Health Legal Report – May 2018

Welcome to the May 2018 edition of the Health Legal Report.

In this issue of the Health Legal Report we discuss:

- Contracting: tips and traps
- Consent and Informed Decision Making—Re: Kelvin [2017] FamCAFC 258
- A B v Australian Capital Territory [2018] ACTSC 16
- OAIC releases statistical information about the notification made under the Notifiable Data Breaches Scheme

We also set out some of the Bills we are tracking throughout Australia.

HEALTH LEGAL 2019 RECOGNIZED BY Best Lawyers

Level 12, 484 St Kilda Road
Melbourne VIC 3004
ABN 52 104 156 694

Phone: 03 9865 1300
Fax: 03 9012 4353

Contracting: tips and traps

By Sarah Caraher, Associate Legal Counsel

Introduction

Entering into a one-sided supplier contract or a poorly drafted contract can significantly diminish your contractual rights and might leave you without compensation if the product or services fail to deliver.

When entering into contracts organisations should be aware of these key tips and traps:

Contracting party

Care needs to be taken to ensure that the correct name of the entity with whom you are contracting is cited. Business names (as opposed to companies) are not legal entities and cannot enter into contracts. The contract must be entered into with the underlying entity which might be an individual or possibly a trustee.

Extensions

When acting for a consumer or purchaser of services, we never recommend automatic extensions. If the date for giving notice to terminate the contract passes, the contract will be deemed to have been automatically extended and this could be for a considerable period of time. Instead, include an option in your favour to renew the contract.

Service description

It is important to accurately describe the services being provided. Failure to do this can be fatal to any termination of the contract if it means you cannot point to an obligation that is not being met. Consider when the performance is required, where the performance is required and the standard of performance. You might also like to provide whether there is an exclusive or preferred supplier status.

Indemnity v liability

An indemnity in your favour means that you can recover more losses (for example, remote losses) than might be otherwise normally available and there is no obligation on you to mitigate losses. So, it is beneficial to obtain an indemnity in your favour, particularly if it is broad. There is a common misconception that if a supplier refuses to give an indemnity it means that they are not liable under the contract. In those circumstances they will be liable, but you just will not be able to recover as much of the loss as you could with an indemnity.

If you are the customer, unless you are yourself providing a service or undertaking tasks that create a risk to the supplier, avoid giving any indemnities.

Limitation of liability and liability caps

Always be on the look out for liability caps and exclusions of liability. Supplier contracts are more often than not drafted to protect the supplier and often include a liability cap and exclude certain losses.

Liability caps and exclusions of liability should also be taken into account in evaluating tender responses. If you do not attach your template contract to a tender and pricing is based on a particular liability position taken by the supplier in its standard terms, then it might be difficult to negotiate an increase in the cap after the tender is awarded. We recommend attaching your template agreement to the tender where possible with unlimited liability as a starting point. Aim not to limit liability for personal injury or death.

There is another common misconception that where there is a liability cap you will still have the benefit of the full insurance cover. Unless stated otherwise, liability caps will limit what you can recover under a supplier's insurance policy. So, if a supplier has $20 million per event insurance but a cap on liability of $1 million, $1 million is the most you can recover from the supplier's insurer.

Consequential loss

Suppliers often seek to exclude liability for 'consequential loss' including 'loss of use' and 'loss of data'. Recent Australian cases have broadened the test for 'consequential loss' so that the term may now include losses that would previously have been considered to be direct losses, such as liquidated damages for delay. We recommend listing the specific types of losses that you would be prepared to exclude (for example, for a public health service, loss of business or loss of profit) rather than including the general term 'consequential loss'.

Payment

Where possible agree to fixed pricing or at least limited price increases by linking them to CPI or a fixed percentage. Where initial works are being undertaken, link payments to milestones and avoid large upfront payments as this will reduce your bargaining power if the supplier fails to deliver on time.

Key performance indicators

Key performance indicators are a good way to manage the supplier's performance. It is important to think carefully about what you are expecting of them and turn these expectations into measurable key performance indicators. Rebates payable on failure to meet key performance indicators are a good way to incentivise compliance. But care needs to be taken to ensure that they are not unenforceable penalties. Any penalty needs to be commensurate to the loss that you might suffer in order to be legally enforceable.

Termination

Always ensure that you have sufficient rights to terminate the contract. This includes a right to terminate on notice for breach (with only a short period to rectify) and immediate termination for material breach or insolvency. You might also consider a right to terminate for convenience.

Templates

Supplier contracts are always one sided in favour of the supplier, so where possible use your own template.

If you are using a Government template it is important to use the current version sourced directly either from your template system or a Government website and to cite the version number. Versions used in other procurements, even with the same supplier, may have been amended in a way that is not readily noticeable. To avoid this confusion, it is also prudent to make all amendments in a schedule.

Conclusion

Negotiation of contracts is a tricky business. Knowing a few basic tips and traps will help you identify potential issues and negotiate a better position.

Sarah and the Health Legal team provide practical training on contract tips and tricks.

*If you would like more information about this training, please contact **Health Legal** on **(03) 9865 1300**.*

Consent and Informed Decision Making—Re: Kelvin *[2017] FamCAFC 258*

By Chris Chosich, Solicitor

Introduction

In *Re: Kelvin* [2017] FamCAFC 258 (**Re: Kelvin**), the Full Court of the Family Court of Australia held that:

- Stage 2 (gender affirming hormone therapy) treatment for gender dysphoria is no longer a "special medical procedure" requiring the Court's approval for the treatment of young people who lack *Gillick* competence; and
- a *Gillick* competent young person can consent to the administration of Stage 2 treatment without the need for their capacity to be determined by a Court, provided that the treating medical practitioners agree that the young person is competent and the parents of the young person do not object to the treatment.

In so holding, the Full Court of the Family Court has cleared the way for trans and gender diverse young people to access Stage 2 treatment without being forced to attend Court at great expense to their families and health, at least in uncontroversial cases where all agree that treatment should be commenced.

Possibly contentious cases will still need to be referred to a Court for judicial approval. These kinds of cases include those where treatment is disputed by one or more of the parents, the child is in State care, or there are doubts concerning the capacity of the young person to consent.

Background

Gender dysphoria is a term that describes the distress experienced by a person due to an incongruence between their gender identity and their assigned sex. Gender dysphoria is diagnosed in accordance with the Diagnostic and Statistical Manual of Mental Disorders Fifth Edition (**DSM-V**) and treatment is administered by multidisciplinary teams in accordance with various internationally and domestically recognised guidelines.

There are 3 stages to the treatment of gender dysphoria in a young person:

- Stage 1 treatment involves the suppression of puberty in a pre-pubescent young person in order to avoid the distress associated with the changes brought on by the young person's puberty. This treatment is reversible;
- Stage 2 treatment is gender affirming hormone therapy, where the hormones corresponding to the young person's gender identity (oestrogen or testosterone) are administered to feminise or masculinise the young person's body in order to align the young person's physical characteristics with their identity. Stage 2 treatment is irreversible and can also carry the risk of infertility;
- Stage 3 treatment refers to various surgical interventions, such as chest reconstructive surgery, intended to align the young person's gender identity and assigned sex.

Re: Kelvin concerns the way in which Stage 2 treatment can be legally commenced and, in particular, the effects of the decision of the Full Court of the Family Court of Australia in *Re Jamie* (2013) FLC 93-547 (**Re Jamie**).

In short, the effect of *Re Jamie* was that:

- a *Gillick* competent young person could consent to the administration of Stage 2 treatment, but that the assessment of a young person's competence was to be undertaken by a court, rather than the child's treating doctors; and
- the parents of a young person who lacks *Gillick* competence could not consent to the

administration of Stage 2 treatment on their child's behalf because Stage 2 treatment was a **special medical procedure** of the kind described in *Marion's Case* (1992) 175 CLR 218 that could only be authorised by a court.

Therefore, prior to *Re: Kelvin* any proposal to commence Stage 2 treatment for a young person with gender dysphoria had to be sanctioned by a court order that either: (1) declared that the young person was competent to consent to Stage 2 treatment; or (2) if the child was not competent, that the Court approved the administration of the treatment.

Facts

Against this legal background, Kelvin's father made an application to the Family Court of Australia in January 2017 seeking court authorisation for the commencement of Stage 2 testosterone therapy for his son, Kelvin.

Kelvin was assigned a female gender at the time of his birth in 2000. By the time of the application, he was 17; had socially transitioned to a male gender; and had, after consultations with multiple health professionals, been diagnosed with gender dysphoria as defined in the DSM-V.

Kelvin's history of gender dysphoria had, according to the evidence before the Court, led to Kelvin experiencing anxiety and depression, which sometimes manifested as self-harm. These negative feelings were associated with his body, which had already undergone female pubertal changes. Through psychiatric treatment, and his pursuit of a medical transition to align his physical characteristics with his male gender identity, Kelvin's mental health had been improving.

Kelvin's decision to pursue a medical transition was supported by both his parents and by his treating doctors. Thus, in accordance with *Re Jamie*, his father made an application seeking:

- a declaration that Kelvin was competent to Stage 2 treatment; or
- the Court's approval for Stage 2 treatment to commence (in the event that Kelvin was not *Gillick* competent).

Issues

The application came before Watts J, who held that Kelvin was competent to consent to the administration of Stage 2 treatment. However, his Honour also referred questions of law to the Full Court of the Family Court of Australia for further determination; primarily:

- whether the Full Court confirmed its decision in *Re Jamie*, that Stage 2 treatment requires the court's authorisation unless the child was Gillick competent to give informed consent; and
- whether it is mandatory to apply to the Court for a determination of competence where: (1) the child consents to Stage 2 treatment; (2) the treating medical practitioners agree that the child is *Gillick* competent to consent to treatment; and (3) the parents of the child do not object to treatment.

The Court, constituted by Thackray, Strickland, Ainslie-Wallace, Ryan and Murphy JJ, in 2 separate judgments, held that the answers to both questions were "No".

Is Stage 2 treatment a "special medical procedure"?

While the Court unanimously agreed that Stage 2 treatment no longer required court authorisation, the majority and minority judgments differed slightly in their reasoning.

The majority, Thackray, Strickland and Murphy JJ, said that changing medical knowledge, especially in relation to the risks of *not* treating a young person with gender dysphoria, meant that the therapeutic benefits of the procedure were no longer outweighed by the risk of making a wrong decision and that this meant that Stage 2 treatment was no longer a treatment requiring court approval. In this way, Thackray, Strickland and Murphy JJ considered their decision to build on the principles in *Re Jamie*, rather than overruling them.

By contrast, the minority, Ainslie-Wallace and Ryan JJ, considered the decision in *Re Jamie* to be plainly wrong, primarily based on the way in which the Court in that case balanced the therapeutic benefits of Stage 2 treatment against the risks of an irreversible wrong decision. Instead, Ainslie-Wallace and Ryan JJ considered that the question posed by *Marion's Case* was whether the intervention was therapeutic

or non-therapeutic with reference to the 'proportionality and purpose' of the treatment (relying on the dicta of Brennan J from *Marion's Case* at 269), not merely whether the treatment was irreversible. In other words, to focus on the irreversible consequences of the treatment did not answer the question about whether the treatment was therapeutic (no court authorisation required) or non-therapeutic (court authorisation required).

Ainslie-Wallace and Ryan JJ held that, having identified a therapeutic purpose for Stage 2 treatment (i.e. the treatment of gender dysphoria), there was no evidence that medical knowledge had ever considered Stage 2 treatment to be anything less than appropriate and proportional for the treatment of gender dysphoria, even at the time of *Re Jamie*. Nor was there any suggestion in *Re Jamie* that Stage 2 treatment would be administered for any purpose other than the treatment of gender dysphoria. Therefore, Ainslie-Wallace and Ryan JJ considered that *Re Jamie* was wrongly decided.

Despite these slight differences in reasoning (which may reflect a different view of the evidence considered in *Re Jamie*), the Court agreed that Stage 2 treatment could be authorised by a young person's parents where they lack *Gillick* competence. The result is to leave the determination of whether Stage 2 treatment is appropriate to a young person's parents and treating doctors, as informed by best practice guidelines, rather than the Court.

However, it is important to note that the Court's decision only applies to cases in which the young person, their parents and their treating doctors agree that Stage 2 treatment is necessary, as Thackray, Strickland and Murphy JJ made clear in their judgment:

> We note though that in answering that question we are not saying anything about the need for court authorisation where the child in question is under the care of a State Government Department. Nor, are we saying anything about the need for court authorisation where there is a genuine dispute or controversy as to whether the treatment should be administered; e.g., if the parents, or the medical professionals are unable to agree. There is no doubt that the Court has the jurisdiction and the power to address issues such as those.

Therefore, in cases where there is the possibility for controversy, then Court approval will still be required.

Is a Court determination of competence necessary?

While the first question concerned the circumstance in which a child was not *Gillick* competent to consent to treatment, the second concerned a case in which the child was *Gillick* competent. As mentioned above, *Re Jamie* stood as authority for the proposition that the Courts, as opposed to young people's treating doctors, were required to assess a child's competence to consent to Stage 2 treatment.

In *Re: Kelvin*, the Court departed from *Re Jamie* to hold that the determination of competence was best left to medical professionals, at least in uncontroversial cases where the young person, their parents and treating doctors all agree that Stage 2 treatment should commence.

For Thackray, Strickland and Murphy JJ, this conclusion followed from their earlier conclusion that 'the nature of the treatment no longer requires court authorisation'. Thus, their Honours continued, 'there is also no longer a basis for the Court to determine *Gillick* competence'.

Justices Ainslie-Wallace and Ryan did not devote much express consideration to the determination of the second question, however it is clear from their Honours' decision that they considered that a competent person, including a *Gillick* competent young person, could consent to Stage 2 treatment without being required to have that competence assessed by a Court.

Of course, if there were doubts about the competence of the young person, and substitute consent cannot (or will not) be provided, then it would still be necessary to apply for a declaration that the young person is competent.

Compliance Impact

The decision in *Re: Kelvin* confirms that Stage 2 treatment for gender dysphoria in young people may be commenced with the consent of the young person themselves, provided that their parents and treating doctors agree, or with the substitute consent of their parents (if the young person is not *Gillick* competent).

However, in possibly controversial cases, such as where there are disputes between the young person and their parents, where one or both of the young person's parents disagree, or where the young person is in the care of a State Government Department, there is a residual requirement to apply for Court approval to administer Stage 2 treatment.

At a broader level, the decision also provides guidance on determining whether a treatment is a special medical procedure of the kind caught by the principles in *Marion's Case*, and therefore outside the ordinary realm of parental responsibility. In particular, the Court's approaches in determining the proportionality and purpose of Stage 2 treatment informs how that analysis may play out in other contexts. The judgment suggests that, while medical knowledge defines whether the risks of a treatment are suitably proportionate to be considered therapeutic, that sufficiency of that definition is subject to the approval of a court.

Further, the minority judgment in *Re: Kelvin* suggests that the possible purposes (some therapeutic, some non-therapeutic) for administration of a treatment may be a key factor in determining whether it requires court approval. This is because medical treatment will often be considered therapeutically proportionate to the risks associated with treatment (except perhaps in cases of medical research), leaving the possible ulterior (non-therapeutic) purposes as the factor that enlivens the requirement to seek court authorisation. In turn, this may explain the results in *Marion's Case* – where the High Court was clearly concerned with the potentially eugenicist overtones associated with the sterilisation of an intellectually disabled adult – and in a line of Queensland cases involving abortions performed on 12 year old girls – where the Supreme Court of Queensland appeared to hold concerns that parents may have reasons for approving the performance of abortions other than the best interests of the young person.

Compliance Alert Service

In response to client demand we have developed a compliance alert service which complements our existing legislative compliance products and services.

Our alert service provides your organisation with pro-active advanced warning of the commencement of new significant Acts. "Significant" Acts means those which will have a significant operational impact on your organisation. As part of this alert, we will provide you with a summary of the legislation and provide you with a link to the relevant Act.

This alert service will allow you to prepare for new legislation before the Acts and Regulations have commenced.

LAW COMPLIANCE

If you would like to add this service to your current subscription (or if you have any questions), please contact ***Teresa Racovalis*** *on* ***(03) 9865 1337*** *or* ***teresa.racovalis@healthlegal.com.au***.

Recent Awards

Our legal counsel, **Natalie Franks**, was recently selected by her peers as one of Australia's Best Lawyers, as published in *Best Lawyers*, the oldest and most respected peer-review publication in the legal profession.

HEALTH LEGAL 2019 RECOGNIZED BY Best Lawyers

Natalie has won this award each year since 2008 when the award was first introduced in Australia.

A B v Australian Capital Territory [2018] ACTSC 16

By Lisa Souquet-Wigg, Solicitor

Introduction

In *A B v Australian Capital Territory*, the ACT Supreme Court awarded $267,662 in damages for negligence, to a patient who had suffered Post Traumatic Stress Disorder as a result of her being sexually assaulted by another patient during an admission to Canberra Hospital.

Background

In late December 2013, the plaintiff was admitted to the emergency medical unit at Canberra Hospital. During the night of her admission, Mr Southwell was also given a bed in the unit.

Mr Southwell displayed verbally abusive behaviour during his admission, and at some time the following morning he sexually assaulted the plaintiff. He was subsequently charged and plead guilty to the sexual assault.

Negligence claim

The plaintiff claimed that Canberra Hospital and its staff had breached its duty of care by allowing Mr Southwell to be placed in the same ward as other patients without providing adequate supervision or a means to summon staff if required. She claimed that she had suffered Post Traumatic Stress Disorder as a result of the Hospital's negligence.

Evidence

The Court treated the Hospital's notes as evidence cautiously, however it held that the evidence given by one of the nurses on duty during the plaintiff's admission supported the plaintiff's claim that it should have been obvious to the Hospital and its staff that Mr Southwell's behaviour was cause for concern.

Evidence regarding the lack of attendance by Hospital staff given by the plaintiff was held to be supported by the Hospital's clinical notes and to indicate clearly that there had been inadequate attention provided given the behaviour demonstrated by Mr Southwell.

The ambulance records submitted to the Court indicated that Mr Southwell had been aggressive and affected by alcohol prior to his admission to the extent that ambulance staff had been required to use intervention to enable Mr Southwell to be transported.

The Court held that although an emergency buzzer was likely to have been attached to the plaintiff's bed, she was either not made aware of its presence or the buzzer was not readily accessible to her.

Defence

The Hospital did not deny that it owed the plaintiff a duty of care, however it denied that it breached its duty by relying on section 110 of the *Civil Law (Wrongs) Act 2002* (ACT), which provides the following:

> **Principles about resources, responsibilities etc of public or other authorities**
>
> The following principles apply in deciding in a proceeding whether a public or other authority has a duty of care or has breached a duty of care:
>
> (a) the functions required to be exercised by the authority are limited by the financial and other resources reasonably available to the authority for exercising the functions;
>
> (b) the general allocation of the resources by the authority is not open to challenge;
>
> (c) the functions required to be exercised by the authority are to be decided by reference to the broad range of its activities (and not only by reference to the matter to which the proceeding relates);
>
> (d) the authority may rely on evidence of its compliance with the general procedures and applicable standards for the exercise of its functions as evidence of the proper exercise of its

functions in the matter to which the proceeding relates.

The Court held that no evidence was given to indicate that the Hospital's funding, capacity to provide staff or warning systems, or its ability to provide resources that would prevent patients assaulting other patients played a part in the assault on the plaintiff and the breach of the Hospital's duty. The Court also held that there was no evidence to suggest that a shortage of beds contributed to the breach.

The Hospital also claimed section 44 of the *Civil Law (Wrongs) Act 2002* (ACT) as a defence. Section 44 provides the following:

Precautions against risk—other principles

In a proceeding in relation to liability for negligence—

(a) the burden of taking precautions to avoid a risk of harm includes the burden of taking precautions to avoid similar risks of harm for which the person may be responsible; and

(b) the fact that a risk of harm could have been avoided by doing something in a different way does not of itself give rise to or affect liability for the way in which it was done; and

(c) the subsequent taking of action that would (had the action been taken earlier) have avoided a risk of harm does not of itself give rise to or affect liability in relation to the risk and is not of itself an admission of liability in relation to the risk.

The Court held that the Hospital's negligence did not arise from the fact that the harm could have been avoided by taking different actions, it arose from exposing the patients on the ward to a foreseeably dangerous person.

Outcome

The Court held that the Hospital had a duty to ensure that the plaintiff received treatment in a safe environment. It held that the danger that Mr Southwell presented was foreseeable due to the Hospital's knowledge of his behaviour during previous admissions, his aggressive behaviour during the admission in question and by his being affected by alcohol.

The Court examined the risk of harm in terms of section 43 of the *Civil Law (Wrongs) Act 2002* (ACT), which provides the following:

Precautions against risk—general principles

(1) A person is not negligent in failing to take precautions against a risk of harm unless—

(a) the risk was foreseeable (that is, it is a risk of which the person knew or ought to have known); and

(b) the risk was not insignificant; and

(c) in the circumstances, a reasonable person in the person's position would have taken those precautions.

(2) In deciding whether a reasonable person would have taken precautions against a risk of harm, the Court must consider the following (among other relevant things):

(a) the probability that the harm would happen if precautions were not taken;

(b) the likely seriousness of the harm;

(c) the burden of taking precautions to avoid the risk of harm;

(d) the social utility of the activity creating the risk of harm.

The Court held that a reasonable person would have taken precautions to avoid the risk of harm to other patients in light of Mr Southwell's aggressive behaviour. It was held that Mr Southwell should not have been admitted to the ward, or he should have been removed shortly after admission when it became obvious that he was behaving aggressively.

Judgment was granted to the plaintiff.

Damages

The plaintiff was awarded general damages, damages for past and future medical expenses, past and future economic loss, and lost superannuation benefits, totalling $267,662.

Compliance Impact

This case demonstrates that hospitals in the A.C.T. cannot rely on a defence of lack of resources and funding in a negligence claim without presenting adequate evidence to satisfy section 110 of the *Civil Law (Wrongs) Act 2002* (ACT). The case also highlights the need for organisations to have controls in place to prevent harm being inflicted on patients by other patients.

*If you have any questions arising out of this article, please contact **Lisa Soquet-Wigg** on **(03) 9865 1340** or email **lisa.soquet-wigg@healthlegal.com.au**.*

Staff News – a departure and new appointments

The end of 2017 and the beginning of 2018 has been one of much change on the people front at Health Legal.

At the end of 2017 we farewelled one of our Legal Counsel, Claudia Hirst (who joined Barwon Health as their corporate counsel) and welcomed 5 new team members: Lisa Souquet-Wiggs, Andrew Gill, Ben Schwarer, Imme Kaschner and William Snowdon.

Lisa Souquet-Wiggs has 3 years of legal experience working at a legal practice which specialises in commercial property leasing matters. Lisa works across both our legal and compliance teams.

Email: **lisa.soquet-wigg@healthlegal.com.au** *or* **lisa.soquet-wigg@lawcompliance.com.au**
Phone: **(03) 9865 1340**

Andrew Gill has a Bachelor of Laws and Arts (Journalism) and his prior experience includes working as a legal assistant at a community legal service and as a barrister's research assistant. Andrew works across both our legal and compliance teams

Email: **andrew.gill@healthlegal.com.au** *or* **andrew-gill@lawcompliance.com.au**
Phone: **(03) 9865 1322**

Ben Schwarer has completed a Juris Doctor (Law) as well as a Bachelor of Biomedical Science. He has experience in both personal injury law and industrial relations, with his most recent experience being an industrial relations consultant.

Email: **ben.schwarer@healthlegal.com.au** *or* **ben.schwarer@lawcompliance.com.au**
Phone: **(03) 9865 1342**

Dr Imme Kaschner is a third year lawyer who is also a qualified doctor who has worked as a Research Fellow at the Children's Hospital in Boston. Imme will provide advice on all health related matters, draft contracts and policies, and assist clients with the handling of subpoenas and the answering of patient complaints.

Email: **imme.kaschner@healthlegal.com.au**
Phone: **(03) 9865 1311**

William Snowdon has joined us as junior administrative assistant.

Email: **william.snowden@healthlegal.com.au** *or* **william.snowden@lawcompliance.com.au**

Baby News

On the baby front − in late February Anne Howard and her husband Eden welcomed with much delight a baby girl – Charlotte Elizabeth.

2018 will continue to be a year of change with 2 new pregnancies just announced (!).

Promotions

We also recently announced the promotion of 4 of our solicitors. Alon Januszewicz has been promoted to Executive Legal Counsel, Sarah Caraher to Associate Legal Counsel, Giovanni Marino has been promoted to Senior Associate and Anne Howard to Senior Solicitor. Each promotion reflects the individual's senior position within the firm and their significant contribution to Health Legal's ongoing success.

OAIC releases statistical information about the notifications made under the Notifiable Data Breaches Scheme

By Natalie Franks, Legal Counsel

As detailed in our article in the March 2017 edition of the Health Legal Report, the Notifiable Data Breaches scheme commenced on 22 February this year.

On 11 April the Federal Office of the Australian Information Commissioner published information about the notifications received under the new scheme since its commencement.

Key statistical information reported by the Commissioner reveals that during the first 6 week period of the Scheme:

- 63 privacy breaches had been reported (this is in contrast to a total of 114 voluntary notifications during the entire 2016-2017 financial year)
- 24% of breaches were reported by health service providers (the largest proportion)
- the second largest proportion of reported breaches were made by legal, accounting and management services (16%)
- the majority of reported data breaches involved contact information ie an individual's name, email address, home address or phone number (78%)
- data breaches involving health information represented 33% of notified breaches
- human error was the cause of the largest number of reported breaches (51%)
- malicious or criminal attack was the second largest cause of the reported breaches (44%)
- 73% of breaches reported involved the personal information of under 100 people.

To read the full report visit https://www.oaic.gov.au/resources/privacy-law/privacy-act/notifiable-data-breaches-scheme/quarterly-statistics/Notifiable_Data_Breaches_Quarterly_Statistics_Report_January_2018__March_.pdf.

New Website Launched

Health Legal has a new website.

Visit **www.healthlegal.com.au** for past issues of the Health Legal Report and articles of interest.

Recent articles include summaries of the new Data Breach Notification regime and Victoria's medical decision making and advanced care planning laws.

Health Legal and Law Compliance are now on LinkedIn.
Follow us for current news and updates.

Policy Service

As a result of client demand we have extended our compliance services to cover policy wordings.

From our perspective:

- understanding where a legislative obligation fits within a policy framework can be difficult, and
- organisations often don't have sufficient resources to keep their policies legally up to date.

Our new service aims to assist organisations to overcome these issues.

Health Legal now offers a new quarterly update service where subscribers are given:

- guidance about the types of policies that may be affected by a legislative change,
- suggested wording for relevant policies to allow subscribers to modify their own policies, and
- completely new policies if Acts in new areas of law are introduced (or existing Acts are substantially re-written).

*If you have any questions about the Policy Service please contact **Teresa Racovalis** on **(03) 9865 1337** or **teresa.racovalis@healthlegal.com.au**.*

Some of the Legislative Changes being tracked

Western Australia

Animal Welfare Amendment Bill 2017 (WA)

Health Practitioner Regulation National Law (WA) Amendment Bill 2017 (WA)

Heritage Bill 2017 (WA)

Liquor Control Amendment Bill 2018 (WA)

Occupational Safety and Health Amendment Bill 2017 (WA)

Northern Territory

Domestic and Family Violence Act 2007 (NT)

Queensland

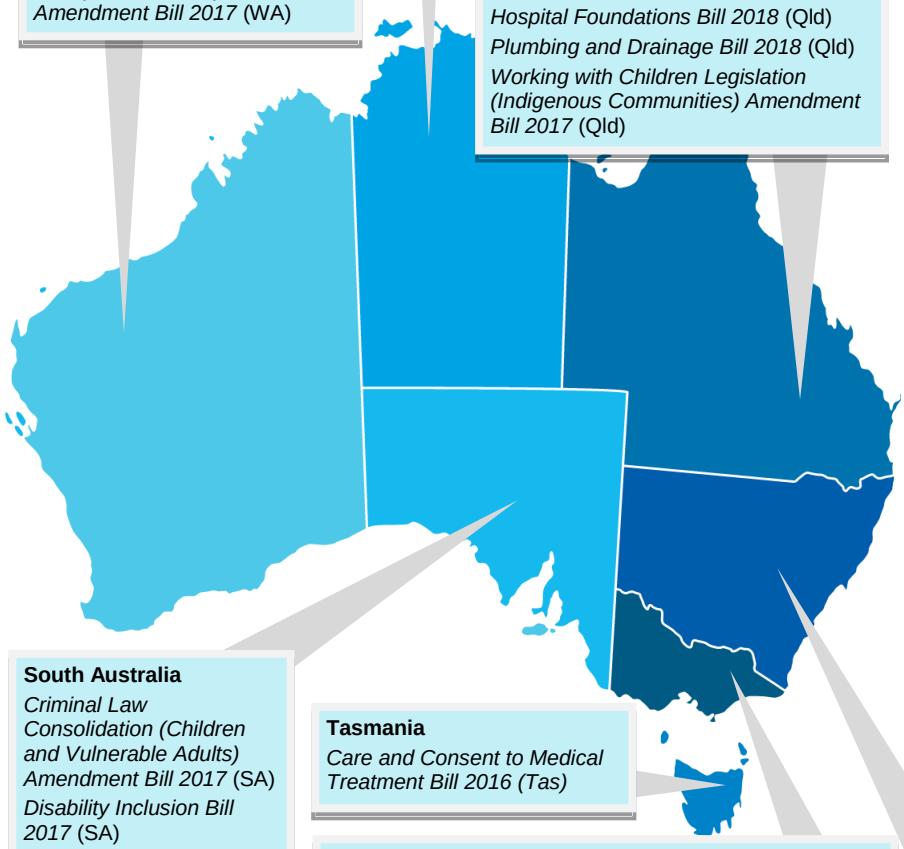
Crime and Corruption and Other Legislation Amendment Bill 2018 (Qld)

Guardianship and Administration and Other Legislation Amendment Bill 2018 (Qld)

Hospital Foundations Bill 2018 (Qld)

Plumbing and Drainage Bill 2018 (Qld)

Working with Children Legislation (Indigenous Communities) Amendment Bill 2017 (Qld)



Commonwealth

Aged Care Amendment (Ratio of Skilled Staff to Care Recipients) Bill 2017 (Cth)

Commonwealth Redress Scheme for Institutional Child Sexual Abuse Bill 2017 (Cth)

Corporations Amendment (Modernisation of Members Registration) Bill 2017 (Cth)

Export Control Bill 2017 (Cth)

Fair Work Amendment (Pay Protection) Bill 2017 (Cth)

Fair Work Amendment (Protecting Australian Workers) Bill 2016 (Cth)

Fair Work Amendment (Protecting Take-Home Pay) Bill 2017 (Cth)

Fair Work Amendment (Recovering Unpaid Superannuation) Bill 2017 (Cth)

Fair Work Laws Amendment (Proper Use of Worker Benefits) Bill 2017 (Cth)

Fringe Benefits Tax Amendment (National Disability Insurance Scheme Funding) Bill 2017 (Cth)

Higher Education Support Legislation Amendment (A More Sustainable, Responsive and Transparent Higher Education System) Bill 2017 (Cth)

Industrial Chemicals (Notification and Assessment) Amendment Bill 2017 (Cth)

Industrial Chemicals Bill 2017 (Cth)

National Integrity Commission Bill 2017 (Cth)

Privacy Amendment (Re-identification Offence) Bill 2016 (Cth)

The Industrial Chemicals (Consequential Amendments and Transitional Provisions) Bill 2017 (Cth)

Treasury Laws Amendment (2018 Measures No. 3) Bill 2018 (Cth)

Treasury Laws Amendment (Enhancing Whistleblower Protections) Bill 2017 (Cth)

Treasury Laws Amendment (Improving Accountability and Member Outcomes in Superannuation Measures No. 2) Bill 2017 (Cth)

South Australia

Criminal Law Consolidation (Children and Vulnerable Adults) Amendment Bill 2017 (SA)

Disability Inclusion Bill 2017 (SA)

Health Care (Privacy and Confidentiality) Amendment Bill 2016 (SA)

Retail and Commercial Leases (Miscellaneous) Amendment Bill 2017 (SA)

Retail and Commercial Leases (Rent Threshold for Application of Act) Amendment Bill 2017 (SA)

Statutes Amendment (Bullying) Bill 2017 (SA)

Tasmania

Care and Consent to Medical Treatment Bill 2016 (Tas)

Victoria

Charities Amendment (Charitable Purpose) Bill 2018 (Vic)

Children Legislation Amendment (Information Sharing) Bill 2017 (Vic)

Firefighters' Presumptive Rights Compensation and Fire Services Legislation Amendment (Reform) Bill 2017 (Vic)

Guardianship and Administration Bill 2018 (Vic)

Integrity and Accountability Legislation Amendment (Public Interest Disclosures, Oversight and Independence) Bill 2018 (Vic)

Long Service Leave Bill 2017 (Vic)

Residential Tenancies Amendment (Long-term Tenancy Agreements) Bill 2017 (Vic)

Service Victoria Bill 2017 (Vic)

Transparency in Government Bill 2015 (Vic)

New South Wales

Child Protection (Working with Children) Amendment (Statutory Review) Bill 2018 (NSW)

Human Tissue Amendment (Trafficking in Human Organs) Bill 2016 (NSW)

Privacy and Personal Information Protection Amendment (Notification of Serious Violations of Privacy by Public Sector Agencies) Bill 2017 (NSW)

Summary Offences Amendment (Safe Access to Reproductive Health Clinics) Bill 2017 (NSW)

Workers Compensation Amendment (Protection of Injured Workers) Bill 2017 (NSW)

If you would like details of these new Bills please contact ***Teresa Racovalis*** *on* ***(03) 9865 1337*** *or* ***teresa.racovalis@healthlegal.com.au****.*

Contact us

For further information please contact:

Natalie Franks
Legal Counsel
Direct: 03 9865 1324
Email: natalie.franks@healthlegal.com.au

Alon Januszewicz
Executive Legal Counsel
Direct: 03 9865 1312
Email: alon.januszewicz@healthlegal.com.au

Sarah Caraher
Associate Legal Counsel
Direct: 03 9865 1334
Email: sarah.caraher@healthlegal.com.au

Teresa Racovalis
Chief Operations Officer (Compliance)
Direct: 03 9865 1337
Email: teresa.racovalis@lawcompliance.com.au

Astrid Keir-Stanley
Compliance Associate
Direct: 03 9865 1300
Email: astrid.keir-stanley@lawcompliance.com.au

Giovanni Marino
Senior Associate
Direct: 03 9865 1339
Email: giovanni.marino@healthlegal.com.au

Anne Howard
Senior Solicitor
Direct: 03 9865 1311
Email: anne.howard@healthlegal.com.au

Ksandra Maruna
Compliance Solicitor
Direct: 03 9865 1320
Email: ksandra.maruna@lawcompliance.com.au

Chris Chosich
Solicitor
Direct: 03 9865 1329
Email: chris.chosich@healthlegal.com.au

Lisa Souquet-Wigg
Solicitor
Direct: 03 9865 1340
Email: lisa.souquet-wigg@healthlegal.com.au

Andrew Gill
Solicitor
Direct: 03 9865 1322
Email: andrew.gill@healthlegal.com.au

Dr Imme Kaschner
Solicitor
Direct: 03 9865 1311
Email: imme.kaschner@healthlegal.com.au

Fiachra Twomey
Law Clerk
Direct: 03 9865 1343
Email: fiachra.twomey@healthlegal.com.au

Benjamin Schwarer
Law Clerk
Direct: 03 9865 1342
Email: ben.schwarer@healthlegal.com.au