

Act and Code review feedback session

11/01/24

Participants: Sue Claridge (Auckland Women's Health Council); Professor Joanna Manning (Auckland University Law School, Cartwright Collective); Charlotte Korte (Advocate for surgical mesh; Health Consumer Advocacy Alliance); Renate Schütte (consumer advocate).

HDC attendees: Catherine McCullough; Kylie Te Arihi; Jane Carpenter

Kylie opened with karakia followed by a round of whakawhanaungatanga. Catherine invited everyone to focus on the matters that were most important to them.

If there was one key message that you want the review team to take away, what would it be?

- Transparency and equity. Eg Provisional Opinion – consumer doesn't get all the information and that is at the end of the process. Putting the consumer at the central focus.
- Lack of balance in preliminary assessment process. Feels very much that the complainant submits their complaint and then is kept at arms-length – shut out of process, loses power. Only receives a redacted version of experts report, whereas provider has full version. After months and months the PO is dropped on the consumer and often no further action. Feels like a set up – that working towards a NFA all along and gathering information to support that. Have seen clinical assessments watered down from moderate to mild departures in order to justify NFA decision – then consumer is given 2 weeks to talk Commissioner out of decision, which is an uphill battle. Best way to do that is to obtain own report, but complainants are hindered by money, contacts, closing ranks. On back foot. If receive NFA, can't go anywhere. Feels wrong, and creates grief.
- Have heard process referred to as making the consumer swallow a dead rat.
- About 900 complaints a year receive a NFA – in around 600 of those there has been a bad outcome and more than minor experience
- Significant imbalance between complainants and providers. Even where a complainant is a Dr have found the whole process a complete nightmare, hugely disappointed. If a highly educated, articulate person finds so nightmarish, how would someone less articulate, less able to fight find it.
- Providers have resources to respond to complaints that consumers just don't have. In the end the PO is given to consumers and have 2 weeks to respond. How do people afford / find anyone in that timeframe. Natural justice is only given to the provider because only they get all the information.

- **Question: Since the petition has the HDC considered the information that can be provided in a PO to consumers? Has anything changed?**
- **Question: Since the petition, the threshold for investigation has supposedly gone down, what is going to investigation that wasn't before?**
- Definition of serious harm – can be quite different between clinicians, HDC, and consumers
- Opportunity to be heard. Feel like don't have a voice. If could actually orally speak and be heard and feel that being heard and listened to would go a long way to rebuilding and building trust
- Research supports that where people feel respected, feel heard - much more willing to expect adverse outcomes
- Consumer voice needs to be carried right through – not just early stages.

Feedback on process improvement proposals

- Support including mana-enhancing. To me includes consumer empowerment. Respecting and validating the consumer voice
- Eg when sending a PO or other communication – a phone call first – or an email saying that want to have a chat so news can be delivered. Compare to mammogram news – given option to a support person
- Not just respectful processes, but also on weight give to complainants wishes. Ombudsman said HDC should have a more explicit policy on the factors it takes into account, he said that HDC should indicate the weight that attach to different factors in exercising discretion. Factors have been published, but the part to indicate weight has not.
- *Hui ā-whānau implements the outcomes that you were talking about. Manaakitanga and level of care and thinking about how to respond respectfully. Try to get in as early as possible in the process, but available the whole way through.*
- *Everyone has mana – up to the individual to maintain their mana as well as respect other's mana – still grappling with how to talk about mana in legislation*
- Care needs to be taken with mana when it means so many different things.
- Hui ā-whānau sounds like the type of process that needs to happen. In that process, what is the follow-up, and what information is given. Who is responsible?
 - *Hui ā-whānau notes are shared with the complainant and the complaints assessment team, and Māori directorate continue to advocate for whānau voice. Expert opinion is not shared with consumer, the same as other complaints*

- Process of discovery in a law situation – don't understand why I can't know information about me
 - o *Can hear that lost autonomy and powerlessness of that process*
- Throughout accreditation process for surgical mesh, discovered that many surgeons don't have accreditation. Do the opinion provider have the requisite expertise to be able to provide a sound opinion. Had put a suggestion of a red flag for patterns and frequent flyer drs. At what point during investigation do you say have to stop.
- Everything is taken from the consumer and no ability to challenge.
- Complainants are HDC's most precious resource. If complainants don't have a voice / or faith in the system, then the whole system falls on its needs. As well as respect, significant utilitarian.
- Don't like changing the name of NFA because taking lots of action. Prefer Ombudsman's rec of sending straight to investigation rather than 18 month preliminary assessment. Should be doing a short assessment, and asking the complainant what process they want. Wishes of complainant important. Once in an investigation then in a judicial process so
- Can never hope to do the number of investigations to satisfy consumer demand – will always be
- Don't like a suggestion that complainants should complain to a provider, but that if a complaint has been made that the hospital, then fear of retribution – if have to report in annual report then have visibility. Do like explicit protection against retribution

Feedback on Right of appeal

- *Keeping an open mind about the options for challenging, and wanting to ensure equitable*
- Want a system and process that doesn't result in an avalanche of appeals – has a filter. Would be an issue with number, would need a system to sort valid appeals
- The question of whether there should be a right of appeal or not is not the hard question – health is most important interest. Can appeal for everything else. It's how it's implemented.
- Right of appeal must be independent. Asking HDC to hav an inhouse appeal is akin to asking turkeys what they think about Christmas
- Strongly advocate for an independent panel. Something along the lines of an ethics committee. Would get a volume of appeals. Panel members would review, then get together to discuss and must include at least 50% consumer / lay and include someone with a legal / ethics background. There would be some where an appeal

was required and others would be dismissed. The process would include discussion by zoom or in person and give an opportunity to be heard and more aligned.

- Would be from NFA as well as investigation.
- Would need independent oversight, formally set up, standards.
- In many ways lowering the threshold for the HRRT is the easy option, but whole new civil proceeding is started and is denovo hearing with oral evidence, cross examination etc, why would a complainant want to go there at the moment. Process is an expensive one. Most appeals in other jurisdictions would proceed based on the Commissioner's file
- 'HDC appeal tribunal' as an intermediary before HRRT
- Eg university appeals panel like an employment processes
- Want to avoid overloading the HRRT when they are struggling to deliver timely responses
- Two issues with appeal
 - o – inequality of arms (providers are insured v personal resources). Redress by underwriting complainants fees out of the disciplinary levy.
 - o Concern that would appeal every decision. Are about 660 NFA decisions every year and about 90 providers who receive breach findings.
- Having an appeal is about keeping the first decision-maker honest.
- If there was a perception among complainants that the processes was fairer and more just then over time the number of appeals would reduce and would have far fewer complainants feeling like they had been dealt with unjustly.
- Closed file review has been increased, but these are not published, neither are the NFAs. Transparency is important.
- People need to be heard and feel like justice has been done. Even if doesn't go way hoped, if came out feeling heard.
- What motivates people – with dead children, feeling that can either let go, or try and do something about it, or have to do justice by baby, so can say that didn't die in vain and did best for. Everything we have been through means something and is validated
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- What are the barriers, other than financial constraints and IT systems, that HDC faces to identify systemic issues. If can prevent things happening
 - o High-turnover of staff, communication and collaboration with other health entities. Holding other health entities in account

- Have to have data, share it and be comparable.
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- In policy is an area that really want HDC to look at. Particularly interested in frequent flyer drs. What is action to identify and then what will do about it
 - Gave example
- What are the levers within the Act to increase accountability for system improvement / change / prevention?
 - Eg our equivalent in NSW has the power to interim suspend people from practice
- Limited oversight of private sector – eg cannot ban mesh or mesh procedures.
- For trivial complaints, probably got it right, some should result in educative letter. But at the serious end, if taken as serious, it is investigated, then breached, the HPDT, then revoking licence – something wrong with how long that process takes. Meanwhile, that practitioner continues to practice. Eg – could it go straight to the DP? Take out the most complex cases and still have natural justice. And that
- Educational comment – when hear that, then can be a knife in the side
- Panel provides an opportunity to speak to issue and the weight
- The timeliness of a complainant making a complaint varies for a number of reasons – by the time in a position to make a complaint, so much time had passed that thought, what's the point.
- Lack of follow-up - - catherine to check on 3-month close-off period
- Essential to have a right of appeal, has potential to drive better decision-making. Everything is staked against the consumer. No right of appeal, nowhere to go. Doesn't feel right.
- Speedy, efficient, early resolution – timely and clear response and thorough analysis. Speedy gives impression that want to get off books.

- If going to HRRT would want it to be streamlined so that it starts like it appeal rather than denovo. Or set up a review panel under the HRRT.

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