



Message from the editor

The health profession today faces challenges and risks unique to this time.

In this edition of the Legal Check-Up, we provide some insight into how practitioners can recognise and manage particular risks in their own practice.

Earlier this year changes to the role of the Health Services Commissioner were made. The changes expand the powers of the Commissioner and now includes unregulated services. You can read more about the changes in our special report on page two.

The TAC has announced the implementation of a new system of payment which should allow for overnight processing of claims. This is welcome news for both health professionals and patients. For details, see page four.

If you require further information about any of the topics discussed in this edition of the Legal Check-Up, contact us on (03) 9321 9988.

- Bree Knoester, Partner

Patients accessing health information

The *Health Records Act 2001* grants a patient the right to access information collected about their health. Under the Act, this includes information or an opinion about:

- the physical, mental or psychological health of a patient;
- a disability of a patient;
- a patient's expressed wishes about the future provision of health services to him or her; or
- a health service provided, or to be provided, to a patient.

If a patient requests access to their medical records, the Act stipulates that a medical practitioner must provide that access. A patient is also entitled to specify how they wish to access the records. For example, a patient may request to:

- inspect records;
- receive a copy of the records; or
- request to view the records.

It is worth noting that where a patient requests a copy of their records, a medical practitioner may, with the patient's consent, provide a summary of those records in lieu of the complete records.

Arranging for records to be copied or viewed will inevitably result in a medical practitioner incurring expenses. The *Health Records Act Regulations 2012* allows a medical practitioner to charge the patient for those expenses. However, the Regulations prescribe maximum fees that can be charged. For example, the prescribed fee for photocopying is 20 cents per page plus reasonable costs, which in total cannot exceed \$34.00.

The fact that records are accessible and patients may be accessing their records with an intention to use the information as evidence in court proceedings is a helpful reminder to medical practitioners to keep clear, concise and competent records.

- Isabelle McCombe, Lawyer

New Health Complaints Commissioner

On 1 February 2017 a new Health Complaints Commissioner ('HCC') was established, abolishing the former Office of the Health Services Commissioner. The Act expands the powers of the HCC and importantly, brings under its umbrella the otherwise unregulated services provided by allied health or alternative health practitioners.

The new HCC Act introduces a Code of Conduct applicable to allied and alternative health practitioners and grants the HCC wide-ranging investigative and regulatory powers.

Expanded definition of a general health service provider

The definition of a general health service provider has been expanded to include any service or practitioner that claims to or engages in assessing, predicting, maintaining or improving a person's physical, mental or psychological health. This expanded definition captures practitioners who were not subject to the old Act, such as massage therapists, counsellors and homeopaths.

Code of Conduct

A new Code of Conduct has been introduced setting out the minimum standard to which general health service providers must adhere. While the new Code of Conduct does not apply to practitioners whose registration is regulated by Australian Health Practitioner Regulation Agency (AHPRA), it does apply to registered practitioners operating outside their area of registration. An example of this is a General Practitioner who provides homeopathic or other alternative health treatments.

Expanded investigative powers

The HCC is empowered to enter and search premises and to order the production of certain documents. The HCC may conduct interviews, and may also call persons to give evidence at an investigation hearing before the Commissioner.

Significantly, the HCC now has an 'own motion' power, entitling the HCC to investigate a matter in the absence of an official complaint.

Expanded regulatory powers

Prohibition orders

Following or during an investigation, the HCC is empowered to issue a prohibition order against a general health service provider. Prohibition orders may ban a general health service from providing all or some of its service and may be permanent or for the period specified by the HCC.

The HCC can impose penalties of up to two years gaol on general health service providers who breach a temporary or permanent prohibition order, whether issued in Victoria or another domestic jurisdiction.

Public warning statement

Following or during an investigation the HCC may issue a public warning statement against a general health services provider. This would occur if the HCC reasonably believes the Code has been contravened and it is necessary to alert people to serious risks to their health, life, safety or welfare.

The HCC may also issue a public statement against a registered practitioner after an investigation has concluded. No such public statements have been made to date.

- Naty Guerrero-Diaz, Senior Associate & Grace Bowran-Burge, Graduate



Non-English speaking patients and informed consent

For most patients understanding medical jargon is hard enough. It is much harder when English is not their native language.

Family or friends might be there to help but, in the case of agreeing to medical treatment, how sure can we be that the condition or procedure is really understood by the patient? And how significant is that in determining legal rights?

These questions have been explored in a New South Wales case in the context of a lady who underwent treatment for a tumour. Her treatment involved surgery, which ultimately severed a nerve causing injury. She alleged both that the treatment provided was below the appropriate standard of care, and also that she was not given enough information to enable her decision to be made and therefore her consent was not informed. Interpreters and family members had been present with her to translate at various appointments.

At trial, the judge found that she had not been provided with enough information to make her decision and that there had been a failure to warn her of the risks. This decision was appealed successfully in favour of the doctor.

A medical practitioner will be found to have exercised reasonable care if they ensure that a patient understands the material risks of the treatment – that is, they understand the substance of the information. They do not need to understand every risk and indeed, this is probably so with all patients regardless of English language ability.

Good practice for doctors treating non-English speaking patients is to encourage the patient to engage an accredited interpreter, or at least someone who is proficient in both the patient's native language and English. It is important that the doctor explains the importance of accurate translation and note in the records that an interpreter was present.

- Liat Blacher, Special Counsel & Alexandra Partington, Graduate

Reportable deaths and a medical practitioner's obligations

The *Coroner's Act 2008* places specific expectations on medical practitioners who are present at or following a "reportable death".

A reportable death includes:

- where the death was unexpected, unnatural, violent, or directly/indirectly caused from an accident or injury;
- where the death occurred during or following a medical procedure;
- where the death occurred immediately after the person was in police custody or was a patient under the *Mental Health Act*; or
- in circumstances where the identity of the deceased person is unknown.

If a registered medical practitioner is present at or after the death of an adult in any of the above circumstances, they are obligated to report the death to the Coroner. Similarly, the death of a child where a previous child or children have died in the same family must be reported. Failure by a medical practitioner to report the death in these circumstances exposes practitioners to penalties, including fines of up to \$3,100.

If a practitioner is present at or following a reportable death, it is important that you do not complete a death certificate in these circumstances. The death certificate will be completed by the Coroner following an autopsy.

- Genna Angelowitsch, Lawyer

TAC's new rapid payment scheme

A most welcome and far-sighted scheme is about to be rolled-out by Victoria's Transport Accident Commission (TAC).

A new software program designed to provide speedy processing of accounts will be adopted by the TAC. Initially applying to GPs, physiotherapists and pharmacists, the software program will be installed on the health professional's computer system. When a TAC claimant has been treated, an account can be sent directly to a central processor for assessment and payment.

It is envisaged by the TAC that payments should be processed overnight.

This is certain to be of great help to the injured. Over the last 30 years of the scheme, surgeons, specialists and many health professionals have increasingly said they want nothing to do with the TAC and refused treatment of TAC claimants. They have expressed annoyance at the "red tape" and extensive delays preventing appropriate and expeditious payment.

The injured have had to shop around, in many cases, to find a practitioner who would assist with their rehabilitation. Not only did this restrict the choice for the injured, it also meant the vitally important rehabilitation was either delayed or not started at all.

Once the process is up and running, the claimant will only have to provide their claim number to the clinic who will enter it in the "Red Lantern" system together with the details of service and fee. This will be recognised by the system and if the claim number is valid, the provider registered and the service within the anticipated treatment parameters, the payment will be approved.

The TAC will have contained within the system an analysis of the category into which the claimant is considered. This removes the need for a person to approve the payment, save for exceptional circumstances or unusual entries.

It is anticipated that the system will be able to be used by other providers of services in the coming years.

It is a huge step forward for the injured and will make the TAC scheme a leader in social insurance.

- Michael Lombard, Partner

LOCATIONS

Epping

Shop 110B, Epping Plaza
Cnr of Cooper/High Street
Epping VIC 3076

Melbourne

Level 8, 555 Bourke Street
Melbourne VIC 3000

Melton

43 Wallace Square
Melton VIC 3337

Moe

Level 1, 18-20 Kirk Street
Moe VIC 3825

Springvale

369C Springvale Road
Springvale VIC 3171

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Introducing our new lawyers!

We are very pleased to announce that graduate lawyers Kirsty Osborne, Isabelle McCombe and Giorgina McCormack have now been admitted to practise.

Whilst working with us as graduates, these lawyers consistently displayed a passion for personal injury law and were dedicated to providing excellence in legal service. We are very privileged that they have decided to continue their practise with our team.



Kirsty Osborne



Isabelle McCombe



Giorgina McCormack