Holman Webb
Lawyers

Health Law Bulletin

August 2013

Contents

Introduction

Welcome to the August 2013 edition of the Holman Webb Health Law Bulletin

With the Federal election announced for early September, 2013/14 will continue to be a time of change and challenge for the Australian healthcare industry. In this edition of the Health Law Bulletin we highlight some of the changes on the horizon and discuss other continuing legal issues for the health, aged care and life sciences sector.

Our August Health Law Seminar, held jointly with the Australasian College of Health Service Management and the Australian Hospitals and Healthcare Association, took a lead role in focussing on legal issues and activity based funding for the industry.

Holman Webb Lawyers continues to strengthen the depth and range of its legal services with the recent addition of new Partners, Corinne Attard in our Sydney office and Craig Singleton in our Brisbane office. Corinne is a franchising and retail specialist advising some of Australia's leading brands and Craig advises major banks and mezzanine financiers in banking and finance law.

Marking further external recognition of our legal expertise, Holman Webb is pleased to advise of our recent inclusion in the Commonwealth Government's Legal Services Multi-Use List of law firms available to assist Commonwealth Government departments and agencies. The list services Government departments and agencies Australia-wide and the appointment reflects our legal expertise at extremely competitive mid-tier rates.

Please do not hesitate to contact me or any member of our legal team should you have any questions about the Health Law Bulletin content and articles or if one of your colleagues would like to be added to our distribution list. ■

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Protecting your medical equipment

by Alison Choy Flannigan, Partner

Hospital operators, invest in expensive medical equipment, such as linear accelerators. The recent case of *Re Cancer Care Institute of Australia Pty Limited* [2013] NSWSC 37 highlights the issue of protecting ownership in medical equipment. Hospital operators should clearly set out in their agreements with landlords and financiers their ownership rights to equipment which is necessary to operate their hospital facility. ■

When does medical equipment become a fixture?

Under Australian law, a chattel (such as equipment) which is affixed to the land, can be regarded as part of the land and ownership can transfer to the Landlord once the lease has expired or terminated.

In the above case, Cancer Care Institute of Australia (**CCIA**) contracted to purchase two Clinic iX linear accelerators and associated equipment (**Equipment**) from Varian Medical Systems Australasia Pty Limited (**Varian**) for approximately $9 million.

The Equipment was delivered and installed in leased premises within a substantial medical centre situated at Hurstville, NSW, known as the Medica Centre (containing a surgical hospital), owned by Cortez Enterprises Pty Limited (**Cortez**).

An administrator was appointed to CCIA, and a dispute arose in relation to the ownership of the Equipment.

The Equipment was attached to steel base frames which were cemented or grouted to the floor of the Premises. CCIA granted to Varian and Varian registered a purchase money security interest (**PMSI**) over the Equipment on the Personal Property Securities Register pursuant to the *Personal Property Securities Act* 2009 (Cth).

Justice Black of the NSW Supreme Court held that the Equipment had not become a fixture and therefore title had not passed to the landlord, Cortez. The reasons included the following:

- the base frames (which were affixed to the building) were not part of the Equipment;
- removal and de-installation of linear accelerators was not unusual;
- linear accelerators could be removed without substantial damage to the premises or Equipment;
- the value of the Equipment far surpassed the cost of removal (approximately $60,000);
- the fact that CCIA did not have a registered or written lease or agreement before purchasing the equipment and installing it in the premises tends strongly against any objective intention of CCIA that the equipment had become a fixture (and therefore was to revert to the Landlord), due to the Equipment's expense and the lack of long-term tenure; and
- the fact that the Equipment was purchased on credit where Varian had a PMSI was inconsistent with an objective intention of CCIA that the Equipment would form part of the premises.

Financiers

Whilst the above case did not deal in detail with Varian's security interest, the case is a reminder to hospital operators to carefully read the conditions of security interests which they sign/grant over their assets. Security interests include:

- romalpa clauses (also known as retention of title clauses commonly included in terms and conditions of equipment manufacturers or suppliers) and terms of equipment leases; and
- general security deeds (formerly known as fixed and floating charges).

Hospital operators should be aware of "triggers" within the securities which grant to the financier a right to enforce their security interest by either seizing and repossessing the equipment or appointing an administrator or liquidator over the company which granted the security. ■

Grants

Whilst not discussed in the above case, last but not least, expensive medical equipment is quite often linked to Commonwealth grants. The Radiation Oncology Health Program Grants Scheme provided by the Commonwealth pursuant to Part IV of the *Health Insurance Act* 1973 (Cth) provides funding in relation to linear accelerators. It is important that hospital operators ensure that they continue to comply with relevant legislative requirements and grant conditions to secure ongoing grant monies.

The above case is a reminder to hospital operators that various people can claim a right in relation to hospital equipment and to ensure that their agreements clearly set out their rights as to ownership and access. ■

Medical device and equipment suppliers

If medical device and equipment suppliers wish to protect their ownership rights in leased equipment or consignment goods, then they must ensure that they register their rights on the Personal Property Securities Register. ■

A quick update on some legal developments

By Dr Tim Smyth

Keeping up to date with what's happening on the legal front is never ending. ***Dr Tim Smyth****,* ***Special Counsel****, outlines some recent developments for clients in NSW and clients who do business with organisations in NSW.* ■

NCAT is getting closer

What is NCAT? It is the new **NSW Civil and Administrative Tribunal**, which will begin operation on 1 January 2014. Established in response to recommendations of the NSW Legislative Council's Standing Committee on Law and Justice, NCAT will bring together over 20 separate tribunals in NSW. NCAT will be established under the *Civil and Administrative Tribunal Act* 2013. This Act is being enacted in stages and will set out NCAT's jurisdiction, powers and functions.

NCAT will comprise most of the existing NSW state tribunals, other than the Industrial Relations Commission. It will include each of the current health professional tribunals (such as the Medical Tribunal, Dental Tribunal and the Nursing and Midwifery Tribunal), the Guardianship Tribunal, the Victims Compensation Tribunal, the Administrative Decisions Tribunal and the Consumer, Trader and Tenancy Tribunal.

Unlike similar bodies in other States (eg VCAT in Victoria), NCAT will be divided into 5 specialist Divisions – Consumer and Commercial, Administrative and Equal Opportunity, Occupational and Regulatory, Guardianship and Victims Support. The health tribunals established under the National Law will form a separate list within the Occupational and Regulatory Division.

A Supreme court Judge will be appointed President of NCAT and Deputy Presidents will head each of its five Divisions. Each Division will have principal members, senior members and general members. NCAT's main Registry is likely to be located in the John Maddison Tower in Goulburn Street Sydney CBD.

Further consultations are underway ahead of the introduction of the next stage of the legislation for NCAT. Issues being debated include rights to legal representation, awarding of costs and appeal rights.

Many health services and health professionals will have had interaction with the Administrative Decisions Tribunal, the Guardianship Tribunal, the Consumer, Trader and Tenancy Tribunal and the health profession tribunals. Staff dealing with these matters now need to be up to date on NCAT. Further information is available on the NCAT website – see www.tribunals.lawlink.nsw.gov.au. ■

Statutory definition of Charities

The *Charities (Consequential Amendments and Transitional Provisions) Act 2013* and the *Charities Act 2013 (Cth)* received Royal Assent on 28 and 29 June 2013 respectively. This legislation introduces a definition of charity and charitable purpose for all Commonwealth legislation from 1 January 2014.

To be a charity for the purposes of Commonwealth law, an entity must be not for profit, have only charitable purposes that are for the public benefit (including other ancillary purposes that are incidental to and further aid the charitable purposes) and must not have a disqualifying purpose (activities that are of a party political nature, are unlawful or which are contrary to public policy).

The charitable purpose categories are:

- advancing health, education, social or public welfare, religion, culture, the natural environment or the security or safety of Australia or the Australian public;
- promoting reconciliation, mutual respect and tolerance between groups of individuals that are in Australia, promoting or protecting human rights;
- preventing or relieving the suffering of animals;
- any other purpose beneficial to the general public that may reasonably be regarded as analogous to, or within the spirit of, the above purposes; and
- promoting or opposing a change to any matter established by law, policy or practice in the Commonwealth, a State, a Territory or another country, in furtherance or protection of one or more of above purposes.

The categories are not a major departure from the current common law position and approach under Commonwealth taxation and charity regulation law. The categories extend charitable purpose to assisting with the rebuilding of the community after a national disaster and funding charity-like government entities. A trust subject to a cy pres or similar scheme leaving only charitable purposes may now be charitable under the new law.

Existing charities should review the legislation and categories to determine whether they need to revise their registration subtype with the Australian Charities and Not for Profits Commission. There is an 18 month transition period for this updating of registration with the ACNC. ■

New boarding house legislation

On 1 July 2013 the remaining provisions of the *Boarding Houses Act* 2012 and the *Boarding Houses Regulation 2013* commenced. The Act and Regulation establish a publicly available register of boarding houses, increase the inspection powers of local councils, enhance occupancy rights for residents, set compulsory standards and occupancy principles and modernise previous laws.

The register is administered by the Commissioner for Fair Trading and can be viewed at www.fairtrading.nsw.gov.au.

Under the Act there are two categories of registrable boarding houses:

- **general boarding houses** – accommodating 5 or more paying residents.
- **assisted boarding houses** – accommodating 2 or more persons with special needs (eg persons with a disability or mental illness).

From 1 July 2013, the Consumer, Trader and Tenancy Tribunal (**CTTT**) has jurisdiction to deal with disputes concerning registrable boarding houses, including state of the premises, fees and charges, inspections and repairs, access to goods and services and notices of eviction. The CTTT can make a range of enforceable orders, including orders to stop particular actions and orders for compensation. ■

Are you a registered health professional and a manager or Minister?

Registration carries with it a range of responsibilities and accountabilities. A recent Medical Board of Australia finding in June 2013 illustrates that these apply to managers and even Ministers.

In February 2013, the Board received a complaint alleging that anaesthetists working in public hospitals in Western Australia were being required to re-use 'single use only' anaesthetic breathing circuits. The complaint named a number of registered medical practitioners including the Health Minister Dr Kim Hames and former WA Country Health Medical Director, Dr Felicity Jefferies.[1]

The Board subsequently found no evidence to substantiate the allegations and resolved to take no further action.

A timely reminder that the practice of medicine has a wide definition! ■

Health funds retreat on benefit reduction for private patients electing single rooms in public hospitals

A number of health funds notified hospitals and the NSW Ministry of Health of a proposed significant reduction in their benefit payment for members choosing single room accommodation for their public hospital stay.

While the funds are required to pay a minimum "default" benefit under the Private Health Insurance Act and Rules, there is no legislative requirement setting the single room benefit. The NSW Ministry of Health estimated that the revenue loss to NSW public hospitals would be around $80M in 2013/14.

The NSW Government introduced legislation as part of the State Budget to recoup the shortfall via an increase in the levy on health funds that provides funding for the ambulance service. The *State Revenue and Other Legislation Amendment (Budget Measures) Act* 2013 *amended the Health Insurance Levies Act* 1982 to increase the base levy to $2.

Following the agreement by the health funds not to proceed with the proposed benefit reduction, the amendment of the Act will not commence. Health funds will now pay the daily single room charge in public hospitals which increased to $611 as of 1 July 2013. ■

Evaluation of National Activity Based Funding

The Independent Hospital Pricing Authority is seeking public lenders to provide an independent evaluation of the national implementation of Activity Based Funding for in scope Australian public hospital services. Information is on their website www.ipha.gov.au ■

[1] Medical Board of Australia, 19 June 2013, 'Board finds Minister has no case to answer', Australian Practitioner Regulation Agency, http://www.medicalboard.gov.au/News/2013-06-19-media-release.aspx

The pitfalls of social media marketing

By Alison Choy Flannigan, Partner and Joann Yap, Graduate

Five things you need to do to risk manage your liability for third party content

Companies have a responsibility to monitor third party content on their websites and blogs, including social media sites, following a decision by the Advertising Standards Bureau (ASB) which found that a company's Facebook page was an advertisement. In addition to ensuring false or misleading claims are not made as part of a company's marketing and promotional activities, companies may be held responsible for posts or public comments made by others on social media pages, including those which are false or likely to mislead and deceive consumers.

The ASB recently considered consumer complaints concerning the official Facebook pages for Smirnoff, managed by Diageo Australia Pty Ltd (Diageo Australia), and VB, managed by Fosters Australia, Asia & Pacific (Fosters).

The separate complaints raised concerns about comments made by each brand's Facebook "fans", which included comments that were discriminatory towards women, degrading to homosexual people, strong and obscene language and did not treat sex, sexuality and nudity with sensitivity to the relevant audience. The complaint in relation to Diageo was upheld, as a company's Facebook page was found to be a marketing communication tool where it is used "to draw the attention of a segment of the public to a product in a manner calculated to promote or oppose directly or indirectly that product."[1] In upholding the complaint against Fosters, the Board noted that social media is an advertising platform requiring monitoring to ensure offensive material is removed within a reasonable timeframe and that content within a Facebook page should, like all other advertisement and marketing communication, be assessed with the Australian Association of National Advertisers Advertiser Code of Ethics (Code) in mind.[2]

The ASB's decisions are broadly consistent with the developing position from case law. In Australian Competition and *Consumer Commission v Allergy Pathway Pty Ltd (No 2)*,[3] Allergy Pathway was found liable as a publisher for false, misleading or deceptive statements posted by users on its Facebook page, as it had control over the social media page, knew of the statements and did not take steps to remove them.

[1] Advertising Standards Bureau, Case Report of Case Number 0272/12.
[2] Advertising Standards Bureau, Case Report of Case Number 0271/12.
[3] [2011] FCA 74.
[4] Competition and Consumer Act 2010 (Cth), Schedule 2, section 18.
[5] Competition and Consumer Act 2010 (Cth), Schedule 2, section 29.

Businesses with social media pages or websites that enable posts to be made by third parties should be particularly aware that the Australian Consumer Law prohibits misleading or deceptive conduct[4] and false or misleading representations about goods or services,[5] and that consumer protection laws and Codes also apply to sites like Facebook and Twitter. Australian Competition and Consumer Commissioner, Sarah Court, has commented that larger companies are expected to monitor and remove misleading or inappropriate comments promptly, with more flexibility for smaller businesses. A failure to do so may lead to court action.[6]

What should businesses do to minimise liability?

1. Understand the Code and any additional guidelines relevant to your industry, such as the Therapeutic Goods Advertising Code.

2. If your business maintains social media pages, be aware of any Page Guidelines, including Advertising Guidelines and Community Standards, such as those applicable to Facebook.

3. Create and display usage guidelines and feature them prominently on your social media pages. Although this won't protect against third parties posting inappropriate or misleading comments on websites, it is good practice to outline what the Page is for, what will and won't be tolerated on the Page, and that you will delete any comments deemed inappropriate or misleading. Users who breach those rules should be blocked.

4. Monitor your social media pages and websites (including setting up email notifications for new posts) and remove any posts that may be false, misleading or deceptive as soon as you become aware with them. Think about enlisting a suitable Page administrator to assist in monitoring content. The amount of time to be spent monitoring depends on the size of the company and the number of fans or followers the business has.[7]

5. Businesses should also pay attention to ensure third party content does not breach other relevant legislation, such as the law surrounding defamation, racial discrimination and gender discrimination.

   Pharmaceutical and medical device companies must also monitor their websites for posts which infringe the Therapeutic Goods Advertising Code, including promoting prescription goods, prohibited and restricted representations to consumers and testimonials.

[6] Cara Waters, "ACCC gives big business 24 hours to fix Facebook comments, but SMEs get more time" 13 August 2012, <http://www.smartcompany.com.au/legal/051187-accc-to-gives-smes-more-time-to-remove-false-and-misleading-comments-on-facebook-2.html> (1 May 2013).
[7] Australian Competition and Consumer Commission, "Social Media", < http://www.accc.gov.au/business/advertising-promoting-your-business/social-media> (1 May 2013).

Medical practitioners, expectant mothers and the chickenpox vaccine

By John Van De Poll, Partner and Vahini Chetty, Solicitor

In the recent decision of *King v Western Sydney Local Health Network* [2013] NSWCA 162, the plaintiff, Tamara King brought proceedings against the Western Sydney Local Health Network as a result of her contraction of foetal varicella syndrome (**FVS**) which had left her severely disabled. Her development of FVS was as a result of her mother having been exposed to chickenpox in the second trimester of pregnancy.

The source of the mother's exposure was the plaintiff's older sister. As soon as the plaintiff's mother realized that the sister might have chicken pox, she sought the advice of her doctor.

The standard treatment in such situations at the time was to administer an intramuscular dose of varicella-zoster immunoglobulin (**VZIG**) to pregnant mothers to boost their defences against the chicken-pox virus. However, the plaintiff's mother was never offered such treatment.

At first instance, the trial judge found that there was a legal duty owed by a medical practitioner to their patient which extended to offering the plaintiff's mother VZIG. He found that the mother would have accepted the treatment were it offered but that it was not offered. However, he found that even if the treatment had been administered, in all likelihood the plaintiff's mother would not have avoided developing chickenpox. Accordingly, at first instance, the plaintiff failed on the question of causation.

The question was raised as to whether administering VZIG to the plaintiff's mother would have simply ameliorated rather than prevented chickenpox. The primary medical evidence relied upon by the trial judge was a German study, as it was the only study available which had a large enough sample size to produce a reliable result. In that study VZIG was shown to prevent rather than ameliorate chickenpox in expectant mothers. However, the Court noted that the standard dosage of VZIG in Germany was far greater than the standard dosage in Australia. It was also noted that VZIG differed in its quality and grade from country to country.

In the Court of Appeal, Justice Basten was in the minority and Justices Hoeben and Ward were in the majority.

Justice Basten was in dissent and was of the view that the appeal should be allowed, the trial judge's decision set aside and that an order of costs in favour of the plaintiff should be made. This was based on the reasoning that factual causation had been made out in that there was a duty owed to inform the plaintiff's mother of VZIG, she was not so informed and the harm that the provision of VZIG sought to prevent then occurred. Justice Basten was of the view that the factual and policy elements of causation should not be separated as they were inter-linked. Accordingly, given that factual causation had been established, Justice Basten could see no reason to find that causation had not been made out simply because there was an absence of empirical information.

Justices Hoeben and Ward were of the view that the appeal should be dismissed as they agreed with the trial judge that although there was a duty of care owed by the health practitioner to inform the plaintiff's mother of VZIG, it could not be established on the evidence that the plaintiff would have avoided contracting FVS in the event that VZIG had been administered.

The medical evidence available in this instance was by no means adequate to establish whether or not the failure to provide VZIG to the mother caused the plaintiff to develop FVS. However, what all judges agreed upon was that there was a clear duty of medical practitioners to inform the mother of the availability of VZIG and by neglecting to provide her with information about VZIG they had failed in their duty. ■

Mental illness, duty of care and risk management – a challenge for health services and police

By Dr Tim Smyth, Special Counsel and Joann Yap, Graduate

Better training for police officers responding to people with a mental illness has been in the media spotlight. A number of court cases have also been exploring the extent of a the duty of care for police and health services.

In NSW, following a coronial inquest into the shooting of Adam Salter in his Lakemba home in 2009, the Police Integrity Commission recently recommended criminal charges against four police officers. A High Court case in 2009 reviewed the legal duties of Victoria Police in dealing with people at risk of self harm. The decision in *Stuart v Kirkland-Veenstra* [2009] HCA 15 allowed the appeal by the police against a decision of the Victorian Court of Appeal that the police had a common law duty of care to prevent the suicide of a man they found sitting in his car in the early morning hours with a vacuum hose running from the exhaust pipe into a car window. The police officers talked with the man, offered to call his wife and drive him home or take him to a hospital. He declined their offers and the police officers took no further action, having formed an opinion that he was not mentally ill or at risk of self harm. His widow sued the police and the State of Victoria alleging that the police were negligent in not exercising their powers to detain her husband under s10 of the *Mental Health Act* 1986 (Vic).

The High Court held that s10 of the Act did not impose a duty of care to detain persons who appear to be mentally ill or have attempted suicide and that at common law there is no general duty to rescue another person and prevent their suicide. Two of the judges found that the police officers, having formed an opinion that the man was not mentally ill, did not then have the power to detain the man under s10 of the Act.

In the August 2011 edition of the Holman Webb Health Law Bulletin, we previously commented on the case of: *Crowley v The Commonwealth of Australia, Australian Capital Territory and Pitkethly* [2011] ACTSC 89.

The Court of Appeal has subsequently overturned the finding of negligence. The case of *Australian Capital Territory v Crowley, The Commonwealth of Australia* [2012] ACTCA 52 involved the response of the ACT Mental Health Service (**ACTMH**) and the Australian Federal Police (**AFP**) to Mr. Crowley, in (2012) a mentally ill man suffering a psychotic episode.

The AFP had received reports that a person was walking the streets in a highly disturbed state and behaving in a threatening manner to a number of people whilst carrying a kendo stick. When two AFP officers found Mr Crowley, he refused to comply with their directions and reacted violently, assaulting both officers with the kendo stick. The plaintiff was shot in the neck by one of the AFP officers, shattering the plaintiff's spinal column and leaving him a quadriplegic. The reasonableness of the shooting itself was not an issue in the case.

The previous day, ACT Mental Health (ACTMH) had been notified of Mr Crowley's condition and had made an assessment suggesting that he required hospitalisation. A plan was made to follow-up the next morning. On the morning of the day of the shooting, Mr Crowley's father informed ACTMH that his son would be voluntarily admitted to hospital, and no further follow-up was made by ACTMH. Another ACTMH staff member was also aware of the Mr Crowley's condition as part of his role with Mr Crowley's brother.

The plaintiff argued the AFP and ACTMH owed a duty of care to him that had been breached. It was further argued by the plaintiff that the Commonwealth and the ACTMH were vicariously liable for the alleged breaches committed by the AFP and ACTMH.

Mr Crowley successfully sued the Federal and ACT governments at first instance, receiving an award of $8 million. The trial judge found the police owed a duty of care to Mr Crowley as he was "under their control" and this duty was breached by a failure to plan ahead and in their approach to Mr Crowley at the scene.

In relation to ACTMH, the trial judge found that the mental health service had a duty of care similar to that of doctor and patient and that this duty had been breached by not following up the previous day's report and admitting Mr Crowley to hospital, and by also failing to inform Mr Crowley's parents of the other staff member's observations on the morning of theshooting.

On appeal, the Court found that the trial judge had erred in finding that particular duties of care were owed to Mr Crowley by the Australian Federal Police and the ACTMH, and that they had breached these duties.

The Court found that the overriding statutory duty of the police was a duty to enforce the criminal law and that they were not under a separate common law duty of care to avoid risks of injury if this conflicted with their statutory duty to apprehend a person. In any event, the court of Appeal also found that the police did not have sufficient control of Mr Crowley to be able to take further steps to avoid the risk of injury and that the actions they took were reasonable in the circumstances.

The judgement in relation to the nature of the duty of care owed by the ACTMH is interesting. At first instance, the trial judge held that the ACTMH had breached their duty of care by failing to follow up on an earlier report they had made of Mr Crowley's condition and admit him to hospital, and by failing to advise his parents of the observations that had been made by an employee of the ACTMH who had visited the home on the day of the shooting.

The Court of Appeal found that although a duty of care was owed to Mr Crowley by the ACTMH following an assessment performed the night before the shooting, the scope of this duty was not, at that time, the same as the duty in a doctor/patient relationship as they were not providing him with treatment. The scope of the duty was to follow up on his condition and this duty had been met following a call from Mr Crowley's father to the mental health crisis team on the morning of the shooting. Mr Crowley's father had advised that his son's condition had not deteriorated and that he did not think intervention and involuntary detention was required as he thought he would be able to take his son to hospital for care. The Court of Appeal held that there was no negligence on the part of the ACTMH in relying on the father's assessment of the situation as it was reasonable to accept his statement that his son would voluntarily admit himself to hospital.

The Court disagreed with the conclusion at first instance that the ACTMH owed a duty of care to use the power to apprehend a person and take them to an approved health facility under section 37(2) of the *Mental Health (Treatment and Care) Act* 1994. Further, the Court held that the trial judge had made an impermissible use of hindsight in determining whether there was a breach in relation to the ACTMH employee not reporting his observations to the Crowley family.

An application for special leave to appeal to the High Court was denied due to insufficient prospects of success[1].

Statutory bodies are required to discharge a wide range of different responsibilities and a duty of care can arise in the discharge of those responsibilities, together with vicarious liability for the acts or omissions of staff. This decision, and other decisions on these issues, reaffirm the Courts will take into account competing policy considerations and that Courts will not readily agree that a duty of care extends to requiring staff to exercise a statutory power. ■

[1] *Crowley v Commonwealth [2013] HCATrans 128.*

Mandatory reporting – Elder Abuse

By Alison Choy Flannigan, Partner and Joann Yap, Graduate

Despite the ethical and professional responsibilities of persons working in the health, aged care and community services sectors to report concerns over conduct of colleagues to their employers or organisations they are appointed to, regulatory bodies and governments have turned to legislated mandatory reporting to bring greater transparency and earlier intervention when problems arise.

While now well accepted in situations of child abuse and domestic violence, concerns over the extent of abuse of older persons and persons with a disability have led to strengthened requirements to report abuse – whether caused by staff, carers, family members or visiting health professionals.

In 2007, the Commonwealth amended the Aged Care Act 1997 to require reporting of actual or suspected cases of serious physical assault and/or sexual assault. In the first year of mandatory reporting 925 reports were made, 725 for alleged unreasonable force and 200 for alleged unlawful sexual assault. The number of reports increased the following year to 1,411. ■

Duties of aged care providers

The statutory rights and responsibilities of care recipients to residential care include to:

- be treated with dignity and respect, and to live without exploitation, abuse or neglect;
- live without discrimination or victimisation; and
- live in a safe, secure and homelike environment.[1]

Community care recipients have rights including to:

- receive care that is respectful of him or her, and his or her family and home;
- full and effective use of all human, legal and consumer rights; and
- be treated without exploitation, abuse, discrimination, harassment or neglect.[2]

Compulsory reporting and protection requirements are imposed on approved providers of Australian Government subsidised residential aged care, with a reportable assault defined as:

- Alleged unlawful sexual contact with a resident of an aged care home; or
- Alleged unreasonable use of force on a resident of an aged care home.[3]

If an approved provider receives an allegation of, or suspects on reasonable grounds that an assault has occurred, they must report it to the Police and the Department of Health and Ageing as soon as reasonably practicable and within 24 hours of the suspicion or allegation.[4] An allegation usually requires a claim or accusation to have been made, while suspicion includes where no allegation has been made or where an assault may not have been witnessed and where staff observe signs that an assault may have occurred.[5] Each approved provider is required to have arrangements in place for staff, in appropriate circumstances, to make relevant reports.[6] ■

[1] Aged Care Act 1997 (Cth), Part 4.2, see also User Rights Principles 1997 (Cth), Schedule 1 'Charter of residents' rights and responsibilities'.
[2] User Rights Principles 1997 (Cth), Schedule 2 'Charter of rights and responsibilities for community care'.
[3] Aged Care Act 1997 (Cth), Section 63-1AA(9).
[4] Aged Care Act 1997 (Cth), Section 63-1AA(2).
[5] Australian Government Department of Health and Ageing, Compulsory Reporting Guidelines for Approved Providers of Residential Aged Care', Office of Aged Care Quality and Compliance, June 2008, at 5.1.1.
[6] Aged Care Act 1997 (Cth), s 66-1AA(5)(a)-(e).

Duties of health care practitioners

Mandatory reporting requirements impose a duty upon registered health practitioners[1] and employers[2] to report where a practitioner has engaged in sexual misconduct in connection with their profession[3]; or placed the public at risk of harm during their practice because of a significant departure from professional standards.[4]

Duties of disability providers

Financial assistance is provided to eligible disability service providers under terms and conditions which include the obligation to comply with the principles and application of principles regarding the rights of patients. These principles state that, among other rights, persons with disabilities have the right to protection from neglect, abuse and exploitation.

In NSW for example, Ageing, Disability and Home Care (ADHC) operated and funded services must comply with the Abuse and Neglect Policy and Procedures, including reporting requirements:

- where abuse or suspected abuse of a client occurs by a member of staff, the line manager must be immediately informed, the matter referred to the NSW Police (Police) and reported to the ADHC Ethics and Professional Standards Unit;
- if a manager reasonably believes that an incident between two clients is abuse or assault the matter must be referred to the Police; and
- reporting to the Police may not be required where the incident which would normally be an assault is caused by a person with an intellectual disability who lacks understanding of the behaviour or the contact between clients is appropriate for resolution using behavioural management strategies and are reported internally. If in doubt, the Police may be consulted.

All providers of health, aged care, community and disability support services should ensure that they have effective policies in place to prevent abuse, to encourage and support internal reporting by staff of abuse concerns, to ensure compliance with mandatory reporting requirements, to report serious concerns to the police and to support and assist clients, families and carers where abuse has occurred.

The case of *Adewumi v Helping Hand Aged Care Inc.* BC 201277783 (23 October 2012) Fair Work Australia is a case where it was held that an employer was justified in summarily dismissing a nurse for serious and wilful misconduct following an assault by that nurse on an elderly aged care resident.

[1] For example, Health Practitioner Regulation National Law (NSW), s 141.
[2] For example, Health Practitioner Regulation National Law (NSW), s 142.
[3] For example, Health Practitioner Regulation National Law (NSW), s 140(b).
[4] For example, Health Practitioner Regulation National Law (NSW), s 140(d).

Living Longer, Living Better update

On 28 June 2013, the Bills forming the Living Longer Living Better package of bills received Royal Assent and passed into law.

These include the:

1. *Aged Care (Living Longer Living Better) Act* 2013;
2. *Aged Care (Bond Security) Amendment Act* 2013;
3. *Aged Care (Bond Security) Levy Amendment Act* 2013;
4. *Australian Aged Care Quality Agency Act* 2013; and
5. *Australian Aged Care Quality Agency (Transitional Provisions) Act* 2013.

This is a significant step in implementing the Living Longer Living Better aged care reform package. The changes to the Aged Care Act 1997 form an important part of the two year legislative amendment process.

New Federal workplace bullying laws commence in January 2014

By Rachael Sutton, Partner and Dr Tim Smyth, Special Counsel

Amendments to the *Fair Work Act* 2009 (Cth) (**Fair Work Act**) give the Fair Work Commission jurisdiction over complaints of bullying in workplaces covered by the Fair Work Act. Previously, bullying could only be raised as an example of conduct that may breach adverse action provisions of the Fair Work Act or unfair dismissal laws. The amendments commence on 1 January 2014, six months later than originally proposed.

At present, redress for bullying is largely dealt with under work health and safety, antidiscrimination and workers compensation regulatory frameworks. Due to constitutional issues, the provisions will not apply to unincorporated sole traders, partnerships and State public sector departments and authorities.

The Commission will be able to make orders requiring an individual or group to stop bullying behaviour, or requiring an employer to implement anti-bullying policies and training. However, orders for compensation or reinstatement are not available.

The amendments introduce a codified definition of workplace bullying describing a situation where an individual or group of individuals exhibit at work 'repeated, unreasonable behaviour directed towards a worker or a group of workers that creates a risk to health and safety'. The requirement for repeated behaviour means that a worker will not be considered to have been bullied in circumstances where the conduct has only occurred once. However, single instances of unreasonable behaviour may give rise to other rights (such as rights under the general protections provisions of the Fair Work Act), depending upon the reason for the conduct.

The definition of 'workplace bullying' does not include reasonable management practices such as appropriate performance management. However, it is unclear who will need to prove that the management activities were unreasonable – the employer or the complainant?

There are a number of issues that will need to be worked through to provide greater clarity for both employers and workers.

One issue is a lack of detail as to who will be parties to a bullying dispute if the alleged bully is not the employer. Bullying in the workplace can involve other players including subcontractors and third parties. It is unclear whether, in those circumstances, an employer will be able to make submissions as an interested or affected party, particularly, if orders made by the Fair Work Commission (FWC) will impact on the way in which the employer deals with its staff

The definition of worker in these provisions also goes much further than "an employee". It is the same as the definition in the model *Work Health Safety Act* 2011, which defines a worker as "any person who carries out work in any capacity for a person conducting a business or undertaking". This will include employees, contractors and subcontractors, volunteers, apprentices, trainees and work experience students.

If the FWC considers bullying has occurred, the FWC will be empowered to make any order it considers appropriate to prevent the bullying other than the payment of money. ■

The real sting in the tail is in the contravention of an anti-bullying order, carrying a maximum penalty of $51,000 for a corporation and $10,200 for an individual.

It is now even more important for employers to clearly document a wider range of performance and conduct discussions and decisions – not just in relation to formal warnings and termination of employment. Additionally, employers should appropriately address complaints, particularly complaints of bullying, when they are made by employees and other workers. ■

Impact on recovery of workers compensation payments under S151Z *Workers Compensation Act* 1987 (NSW)

Many cases of bullying at work result in psychological and in some cases physical injuries to workers. In NSW, workers can claim compensation in the form of weekly payment, medical expenses and non-economic loss for such injuries under the statutory scheme provided for in the *Workers Compensation Act* 1987. It is a no fault scheme.

In NSW an employer who pays statutory benefits is entitled to recover those amounts from a stranger whose fault has caused the worker's injury, subject to any liability of the employer that may jointly contribute to the matter.

Recoveries can be made in two ways. Firstly, if a worker does not bring an action against the party responsible for his injury and who would have a legal liability to pay damages in respect of the injury, the employer is entitled to bring their own proceedings to recover the statutory payments made.

It is necessary, in an action seeking recovery, to prove that the worker's injury for which compensation was paid was caused under circumstances creating a liability in the defendant, what the quantum of damages is that the worker would have been entitled to recover had he, or she, brought proceedings against the defendant, and, the amount of statutory benefits paid and the dates on which those payments were made.

The first of these three elements requires little explanation. The cause of action sued upon will be a cause of action which would have been available to the worker and will generally be in negligence. In some cases, subsidiary causes of action may arise including statutory counts (particularly under Work/Occupational Health and Safety Legislation), contractual counts or an action under a statutory regime such as the *Competition and Consumer Protection Act*. It is critical that the employer be able to prove liability and it must put themselves in the position of the worker for the purpose of doing so.

With the amendments to the Fair Work Act, if the Fair Work Commission makes an order against a third party this order (and any breach of the order) may create further counts or a further evidentiary basis creating a liability on a defendant entitling an employer to recover statutory benefits paid to an injured worker whose injury was the result of bullying by that defendant or its employees. ■

Cloud computing and privacy compliance – an oxymoron?

By Dr Tim Smyth, Special Counsel

Cloud computing and privacy compliance is a topical issue. There is no legal prohibition on health services using cloud computing, including cloud computing based outside Australia, for holding their clinical information. However, if the "cloud" provider and its servers are located outside Australia, the health service does need to take additional steps through its contract with the cloud provider to protect the privacy and security of the clinical information. Depending on the provider and the countries offshore concerned this may be a difficult task.

Under the new Australian Privacy Principles (**APPs**), which replace the current National Privacy Principles (**NPPs**) in March 2014 (applicable to Commonwealth public sector and private sector organisations), the requirements on health services if using a cloud provider to hold clinical information become more explicit. The health service privacy policy will need to disclose that the patient's information is being stored externally in a cloud, especially if the cloud provider is also processing or undertaking some form of data management for the health service in addition to storing the information. Under APP 11, the health service may also become liable in Australia for privacy breaches by the cloud provider offshore in some circumstances.

Irrespective of whether onshore or offshore, the health service needs to carefully review the service contract with the cloud provider especially in relation to:

- Identity and standing/reputation of the provider – can the health service rely on them?
- Ensuring ownership of the information remains with the health service
- Restriction on use of the information for other purposes by the cloud provider
- Compliance with privacy law in relevant jurisdiction and not doing anything that would put the health service in Australia in breach of Australian privacy law
- Adequate separation of the health service's data from other data and users
- Security protection of the information from unauthorised access, use or damage/corruption
- Back up, service support and maintenance
- Business continuity and minimising the impact a disruption to access or damage to the data might have on the health service
- Destruction and/or removal of the data when contract ends
- Duty to notify the health service if a data breach occurs
- Restriction on moving the operation/server to another country without the health service's knowledge and agreement
- Indemnity/liability clauses making clear accountability for when things go wrong
- What other types of data and customers does the cloud provider have – will any of this pose a risk to the health service and its patients and clients?
- Are there any key subcontractors or other parties involved or in other words, is the contracting party actually the entity that runs the server and the cloud operation?
- Ease of access to the data by the health service, any compatibility issues with other systems used by the health service or problems if wanting to have cloud held data available to other clinical records or systems (for example, the national personal electronic record)?

At a practical level, cloud computing storage overseas (and possibly even onshore in view of recent allegations of ability of governments to access data) will expose the data to the offshore jurisdiction's laws on government agency access to databases.

The key issue is effective risk management and ensuring that you understand exactly who you are contracting with and the contractual terms under which you are using the "cloud". ■

Holman Webb appointed to Commonwealth preapproved Law Firms List

Marking further external recognition of Holman Webb's legal expertise, we are pleased to advise of our recent inclusion in the Commonwealth Government's Legal Services Multi-Use List. All Commonwealth Government departments and agencies (other than Commonwealth companies and government business enterprises) are required to use the law firms included on this list for their external legal services from 1 July 2013.

Holman Webb Lawyers has been appointed in the areas of Government and Administrative Law and Corporate and Commercial Law. Appointments to the List and policy on the use of external law firms by Commonwealth departments and agencies is overseen by the Office of Legal Services Coordination in the Attorney General's Department. Further information on the Legal Services Multi-Use List is available at www.ag.gov.au/lsmul.

Our government teams in Brisbane, Sydney and Melbourne are looking forward to strengthening our Commonwealth Government practice. To discuss how we can assist please contact a member of our team:

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Why does the Franchising Code of Conduct matter?

When the word franchising is mentioned, most readers of the Health Law Bulletin will think of fast food chains, home maintenance and retailing. What does it have to do with health, aged care and community services?

Quite a lot it turns out from talking to Corinne Attard, who has recently joined Holman Webb in our Sydney Office as a commercial partner specialising in franchising.

In the US, the birthplace of franchising, healthcare is second only to the food sector in franchise growth and a similar pattern is occurring here.

In Australia, an ageing and longer-living population demands more healthcare services and offers remarkable opportunities for promoters or franchisors of healthcare concepts.

Australia already has established and successful franchise systems operating in health food retail, pharmacy, health and beauty, optometry/spectacles and aids and appliances businesses.

We are also seeing rapid growth of franchised providers of personal care and other home support services for the aged and disabled population.

If you would like to know more about franchising, the legal issues and requirements of the Franchising Code of Conduct give Corinne a call. ■

About Holman Webb

Holman Webb Lawyers is a commercial and insurance law firm which was established in Sydney, Australia in 1960. Today we have offices in Sydney, Melbourne and Brisbane. The firm has more than 140 legal professionals (including 24 Partners).

We focus on the following legal services: business, corporate and commercial, banking and finance, intellectual property, litigation and dispute resolution, commercial recovery and insolvency, insurance and workplace relations.

We have established affiliates in Europe, United States of America and Asia Pacific and are a member of two leading international networks of independent law firms: Cicero and the State Capital Group.

Business, Corporate and Commercial Services

The Business, Corporate and Commercial team is experienced in delivering a wide range of corporate and commercial solutions to business clients. Our goal is to add value to business decisions and to complete each matter efficiently. We deliver practical, commercial solutions tailored to the specific needs of our clients.

As a mid-tier commercial and insurance firm, we are committed to personal contact by our senior lawyers with our clients and keeping abreast of developments in key industries to enable us to understand our client's business goals and objectives.

Our clients

We provide specialist corporate and commercial legal expertise to business across a broad range of industries that include banking and finance, franchising and distribution, energy, environment, government, health, aged care and life sciences, retail, food and hospitality, IT, insurance, manufacturing, the arts and sport.

Our business, corporate and commercial clients include major national and multi-national corporations, small and medium enterprises, not-for-profits and Commonwealth and State Government departments and agencies.

Our Expertise

We have an experienced legal team who are well equipped to provide advice in corporations law, mergers and acquisitions and commercial contracting including:

- asset management and protection;
- financing;
- banking and finance;
- franchising and retail;
- business migration;
- fundraising;
- capital markets;
- investment, including inbound into Australia;
- charity and not for profit structures;
- information technology, internet, software and e-com;
- commercial contracting and terms of trade;
- infrastructure projects;
- company secretarial and meetings;
- joint ventures, partnerships and trusts;
- Competition and Consumer Act and trade practices;
- mergers and acquisitions, including due diligence;
- compliance;
- outsourcing;
- corporate governance and directors duties;
- privacy;
- corporate restructures;
- private equity;
- Corporations Act;
- regulatory compliance; and
- financial regulation.

MEET THE TEAM

Corinne Attard

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Corinne is a Partner in the Business Corporate and Commercial team. She is a franchising and retail specialist. Her clients have included some of Australia's most recognisable brand names. With a wealth of experience in franchising and retail, commercial and property law, Corinne is highly sought-after by some of our well known producers of food, household services, business to business services, bankers and financiers, health and aged care providers and retailers of a vast array of services and products on the market.

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Craig is a Partner in the Business, Corporate and Commercial team. His areas of expertise are in banking and finance, insolvency, commercial property, commercial contracts, liquor licensing and franchising.

Craig advises major banks and mezzanine financiers, listed and unlisted property developers, tourism operators, government organisations, and business operators. He works closely with his clients to obtain a detailed understanding of their requirements so that he can assist them to achieve their goals. His clients appreciate his service philosophy and his ability to communicate complex legal issues in a clear and straight forward manner

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