation officer may use his or her discretion to discuss the recommendations with the provider(s) during this phone call in an attempt to send final letters which close the file e.g. if the provider also sends an apology letter with the response and information confirming other recommendations, then the file will be closed.

All extensions of time must be with the Commissioner's agreement and should be recorded in a letter from the Commissioner or action note. If no response (or explanation of delay) is received by the set date, the Commissioner shall proceed to form his or her final opinion.

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Official Information Act 1982  
Or the Privacy Act 1993