

Unfair treatment by public officials – options for redress

Part 2: Human Rights and Health Services - complaints and rights of review

In the previous issue of *The Legal Lounge*, I discussed the right to make a complaint about unfair treatment by CAA officials under the CAA Service Charter, and to the Office of the Ombudsmen. In this issue, I outline various avenues of complaint under the Health and Disability Commissioner Act 1994 and the Human Rights Act 1993, and the jurisdiction of the Human Rights Review Tribunal.

Health and Disability Commissioner Act 1994

All health care providers in New Zealand are subject to the requirements of the Health and Disability Commissioner Act 1994. A health care provider includes any registered health practitioner (such as Doctors, Nurses, and Psychiatrists, to name but a few). Thus, all CAA medical practitioners and MEs are subject to the Act. In addition, a health care provider is defined to include any other person or organisation which provides, or holds him or herself or itself out as providing, health services to any section of the public, whether or not any charge is made for the services. *In my view, the Civil Aviation Authority and the Director of Civil Aviation should also be considered, in relation to their Part 2A responsibilities under the Civil Aviation Act 1990, to be health care providers within the meaning of this Act.** (Note refer to the postscript at the conclusion of this article regarding this last comment)

The Code of Health and Disability Consumers' Rights

One of the primary purposes of this Act is to provide for the promotion and enforcement of the Code of Health and Disability Services Consumers' Rights (the Code). The Code is published and available for viewing at www.hdc.org.nz under 'The Act and Code'. It is important to note that the Code is itself a statutory instrument and thus is legally binding on health care providers. The Code creates various rights for consumers (and corresponding duties on providers). This includes the right of all health consumers to:

- be treated with respect;
- be provided with sufficient information to explain the consumer's medical condition, including the results of any tests and procedures, and to an adequate explanation of any available medical options;
- have services delivered with reasonable care and skill, and which comply with any applicable legal, professional, ethical and other relevant standards;
- effective communication from providers, including honest and accurate answers to questions about the qualifications or recommendations of the provider, and how to obtain an opinion from another provider;
- make an informed choice and give informed consent to medical procedures;
- expect co-operation among providers to ensure quality and continuity of services; and
- complain about a provider to the health practitioner or health care provider, and/or to any other appropriate person including the Health and Disability Commissioner (HDC).

Jurisdiction of the Health and Disability Commissioner

Any person may complain orally or in writing to the HDC that any action of a health care provider is, or appears to be, in breach of the Code. The HDC has broad powers to investigate complaints against health care providers, and to make findings and recommendations in relation to any established breaches of the Code. This may include a requirement to apologise to an affected consumer, and/or to adopt changes or improvements in a health care provider's practices. The Human Rights Review Tribunal (HRRT) may also hear a case under this Act and make declarations that a health practitioner or provider has breached the Code. The powers of the HRRT are discussed further below.

It is important to bear in mind however, that a breach of the Code by a health practitioner does not of itself amount to a professional disciplinary offence. Such offences are generally concerned with more serious allegations of professional negligence or unethical conduct, for example in the process of performing medical examinations or surgical procedures. In those more serious cases involving alleged professional misconduct by a health practitioner, the outcome of an investigation will be reported by the HDC to the relevant medical practitioners' body, and/or referred to the Health and Disability Director of Proceedings to consider whether disciplinary action should be taken against the health practitioner in the Health Practitioners' Disciplinary Tribunal.

While it is to be hoped that the latter situation would not arise in relation to the provision of aviation related health services by aviation Medical Examiners (and in my view such allegations should not be made lightly), there may be occasions when participants feel that they have not received the standard of service required under the Code. A complaint to the HDC may provide a mechanism to have the issue independently assessed and reviewed, and could result in an apology, further training of the health practitioner(s) concerned, or changes to improve procedures.

It should be noted that the jurisdiction of the HDC does not extend to issues relating to health information privacy breaches, which are dealt with under the Privacy Act 1993 and Health Information Privacy Code 1994. I briefly covered the jurisdiction of the Privacy Commissioner to review alleged breaches or failure to comply with the Privacy Act in the previous edition of *The Legal Lounge*. The HRRT also has jurisdiction to consider breaches of the Privacy Act, and this aspect of the Privacy Act jurisdiction is discussed further below.

Human Rights Act 1993

The purpose of the Human Rights Act 1993 (HRA) is to enforce the fundamental right to freedom from discrimination. Grounds of discrimination are set out in section 20 of the HRA. Part 1A deals with complaints of unlawful discrimination by government and public sector organisations (with some exceptions dealt with under other Parts of the Act that are not relevant to this article). Within the aviation regulatory context, the grounds most likely to be raised against the CAA are those relating to age and disability. The definition of disability includes any physical disability or impairment, or physical or psychological illness. Any person who feels that they have been unlawfully discriminated against under a prohibited ground in the Act may raise a complaint with the Human Rights Commission. The Commission has broad powers to investigate and making findings that a person has been unlawfully discriminated against, and to make appropriate recommendations.

Jurisdiction of the Human Rights Commission

The Human Rights Commission may decline to investigate a complaint where it is apparent that there is a right of appeal or another adequate remedy that should be pursued. However, this is a matter of some discretion and will depend on the facts. Where a person alleges that the primary reason underlying the decision was due to unlawful discrimination, it is open to the Human Rights Commission to investigate the matter. Thus an allegation that, for example, the CAA does not permit any persons of a certain age, or with certain disabilities, to obtain aviation documents or medical certificates could form the basis of a complaint to the Human Rights Commission.

The test applied in determining whether an act of alleged discrimination is unlawful under Part 1A, is dictated by section 5 of the NZ Bill of Rights Act. This requires that the rights in the NZ Bill of Rights Act, including the right under s19 to freedom from discrimination (by government and public officials), “*may be subject only to such reasonable limits prescribed by law as can be demonstrably justified in a free and democratic society*”. Where this test is not satisfied, a finding of unlawful discrimination under Part 1A of the Act may be made, whether or not the impugned decision was required or authorised under another enactment. If the test is considered to be satisfied, the Commission may decide that the discrimination is lawful. Thus, for example, if the CAA has a policy that any persons suffering from a certain type of disability or physical impairment *may* obtain a medical certificate *subject* to certain conditions or restrictions (which may differ depending on the level of assessed seriousness of the condition, and may even extend to denying a certificate in the most severe of cases), this could be considered lawful discrimination. Any such challenge would likely require the Commission to take into account the legislative framework for aviation medical decisions under the Civil Aviation Act and Rules, accepted medical standards and studies, and the extent to which any conditions or restrictions may be considered, on medical and aviation safety grounds, to be reasonable and justified under s5 of the NZ Bill of Rights Act.

The Human Rights Commission may also refer a case to the Director of Human Rights Proceedings if it considers that the case should proceed before the HRRT. This might occur, for example, if it considers that unlawful discrimination has occurred in a particular case and that the case should be subject to the jurisdiction and remedies available to the Tribunal; or if it wishes to seek a declaration that a general policy or practice of a government department amounts to unlawful discrimination under the Human Rights Act. It may alternatively seek a declaration from the High Court.

The Human Rights Review Tribunal

As alluded to above, the HRRT has jurisdiction to hear and determine matters arising under the Human Rights Act 1993, the Health and Disability Commissioner Act 1994, and the Privacy Act 1993. Cases may be brought before the Tribunal either by an aggrieved person directly, or by the Director of Proceedings for the relevant agency. The advantage of the latter option is that the aggrieved person is not directly considered to be a party and thus is not liable for costs in relation to the proceeding. The matter is effectively “taken up” on its behalf by the relevant public agency. The fact that the Director of Proceedings has decided to take the case is also an indication that the relevant agency considers that the complaint made to it was justified, and thus that there is a prima facie case against the public decision maker or organisation concerned.

The HRRT has broad discretion in relation to remedies, not only to make declarations that the relevant Act or Code has been breached, but to award compensatory and punitive damages and costs. In this regard, I refer readers to a recent decision in the civil aviation context, *Shahroodi v Director of Civil Aviation [2011] NZHRRT 5*, which aptly demonstrates the full extent of the jurisdiction and remedies open to the Tribunal.

This case is part of a wider legal dispute between the parties regarding the decision of the Director of Civil Aviation to revoke Mr Shahroodi's pilot licenses. This challenge was brought under the Privacy Act 1993, and concerned the manner in which the CAA responded to requests by Mr Shahroodi for personal information it held about him. Suffice to say that all relevant information that was held by the CAA was not initially provided, and was subsequently only provided well after the decision was made by the Director to revoke his pilot licenses. Mr Shahroodi successfully argued that there was undue delay in providing access to the information, and that the handling of his request by the CAA was an interference with his privacy rights, and he was awarded damages. In reserving its decision as to whether to award costs, the HRRT noted that the lateness with which the information was provided could potentially have been relevant to the adverse decisions made by the Director, or at least of assistance to Mr Shahroodi in responding to the proposed decisions before the final decisions were confirmed. The HRRT accordingly decided that it would await the outcome of the substantive challenge to the decision to revoke his pilot licences in the District Court, before deciding if additional costs should also be awarded (I understand that this matter has now been heard and a decision is pending). The Director subsequently attempted to appeal the HRRT decision to the High Court. However, the appeal was struck out as the notice of appeal was not filed and served within the statutory time limit. In my view, it would in any event have been unlikely to succeed. Both decisions may be viewed on my website, www.amclegal.co.nz, under *Aviation Cases*.

In the next edition of *The Legal Lounge*, I will review and discuss some of the legal issues arising from the recent RENA maritime accident and the parallels that may arise in the aviation context, in particular with regard to criminal enforcement action that may arise from the conduct of pilots and operators which may be considered to have contributed to aviation incidents and accidents.

***Clarification (as published in December 2011 edition of NZ Aviation News)**

In the November 2011 edition of *The Legal Lounge*, I stated an opinion that “in my view, the Civil Aviation Authority and the Director of Civil Aviation should also be considered, in relation to their Part 2A responsibilities under the Civil Aviation Act 1990, to be health care providers within the meaning of this Act”. However, in response to a recent complaint about medical certification issues by an industry participant (which was referred to the HDC on advice of the Office of the Ombudsmen), the Deputy Health and Disability Commissioner has ruled that the CAA is not considered by the office of the HDC to be a provider of health or disability services for the purposes of the Health and Disability Commissioner Act 1994, and the Code of Health and Disability Services Consumers Rights.

Thus, the HDC does not consider that he has jurisdiction to consider medical related complaints against the CAA. This means that, while specific complaints about aviation Medical Examiners could be made to the HDC, more general complaints about CAA medical certification processes, or the CAA's oversight or management of this system, or in relation to the CAA's handling of a complaint about any such matters, should be made to the Office of the Ombudsmen.

While this avenue of complaint may provide some mechanism to address some wider concerns, in my view the CAA medical system should be subject to the wider jurisdiction of the HDC, and this is a policy/legislative issue that may be pursued by AMC Legal Services in the next parliamentary term (along with a number of other issues).

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