Second Reading

The Hon. PENNY SHARPE (Parliamentary Secretary) [10.14 p.m.], on behalf of the Hon. John Hatzistergos: I move:

That this bill be now read a second time.

I seek leave to have the second reading speech incorporated in *Hansard*.

Leave granted.

I am pleased to bring before the House the Health Legislation Amendment Bill 2010. This important bill introduces a range of amendments to health-related legislation.

The bill includes significant amendments to the provisions of the Health Administration Act 1982 and the Private Health Facilities Act 2007 in respect of the appointment of root cause analysis teams to investigate serious clinical events in public hospitals and private health facilities.

Root cause analysis of serious clinical incidents in New South Wales public hospitals was introduced in 2005 in accordance with recommendations of the Walker inquiry into Camden and Campbelltown hospitals. The root cause analysis [RCA] provisions:

required RCA teams to be appointed by health services organisations in respect of the most serious category of clinical incident—so-called Severity Assessment Code 1 [SAC 1] incidents;

required RCA teams to investigate incidents and to provide a report setting out the underlying causes of the incident and any recommendations to avoid such incidents in the future;

gave statutory protections to the members of RCA teams, including a statutory privilege against the disclosure of information acquired or documents produced for the purpose of a root cause analysis; and

made it an offence for RCA team members to disclose information acquired in the course of a root cause analysis, except in accordance with the Act.

An important characteristic of root cause analysis is that RCA teams are prohibited from investigating the competence of individuals or making findings that identify individual patients or clinicians. For this reason root cause analysis has been described as an investigation into the "systemic" causes of incidents.

If during the course of an investigation an RCA team considers there are concerns about the performance, conduct or impairment of any individual, the RCA team must notify the chief executive of the health services organisation of the concern, but dealing with such concerns is not the function of the RCA team.

It is the responsibility of the chief executive to ensure the concerns raised by the RCA team are fully investigated and, if appropriate, referred to the relevant regulatory bodies, such as the health professional registration body or the Health Care Complaints Commission.

When the RCA provisions of the Health Administration Act were introduced they included a requirement for a review of the provisions, after a period of three years, to determine if the provisions were still appropriate.

A review of the RCA provisions was conducted by the New South Wales Health Department in 2009. The review included the release of a public discussion paper, extensive consultation with stakeholder groups and, in September 2009, the tabling of a report before Parliament containing recommended amendments to the Act. The bill before the House contains all of the amendments proposed by the review.

Whilst the departmental review related to the RCA provisions contained in division 6C of part 2 of the Health Administration Act, almost identical provisions are contained in part 4 of the Private Health Facilities Act 2007 in respect of private health facilities in New South Wales. It is therefore considered appropriate to amend both sets of provisions at the same time.

The review of the RCA provisions found that there was strong support amongst key stakeholders not only for retaining, but also for strengthening, the RCA statutory privilege provisions. RCA processes were clearly seen as a vital part of the ongoing improvement of quality and safety in both public and private health facilities in New South Wales.

Overall, the proposed amendments support the retention of statutory protections covering internal RCA processes, whilst also recognising the need to reinforce transparency in making the reports of the outcomes of root cause analysis more readily available.

One of the main concerns raised about the current RCA provisions was that the statutory privilege in section 200 of the Health Administration Act and section 46 of the Private Health Facilities Act against being compelled to disclose or produce RCA documents or communications applies only to RCA team members. The privilege does not apply to

individuals who were involved in or witnessed an incident in respect of any information they provide to the RCA team or to any experts or consultants advising the RCA team.

The statutory review was provided with evidence of instances where non-RCA team members have been cross-examined in court proceedings in relation to what was said during a root cause analysis. This is clearly contrary to the intention of the statutory protections and is a loophole which has the potential to undermine the confidence of those assisting RCA teams that any information they provide will be used only for the purpose of the root cause analysis.

It is therefore proposed to amend sections 200 of the Health Administration Act and 46 of the Private Health Facilities Act to restrict the disclosure by any person of any communication, whether written or verbal, made for the dominant purpose of a root cause analysis.

The "dominant purpose" test proposed is the same as the longstanding requirement for a claim of client legal privilege under the Evidence Act 1995. It will ensure the statutory protections cover clinicians and others who assist RCA teams, so as to facilitate greater co-operation and more effective review of serious incidents.

A further issue raised in the course of the review is the restriction of root cause analysis to so-called SAC 1 incidents. Whilst these are the most serious category of clinical incidents which clearly require root cause analysis other less serious incidents may nonetheless provide evidence of problems or inadequacies in the health system.

For example, a series of apparently minor clinical incidents will not meet the SAC 1 criteria when considered separately but when looked at together may give rise to a potentially concerning pattern of incidents. It is proposed to amend the legislation to permit the appointment of RCA teams to review a broader range of clinical incidents where the incident is considered to be the result of a serious systemic problem.

The bill also proposes a number of amendments to the statutory provisions requiring RCA teams to notify the hospital or health services organisation if it forms an opinion that an individual may have engaged in professional misconduct, unsatisfactory professional conduct or suffers from an impairment. RCA teams also have a discretion to notify of concerns of unsatisfactory professional performance by individuals.

The amendments to the notification provisions include:

First, the statutory review identified a gap in these provisions where the root cause analysis identifies an urgent quality or a safety issue that does not relate to an individual clinician. This may occur, for example, where an RCA team investigating a death under anaesthesia identifies a potential product defect that may have contributed to the death, and which the RCA team considers requires urgent consideration prior to formal completion of its report.

The bill therefore proposes amending the legislation to permit RCA teams to notify of concerns held by the team if the team is of the opinion that the incident it is considering raises matters that indicate a problem giving rise to a risk of serious and imminent harm to any person.

Second, the bill proposes an amendment to require an RCA team, at the time of making a notification of concerns about an individual clinician, to identify the clinician and the nature of the concern so as to expedite the further investigation of the matter by the organisation.

This amendment: will resolve current uncertainty as to the information that should be included in the notification; should increase the effectiveness and efficiency of any subsequent investigation of the matter; and will ensure fairness to the individual concerned by restricting the information contained in the notification to the minimum necessary to enable an appropriate investigation to be commenced.

Third, the bill proposes including definitions of "professional misconduct", "unprofessional conduct", "impairment" and "unsatisfactory professional performance" that reflect the definitions of these terms that New South Wales will adopt under the National Registration and Accreditation Scheme. These terms are currently not defined in the legislation and the amendments will introduce greater clarity as to the notification requirements of RCA teams.

The bill also proposes clarifying that the final report of an RCA team may be provided to any person, including patients, but that such reports cannot be adduced or admitted in evidence in any proceedings.

Whilst the current legislation is silent on the issue of disclosure of RCA reports the Government's view is that the availability of RCA reports is part of the "quid pro quo" for the protections given to RCA processes and team members. This proposed amendment will clarify the availability of RCA reports whilst at the same time broadening the restrictions on the use of such reports in court or other proceedings.

The bill proposes a number of other minor amendments to the RCA provisions, including:

Clarifying that an RCA team may decline to make any recommendations where, following its review of an incident, it reaches the conclusion that the incident does not give rise to any system-wide issues or concerns.

Replacing the current requirement that RCA teams are to apply "the rules of natural justice" with a requirement that they are to act in a "fair and reasonable manner", which is considered more appropriate given the role of RCA teams does not include investigating individual clinician performance or conduct.

Permitting the Clinical Excellence Commission or another appropriate independent body to carry out, on an annual basis, a review or audit of a sample of RCA investigations and reports.

The proposed amendments to the RCA provisions of the Health Administration Act and the Private Health Facilities Act have been the subject of extensive consultation and are strongly supported by key stakeholders, including New South Wales public hospitals, the private hospital sector, the Australian Medical Association, and major medical defence organisations and insurance bodies.

The Health Legislation Amendment Bill contains a number of other amendments to health related legislation. This includes amendments to the Health Services Act 1997 to address an increase in the number of reported incidents of aggressive behaviour resulting in harm to New South Wales ambulance officers. Figures from the Ambulance Service of New South Wales indicate such incidents have increased:

from 75 in 2006-07,

to 107 in 2007-08,

to 120 in 2008-09.

It is therefore proposed to amend the Health Services Act 1997 to create two new offences—

- First, the bill proposes introducing an offence of intentionally obstructing or hindering a New South Wales Ambulance Service officer who is in the course of providing ambulance services to a person. The proposed maximum penalty for the new offence is 50 penalty units or imprisonment for two years or both.

- Second, the bill proposes introducing a more serious level of offence where a person intentionally obstructs or hinders an ambulance officer by way of an act of violence on the ambulance officer. This proposed offence will carry a maximum penalty of five years' imprisonment.

These new offences send the strongest possible message to the community that violence towards ambulance officers carrying out their duties will not be tolerated by this Government.

A further minor amendment is proposed to the Health Services Act 1997 to give two or more statutory health corporations the same powers that area health services currently have under section 30 of the Act to agree, with the approval of the Minister, to work together to manage or jointly manage public hospitals, health services or health support services under the control of one of them.

This will allow statutory health corporations to coordinate or jointly manage hospitals and health services under their control under new models of care. For example, it will permit the proposed new statutory health corporation that will operate the Sydney children's hospitals at Westmead and Randwick to coordinate or jointly provide specific services with Justice Health, such as juvenile health or outreach programs.

The bill also proposes amending section 40 (1) of the Health Services Act, which currently allows an area health service to delegate its functions to a member of the New South Wales Health Service.

The proposed amendment will broaden the category of persons to whom area health service functions can be delegated. This will include visiting practitioners—who may be appointed to clinical management positions or sit on area health service committees and bodies appointed by the director-general or the Minister under legislation.

The bill also proposes an amendment to the Assisted Reproductive Technology Act 2007. This amendment will improve the capacity of the system to match up historical donors and offspring who wish to obtain information about each other.

The Assisted Reproductive Technology Act currently makes provision for a central assisted reproductive technology donor register that records the details of gamete donors and offspring born from donor ART procedures undertaken after commencement of the Act on 1 January 2010.

The Assisted Reproductive Technology Act also currently makes provision for a voluntary register to record details of donors and donor-conceived children who were conceived before commencement of the Act.

While the provisions in the Act concerning the voluntary register will allow for the collection and release of information, there is little scope to cross-reference donor and offspring information without obtaining information from ART providers.

It is therefore proposed to amend the Act to allow the director-general to require ART providers to provide relevant information to the director-general for the purpose of seeking to match-up the voluntarily entered records of donors and offspring, and release this information to donors and offspring with their consent.

Finally, the bill contains a number of other minor amendments to a number of health related Acts, including:

Amending the definition of "New South Wales Health" in section 4 of the Health Administration Act 1982 to include bodies under the control and direction of the Director-General of the New South Wales Health Department.

Amending section 34 (2) of the Guardianship Act 1987 to provide that the principle that the provisions of the Mental Health Act 2007 prevail over the provisions of part 5 of the Guardianship Act, in the event of inconsistency, also applies

Amending the Public Health Tobacco Act 2008 to increase the period for notification to the director-general by tobacco retailers of a change in required business information from seven days to 28 days.

This amendment will bring the notification requirements under the Act into line with other similar reporting requirements under Commonwealth and New South Wales legislation for changes in business particulars.

I commend the bill to the House.