First print

New South Wales

Health Legislation Amendment Bill (No 3) 2018

Explanatory note

This explanatory note relates to this Bill as introduced into Parliament.

Overview of Bill

The objects of this Bill are as follows:

(a) to amend the *Assisted Reproductive Technology Act 2007* (the ***ART Act***) with respect to counselling, the provision, recording and disclosure of information, consent of gamete providers and the provision of ART treatment,

(b) to amend the *Health Administration Act 1982* to enable regulations to be made to permit the notification of certain incidents occurring in health facilities and the exchange of information to facilitate the investigation of such incidents,

(c) to amend the *Health Practitioner Regulation National Law (NSW)* to clarify that employers of health practitioners are not required to report the same conduct twice and to permit the Secretary of the Ministry of Health (the ***Health Secretary***) to approve alternative reporting requirements for certain reports, notices and transcripts given under that Law,

(d) to amend the *Health Services Act 1997* to provide for an additional member to be appointed to a Committee of Review and to specify how a Committee makes decisions and clarify that a chief executive is not required to report the same conduct twice,

(e) to amend the *Mental Health Commission Act 2012* with respect to the objects of the Act, its governing principles, the functions of the Mental Health Commission and plans and reports prepared by the Commission (including by requiring public sector agencies to provide a response in certain circumstances to a report or matters in a report),

(f) to amend the *Private Health Facilities Act 2007* to establish new procedures for dealing with reportable incidents and other incidents and to provide authorised officers with the power to require a person to answer questions or provide information and documents.

Outline of provisions

Clause 1 sets out the name (also called the short title) of the proposed Act.

Clause 2 provides for the commencement of the proposed Act.

Schedule 1 Amendment of Assisted Reproductive Technology Act 2007 No 69

Schedule 1 [1] inserts a definition of ***health services provider*** for the purposes of the ART Act.

Schedule 1 [4] clarifies the meaning of references to ART treatment using gametes and ensures that provisions that apply in relation to donated gametes apply also in relation to gametes used to create donated embryos (whether or not the gamete was originally obtained from the gamete provider as a donated gamete and whether or not the embryo was originally created for use as a donated embryo). **Schedule 1 [1]** (insertion of definition of ***donated embryo***), **[2], [3], [11], [15], [16], [17], [18], [21], [25], [31], [32] and [38]** make consequential amendments.

Schedule 1 [6] requires an ART provider to ensure counselling services are available to a gamete provider who proposes to donate a gamete, or an embryo created using a gamete, that was not originally obtained from the gamete provider as a donated gamete. **Schedule 1 [5]** makes a consequential amendment.

Schedule 1 [7] requires an ART provider, when providing information to a participant in an ART service to also inform the participant about a gamete provider's consent and an offence relating to the provision of false information and to obtain confirmation that the participant understands all the information provided. The participants to whom information must be provided now includes gamete providers who are not donors.

Schedule 1 [9] enables the Health Secretary to approve the form in which a gamete provider's consent is to be given.

Schedule 1 [10] enables a gamete provider to give a notice modifying his or her consent to any ART provider that has ever been in possession of the gamete or embryo to which the consent relates. Currently, the gamete provider may only give the notice to the ART provider that obtained the gamete or is in possession of the gamete or embryo.

Schedule 1 [13] requires verification by an ART provider of the identity of a person purportedly giving, modifying or revoking consent as a gamete provider and prohibits an ART provider from carrying out certain activities involving a gamete or embryo that is not donated unless the ART provider takes certain steps to obtain confirmation of the gamete provider's consent in relation to the activity concerned. **Schedule 1 [12]** makes a consequential amendment.

Schedule 1 [19] requires an ART provider not to use a gamete in providing ART treatment to a woman unless it has obtained certain identifying information about the woman.

Schedule 1 [20] requires an ART provider that provides ART treatment to a woman using a donated gamete to take reasonable steps to find out from the woman whether or not the treatment has resulted in a pregnancy (sustained until at least 1 month) and the birth of an offspring.

Schedule 1 [22] extends the particulars that an ART provider is required to record in relation to a woman to whom it provides ART treatment. If the treatment involves the use of a donated gamete, the ART provider is to record whether or not the woman is pregnant, up until at least 1 month after that treatment, as a result of the treatment. If the ART provider does not know, the ART provider is to record information to that effect.

Schedule 1 [26] requires an ART provider to record instances in which it does not know whether or not an offspring has been born as a result of ART treatment if at least 15 months have passed since it provided the treatment. **Schedule 1 [23]** makes a consequential amendment.

Schedule 1 [28] clarifies that information held on the central register may also be disclosed under Part 3A of the ART Act.

Schedule 1 [29] permits the Health Secretary to assume that information provided to the Health Secretary and held on the central register is accurate for the purposes of applying provisions relating to the disclosure of that information.

Schedule 1 [30] requires records that an ART provider is required to give to the Health Secretary to be given within 2 months after the ART provider becomes aware that a live offspring has been born as a result of ART treatment, or if the ART provider does not know whether or not a live offspring has been born, it must inform the Health Secretary of that fact, between 15 and 16 months after the treatment, and give relevant records to the Health Secretary.

Schedule 1 [34] enables the Health Secretary, on the Health Secretary's own initiative, to enter information in the central register in connection with a live offspring whom the Health Secretary has reasonable grounds to be satisfied was born as a result of ART treatment using a donated gamete.

Schedule 1 [35] enables the Health Secretary, on the Health Secretary's own initiative, to disclose information held on the central register that has been revised or entered on the Health Secretary's own initiative. **Schedule 1 [39]** makes a consequential amendment.

Schedule 1 [37] enables the Health Secretary to direct a health services provider to furnish information to the Health Secretary for the purposes of finding out information that should generally be on the central register. It also enables the Health Secretary and the Registrar of Births, Deaths and Marriages to share information.

Schedule 1 [40] makes it clear that a person who forges a signature in any application or notice under the ART Act makes a representation that is false or misleading in a material particular and, accordingly, commits an offence.

Schedule 1 [41] ensures that the ART Act expressly provides that a disclosure made by any health services provider in accordance with the ART Act is not a breach of professional etiquette or ethics or a departure from accepted standards of professional conduct.

Schedule 1 [8], [14], [24] and [33] make law revision amendments.

Schedule 1 [27] replaces a heading to a Division.

Schedule 1 [36] makes an amendment relating to the order of provisions.

Schedule 1 [42] inserts savings and transitional provisions consequent on the enactment of the proposed Act.

Schedule 2 Amendment of Health Administration Act 1982 No 135

Schedule 2 [1] enables regulations to provide for the notification of certain incidents by the relevant health services organisation. The incidents are those involving the provision of health services by local health districts, prescribed statutory health corporations or prescribed affiliated health organisations (in which case the ***relevant health services organisation*** in respect of the incident is the local health district, prescribed statutory health corporation or prescribed affiliated health organisation) and incidents involving the provision of health services under Chapter 5A of the *Health Services Act 1997* or the provision of services under Part 1A of Chapter 10 of that Act (in which case the ***relevant health services organisation*** in respect of the incident is the Health Secretary). The regulations may also permit the exchange of information for the purposes of the exercise of functions relating to the investigation of those kinds of incidents or similar incidents occurring in private health facilities.

Schedule 2 [2] provides for the exchange of information between health officials. A health official is a person or body that exercises functions under certain health legislation. A health official may disclose information that the health official obtains in the exercise of their functions to another health official for the purposes of enabling the other health official to exercise the other health

official's functions, but only if the first health official considers that it is in the public interest to do so.

Schedule 2 [3] and [4] omit spent provisions.

Schedule 2 [5] inserts a savings and transitional provision.

Schedule 3 Amendment of Health Practitioner Regulation (Adoption of National Law) Act 2009 No 86

Schedule 3 [1] provides that if an employer is required to report the same conduct under section 142 of the *Health Practitioner Regulation National Law (NSW)* and under section 117A of the *Health Services Act 1997*, compliance with either of those sections (or with alternative reporting requirements approved by the Health Secretary) satisfies the requirements of both those sections.

Schedule 3 [2] permits the Health Secretary to approve alternative reporting requirements for certain notices and transcripts that may be provided by courts, coroners or other persons. A court, coroner or other person may comply with the alternative reporting requirement as an alternative to the existing requirement for provision of the notice or transcript.

Schedule 4 Amendment of Health Services Act 1997 No 154

Schedule 4 [1] provides for an additional person to be appointed to a Committee of Review. A Committee of Review has the function of determining an appeal against certain decisions of a public health organisation in relation to visiting practitioners. A visiting practitioner has a right of appeal against certain decisions and the appeal is to be determined by a Committee of Review appointed by the Minister for Health. The additional person appointed to the Committee is to be a person who, in the Minister's opinion, is conversant with the interests of patients as consumers of health services provided by the public health system and who has never been a medical practitioner or a dentist. **Schedule 4 [2]** provides that a decision supported by a majority of a Committee of Review is the decision of the Committee and where there is no majority, the Chairperson of the Committee has a second or casting vote. **Schedule 4 [4]** makes it clear that the proposed amendments apply only in respect of a Committee of Review appointed after the commencement of those amendments.

Schedule 4 [3] provides that if a chief executive is required to report the same conduct under section 117A of the *Health Services Act 1997* and under section 142 of the *Health Practitioner Regulation National Law (NSW)*, compliance with either of those sections (or with alternative reporting requirements approved by the Health Secretary) satisfies the requirements of both those sections. **Schedule 4 [3]** also provides that a report made under section 117A of the *Health Services Act 1997* is taken to be a complaint for the purposes of Part 8 of the *Health Practitioner Regulation National Law (NSW)* and for the purposes of the *Health Care Complaints Act 1993*. This will then enable the conduct reported to be dealt with under those Acts.

Schedule 5 Amendment of Mental Health Commission Act 2012 No 13

Schedule 5 [1] updates the objects of the *Mental Health Commission Act 2012* (the ***principal Act***).

Schedule 5 [2] sets out the governing principles for the purposes of the principal Act. Public sector agencies are required to have regard to the governing principles in the exercise of their functions. **Schedule 5 [5]** provides that the governing principles are to govern the work of the Mental Health Commission (the ***Commission***). **Schedule 5 [3] and [14]** make consequential amendments.

Schedule 5 [4], [6], [11] and [12] remove provisions relating to the preparation by the Commission of a draft strategic plan for the mental health system in NSW (as this has now been

prepared) and provide for the preparation of other strategic plans relating to mental health to be prepared by the Commission when directed to do so by the Minister for Mental Health.

Schedule 5 [6] also provides that it is a function of the Commission to review and evaluate, and report and advise on, the mental health and well-being of the people of New South Wales. **Schedule 5 [7]** removes the function of policy development from the Commission. **Schedule 5 [8]** changes the order in which certain functions of the Commission are listed in the principal Act.

Schedule 5 [9] makes it clear that when the Commission engages and consults with persons (including people who have a mental illness and their families and carers) the Commission is to take into account the particular views of those persons.

Schedule 5 [10] specifically identifies gay, lesbian, bisexual, transgender and intersex communities and young people as sections of the community that the Commission is to take into account the particular views and needs of.

Schedule 5 [13] permits the Commission to provide a public sector agency with a report prepared by the Commission which requires the agency to then provide a written response to the report (or certain matters in the report) to the Minister for Mental Health.

Schedule 5 [15] permits regulations to be made that contain provisions of a savings or transitional nature consequent on the enactment of any Act that amends the principal Act (including the proposed Act).

Schedule 6 Amendment of Private Health Facilities Act 2007 No 9

Schedule 6 [1] substitutes Part 4 of the *Private Health Facilities Act 2009* (the ***principal Act***) to establish new procedures for dealing with incidents involving the provision of a health service by a private health facility.

Proposed Division 1 of Part 4 includes a number of definitions to be used in the proposed Part.

Proposed Division 2 of Part 4 requires the licensee of a private health facility to direct one or more assessors appointed by the licensee to carry out a preliminary risk assessment of an incident involving the provision of a health service by the private health facility that has been reported to the licensee if the licensee is of the opinion that the incident is (or may be) a type prescribed by the regulations under the principal Act as a ***reportable incident*** or if the incident is not a reportable incident but may be the result of a serious systemic problem and the licensee is of the opinion that a preliminary risk assessment of the incident should be carried out. The assessor is to carry out a preliminary risk assessment of the incident and is to provide advice to the licensee about the incident to assist the licensee in understanding the cause of the incident and the measures to be taken. An assessor must immediately notify the licensee and the chair of the medical advisory committee for the private health facility if the assessor is of the opinion that the incident raises matters that indicate a problem giving rise to a risk of serious or imminent harm to a person.

Proposed Division 3 of Part 4 requires the licensee of a private health facility to appoint one or more persons to a serious adverse event review team to carry out a serious adverse event review of an incident involving the provision of a health service by the private health facility if the incident is a reportable incident or the incident is not a reportable incident but may be the result of a serious systemic problem and the licensee is of the opinion that a serious adverse event review of the incident should be carried out. The team must be appointed within 30 days of the incident. The team is to report to the licensee and the chair of the medical advisory committee for the private health facility the findings identified by the team as to how the incident occurred, any factors contributing to the incident and any recommendations as to changes or improvements to procedures, practices or systems. However, the licensee may instead require the recommendations not be included in the report but be further developed and included in a second report. If the team forms the opinion that the incident raises matters that may involve professional misconduct or unsatisfactory professional conduct by a health practitioner, or may indicate that a health

practitioner is suffering from an impairment, it must notify the licensee and the chair of the medical advisory committee for the private health facility as soon as practicable. A team must immediately notify the licensee and the chair of the medical advisory committee for the private health facility if it is of the opinion that the incident raises matters that indicate a problem giving rise to a risk of serious or imminent harm to a person.

Proposed Division 4 of Part 4 places some general limitations on ***incident reviewers*** (being members of serious adverse event review teams and assessors) relating to the recording and disclosure of information and the requirement to act in a fair and reasonable manner. It also makes it clear that an incident reviewer does not have authority to carry out an investigation relating to the competence of an individual. Certain information and documents relating to preliminary risk assessments, serious adverse event reviews or clinical incident reviews cannot be used in evidence in courts and other proceedings. Incident reviewers are also protected from personal liability.

Proposed Division 5 of Part 4 permits regulations to be made for the purposes of Part 4.

Schedule 6 [2] inserts a number of savings and transitional provisions relating to incidents occurring, and RCA teams created, before the substitution of Part 4.