

Low yearly completion rate of HDC investigations is a cause for concern

The annual report of the Health and Disability Commissioner (HDC) for the year ended 30 June 2012 showed a continuing low amount of investigations being completed each year, with 44 investigations being completed out of a total of 1380 complaints closed.¹

The reduction of HDC investigations, both in absolute numbers and as a percentage of the total number of complaints closed each year, can be starkly seen by reviewing investigation figures (gained from HDC annual reports) since 2001:

- Year ended 30 June 2001 – 538/1338 (40%)
- Year ended 30 June 2002 – 234/1299 (18%)
- Year ended 30 June 2003 – 345/1338 (26%)
- Year ended 30 June 2004 – 178/1162 (15%)
- Year ended 30 June 2005 – 172/1158 (15%)
- Year ended 30 June 2006 – 116/1110 (10%)
- Year ended 30 June 2007 – 89/1273 (7%)
- Year ended 30 June 2008 – 100/1295 (8%)
- Year ended 30 June 2009 – 112/1378 (8%)
- Year ended 30 June 2010 – 51/1524 (3%)
- Year ended 30 June 2011 – 27/1355 (2%)
- Year ended 30 June 2012 – 44/1380 (3%)

The original provisions of the HDC Act concerning investigations proved to be too inflexible and the first Commissioner, Robyn Stent, left office with more than 600 open files, including more than 400 investigations. The second Commissioner, Ron Paterson, assumed office in March 2000 and spent his first years clearing the backlog of files.²

Amendments made to the Act in 2003 provided HDC with greater flexibility in handling complaints, requiring a preliminary assessment of a complaint follow by a decision to (1) refer the complaint to another agency; (2) refer the complaint to the provider; (3) refer the complaint to an advocate; (4) call a mediation conference; (5) take no action on the complaint; or (6) investigate the complaint.³ These changes lead to an evident decline in formal investigations which has continued over the years.

In the year ended 30 June 2010, Commissioner Paterson's final year (his last day as Commissioner was 31 March 2010), there was an alarming sharp decline in investigations closed, with 51 investigations completed, a 54% decrease from the previous year. The current Commissioner, Anthony Hill, assumed office in July 2010 and his first year saw a further sharp decline with only 27 investigations being closed, a 47% decrease from the previous year. This year has only seen a very small increase in the number of investigations closed.

In New Zealand's unique legal environment, a HDC investigation is one of the few opportunities consumers have when things go wrong to have an official and independent finding of accountability in relation to the matter. An investigation normally results in "a formal "opinion", which includes any attribution of culpability to the provider in the form of a finding of breach of the Code".⁴

The low amount of investigations being carried out raises concerns that access to HDC investigations has become too restricted. The 2009 HDC satisfaction survey also found that one reason for complainants' dissatisfaction with the HDC process was being denied an investigation.⁴ Indeed, commentators were already calling for the ability of complainants to access HDC investigations in appropriate cases to be strengthened when the latest investigation figure (from the year ending 2009) was 112.⁴

The Commissioner is empowered, following a preliminary assessment, to choose the option that he or she considers will best achieve the aim of facilitating "the fair, simple, speedy, and efficient resolution" of a specific complaint. This will clearly not always be a formal investigation, even in cases of suspected or probable breaches of the Code of Rights.

On a great many occasions, alternative dispute resolutions mechanisms (such as advocacy or mediation) or referring the matter to another agency or to the provider to resolve the matter directly with the complainant will be best suited to achieving this goal. Section 38(1) of the Act also enables the Commissioner to take no action on the complaint if he or she considers action or further action is unnecessary or inappropriate. As HDC has noted, "[i]n practice, before a decision is made to take no further action on a complaint, considerable information is gathered and assessed, and preliminary expert clinical advice may be obtained."⁵

This process does not require the formalities of an investigation and thus involves less time and cost, which may play a factor in decision making given the financial constraints on the office.⁶ However, it also does not result in an official opinion on whether or not there was a breach of the Code of Rights, but rather an 'education letter' highlighting any issues and aspects of care needing review. An apology or other follow-up action is also frequently requested.⁷

A formal investigation is often not the most appropriate way to handle a complaint. However, the current amount of investigations being conducted is concerning and requires further examination.

Stuart McLennan
Research Associate
Institute for Biomedical Ethics
University of Basel
Basel, Switzerland
s.mclennan@unibas.ch

References

1. Health and Disability Commissioner Annual Report for the year ended 30 June 2012.
<http://www.hdc.org.nz/publications/other-publications-from-hdc/annual-reports/annual-report-for-the-year-ending-30-june-2012>

2. Skegg PDG. A Fortunate Experiment? New Zealand's Experience with a Legislated Code of Patient Rights. *Medical Law Review* 2011;19: 235–266.
3. Paterson R. Assessment and Investigation of Complaints. In: PDG Skegg & R Paterson, eds. *Medical Law in New Zealand* (pp. 593-611). Wellington: Thomson Brookers, 2006
4. Manning J. Access to justice for New Zealand health consumers. *JLM* 2010,18:178-194.
5. A Review of the Health and Disability Commissioner Act 1994 and Code of Health and Disability Services Consumers' Rights: A Report to the Minister of Health, June 2009. <http://www.hdc.org.nz/the-act--code/review-of-the-act-and-code-2009>
6. Office of the health and Disability Commissioner: State of Intent 2012/2015. [http://www.hdc.org.nz/publications/other-publications-from-hdc/planning-documents/statement-of-intent-2012-2015-\(pdf\)](http://www.hdc.org.nz/publications/other-publications-from-hdc/planning-documents/statement-of-intent-2012-2015-(pdf))
7. Health and Disability Commissioner Annual Report for the year ended 30 June 2009. <http://www.hdc.org.nz/publications/other-publications-from-hdc/annual-reports/annual-report-for-the-year-ending-30-june-2009>