

# **Health and Disability Commissioner Amendment Act 2003**

Public Act 2003 No 49  
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### **Part4**

#### **Complaints and investigations**

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**The Parliament of New Zealand enacts as follows:****1 Title**

- (1) This Act is the Health and Disability Commissioner Amendment Act 2003.
- (2) In this Act, the Health and Disability Commissioner Act 1994 is called “the principal Act”.

**2 Commencement**

This Act comes into force on the day that is 1 year after the date on which this Act receives the Royal assent.

**3 Interpretation**

- (1) Section 2(1) of the principal Act is amended by omitting from the definition of **Deputy Commissioner** the word “the”, and substituting the word “a”.
- (2) Section 2(1) of the principal Act is amended by omitting from the definition of **disciplinary proceedings** the words “any health registration enactment”, and substituting the words “any former health registration enactment or the Health Practitioners Competence Assurance Act 2003”.
- (3) Section 2(1) of the principal Act is amended by repealing the definitions of **health professional body**, **health registration enactment**, and **registered health professional**.
- (4) Section 2(1) of the principal Act is amended by inserting, in their appropriate alphabetical order, the following definitions:  
“**appropriate authority** includes, for the purposes of any assessment or investigation of any action on the part of a health practitioner that was taken when the health practitioner was registered under a former health registration enactment, the authority that, under section 178(1) of the Health Practitioners Competence Assurance Act 2003, is, in relation to that health practitioner, the successor authority  
“**authority** has the same meaning as in section 5 of the Health Practitioners Competence Assurance Act 2003  
“**former health registration enactment** means any of the former enactments specified in Schedule 1

**“health practitioner—**

- “(a) has the same meaning as in section 5(1) of the Health Practitioners Competence Assurance Act 2003; and
- “(b) includes—
  - “(i) a former health practitioner within the meaning of that section; and
  - “(ii) a person who was conditionally or unconditionally registered, or has held a certificate of registration, under a former health registration enactment; and
  - “(iii) a person who is receiving training or gaining experience under the supervision of a health practitioner”.

**4 Definition of health care provider**

Section 3 of the principal Act is amended by repealing paragraph (h), and substituting the following paragraph:

“

- “(h) any health practitioner.”.

**5 Section 4 repealed**

The principal Act is amended by repealing section 4.

**6 New section 9 substituted**

The principal Act is amended by repealing section 9, and substituting the following section:

**“9 Deputy Commissioners**

- “(1) There may be appointed 1 or more Deputy Health and Disability Commissioners.
- “(2) A Deputy Commissioner is appointed in the same manner as the Commissioner, except that the Minister must, before recommending a person for appointment as Deputy Commissioner, consult with the Commissioner.
- “(3) Sections 10 to 13 apply to every Deputy Commissioner in the same manner as they apply to the Commissioner.
- “(4) A Deputy Commissioner has and may exercise or perform any of the powers, duties, and functions of the Commissioner that the Commissioner may delegate to that Deputy Commissioner either generally or in any particular case.

- “(5) A delegation under subsection (4) may be subject to any stated restrictions or conditions.
- “(6) In the case of absence from duty of the Commissioner (from any cause) or on the occurrence of a vacancy in the office of Commissioner (whether because of death, resignation, or otherwise) and from time to time while the absence or vacancy continues, all or any of the powers, duties, and functions of the Commissioner may be exercised and performed by—
- “(a) a Deputy Commissioner who has, before the occurrence of the absence or vacancy, been nominated for the purpose by the Commissioner by a written notice that is in effect at the time of the absence or vacancy; or
- “(b) if there is no such notice at that time, by the Deputy Commissioner longest in that office.
- “(7) The fact that a Deputy Commissioner exercises any power, duty, or function under this section is, in the absence of proof to the contrary, sufficient evidence of his or her authority to do so.”

## **7 Functions of Commissioner**

- (1) Section 14(1)(c) of the principal Act is amended by omitting the words “disability services providers, and purchasers,” and substituting the words “and disability services providers”.
- (2) Section 14(1) of the principal Act is amended by inserting, after paragraph (d), the following paragraph:
- “
- “(da) to act as the initial recipient of complaints about health care providers and disability services providers, and to ensure that each complaint is appropriately dealt with:”.
- (3) Section 14(1)(e) of the principal Act is amended by adding the words “or, in the case of conduct that occurred before the enactment of the Code, in breach of certain disciplinary standards”.
- (4) Section 14(1)(g) of the principal Act is amended by omitting the words “of the Code”.

**8 Functions of advocates**

Section 30(i)(i) of the principal Act is amended by omitting the words “a health professional body”, and substituting the words “an authority”.

**9 New Part 4 heading, headings, and sections 31 to 45 substituted**

The principal Act is amended by repealing the Part 4 heading, the headings above sections 31, 35, and 41, and sections 31 to 45, and substituting the following headings and sections:

**“Part 4****“Complaints and investigations***“Receipt of complaints***“31 General right to make complaints**

- “(1) Any person may complain orally or in writing to an advocate or to the Commissioner alleging that any action of a health care provider or a disability services provider is or appears to be in breach of the Code.
- “(2) Any person may complain orally or in writing to an advocate or to the Commissioner about any action of a health practitioner that was taken at any time before 1 July 1996, if it is alleged or it appears that the action—
- “(a) affected a health consumer; and
  - “(b) was, at the time that it was taken, a ground for bringing disciplinary proceedings against the health practitioner under a former health registration enactment; but
  - “(c) was not referred to the body that, under that enactment, had jurisdiction to consider it.
- “(3) If a complaint is made under this section to an advocate and the advocate is unable to resolve the complaint, the advocate must—
- “(a) refer the complaint to the Commissioner; and
  - “(b) inform the parties concerned of that referral and the reasons for it.

**“32 Complaints referred to Commissioner**

For the purposes of this Part, a complaint that is referred to the Commissioner under section 31(3) of this Act or section 64(1)

of the Health Practitioners Competence Assurance Act 2003 must be treated as if it had been made to the Commissioner.

**“33 Preliminary assessment**

- “(1) As soon as reasonably practicable after receiving a complaint, the Commissioner must make a preliminary assessment of the complaint to decide—
- “(a) whether to take 1 or more of the following courses of action:
    - “(i) to refer the complaint to an agency or person in accordance with section 34 or section 36:
    - “(ii) to refer the complaint to an advocate:
    - “(iii) to call a conference, under section 61, of the parties concerned:
    - “(iv) to investigate the complaint himself or herself; or
  - “(b) whether to take no action on the complaint.
- “(2) The Commissioner must promptly notify the complainant and the health care provider or the disability services provider to whom the complaint relates of the Commissioner’s preliminary assessment.
- “(3) This section does not preclude the Commissioner from revising a preliminary assessment and from subsequently exercising 1 or more of his or her other powers in relation to the complaint concerned.
- “(4) If the Commissioner revises a preliminary assessment, the Commissioner must promptly notify the following persons and agencies of the revised assessment:
- “(a) the complainant:
  - “(b) the health care provider or the disability services provider to whom the complaint relates:
  - “(c) any agency or any person to whom the complaint has, in accordance with section 34 or section 36, been referred:
  - “(d) any advocate to whom the complaint has been referred.

*“Referral of complaints to agencies, persons,  
statutory officers, or advocates*

**“34 Referral of complaint to agencies or persons involved in health or disability sector**

- “(1) At any time after completing a preliminary assessment of a complaint, the Commissioner may refer the complaint, in whole or in part,—
- “(a) to the appropriate authority if it appears from the complaint that the competence of a health practitioner or his or her fitness to practise or the appropriateness of his or her conduct may be in doubt; or
  - “(b) to the Accident Compensation Corporation if it appears from the complaint that the aggrieved person may be entitled to cover under the Injury Prevention, Rehabilitation, and Compensation Act 2001; or
  - “(c) to the Director-General of Health if it appears from the complaint that failures or inadequacies in the systems or practices of the health care provider or the disability services provider concerned may harm the health or safety of members of the public; or
  - “(d) to the health care provider or the disability services provider to whom a complaint relates if the complaint does not raise questions about the health or safety of members of the public and can, in the Commissioner’s opinion, be appropriately resolved by the provider.
- “(2) At any time before or after referring a complaint, in whole or in part, to an agency or person mentioned in subsection (1), the Commissioner may consult with that agency or person as to the most appropriate means of dealing with the complaint.
- “(3) After referring a complaint, in whole or in part, to an agency or person mentioned in subsection (1), the Commissioner must notify the complainant and the health care provider or the disability services provider to whom the complaint relates of the action that has been taken.
- “(4) The Commissioner may refer a complaint, in whole or in part, to more than 1 agency or person mentioned in subsection (1), as long as each referral is authorised by a paragraph of that subsection.



“(5) A reference of a complaint under subsection (1) does not preclude the Commissioner from taking action on the complaint himself or herself.

“**35 Agencies or persons to keep Commissioner informed about referred complaints**

Each agency or person to whom a complaint is referred under section 34 must—

- “(a) promptly acknowledge receipt of the complaint; and
- “(b) promptly advise the Commissioner of any significant step taken in its consideration or examination of the complaint; and
- “(c) promptly advise the Commissioner of the outcome of its consideration or examination of the complaint.

“**36 Referrals of complaints to certain statutory officers**

- “(1) If, at any time after completing a preliminary assessment of a complaint, the Commissioner considers that the complaint relates, in whole or in part, to a matter that is more properly within the scope of the functions of one of the statutory officers specified in subsection (4), the Commissioner must promptly consult with that officer in order to determine the appropriate means of dealing with the complaint.
- “(2) As soon as reasonably practicable after consulting with the officer concerned, the Commissioner must determine whether the complaint should be dealt with, in whole or in part, under this Act.
- “(3) If the Commissioner determines that the complaint should be dealt with, in whole or in part, by one of the officers specified in subsection (4), the Commissioner must promptly—
  - “(a) refer the complaint or, as the case requires, the appropriate part of the complaint to that officer; and
  - “(b) notify the complainant and the health care provider or the disability services provider to whom the complaint relates of the action that has been taken.
- “(4) The statutory officers referred to in subsection (1) are—
  - “(a) the Chief Commissioner under the Human Rights Act 1993;
  - “(b) the Chief Ombudsman;

“(c) the Privacy Commissioner.

**“37 Commissioner may refer complaint to advocate**

- “(1) At any time after completing a preliminary assessment of a complaint (whether or not the Commissioner is investigating, or continuing to investigate, the complaint himself or herself), the Commissioner may refer the complaint to an advocate for the purpose of resolving the matter by agreement between the parties concerned.
- “(2) On a referral of a complaint, under subsection (1), the advocate must—
- “(a) use his or her best endeavours to resolve the complaint by agreement between the parties concerned; and
  - “(b) report the results of those endeavours to the Commissioner.
- “(3) Every report made under subsection (2)(b) must record—
- “(a) the terms of any agreement reached between the parties concerned; and
  - “(b) if agreement is not reached on all matters, those matters on which agreement is reached and those matters on which no agreement is reached; and
  - “(c) any other matters that the advocate thinks fit.
- “(4) A copy of every report made under subsection (2)(b) must, on request, be made available by the Commissioner to each of the parties concerned.

*“Decision to take no action*

**“38 Commissioner may decide to take no action on complaint**

- “(1) At any time after completing a preliminary assessment of a complaint (whether or not the Commissioner is investigating, or continuing to investigate, the complaint himself or herself), the Commissioner may, at his or her discretion, decide to take no action or, as the case may require, no further action on the complaint if the Commissioner considers that, having regard to all the circumstances of the case, any action or further action is unnecessary or inappropriate.
- “(2) The Commissioner’s consideration under subsection (1) may, in particular, take into account any of the following matters:

- “(a) the length of time that has elapsed between the date when the subject matter of the complaint arose and the date when the complaint was made:
  - “(b) whether the subject matter of the complaint is trivial:
  - “(c) whether the complaint is frivolous or vexatious or is not made in good faith:
  - “(d) whether the person alleged to be aggrieved does not want any action taken or, as the case may be, continued:
  - “(e) whether there is in all the circumstances an adequate remedy or right of appeal, other than the right to petition the House of Representatives or to make a complaint to an Ombudsman, that it would be reasonable for the person alleged to be aggrieved to exercise.
- “(3) Subsection (2) does not detract from the generality of subsection (1).
- “(4) In any case where the Commissioner decides to take no action, or no further action, on a complaint, the Commissioner must inform the following persons and agencies of that decision and the reasons for it:
- “(a) the complainant:
  - “(b) the health care provider or the disability services provider to whom the complaint relates:
  - “(c) any agency or any person to whom the complaint has, in accordance with section 34 or section 36, been referred:
  - “(d) any advocate to whom the complaint has been referred.

*“Commissioner required to share certain  
information*

- “39 Commissioner to inform agencies of certain risks**
- “(1) Whenever the Commissioner has reason to believe that the practice of a health practitioner may pose a risk of harm to the public, the Commissioner must promptly notify the appropriate authority of that belief and the reasons for it.
- “(2) Whenever the Commissioner has reason to believe that failures or inadequacies in the systems or practices of a health care provider or a disability services provider are harming or are likely to harm the health or safety of members of the public,

the Commissioner must promptly notify the Director-General of Health of that belief and the reasons for it.

- “(3) If, during or after an investigation, the Commissioner is of the opinion that there is evidence of a significant breach of duty or misconduct on the part of a health care provider or disability services provider or an officer or employee or member of a health care provider or disability services provider, the Commissioner must promptly refer the matter to the appropriate person or agency.

*“Investigations by Commissioner*

**“40 Commissioner may investigate breaches**

- “(1) The Commissioner may decide to investigate any action of a health care provider or a disability services provider if the action is, or appears to the Commissioner to be, in breach of the Code.
- “(2) The Commissioner may investigate any action of a health practitioner that was taken at any time before 1 July 1996, if it appears that the action affected a health consumer and was, at the time that it was taken, a ground for bringing disciplinary proceedings against the health practitioner under a former health registration enactment.
- “(3) The Commissioner may investigate an action under this section either on complaint or on the Commissioner’s own initiative.

**“41 Complainant and provider to be notified of investigation**

- “(1) Before proceeding to investigate a matter under this Part, the Commissioner—
- “(a) must, by written notice, inform the complainant (if any), the health care provider or the disability services provider to whom the investigation relates, and any person alleged to be aggrieved (if not the complainant) of the Commissioner’s intention to make the investigation; and
- “(b) must, by written notice, inform the health care provider or the disability services provider to whom the investigation relates of—

- “(i) the details of the complaint (if any) or, as the case may be, the subject matter of the investigation; and
  - “(ii) the right of that person to submit to the Commissioner, within 15 working days of the date of the notice, a written response in relation to the complaint or, as the case may be, the subject matter of the investigation.
- “(2) The Commissioner may, at his or her discretion, extend the deadline of 15 working days set by a notice given under subsection (1)(b), and may do so before or after the deadline.

**“42 On notification of investigation authority not to take disciplinary action until further notice**

- “(1) In any case where, after deciding to investigate the action of a health care provider or a disability services provider, it appears to the Commissioner that the investigation directly concerns a health practitioner, the Commissioner must promptly give notice of the investigation to the appropriate authority.
- “(2) Once the authority has received the notice, no disciplinary action under the Health Practitioners Competence Assurance Act 2003 may be taken in relation to any subject matter of the investigation until—
- “(a) the Commissioner notifies the authority—
    - “(i) that the matter is not to be investigated, or investigated further, under this Act; or
    - “(ii) that the complaint or matter has been resolved; or
    - “(iii) that the matter is not to be referred to the Director of Proceedings under section 45(2)(f); or
  - “(b) the Director of Proceedings notifies the authority of his or her decision under section 49 not to institute disciplinary proceedings in relation to the matter.
- “(3) This section does not prevent any action under the Health Practitioners Competence Assurance Act 2003—
- “(a) under any of sections 36 to 42, 45 to 51, or 69 of that Act; or
  - “(b) in bringing and completing disciplinary proceedings initiated by a charge laid by the Director of Proceedings.

**“43 Information about result of investigation**

- “(1) As soon as reasonably practicable after the Commissioner completes an investigation, the Commissioner must advise the persons specified in subsection (2)—
- “(a) of the results of the investigation; and
  - “(b) of any further action that the Commissioner proposes to take or that the Commissioner proposes to take no further action.
- “(2) The persons referred to in subsection (1) are—
- “(a) any complainant whose complaint led to the investigation;
  - “(b) any person alleged to be aggrieved (if not the complainant);
  - “(c) the health care provider or the disability services provider whose action was the subject of the investigation;
  - “(d) if the investigation directly concerns a health practitioner, the appropriate authority.

**“44 Consultation required before matter referred to Director of Proceedings**

- “(1) The Commissioner may not, under section 45(2)(f), refer 1 or more health care providers or disability services providers to the Director of Proceedings for a decision as to whether proceedings should be instituted or action taken in respect of a person unless the Commissioner has given that person an opportunity to comment on that proposed referral.
- “(2) The Commissioner must have regard to any relevant factors of the kind specified in subsection (3) when the Commissioner considers whether or not to refer, under section 45(2)(f) 1 or more health care providers or disability services providers to the Director of Proceedings for a decision as to whether proceedings should be instituted or any action taken.
- “(3) The kinds of factors referred to in subsection (2) are—
- “(a) the wishes of the complainant (if any) and the aggrieved person (if not the complainant) in relation to the matter; and
  - “(b) any comments made under subsection (1) in relation to the matter; and

- “(c) the need to ensure that appropriate proceedings are instituted in any case where the public interest (whether for reasons of public health or public safety or for any other reason) so requires.

**“45 Procedure after investigation**

- “(1) This section applies if, after making an investigation under this Part, the Commissioner is of the opinion that any action that was the subject matter of the investigation—
  - “(a) was in breach of the Code; or
  - “(b) in the case of an action of a health practitioner that was taken at a time before 1 July 1996, affected a health consumer and was, at the time that it was taken, a ground for bringing disciplinary proceedings against the health practitioner under a former health registration enactment.
- “(2) If this section applies, the Commissioner may do all or any of the following:
  - “(a) report the Commissioner’s opinion, with reasons, to any health care provider or disability services provider whose action was the subject matter of the investigation, and may make any recommendations as the Commissioner thinks fit;
  - “(b) report the Commissioner’s opinion, with reasons, together with any recommendations that the Commissioner thinks fit, to all or any of the following:
    - “(i) any authority or professional body;
    - “(ii) the Accident Compensation Corporation;
    - “(iii) any other person that the Commissioner considers appropriate;
  - “(c) make any report to the Minister that the Commissioner thinks fit;
  - “(d) make a complaint to any authority in respect of any person;
  - “(e) if any person wishes to make such a complaint, assist that person to do so;
  - “(f) refer 1 or more health care providers or disability services providers to the Director of Proceedings for the purpose of deciding whether any 1 or more of the

following actions should be taken in relation to those providers:

“(i) any of the actions contemplated by section 47:

“(ii) the institution of proceedings under section 50:

“(iii) the institution of disciplinary proceedings.

- “(3) On referring 1 or more health care providers or disability services providers to the Director of Proceedings under subsection (2)(f), the Commissioner must advise the Director of Proceedings of any relevant factors of the kind specified in section 44(3).
- “(4) Subsection (2)(f)(ii) does not apply if this section applies because of subsection (1)(b).”

#### **10 Implementation of recommendations of Commissioner**

Section 46(1) of the principal Act is amended by omitting the expression “section 45(a)”, and substituting the expression “section 45(2)(a)”.

#### **11 Director of Proceedings’ right to participate in disciplinary and other proceedings**

Section 47(1) of the principal Act is amended—

- (a) by omitting from paragraph (a) the words “health professional body”, and substituting the words “authority or tribunal”; and
- (b) by omitting from paragraph (b)(i) and (ii) the words “a health professional body” in each place where it occurs, and substituting in each case the words “an authority or a tribunal”.

#### **12 Section 48 repealed**

Section 48 of the principal Act is repealed.

#### **13 Functions of Director of Proceedings**

- (1) Section 49(1) of the principal Act is amended by omitting from paragraph (a) the expression “section 45(f)”, and substituting the expression “section 45(2)(f)”.
- (2) Section 49 of the principal Act is amended by repealing subsections (2) and (3).



- 14 Proceedings before Human Rights Review Tribunal**  
Section 50(2) of the principal Act is amended by omitting the expression “49(2)”, and substituting the expression “44(1)”.
- 15 Aggrieved person may bring proceedings before Tribunal**  
Section 51 of the principal Act is amended by repealing paragraphs (a) and (b), and substituting the following paragraphs:  
“  
“(a) the Commissioner, having found a breach of the Code on the part of the person to whom that section applies, has not referred the person to the Director of Proceedings under section 45(2)(f); or  
“(b) the Director of Proceedings declines or fails to take proceedings.”
- 16 Powers of Human Rights Review Tribunal**  
Section 54(5) of the principal Act is amended by repealing the words “registered health professional” in both places where they occur, and substituting in each case the words “health practitioner”.
- 17 Mediation conference**  
Section 61(1) of the principal Act is amended by omitting the words “of an investigation by”, and substituting the words “of a complaint made to, or an investigation by”.
- 18 Further provisions relating to delegations**  
Section 69 of the principal Act is amended by inserting, before the expression “section 68” wherever it occurs in subsections (1), (3), (4), and (6), the words “section 9 or”.
- 19 Revocation of delegations**  
Section 71(1) of the principal Act is amended by inserting, before the expression “section 68”, the words “section 9 or”.
- 20 Schedule 1 amended**  
The heading to Schedule 1 of the principal Act is amended by inserting, before the word “HEALTH”, the word “FORMER”.

**21 Schedule 2 amended**

- (1) Clause 3 of Schedule 2 of the principal Act is amended by repealing subclause (5), and substituting the following subclause:  
“(5) There must be paid to each Deputy Commissioner—  
“(a) a salary at a rate agreed between the Minister and the Deputy Commissioner; and  
“(b) any allowances agreed between the Minister and the Deputy Commissioner.”
- (2) Clause 4 of Schedule 2 of the principal Act is amended by adding the following subclause:  
“(5) For the purposes of this clause, **Commissioner** includes any Deputy Commissioner.”
- (3) Clause 5 of Schedule 2 of the principal Act is amended by omitting the words “the Deputy Commissioner”, and substituting the words “a Deputy Commissioner”.

**22 Transitional provisions**

- (1) The provisions of Part 4 of the principal Act, as amended by this Act, apply, so far as they are applicable, to any complaint received, before the commencement of this Act, under section 31 or section 33 of the principal Act (as in force before that commencement) in respect of which no investigation has, before that commencement, been commenced under Part 4 of the principal Act.
- (2) All investigations under the principal Act that have been commenced before the commencement of this Act and that have not been completed before that commencement are to be continued and completed as if this Act had not been enacted.

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**Legislative history**

28 August 2003

Divided from Health Practitioners Competence  
Assurance Bill (Bill 230-2) as Bill 230-3A

11 September 2003

Third reading

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