

## Failure by health funding body to honour undertaking by predecessor funding body to fund gender reassignment surgery unreasonable

<b>Legislation</b>	Ombudsmen Act 1975, New Zealand Public Health and Disability Act 2000
<b>Agency</b>	Health Funding Authority
<b>Ombudsman</b>	Sir Brian Elwood
<b>Case number(s)</b>	W40303
<b>Date</b>	2003

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*The Health Funding Authority (disestablished in 2001) was required to consider a complaint against its predecessor (Regional Health Authority) about an agreement by RHA to fund gender reassignment surgery—the RHA had initially agreed to fund this surgery but then changed its policy—the Ombudsman concluded that it was unreasonable for the RHA not to honour this undertaking on the basis of a subsequent change in policy and that its successor, the HFA should remedy the unreasonable actions of its predecessor—the HFA agreed with the Ombudsman’s recommendations to fund the gender reassignment surgery in the manner originally approved—as the HFA was by this time disestablished the matter was passed to the Ministry of Health for completion*

The investigation concerned the reversal by a former Regional Health Authority (RHA) of a decision to fund gender reassignment surgery. In April 1997, verbal approval had been given by the RHA to the complainant’s plastic surgeon for the surgery to proceed. A few days before the scheduled operation, the RHA wrote to the plastic surgeon advising that gender reassignment surgery had been reclassified, with the support of the local Ethics Committee, as a cosmetic procedure. The practical effect of reclassification was that the procedure was no longer available in the region through the public health system. On the basis of the reclassification, the earlier approval for surgery was withdrawn.

The complainant alleged that, based on the RHA’s approval, she had a reasonable expectation that surgery would proceed and that the subsequent action in retrospectively applying a new policy to her situation was unreasonable.

The complaint was taken up with the Health Funding Authority (HFA), as successor to the RHA, on 2 July 1998. The main thrust of the HFA's response was that, at 11 April 1997, the policy on whether the medical procedure was available in the RHA area was unclear. It was argued that the policy did not necessarily permit gender reassignment surgery and that, partly in response to the complainant's situation, the RHA had sought clarification of the issue from the Ethics Committee. Whether or not the surgery was to proceed in the complainant's case was contingent on the outcome of the approach to the Ethics Committee. The Committee agreed that the procedure should not be funded.

Whether in 1997 there was a lack of clarity to the policy surrounding the availability of gender reassignment surgery, was irrelevant to the decision in the complainant's case. The papers showed that the RHA sought to reclassify gender reassignment surgery as a cosmetic procedure and thus make clear that it would not be available. The RHA was entitled to do this. The issue was whether, having agreed to fund what was then an approved medical procedure, it was administratively unfair to not fund it.

The HFA contention was at odds with the documentation. The submission to the Ethics Committee concerned a general policy matter, rather than the complainant's case. The Committee was not asked to decide whether the surgery, which had been approved, should proceed.

There was no evidence that the surgeon had been told that approval was conditional or could not be relied on by the complainant. The complainant was given no indication that the RHA had sought to change the policy, nor was she given any opportunity to be heard on a decision which clearly affected her adversely.

It therefore appeared administratively unreasonable for the RHA not to honour its undertaking on the basis of a subsequent change in policy. Accordingly, the opinion was formed, pursuant to section 22 of the *Ombudsmen Act 1975*, that the HFA's failure to remedy the unreasonable actions of its predecessor was, in the circumstances of the case, unreasonable.

Recommendations were made that the HFA should:

1. arrange for new psychiatric assessments which were a prerequisite for such surgery, and meet all costs associated with those assessments; and
2. subject to favourable clinical indications, fund gender reassignment surgery in the manner originally approved, together with all associated costs.

The HFA agreed to implement the recommendations. However, as the psychiatric assessments had not been undertaken at the time the HFA was disestablished, the matter was passed to the Ministry of Health for completion.

*This case note is published under the authority of the [Ombudsmen Rules 1989](#). It sets out an Ombudsman's view on the facts of a particular case. It should not be taken as establishing any legal precedent that would bind an Ombudsman in future.*