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## Consultant Radiologist / Hospital and Health Services

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### Opinion - Case 00HDC06794

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#### Complaint

The Health and Disability Commissioner received the following complaint from the consumer, Ms A.

- *In April 2000, Ms A attended a public hospital radiology department for an ultrasound. During the ultrasound, a consultant radiologist, Dr B, entered the room with a man she introduced as her colleague. This man was not involved in Ms A's treatment but stood and observed her during, and immediately after her ultrasound. Dr B did not explain to Ms A why the observer was present and did not seek Ms A's consent for him to be there.*
- *Dr B was short and abrupt in her communication with Ms A during the ultrasound.*
- *On 23 May 2000 Dr B attended a meeting that had been set up in response to a complaint made by Ms A. During the meeting, Dr B confirmed that the observer had been present for training purposes and acknowledged that she may have been short with Ms A because she was busy. Dr B did not apologise for her manner or for not seeking Ms A's consent for an observer to be present.*

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#### Investigation Process

The complaint was received on 6 July 2000, and an investigation commenced on 14 August 2000.

Information was obtained from:

Ms A	Consumer
Dr B	Provider / Consultant Radiologist
Hospital and Health Services	Chief Executive Officer

Copies of relevant policy documents were obtained from Hospital and Health Services.

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## Consultant Radiologist / Hospital and Health Services

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### Opinion – Case 00HDC06794, continued

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**Information Gathered During Investigation** The consumer, Ms A, attended the public hospital, Radiology Department, for a pelvic ultrasound examination on 11 April 2000. Miss C, ultrasonographer, examined her first. The examination of the lower abdomen and pelvis indicated no left ovary could be found.

A second ultrasonographer, Mr D, was called in to examine Ms A, but was also unable to locate the missing ovary.

Dr B, consultant radiologist, was the third person to examine Ms A. She entered the room with Dr E, registrar, who was not involved in Ms A's treatment. Dr B introduced Dr E to Ms A as her colleague. Dr B continued with the ultrasound, and Dr E observed, during and after the procedure. Dr B did not explain the reason for Dr E's presence.

Ms A advised she felt very uncomfortable having a man in the room observing her in a partially undressed state. She further advised:

*“Not once did he [Dr E] examine me or treat me, the whole time he only observed. I was very unhappy about this and the fact that my consent for [Dr E] to be there was not sought.”*

After the examination, Dr B spoke to Ms A in a way that made her *“feel demeaned .... Dr B then flicked a corner of the sheet ... at [her] saying ‘wipe the gel off first’, in a very short and derogatory tone.”*

Ms A raised her concerns about Dr B's manner, and about the observer's unexplained presence, at a meeting with Dr B that took place on 23 May 2000 at the public hospital, with a Health and Disability Consumer Advocate present. At this meeting, Dr B explained to Ms A that Dr E was a radiology registrar in training. Dr B advised Ms A that this hospital was a teaching hospital, and that it is usual for registrars to accompany specialists to outpatient clinics.

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## Consultant Radiologist / Hospital and Health Services

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### Opinion – Case 00HDC06794, continued

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**Information  
Gathered  
During  
Investigation  
continued**

Dr B stated that it is only when registrars are learning a specific skill, and are actively being taught under the supervision of a consultant, that consent for treatment is required: *“Because there was no need for him to examine [Ms A] I did not request consent for him to do so.”* Dr B also stated that it is usual to gain consent for an *“interventional”* procedure, but not for a diagnostic procedure such as Ms A’s ultrasound.

Dr B also said that she might have seemed to be abrupt because she needed to see another patient at the same time. She explained that she needed to prioritise the order of seeing people according to their degree of sickness or mobility. She acknowledged she may have cut Ms A short:

*“I did say to [Ms A] that I was sorry that she considered my tone of voice brusque and my manner demeaning but I had no intention of offending her in any way and I considered that she had misinterpreted my conversation.”*

Dr B subsequently advised me:

*“In almost 20 years of doing similar examinations and almost 35 years as an active medical practitioner, [Ms A] is the only patient to criticise my tone of voice and manner including my bedside manner. I would not wish to offend even one patient in my career and I am sorry that she has misinterpreted my voice and manner.”*

The minutes of the advocacy meeting supplied by Hospital and Health Services state that Ms A told Dr B she felt demeaned by her manner and tone of voice, and requested an apology. Dr B replied that *“she had not intended to offend”*, and after further discussion indicated that there was no cause to give an apology and that *“if she did it would be an admission of guilt”*.

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## Consultant Radiologist / Hospital and Health Services

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### Opinion – Case 00HDC06794, continued

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**Information Gathered During Investigation continued**      Hospital and Health Services advised that, as a result of this complaint, the Radiology Department developed a communication policy that applies to all staff who have patient contact in the Radiology Department. This policy states, in part: *“The patient must be introduced to all staff who are involved in the examination, or who enter the room during any procedure, and their role explained.”*

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**Code of Health and Disability Services Consumers' Rights**      The following Rights in the Code of Health and Disability Services Consumers' Rights are relevant to this complaint:

*RIGHT 1*

*Right to be Treated with Respect*

- 1) *Every consumer has the right to be treated with respect.*

*RIGHT 4*

*Right to Services of an Appropriate Standard*

- 2) *Every consumer has the right to have services provided that comply with legal, professional, ethical, and other relevant standards.*

*RIGHT 6*

*Right to be Fully Informed*

- 1) *Every consumer has the right to the information that a reasonable consumer, in that consumer's circumstances, would expect to receive, including –*

...

- d) *Notification of any proposed participation in teaching or research, including whether the research requires and has received ethical approval; ....*

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## Consultant Radiologist / Hospital and Health Services

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### Opinion – Case 00HDC06794, continued

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**Code of Health  
and Disability  
Services  
Consumers'  
Rights  
continued**

*RIGHT 7*

*Right to Make an Informed Choice and Give Informed Consent*

- 1) *Services may be provided to a consumer only if that consumer makes an informed choice and gives informed consent, except where any enactment, or the common law, or any other provision of this Code provides otherwise.*

*RIGHT 9*

*Rights in Respect of Teaching or Research*

*The rights in this Code extend to those occasions when a consumer is participating in, or it is proposed that a consumer participate in, teaching or research.*

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**Other Relevant  
Standards**     **Hospital and Health Services**

*“Company Policy Manual: Section 5 – Informed Consent*

***Teaching, Observers and Research***

*Patients have a right to consent to or decline involvement in teaching (including the presence of observers during treatment or examination) or to take part in research. ‘Observers’ (including students) are defined as those additional to the normal medical and nursing team immediately involved in the procedure and staff directly concerned with the ongoing care.”*

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## Consultant Radiologist / Hospital and Health Services

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### Opinion – Case 00HDC06794, continued

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**Opinion:  
No Breach  
Consultant  
Radiologist,  
Dr B**

In my opinion the consultant radiologist, Dr B, did not breach Right 1(1) of the Code.

**Right 1(1)**

*Respect*

The consumer, Ms A, found Dr B's tone of voice to be abrupt, and her manner in general to be demeaning. Dr B has acknowledged that she may have been short and abrupt in her communication with Ms A.

Dr B considers that Ms A has misinterpreted their conversation. I accept that Dr B did not intend to offend Ms A. During the advocacy meeting, Dr B told Ms A she was "*sorry she considered my tone of voice brusque and my manner demeaning ...*" but refrained from extending an apology.

In my opinion, although Dr B might have considered it in order to make a simple apology, she clearly meant no disrespect to Ms A. I do not find that Dr B's behaviour amounted to a failure to treat Ms A with respect, and accordingly she did not breach Right 1(1) of the Code.

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## Consultant Radiologist / Hospital and Health Services

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### Opinion – Case 00HDC06794, continued

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**Opinion:** In my opinion the consultant radiologist, Dr B, breached Rights 6(1)(d),  
**Breach** 7(1) and 4(2) of the Code.  
**Consultant**  
**Radiologist,** **Right 9**  
**Dr B**

#### *Health teaching*

Right 9 extends all of the rights in the Code to situations when a consumer is participating in, or it is proposed that a consumer participate in, teaching or research. It is therefore necessary to establish whether the consumer, Ms A, was participating in a teaching situation.

Dr B has advised that Dr E was a radiology registrar in training. The teaching provisions of the Code apply regardless of whether the person being taught is a medical student, house surgeon, registrar or consultant.

Dr B performed Ms A's ultrasound and Dr E attended the procedure as an observer, for teaching purposes. In my opinion, if any health professional or student attends a procedure to observe or learn, the situation is a teaching situation in terms of the Code. Accordingly, in this instance it is my view that Ms A was a participant in a teaching situation and Right 6(1)(d) of the Code applies.

#### **Right 6(1)(d)**

#### *Notification*

Under Right 6(1)(d), Ms A should have been notified of her participation in teaching, unless "*a reasonable consumer in the consumer's circumstances would not expect to have been notified*". It is my view a reasonable consumer in Ms A's circumstances would have expected to have been told that Dr E was present for teaching purposes. The right to such an explanation extends to this type of observational teaching situation.

Ms A was lying down and in a partially dressed state. Dr B was the third health professional to examine her by ultrasound. Ms A had not been told why further examination by others was necessary. The additional unexplained observer's presence was undoubtedly upsetting for her, adding to her anxiety.

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## Consultant Radiologist / Hospital and Health Services

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### Opinion – Case 00HDC06794, continued

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**Opinion:** In my opinion Dr B's failure to notify Ms A of the proposed participation in teaching was a breach of Right 6(1)(d) of the Code.  
**Breach**  
**Consultant**  
**Radiologist,** **Right 7(1)**  
**Dr B continued**

#### *Consent*

Right 7(1) of the Code states that services may only be provided if a consumer makes an informed choice and gives informed consent. Under Right 9, the right to consent to services extends to occasions when the consumer is participating in teaching. "Services" are defined in clause 4 of the Code to include "health care procedures". "Health care procedure" is defined in section 2 of the Health and Disability Commissioner Act 1994 to mean "*any health treatment, health examination, health teaching, or health research carried out on or in respect of any person by any health care provider*".

Dr B's consultation with Ms A was both health examination and health teaching. The services Dr B provided were examination (for Ms A's benefit) and teaching (for Dr E's benefit). However, Dr B explained only the reasons for the examination; she explained neither the fact of, nor the reasons for, the teaching.

Dr B considered that because Dr E did not examine Ms A, consent for his presence was not required. She also thought that consent is only required where a trainee is undertaking an interventional procedure, but not for a diagnostic procedure such as ultrasound.

The view that informed consent is required only for interventional procedures, although commonly held, is erroneous. Under the Health and Disability Commissioner Act and Code, the right of a consumer to give, withhold or withdraw consent to services (after an adequate explanation of what is proposed) extends beyond interventional procedures to examination (for purposes of assessment and diagnosis), teaching and research.

Because Dr B did not explain the reason for Dr E's presence, Ms A was unable to make a choice about whether she wished to participate in a teaching situation by allowing Dr E to observe her ultrasound.

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## Consultant Radiologist / Hospital and Health Services

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### Opinion – Case 00HDC06794, continued

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**Opinion:  
Breach  
Consultant  
Radiologist,  
Dr B *continued***

Dr B noted that the public hospital is a teaching hospital and that it is standard practice for registrars and house surgeons to accompany senior medical staff on ward rounds and in outpatient clinics throughout New Zealand public hospitals. That is doubtless correct. The legal question is whether, simply because a consumer attends a teaching hospital, it should be assumed that (a) the consumer has been notified (by implication) of participation in teaching and (b) the consumer agrees to be observed for teaching purposes.

During the course of this investigation, I have not been informed of specific notices brought to the attention of patients at the public hospital that they are attending a teaching hospital and may be observed for teaching purposes. Even if such notices were in place, and it could be shown that they were brought to Ms A's attention, the fact that Hospital and Health Services' own policy on informed consent states that patients may decline involvement in teaching, including the presence of observers, indicates a recognition that a generalised notice to patients, and assumed consent, is not sufficient.

Teaching of trainee medical and nursing staff, and of staff who are already registered health professionals, is essential to good quality health care in New Zealand, and ultimately benefits all health consumers. It is important that the law supports rather than hinders continuing medical and nursing education, and is sensitive to the reality of clinical practice in busy public hospitals.

However, I do not consider that the requirements of the Code, in relation to health teaching, specifically Rights 6(1)(d) and 7(1), are onerous or unworkable. I am not aware of any research evidence that health consumers who receive a brief explanation about proposed participation in teaching are likely to withhold consent. The majority of consumers will probably be perfectly happy to be observed for teaching purposes, provided that they understand that this is to occur.

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## Consultant Radiologist / Hospital and Health Services

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### Opinion – Case 00HDC06794, continued

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**Opinion:** If the teaching is to involve “hands on” examination or treatment by the  
**Breach** trainee, a reasonable consumer is likely to request a fuller explanation and  
**Consultant** reassurance that an experienced clinician will oversee the procedure, and  
**Radiologist,** some consumers may prefer not to be involved. That is their right under  
**Dr B continued** the legal and ethical framework in New Zealand.

It follows that, in my opinion, Dr B breached Right 7(1) of the Code.

#### **Right 4(2)**

##### *Relevant standards*

Under Right 4(2), Dr B was also required to provide services to Ms A that complied with legal, professional, ethical, and other relevant standards.

Hospital and Health Services' policy on informed consent is a relevant standard. This policy states that consumers have the right to “*decline involvement in teaching ... including the presence of **observers** during treatment or examination. ‘Observers’ (including students) are defined as those additional to the normal medical and nursing team immediately involved in the procedure and staff directly concerned with the ongoing care.*” Dr E was clearly additional to the team involved in the procedure, and was observing. Ms A was therefore participating in teaching according to hospital policy.

Hospital and Health Services' policy on informed consent in relation to health teaching affirms the Code's requirements, discussed above, of notification and consent. It follows that, in breaching the Code's requirements, Dr B also failed to comply with the relevant Hospital and Health Services' policy. Accordingly, in my opinion Dr B breached Right 4(2) of the Code.

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## Consultant Radiologist / Hospital and Health Services

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### Opinion – Case 00HDC06794, continued

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**Opinion:**  
**No Breach**  
**Hospital and**  
**Health**  
**Services**

*Vicarious liability*

Employers are vicariously liable under section 72(2) of the Health and Disability Commissioner Act 1994 for ensuring that employees comply with the Code of Health and Disability Consumers' Rights. Under section 72(5) it is a defence for an employing authority to prove it took such steps as were reasonably practicable to prevent the employee from doing or omitting to do the thing that breached the Code.

Hospital and Health Services' policy on informed consent makes it clear that consumers have an express right to consent, or to decline involvement, in observational teaching. It is implicit in this policy that a consumer must be notified of participation in observational teaching in order to consent to it. Had Dr B read this guideline prior to attending to Ms A with Dr E present, she would have been in no doubt of her obligation to obtain informed consent from Ms A for the presence of a registrar as an observer/student in a teaching situation.

In my opinion, Hospital and Health Services took reasonable steps to avoid a breach of the Code by having an appropriate policy in place. Accordingly Hospital and Health Services is not vicariously liable for Dr B's breaches of the Code.

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## Consultant Radiologist / Hospital and Health Services

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### Opinion – Case 00HDC06794, continued

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**Actions:  
Consultant  
Radiologist,  
Dr B** I recommend that the consultant radiologist, Dr B, take the following actions:

- Apologises in writing to the consumer, Ms A, for breaching the Code of Health and Disability Services Consumers' Rights. The apology is to be forwarded to the Commissioner, and will be forwarded to Ms A.
- Reviews her practice in light of this report.

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**Other Actions** A copy of this opinion will be sent to the Medical Council of New Zealand. A copy with all identifying features removed will be forwarded to all District Health Board Chief Medical Advisors, for educational purposes.

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**Other  
Comments** I commend Hospital and Health Services' development and adoption of a new communication policy in the Radiology Department entitled "Communication Process for Patient Care Delivery" as a result of this complaint. I recommend that Hospital and Health Services review its policy on informed consent to clarify that consumers must be notified of any proposed involvement in teaching before their consent is sought.

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