



Auckland Women's Health Council

Oral submission of the Auckland Women's Health Council on the petition of Renate Schütte on the right to appeal decisions made by the Health and Disability Commissioner

Ata mārie tātou. I am speaking today on behalf of the Auckland Women's Health Council, and we appreciate the opportunity to present our views.

The right to appeal decisions is a cornerstone of justice.

The *Health and Disability Commissioner Act 1994* exists to promote and protect the rights of health and disability services consumers, and, in particular, to secure the fair, simple, speedy, and efficient resolution of complaints relating to infringements of those rights.

We do not believe that it is coincidence that the first descriptor of complaints resolution is that it should be "fair". And while, as an organisation, our role is in support of, or advocacy for the patient or consumer, in a system that is fair, rights of appeal must apply to both complainant and provider.

Appeal rights would ensure that both complainants and defendants have the opportunity to correct errors that might have been made in the original decision. The HDC's decision is reached after a "paper" assessment or investigation, not a hearing in which there are witnesses giving oral evidence and subject to cross-examination. So, it is arguably more prone to error than are hearings held in public with oral evidence. Appeal rights would recognise that all human beings are fallible, including the HDC and his or her staff, and give all parties an opportunity to review decisions with or without the provision of new information.

The right to appeal is particularly important as New Zealanders, through ACC legislation and the 'no fault' system, have lost their right of access to the courts when they have been harmed by medical care and other services obtained from health and disability services providers.

The lack of appeal rights also impacts on 'whistle-blower' health professionals who may have cause to lodge a complaint about other providers with whom they work. Dame Silvia Cartwright said that colleagues need to speak up about other doctors who breach the code of rights; that there needs to be accountability demanded of and from within the health profession and that practitioners need to challenge others when something isn't right. Health professionals willing to put themselves at risk in order to speak up about harmful practices, or those that breach patient rights, must be reassured that they will be treated fairly and justly, including being able to appeal a decision.

We acknowledge the commitment made by the current HDC, Morag McDowell, to improving the way in which complaints are handled. But, with all due respect to the current Ms McDowell, she will not be the Commissioner forever, and any changes she makes may not be sustained when her tenure is up and a new Commissioner appointed.

Therefore, it is vital that the right to appeal HDC decisions is contained in the legislation.

We have seen very clearly the impact of different Commissioners on the number of complaints that are investigated compared with those closed with a 'no further action' decision. Over the last twenty years there has been a dramatic decrease in the number of complaints investigated, with investigations falling from 40% of closed cases in 2001 to a low of 4% in 2019.

We acknowledge that there has been a significant increase in annual complaints over the last 20 years, with 1088 complaints to June 2000 compared with 2393 in the year to June 2020, an increase of 180%. However, even if all of the increase had been complaints without merit, the proportion of complaints investigated would still have dropped significantly from 40% to 12%.

The analysis of complaints received, investigated and closed over time shows that it is not simply a matter of resources that has led to the significant drop in number of investigations. With this drop in investigations, and without a right of appeal, consumers are disadvantaged by the way in which the caseload is managed by an individual Commissioner and his or her staff. For complainants, the right of appeal would 'level the playing field' between Commissioners.

Introducing an amendment that would allow the right of appeal would not require HDC to have greater resources, since the appeal would be heard and decided by an independent body, and the HDC would simply abide by the decision of the appeal body, as is the case with an independent review of ACC decisions.

The Auckland Women's Health Council submits that a process for appealing HDC decisions and subjecting them to independent review, both those with a 'no further action' decision and those that undergo an investigation, is the only way to ensure a consumer-centred complaints system and to ensure that justice is served. The Act as it stands is not fit for purpose, as it is the legislation itself that imposes the greatest barrier to fairness and justice – the lack of right to appeal. Without any avenue of appeal, promotion and protection of consumer rights, and a fair and just resolution of complaints is simply unachievable.

Ngā mihi

Sue Claridge