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MODEL ESSAY**



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How to write a law essay

Depending on the required work length, writing a law essay can be a long and involved process. START AS EARLY AS POSSIBLE! Many students develop their own style of attacking an essay topic. Generally however it is useful to break the essay-writing process down into the following steps:

1. Analysing your essay topic

Before you can create an effective argument, you must determine exactly what you are being asked to answer. Your lecturer would have chosen his/her words carefully when setting the essay topic so avoid making generalisations and interpreting the question to suit your interests or level of knowledge. Seek clarification from your lecturer where necessary. It is often a good idea to highlight key words in the essay question and use them to structure your essay.

2. Researching

Be thorough in your researching and try to locate as wide a variety of sources as possible i.e. books, journals, texts, internet articles. Make extensive use of NZLII and the LegalTrac database for tracking down journal articles (see the lawskool.com.au research guide). Many law journals are available online these days and you'll find that printing out web articles is much cheaper (and easier) than photocopying from the hard-copy journals.

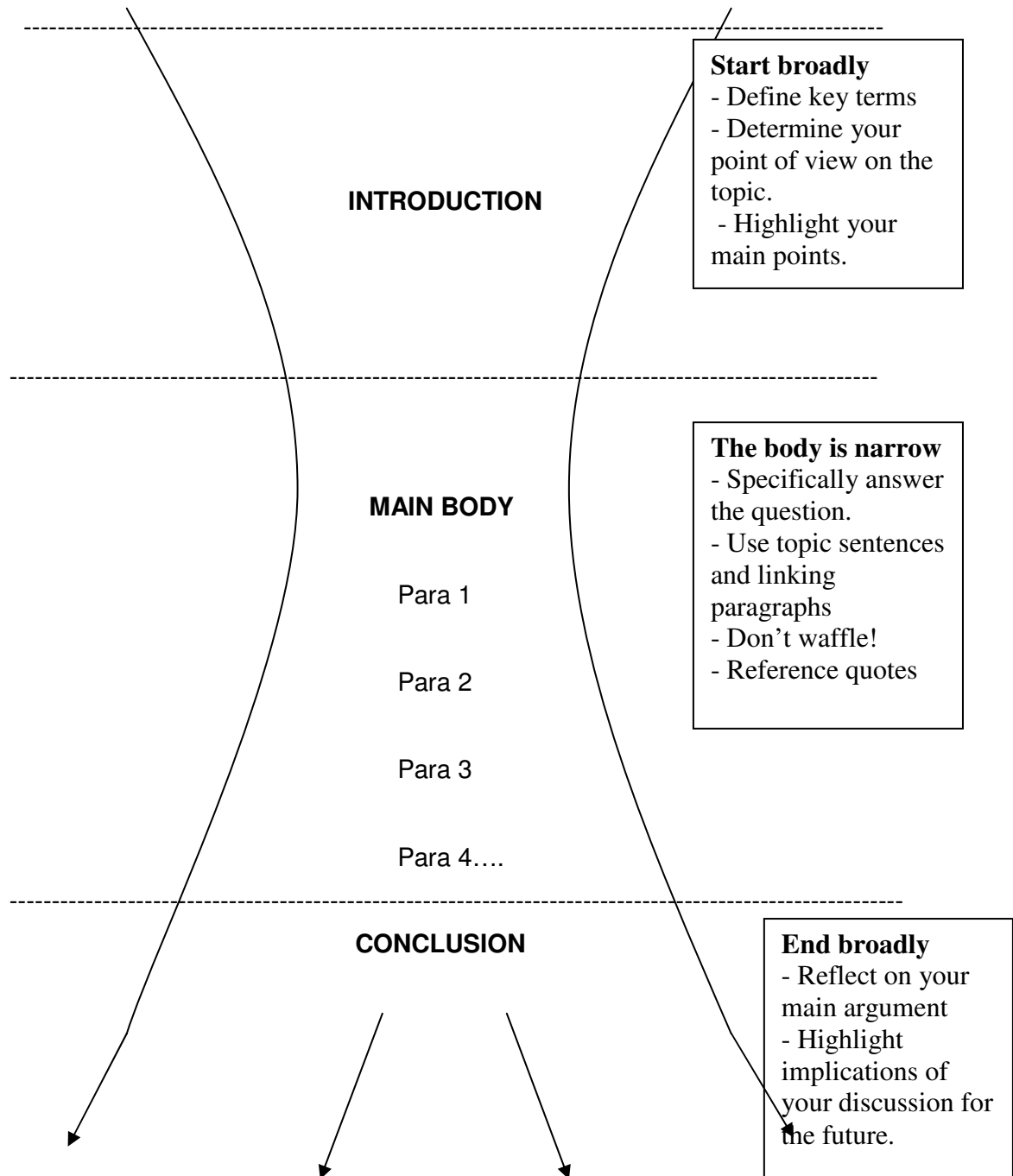
3. Reading/note taking

This will no doubt be the longest part of the essay-writing process. You should have a tentative essay plan in mind at this stage.

- Firstly skim through your sources and try to work out some categories for your notes.
- Now read through each source thoroughly, highlighting your printouts and tabbing your books as you go.
- Record extensive bullet point notes for each category (either on paper or on your word processor). Write/type out direct quotes verbatim. Ensure that you record all of your references as you go (trust us; this will make your life so much easier later on).

4. Planning

You probably won't be able to finalise a definitive essay plan until after you have teased out all of the relevant information from your sources. The following diagram provides you with a useful way of planning out your essay.



5. Draft

The hard part! Personal writing styles will differ: some preferring to stick rigidly to their plan and whittle down the essay in chunks; others taking a stream of consciousness approach in order to just get everything up on the screen before worrying about the text making any sense. Try to follow your plan but by no means worry about writing in perfect English at this stage. That's what the next step is for. Make liberal use of direct quotes and ensure that they are properly sourced.

6. Revising and refining

This is where you turn your shambolic 'essay' into a piece of solid gold that you can be proud of hurling through the essay slot on due date day. Be sure that you fully ANSWER THE QUESTION. It is imperative that there is a logical argument flowing through your entire essay that is easy for your marker to ascertain. If you have time, TAKE THE ESSAY TO YOUR UNI'S STUDY-SKILLS CENTRE. The dedicated individuals working there will be happy to read over your essay and give you thoughtful criticism and advice.

6. Footnoting

Everything must be fully referenced in a law essay, not just direct quotes. EVERY SINGLE PARAGRAPH MUST BE REFERENCED. Don't underestimate how long this can take you. Legal referencing is very precise and particular. Find out which legal referencing style your lecturers prefer. If you keep a record of all your references as you go along, you will avoid having to frantically fumble through your notes at 2am the morning before it's due, trying to work out where you pulled your quotes from.

Happy essay-writing!

Model Medical Law Essay

Essay Question: What is the impact of Clause 3 of the Code of Health and Disability Services Consumers' Rights on the rights contained within that Code? Is Clause 3 a worthwhile component of the Code?

Introduction

Enforceable rights for consumers of health and disability services in New Zealand were established when the Code of Health and Disability Services Consumers' Rights ("the Code") came into force in 1996. There has been little discussion of Clause 3 of the Code, which provides health and disability services' providers a chance to "escape" from liability under the Code. Clause 3 may seem to undermine the entire purpose of the Code, but it could equally be said that the Clause has little or no effect on a number of the rights (particularly as the onus remains on the provider to show that it took actions that were reasonable in the circumstances¹). This essay will discuss the impact of Clause 3 on the rights contained in the Code, and will assess which view of the Clause is more justified.

Background to the Code

The enactment of the Health and Disability Commissioner Act 1994 led to the introduction of the Code. It stands at the heart of the legislative protection of health consumers' rights, and has been internationally recognised as one of the most enlightened forms of consumer legislation in the health and disability field.²

¹ Code of Rights, Clause 3(2).

² "Godbold Rosemary and Antoinette McCallin "Setting the standard? New Zealand's approach to ensuring health and disability services of an appropriate standards" (2004) 13.1 *Journal of Law and Medicine* 125-134.

The Code sets out ten wide-ranging rights which are available to all health or disability consumers, with corresponding duties for the service providers. 'Provider' is broadly defined as meaning a "health care provider or disability services provider."³ 'Health care provider' includes any person who either provides, or holds themselves out as providing, health services to the public, regardless of whether or not they charge for those services.⁴ 'Disability care provider' is even more all-encompassing, and covers the provision of any goods, services and facilities that care for, support, or promote the independence of, disabled people.⁵ In theory, even the driver of a taxi specifically designed to carry wheelchair-bound people could be covered.

The consumer rights set out in Clause 2 of the Code will be discussed below. It is worth noting at this point that the Code does not include a right to access publicly funded services; something which it has been criticised for.⁶ However, when Right 4(3) and Right 7(8) are considered together, the Code actually comes quite close to granting a right of access.

Perhaps because of its comprehensive nature, the Code recognises that, in reality, no provider will be able to give full effect to all of its specified rights. Clause 3 states that a provider will not be in breach of the Code if they have "taken reasonable actions in the circumstances to give effect to the rights, and comply with the duties"⁷ in the Code. "The circumstances" are defined as "all the relevant circumstances, including the consumer's clinical circumstances and the provider's resource

³ Code of Rights, Clause 4.

⁴ Health and Disability Commissioner Act 1994, s3

⁵ Ibid, s2.

⁶ R Paterson "Health Care Law" [1996] *New Zealand Law Review* 292.

⁷ Code of Rights, Clause 3(1).

constraints.”⁸ Given this, there can be no doubt that the Code’s rights are not absolute, and that compliance with them is situation dependent.⁹

What are “the relevant circumstances”?

Clause 3 gives a broad definition of “the circumstances”, with two specific examples: the consumer’s clinical circumstances and the provider’s resource constraints.¹⁰

These would cover factors such as a patient’s medical history, gender and weight, and the provider’s staff shortages and geographical limitations. What is less certain is which circumstances might be relevant beyond these expansive examples. If something (for example, the consumer’s financial circumstances) specifically affects the situation in which the service is provided, it will probably be considered a relevant factor. If a consumer behaves in a way that prevents a provider from carrying out their Code obligations, that behaviour may be considered a relevant circumstance that could excuse non-compliance.¹¹

How can the inclusion of Clause 3 be justified?

In reality it is impossible to give full effect to all of the Code’s rights. Clause 3 recognises that without some reasonable limitations, providers will be constantly in breach of the Code.¹² Providers operate within strict funding limitations, meaning that there is often not the time, space or money available to treat patients in a way that optimises their rights. This problem has been exacerbated by advances in medicine that have resulted in longer life expectancies, and better and more expensive

⁸ Ibid, Clause 3(3).

⁹ Udy, Sarah “A Reasonable Action in the Circumstances? A review of the Clause 3 limitation on provider compliance with the Code of Health and Disability Services Consumers’ Rights” (Honours Dissertation, Otago, 1999).

¹⁰ Code of Rights, Clause 3(3).

¹¹ Udy, Sarah “A Reasonable Action in the Circumstances? A review of the Clause 3 limitation on provider compliance with the Code of Health and Disability Services Consumers’ Rights” (Honours Dissertation, Otago, 1999).

¹² Skegg, PDG, Paterson, Ron, eds (2006) *Medical Law in New Zealand*, Wellington: Thomson Brookers.

technologies.¹³ In *Shortland v Northland Health Ltd* it was recognised that the courts should not make orders relating to the allocation of scarce resources, since clinical judgement is beyond their expertise and they lack knowledge of the competing claims on those resources.¹⁴ Clause 3 is, in part, an embodiment of this principle. It was implied throughout the legislative process that the Code's rights would be subject to limitations. Furthermore, given New Zealand's approach to 'rights' in general, it is even more unlikely that they were intended to be absolute. Even the New Zealand Bill of Rights Act includes a general limitations clause.

The Effect of Clause 3 on Clause 2 Rights

In order to determine how Clause 3 affects consumers' rights, each right must be considered separately. The outcome varies significantly according to the right in question.

Right 1: Right to be Treated with Respect

A number of distinct concepts come within the ambit of this right: respect,¹⁵ privacy,¹⁶ and awareness of cultural, religious, social and ethnic dynamics.¹⁷

The initial presumption would be that a consumer has the right to be treated with respect regardless of the circumstances. This, however, is not strictly true. For example, if a consumer treated a female doctor in a sexist and derogatory manner, that doctor might be excused if they reacted in a way that did not comply fully with

¹³ Joanna Manning, Ron Paterson (2005) 33 *The Journal of Law, Medicine & Ethics* 681.

¹⁴ *Shortland v Northland Health Ltd* [1998] 1 NZLR 433

¹⁵ Code of Rights, Right 1(1).

¹⁶ *Ibid*, Right 1(2).

¹⁷ *Ibid*, Right 1(3).

the Code. Nevertheless, the provider is expected to exercise patience, and act in accordance with the Code to the greatest extent possible.¹⁸

The Code covers a right to personal privacy, not information privacy.¹⁹ Thus, Right 1(2) is already inherently limited by its definition. However, there is no doubt that Clause 3 factors will come into play. By its very nature, the provision of health and disability services is often not conducive to physical privacy. The type of service being provided will dictate the levels of privacy that are practicably possible. For instance, an accident victim being treated in the emergency department cannot expect the level of physical privacy that a woman giving birth might receive. Clause 3 also recognises that a provider will not be in breach of the Code if its limited resources mean that, for example, consumers have to share rooms.²⁰

The obligation that Right 1(3) places on providers is not burdensome. It only requires that a provider take into account the consumer's needs, values and beliefs.²¹ The services provided do not actually have to comply with these considerations. In light of this, Right 1(3) seems rather hollow, as there is no concrete way of ascertaining whether or not the provider has fulfilled its obligation. In theory a lack of time or resources in an emergency situation could exonerate a provider, but the reality is that Clause 3 will likely have little effect on this right.

Right 2: Right to Freedom from Discrimination, Coercion, Harassment, and Exploitation

¹⁸ Udy, Sarah "A Reasonable Action in the Circumstances? A review of the Clause 3 limitation on provider compliance with the Code of Health and Disability Services Consumers' Rights" (Honours Dissertation, Otago, 1999).

¹⁹ Code of Rights, Clause 4.

²⁰ Ibid, Clause 3(1).

²¹ Ibid, Right 1(3).

Presumably nothing could excuse the harassment or exploitation of a consumer.

However, Clause 3 could excuse some degree of discrimination or coercion.

Both the consumer's clinical circumstances and the provider's resource constraints may be relevant when considering the issue of discrimination. The need to ration healthcare has led to prioritised waiting lists for many health and disability services. These waiting lists take into account factors such as the consumer's life-expectancy and pre-existing health conditions. Such considerations would prima facie appear to be discriminatory.²² In *Shortland* a Maori man did not qualify for dialysis treatment.²³ Maori have a shorter life expectancy than non-Maori, meaning that as a group they are less likely to qualify for health and disability services (despite the fact that disproportionate numbers of Maori suffer from chronic disease²⁴). This point was never raised, but it seems likely that Clause 3 would have allowed discrimination in light of the consumer's clinical circumstances and the provider's resource constraints.

Clause 3 can also excuse situations where the consumer experiences some form of coercion. Drug-testing of athletes is allowed, although some athletes only agree to participate because they realise that they risk disqualification if they refuse.²⁵

However, the extent to which coercion could be considered acceptable is uncertain.

A number of American States are currently considering whether pregnant women seeking abortions should be forced to view an ultrasound of the foetus before the termination takes place (presumably in hopes of lowering abortion rates).²⁶ It seems highly unlikely that Clause 3 would allow this level of coercion to take place in New Zealand.

²² Joanna Manning, Ron Paterson *The Journal of Law, Medicine and Ethics*.

²³ *Shortland v Northland Health Ltd* [1998] 1 NZLR 433.

²⁴ Joanna Manning, Ron Paterson *The Journal of Law, Medicine and Ethics*.

²⁵ Udy, Sarah "A Reasonable Action in the Circumstances? A review of the Clause 3 limitation on provider compliance with the Code of Health and Disability Services Consumers' Rights" (Honours Dissertation, Otago, 1999).

²⁶ "States consider ultrasound abortion bills" <http://archives.chicagotribune.com/2009/feb/08/news/chi-ap-ne-xgr-abortion-ultr>

Right 3: Right to Dignity and Independence

The provider's obligation to offer services "in a manner that respects the dignity and independence of the individual"²⁷ is clearly affected by Clause 3, and particularly by the consumer's clinical circumstances. A provider treating a coma patient, for example, will probably be excused if they do not respect the patient's "independence". Resource constraints may also excuse less than full compliance with Right 3. Sometimes, rather than helping a consumer to complete a task independently, providers will do the job themselves to save time.²⁸ Clause 3 recognises a number of situations in which providers will have acted legitimately, even if they are unable to optimise the consumer's right to dignity and independence.

Right 4: Right to Services of an Appropriate Standard

Right 4(1) states that consumers are entitled to services that are "provided with reasonable care and skill."²⁹ The word "reasonable" implies that the right is limited, as what is reasonable in the circumstances necessarily depends on the circumstances themselves.³⁰ In light of this, Clause 3 will have little effect on Right 4(1). It is, however, interesting to note that it is for the Commissioner to decide whether care was of an appropriate standard, and that the *Bolam* test is not determinative under Right 4. This also means that "[i]t is not an excuse (or a relevant circumstance) that other providers would have provided a similar standard of care and information."³¹

²⁷ Code of Rights, Right 3.

²⁸ *HDC Consultation Document: Review of the Health and Disability Commissioner Act 1994 and the Code of Health and Disability Services Consumers' Rights* (November 2005).

²⁹ Code of Rights, Right 4(1).

³⁰ Udy, Sarah "A Reasonable Action in the Circumstances? A review of the Clause 3 limitation on provider compliance with the Code of Health and Disability Services Consumers' Rights" (Honours Dissertation, Otago, 1999).

³¹ *Commissioner's Opinion* 04HDC14171.

On the other hand, Clause 3 will have a significant effect on (and may even directly undermine) Right 4(2), which requires services to be provided which “comply with legal, professional, ethical, and other relevant standards.”³² Many standards of this kind are meant to be absolute and not situational. However, Clause 3 reintroduces circumstances as a justification for a breach of such a standard.³³ Of course, this does not mean that the circumstances will always act as a justification. In one case, a prison dentist failed to keep records that complied with the relevant standard. While time pressure was considered to be a relevant consideration, it was not enough for Clause 3 to excuse his breach.³⁴

If it were not for Clause 3, once a provider had decided to provide a service, Right 4(3) would oblige that provider to supply services “in a manner consistent with his or her needs”³⁵, regardless of the circumstances. The right is not inherently limited, thus meaning that Clause 3 will have a significant effect on it; essentially confining it to “taking reasonable actions in the circumstances” to provide services in the correct manner. Clause 3 recognises that, on its own, Right 4(3) would place an unreasonably arduous obligation on the provider. If funding issues result in services being provided in a manner inconsistent with the consumer’s needs, the provider will have often taken reasonable actions in the circumstances. This was the case when a daughter was no longer able to stay overnight at her mother’s rest home, because she was affecting the provider’s “bed-night” funding levels.³⁶

³² Code of Rights, Right 4(2).

³³ Udy, Sarah “A Reasonable Action in the Circumstances? A review of the Clause 3 limitation on provider compliance with the Code of Health and Disability Services Consumers’ Rights” (Honours Dissertation, Otago, 1999).

³⁴ *Commissioner’s Opinion* 02HDC12290.

³⁵ Code of Rights, Right 4(3).

³⁶ *HDC Consultation Document: Review of the Health and Disability Commissioner Act 1994 and the Code of Health and Disability Services Consumers’ Rights* (November 2005).

The second half of Right 4(4) (the right to have services provided in a way that optimises the consumer's quality of life) is not significantly affected by Clause 3. This is because the right contains a latent limitation: the degree to which quality of life can be optimised is dependent on the circumstances.³⁷ However, the right to have services provided in a manner that minimises potential harm to the consumer³⁸ would be unqualified, if it were not for the inclusion of Clause 3. Presumably this is because the "do no harm" principle is so central to the provision of health and disability services. Despite this, the general application of Clause 3 to the Code means that a provider, such as PHARMAC may be justified in recommending a 9 week course of the drug Herceptin³⁹, rather than the conventional year long course, in light of its budget restrictions.⁴⁰

The heavy burden that Right 4(5) places on the provider is mitigated by Clause 3. It would be unreasonable to expect all providers to cooperate amongst themselves,⁴¹ given the extremely broad definition of a 'provider'. Sometimes the providers may not be aware of the existence of each other, or the consumer may not want their information shared between providers.⁴²

Right 5: Right to Effective Communication

A consumer's right to an interpreter is already limited to situations where it is "necessary and reasonably practicable to provide one"⁴³. Clause 3 means that the other provisions contained in Right 5 are similarly limited depending on the circumstances. While the provider should always attempt to convey the necessary

³⁷ Code of Rights, Clause 4.

³⁸ Code of Rights, Right 4(4).

³⁹ Drug used to treat breast cancer.

⁴⁰ *Journal of Law and Medicine* "Herceptin, Pharmac and the New Zealand District Health Boards: Keeping abreast of the Code of Health and Disability Services Consumers' Rights?"

⁴¹ Code of Rights, Right 4(5).

⁴² Udy, Sarah "A Reasonable Action in the Circumstances? A review of the Clause 3 limitation on provider compliance with the Code of Health and Disability Services Consumers' Rights" (Honours Dissertation, Otago, 1999).

⁴³ Code of Rights, Right 5(1).

information in a manner that the consumer understands, Clause 3 enables them to vary their approach depending on what is appropriate in the situation. The mode of communication in an emergency accident scenario may be very different to what might be expected when discussing a pre-planned surgery.

Right 6: Right to be Fully Informed

According to Right 6 providers are expected to give honest and accurate answers to questions and provide information “that a reasonable consumer, in that consumer’s circumstances”⁴⁴ would expect to be told about. This includes (among other things) an explanation of the available options, the results of tests, and notification of any participation in teaching or research. Given the direct reference to the reasonable consumer and their circumstances, Clause 3 is unlikely to further limit Right 6. In some situations resource limitations may be considered as a justification for less than full compliance, but presumably the “reasonable consumer” would have taken such limitations into account in the first place. However, the obligation placed on the provider is certainly not an undemanding one. The Commissioner has stated that, even when the mitigating effect of Clause 3 is taken into account, a provider will sometimes be required to inform the consumer of risks that have a less than one percent chance of occurring.⁴⁵ Findings such as this should go some way to showing that Clause 3 is not, as some of its detractors claim, a “get out of jail free card.”⁴⁶

Right 7: Right to Make an Informed Choice and Give Informed Consent

Much of Right 7 is unlikely to be significantly affected by Clause 3 because built-in equivalents are specified. Right 7(1) states that services may only be provided to a consumer who gives informed consent, but then qualifies this by reference to

⁴⁴ Ibid, Right 6(1).

⁴⁵ *Commissioner’s Opinion* 98HDC19009.

⁴⁶ Udy, Sarah “A Reasonable Action in the Circumstances? A review of the Clause 3 limitation on provider compliance with the Code of Health and Disability Services Consumers’ Rights” (Honours Dissertation, Otago, 1999).

situations where legislation and the common law provide otherwise. Given that there are statutes specifically designed to deal with situations where informed consent is not given for a procedure,⁴⁷ it is hard to see how Clause 3 would significantly extend any mitigating grounds.

Right 8: Right to Support

A consumer's right to support is already limited to situations where their safety or another consumer's rights will not be unreasonably infringed.⁴⁸ This was illustrated when a woman's partner was unable to accompany her while being airlifted to hospital because of confined space.⁴⁹ Clause 3 is unlikely to have much additional effect on the operation of Right 8. It is possible that resource constraints may provide some limited excuse for a provider's failure to contact a support person for the consumer, but the Commissioner has stated that this will not be the case in serious medical situations.⁵⁰

Right 9: Rights in respect of Teaching or Research

Right 9 is phrased in a way that is more consistent with a directive than a right. It states that all rights in the Code extend to consumers that participate in teaching or research.⁵¹ Clause 3 may allow for research to be carried out in situations where the consumer is unable to give consent – for example a patient with advanced Alzheimer's.⁵² Beyond this it is unlikely to affect Right 9.

⁴⁷ For example, the Mental Health (Compulsory Assessment and Treatment) Act 1992.

⁴⁸ Code of Rights, Right 8.

⁴⁹ *Commissioner's Opinion* 98HDC19009.

⁵⁰ *Commissioner's Opinion* 01HDC09116.

⁵¹ Code of Rights, Right 9.

⁵² Udy, Sarah "A Reasonable Action in the Circumstances? A review of the Clause 3 limitation on provider compliance with the Code of Health and Disability Services Consumers' Rights" (Honours Dissertation, Otago, 1999).

Right 10: Right to Complain

Consumers have the right to complain, and Right 10(6) states that every provider must have an effective complaints procedure. Given that the definition of 'provider' includes people acting in an informal capacity (such as a mother taking care of her son), Clause 3 will almost certainly mean that such providers are not expected to adhere strictly to this requirement. This limitation aside, providers will invariably be expected to deal with complaints in a manner that complies with the Code to the greatest extent possible.

Conclusion

The effect that Clause 3 has on the rights contained in the Code varies depending on the right in question. While Clause 3 limits the ambit of a number of those rights, it is incorrect to claim that it undermines the Code altogether. The broad nature of the rights means that, without Clause 3, strict application of the Code would unfairly burden providers of health and disability services. Clause 3 should, therefore, be considered an asset to the Code because it allows for a comprehensive scheme of enforceable rights, without creating absurdities in the system.



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suggestions.**