

# Medical treatment and the law

## The health system and the law in NSW

Most law relating to health care in Australia is state law – which means that it varies from one state to another. In NSW there is no specific legislation that covers everything to do with health care. The various laws dealing with health come from both legislation (state and Commonwealth) and common law sources.

There are other principles that apply to health care besides those contained in the law, and they can have legal implications. They are generally found in:

- codes of practice
- guidelines (such as the *NSW Interagency Guidelines for Child Protection Intervention*)
- the policies of individual service providers.

## The rights of clients

Consumers of health services have the same legal rights as consumers of other goods and services, as well as certain rights that relate specifically to health care. Together these can be summarised as:

- the right to be treated with reasonable care
- the right not to be abandoned
- the right to receive prompt emergency treatment
- the right to refuse treatment
- the right to be informed about proposed treatment
- the right to access their own medical records
- the right not to be discriminated against
- the right to lodge a complaint
- the right not to be mentally or physically abused
- the right to stay with their child
- the right to have access to adequately qualified health personnel
- the right to obtain a second opinion
- the right to obtain assistance from qualified interpreters
- the right to know the costs involved in any proposed treatment
- the right to know which services are available in hospitals
- the right to seek legal advice after treatment.

Health consumers also have rights to privacy and confidentiality.

Most of these rights are enshrined in legislation, some are set out in policy documents and guidelines (which may be legally enforceable), some are based on the common law and some are based on common practice. In some cases exceptions are also specified; for example, practitioners are required to notify authorities of certain matters even if this would normally be regarded as a breach of confidentiality.

## *Discrimination*

Under state and federal legislation it is against the law for a person or organisation to discriminate against someone on the grounds of:

- race
- disability
- sex
- marital status
- homosexuality
- age
- who they are related to or associate with
- any carer's or family responsibilities they may have
- transgender status.

Such discrimination is illegal in (among other things) the provision of goods and services, which clearly includes the provision of health services.

The NSW legislation is the *Anti-Discrimination Act 1977*. Relevant federal legislation is contained in:

- the *Racial Discrimination Act 1975*
- the *Sex Discrimination Act 1984*
- the *Disability Discrimination Act 1992*
- the *Human Rights and Equal Opportunity Commission Act 1986*.

## The law of assault

Assault is a criminal offence. It means deliberately or recklessly doing anything that causes another person to have a reasonable apprehension that they are in danger of violence, without that person's consent. Threatening or bullying someone verbally can be assault if the person has a real fear that the threat will be carried out. You can assault someone without even touching them.

This has implications for medical treatment, which nearly always involves touching a person, sometimes in a very intrusive way. Whether the health practitioner intended to carry out the threat or not is irrelevant. It may be that the person believes or fears that some unwanted physical contact will take place, for example threatening a client with medication or restraint if they do not behave in a particular way.

Legally, no medical treatment can be given without a valid consent; that is:

- the consent of the person receiving the treatment, or
- the consent of a person authorised to give consent on that person's behalf, or

- an order of the court.

The issue of consent to medical treatment is complex.

It is discussed in detail in chapter 2.

Assault may be reported to the police, who may prosecute the alleged offender. The victim may also take civil action.

Clients may also litigate if they have actually refused treatment and it has been given anyway. Giving a contraceptive injection, inserting an IUD or testing for HIV/AIDS, for example, may constitute an assault if the person concerned had not given their consent to the procedure.

## The law of negligence

### *The duty of care*

The law of negligence developed from common law principles as part of the area of civil law known as *torts* ('civil wrongs'). It was developed to fill a gap in the law whereby a person who was injured could not sue the person who injured them unless there was some sort of contractual relationship between them. The law of negligence recognises a legal *duty of care*, even where there is no contract.

Health workers, like other professionals, owe a duty of care to the people they provide services to. This means that they must take steps to ensure that a person in their care comes to no foreseeable harm through either their actions or their failure to act.

The main NSW statute dealing with negligence is the *Civil Liability Act 2002*. This statute aimed to clarify the common law dealing with negligence, and to limit the number of claims and the damages that can be awarded.

## *What is negligence?*

Negligence is defined in section 5 of the *Civil Liability Act* as a 'failure to exercise reasonable care and skill'.

Under section 5B(1) of the Act:

A person is not negligent in failing to take precautions against a risk of harm unless:

- the risk was foreseeable (that is, it is a risk of which the person knew or ought to have known), and
- the risk was not insignificant, and
- in the circumstances, a reasonable person in the person's position would have taken those precautions.

The Act also sets out what this 'reasonable person' would take into account (s.5B(2)):

In determining whether a reasonable person would have taken precautions against a risk of harm, the court is to consider the following (amongst other relevant things):

- the probability that the harm would occur if care were not taken,
- the likely seriousness of the harm,
- the burden of taking precautions to avoid the risk of harm,
- the social utility of the activity that creates the risk of harm.