

Version No. 020
Health Records Act 2001
No. 2 of 2001

Version incorporating amendments as at 2 April 2009

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The Parliament of Victoria enacts as follows:

PART 1—PRELIMINARY

1 Purpose

The purpose of this Act is to promote fair and responsible handling of health information by—

- (a) protecting the privacy of an individual's health information that is held in the public and private sectors; and
- (b) providing individuals with a right of access to their health information; and
- (c) providing an accessible framework for the resolution of complaints regarding the handling of health information.

2 Commencement

- (1) Subject to subsection (2), this Act comes into operation on a day or days to be proclaimed.
- (2) If a provision referred to in subsection (1) does not come into operation before 1 July 2002, it comes into operation on that day.

3 Definitions

(1) In this Act—

child means a person under the age of 18 years;

consent means express consent or implied consent;

correct, in relation to health information, means to alter that information by way of amendment, deletion or addition;

Council has the same meaning as in the **Local Government Act 1989**;

disability has the same meaning as in the **Disability Services Act 1991**;

domestic partner of a person means—

- (a) a person who is in a registered relationship with the person; or
- (b) an adult person to whom the person is not married but with whom the person is in a relationship as a couple where one or each of them provides personal or financial commitment and support of a domestic nature for the material benefit of the other, irrespective of their genders and whether or not they are living under the same roof, but does not include a person who provides domestic support and personal care to the person—
 - (i) for fee or reward; or
 - (ii) on behalf of another person or an organisation (including a government or government agency, a body corporate or a charitable or benevolent organisation);

S. 3(1) def. of *domestic partner* inserted by No. 27/2001 s. 6(Sch. 4 item 4.1(a)), substituted by No. 12/2008 s. 73(1)(Sch. 1 item 29.1).

enactment means an Act or a Commonwealth Act or an instrument of a legislative character made under an Act or a Commonwealth Act;

Federal Privacy Commissioner means Privacy Commissioner appointed under the Privacy Act 1988 of the Commonwealth;

generally available publication means a publication (whether in paper or electronic form) that is generally available to members of the public and includes information held on a public register;

health information means—

- (a) information or an opinion about—
 - (i) the physical, mental or psychological health (at any time) of an individual; or
 - (ii) a disability (at any time) of an individual; or
 - (iii) an individual's expressed wishes about the future provision of health services to him or her; or
 - (iv) a health service provided, or to be provided, to an individual—
that is also personal information; or
- (b) other personal information collected to provide, or in providing, a health service; or
- (c) other personal information about an individual collected in connection with the donation, or intended donation, by the individual of his or her body parts, organs or body substances; or

- (d) other personal information that is genetic information about an individual in a form which is or could be predictive of the health (at any time) of the individual or of any of his or her descendants—

but does not include health information, or a class of health information or health information contained in a class of documents, that is prescribed as exempt health information for the purposes of this Act generally or for the purposes of specified provisions of this Act;

Health Privacy Principle means any of the Health Privacy Principles set out in Schedule 1;

HPP means Health Privacy Principle;

health service means—

- (a) an activity performed in relation to an individual that is intended or claimed (expressly or otherwise) by the individual or the organisation performing it—
- (i) to assess, maintain or improve the individual's health; or
 - (ii) to diagnose the individual's illness, injury or disability; or
 - (iii) to treat the individual's illness, injury or disability or suspected illness, injury or disability; or
- (b) a disability service, palliative care service or aged care service; or
- (c) the dispensing on prescription of a drug or medicinal preparation by a pharmacist; or

-
- (d) a service, or a class of service, provided in conjunction with an activity or service referred to in paragraph (a), (b) or (c) that is prescribed as a health service—

but does not include a health service, or a class of health service, that is prescribed as an exempt health service for the purposes of this Act generally or for the purposes of specified provisions of this Act or to the extent that it is prescribed as an exempt health service;

health service provider means an organisation that provides a health service in Victoria to the extent that it provides such a service but does not include a health service provider, or a class of health service provider, that is prescribed as an exempt health service provider for the purposes of this Act generally or for the purposes of specified provisions of this Act or to the extent that it is prescribed as an exempt health service provider;

Health Services Commissioner means Health Services Commissioner appointed under the **Health Services (Conciliation and Review) Act 1987** and includes the Acting Health Services Commissioner under that Act;

Health Services Review Council means the Health Services Review Council established under the **Health Services (Conciliation and Review) Act 1987**;

identifier means an identifier (which is usually, but need not be, a number and does not include an identifier that consists only of the individual's name) that is—

- (a) assigned to an individual in conjunction with or in relation to the individual's health information by an organisation for the purpose of uniquely identifying that individual, whether or not it is subsequently used otherwise than in conjunction with or in relation to health information; or
- (b) adopted, used or disclosed in conjunction with or in relation to the individual's health information by an organisation for the purpose of uniquely identifying that individual;

illness means a physical, mental or psychological illness, and includes a suspected illness;

immediate family member of an individual means a person who is—

- (a) a parent, child or sibling of the individual; or
- (b) a spouse or domestic partner of the individual; or
- (c) a member of the individual's household who is a relative of the individual; or
- (d) a person nominated to a health service provider by the individual as a person to whom health information relating to the individual may be disclosed;

individual means a natural person;

S. 3(1) def. of
*immediate
family
member*
amended by
No. 27/2001
s. 6(Sch. 4
item 4.1(b)).

law enforcement agency means—

- (a) the police force of Victoria or of any other State or of the Northern Territory; or
- (b) the Australian Federal Police; or
- (c) the Australian Crime Commission; or
- (d) the Commissioner appointed under section 8A of the **Corrections Act 1986**; or
- (e) a commission established by a law of Victoria or the Commonwealth or of any other State or a Territory with the function of investigating matters relating to criminal activity generally or of a specified class or classes; or
- (f) an agency responsible for the performance of functions or activities directed to the prevention, detection, investigation, prosecution or punishment of criminal offences or breaches of a law imposing a penalty or sanction for a breach; or
- (g) an agency responsible for the performance of functions or activities under an Act directed to the prevention, detection, investigation or remedying of, or the imposing of sanctions in relation to, seriously improper conduct; or
- (h) an agency responsible for the holding of a person in custody or for the execution, enforcement or implementation of an order or decision made by a court or tribunal, including an agency that—

S. 3(1) def. of *law enforcement agency* amended by No. 52/2003 s. 52(Sch. 1 item 5).

- (i) executes warrants; or
- (ii) provides correctional services, including a contractor within the meaning of the **Corrections Act 1986** or a sub-contractor of that contractor, but only in relation to a function or duty or the exercise of a power conferred on it by or under that Act; or
- (iii) makes decisions relating to the release of persons from custody; or
- (i) an agency responsible for the protection of the public revenue under a law administered by it; or
- (j) the Australian Security Intelligence Organization; or
- (k) the Australian Secret Intelligence Service; or
- (l) a prescribed body;

S. 3(1) def. of
law enforcement function
amended by
Nos 52/2008
s. 250, 68/2008
s. 77.

law enforcement function means one or more of the following—

- (a) the prevention, detection, investigation, prosecution or punishment of criminal offences or breaches of a law imposing a penalty or sanction;
- (b) a function or activity under an Act directed to the prevention, detection, investigation or remedying of, or the imposing of sanctions in relation to, seriously improper conduct;

-
- (c) the prevention, detection or investigation of conduct that could found an application for a family violence intervention order under the **Family Violence Protection Act 2008**;
 - (ca) the prevention, detection or investigation of conduct that could found an application for an intervention order under the **Stalking Intervention Orders Act 2008**;
 - (d) the preparation for, or conduct of, proceedings before any court or tribunal, or execution, enforcement or implementation of the orders or decisions made by a court or tribunal;
 - (e) the holding of a person in custody or the provision of correctional services, including by a contractor within the meaning of the **Corrections Act 1986** or a sub-contractor of that contractor, but only in relation to a function or duty or the exercise of a power conferred on it by or under that Act;
 - (f) in the case of the Australian Security Intelligence Organization or the Australian Secret Intelligence Service, the performance of a function directed to the protection of the national security;

legal representative, in relation to a deceased individual, means a person—

- (a) holding office as executor of the will of the deceased individual where probate of the will has been granted or resealed in Victoria or any other State or Territory; or

-
- (b) holding office in Victoria or any other State or Territory as administrator of the estate of the deceased individual;

news activity means—

- (a) the gathering of news for the purposes of dissemination to the public or any section of the public; or
- (b) the preparation or compiling of articles or programs of or concerning news, observations on news or current affairs for the purposes of dissemination to the public or any section of the public; or
- (c) the dissemination to the public or any section of the public of any article or program of or concerning news, observations on news or current affairs;

news medium means any organisation whose business, or whose principal business, consists of a news activity;

organisation means a person or body that is an organisation to which this Act applies by force of Division 1 or 2 of Part 2;

parent, in relation to a child, includes—

- (a) a step-parent;
- (b) an adoptive parent;
- (c) a foster parent;
- (d) a guardian;
- (e) a person who has custody or daily care and control—

of the child;

personal information means information or an opinion (including information or an opinion forming part of a database), whether true or not, and whether recorded in a material form or not, about an individual whose identity is apparent, or can reasonably be ascertained, from the information or opinion, but does not include information about an individual who has been dead for more than 30 years;

Privacy Commissioner means Privacy Commissioner appointed under Part 7 of the **Information Privacy Act 2000**;

private sector organisation means a person or body that is referred to in Division 2 of Part 2;

public register means a document held by a public sector agency or a Council and open to inspection by members of the public (whether or not on payment of a fee) by force of a provision made by or under an Act other than the **Freedom of Information Act 1982** or the **Public Records Act 1973** containing information that—

- (a) a person or body was required or permitted to give to that public sector agency or Council by force of a provision made by or under an Act; and
- (b) would be health information if the document were not a generally available publication;

public sector agency means a public service body or public entity within the meaning of the **Public Administration Act 2004**;

S. 3(1) def. of *public sector agency* substituted by No. 108/2004 s. 117(1) (Sch. 3 item 95).

public sector organisation means a person or body that is referred to in Division 1 of Part 2;

registered health service provider has the same meaning as ***registered provider*** has in the **Health Services (Conciliation and Review) Act 1987**;

registered medical practitioner means a medical practitioner registered under the **Health Professions Registration Act 2005**;

S. 3(1) def. of *registered medical practitioner* amended by No. 97/2005 s. 182(Sch. 4 item 26).

registration board means a body that is—

- (a) listed in the Schedule to the **Health Services (Conciliation and Review) Act 1987**; or
- (b) prescribed as a registration board for the purposes of that Act;

relative of an individual means a grandparent, grandchild, uncle, aunt, nephew or niece of the individual;

sibling of an individual includes a half-brother, half-sister, adoptive brother, adoptive sister, step-brother or step-sister of the individual;

spouse of a person means a person to whom the person is married;

S. 3(1) def. of *spouse* inserted by No. 27/2001 s. 6(Sch. 4 item 4.1(a)).

State contract means a contract between—

- (a) a public sector organisation; and

(b) another person or body that is not a public sector organisation—

under which services are to be provided to one (the outsourcing organisation) by the other (the outsourced service provider) in connection with the performance of functions of the outsourcing organisation, including services that the outsourcing organisation is to provide to other persons or bodies;

the Tribunal means the Victorian Civil and Administrative Tribunal established by the **Victorian Civil and Administrative Tribunal Act 1998**.

Note

Document is defined by section 38 of the **Interpretation of Legislation Act 1984**.

- (2) A reference in this Act to an outsourced service provider is a reference to a person or body in the capacity of outsourced service provider and includes a reference to a subcontractor of the outsourced service provider (or of another such subcontractor) for the purposes (whether direct or indirect) of the outsourcing contract.
- (3) For the purposes of the definition of *domestic partner* in subsection (1)—
- (a) *registered relationship* has the same meaning as in the **Relationships Act 2008**; and
 - (b) in determining whether persons who are not in a registered relationship are domestic partners of each other, all the circumstances of their relationship are to be taken into account, including any one or more of the matters referred to in section 35(2) of the

S. 3(3)
inserted by
No. 27/2001
s. 6(Sch. 4
item 4.2),
substituted by
No. 12/2008
s. 73(1)(Sch. 1
item 29.2).

Relationships Act 2008 as may be relevant in a particular case; and

- (c) a person is not a domestic partner of another person only because they are co-tenants.

4 Interpretative provisions

- (1) Without limiting section 37(a) of the **Interpretation of Legislation Act 1984**, a reference in this Act to an organisation using a neuter pronoun includes a reference to an organisation that is a natural person, unless the contrary intention appears.
- (2) If a provision of this Act refers to a HPP by a number, the reference is a reference to the HPP designated by that number.

5 When does an organisation hold health information?

For the purposes of this Act, an organisation holds health information if the information is contained in a document that is in the possession or under the control of the organisation, whether alone or jointly with other persons or bodies, irrespective of where the document is situated, whether in or outside Victoria.

6 Objects of Act

The objects of this Act are—

- (a) to require responsible handling of health information in the public and private sectors;
- (b) to balance the public interest in protecting the privacy of health information with the public interest in the legitimate use of that information;
- (c) to enhance the ability of individuals to be informed about their health care or disability services;

- (d) to promote the provision of quality health services, disability services and aged care services.

7 Relationship of this Act to other laws

- (1) If a provision made by or under this Act is inconsistent with a provision made by or under any other Act, that other provision prevails and the provision made by or under this Act is (to the extent of the inconsistency) of no force or effect.
- (2) Without limiting subsection (1), nothing in this Act affects the operation of the **Freedom of Information Act 1982** (except as otherwise provided by that Act) or any right, privilege, obligation or liability conferred or imposed under that Act or any exemption arising under that Act.

8 Nature of rights created by this Act

- (1) Nothing in this Act—
- (a) gives rise to any civil cause of action; or
- (b) without limiting paragraph (a), operates to create in any person any legal right enforceable in a court or tribunal—
- otherwise than in accordance with the procedures set out in this Act.
- (2) A contravention of this Act does not create any criminal liability except to the extent expressly provided by this Act.

9 Act binds the Crown

- (1) This Act binds the Crown in right of Victoria and, so far as the legislative power of the Parliament permits, the Crown in all its other capacities.
- (2) Nothing in this Act makes the Crown in any of its capacities liable to be prosecuted for an offence.

PART 2—APPLICATION OF THIS ACT

Division 1—Public sector organisations

10 Application to public sector

- (1) This Act applies to—
- (a) a Minister;
 - (b) a Parliamentary Secretary, including the Parliamentary Secretary of the Cabinet;
 - (c) a member of the Parliament of Victoria;
 - (d) a public sector agency;
 - (e) a Council;
 - (f) a body established or appointed for a public purpose by or under an Act;
 - (g) a body established or appointed for a public purpose by the Governor in Council, or by a Minister, otherwise than under an Act;
 - (h) a person holding an office or position established by or under an Act or to which he or she was appointed by the Governor in Council, or by a Minister, otherwise than under an Act;
 - (i) a court or tribunal;
 - (j) the police force of Victoria;
 - (k) a denominational hospital within the meaning of the **Health Services Act 1988**;
 - (l) a privately operated hospital within the meaning of the **Health Services Act 1988**;

- (m) any other body that is declared, or to the extent that it is declared, by an Order under subsection (2) to be an organisation for the purposes of this subsection—
that is a health service provider or collects, holds or uses health information.
- (2) The Governor in Council may, by Order published in the Government Gazette, declare a body to be, either wholly or to the extent specified in the Order, an organisation for the purposes of subsection (1).
- (3) A person or body to which this Act applies by force of subsection (1) is an organisation for the purposes of this Act, either wholly or to the relevant extent.
- (4) This section is subject to Division 3.
- (5) Despite subsections (1) and (2), nothing in this Act applies to an agency within the meaning of the Privacy Act 1988 of the Commonwealth.

S. 10(5)
inserted by
No. 98/2003
s. 12(1).

Division 2—Private sector organisations

11 Application to private sector

- (1) This Act applies to—
- (a) a natural person;
 - (b) a body corporate;
 - (c) a partnership;
 - (d) a trust;
 - (e) any other unincorporated association or body—

that is a health service provider or collects, holds or uses health information and is not, or to the extent that it is not, a person or body to which this Act applies by force of section 10(1).

S. 11(4)
inserted by
No. 98/2003
s. 12(2).

- (2) A person or body to which this Act applies by force of subsection (1) is an organisation for the purposes of this Act.
- (3) This section is subject to Division 3.
- (4) Despite subsection (1), nothing in this Act applies to an agency within the meaning of the Privacy Act 1988 of the Commonwealth.

12 Effect of outsourcing

- (1) An act or practice done or engaged in by an outsourced service provider under a State contract that is an interference with the privacy of an individual must, for the purposes of this Act, be taken to have been done or engaged in by the outsourcing organisation as well as the outsourced service provider if the provision of this Act or the HPP to which the act or practice is contrary, or with which it is inconsistent, is not capable of being enforced against the outsourced service provider in accordance with the procedures set out in this Act.
- (2) Section 92(1) does not apply to an act done or practice engaged in by an outsourced service provider acting within the scope of a State contract.

Division 3—Exemptions

13 Personal, family or household affairs

Nothing in this Act or in any HPP applies in respect of the collection, holding, management, use, disclosure or transfer of health information by an individual, or health information held by an individual, only for the purposes of, or in connection with, his or her personal, family or household affairs.

14 Courts, tribunals, etc.

Nothing in this Act or in any HPP applies in respect of the collection, holding, management, use, disclosure or transfer of health information—

- (a) in relation to its or his or her judicial or quasi-judicial functions, by—
 - (i) a court or tribunal; or
 - (ii) the holder of a judicial or quasi-judicial office or other office pertaining to a court or tribunal in his or her capacity as the holder of that office; or
- (b) in relation to those matters which relate to the judicial or quasi-judicial functions of the court or tribunal, by—
 - (i) a registry or other office of a court or tribunal; or
 - (ii) the staff of such a registry or other office in their capacity as members of that staff.

15 Publicly available health information

- (1) Nothing in this Act or in any HPP applies to a document containing health information, or to the health information contained in a document, that is—
 - (a) a generally available publication unless the health information has been obtained by contravention of this Act and the organisation which seeks to rely on this exemption knows of the contravention; or
 - (b) kept in a library, art gallery or museum for the purposes of reference, study or exhibition; or

- (c) a public record under the control of the Keeper of Public Records that is available for public inspection in accordance with the **Public Records Act 1973**; or
 - (d) archives within the meaning of the Copyright Act 1968 of the Commonwealth.
- (2) Nothing in this Act or in any HPP applies to health information that is generally available to members of the public unless the health information has been obtained by contravention of this Act and the organisation which seeks to rely on this exemption knows of the contravention.

16 Freedom of Information Act 1982

Except as otherwise provided by the **Freedom of Information Act 1982**, nothing in Part 5, HPP 5.2 or HPP 6 applies—

- (a) to a document containing health information, or to the health information contained in a document, that is—
 - (i) a document of an agency within the meaning of the **Freedom of Information Act 1982**; or
 - (ii) an official document of a Minister within the meaning of that Act—

and access can only be required to be granted to that document or information, and that information can only be corrected, in accordance with the procedures set out in, and in the form required or permitted by, that Act; or

-
- (b) to a document containing health information, or to the health information contained in a document, to which access would not be granted under the **Freedom of Information Act 1982** because of section 5(3) or 6 of that Act.

17 News media

- (1) Nothing in HPP 1, HPP 2 or HPP 9 applies to the collection, use, disclosure or transfer of health information by a news medium in connection with its news activities.
- (2) Nothing in Part 5, HPP 5.2 or HPP 6 applies to health information held by a news medium in connection with its news activities unless and until the information is actually disseminated to the public or any section of the public.

S. 17(1)
amended by
No. 14/2002
s. 48(a)(b).

PART 3—PRIVACY OF HEALTH INFORMATION

18 What is an interference with privacy?

For the purposes of this Act, an act or practice of an organisation is an interference with the privacy of an individual if, and only if—

- (a) the act or practice breaches Part 5 or a Health Privacy Principle in relation to health information that relates to the individual; or
- (b) the act or practice breaches HPP 7 in relation to an identifier; or
- (c) the act or practice is or results in a failure to provide access to health information that relates to the individual in accordance with Part 5 or HPP 6.

19 Health Privacy Principles

- (1) The Health Privacy Principles are set out in Schedule 1.
- (2) Nothing in any Health Privacy Principle affects the operation or extent of any exemption arising under Division 3 of Part 2 and those Principles must be construed accordingly.

20 Application of HPPs

- (1) HPP 1 applies only in relation to health information collected after the commencement of this section.
- (2) HPP 3, to the extent that it applies to the collection of health information, applies only in relation to health information collected after the commencement of this section.
- (3) HPP 6 applies to health information as specified in section 25.

-
- (4) The remaining Health Privacy Principles (including HPP 3 to the extent that it applies to the use, holding or disclosure of health information) apply in relation to all health information, whether collected by the organisation before or after the commencement of this section.
- (5) HPP 8 applies only in relation to transactions entered into after the commencement of this section.
- (6) To avoid doubt it is declared that, despite the commencement of section 19 and Schedule 1 on 1 March 2002, an act or practice that occurs at any time before the commencement of Part 6 does not constitute an interference with the privacy of an individual—
- (a) about which a complaint may be made under section 45(1); or
 - (b) that may be dealt with in any way by the Health Services Commissioner under this Act, including by the service of a compliance notice under section 66(1)—
- whether before or after the commencement of that Part.

S. 20(6)
inserted by
No. 14/2002
s. 49.

21 Organisation to comply with HPPs

- (1) Subject to this section and section 20, an organisation must not do an act, or engage in a practice, that is an interference with the privacy of an individual.
- (2) Subsection (1) does not apply if the organisation proves that, in the circumstances, compliance with this Act or the Health Privacy Principle would have contravened another Act, regulations made under another Act or an order of a tribunal or of a court of competent jurisdiction.

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- (3) Subsection (1) does not apply to the doing of an act, or the engaging in of a practice, by an organisation that, but for this subsection, would constitute a breach of HPP 1 or HPP 2, if—
- (a) the doing of the act or the engaging in of the practice is necessary for the performance of a contract to which the organisation is a party entered into by the organisation before 23 November 2000; and
 - (b) the act is done or the practice is engaged in before the second anniversary of the commencement of section 20 or the end of any extension of that period granted in relation to that contract under subsection (4).
- (4) On the application of an organisation before the second anniversary of the commencement of section 20 or before the expiry of any extension of that period granted under this subsection, the Health Services Commissioner may grant an extension of that period in relation to a specified contract if he or she is of the opinion that the organisation is doing its best—
- (a) to comply with HPP 1 or HPP 2 consistent with its obligations under the contract; and
 - (b) to seek to have the contract re-negotiated to enable the organisation to comply fully with HPP 1 or HPP 2.
- (5) Subsection (1) does not apply to the doing of an act, or the engaging in of a practice, by an organisation that, but for this subsection, would constitute a breach of HPP 2, in relation to health information collected by the organisation before the commencement of section 20, if—
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- (a) the Health Services Commissioner, on the application of the organisation, grants the organisation an exemption from that Principle in relation to specified information or information of a specified class for a specified period; and
 - (b) the act is done or the practice is engaged in, in relation to information to which the exemption applies—
 - (i) before the second anniversary of the commencement of section 20; and
 - (ii) during the period specified in the exemption.
- (6) The Health Services Commissioner may grant an exemption under subsection (5) if he or she is of the opinion that, in the particular circumstances, it is in the public interest for the use or disclosure to continue otherwise than in compliance with HPP 2.
- (7) Subsection (1) does not apply to the doing of an act, or the engaging in of a practice, by an organisation that, but for this subsection, would constitute a breach of HPP 2, in relation to health information collected by the organisation before the commencement of section 20, if the act is done, or the practice is engaged in, in the prescribed circumstances.
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PART 4—GUIDELINES

22 Health Services Commissioner may issue, approve or vary guidelines

- (1) For the purposes of HPP 1.1(e)(iii), HPP 1.1(f), HPP 2.2(e), HPP 2.2(f)(vi), HPP 2.2(g)(iii), HPP 2.2(h), HPP 2.5(g), HPP 6.1(a), HPP 6.1(b) and HPP 10.2, the Health Services Commissioner may, by notice published in the Government Gazette—
 - (a) issue guidelines; or
 - (b) approve, in whole or in part and with or without modification, guidelines that are prepared or issued by a public sector agency or any other person or body; or
 - (c) vary any guidelines as issued or approved by the Health Services Commissioner.
- (2) Before exercising a power conferred by subsection (1), the Health Services Commissioner must cause a notice of intention to issue, approve or vary guidelines to be published—
 - (a) in the Government Gazette; and
 - (b) in a newspaper circulating generally in Victoria.
- (3) A notice under subsection (2) must—
 - (a) state where copies of the guidelines (as proposed to be issued, approved or varied) can be obtained; and
 - (b) specify a period of not less than 28 days after the date of the notice for making submissions to the Health Services Commissioner on them.

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- (4) After considering any submissions received, the Health Services Commissioner may proceed under subsection (1), as proposed or with any amendments that the Health Services Commissioner considers appropriate.
 - (5) For the purposes of subsection (1), the Health Services Commissioner may only issue, approve or vary guidelines that would have the effect of lessening the level of privacy protection afforded by the relevant Health Privacy Principle if he or she is satisfied that the public interest to be protected by the guidelines, or the guidelines as varied, substantially outweighs the public interest in maintaining that level of privacy protection.
 - (6) The guidelines may apply, adopt or incorporate any matter contained in any document, whether—
 - (a) wholly or partially or as amended by the guidelines; or
 - (b) as in force at the time the guidelines are made or at any time before then; or
 - (c) as in force from time to time.
 - (7) The guidelines—
 - (a) may be of general or limited application;
 - (b) may differ according to differences in time, place or circumstances.

23 Revocation of issue or approval

The Health Services Commissioner may, by notice published in the Government Gazette, revoke an issue or approval of guidelines under section 22 if he or she is no longer satisfied of the matter that he or she had to be satisfied of to issue or approve the guidelines.

24 Disallowance by Governor in Council

The Governor in Council may at any time, by notice published in the Government Gazette, disallow a decision of the Health Services Commissioner to issue, approve or vary guidelines or to revoke an issue or approval of guidelines.

PART 5—ACCESS TO HEALTH INFORMATION

Division 1—Right of access

25 Right of access

- (1) Subject to subsections (2) and (3), an individual has a right of access, in accordance with this Part and HPP 6, to health information relating to the individual held¹ by a health service provider or any other organisation.
- (2) Subsection (1) applies to all health information collected on or after the commencement of this section.
- (3) Subsection (1) also applies to the following health information collected before the commencement of this section—
 - (a) a history of the health, an illness or a disability of the individual; or
 - (b) any findings on an examination of the individual in relation to the health, an illness or a disability of the individual; or
 - (c) the results of an investigation into the health, an illness or a disability of the individual; or
 - (d) a diagnosis, or preliminary diagnosis, of an illness or disability of the individual; or
 - (e) a plan of management, or proposed plan of management, of the treatment or care of an illness or disability of the individual; or
 - (f) action taken or services provided (whether or not in accordance with a plan of management) by or under the direction or referral of a health service provider in relation to the individual; or

- (g) personal information about the individual collected in connection with the donation, or intended donation, by the individual of his or her body parts, organs or body substances; or
- (h) genetic information about an individual in a form which is or could be predictive of the health, at any time, of the individual or of any of his or her descendants.

26 No access to health information where threat to life or health of individual or another person²

An organisation must not give an individual access under this Act to his or her health information, or part of his or her health information, if the organisation believes on reasonable grounds, having regard to the guidelines, if any, issued or approved by the Health Services Commissioner under section 22 for the purposes of HPP 6.1(a), that the provision of the health information, or that part of the health information, would pose a serious threat to the life or health of the individual or any other person.

27 No access to health information where information given in confidence³

- (1) Subject to subsection (3), an organisation must not give an individual access under this Act to his or her health information if the health information is subject to confidentiality within the meaning of this section.
- (2) Health information relating to an individual is subject to confidentiality to the extent that it is given in confidence to the person who recorded the health information by a person other than—
 - (a) the individual; or

(b) a health service provider in the course of, or otherwise in relation to, the provision of health services to the individual—

with a request that the information not be communicated to the individual to whom it relates.

(3) A person who gives health information in confidence may consent to the information being communicated to the individual to whom it relates.

28 How right of access may be exercised

- (1) A right of access may be exercised in any one or more of the following ways—
- (a) by inspecting the health information or, if the health information is stored in electronic form, a print-out of the health information, and having the opportunity to take notes of its contents;
 - (b) by receiving a copy of the health information;
 - (c) by viewing the health information and, if it is held by a health service provider, having its content explained.
- (2) If the organisation holding the health information is not a health service provider, the organisation may agree to provide an explanation of its content to an individual exercising a right to view the information.
- (3) An explanation under subsection (1)(c) or (2) is to be provided—
- (a) by the organisation holding the information if the organisation is a suitably qualified health service provider and is willing to do so; or

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- (b) if paragraph (a) does not apply, by a suitably qualified health service provider who practises in Victoria and—
- (i) is nominated by the organisation and has consented to being so nominated and is approved by the individual to whom the health information relates; or
 - (ii) if the individual does not approve the health service provider nominated under subparagraph (i), is nominated by the individual and has consented to being so nominated.
- (4) Despite anything to the contrary in this section, a right of access to health information referred to in section 25(3) may only be exercised—
- (a) in a way provided by this section, with the agreement of the organisation holding the health information; or
 - (b) in the absence of such an agreement, by receiving an accurate summary of the health information.

29 Providing access

- (1) An organisation must provide access to an individual's health information—
- (a) in the case of a request to inspect the health information, or a print-out of the health information, by making the health information or print-out available to the individual immediately or at a date, time and place in Victoria specified in a written notice given to the individual;

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- (b) in the case of a request to receive a copy of the health information, by giving to the individual—
- (i) a copy of the health information; or
 - (ii) if the individual agrees, an accurate summary of the health information;
- (c) in the case of a request to view the health information, by making the health information available to the individual;
- (d) if a request to view the health information is accompanied by a request to have its content explained and the organisation is required, or has agreed, to provide that explanation, by explaining its content immediately or giving to the individual a written notice stating—
- (i) if the organisation is a suitably qualified health service provider and is willing to do so, that the organisation will be available to explain the health information at a date, time and place in Victoria specified in the notice; or
 - (ii) in any other case, the name and address of a suitable health service provider who will be available in Victoria by arrangement with the individual, to explain the health information.
- (2) Despite anything to the contrary in this section, an organisation is not required to provide access in accordance with this section to an individual's health information of a kind referred to in section 25(3) but may agree to do so and, in the absence of such an agreement, must give to the individual an accurate summary of the health information.
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30 Individual may authorise another person to be given access

If an individual—

- (a) has a right of access; and
- (b) has signed a written authority for access to be provided to a person named in the authority—

the person so named must be given access to the health information.

31 Organisation may require evidence of identity or authority

Before giving a person access to health information, the organisation must take reasonable steps to be satisfied about that person's right to it and, for this purpose, may require evidence of—

- (a) the person's identity; and
- (b) if an individual has authorised the organisation to provide access to that person, the authority of the individual; and
- (c) if the person seeking access is an authorised representative of the individual within the meaning of section 85(6) or the legal representative of a deceased individual, the authority of that person.

32 Fees

- (1) An organisation is not required to charge a fee for providing access to health information under this Act.
- (2) A fee may not be charged under this Act for providing a manner of access to health information (except under section 29(1)(d)) unless a maximum fee has been prescribed for that manner of access.

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- (3) An organisation must not charge a fee exceeding the prescribed maximum fee.
 - (4) A person who gives an explanation of health information to an individual under section 29(1)(d) may charge a fee for the service that does not exceed the amount of the person's usual fee for a consultation of a comparable duration.
 - (5) An organisation must not charge for the lodgment of a request for access.

Division 2—Request for access

33 Request for access

- (1) An individual who has a right of access under section 25 to health information may request the organisation holding the information to provide access to it.
- (2) An organisation may assist an individual in making a request by advising him or her about the different ways in which a right of access may be exercised.
- (3) A request must—
 - (a) state the name and, unless it is already known to the organisation, the address of the individual; and
 - (b) sufficiently identify the health information to which access is sought; and
 - (c) specify the way in which the individual wishes to have access, being a way referred to in section 28; and
 - (d) be in writing if it is—
 - (i) a request by an authorised representative within the meaning of section 85(6); or

- (ii) a request by a legal representative of a deceased individual.
- (4) If the request is made orally, the organisation possessing the health information—
 - (a) may, as soon as reasonably practicable, ask the individual to make the request in writing; and
 - (b) if the organisation does so, need not take any further action in respect of the oral request.

34 Response to request

- (1) This section applies to a request made under section 33, other than an oral request which the organisation has asked the individual to make in writing.
- (2) Within 45 days after receiving a request, the organisation must—
 - (a) give to the individual a written reason for refusal of access to the health information, being a reason for refusal provided by this Part or HPP 6; or
 - (b) if the organisation is charging a fee in accordance with section 32 for giving access—
 - (i) give to the individual a written notice stating that the organisation will give access to the health information on payment of the fee specified in the notice; and
 - (ii) give access to the health information in accordance with section 29 or HPP 6.2 within 7 days after payment of the fee or 45 days after receiving the request, whichever is the later; or

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- (c) in every other case, give access to the health information in accordance with section 29 or HPP 6.2 as soon as practicable but not later than 45 days after receiving the request.
- (3) If the organisation gives a notice under subsection (2)(a) that relates only to a part of the health information held by the organisation, the organisation must comply with subsection (2) in respect of the remainder of the health information.

35 Refusal of access

An organisation is taken to have refused access to the health information if—

- (a) the organisation fails to comply with a requirement of section 29 or 34; or
- (b) in the case of a notice given by the organisation under section 29(1)(a) or 29(1)(d)(i)—
- (i) the notice does not specify a date, time or place that, in all the circumstances, is reasonable; or
 - (ii) the organisation unreasonably fails to allow inspection of the health information, or to give a reasonable explanation, in accordance with the notice; or
- (c) in the case of a notice given by the organisation under section 29(1)(d)(ii), the health service provider specified in the notice unreasonably fails—
- (i) to make an arrangement with the individual to explain the health information; or
 - (ii) to comply with an arrangement so made.

Division 3—Refusal of access on ground of threat to life or health of the individual requesting access

36 Application

This Division applies if an organisation that holds health information about an individual refuses under section 26 to provide the individual with access to the health information on the ground that providing access would pose a serious threat to the life or health of the individual.

37 Offer to discuss health information

- (1) If the organisation considers that it would be desirable for a suitably qualified health service provider to discuss the health information with the individual, the organisation may include in, or attach to, the notice of refusal an offer—
 - (a) to discuss the health information with the individual, if the organisation is a suitably qualified health service provider; or
 - (b) to arrange for a specified health service provider who practises in Victoria, is suitably qualified and has consented to being nominated, to discuss the health information with the individual.
- (2) The organisation must advise the individual in the notice of refusal that he or she may nominate a health service provider in the circumstances referred to in section 38, whether or not the organisation makes an offer under subsection (1).

38 Individual may nominate health service provider to assess ground for refusal etc.

- (1) If—
 - (a) the organisation does not make an offer referred to in section 37; or

- (b) the individual does not accept an offer made under that section; or
- (c) the individual is not satisfied with the outcome of the discussion—

the individual may, within the period specified in subsection (2), give a written notice to the organisation nominating a health service provider for the purposes of this Division.

- (2) The period for giving a written notice under subsection (1) is—
 - (a) the period of 21 days after receiving the notice of refusal, if the organisation does not make an offer referred to in section 37 or the individual does not accept such an offer; or
 - (b) the period of 21 days after a discussion with the organisation or a health service provider held under such an offer.
- (3) An individual may only nominate a health service provider who has consented to being nominated for the purposes of this Division.

39 Organisation may object to nomination

- (1) Subject to subsection (2), if—
 - (a) an organisation receives a notice under section 38(1) nominating a health service provider; and
 - (b) the organisation believes on reasonable grounds that the nominated health service provider is not suitable to act as the nominated health service provider—

the organisation may, within 14 days after receiving the notice, give a written notice to the individual—

- (c) stating that the organisation objects to the nominated health service provider and specifying the ground of the objection; and
 - (d) if the organisation considers it appropriate to do so, suggesting the class of health service providers from which a health service provider should be nominated.
- (2) Subsection (1) does not apply in any of the following cases—
- (a) if the health service provider who recorded the health information and the nominated health service provider are registered with the same registration board;
 - (b) if the nominated health service provider is a registered medical practitioner and has the ability to understand and interpret the health information;
 - (c) if the nominated health service provider provides the same kind of service as the health service provider who recorded the health information and the nominated health service provider has the ability to understand and interpret the health information.

40 Lapsing of nomination

- (1) The nomination of a health service provider lapses if—
- (a) the organisation gives a notice in accordance with section 39(1); or
 - (b) the nominated health service provider—
 - (i) dies; or
 - (ii) ceases to be a health service provider; or
 - (iii) refuses or fails to act within a reasonable time.

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- (2) If a nomination lapses, the individual may make one more nomination under section 38(1).

41 Organisation must give health information to nominee

If—

- (a) an organisation has made an offer referred to in section 37(1)(b) and it is advised by the individual of the acceptance of that offer; or
- (b) an organisation receives from the individual a notice under section 38(1) nominating a health service provider—

the organisation must give the health information, or a copy of it, to the nominated health service provider within 14 days after receiving the advice or notice unless within that period—

- (c) in a case referred to in paragraph (a), the individual withdraws consent to discuss the health information; or
- (d) in a case referred to in paragraph (b), the organisation gives a notice under section 39(1) in respect of the notice given to it under section 38(1); or
- (e) in any case, the nomination of the health service provider lapses.

42 Functions of nominated health service provider

- (1) Subject to subsection (2), the functions of a nominated health service provider are—
 - (a) to notify the individual that the provider will discuss with the organisation the basis for the refusal of access by the organisation; and
 - (b) to contact the organisation that refused access in order to discuss the nature of its concerns; and

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- (c) to form an opinion on the validity or otherwise of the refusal to provide the individual with access on the ground that providing access would pose a serious threat to the life or health of the individual; and
 - (d) if the nominated health service provider thinks it appropriate to do so, to explain the grounds of the claim to the individual; and
 - (e) if the nominated health service provider thinks it appropriate to do so, to discuss the content of the health information with the individual; and
 - (f) if the provider is satisfied that to do so would not constitute a serious threat to the life or health of the individual, to allow the individual to inspect the health information or, if the individual so wishes and the organisation agrees, to have a copy of it; and
 - (g) if the provider is not so satisfied, to decline to allow the individual to have access to the health information.
- (2) A nominated health service provider must not disclose to the individual any health information to which access has been refused under this Part or HPP 6 on any ground other than the ground referred to in section 36.
- (3) The nominated health service provider may charge the individual a fee (not exceeding the prescribed maximum fee) for performing the functions set out in subsection (1).
- (4) For the avoidance of doubt it is declared that the act of forming an opinion in the exercise by a nominated health service provider of a function under subsection (1)(c) is not an interference with the privacy of the individual to whom the information relates.
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Division 4—Miscellaneous

43 Alternative arrangements may be made

Nothing in this Part (except sections 26 and 27) is intended to prevent or discourage an organisation from providing an individual, with his or her consent, with access to his or her health information otherwise than as required by this Part.

44 Provision of health services and keeping of health information—terms and conditions

- (1) It is a term of a contract, whether oral or in writing, for the provision of a health service to an individual that the health service provider will allow the individual to have access, in accordance with this Act, to health information relating to the individual that relates to, or is made in consequence of the provision of, the service.
- (2) Subsection (1) applies to a contract, whether or not the individual is a party to the contract, made after the commencement of this section and—
 - (a) the contract is made in Victoria; or
 - (b) the contract has been, or is to be, performed wholly or partly in Victoria; or
 - (c) the individual is present or resides in Victoria when the contract is made.
- (3) For the purposes of this section, it is immaterial whether—
 - (a) the health service was provided in Victoria; or
 - (b) the health information is kept or located in Victoria.

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s. 44

- (4) If a contract or other agreement purports to exclude, or is inconsistent with, a provision of this section, the contract or agreement is, to that extent, void.
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PART 6—COMPLAINTS

Division 1—Making a complaint

45 Complaints

- (1) An individual may complain to the Health Services Commissioner about an act or practice that may be an interference with the privacy of the individual⁴.
- (2) In the case of an act or practice that may be an interference with the privacy of a deceased individual, it is immaterial whether the act or practice occurred, or is alleged to have occurred, during the lifetime or after the death of the individual.
- (3) In the case of an act or practice that may be an interference with the privacy of 2 or more individuals, any one of those individuals may make a complaint under subsection (1) on behalf of all of the individuals with their consent.
- (4) A complaint must be in writing and be lodged with the Health Services Commissioner by hand, facsimile or other electronic transmission or post.
- (5) A complainant may request that his or her complaint be expedited and give grounds for the request.
- (6) It is the duty of the Health Services Commissioner to provide appropriate assistance to an individual who wishes to make a complaint and requires assistance to formulate the complaint.
- (7) The complaint must specify the respondent to the complaint.
- (8) If the organisation represents the Crown, the State shall be the respondent.

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- (9) If the organisation does not represent the Crown and—
- (a) is a legal person, the organisation shall be the respondent; or
 - (b) is an unincorporated body, the members of the committee of management of the organisation shall be the respondents.
- (10) A failure to comply with subsection (7) does not render the complaint, or any step taken in relation to it, a nullity.

46 Complaint referred to Health Services Commissioner

The Health Services Commissioner may treat a complaint referred to him or her by—

- (a) the Ombudsman under section 15B of the **Ombudsman Act 1973**; or
- (b) the Privacy Commissioner under section 34A of the **Information Privacy Act 2000**—

as if it were a complaint made under section 45(1).

47 Complaints by children and people with an impairment

- (1) A complaint may be made—
- (a) by a child; or
 - (b) on behalf of a child by—
 - (i) a parent of the child; or
 - (ii) any other person chosen by the child or by a parent of the child; or
 - (iii) any other person who, in the opinion of the Health Services Commissioner, has a sufficient interest in the subject-matter of the complaint.

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- (2) A child who is capable of understanding the general nature and effect of choosing a person to make a complaint on his or her behalf may do so even if he or she is otherwise incapable of exercising powers.
 - (3) If an individual is unable to complain by reason of injury, disease, senility, illness, disability, physical impairment or mental disorder, a complaint may be made on behalf of that individual by—
 - (a) another person authorised by the individual to complain on his or her behalf; or
 - (b) if the individual is unable to authorise another person, any other person on his or her behalf who, in the opinion of the Health Services Commissioner, has a sufficient interest in the subject-matter of the complaint.
 - (4) An individual who is capable of understanding the general nature and effect of authorising another person to complain on his or her behalf may do so even if he or she is otherwise incapable of exercising powers.

Division 2—Procedure after a complaint is made

48 Health Services Commissioner must notify respondent

The Health Services Commissioner must notify the respondent in writing of the complaint as soon as practicable after receiving it.

49 Preliminary assessment of complaint

- (1) Within a reasonable period after receiving a complaint but not later than 90 days after the day on which a complaint is lodged, the Health Services Commissioner must decide whether, and to what extent, to entertain the complaint.
- (2) To enable the Health Services Commissioner to make a decision under subsection (1), he or she may, by written notice, invite any person—
 - (a) to attend before the Health Services Commissioner for the purpose of discussing the subject-matter of the complaint; or
 - (b) to produce any documents specified in the notice.
- (3) If the Health Services Commissioner considers it appropriate, he or she may attempt to resolve the complaint informally.

50 Splitting complaints

- (1) If a complaint—
 - (a) deals with more than one subject-matter; or
 - (b) deals with more than one set of circumstances; or
 - (c) makes allegations against more than one organisation; or
 - (d) makes more than one allegation against an organisation; or
 - (e) for any other reason is suitable to be dealt with in separate parts—
the Health Services Commissioner—
 - (f) may if it is administratively convenient to do so; or

(g) must if it is in the interest of the complainant to do so—

determine that any subject-matter, set of circumstances, allegation or part, as the case requires, be treated as a separate complaint.

(2) The Health Services Commissioner must not make a determination under subsection (1) unless he or she is satisfied that any attempt at conciliation is unlikely to be prejudiced by the making of the determination.

51 Circumstances in which Health Services Commissioner may decline to entertain complaint

(1) The Health Services Commissioner may decline to entertain a complaint made under section 45(1) by notifying the complainant and the respondent in writing to that effect within 90 days after the day on which the complaint was lodged if the Health Services Commissioner considers that—

- (a) the act or practice about which the complaint has been made is not an interference with the privacy of an individual; or
- (b) the complaint is made on behalf of a complainant by a person who is not authorised by section 47 to do so; or
- (c) although a complaint has been made to the Health Services Commissioner about the act or practice, the complainant has not complained to the respondent; or
- (d) the complaint to the Health Services Commissioner was made more than 12 months after the complainant became aware of the act or practice; or
- (e) the complaint is frivolous, vexatious, misconceived or lacking in substance; or

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- (f) the act or practice is the subject of—
- (i) an application under another enactment;
or
 - (ii) a proceeding in a court or tribunal—
and the subject-matter of the complaint has
been, or is being, dealt with adequately by
that means; or
- (g) the act or practice could be made the subject
of an application under another enactment
for a more appropriate remedy; or
- (h) the complainant has complained to the
respondent about the act or practice and
either—
- (i) the respondent has dealt, or is dealing,
adequately with the complaint; or
 - (ii) the respondent has not yet had an
adequate opportunity to deal with the
complaint.
- (2) A notice under subsection (1) must state that the
complainant, by notice in writing given to the
Health Services Commissioner, may require the
Health Services Commissioner to refer the
complaint to the Tribunal for hearing under
Division 6.
- (3) If the act or practice could be made the subject of
an application under—
- (a) the **Information Privacy Act 2000**; or
 - (b) the Privacy Act 1988 of the Commonwealth;
or
 - (ba) the **Disability Act 2006**; or

S. 51(3)
amended by
No. 23/2006
s. 241(b).

S. 51(3)(ba)
inserted by
No. 23/2006
s. 241(a).

(c) the **Ombudsman Act 1973**—

the Health Services Commissioner may refer the complaint to the Privacy Commissioner, the Federal Privacy Commissioner, the Disability Services Commissioner or the Ombudsman, as the case may be, and notify the complainant and the respondent in writing of the referral.

- (4) If the document to which the individual seeks access is a document referred to in section 16, the Health Services Commissioner may advise the complainant to make a request for access to the document under the **Freedom of Information Act 1982**.
- (5) Within 60 days after receiving the Health Services Commissioner's notice declining to entertain a complaint, the complainant, by notice in writing given to the Health Services Commissioner, may require him or her to refer the complaint to the Tribunal for hearing under Division 6.
- (6) The Health Services Commissioner must comply with a notice under subsection (5).
- (7) If the complainant does not notify the Health Services Commissioner under subsection (5), the Health Services Commissioner may dismiss the complaint.
- (8) As soon as possible after a dismissal under subsection (7), the Health Services Commissioner must, by written notice, notify the complainant and the respondent of the dismissal.
- (9) A complainant may take no further action under this Act in relation to the subject-matter of a complaint dismissed under this section.

52 Referral to registration board

- (1) If a complaint, or part of a complaint, relates to a registered health service provider, the Health Services Commissioner may refer the complaint, or that part of the complaint, to the appropriate registration board if—
 - (a) the registration board has power to resolve or deal with the matter; and
 - (b) the Health Services Commissioner considers that it is appropriate to refer the complaint or that part of the complaint to the registration board; and
 - (c) the registration board is willing to accept the complaint or that part of the complaint.
- (2) Within 14 days after referring a complaint, or part of a complaint, about a registered health service provider to a registration board, the Health Services Commissioner must notify the complainant and the registered health service provider in writing of the referral.
- (3) If a complaint, or part of a complaint, has been referred to a registration board, the registration board must advise the Health Services Commissioner of the progress of the matter, when required by the Health Services Commissioner to do so, and, when the matter is completed, of the outcome of the matter.
- (4) Advice under subsection (3) must include any information that the Health Services Commissioner specifies by written notice to the registration board.

53 Health Services Commissioner may dismiss stale complaint

- (1) The Health Services Commissioner may dismiss a complaint if he or she has had no substantive response from the complainant in the period of 90 days following a request by the Health Services Commissioner for a response in relation to the complaint.
- (2) As soon as possible after a dismissal under subsection (1), the Health Services Commissioner must, by written notice, notify the complainant and the respondent of the dismissal.
- (3) A complainant may take no further action under this Act in relation to the subject-matter of a complaint dismissed under this section.

54 Minister may refer a complaint direct to Tribunal

- (1) If the Minister considers that the subject-matter of a complaint raises an issue of important public policy, the Minister may refer the complaint directly to the Tribunal for hearing under Division 6, whether or not the Health Services Commissioner has considered it or the complaint is in the process of being conciliated.
- (2) The Minister is not a party to a proceeding on a complaint referred to the Tribunal under subsection (1) unless joined by the Tribunal.

55 Complaint about registered health service provider

- (1) If the Health Services Commissioner—
 - (a) accepts a complaint, in whole or in part, about an act or practice of a registered health service provider; or

(b) refers such a complaint to an authority other than the appropriate registration board—

the Health Services Commissioner must give a copy of the complaint to the appropriate registration board.

- (2) The giving of a copy of a complaint under subsection (1) must not be taken to be a complaint to, or a referral of the complaint to, the registration board for the purposes of this or any other Act and the information provided must not be used by the registration board as the basis for any investigation, inquiry into, or other action relating to, the complaint unless the complaint is referred to the board under section 52.

56 What happens if a complaint is accepted?

- (1) If the Health Services Commissioner decides to accept a complaint in whole or in part, he or she may adopt one of the following options—
- (a) if the Health Services Commissioner considers that it is reasonably possible that the complaint may be conciliated successfully under Division 3, he or she may decide to conciliate the complaint; or
- (b) if the Health Services Commissioner—
- (i) does not consider that it is reasonably possible that the complaint may be conciliated successfully under Division 3; or
- (ii) considers that the complaint is more likely to be resolved by the making of a ruling under Division 4—

he or she may decide to proceed under Division 4; or

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- (c) if the Health Services Commissioner considers that, in the circumstances of the complaint, conciliation or the making of a ruling is inappropriate, he or she may decide to decline to further entertain the complaint.
 - (2) Subsection (1) does not apply to a complaint—
 - (a) that the Health Services Commissioner has declined to entertain under section 51 or dismissed under section 53; or
 - (b) that the Minister has referred to the Tribunal under section 54.
 - (3) In making a decision under subsection (1), the Health Services Commissioner may take into account the wishes, if expressed, of the complainant and the respondent.
 - (4) The Health Services Commissioner must notify the complainant and the respondent in writing of his or her decision under subsection (1).
 - (5) A notice under subsection (4) must state that the complainant, by notice in writing given to the Health Services Commissioner, may require the Health Services Commissioner to refer the complaint to the Tribunal for hearing under Division 6.

57 What happens if conciliation or ruling is inappropriate?

- (1) Within 60 days after receiving the Health Services Commissioner's notice under section 56(4), the complainant, by written notice, may require the Health Services Commissioner to refer the complaint to the Tribunal for hearing under Division 6.
 - (2) The Health Services Commissioner must comply with a notice under subsection (1).
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- (3) If the complainant does not notify the Health Services Commissioner under subsection (1), the Health Services Commissioner may dismiss the complaint.
 - (4) As soon as possible after a dismissal under subsection (3), the Health Services Commissioner must, by written notice, notify the complainant and the respondent of the dismissal.
 - (5) A complainant may take no further action under this Act in relation to the subject-matter of a complaint dismissed under this section.

58 Duty to stop proceedings

- (1) The Health Services Commissioner must cease dealing with an issue raised in a complaint if he or she—
 - (a) becomes aware that the complainant or respondent has begun legal proceedings which relate to that issue; or
 - (b) becomes aware that proceedings relating to that specific issue have been initiated before a court or tribunal; or
 - (c) considers that the issue should properly be dealt with by a court or tribunal.
- (2) Within 14 days after ceasing to deal with a complaint under subsection (1), the Health Services Commissioner must give written notice of the fact to the complainant and the respondent.
- (3) Despite subsection (1), the Health Services Commissioner—
 - (a) may, with the consent of the complainant and the respondent, continue dealing with the matter, but only by referring it to conciliation; and

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- (b) must cease dealing with the matter when the Health Services Commissioner becomes aware that a court or tribunal has commenced to hear a proceeding relating to the complaint.
- (4) If the Health Services Commissioner has ceased dealing with an issue raised in a complaint and later becomes aware that the complainant or the respondent has withdrawn proceedings relating to the complaint, the Health Services Commissioner may, with the consent of the complainant, re-open proceedings under this Act.
- (5) The Health Services Commissioner may continue to deal with a complaint about a health service provider which the Commissioner has referred to the appropriate registration board under section 52 unless the board asks the Health Services Commissioner to suspend dealing with the complaint until the board has completed the matter and advised the Health Services Commissioner of the outcome under section 52(3).

Division 3—Conciliation of complaints

59 Conciliation process

- (1) If the Health Services Commissioner decides under section 56(1) to conciliate a complaint, he or she must make all reasonable endeavours to conciliate the complaint.
- (2) The Health Services Commissioner may require a party to attend a conciliation either personally or by a representative who has authority to settle the matter on behalf of the party.

60 Power to obtain information and documents

- (1) If the Health Services Commissioner has reason to believe that a person has information or a document relevant to a conciliation under this Division, the Health Services Commissioner may give to the person a written notice requiring the person—
 - (a) to give the information to the Health Services Commissioner in writing signed by the person or, in the case of a body corporate, by an officer of the body corporate; or
 - (b) to produce the document to the Health Services Commissioner.
 - (2) If the Health Services Commissioner has reason to believe that a person has information relevant to a conciliation under this Division, the Health Services Commissioner may give to the person a written notice requiring the person to attend before the Health Services Commissioner at a time and place specified in the notice to answer questions relevant to the complaint.
 - (3) The Health Services Commissioner is not entitled to require an agency within the meaning of the **Freedom of Information Act 1982** or a Minister to give any information if the Secretary to the Department of Premier and Cabinet furnishes to the Health Services Commissioner a certificate certifying that the giving of that information (including in answer to a question) would involve the disclosure of information which, if included in a document of the agency or an official document of the Minister, would cause the document to be an exempt document of a kind referred to in section 28(1) of the **Freedom of Information Act 1982**.
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- (4) The Health Services Commissioner may not conduct an investigation in respect of a certificate under subsection (3) or question whether the information is of a kind referred to in section 28(1) of the **Freedom of Information Act 1982** or a decision to sign such a certificate.

61 Conciliation agreements

- (1) If, following conciliation, the parties to the complaint reach agreement with respect to the subject-matter of the complaint—
- (a) at the request of any party made within 30 days after agreement is reached, a written record of the conciliation agreement is to be prepared by the parties or the Health Services Commissioner; and
 - (b) the record must be signed by or on behalf of each party and certified by the Health Services Commissioner; and
 - (c) the Health Services Commissioner must give each party a copy of the signed and certified record.
- (2) Any party, after notifying in writing the other party, may lodge a copy of the signed and certified record with the Tribunal for registration.
- (3) Subject to subsection (4), the Tribunal must register the record and give a certified copy of the registered record to each party.
- (4) If the Tribunal, constituted by a presidential member, considers that it may not be practicable to enforce, or to supervise compliance with, a conciliation agreement, the Tribunal may refuse to register the record of the agreement.
- (5) On registration, the record must be taken to be an order of the Tribunal in accordance with its terms and may be enforced accordingly.
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- (6) The refusal of the Tribunal to register the record of a conciliation agreement does not affect the validity of the agreement.

62 Conciliation statements, acts and documents inadmissible

- (1) Subject to subsection (2), evidence of anything said or done in the course of a conciliation is not admissible in proceedings before the Tribunal or any other legal proceedings or proceedings before a registration board relating to the subject-matter of the health information or the complaint, unless all parties to the conciliation otherwise agree.
- (2) A document prepared by a party for the purpose of, or in connection with, a conciliation (or a copy of such a document), whether or not produced or used in the course of the conciliation, is not admissible in proceedings before the Tribunal or any other legal proceedings or proceedings before a registration board relating to the subject-matter of the health information or the complaint, unless all parties to the conciliation otherwise agree.

63 What happens if conciliation fails?

- (1) If the Health Services Commissioner has attempted unsuccessfully to conciliate a complaint, he or she—
- (a) must decide whether to investigate the complaint under Division 4 or to take no further action in respect of the complaint; and
 - (b) must notify the complainant and the respondent in writing.
- (2) A notice under subsection (1) must state that the complainant, by notice in writing given to the Health Services Commissioner—

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- (a) may require the Health Services Commissioner to refer the complaint to the Tribunal for hearing under Division 6; and
 - (b) if the Health Services Commissioner proposes to investigate the complaint, may object or agree to the investigation.
 - (3) If the Health Services Commissioner proposes to take no further action in respect of a complaint, the complainant, by written notice to the Health Services Commissioner within 60 days after receiving the notice under subsection (1), may require the Health Services Commissioner to refer the complaint to the Tribunal for hearing under Division 6.
 - (4) If the Health Services Commissioner proposes to investigate a complaint under Division 4, the complainant, by written notice to the Health Services Commissioner within 60 days after receiving the notice under subsection (1)—
 - (a) may object to the investigation and may require the Health Services Commissioner to refer the complaint to the Tribunal for hearing under Division 6; or
 - (b) may agree to the investigation.
 - (5) The Health Services Commissioner must comply with a notice under subsection (3) or (4)(a).
 - (6) If the complainant does not notify the Health Services Commissioner under subsection (3) or (4), the Health Services Commissioner must dismiss the complaint.
 - (7) If the complainant objects to the investigation but does not require the Health Services Commissioner to refer the complaint to the Tribunal for hearing under Division 6, the Health Services Commissioner must dismiss the complaint.
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- (8) As soon as possible after a dismissal under subsection (6) or (7), the Health Services Commissioner must, by written notice, notify the complainant and the respondent of the dismissal.
 - (9) A complainant may take no further action under this Act in relation to the subject-matter of a complaint dismissed under this section.
 - (10) If a complainant agrees to an investigation of the complaint, the Health Services Commissioner—
 - (a) must notify the respondent in writing that an investigation will be conducted; and
 - (b) must investigate the complaint as soon as practicable after receipt of the notice under subsection (4)(b).

Division 4—Investigation, rulings and compliance notices

64 Investigation and ruling

- (1) The Health Services Commissioner may investigate—
 - (a) a complaint in respect of which he or she has made a decision under section 56(1)(b); and
 - (b) a complaint referred to in section 63(1) which he or she has decided to investigate and the complainant has agreed to the investigation—

and make a ruling as to whether the act or practice of the respondent that is the subject of the complaint is an interference with the privacy of the complainant⁵.
- (2) Within 14 days after ruling as to whether there has been an interference with the privacy of the complainant, the Health Services Commissioner must serve written notice of the ruling on the complainant and the respondent.

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- (3) A ruling must include—
- (a) the reasons for the ruling; and
 - (b) the action, if any, that the Health Services Commissioner specifies to remedy the complaint; and
 - (c) a specified period, not exceeding one month, within which the action must be taken.
- (4) If the Health Services Commissioner is satisfied, on the application of an organisation on which a ruling is served, that it is not reasonably possible to take the action specified in the ruling within the period specified in the ruling, the Health Services Commissioner may extend the period specified in the ruling on the giving to him or her by the organisation of an undertaking to take the specified action within the extended period.
- (5) The Health Services Commissioner may only extend a period under subsection (4) if an application for the extension is made before the period specified in the ruling expires.
- (6) If the Health Services Commissioner thinks it appropriate, he or she may give a copy of a ruling to the registration board by which the respondent is registered and must give written notice of having done so to the respondent.
- (7) A respondent who receives notice of a ruling under subsection (2) which requires the respondent to take specified action must report in writing to the Health Services Commissioner, within 7 days after the expiry of the period, or extended period, within which the action must be taken, on the action taken by the respondent with respect to the ruling.

Penalty: 10 penalty units.

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- (8) The Health Services Commissioner must give written notice to the complainant of the contents of a report referred to in subsection (7) within 7 days after receipt of the report or, if the report has not been provided, must give written notice to the complainant of that fact within 7 days after the expiry of the period, or extended period, referred to in subsection (7).

65 Referral to Tribunal

- (1) The complainant or the respondent, by written notice within 60 days after receiving notice of a ruling under section 64(2), may require the Health Services Commissioner to refer the complaint to the Tribunal for hearing under Division 6.

- (2) If the respondent fails—

- (a) to comply with a ruling; or
- (b) to report to the Health Services Commissioner as required by section 64(7)—

the complainant, by written notice within 30 days after receipt of a notice under section 64(8), may require the Health Services Commissioner to refer the complaint to the Tribunal for hearing under Division 6.

- (3) The Health Services Commissioner—

- (a) must comply with a notice under subsection (1) or (2); and
- (b) must provide to the Tribunal a copy of all documents that were considered by the Health Services Commissioner in the investigation of the complaint.

66 Compliance notice

- (1) The Health Services Commissioner may serve a compliance notice on the organisation, if it appears to him or her that—
 - (a) the organisation has done an act or engaged in a practice in contravention of this Act; and
 - (b) the act or practice—
 - (i) constitutes a serious or flagrant contravention; or
 - (ii) is of a kind that has been done or engaged in by the organisation on at least 5 separate occasions within the previous 2 years.
- (2) A compliance notice requires the organisation to take specified action within a specified period for the purpose of ensuring compliance with this Act and to report the taking of that action to the Health Services Commissioner in a specified manner within a specified period after taking that action.
- (3) If the Health Services Commissioner is satisfied, on the application of an organisation on which a compliance notice is served, that it is not reasonably possible to take the action specified in the notice within the period specified in the notice, the Health Services Commissioner may extend the period specified in the notice on the giving to him or her by the organisation of an undertaking to take the specified action within the extended period.
- (4) The Health Services Commissioner may only extend a period under subsection (3) if an application for the extension is made before the period specified in the notice expires.

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- (5) The Health Services Commissioner may act under subsection (1)—
- (a) on his or her own initiative at any stage and irrespective of whether a complaint has been made or a complainant has objected to an investigation; or
 - (b) on an application by an individual who was a complainant under this Part and the complaint was the subject of a conciliation agreement or was determined by the Tribunal.
- (6) In deciding whether or not to serve a compliance notice, the Health Services Commissioner may have regard to the extent to which the organisation has complied with a decision of the Tribunal under Division 6.

67 Power to obtain information and documents

- (1) If the Health Services Commissioner has reason to believe that a person has information or a document relevant to a decision under section 64(1) or 66, the Health Services Commissioner may give to the person a written notice requiring the person—
- (a) to give the information to the Health Services Commissioner in writing signed by the person or, in the case of a body corporate, by an officer of the body corporate; or
 - (b) to produce the document to the Health Services Commissioner.
- (2) If the Health Services Commissioner has reason to believe that a person has information relevant to a decision under section 64(1) or 66, the Health Services Commissioner may give to the person a written notice requiring the person to attend before the Health Services Commissioner at a
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time and place specified in the notice to answer questions relevant to the decision.

- (3) The Health Services Commissioner is not entitled to require an agency within the meaning of the **Freedom of Information Act 1982** or a Minister to give any information if the Secretary to the Department of Premier and Cabinet furnishes to the Health Services Commissioner a certificate certifying that the giving of that information (including in answer to a question) would involve the disclosure of information which, if included in a document of the agency or an official document of the Minister, would cause the document to be an exempt document of a kind referred to in section 28(1) of the **Freedom of Information Act 1982**.
- (4) The Health Services Commissioner may not conduct an investigation in respect of a certificate under subsection (3) or question whether the information is of a kind referred to in section 28(1) of the **Freedom of Information Act 1982** or a decision to sign such a certificate.

68 Conduct of investigation etc.

In exercising a power under section 64, 66 or 67, the Health Services Commissioner—

- (a) must proceed with as much expedition as the requirements of this Act and proper investigation of the matter permit; and
- (b) is not bound by the rules of evidence.

69 Power to examine witnesses

- (1) The Health Services Commissioner may administer an oath or affirmation to a person required under section 67(2) to attend before the Health Services Commissioner and may examine the person on oath or affirmation.

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- (2) The oath or affirmation to be taken or made by a person for the purposes of this section is an oath or affirmation that the answers the person will give will be true.

70 Protection against self-incrimination

- (1) It is a reasonable excuse for a natural person to refuse or fail to give information or answer a question or to produce a document when required to do so under this Part if giving the information or answering the question or producing the document might tend to incriminate the person.
- (2) This section does not limit section 67(3).

71 Offence not to comply with compliance notice

- (1) An organisation must comply with a compliance notice served on it under section 66(1) that is in effect.

Penalty: In the case of a body corporate,
3000 penalty units;

In any other case, 600 penalty units.

- (2) A compliance notice served under section 66(1) does not take effect—
- (a) until the expiry of the period specified in the notice; or
 - (b) until the expiry of any extended period fixed under section 66(3); or
 - (c) until the expiry of the period within which an application for review of the decision to serve the notice may be made to the Tribunal under section 72(1); or

(d) if an application is made under section 72(1) for review of the decision to serve the notice, unless and until the decision is affirmed on the review—

whichever is the later.

(3) An offence against subsection (1) is an indictable offence.

72 Application for review—compliance notice

(1) An individual or organisation whose interests are affected by a decision of the Health Services Commissioner under section 66(1) to serve a compliance notice may apply to the Tribunal for review of the decision.

(2) An application for review must be made within 28 days after the later of—

(a) the day on which the decision is made; or

(b) if, under the **Victorian Civil and Administrative Tribunal Act 1998**, the person requests a statement of reasons for the decision, the day on which the statement of reasons is given to the person or the person is informed under section 61(5) of that Act that a statement of reasons will not be given.

(3) The Health Services Commissioner is a party to a proceeding on a review under this section.

Division 5—Interim orders

73 Tribunal may make interim orders before hearing

(1) A complainant or a respondent or the Health Services Commissioner may apply to the Tribunal for an interim order to prevent any party to the complaint from acting in a manner prejudicial to negotiations or conciliation or to any decision or order the Tribunal might subsequently make.

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- (2) An application may be made under subsection (1) at any time before the complaint is referred to the Tribunal.
 - (3) In making an interim order, the Tribunal must have regard to—
 - (a) whether or not the complainant has established a prima facie case with respect to the complaint; and
 - (b) any possible detriment or advantage to the public interest in making the order; and
 - (c) any possible detriment to the complainant's or the respondent's case if the order is not made.
 - (4) An interim order applies for the period, not exceeding 28 days, specified in it and may be extended from time to time by the Tribunal.
 - (5) The party against whom the interim order is sought is a party to the proceeding on an application under subsection (1).
 - (6) In making an interim order, the Tribunal—
 - (a) may require any undertaking as to costs or damages that it considers appropriate; and
 - (b) may make provision for the lifting of the order if specified conditions are met.
 - (7) The Tribunal may assess any costs or damages referred to in subsection (6)(a).
 - (8) Nothing in this section affects or takes away from the Tribunal's power under section 123 of the **Victorian Civil and Administrative Tribunal Act 1998** to make orders of an interim nature in a proceeding in the Tribunal in respect of a complaint.
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Division 6—Jurisdiction of the Tribunal

74 When may the Tribunal hear a complaint?

- (1) The Tribunal may hear a complaint—
 - (a) referred to it by the Health Services Commissioner under section 51, 57, 63 or 65;
 - (b) referred to it by the Minister under section 54.
- (2) The Tribunal also has the jurisdiction conferred by section 73.

75 Who are the parties to a proceeding?

- (1) The complainant and the respondent are parties to a proceeding in respect of a complaint referred to in section 74(1).
- (2) The Health Services Commissioner is not a party to a proceeding in respect of a complaint referred to in section 74(1)(a) unless joined by the Tribunal.

76 Time limits for certain complaints

- (1) The Tribunal must commence hearing a complaint within 30 days after its referral to the Tribunal if the complaint was referred to it by the Minister under section 54.
- (2) The Tribunal, constituted by a presidential member, may extend the period of 30 days under subsection (1) by one further period of not more than 30 days.

77 Inspection of exempt documents by Tribunal

- (1) Subject to subsection (2) and to any order made by the Tribunal under section 51(2) of the **Victorian Civil and Administrative Tribunal Act 1998**, the Tribunal must do all things necessary to ensure that—
 - (a) any document produced to the Tribunal in proceedings under this Act that is claimed to be an exempt document of a kind referred to in section 28(1) of the **Freedom of Information Act 1982**, or the contents of that document, is not disclosed to any person other than—
 - (i) a member of the Tribunal as constituted for the proceedings; or
 - (ii) a member of the staff of the Tribunal in the course of the performance of his or her duties as a member of that staff; and
 - (b) the document is returned to the respondent at the conclusion of the proceedings.
- (2) The Tribunal may make such orders as it thinks necessary having regard to the nature of the proceedings.
- (3) If the applicant is represented by an Australian legal practitioner (within the meaning of the **Legal Profession Act 2004**), orders under subsection (2) may include an order that the contents of a document produced to the Tribunal that is claimed to be an exempt document be disclosed to that practitioner.
- (4) In making an order under subsection (2), the Tribunal must be guided by the principle that the contents of a document that is claimed to be an exempt document should not normally be disclosed except in accordance with an order of

S. 77(3)
substituted by
No. 18/2005
s. 18(Sch. 1
item 48).

the Tribunal under section 51(2) of the **Victorian Civil and Administrative Tribunal Act 1998**.

- (5) If a complaint referred to in section 74(1) relates to a document or part of a document in relation to which disclosure has been refused on the grounds specified in section 28 of the **Freedom of Information Act 1982**, the Tribunal may, if it regards it as appropriate to do so, announce its findings in terms which neither confirm nor deny the existence of the document in question.

78 What may the Tribunal decide?

- (1) After hearing the evidence and representations that the parties to a complaint desire to adduce or make, the Tribunal may—
- (a) find the complaint or any part of it proven and make any one or more of the following orders—
 - (i) an order that the respondent provide the complainant with access to health information that relates to the complainant;
 - (ii) an order restraining the respondent, or the organisation of which the respondent is the committee of management, from repeating or continuing any act or practice the subject of the complaint which the Tribunal has found to constitute an interference with the privacy of an individual;
 - (iii) an order that the respondent perform or carry out any reasonable act or course of conduct to redress any loss or damage suffered by the complainant, including injury to the complainant's feelings or humiliation suffered by the

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- complainant, by reason of the act or practice the subject of the complaint;
- (iv) an order that the complainant is entitled to a specified amount, not exceeding \$100 000, by way of compensation for any loss or damage suffered by the complainant, including injury to the complainant's feelings or humiliation suffered by the complainant, by reason of the act or practice the subject of the complaint; or
- (b) find the complaint or any part of it proven but decline to take any further action in the matter; or
- (c) find the complaint or any part of it not proven and make an order that the complaint or part be dismissed; or
- (d) in any case, make an order that the complainant is entitled to a specified amount to reimburse the complainant for expenses reasonably incurred by the complainant in connection with the making of the complaint and the proceedings held in respect of it under this Act.
- (2) In an order under subparagraph (ii) or (iii) of subsection (1)(a) arising out of a breach of HPP 6.5, 6.6 or 6.7, the Tribunal may include an order that—
- (a) an organisation or respondent make an appropriate correction to the health information; or
- (b) an organisation or respondent attach to the health information a statement provided by the complainant of a correction sought by the complainant; or
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- (c) an organisation or respondent place the incorrect information on a record which is not generally available to anyone involved in providing health services to the complainant and to which access is restricted.
- (3) If an order of the Tribunal relates to a public register, the Health Services Commissioner must, as soon as practicable after its making, report the order to the Minister responsible for the public sector agency or Council that administers that public register.
- (4) The Health Services Commissioner may include in a report under subsection (3) recommendations in relation to any matter that concerns the need for, or the desirability of, legislative or administrative action in the interests of privacy of individuals.
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PART 7—OFFENCES

79 Definition

In this Part, *false representation* means a representation that is—

- (a) false in a material particular; and
- (b) made knowing that it is false in that particular or without believing that it is true in that particular.

80 Unlawfully requiring consent etc.

A person or body must not, by threat, intimidation or false representation, require another person or body—

- (a) to give a consent under this Act; or
- (b) to do, without consent, an act for which a consent under this Act is required.

Penalty: In the case of a body corporate,
300 penalty units;

In any other case, 60 penalty units.

81 Unlawful destruction etc. or removal of health information

- (1) A person or body must not destroy, deface or damage health information held by an organisation or any other document with intent to evade or frustrate the operation of this Act.

Penalty: In the case of a body corporate,
300 penalty units;

In any other case, 60 penalty units.

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- (2) A person or body must not remove from Victoria health information held by an organisation with intent to evade or frustrate the operation of this Act.

Penalty: In the case of a body corporate,
300 penalty units;

In any other case, 60 penalty units.

82 Unlawfully requesting or obtaining access to health information

A person or body must not, by threat, intimidation or false representation, request or obtain access to health information relating to himself, herself or any other person.

Penalty: In the case of a body corporate,
300 penalty units;

In any other case, 60 penalty units.

83 Persons not to be persuaded not to exercise rights under Act

A person or body must not, by threat, intimidation or false representation, persuade or attempt to persuade another person—

- (a) to refrain from making or pursuing—

(i) a request for access to health information under Part 5; or

(ii) a complaint to the Health Services Commissioner under Part 6; or

- (b) to withdraw a request or complaint referred to in paragraph (a).

Penalty: In the case of a body corporate,
300 penalty units;

In any other case, 60 penalty units.

**84 Failure to attend etc. before Health Services
Commissioner**

A person or body must not—

- (a) without reasonable excuse, refuse or fail—
 - (i) to attend before the Health Services Commissioner; or
 - (ii) to be sworn or to make an affirmation; or
 - (iii) to give information; or
 - (iv) to answer a question or produce a document—
when so required by the Health Services Commissioner under this Act; or
- (b) wilfully obstruct, hinder or resist the Health Services Commissioner or an employee in the office of the Health Services Commissioner or a delegate of the Health Services Commissioner in—
 - (i) performing, or attempting to perform, a function or duty under this Act; or
 - (ii) exercising, or attempting to exercise, a power under this Act; or
- (c) furnish information or make a statement to the Health Services Commissioner knowing that it is false or misleading in a material particular.

Penalty: In the case of a body corporate,
300 penalty units;
In any other case, 60 penalty units.

PART 8—GENERAL

85 Capacity to consent or make a request or exercise right of access

- (1) If this Act requires the consent of an individual to the collection, use or disclosure of health information or to the transfer of health information to someone who is outside Victoria, the power to give that consent may be exercised on behalf of an individual who is incapable of giving consent by an authorised representative of that individual, if the consent is reasonably necessary for the lawful performance of functions or duties or exercise of powers in respect of the individual by the authorised representative.
- (2) If this Act empowers an individual to request access to, or the correction of, health information or confers on an individual a right of access to health information, the power to make that request, or the right of access, may be exercised—
 - (a) by the individual personally, except if the individual is a child who is incapable of making the request; and
 - (b) by an authorised representative of the individual if—
 - (i) the individual is incapable of making the request or exercising the right of access; and
 - (ii) the health information to be accessed is reasonably necessary for the lawful performance of functions or duties or exercise of powers in respect of the individual by the authorised representative.

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- (3) For the purposes of subsections (1) and (2), an individual is incapable of giving consent, making the request or exercising the right of access if he or she is incapable by reason of age, injury, disease, senility, illness, disability, physical impairment or mental disorder of—
- (a) understanding the general nature and effect of giving the consent, making the request or exercising the right of access (as the case requires); or
 - (b) communicating the consent or refusal of consent, making the request or personally exercising the right of access (as the case requires)—

despite the provision of reasonable assistance by another person.

- (4) Subject to the **Guardianship and Administration Act 1986**, an authorised representative of an individual must not give consent or request access to, or the correction of, health information if the authorised representative knows or believes that the consent or request does not accord with the wishes expressed, and not changed or withdrawn, by the individual before he or she became incapable of giving consent or requesting access and any purported consent given or request made in those circumstances is void.
- (5) An organisation may refuse a request by an authorised representative of an individual for access to the health information of the individual if the organisation reasonably believes that access by the authorised representative may prejudice the health or safety of the individual.

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- (6) In this section, *authorised representative*, in relation to an individual, means a person who is—
- (a) a guardian of the individual; or
 - (b) an attorney for the individual under an enduring power of attorney; or
 - (c) an agent for the individual within the meaning of the **Medical Treatment Act 1988**; or
 - (d) an administrator or a person responsible within the meaning of the **Guardianship and Administration Act 1986**; or
 - (e) a parent of an individual, if the individual is a child; or
 - (f) otherwise empowered under law to perform any functions or duties or exercise powers as an agent of or in the best interests of the individual—

except to the extent that acting as an authorised representative of the individual is inconsistent with an order made by a court or tribunal.

86 Protection from liability

- (1) A person who lodges a complaint under section 45(1) is not personally liable for any loss, damage or injury suffered by another person by reason only of the lodging of the complaint.
- (2) A person who produces a document, or gives any information or evidence, to the Health Services Commissioner under this Act is not personally liable for any loss, damage or injury suffered by another person by reason only of that production or giving.

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- (3) Subsection (4) applies where—
- (a) a person has been provided by an organisation with access to health information under this Act; and
 - (b) the access was required by Part 5 or HPP 6 or the organisation, or an employee or agent of the organisation acting within the scope of his or her actual or apparent authority, believed in good faith that the access was required by Part 5 or HPP 6.
- (4) The provision of access to health information in the circumstances referred to in subsection (3)—
- (a) is not to be regarded as making the organisation, or any employee or agent of the organisation, liable for defamation or breach of confidence or guilty of a criminal offence by reason only of the provision of access; or
 - (b) is not to be regarded as making any person who provided the health information to the organisation liable for defamation or breach of confidence in respect of any publication involved in, or resulting from, the provision of access by reason only of the provision of access; or
 - (c) must not be taken for the purpose of the law relating to defamation or breach of confidence to constitute an authorisation or approval of the publication of the information by the person who is provided with access to it.
- (5) An organisation is not in breach of this Act by reason only of—
- (a) collecting, using, disclosing or transferring health information; or
 - (b) providing access to health information; or
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(c) correcting health information—
of an individual in response to a consent or
request by an authorised representative whose
consent or request is void by virtue of
section 85(4).

87 Functions of Health Services Commissioner

The functions of the Health Services
Commissioner under this Act are—

- (a) to promote an understanding and acceptance
of the Health Privacy Principles and of the
objects of those Principles;
- (b) in accordance with Part 4, to issue, approve
or vary guidelines for the purposes of the
Health Privacy Principles;
- (c) to publish model terms capable of being
adopted by an organisation in a contract or
arrangement with a recipient of health
information being transferred by the
organisation outside Victoria;
- (d) subject to this Act, to receive complaints
about an act or practice of an organisation—
 - (i) that may contravene a Health Privacy
Principle; or
 - (ii) that may interfere with the privacy of
an individual or may otherwise have an
adverse effect on the privacy of an
individual—

and, if the Health Services Commissioner
considers it appropriate to do so, to
endeavour, by conciliation, to effect a
settlement of the matters that gave rise to the
complaint;

- (e) to investigate, conciliate and make rulings on
complaints under this Act;

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- (f) to serve compliance notices on organisations;
 - (g) subject to approval from the Minister, to initiate inquiries into—
 - (i) matters referred by the Health Services Review Council; and
 - (ii) broader issues of health care arising out of complaints received under this Act;
 - (h) to conduct or commission audits of records of health information held by an organisation for the purpose of ascertaining whether the records are handled according to the Health Privacy Principles;
 - (i) to monitor and report on the adequacy of equipment and user safeguards;
 - (j) to undertake research into, and to monitor developments in, data processing and computer technology (including data matching and data linkage) to ensure that any adverse effects of such developments on personal privacy are minimised, and to report to the Minister the results of the research and monitoring;
 - (k) for the purpose of promoting the protection of personal privacy, to undertake educational programs on the Health Services Commissioner's own behalf or in co-operation with other persons or bodies whose functions concern the protection of personal privacy;
 - (l) from time to time, in the public interest, to publish reports and recommendations relating generally to the Health Services Commissioner's functions under this Act or to any matter investigated by the Health Services Commissioner under this Act, whether or not the matters to be dealt with in
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- any such report have been the subject of a report to the Minister;
- (m) to consult and co-operate with other persons and bodies concerned with personal privacy;
 - (n) to provide advice to the Health Services Review Council;
 - (o) to provide advice (with or without a request) to any individual or organisation on any matter relevant to the operation of this Act;
 - (p) to examine and assess (with or without a request) the impact on personal privacy of any act or practice, or proposed act or practice, of an organisation;
 - (q) to make suggestions to any individual or organisation in relation to any matter that concerns the need for, or the desirability of, action by that individual or organisation to protect the privacy of health information;
 - (r) to gather information that, in the opinion of the Health Services Commissioner, will assist the Health Services Commissioner in carrying out his or her functions under this Act;
 - (s) to perform any other function conferred on the Health Services Commissioner by this Act.

88 Powers

The Health Services Commissioner has power to do all things that are necessary or convenient to be done for or in connection with the performance of his or her functions under this Act.

89 Health Services Commissioner to have regard to certain matters

The Health Services Commissioner must have regard to the objects of this Act in the performance of his or her functions and the exercise of his or her powers under this Act.

90 Secrecy

- (1) A person who is, or has been, the Health Services Commissioner, an acting Health Services Commissioner, a delegate of the Health Services Commissioner or an employee in the office of the Health Services Commissioner must not, directly or indirectly, make a record of, disclose or communicate to any person any information relating to the affairs of any individual or organisation acquired in the performance of functions or duties or the exercise of powers under this Act, unless—
- (a) it is necessary to do so for the purposes of, or in connection with, the performance of a function or duty or the exercise of a power under, or in relation to, this, or any other, Act; or
 - (b) the individual or organisation to whom the information relates gives written consent to the making of the record, disclosure or communication.

Penalty: 60 penalty units.

- (2) A person who is, or has been, the Health Services Commissioner, an acting Health Services Commissioner, a delegate of the Health Services Commissioner or an employee in the office of the Health Services Commissioner must not disclose or communicate to any person any information given to the Health Services Commissioner pursuant to a requirement made under Division 3

of Part 6 (including information contained in a document required to be produced to the Health Services Commissioner) unless all parties to the conciliation consent to the making of the disclosure or communication.

Penalty: 60 penalty units.

- (3) Subsection (2) does not prevent—
- (a) the disclosure to the Health Services Commissioner, an acting Health Services Commissioner, a delegate of the Health Services Commissioner or an employee in the office of the Health Services Commissioner of whether the conciliation under Division 3 of Part 6 was successful and the terms of any agreement reached; or
 - (b) the making of a recommendation that the Health Services Commissioner should investigate a complaint under Division 4 of Part 6.
- (4) A person who is, or has been, the Health Services Commissioner, an acting Health Services Commissioner, a delegate of the Health Services Commissioner or an employee in the office of the Health Services Commissioner must not disclose or communicate to any person, other than a person employed in the office of the Health Services Commissioner, any information given to the Health Services Commissioner pursuant to a requirement made under Division 4 of Part 6 (including information contained in a document required to be produced to the Health Services Commissioner) unless—
- (a) he or she has notified the person from whom the information was obtained of the proposal to disclose or communicate that information; and
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- (b) he or she has given that person a reasonable opportunity to object to the disclosure or communication; and
- (c) that person has not objected to the disclosure or communication.

Penalty: 60 penalty units.

91 Delegation

- (1) The Health Services Commissioner may, by instrument, delegate to a person employed for the purposes of this Act, or a person belonging to a class of those persons, any of his or her powers under this Act other than this power of delegation.
- (2) The Health Services Commissioner may, by instrument, delegate to any person any of his or her powers under Division 3 of Part 6.

92 Employees and agents

- (1) Any act done or practice engaged in on behalf of an organisation by an employee or agent of the organisation acting within the scope of his or her actual or apparent authority is to be taken, for the purposes of this Act including a prosecution for an offence against this Act, to have been done or engaged in by the organisation and not by the employee or agent unless the organisation establishes that it took reasonable precautions and exercised due diligence to avoid the act being done or the practice being engaged in by its employee or agent.
- (2) If, for the purpose of investigating a complaint or a proceeding for an offence against this Act, it is necessary to establish the state of mind of an organisation in relation to a particular act or practice, it is sufficient to show—

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- (a) that the act was done or practice engaged in by an employee or agent of the organisation acting within the scope of his or her actual or apparent authority; and
 - (b) that the employee or agent had that state of mind.

93 Offences by organisations or bodies

If this Act provides that an organisation or body is guilty of an offence, that reference to an organisation or body must, if the organisation or body is unincorporated, be read as a reference to each member of the committee of management of the organisation or body.

94 Prosecutions

- (1) A proceeding for an offence against this Act may only be brought by—
 - (a) a member of the police force; or
 - (b) the Health Services Commissioner; or
 - (c) a person authorised to do so, either generally or in a particular case, by the Health Services Commissioner.
- (2) In a proceeding for an offence against this Act it must be presumed, in the absence of evidence to the contrary, that the person bringing the proceeding was authorised to bring it.

95 Deceased individuals

- (1) This Act applies in relation to a deceased individual who has been dead for 30 years or less, so far as it is reasonably capable of doing so, in the same way as it applies in relation to an individual who is not deceased.

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- (2) Subject to subsection (3), if an individual has died, a right or power conferred on individuals by a provision of this Act is exercisable in relation to the deceased individual, so far as the circumstances reasonably permit, by a legal representative of the deceased individual.
 - (3) A purported consent by a legal representative of a deceased individual is void if, when giving it, the legal representative knows or believes that the consent does not accord with the wishes expressed, and not changed or withdrawn, by the individual in his or her lifetime.

96 Legal professional privilege not affected by this Act⁶

Despite any other section, this Act does not—

- (a) apply in relation to a document that is the subject of legal professional privilege; or
- (b) affect the law or practice relating to legal professional privilege.

97 Defect or invalidity—protection if person acts in good faith etc.

If a person takes any action in respect of, or in consequence of having received—

- (a) a notice or request, made or apparently made under this Act; or
- (b) a consent or authorisation, given or apparently given under this Act—

that is void or defective, the person is not liable in respect of the action by reason only that the notice, request, consent or authorisation was void or defective, if the person proves that they—

- (c) took the action in good faith; and

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- (d) did not know, and had no reason to be aware, when taking the action, that the notice, request, consent or authorisation was void or defective (as the case may be).

98 Unqualified organisation may obtain and act on expert advice

An organisation may, for the purpose of performing a function under this Act, obtain and act on the advice of a person possessing skill and training necessary for the performance of that function.

99 Supreme Court—limitation of jurisdiction

It is the intention of section 8 to alter or vary section 85 of the **Constitution Act 1975**.

100 Regulations

- (1) The Governor in Council may make regulations for or with respect to—
- (a) prescribing maximum fees for providing access to health information under this Act; and
 - (b) prescribing maximum fees for performing functions under section 42; and
 - (c) prescribing maximum fees for transfers of health information under HPP 11; and
 - (d) prescribing retention periods, whether greater or less than the periods specified in HPP 4.2, for the preservation of health information or classes of health information for the purposes of HPP 4.2; and
 - (e) generally prescribing any other matter or thing required or permitted by this Act to be prescribed or necessary to be prescribed to give effect to this Act.

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- (2) The regulations—
- (a) may be of general or limited application; and
 - (b) may differ according to differences in time, place or circumstance; and
 - (c) may apply, adopt or incorporate any matter contained in any document, whether—
 - (i) wholly or partially or as amended by the regulations; or
 - (ii) as in force at the time the regulations are made or at any time before then; or
 - (iii) as in force from time to time; and
 - (d) may confer a discretionary authority or impose a duty on a specified person or body or a specified class of person or body.
- (3) A power conferred by this Act to make regulations prescribing maximum fees for providing access to health information by way of a summary may be exercised by reference to the time taken to prepare the summary based on the usual fee of the health service provider for a consultation of a comparable duration.

Pt 9
(Headings
and ss 101–
137)
amended by
No. 110/2003
s. 57,
repealed by
No. 28/2007
s. 3(Sch.
item 30).

* * * * *

SCHEDULE 1

Section 19

THE HEALTH PRIVACY PRINCIPLES

1 Principle 1—Collection

When health information may be collected

- 1.1 An organisation must not collect health information about an individual unless the information is necessary for one or more of its functions or activities and at least one of the following applies—
- (a) the individual has consented;
 - (b) the collection is required, authorised or permitted, whether expressly or impliedly, by or under law (other than a prescribed law);
 - (c) the information is necessary to provide a health service to the individual and the individual is incapable of giving consent within the meaning of section 85(3) and—
 - (i) it is not reasonably practicable to obtain the consent of an authorised representative of the individual within the meaning of section 85; or
 - (ii) the individual does not have such an authorised representative;
 - (d) the information is disclosed to the organisation in accordance with HPP 2.2(a), (f), (i) or (l) or HPP 2.5;
 - (e) if the collection is necessary for research, or the compilation or analysis of statistics, in the public interest—
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- (i) that purpose cannot be served by the collection of information that does not identify the individual or from which the individual's identity cannot reasonably be ascertained; and
 - (ii) it is impracticable for the organisation to seek the individual's consent to the collection; and
 - (iii) the information is collected in accordance with guidelines issued or approved by the Health Services Commissioner under section 22 for the purposes of this subparagraph;
- (f) the collection is necessary to prevent or lessen—
- (i) a serious and imminent threat to the life, health, safety or welfare of any individual; or
 - (ii) a serious threat to public health, public safety or public welfare—
- and the information is collected in accordance with guidelines, if any, issued or approved by the Health Services Commissioner under section 22 for the purposes of this paragraph;
- (g) the collection is by or on behalf of a law enforcement agency and the organisation reasonably believes that the collection is necessary for a law enforcement function;
 - (h) the collection is necessary for the establishment, exercise or defence of a legal or equitable claim;
 - (i) the collection is in the prescribed circumstances.
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How health information is to be collected

- 1.2 An organisation must collect health information only by lawful and fair means and not in an unreasonably intrusive way.
- 1.3 If it is reasonable and practicable to do so, an organisation must collect health information about an individual only from that individual.
- 1.4 At or before the time (or, if that is not practicable, as soon as practicable thereafter) an organisation collects health information about an individual from the individual, the organisation must take steps that are reasonable in the circumstances to ensure that the individual is generally aware of—
 - (a) the identity of the organisation and how to contact it; and
 - (b) the fact that he or she is able to gain access to the information; and
 - (c) the purposes for which the information is collected; and
 - (d) to whom (or the types of individuals or organisations to which) the organisation usually discloses information of that kind; and
 - (e) any law that requires the particular information to be collected; and
 - (f) the main consequences (if any) for the individual if all or part of the information is not provided.
- 1.5 If an organisation collects health information about an individual from someone else, it must take any steps that are reasonable in the circumstances to ensure that the individual is or has been made aware of the matters listed in HPP 1.4 except to the extent that making the individual aware of the matters would pose a

serious threat to the life or health of any individual or would involve the disclosure of information given in confidence⁷.

- 1.6 An organisation is not required to notify the individual of the identity of persons, or classes of persons, to whom health information may be disclosed in accordance with HPP 2.2(f).

Information given in confidence⁸

- 1.7 If personal information is given in confidence to a health service provider about an individual by a person other than—

- (a) the individual; or
- (b) a health service provider in the course of, or otherwise in relation to, the provision of health services to the individual—

with a request that the information not be communicated to the individual to whom it relates, the provider must—

- (c) confirm with the person that the information is to remain confidential; and
- (d) if the information remains confidential—
 - (i) record the information only if it is relevant to the provision of health services to, or the care of, the individual; and
 - (ii) take reasonable steps to ensure that the information is accurate and not misleading; and
- (e) take reasonable steps to record that the information is given in confidence and is to remain confidential.

2 Principle 2—Use and Disclosure⁹

- 2.1 An organisation may use or disclose health information about an individual for the primary purpose for which the information was collected in accordance with HPP 1.1.
- 2.2 An organisation must not use or disclose health information about an individual for a purpose (the *secondary purpose*) other than the primary purpose for which the information was collected unless at least one of the following paragraphs applies¹⁰—
- (a) both of the following apply—
 - (i) the secondary purpose is directly related to the primary purpose; and
 - (ii) the individual would reasonably expect the organisation to use or disclose the information for the secondary purpose; or
 - (b) the individual has consented to the use or disclosure; or
 - (c) the use or disclosure is required, authorised or permitted, whether expressly or impliedly, by or under law (other than a prescribed law); or
 - (d) all of the following apply—
 - (i) the organisation is a health service provider providing a health service to the individual; and
 - (ii) the use or disclosure for the secondary purpose is reasonably necessary for the provision of the health service; and

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- (iii) the individual is incapable of giving consent within the meaning of section 85(3) and—
 - (A) it is not reasonably practicable to obtain the consent of an authorised representative of the individual within the meaning of section 85; or
 - (B) the individual does not have such an authorised representative; or
- (e) all of the following apply—
 - (i) the organisation is a health service provider providing a health service to the individual; and
 - (ii) the use is for the purpose of the provision of further health services to the individual by the organisation; and
 - (iii) the organisation reasonably believes that the use is necessary to ensure that the further health services are provided safely and effectively; and
 - (iv) the information is used in accordance with guidelines, if any, issued or approved by the Health Services Commissioner under section 22 for the purposes of this paragraph; or
- (f) the use or disclosure is for the purpose of—
 - (i) funding, management, planning, monitoring, improvement or evaluation of health services; or

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- (ii) training provided by a health service provider to employees or persons working with the organisation—
- and—
- (iii) that purpose cannot be served by the use or disclosure of information that does not identify the individual or from which the individual's identity cannot reasonably be ascertained and it is impracticable for the organisation to seek the individual's consent to the use or disclosure; or
 - (iv) reasonable steps are taken to de-identify the information—
- and—
- (v) if the information is in a form that could reasonably be expected to identify individuals, the information is not published in a generally available publication; and
 - (vi) the information is used or disclosed in accordance with guidelines, if any, issued or approved by the Health Services Commissioner under section 22 for the purposes of this subparagraph; or
- (g) if the use or disclosure is necessary for research, or the compilation or analysis of statistics, in the public interest—
 - (i) it is impracticable for the organisation to seek the individual's consent before the use or disclosure; and
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- (ii) that purpose cannot be served by the use or disclosure of information that does not identify the individual or from which the individual's identity cannot reasonably be ascertained; and
- (iii) the use or disclosure is in accordance with guidelines issued or approved by the Health Services Commissioner under section 22 for the purposes of this subparagraph; and
- (iv) in the case of disclosure—
 - (A) the organisation reasonably believes that the recipient of the health information will not disclose the health information; and
 - (B) the disclosure will not be published in a form that identifies particular individuals or from which an individual's identity can reasonably be ascertained; or
- (h) the organisation reasonably believes that the use or disclosure is necessary to lessen or prevent—
 - (i) a serious and imminent threat to an individual's life, health, safety or welfare; or
 - (ii) a serious threat to public health, public safety or public welfare—and the information is used or disclosed in accordance with guidelines, if any, issued or approved by the Health Services Commissioner under section 22 for the purposes of this paragraph; or

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- (i) ¹¹the organisation has reason to suspect that unlawful activity has been, is being or may be engaged in, and uses or discloses the health information as a necessary part of its investigation of the matter or in reporting its concerns to relevant persons or authorities and, if the organisation is a registered health service provider, the use or disclosure would not be a breach of confidence; or
 - (j) ¹²the organisation reasonably believes that the use or disclosure is reasonably necessary for a law enforcement function by or on behalf of a law enforcement agency and, if the organisation is a registered health service provider, the use or disclosure would not be a breach of confidence; or
 - (k) the use or disclosure is necessary for the establishment, exercise or defence of a legal or equitable claim; or
 - (l) the use or disclosure is in the prescribed circumstances.

Note

Nothing in HPP 2 requires an organisation to disclose health information about an individual. An organisation is always entitled not to disclose health information in the absence of a legal obligation to disclose it.

- 2.3 If an organisation discloses health information under paragraph (i) or (j) of HPP 2.2, it must make a written note of the disclosure.
- 2.4 Despite HPP 2.2, a health service provider may disclose health information about an individual to an immediate family member of the individual if—

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- (a) either—
 - (i) the disclosure is necessary to provide appropriate health services to or care of the individual; or
 - (ii) the disclosure is made for compassionate reasons; and
- (b) the disclosure is limited to the extent reasonable and necessary for the purposes mentioned in paragraph (a); and
- (c) the individual is incapable of giving consent to the disclosure within the meaning of section 85(3); and
- (d) the disclosure is not contrary to any wish—
 - (i) expressed by the individual before the individual became incapable of giving consent and not changed or withdrawn by the individual before then; and
 - (ii) of which the organisation is aware or could be made aware by taking reasonable steps; and
- (e) in the case of an immediate family member who is under the age of 18 years, considering the circumstances of the disclosure, the immediate family member has sufficient maturity to receive the information.

2.5 Despite HPP 2.2, an organisation may use or disclose health information about an individual where—

- (a) it is known or suspected that the individual is dead; or
- (b) it is known or suspected that the individual is missing; or

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- (c) the individual has been involved in an accident or other misadventure and is incapable of consenting to the use or disclosure—

and the use or disclosure is to the extent reasonably necessary—

- (d) to identify the individual; or
- (e) to ascertain the identity and location of an immediate family member or other relative of the individual for the purpose of—
- (i) enabling a member of the police force, a coroner or other prescribed organisation to contact the immediate family member or other relative for compassionate reasons; or
 - (ii) to assist in the identification of the individual—

and, in the circumstances referred to in paragraph (b) or (c)—

- (f) the use or disclosure is not contrary to any wish—
- (i) expressed by the individual before he or she went missing or became incapable of consenting and not withdrawn by the individual; and
 - (ii) of which the organisation is aware or could have become aware by taking reasonable steps; and
- (g) the information is used or disclosed in accordance with guidelines, if any, issued or approved by the Health Services Commissioner under section 22 for the purposes of this paragraph.

3 Principle 3—Data Quality

3.1 An organisation must take steps that are reasonable in the circumstances to make sure that, having regard to the purpose for which the information is to be used, the health information it collects, uses, holds or discloses is accurate, complete, up to date and relevant to its functions or activities.

4 Principle 4—Data Security and Data Retention

4.1 An organisation must take reasonable steps to protect the health information it holds from misuse and loss and from unauthorised access, modification or disclosure.

4.2 A health service provider must not delete health information relating to an individual, even if it is later found or claimed to be inaccurate, unless—

(a) the deletion is permitted, authorised or required by the regulations or any other law; or

(b) the deletion is not contrary to the regulations or any other law and occurs—

(i) in the case of health information collected while the individual was a child, after the individual attains the age of 25 years; or

(ii) in any case, more than 7 years after the last occasion on which a health service was provided to the individual by the provider—

whichever is the later.

4.3 A health service provider who deletes health information in accordance with HPP 4.2 must make a written note of the name of the individual to whom the health information related, the period covered by it and the date on which it was deleted.

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- 4.4 A health service provider who transfers health information to another individual or organisation and does not continue to hold a record of that information must make a written note of the name and address of the individual or organisation to whom it was transferred.
- 4.5 An organisation other than a health service provider must take reasonable steps to destroy or permanently de-identify health information if it is no longer needed for the purpose for which it was collected or any other purpose authorised by this Act, the regulations made under this Act or any other law.

5 Principle 5—Openness

- 5.1 An organisation must set out in a document—
- (a) clearly expressed policies on its management of health information; and
 - (b) the steps that an individual must take in order to obtain access to their health information.

The organisation must make the document available to anyone who asks for it.

- 5.2 On request by an individual, an organisation must take reasonable steps—
- (a) to let the individual know—
 - (i) whether the organisation holds health information relating to the individual; and
 - (ii) the steps that the individual should take if the individual wishes to obtain access to the information; and

- (b) if the organisation holds health information relating to the individual, to let the individual know in general terms—
 - (i) the nature of the information; and
 - (ii) the purposes for which the information is used; and
 - (iii) how the organisation collects, holds, uses and discloses the information.

6 Principle 6—Access and Correction

*Access*¹³

- 6.1 If an organisation holds health information about an individual, it must provide the individual with access to the information on request by the individual in accordance with Part 5, unless—
- (a) providing access would pose a serious threat to the life or health of any person under section 26 and refusing access is in accordance with guidelines, if any, issued or approved by the Health Services Commissioner under section 22 for the purposes of this paragraph; or
 - (b) providing access would have an unreasonable impact on the privacy of other individuals and refusing access is in accordance with guidelines, if any, issued or approved by the Health Services Commissioner under section 22 for the purposes of this paragraph; or
 - (c) the information relates to existing legal proceedings between the organisation and the individual and the information would not be accessible by the process of discovery in those proceedings¹⁴ or is subject to legal professional privilege; or
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- (d) providing access would reveal the intentions of the organisation in relation to negotiations, other than about the provision of a health service, with the individual in such a way as to expose the organisation unreasonably to disadvantage; or
 - (e) the information is subject to confidentiality under section 27; or
 - (f) providing access would be unlawful; or
 - (g) denying access is required or authorised by or under law; or
 - (h) providing access would be likely to prejudice an investigation of possible unlawful activity; or
 - (i) providing access would be likely to prejudice a law enforcement function by or on behalf of a law enforcement agency; or
 - (j) a law enforcement agency performing a lawful security function asks the organisation not to provide access to the information on the basis that providing access would be likely to cause damage to the security of Australia; or
 - (k) the request for access is of a kind that has been made unsuccessfully on at least one previous occasion and there are no reasonable grounds for making the request again; or
 - (l) the individual has been provided with access to the health information in accordance with Part 5 and is making an unreasonable, repeated request for access to the same information in the same way.

6.2 However, where providing access would reveal evaluative information generated within the organisation in connection with a commercially sensitive decision-making process, the organisation may give the individual an explanation for the commercially sensitive decision rather than access to the information.

Note

An organisation breaches HPP 6.1 if it relies on HPP 6.2 to give an individual an explanation for a commercially sensitive decision in circumstances where HPP 6.2 does not apply.

6.3 If access is refused on the ground that it would pose a serious threat to the life or health of the individual, the procedure in Division 3 of Part 5 applies.

6.4 Without limiting sections 26 and 27, nothing in this Principle compels an organisation to refuse to provide an individual with access to his or her health information.

Correction

6.5 ¹⁵If an organisation holds health information about an individual and the individual is able to establish that the information is inaccurate, incomplete, misleading or not up to date, the organisation must take reasonable steps to correct the information so that it is accurate, complete and up to date but must not delete the information otherwise than in accordance with HPP 4.2.

6.6 If—

- (a) the organisation is not willing to correct the health information in accordance with a request by the individual; and

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- (b) no decision or recommendation to the effect that the information should be corrected wholly or partly in accordance with the request, is pending or has been made under this Act or any other law; and
 - (c) the individual gives to the organisation a written statement concerning the requested correction—

the organisation must take reasonable steps to associate the statement with the information.

6.7 If the organisation accepts the need to correct the health information but—

- (a) the organisation considers it likely that leaving incorrect information, even if corrected, could cause harm to the individual or result in inappropriate health services or care being provided; or
- (b) the form in which the health information is held makes correction impossible; or
- (c) the corrections required are sufficiently complex or numerous for a real possibility of confusion or error to arise in relation to interpreting or reading the record if it were to be so corrected—

the organisation must place the incorrect information on a record which is not generally available to anyone involved in providing health services to the individual, and to which access is restricted, and take reasonable steps to ensure that only the corrected information is generally available to anyone who may provide health services to the individual.

- 6.8 If an organisation corrects health information about an individual, it must—
- (a) if practicable, record with the correction the name of the person who made the correction and the date on which the correction is made; and
 - (b) take reasonable steps to notify any health service providers to whom the organisation disclosed the health information before its correction and who may reasonably be expected to rely on that information in the future.
- 6.9 If an individual requests an organisation to correct health information about the individual, the organisation must take reasonable steps to notify the individual of a decision on the request as soon as practicable but in any case not later than 30 days after the request is received by the organisation.

Written reasons

- 6.10 An organisation must provide written reasons for refusal of access¹⁶ or a refusal to correct health information.

7 Principle 7—Identifiers

- 7.1 An organisation may only assign identifiers to individuals if the assignment of identifiers is reasonably necessary to enable the organisation to carry out any of its functions efficiently.
- 7.2 Subject to HPP 7.4, a private sector organisation may only adopt as its own identifier of an individual an identifier of an individual that has been assigned by a public sector organisation (or by an agent of, or contractor to, a public sector organisation acting in its capacity as agent or contractor) if—

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- (a) the individual has consented to the adoption of the same identifier; or
 - (b) the use or disclosure of the identifier is required or authorised by or under law.

7.3 Subject to HPP 7.4, a private sector organisation may only use or disclose an identifier assigned to an individual by a public sector organisation (or by an agent of, or contractor to, a public sector organisation acting in its capacity as agent or contractor) if—

- (a) the use or disclosure is required for the purpose for which it was assigned or for a secondary purpose referred to in one or more of paragraphs (c) to (l) of HPP 2.2; or
- (b) the individual has consented to the use or disclosure; or
- (c) the disclosure is to the public sector organisation which assigned the identifier to enable the public sector organisation to identify the individual for its own purposes.

7.4 If the use or disclosure of an identifier assigned to an individual by a public sector organisation is necessary for a private sector organisation to fulfil its obligations to, or requirements of, the public sector organisation, a private sector organisation may either—

- (a) adopt as its own identifier of an individual an identifier of the individual that has been assigned by the public sector organisation; or
- (b) use or disclose an identifier of the individual that has been assigned by the public sector organisation.

8 Principle 8—Anonymity

8.1 Wherever it is lawful and practicable, individuals must have the option of not identifying themselves when entering transactions with an organisation.

9 Principle 9—Transborder Data Flows

9.1 An organisation may transfer health information about an individual to someone (other than the organisation or the individual) who is outside Victoria only if—

- (a) the organisation reasonably believes that the recipient of the information is subject to a law, binding scheme or contract which effectively upholds principles for fair handling of the information that are substantially similar to the Health Privacy Principles; or
- (b) the individual consents to the transfer; or
- (c) the transfer is necessary for the performance of a contract between the individual and the organisation, or for the implementation of pre-contractual measures taken in response to the individual's request; or
- (d) the transfer is necessary for the conclusion or performance of a contract concluded in the interest of the individual between the organisation and a third party; or
- (e) all of the following apply—
 - (i) the transfer is for the benefit of the individual;
 - (ii) it is impracticable to obtain the consent of the individual to that transfer;
 - (iii) if it were practicable to obtain that consent, the individual would be likely to give it; or

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- (f) the organisation has taken reasonable steps to ensure that the information which it has transferred will not be held, used or disclosed by the recipient of the information inconsistently with the Health Privacy Principles; or
 - (g) the transfer is authorised or required by any other law.

10 Principle 10—Transfer or closure of the practice of a health service provider

10.1 This Principle applies if the practice or business of a health service provider (*the provider*) is to be—

- (a) sold or otherwise transferred and the provider will not be providing health services in the new practice or business; or
- (b) closed down.

10.2 The provider or, if the provider is deceased, the legal representatives of the provider, must—

- (a) publish a notice in a newspaper circulating in the locality of the practice or business stating—
 - (i) that the practice or business has been, or is about to be, sold, transferred or closed down, as the case may be; and
 - (ii) the manner in which the provider proposes to deal with the health information held by the practice or business about individuals who have received health services from the provider, including whether the provider proposes to retain the information or make it available for transfer to those individuals or their health service providers; and

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- (b) take any other steps to notify individuals who have received a health service from the provider in accordance with guidelines issued or approved by the Health Services Commissioner under section 22 for the purposes of this paragraph.
 - 10.3 Not earlier than 21 days after giving notice in accordance with HPP 10.2, the person giving the notice must, in relation to health information about an individual held by, or on behalf of, the practice or business, elect to retain that information or transfer it to—
 - (a) the health service provider, if any, who takes over the practice or business; or
 - (b) the individual or a health service provider nominated by him or her.
 - 10.4 A person who elects to retain health information must continue to hold it or transfer it to a competent organisation for safe storage in Victoria, until the time, if any, when the health information is destroyed in accordance with HPP 4.
 - 10.5 Subject to HPP 10.2, a person must comply with the requirements of this Principle as soon as practicable.
 - 10.6 Despite any other provision of the Health Privacy Principles, a person who transfers health information in accordance with this Principle does not, by so doing, contravene the Health Privacy Principles.
 - 10.7 If—
 - (a) an individual, in response to a notice published under HPP 10.2, requests that health information be transferred to him or her or to a health service provider nominated by him or her; and
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(b) the person who published the notice elects to retain the health information—

the request must be taken to be—

- (c) in the case of a request that the health information be transferred to him or her, a request for access to that health information in accordance with Part 5 or HPP 6; and
- (d) in the case of a request that the health information be transferred to a health service provider nominated by him or her, a request for the transfer of that health information in accordance with HPP 11—

and it must be dealt with in accordance with this Act.

10.8 This Principle operates subject to any other law, including the **Public Records Act 1973**.

10.9 For the purposes of HPP 10.1(a), a business or practice of a provider is transferred if—

- (a) it is amalgamated with another organisation; and
- (b) the successor organisation which is the result of the amalgamation is a private sector organisation.

11 Principle 11—Making information available to another health service provider

11.1 If an individual—

- (a) requests a health service provider to make health information relating to the individual held by the provider available to another health service provider; or

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(b) authorises another health service provider to request a health service provider to make health information relating to the individual held by that provider available to the requesting health service provider—

a health service provider to whom the request is made and who holds health information about the individual must, on payment of a fee not exceeding the prescribed maximum fee and subject to the regulations, provide a copy or written summary of that health information to that other health service provider.

- 11.2 A health service provider must comply with the requirements of this Principle as soon as practicable.
- 11.3 Nothing in Part 5 or HPP 6 limits the operation of this Principle.
- 11.4 For the purposes of HPP 10.7, this Principle applies to a legal representative of a deceased health service provider in the same way that it applies to a health service provider.
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ENDNOTES

1. General Information

Minister's second reading speech—

Legislative Assembly: 23 November 2000

Legislative Council: 22 March 2001

The long title for the Bill for this Act was "A Bill to establish a regime for the protection of health information held by health service providers and other organisations, to create an enforceable right of access to health information, to establish privacy standards for health information, to amend the **Parliamentary Committees Act 1968**, the **Ombudsman Act 1973**, the **Freedom of Information Act 1982**, the **Health Services (Conciliation and Review) Act 1987**, the **Subordinate Legislation Act 1994** and certain other Acts and for other purposes."

Constitution Act 1975:

Section 85(5) statement:

Legislative Assembly: 23 November 2000

Legislative Council: 22 March 2001

Absolute majorities:

Legislative Assembly: 20 March 2001

Legislative Council: 3 April 2001

The **Health Records Act 2001** was assented to on 10 April 2001 and came into operation as follows:

Ss 1–6, 22–24, 84, 87(a)(b)(k)(m)–(o)(q)(r), 88–91, 94, 100, 105(c)–(e)(i)(f)–(k)(n), 107(b)(c), 111(2)(a)(3)(5) on 16 November 2001: Government Gazette 15 November 2001 page 2839; ss 7, 8, 13–17, 19, 85, 86(2)–(5), 93, 95–99, 103(1)(2)(b), 109, 111(1), Schedule 1 on 1 March 2002: Government Gazette 28 February 2002 page 318; rest of Act on 1 July 2002: section 2(2).

2. Table of Amendments

This Version incorporates amendments made to the **Health Records Act 2001** by Acts and subordinate instruments.

Statute Law Amendment (Relationships) Act 2001, No. 27/2001

Assent Date: 12.6.01
Commencement Date: S. 6(Sch. 4 item 4) on 28.6.01: Government Gazette 28.6.01 p. 1428
Current State: This information relates only to the provision/s amending the **Health Records Act 2001**

Health Practitioner Acts (Further Amendments) Act 2002, No. 14/2002

Assent Date: 7.5.02
Commencement Date: Ss 48, 49 on 8.5.02: s. 2(1)
Current State: This information relates only to the provision/s amending the **Health Records Act 2001**

Australian Crime Commission (State Provisions) Act 2003, No. 52/2003

Assent Date: 16.6.03
Commencement Date: S. 52(Sch. 1 item 5) on 17.6.03: s. 2(1)
Current State: This information relates only to the provision/s amending the **Health Records Act 2001**

Health Legislation (Further Amendment) Act 2003, No. 98/2003

Assent Date: 2.12.03
Commencement Date: S. 12 on 3.12.03: s. 2(1)
Current State: This information relates only to the provision/s amending the **Health Records Act 2001**

Parliamentary Committees Act 2003, No. 110/2003

Assent Date: 9.12.03
Commencement Date: S. 57 on 10.12.03: s. 2
Current State: This information relates only to the provision/s amending the **Health Records Act 2001**

Public Administration Act 2004, No. 108/2004

Assent Date: 21.12.04
Commencement Date: S. 117(1)(Sch. 3 item 95) on 5.4.05: Government Gazette 31.3.05 p. 602
Current State: This information relates only to the provision/s amending the **Health Records Act 2001**

Legal Profession (Consequential Amendments) Act 2005, No. 18/2005

Assent Date: 24.5.05
Commencement Date: S. 18(Sch. 1 item 48) on 12.12.05: Government Gazette 1.12.05 p. 2781
Current State: This information relates only to the provision/s amending the **Health Records Act 2001**

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Health Professions Registration Act 2005, No. 97/2005

Assent Date: 7.12.05
Commencement Date: S. 182(Sch. 4 item 26) on 1.7.07: s. 2(3)
Current State: This information relates only to the provision/s amending the **Health Records Act 2001**

Disability Act 2006, No. 23/2006

Assent Date: 16.5.06
Commencement Date: S. 241 on 1.7.07: s. 2(3)
Current State: This information relates only to the provision/s amending the **Health Records Act 2001**

Statute Law Revision Act 2007, No. 28/2007

Assent Date: 26.6.07
Commencement Date: S. 3(Sch. item 30) on 27.6.07: s. 2(1)
Current State: This information relates only to the provision/s amending the **Health Records Act 2001**

Relationships Act 2008, No. 12/2008

Assent Date: 15.4.08
Commencement Date: S. 73(1)(Sch. 1 item 29) on 1.12.08: s. 2(2)
Current State: This information relates only to the provision/s amending the **Health Records Act 2001**

Family Violence Protection Act 2008, No. 52/2008

Assent Date: 23.9.08
Commencement Date: S. 250 on 8.12.08: Special Gazette (No. 339) 4.12.08 p. 1
Current State: This information relates only to the provision/s amending the **Health Records Act 2001**

Stalking Intervention Orders Act 2008, No. 68/2008

Assent Date: 18.11.08
Commencement Date: S. 77 on 8.12.08: Special Gazette (No. 339) 4.12.08 p. 1
Current State: This information relates only to the provision/s amending the **Health Records Act 2001**

3. Explanatory Details

¹S. 25(1): Section 5 defines what is meant by this expression.

²S. 26: See also Division 3 of Part 5 and HPP 6.3.

³S. 27: HPP 1.7 relates to the collection of information given in confidence.

⁴S. 45(1): Section 18 defines what is meant by this expression.

⁵S. 64(1): Section 18 defines what is meant by this expression.

⁶S. 96: See also HPP 6.1(c).

⁷Sch. 1 HPP 1.5: See HPP 1.7 and also section 27.

⁸Sch. 1 HPP 1.7: See also section 27.

⁹Sch. 1 HPP 2: See also HPP 9 for requirements relating to the transfer of health information to a person who is outside Victoria.

¹⁰Sch. 1 HPP 2.2: A use or disclosure may be permitted under more than one paragraph of HPP 2.2.

¹¹ Sch. 1. HPP 2.2(i): For the purposes of this paragraph, the term "breach of confidence" relates to the general law of confidence (including but not limited to the common law or in equity), which requires, amongst other things, that a duty of confidence exists under that law which is not, in the particular circumstances, outweighed by any countervailing public interest under that law.

¹² Sch. 1. HPP 2.2(j): For the purposes of this paragraph, the term "breach of confidence" relates to the general law of confidence (including but not limited to the common law or in equity), which requires, amongst other things, that a duty of confidence exists under that law which is not, in the particular circumstances, outweighed by any countervailing public interest under that law.

¹³Sch. 1 HPP 6: See section 34(3) for access to health information, only part of which is claimed to fall within HPP 6.1 or 6.2.

¹⁴Sch. 1 HPP 6.1(c): See also section 96.

¹⁵Sch. 1 HPP 6.5: See HPP 4.2 and HPP 4.3 for deletion or destruction of health information.

¹⁶Sch. 1 HPP 6.10: See section 35 regarding refusal of access.

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