BUDDLE FINDLAY

Legal update - On the pulse: 10 health law issues to watch in 2017

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We set out a summary of 10 health law issues that will be of interest in the coming year.

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1. The DePuy case - claims for compensatory damages continue

2016 saw important progress in the DePuy litigation, which will continue in 2017.

The DePuy cases involve defective hip implants manufactured by DePuy International in England. Some of those implants were supplied to DePuy's New Zealand subsidiaries, and provided to New Zealand patients requiring a hip replacement. Subsequently questions emerged regarding the safety of the implants. Patients allegedly suffered metal poisoning and tissue damage as a result of implant defects. The implants were recalled, and the patients concerned underwent revision surgery to replace the original implants.

The patients concerned have claimed that DePuy failed to undertake a proper risk assessment and testing of the implants before they were distributed, and also that DePuy failed to adequately monitor the implants after they were placed into patients. In preliminary hearings in England, the English High Court found that New Zealand law governed the New Zealand patients' claim, and also found that the New Zealand patients were not able to bring a claim against DePuy for compensatory damages, due to the statutory prohibition on proceedings for damages in relation to personal injury covered by the Accident Compensation Act.

In October and December 2016, the New Zealand High Court released two judgments. The High Court agreed with the English High Court decision that the New Zealand patients are prohibited from bringing a claim against DePuy for compensatory damages (due to the prohibition on proceedings for damages in relation to personal injury covered by the Act). The Court considered that this position was not changed by the fact that DePuy's conduct in manufacturing the implants occurred in England and not New Zealand. This decision has been appealed. The findings are critical to New Zealand accident compensation law and policy, as they govern the extent to which patients can make a civil claim for compensatory damages in relation to medical products and devices which are manufactured overseas.

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2. Drinking water - one to watch

The government inquiry into the Havelock North drinking water contamination incident, which saw around 5,000 people become sick with gastroenteritis due to the presence of E.coli in drinking water, is well underway. The inquiry seeks to identify the causes of the incident and the adequacy and appropriateness of responses by authorities, including the Hastings District Council, Hawke's Bay Regional Council, Hawke's Bay District Health Board (DHB), and Ministry of Health.

The terms of reference for the inquiry provide that the inquiry may make recommendations on any legal or regulatory changes or additions necessary and desirable to prevent or minimise similar incidents. That could result in changes to the very detailed drinking water provisions introduced into the Health Act 1956 in 2007. The inquiry is due to report back by 31 March 2017.

In addition, the fluoridation of drinking water is likely to remain a topical issue, following the introduction of the Health (Fluoridation of Drinking Water) Amendment Bill at the end of last year. The Bill amends the Health Act 1956 to give District Health Boards the power to direct local authorities to fluoridate their drinking water supplies. Buddle Findlay's legal alert on the Bill provides more detail on the proposed changes.

The Health Committee received 626 submissions on the Bill. Those submissions reflect that there is a range of views not only about whether drinking water should be fluoridated at all, but also as to where responsibility for drinking water fluoridation decisions, and the cost of fluoridation, should sit. Some submissions advocate for the Director-General of Health, rather than DHBs, to be responsible for such decisions, and that the costs of fluoridation should be met by central government, rather than

territorial authorities.

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3. The carer support decision - contractor or employer?

In our August 2016 Health Law Update, we commented on a Court of Appeal decision on the government's Carer Support Scheme. Mrs Lowe provided care for disabled individuals that she knew through acquaintances and, as part of this, she received a subsidy under the Carer Support Scheme. Mrs Lowe claimed that this made her a "homeworker" under the Employment Relations Act 2000 and therefore meant that she was an employee of either the Ministry of Health or Capital and Coast District Health Board, who funded the Carer Support Scheme payments. The Court of Appeal overturned a decision of the Full Employment Court which had found that she was a "homeworker" and therefore deemed to be an employee, and held that there was no employment relationship between Mrs Lowe, the Ministry of Health or Capital and Coast District Health Board.

Soon after the Court of Appeal decision was released, the union E tū announced that it would appeal the decision to the Supreme Court on Mrs Lowe's behalf. Leave was granted to appeal in November 2016, and the case was heard by the Supreme Court earlier this month. Given that there has been little guidance on the interpretation of "homeworker" by the courts, and the history of this case, the Supreme Court's decision will be significant for many, not only Mrs Lowe. We will send out an update following the Supreme Court decision.

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4. Publicly naming agencies in breach of the Privacy Act

The Privacy Commissioner has, in the last couple of months, begun implementing a policy of publicly naming companies that have been found to have breached the information privacy principles in the Privacy Act 1993. The Privacy Commissioner's Naming Agencies in Public Reports Policy came into effect in December 2014, and is intended to encourage agencies to comply with the Privacy Act. In developing the Policy, the Privacy Commissioner stated:

"We think it is time to ‘name names’ where it is warranted. Our view is that in certain circumstances, the Privacy Act is better served by revealing the organisations that have breached the law."

The Policy does not mean that all agencies that breach the privacy principles will automatically be named - rather, the Policy sets out the factors that the Privacy Commissioner will take into account in deciding whether to name an agency. Those factors include the seriousness of the breach, the number of people affected, whether there have been repeated breaches, and whether the agency has demonstrated an unwillingness to comply with the law. A key consideration will also be whether, in the circumstances, the public interest would benefit from identification of the agency, due to its deterrent effect, educative purpose, or other reasons.

The naming of agencies comes at a time when the Privacy Commissioner is continuing to raise concerns about the effectiveness of the enforcement framework set out in the Privacy Act. The Government has, for some time, signalled that it intends to introduce a Privacy Bill to replace and modernise the Privacy Act. The Government has indicated that the Bill will include stronger powers for the Privacy Commissioner, mandatory reporting of privacy breaches, new offences, and increased fines. The naming of agencies will, in the meantime, be a useful tool available to the Privacy Commissioner to encourage compliance with the Act because it does not require a legislative change.

We will provide a further update when a new Privacy Bill is introduced.

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5. CCTV and surveillance - another privacy area to watch

It is becoming increasingly important for agencies using surveillance technology to consider the privacy implications of that technology, including how the information will be securely stored and how access to that information will be provided to individuals who have legitimate requests.

In December 2016, the Privacy Commissioner released a finding that the Department of Corrections had interfered with the privacy of a complainant who was seriously assaulted in 2013 at Mt Eden Corrections Facility, then under the management of SERCO. The Department refused to provide to the complainant a copy of footage relating to the assault, deleted footage from a second camera, and deleted/lost footage that showed the complainant being removed on an ambulance stretcher. The Department had offered the complainant an opportunity to view the footage, but the complainant sought a copy of the footage. The Department's reasons for declining the complainant's request included that providing such footage would severely compromise the security of the prison and risks to staff and prisoner safety, and that it would interfere with the privacy of third parties (i.e staff and other prisoners) in the footage. The Commissioner found that providing the CCTV footage would not prejudice the security of the prison facility - in fact, photographs from the same angle as the CCTV camera concerned are publicly available on the facility's website. The Commissioner was also not satisfied that the Department had demonstrated that it would be too onerous or costly to edit the

footage so as to protect third parties' privacy and satisfy the complainant's request.

As more information is collected via CCTV cameras, the relevant agency will be expected to consider how the information collected will be made available while also protecting third parties' privacy and affairs. The matter has since been referred to the Director of Human Rights Proceedings, and the footage provided by the New Zealand Police to the complainant. The Department has also modified its position to take a case by case approach to any future requests for CCTV footage.

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6. Balance restored to public sector procurement - the Problem Gambling decision

The recent Court of Appeal decision in Attorney-General v Problem Gambling Foundation of New Zealand [2016] NZCA 609 will be welcomed by public sector agencies, as it restores the longstanding principle that judicial review of their commercial contracting decisions is only available in limited circumstances.

The decision restricts disappointed request for proposal (RFP) participants from using complaints about the RFP process through which they sought to secure a contract as a basis for a broad scope of judicial review. The Court stated "the applicant for review must raise issues relevant to the public interest and not just be a disappointed commercial party, seeking to take advantage of public remedies in a commercial context." The Court also considered that the ability to complain to the Ombudsman or Auditor-General provided alternative avenues to address concerns regarding an RFP process. A Buddle Findlay legal update with further discussion of the case is available here.

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7. Compensation for Live Organ Donors Bill passed

The Compensation for Live Organ Donors Act 2016 was passed into law by Parliament on 30 November 2016. The corresponding Act will commence on 5 December 2017 (unless brought into force earlier by an Order-in-Council).

The new Act means that qualifying people who donate kidney or liver tissue for transplantation purposes will be reimbursed 100% of their income for up to 12 weeks to allow for recovery after surgery. Currently, organ donors receive the equivalent of the sickness benefit during their recovery period. Interestingly, the original bill recommended 80% reimbursement, but this was increased to 100% by the Health Select Committee.

Donors who qualify for compensation are those who will forego earnings as a result of taking unpaid leave or otherwise ceasing employment to allow for their recovery from surgery. The donation surgery and the surgery to implant the donated organ must be carried out in New Zealand, and the recipient must be eligible to receive services funded under the New Zealand Public Health and Disability Act 2000. The Act also shifts responsibility for compensation from the Ministry of Social Development to the Director-General of the Ministry of Health.

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8. Substance Addiction Bill passed

In our 'On the Pulse' update for 2016, we commented on the introduction of the Substance Addiction (Compulsory Assessment and Treatment) Bill into Parliament. After a long process the Bill, which is intended to replace the Alcohol and Drug Addiction Act 1966, was read for a third time on 15 February 2017 and will be passed into law.

The Bill provides a new regime for the compulsory assessment and treatment of people with substance addiction. Under the Bill, compulsory treatment may only be imposed if a person has a "severe substance addiction" and their capacity to make informed decisions about treatment is also "severely impaired". The Bill also expressly recognises that compulsory treatment must be a last resort, only to be used when voluntary treatment is unlikely to be effective.

During 2016, the Bill went through its first two readings and to Select Committee. It received full support from the Committee in mid-November 2016. The Health Committee recommended various amendments to the Bill (which have been incorporated), including that legal advice be made available to patients as soon as possible (where they are entitled to legal advice under section 57), and that the operation and effectiveness of the Bill be reviewed three years after the legislation comes into force. The later recommendation was made in light of concern, expressed by the Office of the Ombudsman to the Ministry, that the Bill breached the United Nations Convention on the Rights of Persons with Disabilities.

Enactment of this legislation will likely require a close review of current facilities and additional training for health professionals to ensure compliance with the new requirements.

9. Treatment injury and hindsight

Later this year, the Court of Appeal will consider the proper interpretation of the treatment injury regime in the Accident Compensation Act 2001 in Adlam v ACC.

The case concerns Jeremy Adlam's claim for cover for an injury suffered during his birth. ACC's decision to decline cover for treatment injury has been reviewed by both the District Court (which found, applying a hindsight analysis, that earlier intervention would have provided a positive outcome for Jeremy) and the High Court (which found in favour of ACC). The High Court considered that there was not a "failure to treat" (for the purposes of treatment injury cover) in circumstances where there are no observable clinical indications for a different course of treatment. The High Court has granted leave to appeal this decision, acknowledging the "general public importance" of determining the proper approach to take in treatment injury cases.

An appeal has been lodged with the Court of Appeal, and is set down to be heard on 6 April 2017. We will keep you updated regarding the Court of Appeal decision.

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10. Health policy to be hotly debated leading up to the general election

Prime Minister Bill English has announced that the general election will be held on 23 September 2017. Health policy will, as is always the case in the lead up to an election, be hotly debated by all parties. While the Government and opposition parties have yet to formally announce any new health policies as part of their broader election campaigns, policy areas of interest may include:

- For the Labour Party; childhood obesity, health spending, improving access to GPs and elective surgery, and fluoridation of drinking water
- For the Green Party; mental health, a sugar tax, funding for support for children with disabilities, and access to GPs for young adults
- For New Zealand First, tobacco taxes.

The contentious issue of access to medical cannabis was also looking likely to be an election issue. However, the recent announcement by the Associate Minister of Health that decisions on the prescribing of cannabis-based products will now be delegated to, and made by, Ministry of Health officials rather than the Minister, may take the focus off this issue.

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