

Health Services (Further Amendment) Bill

EXPLANATORY MEMORANDUM

Outline

The aim of this Bill is to resolve a number of problems which have arisen during the implementation of the *Health Services Act 1988*.

The opportunity is also being taken to revise references to the Health Services Act in other legislation.

Clause Notes

Clause 1 defines the objectives of the Act.

Clause 2 is the commencement provision.

Clause 3 identifies the *Health Services Act 1988* as the Principal Act.

Clause 4 amends several definitions in section 3 of the Principal Act.

Paragraph (a) substitutes a new definition for the definition of “by-law”.

As currently enacted, “by-law” is defined as being the principal regulatory instrument made by a health service establishment or a registered funded agency.

Doubt has been expressed as to how this definition should be interpreted if the establishment or service is a corporation.

The revised definition clarifies the situation by providing that where the establishment or agency is a corporation, “by-law” means the corporation’s articles of association.

Paragraph (b) amends the interpretation of “supported residential service”.

Under the Act, a supported residential service (that is, a special accommodation house) is defined as being a premises where accommodation and special or personal care is provided “for profit”.

An apparent effect is that a service operated by a charitable organisation is not encompassed by the definition if the service is run on a not-for-profit basis.

As a result, such services cannot be required to comply with the minimum standards and requirements which must be observed by other supported residential services.

The amendment is designed to clearly bring not-for-profit services within the scope of the Act by substituting for the term “for profit” the expression “fee or reward”.

Clause 5 extends the power to exempt agencies from the Act vested in the Governor-in-Council by section 11 of the Principal Act.

The definition of “supported residential service” in section 3 appears to pick up some facilities which it would be preferable to exempt either partially, or wholly, from the legislation.

These include serviced apartments, owned by a resident under a strata title, where special or personal care is provided, or “lodges” within retirement villages. There are also about 20 facilities currently exempted from registration as special accommodation houses under the *Health Act 1958*.

In the case of current exemptions, a requirement to register may have a potentially detrimental effect because, while the facilities are regularly inspected, they would probably close rather than upgrade to the requisite standard thus forcing residents out of their homes.

The proposed amendment will give the Governor in Council a capacity to approve exemptions from the Act in suitable cases.

Clause 6 inserts a new paragraph (*aa*) in section 12 of the Principal Act.

Section 12 lists the various matters which can be the subject of Health Services Development Guidelines.

Although sections 71 (1) (*a*) (iii), 71 (*c*) (iii) and 83 (1) (*b*) imply that the guidelines can deal with adequacy of health services, the term is not actually used in section 12.

The purpose of the amendment is to put beyond doubt that guidelines can deal with the adequacy of health services in Victoria.

Clause 7 makes several amendments to section 24 of the Principal Act.

Among other things, the section currently requires a registered funded agency to obtain the approval of the Chief General Manager of the Department of Health before the agency amends or alters its by-laws.

A defect in the provision is that there is no such approval appears necessary if an agency proposes to make a new by-law.

The amendments to section 24 are designed to make clear that the making of a by-law is also subject to the approval of the Chief General Manager.

Clause 8 inserts a new section 31A into the Principal Act.

Over the years, public hospitals have become increasingly accountable to Government to the extent that it has been suggested that it is possible that a court might form the view that such a hospital now represents the Crown.

This would raise a number of difficult issues in terms of immunities, the beneficial ownership of hospital property, and the funding of a public hospital's legal liabilities.

The proposed new section is designed to put beyond doubt that public hospitals are separate legal entities and are not part of the Crown.

Clause 9 inserts a new sub-section in section 33 of the Principal Act.

The new section will make clear that the board of management of a public hospital has the power to make by-laws.

The Act is currently silent as to whether public hospitals have such a capacity.

The amendment states expressly that a board is able to make, amend or revoke by-laws on behalf of the hospital.

Clause 10 resolves several anomalies in sections 46 and 47 of the Principal Act which provide for the appointment of non-elected members to the boards of community health centres.

Among other things, section 46 (1) states that, if the by-laws of a community health centre so provide, one of the members of the board is to be "a representative of the municipality in which the centre is located".

This provision is considered unduly limiting because, while a centre may be located in one municipality, it may actually service the residents of two or three other municipalities which would not be entitled to representation.

The effect of the new paragraph (b) to be substituted in section 46 (1) by the clause is to enable more than one council to nominate a representative to the Board.

Section 46 (1) (b) of the Act also makes provision for the appointment to the board of a community health centre of a representative of a hospital which serves the area served by the board.

The opportunity is being taken in the substituted paragraph to make clear that “hospital” means a public hospital or denominational hospital.

It should be noted that new paragraph (b) restricts the right of nomination to members or employees of the council or members of the board or employees of the hospital.

This will avoid councils or hospitals nominating to the board of a community health centre any person who has no connection with the area served by the centre.

The proposed amendments to section 47 of the Principal Act and consequential amendment to section 51 (a) will resolve a problem which has arisen in connection with the elections of boards of community health centres.

The proposed amendments will make clear that, as nearly as possible, one-third of the positions of elected member of the board of a community health centre become vacant at each annual general meeting.

This will prevent vacancies becoming “bunched” over a period of time if all positions are not filled in any given year.

The amendments will also give boards the capacity to co-opt additional members if not enough candidates stand at an election, or if a member resigns during his or her term of office and there is no eligible person available to fill the vacancy.

Clause 11 clarifies the interpretation of section 70 (1) of the Principal Act.

Among other things, section 70 (1) enables a person to apply to the Chief General Manager for approval in principle to the use of “land” as a specified kind of health service establishment. In implementing this provision, doubts have been expressed as to whether “land” is to be construed as being a specific site or a general, though defined, locality.

To resolve the dilemma, the above section is to be amended to make clear that it refers to a specific site.

Clause 12 inserts a new sub-section (3) in section 74 of the Principal Act.

Sections 74 and 81, respectively, provide for variation and transfer of a certificate of approval in principle, and of a certificate of design approval for a health service establishment.

However, it is not clear from these provisions whether a new certificate has to be issued, or the existing certificate endorsed, if a variation or a transfer is agreed to by the Chief General Manager.

The problem is highlighted by section 96 which clearly requires a registration certificate to be returned for endorsement if a variation in registration occurs.

To resolve the problem, it is proposed to amend section 74 and to make a related amendment to section in a subsequent clause to provide that, in the event of a variation or transfer, the certificate is to be returned to the Chief General Manager for endorsement.

Clause 13 resolves an anomaly in section 76 of the Principal Act.

Section 76 enables a person to apply to the Chief General Manager for a design approval for a health service establishment for—

- (a) new premises; or
- (b) an existing premises already used as a health service establishment.

No capacity exists in the provision for a person to seek design approval for an existing premises, which is not being used as a health service establishment, but which it is proposed to alter for such use. The clause amends section 76 to make it possible for design approval to be granted by the Chief General Manager in such an instance.

Clause 14 amends section 81 as foreshadowed in the notes on clause 12.

Clause 15 amends section 88 of the Principal Act.

As enacted, section 88 (1) enables the proprietor of a health service establishment to apply for renewal of registration “at any time within the period of three months before the expiration of the registration”. In other words, the proprietor has a discretion to apply for renewal between 3 months and the day immediately before the registration expires.

This is unsatisfactory because, in determining whether registration is to be renewed, the Chief General Manager needs sufficient time to take into account all of the matters he or she must consider under section 89.

It is, therefore, essential that reasonable notice of an application for renewal is given to the Chief General Manager so that the assessment process envisaged by section 89 can be carried out.

With this in mind, it is proposed to reword section 88 to provide that—

- (a) an application for renewal must be lodged at least 3 months before registration expires; or
- (b) a late application may be lodged up to the date of expiry provided a late fee is paid.

Clause 16 amends section 92 (2) of the Principal Act.

Section 92 (2) (c) (i) provides for the transfer of registration of a health service establishment from one proprietor to “another proprietor”.

“Proprietor”, by definition, means the owner or person conducting a health service establishment.

In other words, a transfer of registration of a health care establishment can only be effected to a person already running another health service establishment. This, clearly, was not intended. The effect of the amendment to the section is to enable a transfer to be made from a proprietor to a person who intends to become the proprietor.

Clause 17 makes several amendments to sections 99 and 102 of the Principal Act.

One of the problems experienced under the Health Act, and which will be exacerbated under the Health Services Act because of the longer periods of registration expected to be granted, is that of corporate proprietors of health service establishments being taken over by undesirable persons.

While in determining whether such an establishment should be registered (s. 83), or registration renewed (s. 89), the Chief General Manager must consider whether the applicant is a fit and proper person, or, in the case of a body corporate, whether each director or officer exercising control over the corporation, is a fit and proper person, there is little

action that can be taken if a body corporate is subsequently sold or comes under the control of someone with an unsavoury reputation in the industry.

The proposed amendments to sections 99 and 102 will provide a means for censuring, suspending admissions, or deregistering a premises in the event of the takeover of a body corporate by an unethical or undesirable person after registration or renewal.

Clause 18 deletes references to hostels and nursing homes in sections 89, 106 and 165 of the Principal Act.

These amendments are necessary to avoid potential duplications between the Health Services Act and the recently enacted Commonwealth Community Services and Health Legislation Act.

The overall effect of the amendments is to omit from the Act the requirement that “residential statements” must be prepared for residents of hostels and nursing homes.

These will be replaced by the “residential contracts” system provided for in the Commonwealth legislation.

The opportunity is also being taken to insert a missing reference to hostels and nursing homes in section 99 (d) of the Act.

Clause 19 makes an amendment to section 115 of the Principal Act to correspond with the earlier amendment proposed to section 76.

The amendment to section 76 will enable a person to apply to the Chief General Manager for design approval of a premises “proposed to be used” as a health service establishment.

The purpose of the amendment to section 115 is to prohibit any agreement being entered into for the alteration or extension of such premises unless such a design approval is in force.

Clause 20 amends various sections of the Principal Act.

The main effect of the amendments is to remove hostels and nursing homes from the scope of the community visitor scheme established by Part 5 of the Act in favour of a similar scheme provided for under the new Commonwealth legislation.

The opportunity is also being taken to resolve doubts as to whether community visitors have access to the personnel files of an employee.

The effect of the substituted section 120 (2) is to exclude community visitors having the right of access to personnel records unless the staff member concerned consents.

Clause 21 amends section 139 of the Principal Act.

Section 139 of the Act deals with Quality Assurance programs.

Among other things, sub-sections (3) and (4) prohibit *members* of a committee, council or other body declared to be an approved quality assurance body divulging, or using information gained as member, or producing a document etc. to a court. However, the prohibition does not extend to an *officer or employee* of an approved quality assurance body.

To preclude any potential disclosures through this avenue, section 139 is to be amended so that the confidentiality provision also applies to officers and employees.

The section is to be further amended to enable psychiatric services to also participate in Quality Assurance programs.

This will allow agencies under the Mental Health Act to establish approved quality assurance bodies within their own institutions, or in association with registered funded agencies or health service establishments.

New sub-section (6) is designed to allay fears raised by some members of quality assurance bodies that the confidentiality of quality assurance proceedings may, inadvertently, conflict with provisions in other legislation. The new sub-section provides that, in the event of any inconsistency, section 139 prevails.

The opportunity is being taken to limit the application of section 139 to information and documents relating specifically to the quality assurance process so that information and documents created for other purposes will not be protected by the provision.

Clause 22 amends section 141 (2) (c) of the Principal Act.

Section 141 deals with the confidentiality of medical records held by health services.

Among other things, it prohibits the disclosure of medical information by a service unless, in part, disclosure is “authorized or permitted” under the Health Services Act or any other Act.

However, this provision does not sit comfortably with the Transport Accident Act which uses the word “required”.

This has led to uncertainties in the field as to whether section 141 acts as a bar to the release of information under the Transport Accident Act.

To put the issue beyond question, the amendment to section 141 (2) (c) is designed to clearly authorize disclosure of medical records if “required” under an Act.

Clause 23 makes some machinery changes to the heads of power to make regulations in section 158 of the Principal Act.

Among other things, these will provide a capacity to specify standards of care, to regulate the use of the titles of nursing home, hostel, private hospital and supported residential service, and to enable fees for services to be prescribed as a proportion of the Commonwealth pension.

Clause 24 inserts a new section 159A into the Principal Act. The new section is a savings provision relating to public hospital by-laws and is designed to resolve legal uncertainties as to whether existing by-laws continued in operation when public hospitals were incorporated under the Health Services Act on 14 May 1989.

Clause 25 makes some minor corrections to section 160 of the Principal Act.

Section 160 is a transitional provision relating to premises formerly registered under the Health Act.

Sub-section (2) deems a registered special accommodation house to be a supported residential service registered under the Health Services Act while sub-section (3) goes on to deal with such matters as the period of registration, proprietorship and so on.

However several references to “service” have obviously been omitted from that sub-section.

The aim of the amendments is to insert the missing reference as required.

Clause 26 corrects some technical errors in section 161 of the Principal Act.

Among other things, that section deems nursing homes and hostels which were not registered under the Health Act “before the commencement of this Act” to be registered under the Health Services Act.

The use of “this Act” is nonsensical in that all the provisions of the Health Services Act have not been brought into operation on the same day.

The effect of the amendments is to replace references to “this Act” with “this section”.

Clause 27 makes some minor machinery amendments to sections 168 and 171 (5) of the Principal Act. These are transitional provisions relating to community health centres. The proposed amendments remedy some obvious drafting errors in these two provisions.

Clause 28 amends section 36 (4) of the *Dentists Act 1972*.

The amendment revises the wording of that section to reflect the terminology of the Health Services Act. It also removes the current prohibition on the employment of dentists by community health centres.

Clause 29 makes several amendments to the *Pharmacists Act 1974*.

Section 21 (4) of that Act exempts a friendly society, or hospital, from the prohibition on a body corporate or non-pharmacist having an interest in a pharmacy.

The proposed amendment to that section brings the wording into line with that of the Health Services Act, and will enable pharmacy departments to be established in a wider range of facilities than currently permitted under the Pharmacists Act.

The proposed amendment to section 24 (2) is, essentially, cosmetic and updates the wording of that particular provision.

Clause 30 repeals section 5 (1) of the *Retirement Villages Act 1986*.

Section 5 (1) exempts from the Retirement Villages Act any premises registered under the Health Act as a special accommodation house (i.e. supported residential service).

This distinction is no longer tenable because some retirement villages now offer services which would bring them within the definition of a supported residential service.

If such villages register as a supported residential service, their residents would lose the protections afforded by the Retirement Villages Act.

On the other hand, if they failed to register, they would be in breach of the Health Services Act.

The proposed repeal of section 5 (1) of the Retirement Villages Act aims to resolve the consequent dilemma. The effect is that standards of “special or personal care” offered by retirement villages will be subject to the Health Services Act, while the Retirement Villages Act will still apply to such matters as finances and contracts of residents.

The amendment to section 11 of the Health Services Act mentioned in the notes on clause 5 will provide a mechanism for exempting from the Health Services Act those health service establishments which only provide a limited range of services.

