

# **MEDICAL LAW SUMMARY**



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## 1. An Introduction to New Zealand Health Law

New Zealand's health care law is drawn from a wide variety of statutes and legislation. The key legislative framework for the provision of publicly funded health care is the New Zealand Public Health and Disability Act 2000. Also of vital importance is the Code of Health and Disability Services Consumers' Rights ("the Code"). Unlike many other countries, where medical negligence lawsuits are common, victims of medical misadventure are nearly entirely barred from suing for common law damages in civil proceedings in New Zealand.<sup>1</sup> Potential claimants are instead compensated by this country's comprehensive no-fault accident compensation scheme.

### 1.1 KEY FEATURES OF THE PUBLICLY FUNDED HEALTH SYSTEM

- Health care in New Zealand is essentially a tax-based, government funded system.
- If you are an "eligible person" your hospital and mental health treatment is generally free of charge. However, things such as pharmaceuticals are usually only partially funded by the government, if at all.
- A District Health Board is responsible for the residents in its region. Responsibilities include funding the services provided by community and primary organisations, providing hospital care, and planning and organising services in its district.<sup>2</sup> In a nutshell, the Ministry of Health determines healthcare policy, and this policy is then pursued by the DHBs.
- A number of ministerial advisory committees on health care have been established through the New Zealand Public Health and Disability Act 2000. These include the National Advisory Committee on Health and Disability, the National Ethics Advisory Committee, mortality review committees, and the Health Workforce Advisory Committee.

### 1.2 REGULATION

Health services are regulated by legislation such as the Code, the Health and Disability Commissioner Act 1994, the Health Practitioners Competence Assurance Act 2003, and the Health and Disability Services (Safety) Act 2001. This legislation is meant to ensure (amongst other things) that consumers receive an acceptable standard of health care, and that health care practitioners are competent to carry out the duties which their profession demands of them.

While a range of legislation regulates the provision of health care services, the conduct of health care practitioners is governed by one statute: the Health Practitioners Competence Assurance Act 2003. According to this, the competence of practitioners is meant to be

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<sup>1</sup> See Injury Prevention, Rehabilitation, and Compensation Act 2001, s317(1)

<sup>2</sup> Skegg, PDG, Paterson, Ron, eds (2006) *Medical Law in New Zealand*, Wellington: Thomson Brookers, p6.

assured by a registration and certification process, as well as by the Health Practitioners Disciplinary Tribunal. If there are concerns about a practitioner's competence then another practitioner or an employer or the Health and Disability Commissioner can report those concerns.<sup>3</sup> If a concern is reported to the appropriate authority then there is a rigid procedure that must be followed if the authority wishes to investigate the practitioner's competence.<sup>4</sup> If the concerns are found to be justified following investigation, the authority must make sure that the practitioner does one of the following things: sit an examination or assessment; take part in a programme; have conditions imposed on the scope of their practice; or be counselled or assisted.<sup>5</sup>

## **2. The Code of Health and Disability Services Consumers' Rights**

### **2.1 INTRODUCTION**

"The Code" is New Zealand's Code of Patients' Rights. In 1998 it was suggested by the "Cartwright Report" into cervical cancer treatment that a statement of patients' rights should be introduced. A major reform of health and disability services in New Zealand followed this, after which the Health and Disability Commissioner Act 1994 was passed into law. The Code was developed according to the procedure set out in the Health and Disability Commissioner Act, and came into force on July 1 1996.

### **2.2 STATUTORY REQUIREMENTS AND LEGAL STATUS OF THE CODE**

When the first Health and Disability Commissioner (Robyn Stent) was appointed in 1994, her first priority under the Health and Disability Commissioner Act was to draw up a draft copy of the Code.<sup>6</sup> The Code would have to include provisions relating to the following: informed consent; duties and obligations of health care providers; rights of health consumers and disability services' consumers; procedures for dealing with complaints against health care and disability care providers; provision of services of an appropriate standard; and respecting the dignity and independence of the individual.<sup>7</sup> In addition to this, the Commissioner also had a wide ambit to include anything in the Code that she considered to be either particularly important to the rights of disability consumers, or to otherwise impact on the rights of health or disability services' consumers.

The Code's legal status stems from section 74(1) of the Health and Disability Commissioner Act 1994, which states that the Governor-General may make regulations which prescribe a Code of Health and Disability Services Consumers' Rights. Because the Code was

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<sup>3</sup> Health Practitioners Competence Assurance Act 2003, s118(f)

<sup>4</sup> Health Practitioners Competence Assurance Act 2003, s36(1)

<sup>5</sup> Health Practitioners Competence Assurance Act 2003, s38(1)

<sup>6</sup> Health and Disability Commissioner Act 1994, s14(1)(a)

<sup>7</sup> Health and Disability Commissioner Act 1994, s20(1)

developed through an exercise of Parliament's conferred powers, it is subordinate legislation and thus has full legal effect.<sup>8</sup>

## 2.3 KEY DEFINITIONS AND THE RANGE OF APPLICATION

In order to understand the Code, we must first define three important terms: "providers"; "consumers"; and "services". The definitions of these words are found in the Health and Disability Commissioner Act 1994, and thus apply to the Code.<sup>9</sup>

### 'Provider'

According to Clause 4 of the Code, 'Provider' means a health care provider or a disability services provider. Turning to the Health and Disability Commissioner Act, we then find that the term 'health care provider' covers a wide ambit,<sup>10</sup> including:

- A person in charge of providing health care services, if those services come within the meaning of the Health and Disability Services (Safety) Act 2001;<sup>11</sup>
- Any health practitioner;<sup>12</sup>
- Any person who provides, or holds himself or herself or itself out as providing, health services to the public or to any section of the public, whether or not any charge is made for those services;<sup>13</sup>

It is obvious from this that the definition of a 'health care provider' is very broad, especially in light of the catch-all provision in section 3(k). For example, one interpretation of 'health care provider' was broad enough to cover a person who offered beauty treatments and massage therapy.<sup>14</sup>

Continuing with our definition of 'provider', the term 'disability services provider' covers an even broader range of activities. Anyone who provides, or holds himself/itself out as providing, disability services is covered. Disability services include goods, services, and facilities which are provided either to people with disabilities for their care or support or the promotion of their independence, or for purposes which are related to this goal.<sup>15</sup> This definition is fairly all-encompassing, and could include some very unlikely people, such as a person who drives a taxi specifically designed for disabled passengers.

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<sup>8</sup> Skegg, PDG, Paterson, Ron, eds (2006) *Medical Law in New Zealand*, Wellington: Thomson Brookers, p25.

<sup>9</sup> See Interpretation Act 1999, s34: "A word or expression used in a regulation, Order in Council, Proclamation, notice, rule, bylaw, Warrant, or other instrument made under an enactment has the same meaning as it has in the enactment under which it is made."

<sup>10</sup> For the full definition of 'health care provider', see Health and Disability Commissioner Act 1994, s3

<sup>11</sup> Health and Disability Commissioner Act 1994, s3(a)

<sup>12</sup> Health and Disability Commissioner Act 1994, s3(h); for a further definition of 'health practitioner' see the Health and Disability Commissioner Act 1994, s2(1)

<sup>13</sup> Health and Disability Commissioner Act 1994, s3(k)

<sup>14</sup> *Opinion 02HDC18117* (Health and Disability Commissioner, 4/2/04)

<sup>15</sup> Health and Disability Commissioner Act 1994, s2(1)



## **‘Consumer’**

Section 4 of the Code states that a ‘consumer’ is a health or disability services’ consumer. For the purposes of rights 5, 6, 7(1), 7(7) to 7(10), and 10, this includes a person entitled to give consent on behalf of that consumer.

Once more we must turn to the Health and Disability Commissioner Act for a more detailed definition. According to this, a ‘health consumer’ is someone on or in respect of whom any health care procedure is carried out.<sup>16</sup> ‘Health care procedure’ means “any health treatment, health examination, health teaching, or health research administered to or carried out on or in respect of any person by any health care provider; and includes any provision of health services to any person by any health care provider”.<sup>17</sup> While this definition is, again, very broad, it is interesting to note that a dead person is no longer considered to be a ‘consumer’.<sup>18</sup>

A ‘disability services’ consumer’ is any person who, because they have a disability, has a reduced ability to function independently, or is likely to need support for an indefinite period.<sup>19</sup>

## **‘Services’**

‘Services’ include both ‘health services’ and ‘disability services’.<sup>20</sup> According to section 2(1) of the Health and Disability Commissioner Act 1994, ‘health services’ are:

- Services to promote health;
- Services to protect health;
- Services to prevent disease or ill-health;
- Treatment services;
- Nursing services;
- Rehabilitative services;
- Diagnostic services.



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<sup>16</sup> Health and Disability Commissioner Act 1994, s2(1).

<sup>17</sup> Health and Disability Commissioner Act 1994, s2(1)

<sup>18</sup> Skegg, PDG, Paterson, Ron, eds (2006) *Medical Law in New Zealand*, Wellington: Thomson Brookers, p33.

<sup>19</sup> Health and Disability Commissioner Act 1994, s2(1)

<sup>20</sup> The Code, Clause 4.