

We would like to introduce ourselves as legal advisers with strong specialist skills and experience in the health sector.

We are practising and advising extensively in the public and private health sectors, and we have a team of experienced lawyers which we believe can provide clients with a high level of legal services.

Details of our team and their experience is set out below. We are confident that you will find our firm has an outstanding reputation as legal advisers in the health and disability sector.

Outlining Sharp Tudhope as a firm

Sharp Tudhope is one of New Zealand's most-widely recognised legal firms outside the main centres.

The firm, which was founded 110 years ago, is:

- dedicated to serving clients in the Bay of Plenty, Auckland, and nationwide
- growing its base of clients and staff, currently we have 24 lawyers, a total staff of the firm is 57 people
- equipped to support clients where they require representation across New Zealand
- committed to providing a full range of legal services
- ensuring it recruits the best-possible legal talent in New Zealand and internationally
- established as a long-term constructive contributor to the community, including supporting several sponsorships in commerce and arts in the Bay of Plenty

Providing legal service and advice in the health and disability sector

Sharp Tudhope can offer a dynamic health sector legal team.

The team is led by three partners in Sharp Tudhope, whose skills and experience are complementary. They are:

- Mark Beech (LLB, AAMINZ) who has extensive experience in health sector and medico-legal issues.
- Elaine Henderson (LLB) who has extensive experience in the health and disability sector, both public and private
- Duncan Cook (LLB) who has extensive experience in the private sector and acts for the largest integrated health services provider in New Zealand, Radius Health Group Limited and its Residential Care, Medical, Pharmacy, Home Services and Security subsidiaries.

Mark, Elaine and Duncan oversee all work briefed to Sharp Tudhope, ensuring the legal advice and services provided to clients meet the client's specific requirements.

Other members of our health sector team are:

- Alasdair Christie (LLB), partner

Sharp
Tudhope

LAWYERS

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- John Gordon (LLB), partner
- Karen Jones (LLB), solicitor
- Rebekah Webby (LLB Hons), solicitor
- Kylie Boyd (LLB Hons), solicitor

Our team members have provided legal advice and services to a range of organisations in the health and disability sector. These include:

- District Health Board
- general practitioners
- independent practitioner groups
- private health providers
- home-care providers
- residential care facilities, rest homes, and hospitals throughout New Zealand
- a nationwide chain of pharmacies

Outlining our approach

Sharp Tudhope recognises the specific requirements of clients.

In working with clients, our team ensures that it is:

- accessible: that means one-to-one legal service and advice is available when and where required
- flexible: recognising and embracing the demands that clients place on legal advisers
- timely: the right people with the right experience are available to meet the client's legal needs
- current: fully up to date with changes in the health and disability sector, both public and private

Outlining our experience in the health and disability sector

The team that works with our clients include:

- solicitors who have strong individual skills in specialist areas of the health and disability sector
- a strong team ethic, which means the overall team brings its collective skills and experience to a client's work

Team leaders, and their personal areas of experience, are:

- Mark Beech:
 - Health and medico legal issues (contentious and non-contentious)
 - Commercial / civil disputes (at all Court levels)
 - Employment law
 - Alternative dispute resolution and arbitration / mediation
 - Regulatory matters
 - Health and safety

- Elaine Henderson:
 - Health law
 - Legal Compliance
 - Commercial contracts
 - General commercial and company law
 - Commercial financing transactions

- Duncan Cook:
 - Commercial transactions and restructuring
 - Business and finance structures
 - Capital raising
 - Corporate governance
 - Management structures
 - Services agreements

Other team members areas of expertise are:

- Alasdair Christie – property, resource management / environmental law, regulatory, building and construction, project contracts / service agreements
- John Gordon – commercial contracts, funding, company law, sales and acquisitions, joint ventures
- Karen Jones – employment law, commercial disputes, civil litigation, alternative dispute resolution, medico-legal regulation
- Rebekah Webby – employment law, civil litigation, Official Information Act
- Kylie Boyd – employment law, commercial contracts, company law

Outlining recent publications and conference appearances

Our health sector team is active in public and professional discussion of legal issues in the sector, ensuring they remain fully briefed on major issues and sharing their expertise with others in the sector.

Papers and conferences by the team this year are:

- Paper: “The Position of Medical Practitioners During a Pandemic: Is There An Obligation to Treat and Are Practitioners Provided with Sufficient Legal Protection,” Mark Beech and Kylie Boyd, Lawlink, winter 2006
- Paper: “Implications of the New Code of Practice for Retirement Villages 2006,” Elaine Henderson (forthcoming)

- Seminars: HealthCare Providers New Zealand, nurse managers' seminars, on "Managers and the DHB Age Related Residential Care Contract – Your Rights and Obligations," Palmerston North and Auckland, November 2006, Elaine Henderson as guest speaker
- Conference: HealthCare Providers New Zealand conference, Mark Beech and Elaine Henderson, members of professional discussion panel, Christchurch, 11 September 2006.



The Position Of Medical Practitioners During A Pandemic Is There An Obligation To Treat And Are Practitioners Provided With Sufficient Legal Protection?



*There are many issues to consider in the event of Bird Flu reaching New Zealand. In this article, **Mark Beech**, a partner, and **Kylie Boyd**, a solicitor, with the Tauranga Lawlink firm of Sharp Tudhope Lawyers, discuss issues for health care providers.*

There has been considerable media speculation that New Zealand is on the verge of a possible "Bird Flu" pandemic. While the concern to date has been predominantly focused on how best to avoid contracting the virus or, if it is contracted, how best to combat its potential effects, little attention has been paid to the complex legal and ethical issues which face medical practitioners. One such issue is whether doctors have an obligation to treat patients during a pandemic. Moreover, if doctors do continue to provide health care services during a pandemic, the issue arises as to whether they are provided with sufficient legal protection where the circumstances do not permit usual standards of care to be met. This article looks to consider both those issues and in doing so provide an overview of the powers, rights and responsibilities of health care providers.

WHAT IS BIRD FLU AND IS THERE A NEED FOR CONCERN?

Bird Flu is a particular strain of the influenza virus. To date it has only been contracted through the digestion of, or contact with, infected poultry. Presently, the risk of contracting Bird Flu in New Zealand is slight. However, the World Health Organisation is concerned the virus may mutate, thereby allowing it to be transmitted from person to person, causing an influenza pandemic similar to that which occurred in New Zealand in 1918, causing 8,600 deaths.

While the need for concern may be slight, the New Zealand government, in conjunction with the Ministry of Health and various other health organisations, has developed a Pandemic Action Plan which can be viewed at www.moh.govt.nz/pandemicinfluenza. This Plan outlines the appropriate measures to be taken to minimise the risk of contracting the virus and further prescribes procedures to be followed by employers, schools, health professionals and the general public. These procedures aim to ensure the public at large is prepared in the event a pandemic occurs by outlining the types of emergency supplies each person or organisation should have on hand, and also clarifying the roles and contact details of official bodies such as district health boards, civil defence services and the like.

As noted in the Plan the primary means of protection is the maintenance of hygiene by regular washing of hands, disinfecting hard surfaces, and ensuring those with any flu type symptoms maintain a distance of at least 1-2 metres from any other person. Medical practitioners stand to be exposed to a relatively high level of risk if the virus were to mutate into a transmittable form, simply because of the proximity required between a doctor and their patient in order for treatment to be provided. While doctors and other medical care givers would be given precautionary supplies such as gloves, aprons, gowns, surgical

masks, eye protection and preferential status in respect of receiving vaccinations against the virus, it is unknown whether such protection will be effective. There could be considerable risk to treating clinicians. The Plan does not specifically address the issue of whether medical practitioners are obliged to place themselves at risk in order to provide treatment during a pandemic.

THE OBLIGATION TO TREAT

Health professionals are faced with a variety of professional, legal and ethical duties, stemming from a range of sources. Apart from individual contractual obligations, the most significant general duty imposed on doctors is the duty to provide emergency care to any person in need of such care. Such an obligation to treat is considered by the Medical Council of New Zealand to be derived from sections 151 and 160 of the Crimes Act 1961, which effectively provide that everyone who has charge of any other person by reason of sickness, has a legal duty to provide the necessities of life to that person.

A further source of the legal obligations imposed on health professionals is the Code of Consumer Rights established under the Health and Disability Commissioner Act 1994. Right 2 of that Code gives patients a right to treatment free from discrimination of the type prohibited under Part II of the Human Rights Act 1993. Section 21(h)(vii) of the Human Rights Act prohibits discrimination on the basis of the *presence in the body of organisms capable of causing illness*. This right may arguably prevent doctors from refusing to treat a patient on the grounds that they have, or are suspected to have, pandemic influenza.

However, as in the case of most obligations or duties, exceptions do exist. Section 29 of the Human Rights Act provides that discrimination may be permitted where the presence of an infectious organism requires special facilities or services that cannot be reasonably

provided. The duty must also be considered against an employer's obligation under the Health and Safety in Employment Act 1992 to take all practicable steps to eliminate or minimise the prospect of harm to people in the workplace. In addition, each person has an individual obligation to their own health which cannot be ignored. As recognised in the Health and Safety in Employment legislation, every employee has a right to refuse work where there is a realistic prospect of serious harm being caused.

Essentially what is required is a balancing exercise between a doctor's legal obligation to provide the necessities of life to those in need, and each person's obligation to protect their own health and safety. In order to achieve this balance the concept of "reasonable efforts" has been acknowledged as a benchmark to determine the extent of a medical practitioner's obligations. For example, clause 3 of the Code of Rights provides that as long as reasonable actions are taken, a Provider shall not be found in breach of the Code. This concept was reiterated by Health and Disability Commissioner, Ron Paterson, in a forum held in May of 2004 on emerging infectious diseases where he stated, "*Health professionals may choose not to attend if their personal safety is at risk but they must still make reasonable efforts to ensure the patient receives appropriate care.*"

More recently, in an article published in the April edition of The Royal New Zealand College of General Practitioners magazine, the Commissioner stated, "*In my view it may well be unethical for a practitioner to refuse to provide necessary care to current patients suffering from influenza, or a new patient presenting in an emergency situation, at least if no alternative arrangements are made for the patient to access care.*"

As illustrated by the above it seems clear that so long as health professionals do their best to ensure a patient has access to alternative care, they do not have a personal obligation to treat patients during a pandemic if to do so would put their own health and safety at risk.

LEGAL PROTECTION FOR MEDICAL PRACTITIONERS

The issue perhaps of greater

concern to many health professionals is whether there are sufficient legal protection mechanisms in place if a pandemic forces practitioners to work in less than satisfactory conditions.

Under the law as it currently stands medical care providers have various standards they must satisfy. For example, the Health and Safety in Employment Regulations 1995 provides in Regulation 4 that facilities must be suitable for the purpose for which they are used and that they are to be maintained in good order and condition. Regulation 9 then requires facilities to be kept in a clean and hygienic state. In addition, Regulation 13 prohibits overcrowding in a place of work. Further obligations are contained in the Health Consumers' Code of Rights. While the Code does not expressly provide a basic legal right to medical attention, Right 4 of the Code provides that every consumer has the right to services provided:

- with reasonable care and skill;
- that comply with legal, professional, ethical and other relevant standards;
- in a manner consistent with his/her needs;
- in a manner that minimises the potential harm to, and optimises the quality of life of, that consumer;
- in co-operation with other providers to ensure quality and continuity of service.

When read together with the legal obligation to treat imposed upon doctors by the Crimes Act, the Code does effectively create a basic consumer right to medical attention.

The Code is very wide in its application and covers all registered health professionals such as doctors, nurses and dentists and in addition covers those who might otherwise be considered outside the mainstream of medical practice, such as naturopaths, homeopaths and acupuncturists. A breach of the Code can result in charges of professional misconduct and/or the imposition of fines.

If a pandemic were to occur in New Zealand severe staff shortages coupled with rocketing patient numbers could create

circumstances in which doctors and other medical care givers would be stretched to provide the standard of care required in the Code of Consumer Rights and OSH regulations. The legal risk that could arise has caused debate and a considerable amount of unease in medical circles as to the medico-legal responsibilities of practitioners in the event of a pandemic. This is largely due to a concern that medical providers may face fines from OSH for failing to maintain a safe working environment, or alternatively, face liability in negligence for failing to provide a professional service with due care and skill. While the probability of such legal ramifications actually occurring is relatively small given the defence of reasonable actions available under the Code as well as at common law, the government has still been called upon to provide medical practitioners with a level of assurance that they will be immune from adverse legal consequences should a pandemic occur. In December 2005, New Zealand Medical Association Chairman Ross Boswell urged the Ministry of Health to define clearly in advance the extent to which doctors will be protected against legal jeopardy if they are unable to provide safe working conditions and/or normal standards of care for patients. He stated, "*We need assurance given in legislation or regulation that doctors who use best endeavours in nightmarish circumstances will not later find themselves in difficulties with draconian OSH fines, with adverse Health and Disability Commissioner findings, or with disciplinary proceedings.*"

The government has gone some way to alleviate the concerns of medical practitioners in the Law Reform (Epidemic Preparedness) Bill, introduced into Parliament on 6 April 2006. The Bill seeks to clarify a number of important issues for businesses, government agencies, medical institutions and the wider community. With particular application to the medical profession Clauses 8 and 9 of the Bill give the Governor-General power to relax any requirement or restriction imposed by any enactment while an epidemic is in force. This would be done upon the written recommendation of the Minister of the Crown responsible for the administration of the enactment

in question. Moreover, the Bill proposes numerous clauses to increase the powers of Medical Officers of Health (officers appointed under the Health Act 1956) and any person who works under the supervision of those officers. Medical Health Officers are provided with immunity from liability in clause 70(3) when exercising their powers set out in the Health Act, as amended by the Law Reform Bill.

In addition, Health and Disability Commissioner, Ron Paterson, in a letter to the editor of NZ Doctor in April 2006, stated, *"I encourage local practitioners to focus on the multiple challenges of providing care during a pandemic, and set aside alarmist and unwarranted fears of incurring discipline or the Commissioner's wrath."* The Commissioner then went on to state, *"In the unlikely event of a complaint to HDC, the Code defence of taking "reasonable actions in the circumstances" would be highly relevant."*

The concerns of the medical profession have not gone unheard. What remains to be seen is whether they are addressed to an extent satisfactory to the medical profession and how the medical profession may react in the event that they are not. However, for the moment at least, doctors, nurses and other medical care givers can rest assured that, should a pandemic occur, appropriate measures will be taken to ensure doctors are able to provide treatment free from coercion or fear of later reprisal, where reasonable actions have been taken.

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