

CONSUMER COMPLAINTS PROVIDE A RISK MANAGEMENT OPPORTUNITY FOR PROVIDERS

INTRODUCTION

Why am I commenting on managing risk when the Commission does not have to accept or bear the consequences of such decisions? My answer is the Commission experiences firsthand the consequences of poor risk management, albeit related to the management and outcome of complaints against health service and community service providers. For example, I have observed:

- complaints taking over 12 months to be resolved when they could have taken a quarter of the time, if detailed and accurate information had been provided and the complainant's desired outcomes seriously considered at the start;
- complainants and providers becoming frustrated and stressed at being continually questioned and probed by the Commission in relation to the issues of complaint and the provision of additional information and documents because satisfactory details weren't provided or appropriate decisions were not made at an early stage; and
- complaints being withdrawn because the complainants become frustrated and down and therefore do not have the energy or will to continue.

The Commission's experience over the past four years suggests that a number of risk management opportunities are presented to providers during the course of a complaint. If these opportunities were taken in the context of an open and genuine desire to resolve an issue, it could result in a better outcome for all concerned.

It is my contention that a number of risk management opportunities exist for the provider following the receipt of a complaint. These are:

- before a formal complaint is made to the Commission, but is made directly to the provider; and
- if made to the Commission:
 - during its assessment stage ; or
 - during conciliation.

FIRST OPPORTUNITY

The Commission, as a general rule, receives complaints because either the complainant is not satisfied with the provider's explanation or the complainant has valid reasons for not going to the provider direct. Reasons or causes for a complainant not previously contacting the provider might include:

- the person not being physically or emotionally capable;
- a perceived power imbalance by the complainant;
- the complainant having a strained and negative relationship with the provider; or
- the very nature of the complaint, eg attitude of the provider, lack of knowledge by the complainant or sexual misconduct.

There may be many reasons why a complainant is not satisfied with the initial explanation given by a provider or why a complainant has a strained relationship with the provider. It is the Commission's experience however that in many cases the overriding reasons are lack of accurate information and poor communication.

I believe there is an underlying perception by a complainant when he/she approaches the Commission that the provider is covering up, not telling all the story and is protecting themselves or their employees. This perception, and therefore the number of complaints coming to the Commission, could be reduced if providers were to take a risk management decision very early in the piece to openly disclose what happened to complainants.

Ideally, open disclosure should include:

- an expression of regret, ie. saying sorry for the mistake or harm done;
- a factual explanation of what happened;
- taking appropriate remedial action; and
- an explanation of what will be done to ensure it will not recur.

The risk associated with open disclosure is the complainant, having been advised the provider made a mistake or apologised, may take some form of civil action against the provider, that is, litigate.

This may or may not happen. As stated earlier, that is the risk. What does need to be recognised is that the risk of litigation is much greater in an environment where there is a lack of 'open disclosure'. Conversely, 'open disclosure' will often generate an environment of cooperation and a willingness to find solutions that do not necessarily include litigation. The benefits to such an approach are:

- the complainant may take no further action on the complaint because he/she is satisfied that their concerns have been recognised and changes will occur to ensure it doesn't happen to someone else;
- the complaint will not be escalated and referred to the Commission; and
- resolution can be agreed between the provider and complainant.

If the risk of litigation is considered high at this stage, I would suggest that the provider seriously consider seeking the involvement of the Commission and negotiate with the complainant to enter the Commission's conciliation process.

Any admissions and documentation brought into being by the provider or the complainant for the purpose of conciliation are then privileged. Effectively, the Commission's formal conciliation process provides an ideal environment in which 'open disclosure' can take place.

It is the Commission's experience that open disclosure and the provision of accurate, honest and detailed information will assist the complainant to better understand the issues and lead to an early resolution of their concerns. Such an outcome has to be better for everyone; patients, providers and the Commission.

I accept that, in order for this approach to be successful, the Commission must also play a role to ensure it is encouraging and maximising opportunities for complainants to take up their concerns direct with the provider in the first instance. Every opportunity should be given to the provider to manage the complaint and to the consumer to participate directly in resolving any issue. The Commission's legislation supports this role and we need to maintain focus in this regard.

SECOND OPPORTUNITY

If the complainant does approach the Commission, we have a responsibility to assess the complaint within 60 days to determine what further action should take place. I can determine to:

- take no further action;
- conciliate;
- investigate; or
- refer the complaint to an appropriate registration board.

During this assessment stage the Commission undertakes preliminary enquiries, gathers information and often obtains medical records and professional advice to assist in the formulation of recommendations for further action.

Inevitably the first stage of the assessment process is to forward the complaint to the provider and ask for a response to the issues raised. The response, once received by the

Commission, is then forwarded to the complainant in the hope the information provided by the provider will resolve the complainant's concerns. In practice, the initial responses from providers to the issues of complaint have not always realised this hope. There appears to be two reasons for this:

- although the issues identified by the complainant may be valid, the outcomes sought or expected are often unrealistic and unachievable and the response from the provider is therefore seen by the complainant as negative, unsympathetic or unhelpful; or
- the provider's response does not address the actual issues of complaint or contain enough detail to adequately address the issues of complaint or the expectations of the complainant.

It is this first stage of assessment where the provider has another risk management opportunity. The provider must decide how much information to provide the complainant.

A detailed, open and honest response is seen by many providers as risky, and makes it difficult for the provider to manage the complaint by predetermining how the complainant might respond. Very few providers however, are prepared to undertake 'open disclosure' at this stage. As a general rule, provider responses do not address the specific issues of complaint. They are generally couched in a way that contemplates the possibility of legal action, even when no suggestion arises of this being likely, and this, in turn, often escalates the complainant's frustration and perception that the provider is trying to hide something.

I can only reinforce from the Commission's experience that a factual, honest and detailed response, even if it relates to an adverse event, is most likely to bring about an earlier resolution to the complaint and is less likely to result in legal action. In many instances, as long as the complainant is convinced that their concerns have been taken seriously and what happened to them will not happen to others they will consider reasonable options to resolve their complaint and forgo the litigation option.

The Commission also appreciates this type of response as it reduces the need for us to undertake more detailed inquiries and obtain additional information such as medical records, etc.

Again I stress, if the risk of litigation is considered high at this stage, the provider should seriously consider seeking the Commission's involvement to negotiate with the complainant to enter our conciliation process.

THIRD OPPORTUNITY

Some complainants not only require an adequate explanation from the provider to the issues they raise, but may also be seeking compensation or specific changes to procedures or protocols. A complainant may seek these outcomes through the Commission's conciliation process or in the case of compensation, through the courts. Changes to procedure, compensation or some other outcome will be identified on the Commission's complaint form if that is their desired outcomes.

Unfortunately, there is a perception amongst many providers that the Commission determines the outcomes sought in the complaint and "encourages" complainants to seek compensation. That is not correct. In over 90% of cases a complaint form is forwarded to a complainants and completed without any assistance from the Commission, including the outcomes they are seeking as a result of making a complaint.

If the complainant nominates compensation as an outcome, the Commission is obliged to facilitate discussion about it. Often the Commission's involvement in such cases results in alternative solutions being found such as further treatment being provided or a waiver of fees. In some instances the process will resolve that compensation is not a valid outcome.

It is clearly the provider's responsibility to weigh up the risks associated with the issues of complaint to determine whether they wish to proceed to negotiate some form of compensation under our Act or risk the possibility of the complainant taking the matter further through the Courts. They also need to compare the costs associated with proceeding through the courts in comparison to the non-cost jurisdiction of the Commission.

Conciliation under the Health and Community Services Complaints Act is a consensual process by which a health complaint is resolved (or attempts are made to resolve it) through discussion and negotiation without recourse to litigation. I must stress at this point that conciliation is available to resolve all complaints, not just those where the complainant is seeking compensation. Parties to the complaint are brought together (not necessarily at the same time) to try and work out a solution that can be put into writing and if appropriate can become binding by way of an enforceable agreement under the Act. Conciliation is founded on principles of confidentiality between the parties to a dispute and the facilitator, who is independent and impartial. Information gained through the course of conciliation, such as an expert opinion, is privileged. Conciliation provides a confidential and non-adversarial environment in which to resolve complaints and is the Commission's preferred strategy for such.

The provider can make a risk management decision to attempt conciliation under the Commission's provisions at any stage and providing the complainant agrees this process can occur. On the other hand, the Commissioner may determine, following preliminary enquiries, that the issues of complaint and the outcomes sought are such they should be conciliated. If this is then agreed to by both parties, conciliation will proceed.

Agreement by the provider to conciliate has a number of risks and advantages attached to it. These can include:

Advantages to the Provider

- Conciliation encourages the complainant and provider to be involved in the management and resolution of the complaint and as information is exchanged there is an opportunity to explore what has happened and to review their position.
- Any information and opinions gained during the conciliation process becomes privileged, remains confidential and cannot be used for any other purpose.
- There is no cost to parties associated with the Commission's conciliation process.
- Formal enforceable agreements, including compensation and costs, can be made and adequate protection provided regarding the complainant taking further action.
- It is an informal non-legal and non-adversarial process.
- The process is quicker than the court process because factors involving court rules and administration do not impede the process;

Risks to the Provider

- If the provider does not agree to conciliate, the complainant may decide to seek legal advice and take legal action through the courts. This can be a very time consuming, traumatic, adversarial, public and an expensive exercise.
- The internal expense, trauma and frustration to the provider of defending their position often outweighs any redress, including compensation sought by the complainant.

CONCLUSION

The major risk to the provider in openly disclosing information in relation to a complainant's issues is judging whether the person can make a distinction between an expression of regret with an explanation of the facts and an admission of liability.

I would contend that in relation to complaint resolution, the earlier a provider manages its risks and makes decisions regarding:

- the extent of detail required to respond adequately and openly to the issues of complaint;
- the provision of an expression of regret, ie. saying sorry for the mistake or harm done;
- the realism of the outcomes sought by the complainant; and
- how they can participate in resolving the complaint;

the more likely the complainant is to accept the response and move on.

The risk to the provider is that the complainant, having received the information, may consider that the provider has conceded fault and remove himself from the Commission's process and seek action through the court.

Will the benefits outweigh the risks? That decision can only be made by the provider and will need to be judged on a case by case basis. The good news is providers, as I have already alluded to, have three chances in which to make such decisions.

I further suggest that providers who make these decisions when a complaint is first made to them, will more than likely reap the following benefits:

- a speedier resolution to the complaint;
- reduced stress amongst those involved in the complaint;
- reduction in the number of complaints being referred to the Commission; and
- a possible reduction in compensation payments.