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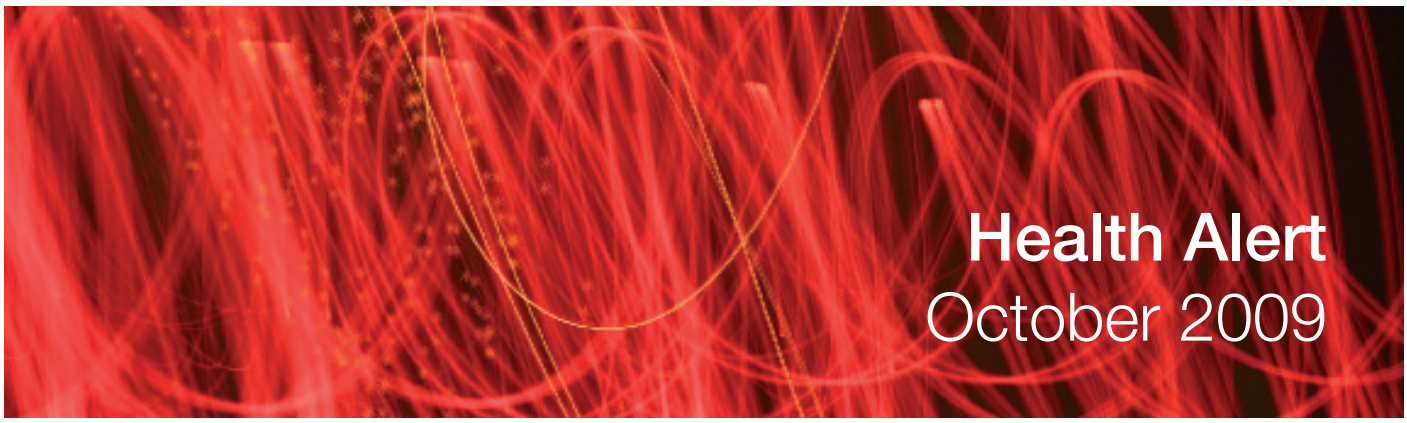

Health Alert
October 2009

This Alert contains information on the following topics:

Long awaited Retirement Village Regulations released – with some surprises

On 7 October 2009, some ten months after the *Retirement Villages Amendment Act 2008* (NSW) (**Amending Act**) was passed, the NSW Department of Fair Trading released the draft *Retirement Villages Regulation 2009* (NSW) (**Regulations**). The Regulations and the accompanying Regulatory Impact Statement can be accessed at the NSW Department of Fair Trading website.

Once the Regulations are finalised and come into force, the significant amendments to the *Retirement Villages Act 1999* (NSW) proposed by the Amending Act (which we covered in some detail in our November 2008 health alert and our December 2008 health alert will also come into force.

The Regulations contain some provisions that have caught the industry by surprise, and it appears that they will be subject to the same intense scrutiny as the provisions of the Amending Act.

The key provisions of the draft Regulations include:

> Clause 4: An expansive list of items are prescribed as being capital maintenance, and other items are prescribed as not being capital maintenance. This clause also contains two financial tests that work must comply with if it is to be classified as capital maintenance. These tests are:

- replacement of a component of a capital item is prescribed as capital maintenance, but only if the component is replaced in the course of maintaining the item and the cost of replacing that component is no more than 10% of the cost of replacing the whole item.

- maintenance of a capital item (including the replacement of a component of that item) is prescribed as **not** being capital maintenance, but only if the cost of the maintenance is more than 50% of the cost of replacing the whole item.

> Clause 13: the contribution that the resident may be required to make to the legal and other expenses incurred by the operator in connection with the preparation of a village contract is capped at $200.

> Clause 20: The amount that may be included for contingencies in a proposed annual budget as a proportion of the total budget is limited to 4% or the increase in CPI (whichever is greater).

> Clause 26: An extensive list of items must not be financed by recurrent charges. These include:

- payroll tax unless it is solely attributable to the village to which it is charged

- costs associated with an operator's head office

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- flat rate management or administration fees.

These provisions will have a significant impact on operators of multiple villages.

> Clause 49(2): The administration fee that an operator may charge a resident in the event that the resident terminates the village contract during the new 90 day settling in period is capped at $200.

Thomson Playford Cutlers is working with the Retirement Villages Association (**RVA**) to prepare a submission to the Department in response to the proposed Regulations.

The deadline for submissions is Wednesday 4 November 2009.

Public v Private hospitals

Following a five month enquiry, the Productivity Commission has produced a discussion draft of its report comparing the performance of public and private hospitals.

In particular, the Productivity Commission was asked to investigate the cost of treating patients in public versus private hospitals.

The preliminary findings of the Commission include the following:

> Comparing total costs, the public and private hospital systems cost about the same per procedure. However, significant differences were found in the composition of costs. In private hospitals, doctors and diagnosis cost more, while in public hospitals, ancillary costs, supplies and salaries are higher.

> Private hospitals appear to have lower infection rates than public hospitals, but this result could be misleading because private hospitals on average treat patients who have a lower risk of infection.

> Private hospitals have higher labour productivity and shorter lengths of stay than public hospitals.

> Elective surgery in public hospitals is more accessible for disadvantaged socioeconomic groups, but tends to be less timely than in the private sector.

The Commission noted the difficulty in comparing data collected from different institutions, and emphasised that the resulting estimates should be considered experimental. The report recommends that improvements could be made to data collections to improve the feasibility of future comparisons.

The report is a draft, and the Commission now wants to hear from interested parties to comment on its findings. The findings have some commentators calling for the private system to be brought into government calculations in trying to tackle long public waiting lists.

Submissions will need to reach the Commission by no later than 9 November 2009 to enable their full consideration prior to completion of the study. Submissions may be sent by email (hospitals@pc.gov.au). The Commission is to present its final report to the government in early December 2009.

The full draft report can be viewed at the Productivity Commission website.

Productivity Commission draft report on not-for-profits released

The Productivity Commission has also released its draft research report on the Contribution of the not-for-profit sector. The Commission has made 31 recommendations to the Federal Government, including:

> a new 'one stop shop' for Commonwealth oversight, covering a new incorporation regime, registration and tax endorsements, national fundraising and a single portal for financial reporting

> improve tax endorsement and fund raising

> a high level working party to explore obstacles to NFPs raising capital

> encourage philanthropy and giving, noting that the deductible gift recipient regime is too restrictive

> improve effectiveness of direct government spending and building stronger, more effective relationships between NFPs and government.

FBT concessions for hospitals received the most press on the release of the report. However, although the Commission expressed some criticism of the current arrangements, particularly the competitive disadvantage faced by for-profit hospitals, no specific recommendations for change of FBT concessions are made in the report.

The full report can be found at the Commission's website.The Commission is accepting submissions on the draft report until 24 November 2009.

We will be monitoring the government's response to the report and any legislative changes.

AIHW report recommends safety and quality indicators for the health care system

The Australian Institute of Health and Welfare (**AIHW**) has released a report recommending a set of 55 safety and quality indicators for use in the national health care system. It is intended that the indicators:

- are suitable for public reporting purposes and cover the entire health care system
- have meaning at a clinical and health service level
- identify areas where action is needed
- facilitate international benchmarking
- are based on (available) routinely collected data
- align with national data standards

The AIHW believes that these indicators will provide greater transparency on priorities and strategies for safety and quality improvement as well as informing on quality improvement activities of service providers.

New principles to deal with conflict of interests for health practitioners

The National Health & Medical Research Council (**NHMRC**) proposes to develop a set of principles for the management of conflict of financial and other interests for health practitioners. The draft principles will be considered at the next NHMRC meeting in December and are aimed at assisting health practitioners in their collaborations with the health industry.

Working within the system - a recent case raises important issues concerning medical doctors working within private health facilities

G and M v Armellin [2009] ACTCA 6; BC200903375

A recent Court of Appeal decision allowing an appeal from a decision of the Supreme Court of the Australian Capital Territory raises some interesting points and reminders concerning the responsibility and liability issues between treating medical practitioners and private health facilities.

The facts

The initial decision involved a single judge of the Supreme Court of the Australian Capital Territory dismissing an action for damages brought against a medical practitioner (Dr Armellin) for allegedly breaching his duty of care by implanting two embryos instead of one in a patient. The patient gave evidence that she was told by Dr Armellin that she could decide how many embryos she wanted transferred any time "up to the point of the transfer" and that immediately before the procedure the first plaintiff told Dr Armellin that she only wanted one embryo transferred.

It is understood from the judgement that Dr Armellin believed that one embryo was to be delivered by the embryologist for transfer, but accepts that, in fact, two were transferred. The embryologist and fertility centre had received no decision direct from the patient and did not know of the patients decision as told to Dr Armellin to have one embryo inserted. Dr Armellin believed that the number to be transferred had also been organised between the patient and the centre.

The decision on appeal

The action was originally dismissed in the Supreme Court of the Australian Capital Territory. The Court of Appeal has allowed the appeal and in doing so clearly states in the judgment that:

> *"...Dr Armellin should have checked with the embryologist about how many were being transferred before allowing the procedure to go ahead. It was negligent, in the circumstances, for Dr Armellin simply to assume that the embryologist was complying with the wishes of the appellants." [36]*

The case discusses the systems in place at the fertility centre and comments:

> *"...The so-called "system" was nothing more than a practice usually adhered to. It was a practice departed from in this case as G reasonably believed, based on Dr Armellin's advice and that of the Centre, that she could tell him right up to the point immediately before the procedure as to how many embryos would be transferred. Dr Armellin did not ensure that what was promised in August 2003 actually occurred in November 2003" [40]*

Comments

In this decision the medical practitioner was held to have ultimate responsibility for the treatment of the patient, particularly in circumstances where the medical practitioner allowed the patient to communicate its wishes to the medical practitioner outside of the normal practices and procedures at the centre.

In our view, the case highlights the importance of:

- ensuring patient's wishes are communicated to the medical practitioner and the private health facility

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- having appropriate systems in place at private health facilities which are adhered to and which ensure medical practitioners and private health facilities are working off the same page in relation to patient treatment and processes for patient consent, and
- having cross checks in place for any system (which are particularly important if the system is deviated from).

Another word on preventative health

After we circulated our item last month on the Australian National Preventative Health Strategy, it was pointed out to us that there is a well documented view that preventative measures are not necessarily the most cost effective. On this view, the fiscal benefits that the Australian government claims will arise from the implementation of the Strategy may not be as extensive as the government has envisaged.

Legislation update

Health Practitioner Regulation National Law Bill 2009 **(Qld)**

This Bill was introduced into the Queensland Legislative Assembly and received its second reading speech on 6 October 2009.

The object of the Bill is to adopt the give effect to the Intergovernmental Agreement for a National Registration and Accreditation Scheme for Health Professions, which the Commonwealth and the States entered into on 26 March 2008.

Health Practitioner Regulation National Law (Victoria) Bill 2009 **(Vic)**

This Bill was introduced into the Victorian Legislative Assembly on 14 October 2009 and received its second reading speech on 15 October 2009.

The object of the Bill is to adopt the give effect to the Intergovernmental Agreement for a National Registration and Accreditation Scheme for Health Professions, which the Commonwealth and the States entered into on 26 March 2008.

Health Insurance (Pathology Services Table) Regulations 2009 **(Cth)**

These Regulations will replace the Health Insurance (Pathology Services Table) Regulations 2008 (Cth). The main changes are that the new Regulations will:

- add a new group of items to the table of pathology services in order to provide a bulk billing incentive
- reduce the fees for certain Pathology Episode Initiation items.

The Regulations will commence on 1 November 2009.

Australian Organ and Tissue Donation and Transplantation Authority Regulations 2009 No. 269 **(Cth)**

These Regulations provide that

- the definition of 'tissue' in the Australian Organ and Tissue Donation and Transplantation Authority Act 2008 (Cth) does not include blood or blood products, reproductive tissue or stem cell
- the Australian Organ and Tissue Donation and Transplantation Authority may also be known by the shorter name of the Organ and Tissue Authority; and
- if a donor is less than 18 years old, the parent or legal guardian of the donor is authorised to give consent to the publication or dissemination of information.

The Regulations commenced on 14 October 2009.

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