

# Health Law in New Zealand

Professor Kate Diesfeld, AUT, with a book review

Professors Peter Skegg and Ron Paterson are the editors of the definitive and eloquent text, *Health Law in New Zealand* (Thomson Reuters, Wellington, 2015). Its length is 50 per cent greater than the original 2007 text and all readers will enormously benefit from this comprehensive analysis. The book explains both the broad legal landscape, and intricate terrain, of health law in Aotearoa New Zealand.

This publication is truly essential for specialist legal practitioners. Lawyers who represent those seeking, or receiving, health and disability services will agree that this is the authoritative resource for their practices. The book is vital for all community law centres and lawyers who advise District Health Boards and regulatory bodies. Equally, it is invaluable for those who practice trusts and estates, family, disability, medical and elder law. Academics in these fields, their students and doctoral candidates need the accurate information it contains.

However, *Health Law in New Zealand* is not only relevant to legal professionals. Given the legal complexity of health and disability care, it is an essential resource for those assessing and delivering services. This includes employees within the accident compensation system and those who advocate for claimants. Also, all staff members of clinics, ambulance services and residential care services need access to the book's contents.

The book's preventive potential is vast. For example, the research on the standard of treatment, treatment injury and discipline could be used to reduce their incidence. Thus, this text is very valuable for educators and health providers.

The scope of this edition covers new territory. It offers a stimulating analysis of contemporary topics that are not universally included in medical law texts, including research on coronial law and a detailed exploration of public health law. These chapters are indicative of the book's importance to policy makers.

In addition to New Zealanders, international audiences will appreciate the comprehensive explanation of New Zealand's novel accident compensation system, subsequent legal impacts and reforms. Likewise, the book illuminates why and how New Zealand's medical jurisprudence has evolved in matters surrounding intellectual disability, human tissue and reproduction.

The contributors are three professors and a senior lecturer from the University of Otago, two professors from the University of Auckland, and a practicing Coroner. As the content demonstrates, they are expert in their fields. The following is a brief survey of the 1227 pages and ten broad headings.

Part A was written by Professor Paterson and graphs the evolution of health law in New Zealand's jurisprudence. It explains the regulation of health practitioners and key elements of New Zealand's publicly funded health system. In ch 2, the legal status of the Code of Health and Disability Services Consumers' Rights (Code) is analysed. Given the

Code's pivotal role in New Zealand, this is essential reading for the spectrum of disability and health providers, regardless of their registration status. Importantly, this version dedicates a chapter to *access to health care* for New Zealanders.

In Part B, Professor Manning addresses the standard of care required of health providers within New Zealand's unique medico-legal system. Since 1974, victims of accidents (including medical accidents) have been compensated by a no-fault accident compensation scheme. Its impact, and the limited circumstances when exemplary damages may be awarded, are explained. Of particular relevance to health providers, ch 4 details the standard expected of specialists and novices, as well as providers of complementary and alternative medicine. Chapter 5 reveals *how* the standard of care is determined. The influence of foreign law upon New Zealand's jurisprudence is explained, with analysis of recent decisions from New Zealand's Health Practitioners Disciplinary Tribunal and Human Rights Review Tribunal.

Part C comprehensively analyses consent and is written by Professor Skegg. Chapter 7 scrutinises capacity to consent to treatment, including the complex legal nuances of minors' capacity. Chapter 8 addresses the duty to inform and ch 9 explains justifications for treatment without consent. This information is extremely important for advocates who grapple with legal issues relating to decision-making with people who experience compromised or fluctuating capacity.

In Part D, Professor John Dawson scrutinises the law governing health information. Following a discussion of general principles, ch 11 examines privacy and disclosure of health information. The common law of confidentiality, privacy and disclosure is explained in ch 12. For those participating in legal proceedings, ch 13 offers expert guidance on disclosure of health information.

The law regarding mental health and intellectual disability is reported in pt E, also by Professor Dawson. Chapter 14 is devoted to compulsory psychiatric treatment. In contrast to the previous book, an additional chapter specifically explains the powers, rights and review procedures in the mental health law context. The intricate legal framework for forensic care is then delivered in ch 16.

The diverse legal issues at the beginning of life are explored in depth by Professor Nicola Peart in Part F. Chapter 17 addresses alternative means of reproduction including assisted reproduction, artificial insemination, in vitro procedures, surrogacy and posthumous conception. The complex legal status of life before birth is examined in ch 18 followed by a discussion of the prevention of pregnancy and analysis of terminations. The scope includes the legal limbo of an embryo while it is outside the human body. The debates involve diverse arguments on whether the embryo qualifies as human, as property, or a unique entity.

In pt G, Professor Skegg digests the law regarding death. The legal implications of medical acts that hasten death and omissions to prolong life are addressed in chs 20 and 21. The

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absence of a legal definition of death, and its wide impacts, are examined in ch 22, with consideration of brain-stem death and persistent vegetative state.

Part H includes a comprehensive discussion of the legal status of human tissue and is authored by Professor Peart. Next, the book's scope is broadened and enriched by Morag McDowell's research, in which her expertise as a Coroner enhances the discussion of New Zealand's coronial jurisprudence. This chapter is distinctive because it sensitively acknowledges that the multi-cultural nature of New Zealand requires respect for Māori values and Te Tiriti o Waitangi (Treaty of Waitangi). This important dimension was not as apparent in other chapters.

New territory, public health law, is covered in pt I. Following an introduction to this stimulating and relatively new sub-specialty, the issues are framed as the public health law relevant to "people", "places", and "products".

In the final portion, Professor Joanna Manning illuminates New Zealand's regime for complaints, investigations and compensation. In detail, ch 29 analyses the role and function of the Health and Disability Commissioner. Chapter 30 explains the professional disciplinary regime for registered health practitioners, with abundant reference to recent decisions of the Health Practitioners Disciplinary Tribunal.

The complex law governing treatment injury in the context of the Accident Compensation Act 2001 is analysed in ch 31. In the final chapter, Professor Manning reviews the scope of the "legislative bar" to compensatory damages that was created by New Zealand's accident compensation scheme. She also identifies the exceptional circumstances when there is potential for civil action for damages. The discussion includes, for example, the potential to obtain exemplary damages, psychiatric injury damages and accident compensation cover related to pregnancy and birth.

With their expert contributors, the editors have achieved a consistent style that is accessible to the lay person. The comprehensive footnotes offer a map to further, recent research. The book includes an index of domestic and foreign cases, statutes and regulations. Also, the annotated Code of Patients' Rights is a rich resource for teaching and research purposes.

There are two humble recommendations. Readers would welcome larger font (although this would increase the length, weight and cost). Also, access to an affordable online version would benefit many students, academics and advocates across professions.

*Health Law in New Zealand* is an enormous scholarly achievement. On behalf of their audiences, I congratulate and thank the dedicated contributors, editors and publishers.

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- Hybrid arrangements. Inland Revenue released a discussion document on hybrid arrangements in September 2016, and intends to progress this issue in 2017. Hybrids exploit differences between the two or more tax jurisdictions. For example, an entity might be regarded as a company in one jurisdiction and a look-through entity in another, or a financial instrument might be regarded as debt in one jurisdiction and equity in another. This might allow, for example, a deduction in two jurisdictions for the same expenditure, or a deduction in one jurisdiction and no corresponding income in the other. The OECD has created an Action Plan to address hybrids, and the Government proposes that New Zealand adopt this Action Plan. The paper was long and complex and the deadline for submissions was extended twice.
- Transfer pricing. The Government intends to prevent multinationals entering into artificial transactions with associated parties that do not reflect the actual substance of the multinational's economic activities.
- The definition of permanent establishment (PE). Multinationals currently operating in New Zealand without having created a PE here that is subject to New Zealand tax should remain alert to Government proposals for reform, as reforms are likely to create many new PEs. Multinationals will then need to attribute income to the PE and pay tax in New Zealand. The combination of these proposals has the potential to have a significant impact on the taxation of multinationals operating in New Zealand. The OECD has also developed a multinational tax treaty, intended to allow the standardisation of international tax treaties, to support the BEPS pro-

posals. It is hoped that Inland Revenue and the Government allow reasonable time for the tax and business community to consider and give feedback on these very important proposals.

**Tax Administration:** A discussion document on changes to the Tax Administration Act 1994 will be released in December 2016. This will include changes to the care and management provisions to allow the Commissioner more flexibility in amending assessments. Tax practitioners will await that document with interest, and hope that any changes are meaningful and practical. The document will also propose some changes to the binding rulings regime, making it cheaper for small to medium enterprises, extending the scope of the rulings regime, and allowing post-assessment rulings.

**Exporting to Australia? You might need to pay Australian GST**

Finally, if you have clients who are exporting low-value goods to end-consumers in Australia, this would be a good time to alert them to an upcoming change to Australian GST rules, so that they have time to prepare.

The Australian Government has recently announced that they will charge GST on low value goods imported into Australia, from 1 July 2017. This will apply to goods that cost less than AU\$1,000, where GST is not collected by Australian customs at the border, and to suppliers making for more than AU\$75,000 of supplies in Australia per annum. If that threshold is exceeded, the supplier will need to register for GST in Australia and charge Australian GST at 10 per cent on goods sold to Australian end-consumers. The rule will not apply to sales to businesses registered for GST in Australia.

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