RUSSELL KENNEDY
MEMBER OF THE KENNEDY STRANG LEGAL GROUP

HEALTH LAW

LEGAL RESPONSIBILITIES REGARDING VOLUNTEERS

Many organisations use and rely on the services of volunteers. This article explores exposure for health and other services arising from the use of volunteers. MICHAEL GORTON, Principal

Legal responsibilities regarding volunteers fall into two categories:

- responsibilities to volunteers; and
- responsibilities arising out of the conduct of volunteers.

Occupational Health & Safety Legislation

This legislation will usually impose a statutory responsibility on employers in relation to non-employees such as volunteers.

Duties of employers

In Victoria, for example, legislation requires:

"Every employer…shall ensure so far as is practicable that persons (other than the employees of the employer…) are not exposed to risks to their health or safety arising from the conduct of the undertaking of the employer…"

The section is applicable to volunteers.

The obligation of an employer under this section turns on the meaning of the phrase "so far as is practicable" and will usually require consideration of the following issues:-

(a) the severity of the hazard or risk in question;

(b) the state of knowledge about that hazard or risk, and any ways of removing or mitigating that hazard or risk;

(c) the availability and suitability of ways to remove or mitigate that hazard or risk; and

(d) the cost of removing or mitigating that hazard or risk.

The Courts have set out some principles for employers to decide the meaning of the word "practicable". They are:

- What is practicable must be determined on the facts of the case known at the time of the event which may have been a breach, not at the time of the hearing of the case.
- The higher the seriousness of the potential outcome of the event, the more that it is expected to be done to control the risk, even if the likelihood is low. Further, more is expected

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to be done to control a risk which has a higher likelihood of happening, even if the outcome is less serious.

- The consideration of knowledge must take into account what someone in the position of the person not only knows, but ought to know.
- It is relevant to consider what may reasonably be expected of others. Employers should take into account the potential for inadvertence or error, or potential failures of others to comply with their obligations. However, the employer does not have to allow for unforeseeable, inexplicable or bizarre behaviour of others. Put simply, the employer should expect inherent failure of systems, but not gross misconduct.
- The ability of the person to control the circumstances and outcomes is a significant factor in determining what is practicable for them to do.
- The Courts are usually unsympathetic to arguments based on cost alone, but the level of effort or cost expended need not be disproportionate to the level of the risk.
- The cost of taking measures to control a risk will rarely, if ever, excuse doing nothing.

The next issue is the definition of the "workplace". The workplace is usually defined to include a premises under the control of the employer; including any area of the employer's enterprise in which the employer has any control. The distinction is relevant because volunteers may be injured in an area not under the employer's sole control.

Duties of occupiers of workplaces

Again, for example, Victorian legislation provides:

"An occupier of a workplace shall take such measures as are practicable to ensure that the workplace and the means of access to and egress from the workplace are safe and without risks to health".

Employers are occupiers of the premises at which they conduct any part of their business but the issue is complicated by the possibility of different people having management or control of the same workplace for different purposes (or the possibility of one person having the management and another having control of the workplace). However, the legislation is interpreted to establish that the person will only be an occupier of that part of the workplace over which that person has management or control.

Duties of employees

Legislation usually requires that:-

1 While at work an employee must take reasonable care for…the health and safety of anyone else who may be affected by his or her acts or omissions at the workplace.

2 An employee shall not wilfully place at risk the health or safety of any person at the workplace.

The significance of this obligation is that it imposes, an obligation on employees to be concerned for the health and safety of volunteers. The issue includes behaviour of an employee which is in contravention of safety directions or safety policies.

The impact of this obligation is that, provided an employee is acting within the normal course of his or her employment, although negligently, the employer will generally be vicariously liable for the actions of the employee. At law the employer may be liable vicariously for the breach by an employee of his or her statutory duty.

Liability of Occupiers

Relevant legislative provisions usually provide that:

- An occupier of premises owes a duty to take such care as in all the circumstances of the case is reasonable to see that any person on the premises will not be injured or damaged by reason of the state of the premises or of things done or omitted to be done in relation to the state of the premises.
- In determining whether the duty of care has been discharged consideration can be given to:

  (a) the gravity and likelihood of the probable injury;

  (b) the circumstances of the entry onto the premises;

  (c) the nature of the premises;

  (d) the knowledge which the occupier has or ought to have of the likelihood of persons or property being on the premises;

  (e) the age of the person entering the premises;

  (f) the ability of the person entering the premises to appreciate the danger;

  (g) whether the person entering the premises is intoxicated by alcohol or drugs voluntary consumed and the level of intoxication;

  (h) whether the person entering the premises is engaged in an illegal activity;

  (i) the burden on the occupier of eliminating the danger or protecting the person entering the premises from the danger as compared to the risk of the danger of the person".

These provisions are primarily designed to render occupiers of premises liable for the state in which they leave the premises. The application of such obligations include situations where persons entering onto premises, even trespassers, are injured (for instance, falls or unsafe machinery or, in the case of children, being attracted to dangerous items attractive to those unfamiliar with their use). Such obligations are applicable to volunteers injured because of the state of the employers premises.

Insurance

Obviously organisations will ensure that they adequately insure for all of these risks - but it should be clear that the insurance specifically covers:

- Liability for injury to volunteers;
- Liability for injury to others caused by volunteers.

I am grateful for the assistance of **MR ROSS HODGENS**, Principal, Russell Kennedy solicitors, in the preparation of this article.

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EMPLOYER'S OBLIGATIONS TO ACCEPT MEDICAL CERTIFICATES

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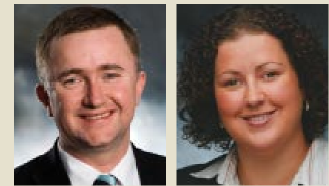

Two recent decisions highlight the difficulty employers face challenging medical certificates.

In *Bull v City of Botany Bay* [2008] NSWIRComm 1041, an employee was terminated for refusing to work outside of normal office hours. The employee acted as a driver for the mayor, regularly working outside of office hours on short notice.

The employee raised concerns with the council's general manager as to the way that the overtime was arranged, and regarding the requirement that he wait in the car until the Mayor was ready to leave.

He was told by the General Manager that it was part of his job to work the overtime and if he was not going to do it, then he could leave.

The employee agreed to work both a Friday and Sunday night on 7 and 9 December 2007, however he became ill on the Saturday and communicated this to his employer. The employee stated that this was the first time he had failed to work overtime.

The employee attended at his doctor on Monday 10 December and received a Workcover NSW Medical Certificate which diagnosed that he had an "adjustment disorder with anxious mood" which was the result of "workplace stress". The certificate provided that he would be unfit for work from 10 December 2007 to 14 January 2008.

The employer's Human Resources Manager directed the employee to attend a meeting. The employee was terminated for misconduct at this meeting.

The employee subsequently received a letter dated 13 December 2008 stating that the reasons for the termination of his employment were misconduct and incorrect use of Council provided equipment.

The employee brought an unfair dismissal claim.

The NSW Industrial Relations Commission found that the termination was harsh, unjust or unreasonable. The employee's withdrawal of his services as a driver did not constitute serious misconduct, and although he had promised to work, his failure to do so was justified in the context of the medical certificate which he received.

If the employer did not believe the authenticity of the medical certificate, they should have had the employee's condition reviewed by its own doctor.

In relation to the termination on the grounds of the incorrect use of council's equipment, the Commission did not accept that this constituted grounds for termination, because of the absence of any warning to the employee.

The worker was awarded $16,500 in compensation.

In *Kaur v DHL Exel Supply Chain (Aust) Pty Ltd* (U2007/4316), the employee, Mrs Kaur, sought 4 weeks annual leave from her 8 weeks accrued leave, after having booked flights to India to visit her seriously ill mother. The employer refused to grant the leave sought on the grounds of operational reasons, instead allowing the employee to take only 1 week's leave.

The employee did not return to work on time. The employee claimed to have attempted to arrange a standby flight to return to Australia to return to work on the date requested by the employer. The employee provided the employer with a medical certificates from a doctor in India that purported to indicate that she was too unwell to return to Australia on the standby flight that she had identified.

Despite having received copies of the employee's medical certificates, the employer commenced the termination process when the employee failed to return to work on the date the employer had specified.

The employee sought relief from unfair termination of employment.

The employer argued that there was nothing on the medical certificates which did not permit the employee to fly back to Australia.

The Australian Industrial Relations Commission (AIRC) held that the employee's failure to return to work was the result of an appropriately certified medical illness. The AIRC rejected the employer's submission that an inference should be drawn from the circumstances that the absence was not for a bona fide reason.

The AIRC indicated that if the employer had concerns about the validity of a certificate it should have arranged for the employee to attend a doctor of their choosing upon her return to Australia.

The employee was awarded 13 weeks compensation in addition to the payment of her sick leave for the period covered by her medical certificate.

The AIRC also held that it was unreasonable for the employer to have rejected her request for four weeks leave, particularly in light of the compassionate grounds that existed.

It is important that employers accept all medical certificates provided to them by employees unless the employer has good reason to believe that the employee was fit for work on the day to which the certificate relates. In such circumstances, it may be appropriate to refer the employee to a doctor of the employer's choice for review.

If you have any questions about your personal leave policies or practices, please contact Paul Ronfeldt, Principal on (03) 9609 1686 or Marion Cole, Solicitor on (03) 9609 1642.

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HUMAN RIGHTS AND HEALTHCARE

PHILLIPA DAVEY, Special Counsel

Following the introduction of the *Charter of Human Rights and Responsibilities Act* 2006 health care providers which are 'public authorities' need to:

- ensure that they are acting compatibly with Charter rights when providing a service or making decisions about individuals
- prepare for human rights informed dialogue about the provision of their services and challenges to their treatment of patients or clients
- be aware of the potential for human rights based arguments to stimulate new ways for courts and tribunals to influence the provision of healthcare services particularly in the interpretation of a 'public authority'.

Introduction

The *Charter of Human Rights and Responsibilities Act* 2006 is an Act of the Victorian Parliament which came into full force in Victoria on 1 January 2008. It applies to state parliament, state courts and tribunals and to 'public authorities', all of which are required to comply with the Charter, and to give human rights proper consideration, when making decisions.

A 'public authority' which is responsible for the delivery of public health services or social services, must not only consider human rights in the course of its decision making, it must also be aware of the potential of the Charter to be used to challenge its processes, its procedures and its decision-making because it is in these contexts that human rights issues readily arise.

While the Charter does not give a person the right to directly challenge violations of their human rights nor to seek damages just because they believe one of their rights under the Charter has been breached, it does give individuals a very powerful tool and language with which to embark on a human rights informed dialogue with 'public authorities'. Healthcare providers need to prepare for human rights based challenges to the provision of their services.

If a person takes legal action based on grounds other than the Charter, during that case they can make human rights arguments based on the Charter and so the Charter provides courts and tribunals with considerable scope to decide the ambit of the Charter rights.

What is a 'public authority'?

The concept of a 'public authority' is central to the operation of the Charter. It determines the extent to which the Charter will be able to promote and protect human rights.

Victoria Police and local councils are specified as 'public authorities' in the Charter and must therefore comply with the Charter in all their functions.

An organisation is a 'public authority' if it is established by law and it exercises a public function. Public hospitals, professional registration boards and the ambulance service

are ready examples of functional, public authorities.

A private organisation is likely to be considered a 'public authority' if it is directly funded by government to perform the function; if its structures and work are closely linked with or generally identified with government; if it is exercising powers of a public nature directly assigned to it by statute; or it is exercising coercive powers devolved from the State.

For example, organisations which provide alcohol and drug treatment services or community health services are arguably 'public authorities' if the entity is funded by DHS to perform those functions.

When a private hospital is detaining someone under mental health legislation it is performing a function which is regulatory and is therefore likely to be a public authority and subject to the Charter.

The provision of public transport services or the provision of prison services by a private provider is so closely linked with government that those providers are a most likely public authorities for the purposes of the Charter.

If an entity is established by statute it is clearly a public authority so that universities, for example, are obliged to conform with the Charter.

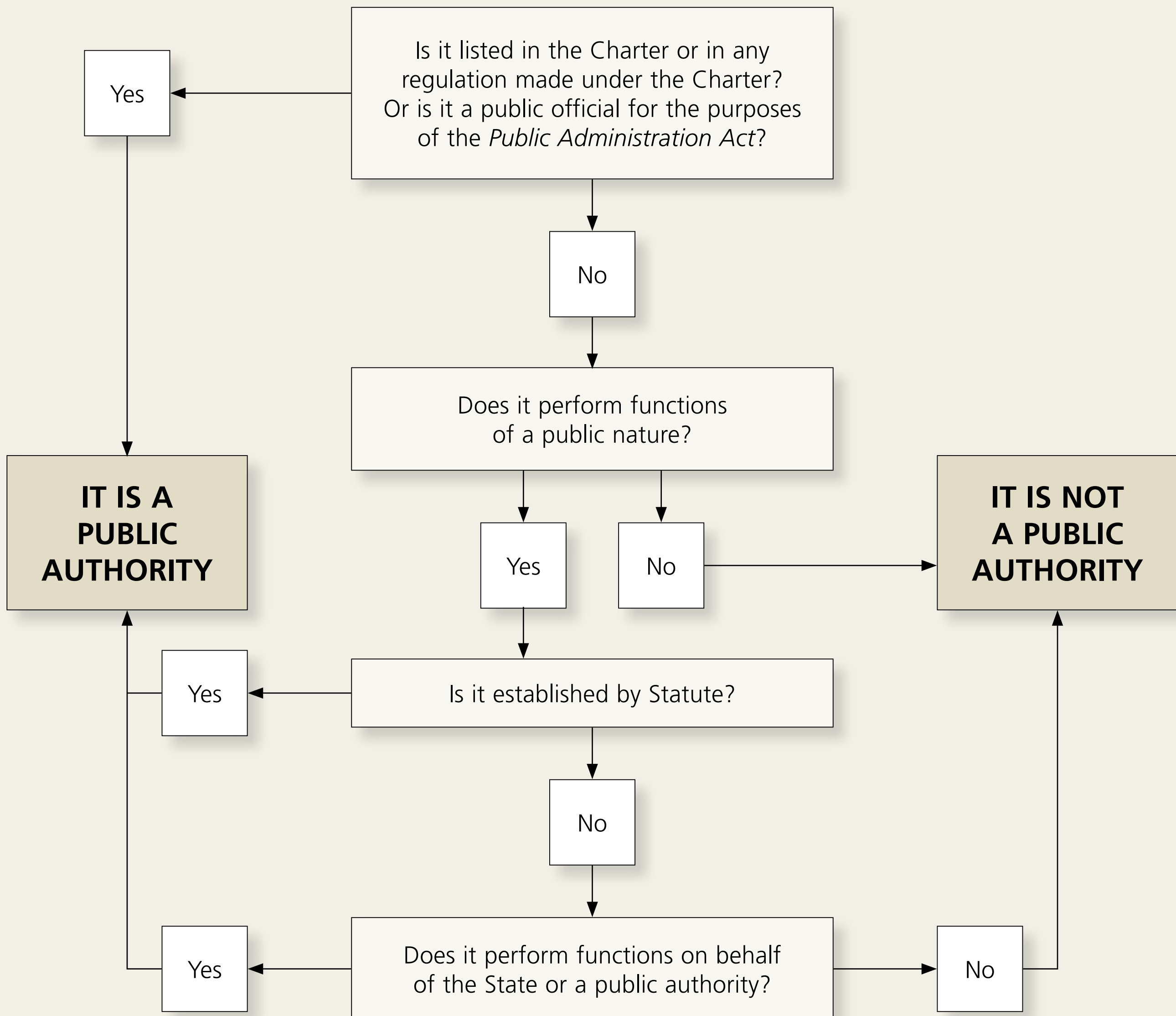
Some organisations that perform a number of functions may satisfy the criteria in relation to only one out of those several functions. If that is the case the organisation will only be bound by the Charter when it is performing the functions that meet the determinative functional criteria.

In many cases it is clear when a function is being performed for the State or another 'public authority' but often it will depend on the circumstances in each case. The Charter specifies that:

- the fact that an organisation is publicly funded to perform a function does not necessarily mean that the organisation is performing the function on behalf of the State.
- an organisation does not have to be an agent of the State to be acting on behalf of the State.

Are you a public authority?

The questions that need to be asked if there is uncertainty about whether an organisation is a public authority or not are these:



The extent of the meaning of 'public authority'

In the UK the courts have interpreted the words 'public authority' in the UK Charter of Human Rights Act 1998 very, very narrowly. The provisions of that Act are very different from the Victorian Charter. One significant difference is that in the UK an individual has the right to directly challenge violations of their human rights. Nonetheless, it is interesting to see that the courts in the UK have been reluctant to impose human rights obligations on private organisations. Courts there have held that it is not enough to categorise an organisation as a 'public authority' just because it is performing a function delegated from the state, it is funded under a contract with the state, it is supervised by the state, or it is a serving the public interest.

In the most controversial case concerning a private provider of residential aged care services, the House of Lords confirmed that care homes run by the private or voluntary sector, but contracted by public authorities to provide residential care, are not covered by the Human Rights Act 1998 (YL v Birmingham City Council [2007] UKHL 27).

In their decision, the majority of the court focussed on the nature of the organisation. Their reasoning was that the organisation was operating in a commercial market against commercial competitors and even though it was conducting a socially useful business it was in that business to make a profit. The fact that the state regulated, supervised and inspected such businesses was not determinative, nor was the fact that the state was funding the individual and thereby indirectly paying for the service.

The minority focussed on the human rights in question and not on the organisation. They considered that the purpose of the legislation was to give effective protection of their human rights to as many people as possible so that to so narrowly interpret the term 'public authority', as the majority did, deprived vulnerable and disadvantaged people of their human rights and denied them effective remedies against breaches of their human rights.

The drafting of the Victorian Charter was informed by the narrow approach which was emerging in the UK and can be said to have culminated in YL's case. The result in Victoria is that section 32 of the Charter provides that:

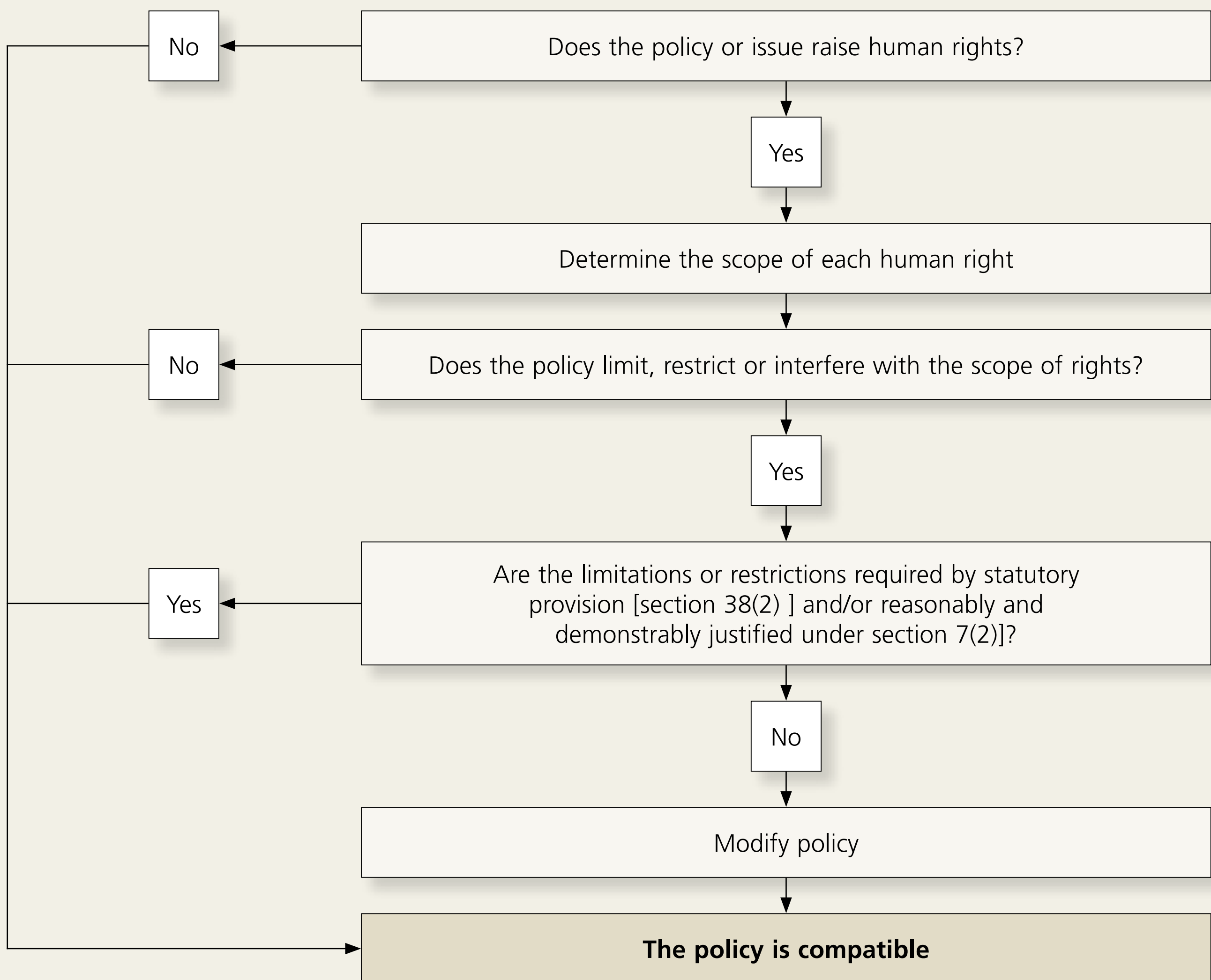
(1) So far as is possible to do so consistently with their purpose, all statutory provisions must be interpreted in a way that is compatible with human rights.

Therefore, it is likely that in Victoria the words 'public authority' in the Charter will be interpreted purposively, because a narrow approach, as taken in the UK, could itself breach section 32 of the Charter.

The obligations of 'public authorities' under the Charter

In order to act in a way that is compatible with the Charter as section 38 requires, a 'public authority' needs to adopt a logical and stepped approach as a practical decision making framework.

A stepped approach adopted from Canadian and New Zealand authorities which might be considered is as follows:



Conclusion

Health providers need to be aware that the Charter of Human Rights sets a new benchmark against which to measure the quality of care they provide but only if they are a 'public authority'. The words 'public authority' are required by the Charter to be interpreted so as to allow maximum access to Charter rights. Advocates of vulnerable and disadvantaged people, in particular, are likely to call for health providers to be accountable for the provision of services on a human rights basis.

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NATIONAL PATIENT CHARTER ENDORSED

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Following on from an extensive public consultation process, the Australian Charter of Healthcare Rights was endorsed by the Australian Health Ministers on 22 July 2008.

The Charter applies to all States and Territories and prescribes minimum standards of rights, expectations and entitlements for patients, and in turn, responsibilities of health providers. As well as applying nationally, the Charter is to apply to all designated health services and not simply the traditional hospital sector.

As to the scope of the Charter, the Charter is based on seven "fundamental" human rights, outlined below:

- **Access** – everyone has a right to public healthcare;
- **Safety** – people are entitled to receive safe and high quality care;
- **Respect** – patients are entitled to be shown respect, dignity and consideration;
- **Communication** – patients have a right to be informed about services, treatment options and costs in a clear and open way;
- **Participation** – patients have a right to be included in an informed decision making process and to make informed choices about their own care;
- **Privacy** – people have a right to privacy and to their personal health and other information being kept confidential and secure; and
- **Comment** – patients are entitled to comment on their own care and to have their concerns addressed properly and promptly.

The key rights identified above are expanded on in the Charter and must be taken into account when reviewing existing charters.

The Australian Commission on Safety and Quality in Health Care envisages the Charter raising the profile of patient charters in the Australian health care system, whilst also improving the safety and quality of the healthcare system. To that end, it is envisaged that with time the Charter will play a greater role in accreditation assessments and future Australian Health Care Agreements.

The Commission has committed to making resource materials available on its website, www.safetyandquality.org, to assist people to respond to the Charter.

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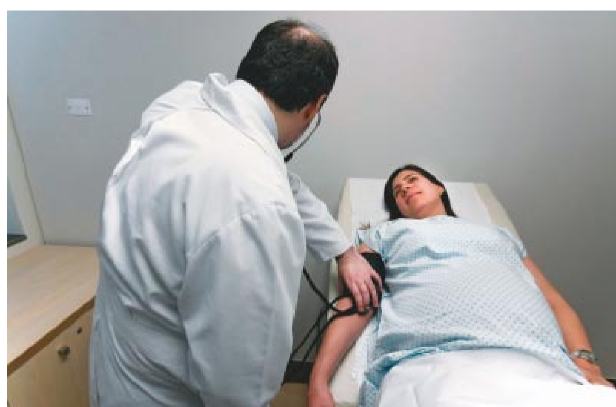
SPECIALIST OBSTETRICIAN LOCUM SCHEME

SOLOMON MILLER, Senior Associate

The Specialist Obstetrician Locum Scheme (SOLS) is a pilot project, designed to deliver affordable and quality locum relief to rural obstetricians, by way of facilitating subsidised locum relief for specialist obstetricians wishing to take study or personal leave. SOLS was developed through funding provided by the Australian Government, with current management responsibility resting with a 'tripartite management group' of the Royal Australian and Zealand College of Obstetricians and Gynaecologists, the Rural Doctors Association of Australia and the NSW Rural Doctors Network.

It is envisaged that SOLS will continue to address the critical shortage of obstetricians in rural and remote Australia by way of enabling and promoting leave, whilst maintaining quality local obstetric care for reliant communities.

Russell Kennedy assisted in the implementation and ongoing regulation of SOLS, by way of identifying regulatory obligations and systems and developing unique participation terms for issuing to specialists and medical practices.



Further information on the operation and management of SOLS can be found on the RANZCOG website, http://www.ranzcog.edu.au/sols/index.shtml.

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OUR COMMITMENT TO OUR COMMUNITY

Russell Kennedy is fully committed to giving back to our community, and its people are heavily involved with a range of government and non-government organisations.

Michael Gorton has recently been appointed Chairperson of the Victorian Equal Opportunity and Human Rights Commission, dealing with complaints of discrimination and sexual harassment, as well as the functions of the Commission under the Charter of Rights. In announcing the appointment, Victoria's Attorney-General, Mr Rob Hulls, said that "Mr Gorton will bring a broad range of legal and professional ethical experience to the role. Mr Gorton's (previous) experience ... will serve the Commission well."

Michael has also recently been appointed a Board member of Melbourne Health, including the Royal Melbourne Hospital.

We have a commitment to the public health sector, with Sabine Phillips, also as a Board member of Northern Health, and Phillipa Davey as a Board member of Uniting Aged Care. Victor Harcourt is a member of the Uniting Aged Care Quality and Safety Committee.

At the end of this year, John Corcoran will take up his position as President of the Law Council of Australia, where he is currently a Council member. The Law Council represents all legal practitioners across Australia.

Our people are also represented on a number of other community organisations and we provide substantial pro-bono services to a range of charities and not for profit organisations.

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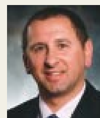

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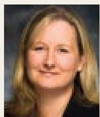

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