New Zealand Law Society
Te Kāhui Ture o Aotearoa

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Health and Disability Commissioner
By email: review@hdc.org.nz

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

1 Introduction

1.1 The New Zealand Law Society Te Kāhui Ture o Aotearoa (**Law Society**) welcomes the opportunity to make a submission on the Health and Disability Commissioner's (**HDC**) *Review of the Health and Disability Commissioner Act 1994 and the Code of Health and Disability Services Consumers' Rights* consultation document (**consultation document**).

1.2 This submission, prepared with input from the Law Society's Health and Disability Law Committee, responds to some of the questions in the consultation document on which the Law Society is able to express a view.[1]

2 Topic 1: Supporting better and equitable complaint resolution

1.1 Did we cover the main issues about supporting better and equitable complaint resolution?

2.1 Generally, yes. However, the consultation document notes increased complaint numbers are impacting timeliness and acknowledges that "delays can lead to increased stress for all involved parties and diminish the effectiveness of recommendations for quality improvement".[2] It is important to acknowledge these delays could also:

(a) Hinder access to justice;

(b) Impact the ability of other regulators to meet their statutory obligations, including under Part 4 of the Health Practitioners Competence Assurance Act 2003 (**HPCAA**);

(c) Undermine the purpose of the HPCAA, which is to protect the health and safety of members of the public by ensuring health practitioners are competent and fit to practise in their professions; and

(d) Undermine public confidence in the HDC's complaints resolution system.

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1 More information about these committees can be found on the Law Society's website: https://www.lawsociety.org.nz/branches-sections-and-groups/law-reform-committees/health-and-disability-law-committee/.

2 At pages 19-20.

1.2 What do you think of our suggestions for supporting better and equitable complaint resolution, and what impacts could they have?

Amending the purpose statement of the Act and clarifying cultural responsiveness

2.2 We recommend broadening the purpose statement in the Health and Disability Commissioner Act 1994 (**Act**) by inserting the words "people centred" and "culturally responsive" – i.e. "to 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 *in a way that is people centred and culturally responsive*".

2.3 With respect to the suggestion to explicitly incorporate the concept of upholding mana into the purpose statement of the Act, we note that Right 1 of the Code of Health and Disability Services Consumers' Rights (**Code**) relates to the right to be treated with respect, and Right 3 relates to the right to dignity and independence. Expressly recognising the concept of mana (described in the consultation document as one's dignity and authority, including respect and autonomy)[3] in the purpose statement of the Act risks elevating Rights 1 and 3 over others. We consider that these concepts are better incorporated into the rights themselves as articulated in the Code.

2.4 We support the proposed amendments to Right 1(3),[4] and the proposal to issue sector guidance,[5] in order to clarify what is meant by cultural responsiveness.

2.5 The HDC may also wish to seek feedback on these proposals from other relevant stakeholders such as Te Hunga Rōia Māori o Aotearoa and the Pacific Lawyers Association. We also encourage the HDC to seek feedback on other ways to ensure the statutory scheme is more culturally responsive (for example, by giving better recognition to te Tiriti o Waitangi – the Treaty of Waitangi, and to tikanga, in the purpose statement of the Act).

Replacing the term 'independence' with 'autonomy' in Right 3

2.6 The Law Society supports the proposed change to the wording in Right 3 from 'independence' to 'autonomy',[6] for the reasons set out in the consultation document. We consider the term 'autonomy' more properly reflects the legal and ethical principles which underpin the Code.

Expanding Right 8 to include the right to have support persons

2.7 We also support expanding Right 8 to include the right to have support persons of the consumer's choice involved, including in circumstances where they cannot be physically present. However, we suggest a small amendment to the HDC's proposed rewording of Right 8, in order to ensure the consumer's choice remains at the centre of the right to have support:

> Every consumer has the right to have one or more support persons of their choice present, except where safety may be compromised or another consumer's rights may be unreasonably infringed. Where support people cannot be

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3 At page 22.
4 Consultation document, page 56.
5 Consultation document, page 22.
6 Consultation document, page 24.

physically present, this includes the right to have support people *of the consumer's choice* involved in other ways.

Amending Right 10 to allow complaints to be made on behalf of a consumer

2.8 The HDC has suggested amending Right 10 to allow a 'representative' to make a complaint on behalf of the consumer.[7] The use of the word 'representative' could introduce confusion, even if it is to be defined as suggested in the consultation document,[8] because that term currently carries a different meaning under the Health Information Privacy Code 2020.

2.9 The Health Information Privacy Code states that a 'representative', in relation to an individual, means:[9]

(a) Where that individual is dead, that individual's personal representative; or

(b) Where the individual is under the age of 16 years, that individual's parent or guardian; or

(c) Where that individual, not being an individual referred to in subclauses (a) or (b), is unable to give their consent or authority, or exercise their rights, a person appearing to be lawfully acting on the individual's behalf in the individual's interests.

2.10 In order to avoid confusion, we suggest using the term 'support person' instead of 'representative'. 'Support person' could be defined as 'someone who has been chosen by the consumer, or is otherwise legally entitled, to act on behalf of or speak for a consumer'. It may also be appropriate for this definition to refer to the need to support the consumer's decisions and/or their will and preferences.

2.11 Members of the Law Society's Health and Disability Law Committee have also observed that it is not infrequent for the HDC to consider complaints from individuals other than the consumer themselves, including in circumstances where:

(a) The consumer has not consented to the other person making a complaint on their behalf; and/or

(b) The legal status of the person making the complaint (and their authority to make the complaint on behalf of the consumer) is unclear.

2.12 The HDC should not investigate complaints made on behalf of a consumer without the consumer's express consent, except in circumstances where the consumer has affected decision-making capacity such that they cannot give consent to the making of the complaint.

2.13 We also recommend inserting the word 'legally' before 'entitled' in the current definition of 'consumer' (and the proposed definition of 'representative' in clause (4) of the Code, if our recommendation at [2.10] above is not accepted), in order to improve the clarity of Right 10.

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7 Consultation document, page 61.

8 See page 65, which defines 'representative' as someone who has been chosen by the consumer to, or is otherwise entitled to, act on behalf of or speak for a consumer.

9 Clause 3(1) of the Code.

Using gender-inclusive language in the Code

2.14 We support the proposed amendments to the Code to ensure it is gender-inclusive.

Amending Right 10 to protect against retaliation

2.15 Although various rights in the Code already protect consumers from retaliation from providers, we support the proposed amendment to Right 10 to better protect consumers, and to encourage people to feel safe in raising concerns and making complaints.

Amending Right 10 to clarify the provider complaints process

2.16 Right 10(5) remains unclear despite the amendments proposed in the consultation document,[10] and overlaps with proposed Rights 10(6), 10(7), 10(8) and Right 10(10).

2.17 We understand the amendments to Right 10(5) and Right 10(10) seek to ensure information about the various complaints mechanisms is made available in an accessible form.[11] We therefore suggest replacing Right 10(5) with what is currently proposed as Right 10(10) in the consultation document, but with the following additional amendments:

> Providers must communicate to consumers and/or their representatives [or support people, as suggested above] accessible information about:
>
> (a) The provider's internal complaints procedures and how to use these procedures;
>
> (b) *Independent advocates provided under the Health and Disability Commissioner Act 1994 and/or the Nationwide Health and Disability Advocacy Service; and*
>
> (c) *The right to complain to the Health and Disability Commissioner*.

2.18 Rights 10(6), (7) and (8) could then focus on the process to be followed by a provider once a complaint is received – for example:

> (6) On receiving the complaint the provider must —
>
> (a) acknowledge the complaint within 5 working days of receipt, in a form and manner that takes account of the consumer's needs, unless it has been resolved to the satisfaction of the consumer within that period;
>
> (b) use their best endeavours to resolve the complaint;
>
> (c) ensure that the consumer and/or their representative [or support person] is informed of what the provider is doing to resolve the complaint in accordance with 6(b) and the reasons why.
>
> (7) If the complaint is not resolved within 20 working days, the provider must —
>
> (a) inform the consumer and/or their representative [or support person] of the reasons for the delay and how long they expect it will take to resolve the complaint; and

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10 At page 62.

11 Consultation document, page 25.

(b) appropriately update and keep the consumer and/or their representative [or support person] updated about progress.

(8) As soon as is practicable after a provider has made a determination on a complaint, and decided whether or not it accepts that a complaint is justified, the provider must inform the consumer and/or their representative [or support person] of the determination and —

(a) the reasons for the determination regarding the decision; and

(b) any actions the provider proposes to take; and

(c) any appeal procedure the provider has in place.

Strengthening the Advocacy Service

2.19 We believe the automatic referral of all complaints received by the HDC to the Advocacy Service in the first instance could:

(a) Help create a more consumer-focused complaints resolution process;

(b) Lead to more complaints being resolved at a local level; and

(c) Provide an opportunity for restorative practices to be adopted with respect to the complaints received.

Reframing the term 'no further action'

2.20 We agree the term 'no further action' is disempowering, and is not reflective of the substantive work that would have been undertaken by the complainant, the provider, and the HDC at the point the HDC decides to take 'no further action'. However, we do not consider the alternative wording proposed by the HDC ('no investigative action') significantly improves the clarity of the complaint resolution pathway.

2.21 We also note that amending section 38 of the Act (which refers to the ability to take 'no further action') may be more complicated than it may first appear, as this section relates to circumstances where any action or further action may be unnecessary or inappropriate. A more extensive and holistic review of the Act (and the powers granted to the Commissioner under section 38 to take no further action) would be required in order to determine if, and how, the term 'no further action' should be revised.

2.22 Nevertheless, the language used in the Act, and the options available to the HDC under section 38, should not preclude the use of more consumer-focused and accessible language in the HDC's decision letters. We therefore encourage the HDC to consider if the language used in its letter templates could be revised.

Reframing the term 'mediation conference'

2.23 We agree it would be appropriate to replace the term 'mediation conference' with a term such as 'facilitated resolution' in order to capture other forms of resolution such as conciliation, as well as the restorative practice approach now provided for in the National Adverse Events Policy 2023.[12]

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12 Te Tāhū Hauora Health Quality & Safety Commission *Healing, learning and improving from harm: National adverse events policy 2023 | Te whakaora, te ako me te whakapai ake i te kino: Te kaupapa here ā-motu mō ngā mahi tūkino 2023*, at page 11.

2.24 We encourage the HDC to seek further feedback from relevant stakeholders (including Te Hunga Rōia Māori o Aotearoa) on whether a different term is needed to explicitly recognise and provide for resolution practices from a te ao Māori perspective.

1.3 What other changes, both legislative and non-legislative, should we consider for supporting better and equitable complaints resolution?

Reducing delays and increasing clarity around the HDC's processes

2.25 The Law Society is concerned about the delays and backlogs in the HDC's complaints processes,[13] which restrict consumers' and providers' access to justice, and the ability to uphold consumers' rights in a manner consistent with the purpose of the Act (which requires the fair, simple, speedy, and efficient resolution of complaints).[14] These concerns have been heightened following recent reductions in the HDC's funding,[15] and increased complaints volumes, which the HDC has noted will reduce service levels and 'place significant and unprecedented pressure' on timeliness.[16]

2.26 Lawyers have also observed that there remains a lack of clarity around the HDC's internal complaints processes, which could be contributing to the current delays, and negatively impacts on the consumers and providers who are involved in a complaint (particularly those unfamiliar with the HDC's complaints process).

2.27 If there is to be no immediate additional funding for the HDC, we urge the HDC and the Minister of Health to consider whether other legislative and operational changes could be made to improve access to justice in the HDC's complaints process – for example:

(a) There could be more scope for the HDC to undertake a quicker, initial triage of complaints, which involves consideration of whether:

(i) The complainant has already received a response from the provider;

(ii) The matter has been referred to the Advocacy Service; and

(iii) The seriousness of the complaint.

(b) It could be helpful to consider what other changes could be made to the investigation process to expedite matters.

(c) Greater clarity and transparency about the HDC's internal processes (in the form of guidance that is easy to find and access) could also be helpful.

(d) Consideration could be given to whether it would be appropriate to refine the scope of the HDC's statutory role and jurisdiction (for example, by identifying areas of crossover between the HDC's work, and the work undertaken by Responsible Authorities under the HPCAA, and Te Tāhū Hauora Health Quality & Safety Commission, in order to ensure work is not duplicated across those bodies. In providing this feedback, we acknowledge that changes to the scope of the

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13 See, for example: https://www.stuff.co.nz/nz-news/350315730/terribly-short-sighted-govt-cuts-struggling-health-watchdogs-budget.

14 Section 6 of the Act.

15 Government of New Zealand *Vote Health: Health Sector - Estimates of Appropriations 2024/25* (30 May 2024).

16 Office of the Health and Disability Commissioner, *Statement of Performance Expectations 2024/25*, at 1.3.4.

HDC's role are not proposed or considered in the consultation document. However, we believe a broader review of the HDC's regulatory framework is now overdue.

Simplifying the preliminary assessment process

2.28 Lawyers have also observed that the current preliminary assessment process can be quite comprehensive, and usually includes a very broad request for information from the relevant provider, as well as the HDC seeking internal or external clinical advice. We note this was the subject of an investigation by the Chief Ombudsman in 2020, which concluded that the HDC's process unreasonably went beyond what Parliament envisaged when legislating the 'preliminary assessment' stage and caused undue negative effects for those involved.[17]

2.29 It is not clear what has been done so far to address the recommendations arising from that investigation. We invite the HDC to consider whether the preliminary assessment process could be simplified in order to create a more consumer-centric and accessible complaints resolution service.

3 Topic 3: Making the Act and the Code work better for tāngata whaikaha | disabled people

3.1 Did we cover the main issues about making the Act and the Code work better for tāngata whaikaha | disabled people?

3.1 Yes.

3.2 What do you think of our suggestions for making the Act and the Code work better for tāngata whaikaha | disabled people, and what impacts could they have?

Strengthening the disability functions in the Act

3.2 We support amendments to the Act to add a legislated role focused on disability issues, as well as a requirement for HDC to report to the Minister for Disability Issues, for the reasons given in the consultation document.[18]

Updating definitions relating to disability

3.3 We support replacing the definitions in the Act relating to disability. The term 'disability services' could be replaced with the term 'disability support services', which has a meaning which mirrors the definition of 'disability support services' in section 4 of the Pae Ora (Healthy Futures) Act 2022 – i.e.:

> disability support services includes goods, services, and facilities—
>
> (a) provided to people with disabilities for their care or support or to promote their inclusion and participation in society and their independence; or

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17 Chief Ombudsman Peter Boshier, *'Complaints about Preliminary assessment process and decision to take no further action on complaints,'* December 2020.

18 At pages 37-38.

(b) provided for purposes related or incidental to the care or support of people with disabilities or to the promotion of their inclusion and participation in society and their independence.

3.4 We also invite the HDC to consider whether it would be appropriate to align the definition of 'health services' in the Act with the definition of 'personal health services' in section 4 of the Pae Ora (Healthy Futures) Act – i.e., to say:

> health services—
>
> (a) means goods, services, and facilities provided to an individual for the purpose of improving or protecting the health of that individual, whether or not they are also provided for another purpose; and
>
> (b) includes goods, services, and facilities provided for related or incidental purposes

3.5 If this recommendation is accepted:

(a) There would be no need for the current definition of 'health' in the Act (noting that definition is not particularly helpful,[19] and that there is no corresponding of 'disability').

(b) A 'health and disability services consumer' could simply be defined (together or separately) as a person receiving health and/or disability support services.

(c) There would be no need to define 'health care provider', 'health care institution', 'health care procedure' or 'health treatment', as all those terms would come within the meaning of 'health services' and/or 'disability support services'.

Strengthening references to accessibility

3.6 We agree with the proposed amendments to the Code to strengthen the right to accessible services.[20]

Strengthening and clarifying the right to support to make decisions

3.7 We agree the Code currently implies a person should be supported to make decisions about their care to their fullest decision-making ability, and there is a need for good-practice guidance, education, and resourcing to support providers to put Right 7 into practice.[21]

3.8 We recommend making the following additional amendments to (revised) Right 7(2) to clarify that decision-making capacity is decision-specific (i.e., decision-making capacity could fluctuate, and affected decision-making capacity may not be permanent, or impact *all* decision-making):

> Every consumer must be presumed to have decision-making capacity to make an informed choice and give informed consent *with respect to a particular decision*, unless there are reasonable grounds for believing that the consumer does not have decision-making capacity *to make that decision*.

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19 Section 2(1) of the Act states 'health means human health'.
20 Consultation document, page 39.
21 Consultation document at page 40.

3.9 We also suggest rephrasing Right 7(3) as follows, in order to give primacy to the right to support, and the right to make informed choices and give informed consent:

> Where a consumer has affected decision-making capacity, the consumer has a right to support to make decisions, and retains the right to make informed choices and give informed consent to the extent appropriate to their level of decision-making capacity.

3.10 The Law Society supports the proposed amendment to Right 7(4),[22] and notes Right 7(4)(c)(ii) could be further amended as follows to expressly refer to the need to take into account the views of whānau:

> if 7(4)(c)(i) does not apply, the provider takes into account the will and preferences of the consumer to the extent they are ascertained, and the views of ***whānau and*** other suitable persons who are interested in the welfare of the consumer and available to advise the provider.

4 Topic 4: Considering options for a right of appeal of HDC decisions

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

4.1 The Law Society believes the HDC's complaints resolution system is in need of urgent reform, both in terms of the current investigation process (as discussed at [2.25] to [2.28] above), and the ability to challenge HDC opinions.

4.2 While those who are dissatisfied with the outcome of an investigation can lodge a complaint with the Ombudsman, or seek judicial review, it is important to acknowledge that these review mechanisms do not always enable the fair, simple, speedy, and efficient resolution of complaints. For example, the Law Society understands:

(a) There are delays in the Ombudsman's complaints process, which contribute to overall delays in accessing justice and resolving complaints.

(b) The Ombudsman tends to investigate procedural issues relating to the complaint, and does not seek expert medical advice or make determinations about the facts and substantive merits of a complaint.

(c) The Ombudsman's recommendations are not binding, and there is no requirement for the HDC, or providers to implement those recommendations.

(d) Judicial review may not always be an accessible review mechanism because of the costs involved in taking matters to the High Court.

4.3 We also query how a new statutory appeal right would sit within the current statutory framework, as the HDC only has the power to issue 'opinions' and 'recommendations'[23] which cannot, in a strict sense, be 'appealed'.

4.4 We recommend the HDC give further thought to these matters, and to take a more holistic approach to reforms in this area, in order to ensure the rights and interests of both consumers and providers are upheld.

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22 At pages 59-60 of the consultation document.

23 Section 45 of the Act.

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

Introducing a statutory requirement to undertake internal reviews of HDC decisions

4.5 The Law Society supports the introduction of a statutory requirement to undertake internal reviews of HDC decisions.

4.6 We also support including a requirement that the original decision-maker should not be involved in the internal review, in order to enhance the independence of the internal review process.

4.7 We also emphasise the importance of ensuring this internal review system is:

(a) Adequately funded and resourced, and equipped to deal with an increased volume of review requests (which would be a likely outcome if internal reviews become a statutory requirement); and

(b) Capable of facilitating the "fair, simple, speedy, and efficient resolution of complaints" (as required under section 6 of the Act).

4.8 Another under-resourced review system is likely to create further barriers to access to justice, and contribute to existing perceptions that "complaint processes are not always working, and complaint resolution principles of 'fair, simple, speedy, and efficient' are not being met as well as they could be".[24]

Lowering the threshold for access to the HRRT

4.9 Lawyers have differing views on lowering the threshold for accessing the Human Rights Review Tribunal (**HRRT**). Some do not consider it is necessary to lower the threshold if there is to be a statutory requirement to review HDC decisions, as proposed in the consultation document.[25] They agree a lower threshold could result in a significant increase in complaints which may not be appropriate for the HRRT,[26] and believe a new statutory review process would address the concerns noted in the consultation document about the limited options for challenging HDC decisions.[27]

4.10 Others, however, believe easier access to the HRRT could help uphold consumers' rights under the Code, enhance professional accountability, and help deter future breaches of the Code (particularly if the proposal to introduce a statutory review mechanism is not implemented). These lawyers support lowering the threshold in order to allow claims to be made to the HRRT even if the HDC has decided not to investigate a complaint.

4.11 We invite the HDC to consider this proposal against the feedback we have provided in section 4 of this submission (and in particular, our comments at [4.1]-[4.4] above. If the threshold for accessing the HRRT is to be lowered, the HDC would need to give further thought to how it can strike the right balance between giving consumers the right to take a matter further, and avoiding opening the floodgates for unmeritorious claims.

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24 Consultation document at page 19.
25 At pages 45-46.
26 Consultation document at page 46
27 At pages 43-44.

5 Topic 5: Minor and technical improvements

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

Revising the requirements for reviews of the Act and the Code

5.1 The consultation document notes it would be helpful to update the sections of the Act which relate to the requirement to review the Act and the Code, in order "to make them clearer, reflect a context where we are updating an existing Code rather than developing a new Code, and better align the requirements of reviews of the Act and the Code".[28]

5.2 We do not agree with the recommendations made by previous Health and Disability Commissioners to amend the review period to 10 years.[29] In a submission on the HDC's 2014 review of the Act and the Code, the Law Society objected to extending the review period to 10 years because of concerns about the robustness of the 2014 review, and the failure to progress outstanding recommendations from the 2009 review.[30] We note some of those recommendations still remain to be actioned.[31]

5.3 We reiterate our concerns that a longer review period would not allow due consideration to be given to outstanding recommendations from previous reviews. There is also likely to be a greater shift in the wider legal landscape over a 10-year period (noting, for example, there has been significant shift towards a more human rights-based focus in the law in all respects over the past 10 years). A shorter (5-year) review period would help ensure any inadequacies in the Act and the Code are more promptly identified, and those instruments remain in step with other developments in related areas of the law.

Increasing the maximum fine for offences under the Act

5.4 The consultation document does not contain any information about the extent to which offences are committed under the Act, or provide any evidence which suggests the current $3,000 fine "provides little discouragement for those who choose to obstruct the Commissioner's process".[32]

5.5 If few, or no offences have been prosecuted under the Act, it may not be necessary to amend the maximum fine.[33] We also understand the offence of failing to provide information to the Commissioner only applies in circumstances where the Commissioner

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28 At page 48.

29 As noted at page 48 of the consultation document.

30 See Law Society submission dated 17 February 2014, at page 3 (available here: https://www.lawsociety.org.nz/assets/Law-Reform-Submissions/0012-75999-l-HDC-Act-and-Code-Review-17-02-14.pdf).

31 We understand the previous Health and Disability Commissioner requested the Minister of Health to action outstanding recommendations, and the Minister indicated those reforms were not a Government priority at the time (see correspondence between Anthony Hill (Health and Disability Commissioner) and Hon Dr David Clark (Minister of Health) dated December 2019, available here: https://www.hdc.org.nz/your-rights/about-the-code/review-of-hdc-act-and-code-of-health-and-disability-services-consumers-rights-2019/).

32 Consultation document at page 48.

33 We note the consultation document

has referred a complaint for formal investigation (pursuant to section 59 of the Act), which may mean there is a reduced likelihood of offending.

5.6 We therefore invite the HDC to publish further information about the underlying policy reasons for this proposal, and to undertake further consultation on whether an increased fine is in fact necessary.

Giving the Director of Proceedings the power to require information

5.7 We support an amendment to enable the Director of Proceedings to require any person to provide information, up until the Director decides to issue proceedings.

Introducing a definition for 'aggrieved person'

5.8 While the consultation document proposes to introduce a definition of 'aggrieved person', it does not provide a suitable definition; it simply proposes to replace the phrase 'the complainant (if any) or the aggrieved person(s) if not the complainant' with the phrase 'aggrieved person'.[34] This change does not sufficiently clarify what the term 'aggrieved person' means, and risks creating more uncertainty and confusion as to the meaning and scope of the term.

5.9 The Law Society recommends inserting a definition of the term 'aggrieved person' into section 2 of the Act, which clarifies the term includes, but is not limited to, a health or disability services consumer (and extends, for example, to the wider range of individuals closely connected to a consumer, who may also be harmed through breaches of the Code).

Allowing for substituted service

5.10 The Law Society supports an amendment allowing for substituted service when the HDC cannot find a person who needs to be advised about the results of an investigation (for example, by giving them notice via registered post, or through their social media account/s, as suggested in the consultation document).[35]

Providing the HDC with grounds to withhold information where appropriate

5.11 We support the HDC having a similar ability to the Privacy Commissioner's office to withhold information relating to an investigation, alongside the ability to disclose any matter the Commissioner considers necessary for the purpose of giving effect to the Act.

Expanding the requirement for written consent for sedation that is equivalent to anaesthetic

5.12 We support the proposed amendments to Right 7(6)(c) of the Code.[36]

Clarifying the requirement for written consent where there is a high risk of serious adverse consequences

5.13 We support the proposed amendments to Right 7(6)(d) of the Code.[37]

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34 Consultation document at page 49.
35 At page 49.
36 Consultation document, page 60.
37 Consultation document, page 60.

5.3 What are your main concerns about advancing technology in relation to the rights of people accessing health and disability services? 5.4 What changes, both legislative and non-legislative, should we consider to respond to advancing technology?

5.14 The use of new technologies raises various questions and concerns about the protection and promotion of people's rights under the Code. These include (but are not limited to):

(a) Risks to the privacy of health information (including, for example, in circumstances where that information can be picked up via interactions with artificial intelligence (**AI**) software);

(b) The difficulty of enforcing rights when the provider of a service is not based in New Zealand (for example, where surgery is provided using robots/hardware remotely controlled from another country);

(c) Bias, misleading predictions, adverse outcomes, and discrimination by AI which have been developed through inaccurate or under-representative training data;

(d) Ensuring informed consent can be provided to self-improving AI and other technologies which learn as they go; and

(e) Accountability and the ability to uphold consumers' rights if care is provided by a non-human (and whether non-human healthcare – i.e. AI – could come within the Accident Compensation Corporation's no-fault scheme).[38]

5.15 In our view, the current statutory review of the Act and the Code is not the most appropriate way to fully consider the wide range of issues arising from recent advances in technology. These issues require careful consideration, and would benefit from a more bespoke and detailed review which examines the impacts of advances in technology (including the use of AI) and makes recommendations to address any concerns, following meaningful engagement with the public, and consumers and providers of health and disability services.

5.16 We encourage the HDC to undertake a separate review which examines these issues (and this could be similar to the HDC's review of research involving adult consumers who are unable to consent to their participation in research).[39]

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38 We acknowledge this particular issue is not directly related to the HDC's statutory regime. However, it raises wider policy, ethical and legal considerations which are also relevant to issues relating to the Act and the Code.

39 More information about this review is available on the HDC's website: https://www.hdc.org.nz/your-rights/about-the-code/research-with-adults-unable-to-provide-informed-consent/.

6 Next steps

6.1 We would be happy to answer any questions, or to discuss this feedback further. Please feel free to get in touch with us via the Law Society's Senior Law Reform & Advocacy Advisor, Nilu Ariyaratne (Nilu.Ariyaratne@lawsociety.org.nz).

Nāku noa, nā

David Campbell
Vice-President