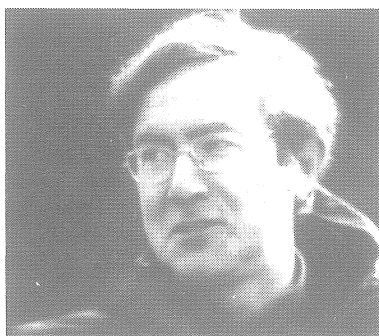


THE APPLICATION OF THE "CODE OF HEALTH AND DISABILITY CONSUMERS' RIGHTS"

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INTRODUCTION

An earlier issue of this *Report* included an account of some of the statute law relating to the Code of Health and Disability Consumers' Rights ('the Code') (Skegg, 1995). However, two important issues were reserved for later consideration. One of these is discussed in this article; the other - the consequences of breach - will be the subject of an article in the next issue of this *Report*.

The Code does not seek to impose duties on consumers, or provide rights for providers. Under the Code, consumers have rights and providers have duties. Providers alone can be in breach of the Code, although in some cases this will be because of the actions of their employees, agents, or members, rather than because they have personally infringed the rights of a consumer.

The definition provision of the Code throws little light on who is a provider. The relevant part of Clause 4 simply provides that:

In this Code, unless the context otherwise requires, ... "Provider" means a health care provider or a disability services provider:

To understand who is 'a health care provider or a disability services provider', it is necessary to look to the Health and Disability Commissioner Act 1994 ('the Act').

STATUTORY DEFINITIONS

The definition provisions in the Act almost all commence 'In this Act, unless the context otherwise requires' (see ss 2, 3, 4(1), cf s4(2)), but they also throw light on the meaning of the same terms in the Code. One reason for this is that the Act provides that the Code 'shall contain provisions relating to' various specified matters, including the 'duties of health care providers and disability services providers' (see eg s20(1)(f)). In the absence of any indication to the contrary, it is to be assumed that the Code gives effect to the statutory provisions, and uses terms in a way that it is consistent with them (see Acts Interpretation Act 1924, s7).

The Act provides separate definitions of 'health care provider' and 'disability services provider'.

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Health care providers

In the Act, the definition of 'health care provider' is a complex one (see ss 2, 3, and 4). However, an understanding of its breadth is essential to an understanding of the very extensive application of the Code. To deal first with the most straightforward meaning of 'health care provider', it includes any 'registered health professional' (s3(h)), a term which is defined so as to include all registered medical practitioners, dentists, pharmacists, nurses, midwives, psychologists, chiropractors, opticians, dietitians, occupational therapists, and physiotherapists. It also includes registered dental and clinical dental technicians, medical laboratory technologists, medical radiation

technologists, and podiatrists. In all of these cases, it includes not only people with full registration, but also those with conditional, temporary, or equivalent registration (see s4(1)).

However, the term 'registered health professional' is not restricted to those who hold some form of registration. For almost all purposes of the Act, people who are 'receiving training or gaining experience under the supervision of a registered health professional' are deemed to be registered health professionals (see s 4 (2)), and therefore come within the definition of 'health care provider'.

While the term 'health care provider' includes all 'registered health professionals', and those training or gaining experience under their supervision, it is by no means

restricted to them. The Act provides a long list of other persons who come within the meaning of 'health care provider' (see s3). The list includes licensees of licensed hospitals within the meaning of the Hospitals Act 1957 (s3(a)), and licensees or controlling authorities of other types of institutions which are specified (s3(b)-(d)); see also (s3(e)-(g)). It also includes anyone who provides ambulance services to the public (s3(i)), anyone employed by the School Dental Service to carry on the practice of dentistry (s3(j)), and

Any other 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 a charge is made for those services (s3(k), emphasis added).

The term 'health services' is itself defined in the Act (s2). It is stated to mean services to promote health, to protect health, and to prevent disease or ill-health, as well as treatment, nursing, rehabilitative and diagnostic

services. It also includes psychotherapy and counselling services, contraception services and advice, fertility services, and sterilisation services.

Maori Traditional Healers, proprietors of fitness centres and health food shops, and school counsellors, may be among the many who come within the definition of 'health care provider', and will therefore be subject to the Code.

Disability service providers

The Act's definition of 'disability services provider' is much briefer than that of 'health care provider', but it is at least as broad. Many 'health care providers' come within its terms, but so too do many others.

In the Act, and hence the Code, 'disability service provider' means any person who provides, or holds himself or herself or itself out as providing, 'disability services' (s2, emphasis added).

'Disability services' are stated to include goods, services, and facilities provided to people with disabilities for their care or support, or to promote their independence. This is a very extensive category, but the definition goes beyond this. The Act states that 'disability services' also include goods, services, and facilities provided for purposes 'related or incidental to the care or support of people with disabilities', or to the promotion of the independence of such people (s2). Given this definition, many people who supply goods or services to homes for the aged may be providers, and subject to the Code.

The extensive definitions of health service provider and disability service provider have the consequence that a very large number of people are subject to the Code and capable of breaching its provisions. Given that the Code provides that every provider must take action to inform consumers of their rights (Right 1(3)(a)), and that (unless an employee) every provider must have a complaints procedure (Right 10(5)), there is enormous potential for breach of the Code.

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BREACH BY THE CONDUCT OF OTHERS

The Act provides that anything done by an employee of a provider shall, for the purpose of the Act (and, it will follow, the Code), be treated as done by the provider as well as by the employee (see s72(1)(2)). This is so even if it is done without the employer's knowledge or approval. In practice, the employee will often fall within the definition of 'health care provider' or 'disability service provider', so will be capable of breaching the Code personally. In these cases, both the employer and employee may be in breach of the Code.

There will, however, be cases where the employee is not, in terms of the Act, a 'health care provider' or 'disability service provider'. In these cases, the employer alone will be in breach of the Code. This may be the case if a doctor's receptionist treats a patient disrespectfully. The employer could here be held to have breached the patient's 'right to be treated with respect' (Right 1(1)).

In proceedings under the Act, the employer would have a defence if the employer could prove that he, she, or it took 'such steps as were reasonably practicable' to prevent the employee from behaving in this way (s72(5)). In the absence of such proof, the employer may be liable to pay damages for injury to the feelings of the aggrieved person (s57(1)(c)).

In addition to the provisions relating to the responsibility of providers for their employees, there are similar provisions relating to the responsibility of providers for their agents, and for members of the employing authority (see s72(3)(4)).

AN EXPLANATION

Given that the rights in the Code do not distinguish between health care

providers and disability service providers, an explanation is required for the distinction that is drawn in the Act, and the separate if overlapping definitions that are provided.

Those responsible for the Act envisaged a Code which dealt similarly with duties of health care providers and disability service providers in many, but not all, respects. Section 20(1) commenced:

A Code of Health and Disability Services Consumers' Rights prescribed by regulations made under section 74(1) of this Act shall contain provisions relating to the following matters:

- (a) 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;
- (b) The duties and obligations of *health care providers* as they relate to the principle set out in paragraph (a) of this subsection: [emphasis added]

There was no requirement that the Code provide comparable, much less identical, provisions relating to disability service consumers and disability services providers. Section 20(2) did, however, provide in part that:

Without limiting the generality of subsection (1) of this section, a Code of Health and Disability Consumers' Rights... may provide for -

- (a) Any matter relating to the rights of disability services consumers that the Commissioner considers is of particular importance to such consumers:

As the Commissioner considered matters of informed choice and consent to be of particular importance to disability services consumers, the Code could impose the same duties on disability services providers as on health care providers, with regard to informed choice and consent. The end result is that the distinction drawn in the Act, between health care providers and disability service providers, does not affect the application of the Code.

Skegg, 1995 'The Forthcoming "Code of Health and Disability Consumers' Rights"'
4 *Otago Bioethics Report* (1) 11-13