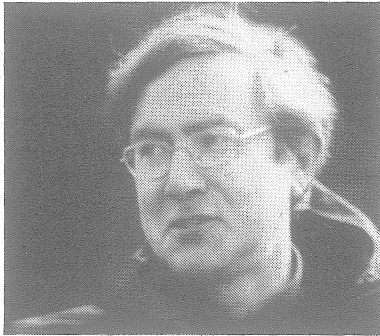


The Forthcoming "Code of Health and Disability Services Consumers' Rights"

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Last October the Health and Disability Commissioner Act 1994 ("the Act") was finally enacted, and in December Mrs Robyn Stent was appointed Health and Disability Commissioner ("the Commissioner"). These events brought about the beginning of a new phase in the long process which started more than six years earlier, with the publication of the Cartwright Report. The report recommended that the Human Rights Commission Act be amended to provide for a statement of patients' rights and the appointment of a Health Commissioner.¹

The Act provides for a Code of Health and Disability Services Consumers' Rights ("the Code"). This article gives an account of those parts of the Act which have a bearing on the preparation of the Code, its legal status, its contents, and future review and amendment of it.

The Commissioner's Task

The Act states that the preparation of a draft Code is to be "a first priority" of the Commissioner.²

"As soon as [is] practicable" she is to prepare the draft Code and forward the draft to the Minister of Health ("the Minister").³ Until that is done, she is required to report to the Minister regularly on the progress made in preparation of the draft Code.⁴

The requirements of the Act concerning the contents of the Code will constrain the Commissioner in the preparation of the draft. The Act also prescribes a consultative process which the Commissioner must follow in the preparation of the draft Code.

The Commissioner is to consult widely, and invite submissions, to ensure that "a wide range of views" is available to assist her in the preparation of the Code.⁵

There is also to be an opportunity for comment on the proposed draft Code before the Commissioner forwards a draft to the Minister of Health.⁶

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The Commissioner is not to forward a draft Code to the Minister unless she has done "everything reasonably possible" on her part to advise "all persons whom the Commissioner considers may have an interest in the proposed draft Code, or representatives of those persons" of the terms of the proposed draft Code. They are also to be given a "reasonable opportunity" to consider the proposed draft Code and to make submissions to the Commissioner about it.⁷

The Act also provides that the Commissioner "shall not forward a draft Code" to the Minister unless, having provided the opportunity for submissions on it, she has "considered any such submissions".⁸ This requirement would be pointless if the Commissioner was not expected to alter her draft in the light of submissions which she finds persuasive.

The Commissioner cannot be expected to provide opportunities for submissions on successive drafts of the Code. Having considered the submissions on the draft which she has made available for comment, the expectation must be that the Commissioner will decide on her final draft and forward it to the Minister. The Act does not require more than one opportunity to make submissions on the text of the draft Code: only if massive alterations were to be made, in the light of the submissions received, might it be appropriate for the Commissioner to provide some further opportunity for submissions on a new draft.

Although the Commissioner can delegate many of her functions and powers under the Act,⁹ she is not permitted to delegate those relating to the preparation of the draft Code.¹⁰ However, the Commissioner does not have to deal with these matters without assistance: she is authorised to appoint people "to assist in connection with the exercise by the Commissioner of the Commissioner's functions".¹¹

The Minister's Role

Ultimately, it is for the Minister of Health, rather than for the Commissioner, to decide on the form – and, subject to the statutory requirements, the content – of the Code. The Act provides for the Code, or amendments to the Code, being made against or without the advice of the Commissioner.¹²

The Code will become part of New Zealand law once it is made by Order in Council. It will take the form of statutory regulations.

The legal basis for the Code is contained in the provision of the Act which states:¹³

The Governor-General may from time to time, by Order in Council, make regulations prescribing a Code of Health and Disability Services Consumers' Rights.

In exercising this power, the Governor-General will act in accordance with the well-established constitutional convention that she acts on the advice of her Ministers.

If regulations are made as a result of a draft Code (or draft amendments) being forwarded by the Commissioner, and the regulations "differ in any material respect (other than in matters of drafting style)" from that draft, the Minister is to lay a statement before Parliament within twelve sitting days of the making of the regulations. This statement is to set out the respect in which the regulations differ (other than in matters of drafting style) from that forwarded by the Commissioner, and the reasons for any differences.¹⁴

A statement of reasons is also to be laid before Parliament if the regulations are made other than in accordance with a recommendation of the Commissioner, or without any recommendation from the Commissioner.

It is possible to envisage circumstances when it might be desirable to amend the Code promptly, to deal with some unforeseen and serious difficulty, without waiting for the Commissioner to undertake the extensive consultative process that is required before she forwards a proposal to the Minister.

However, the Minister will be reluctant to act except following a recommendation of the Commissioner. The Minister is also unlikely to seek to make major alterations to a draft forwarded by the Commissioner, following the required public consultation and consideration of submissions.

Content of the Code

Neither the Commissioner in preparing the draft Code, nor the Minister in making final decisions about it, has complete discretion to determine its content. The Code must deal with various matters which are required by the Act, and it may not

deal with any matter which is not provided for by the Act. The requirements of the Act will be examined here under four headings: informed consent, the rights of consumers, the duties of providers, and complaints procedures.

Informed consent

The Act specifies that Code is to contain provisions relating to:¹⁷

The principle that, *except where any enactment or any provision of the Code otherwise provides*, no health care procedure shall be carried out without informed consent.

The Code will become part of New Zealand law once it is made by Order in Council. It will take the form of statutory regulations.

A broad definition of "health care procedure" is provided by the Act,¹⁸ which also states that:¹⁹

In this Act, unless the context otherwise requires:

"Informed consent", in relation to a health consumer or in respect of whom there is carried out any health care procedure, means consent to that procedure where that consent:-

- (a) Is freely given, by the health consumer or, where applicable, by any person who is entitled to consent on that health consumer's behalf; and
- (b) Is obtained in accordance with such requirements as are prescribed by the Code.

The Code cannot require that informed consent be obtained where someone has a statutory entitlement, or even duty, to provide a health care procedure without consent.

A particularly difficult issue will be the relationship between the general law and the Code as to other circumstances in which a health care procedure may be performed without informed consent. It has long been accepted that there are many circumstances in which someone may be legally entitled, or even obligated, to provide a health care procedure without consent, even though there is no "enactment" which so provides. This well-established but ill-defined non-statutory justification applies to

much that is done in emergency conditions, and to much that is done in the long-term care of some incapacitated people.

The Code cannot alter these legal principles, for the purpose of the criminal law, the law of torts, or accident compensation law. However, it will have to deal with these matters for the purpose of the Code itself. It will be most important that the Code and the general law do not impose conflicting obligations on providers.

The Commissioner (in preparing the draft Code) and the Minister (in making final decisions about the Code itself) are both left with an extremely wide discretion about two crucial matters: what is to be regarded as informed consent, for the purpose of the Code; and when (other than where statute so provides) informed consent is not required, for the purpose of the Code.

Rights of consumers

The Act's provisions concerning informed consent are not expressed in terms of the rights of consumers²⁰, although they will have clear implications for these rights. However, the Act does require that the Code contain provisions concerning the "rights of health consumers and disability service consumers" ("consumers"), as they relate to:

- matters of privacy, other than, broadly, matters of information privacy which come within the jurisdiction of the Privacy Commissioner;²¹
- health teaching and research;²² and
- the provision of services that take into account the needs, values and beliefs of different cultural, religious, social, and ethnic groups.²³

Duties to be imposed on providers will also have the effect of providing some additional rights for consumers.

Duties of providers

The Act indicates that the Code is to contain provisions relating to the duties of "health care providers and disability services providers" ("providers")²⁴ relating to the following matters:

- the principle about informed consent, quoted above;²⁵
- matters of privacy, teaching and research, and culturally appropriate services, as specified above;²⁶
- measures (including the provision of interpreters) necessary to enable consumers to communicate effectively with providers;²⁷
- the provision of services of an appropriate standard²⁸; and
- the provision of services in a manner which respects the dignity and independence of the individual.²⁹

Complaints procedures

The Code is also to contain provisions relating to the establishment and maintenance, by providers, of procedures for dealing with complaints against them by consumers.³⁰ It is also to deal with the access of consumers to such procedures.³¹

Other matters

The Code does not have to be restricted entirely to the matters specified. The Act provides that the Code may provide for:

- any matter relating to the rights of *disability service* consumers that the *Commissioner* considers is of particular importance to such consumers;³² and
- any matter incidental or ancillary to the rights of health consumers or disability service consumers or both.³³

The first of these matters is the only one where the Minister is constrained by law by the views of the Commissioner: for regulations to be able to deal with a matter relating to the rights of disability services consumers, not covered by the other terms of the Act, the Commissioner must consider the matter to be "of particular importance to such consumers". However, the Minister is not required to accept the Commissioner's views about how the Code should deal with such matters. Provided the Commissioner considers a matter to be of particular importance to disability services consumers, the Minister has complete discretion concerning how (if at all) the matter will be dealt with in the Code.

As delegated legislation, the Code can deal only with the matters which the Act authorises.

Review and Amendment

The Act makes provision for the review and amendment of the Code.

The Commissioner is required to carry out a "complete review" of the Code at least every three years.³⁴ In addition to this regular and complete review of the Code, the Commissioner is to review the Code, or part of it, whenever the Minister so requests, and may do so at any time on her own initiative.³⁵ Following any review, the Commissioner is to make recommendations to the Minister on what changes, if any, the Commissioner considers should be made to the Code.³⁶

Before forwarding to the Minister any recommendation for amendment to the Code, the Commissioner must have given reasonable opportunity for the preparation of submissions on the

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proposed draft amendment, and have considered the submissions.³⁷

The Minister is not required to implement the changes recommended by the Commissioner. However, she must lay a copy of the recommendations before Parliament within twelve sitting days of receiving them.³⁸

The Code may be amended against or without any recommendation of the Commissioner. But, as in the making of the regulations in the first place, if the Minister acts against or without a recommendation of the Commissioner, she is to lay a statement of her reasons³⁹ before Parliament within twelve sitting days of the regulations being made.⁴⁰

The consequences of breach of the Code, and the broad definition of provider, will be examined in a later issue of the *Otago Bioethics Report*.

References

- ¹ Report of the Committee of Inquiry into allegations concerning the treatment of Cervical Cancer at National Women's Hospital and into related matters (July 1988), 176.
- ² Health and Disability Commissioner Act 1994, s. 14(1)(a). Unless otherwise indicated, all further references will be to sections of this Act.
- ³ S. 19(1).
- ⁴ See s. 19(3) for details.
- ⁵ See s. 23 for details.
- ⁶ See s. 22 for details. Failure to comply with any or all of the requirements would not affect the legal status of the Code: s. 22(3).
- ⁷ S. 22(1)(b).
- ⁸ *Idem*.
- ⁹ See ss. 68(1), 69-71.
- ¹⁰ See s. 68(2)(b).
- ¹¹ Second Schedule, clause 1(1) emphasis added; note also s 17.
- ¹² See s. 75.
- ¹³ S. 74(1).
- ¹⁴ S. 75(1)(a),(2)(a).
- ¹⁵ S. 75(1)(b),(2)(b).
- ¹⁶ See s. 20(1).
- ¹⁷ S. 20(1)(a). Emphasis added.
- ¹⁸ See s. 2.
- ¹⁹ S. 2.
- ²⁰ For the definitions of "health consumer" and "disability service consumer", see s. 2.
- ²¹ S. 20(1)(c)(i). The exception is expressed in terms of "matters that may be the subject of complaint under Part VII or Part VIII of the Privacy Act 1993 or matters to which Part X of that Act relates".
- ²² S. 20(1)(c)(ii).
- ²³ S. 20(1)(c)(iii).
- ²⁴ For the definitions of "health care provider" and "disability service provider", see s. 2.
- ²⁵ S. 20(1)(b). Paragraph (b) states that the Code shall contain provisions relating to the "duties and obligations of health care providers as they relate to the principle set out in paragraph (a)", which is quoted in the text above. Emphasis added.
- ²⁶ S. 20(1)(c) ("duties and obligations").
- ²⁷ S. 20(1)(d).
- ²⁸ S. 20(1)(f).
- ²⁹ S. 20(1)(g).
- ³⁰ S. 20(1)(e).
- ³¹ *Idem*.
- ³² S. 20(2)(a). Emphasis added.
- ³³ S. 20(2)(b).
- ³⁴ S. 21(1). See also s. 14(1)(b).
- ³⁵ S. 21(2).
- ³⁶ S. 21(1),(2).
- ³⁷ S. 21(3).
- ³⁸ S. 21(4). For the equivalent provision relating to the initial recommendation of a draft Code, see s. 19(3).
- ³⁹ If the regulations differ "in any material respect (other than in matters of drafting style)" from the draft forwarded by the Commissioner, the statement to be laid before Parliament is to specify the relevant differences, as well as the Minister's reasons.
- ⁴⁰ S. 75.