

The Health Legal Report will be published every two (2) months, and is edited by Suzie Linden, Senior Consultant.

At Health Legal we are keen to ensure that we address the specific needs of the Victorian health sector.

We welcome your feedback and suggestions regarding particular issues and topics that you would like canvassed in future issues.

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Welcome to the first issue of the Health Legal Report. The Health Legal Report is a regular publication by Health Legal which will provide an update on important legal and other regulatory developments impacting on the health sector.

In this issue, we report on recent important legislative changes to both the *Health Services Act 1988 (Vic)* and the *Mental Health Act 1986 (Vic)* regarding confidentiality, and the use of and access to confidential information. The Report also provides an update on the recent Victorian Public Hospital Governance Reform Panel Report and its recommendations.

Important amendments regarding the duty of confidentiality

Section 141 of the *Health Services Act 1988 (Vic)* (HSA) and section 120A of the *Mental Health Act 1986 (Vic)* (MHA) contain important provisions aimed at ensuring the confidentiality of patient identifying information, subject only to a number of specific exceptions where disclosure is authorised. These Acts govern the provision of health services by Victorian public and private hospitals, day procedure centres, community health centres and mental health services.

A particular concern for health service providers has been the circumstances in which they are authorised to disclose patient information for the purposes of carrying out and exercising their statutory functions and powers. Both the HSA and the MHA have been recently amended to clarify the operation of these provisions and ensure that the provisions are consistent with the *Health Records Act 2001 (Vic)* (HRA), which specifically regulates the collection and handling of health information. The amendments also ensure that the provisions in place relating to patient information for psychiatric services are the same as those in place for other health services.

The relevant amendments are as follows:

- Confirmation that hospitals and health services are authorised to disclose patient or client information where the disclosure is in accordance with Health Privacy Principle (HPP) 2 in the HRA. This amendment confirms that section 141 does NOT apply to the giving of information and communication between staff within the same health service. Such communications are covered by HPP 2 under the HRA.
- Hospitals and health services will be authorised to disclose patient information to other third parties where the disclosure:
 - is for a secondary purpose, directly related to the primary purpose for which it was collected, and the purpose is one for which the patient would reasonably expect the information to be used (in accordance with HPP 2.2(a));

- is necessary for the establishment, exercise or defence of a legal claim (in accordance with HPP 2.2(k));
- is in circumstances that are prescribed by law (in accordance with HPP 2.2(1)).

None of the above circumstances were previously expressly included in the list of specific authorised disclosures under either the *HSA* or the *MHA*.

- Inclusion of an additional circumstance in which disclosure of patient information will be authorised, namely the giving of information in relation to a notification of a claim to be given to a person or body providing insurance or indemnity.
- Clarification that where a patient consents to the release of identifying information, for the purposes of the current exception as set out in section 141(3) (a), that consent may be either express or implied from the person's conduct or words.

Additional amendments have also been made to those provisions of the MHA dealing with the apprehension of mentally ill persons.

Section 10 of the MHA has been amended to allow police, in seeking to apprehend a person who appears to be mentally ill, to also act on the advice of a mental health practitioner as an alternative to that of a registered medical practitioner. This amendment seeks to reflect the practical reality that a crisis assessment and treatment (CAT) team often is in attendance when police seek to apprehend a person under the provisions of the *MHA*. A CAT team would not ordinarily include a registered medical practitioner, but does include a mental health practitioner such as a psychiatric nurse, who are familiar with the necessary statutory criteria for determining whether a person should be admitted for treatment under the Act as an involuntary patient.

Under the new provisions, police are authorised to rely on an initial assessment by a mental health practitioner, who can advise whether the person apprehended should be released or whether they should be examined by a registered medical practitioner.

As stated by the Minister for Aged Care, Mr Gavan Jennings, in his second reading speech before Parliament, by allowing police to make better use of the expertise of mental health practitioners, these amendments will, in some cases, “enable a person apprehended by police under section 10 to be released more quickly, than is currently the case”, as well as “ensure that police resources are not directed to arranging unnecessary medical examinations”.

Simon Cooke was involved in the development of the policy underpinning these amendments to section 10 of the MHA.

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Corporate Governance framework for Victoria

The Victorian Public Hospital Governance Reform Panel (the Panel), was established in May 2003 by the Minister for Health, to consider mechanisms to bolster the capacity of the Boards of the Metropolitan Health Services and Victoria's major regional hospitals to fulfil their governance obligations. After consulting with key stakeholders, including the Auditor General, the Panel has now published its Final Report (August 2003). A copy of the Report is available at www.health.vic.gov.au/governance.

The Report identifies a number of key issues regarding current governance and accountability arrangements within the Victorian public health sector, including:

- The lack of clarity and understanding of the roles and responsibilities of key parties within the health system, including the relationships between the Minister, the Department of Human Services (DHS) and the Boards and Chief Executive Officers (CEOs) of the Health Services. One particular theme emerging from the consultations was a view that CEOs were receiving conflicting directions and performance expectations from both their Boards as well as the Minister, with there being additional confusions between the roles of management and governance.
- The need to strengthen the capacity of Boards to govern effectively in relation to both the skills and experience of appointees and appropriate induction and ongoing training for directors.
- The lack of adequate and effective information systems available to Boards to ensure effective monitoring, especially with respect to financial and clinical governance reporting. In particular, the Panel noted that there was no clear description of what constitutes the minimum adequate reporting of information to Boards and the need for development of a standardised reporting template identifying the core minimum key performance indicators.
- The need for greater direction on the elements of an effective accountability framework, including identification of the instruments and tools used by Boards for determining and monitoring strategic objectives, and annual performance priorities and targets.

The Report contains a detailed review of the existing governance and management mechanisms for publicly funded health services, current governance arrangements, the various accountability tools and instruments available, avenues available to the Minister in the event of non-performance by any health service, mechanisms to improve and strengthen communication and relationships between key parties, mechanisms to deal with system-wide governance issues and other ways of maximising a Board's capacity for effective governance.

At Health Legal, we have developed professional development modules specifically focusing on governance obligations of Health Service Boards, including identification of effective risk management tools and instruments.

We are able to provide Board training and education at competitive prices. Please contact Suzie Linden on (03) 9861 4029 for further information.

The Panel has made a number of key recommendations for change to the existing system, including:

- Clarity of the roles, functions and accountabilities of the key parties, ie the Minister, the Department, the Boards and CEOs, which should be clearly set out in legislation, together with development of a governance charter.
- Introduction of new accountability instruments and tools, including an annual Statement of Priorities, enabling the Board and the Minister to agree on key and deliverable performance priorities. This annual document will be the main accountability document by which Health Service performance will be assessed. This will also involve the development of a minimum set of measurable KPIs, based on standardised definitions, addressing financial, activity/access and quality aspects of Health Service performance.
- Greater focus on benchmarking, including the development and implementation of a common chart of accounts.
- Reduction of the amount of detailed reporting required by DHS, which is to be balanced by an expansion of powers of DHS to conduct audits from time to time. High-performing Health Services will be rewarded by lesser reporting requirements, whilst non-performing Health Services will be subjected to more intrusive reporting.
- An agreed calendar for the annual planning and reporting cycle, providing the tool to structure the process for agreement on budgets, plans and performance expectations.
- Improvement of communication and relationships between all key parties by establishing regular, structured and interactive forums, including a regular meeting between the Minister and a group of Board Chairs, an annual meeting between the Board Chair of each Health Service and the Minister and a joint CEOs forum with DHS.
- Establishment of a Health System Improvement Board (HSIB) to facilitate a collaborative approach to addressing system-wide policy and operational objectives. The HSIB will comprise Health Service Board chairs, (three metropolitan, one regional and one rural), the Secretary of DHS, a representative from the Departments of Treasury & Finance and Premier & Cabinet, two senior clinicians as well as the chair of the CEO-DHS Executive Group. The CEO-DHS Executive Group is to be established to support the HSIB in developing and implementing its work programs.
- Enhancement of Board effectiveness, focusing on ensuring for appropriate skills and experience, and strengthening induction and ongoing education and training specifically on governance.
- Enhance Board accountability and maximise the opportunities for good management and performance by allocating funding on a three-year basis rather than an annual basis.

In formulating its report, the Panel was mindful of an important policy tension – namely, realising the potential for Health Services to act corporately to optimise outcomes across the whole system, whilst still preserving sufficient autonomy for Boards and management to move their organisations forward. Ultimately, the Panel concluded that the current basic Board structure and Board responsibilities should be retained, but recommended additional mechanisms to enhance the capacity for Boards to effectively govern.

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The aim of Health Legal is to provide quality, sector-focused legal services at a competitive price.

Health Legal will provide a full range of commercial, advisory and medico-legal services, as well as specialist professional development programs and other risk management services.

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The staff at Health Legal wish to thank the sector for the support which has been shown to date. We look forward to continuing to work with you.