

Confidentiality not in the 'public interest': *Royal Women's Hospital v Medical Practitioners Board of Victoria* [2006] VSCA 85

By Julie Clayton

On 20 April 2006, the Victorian Court of Appeal held that the Royal Women's Hospital was required to produce the medical records of a patient to the Medical Practitioners Board of Victoria (the Board) because the public interest immunity did not apply.

The case involved a patient, Ms X, who discovered at 32 weeks' gestation that her foetus had skeletal dysplasia. She became suicidal and demanded a termination of pregnancy. After psychiatric assessment and recommendation, a termination of pregnancy was performed at the Royal Women's Hospital (the Hospital) in January 2000.

In May 2001, Senator Julian McGauran made a complaint to the Board, which regulates standards of medical practice and investigates professional conduct and performance of registered medical practitioners. Ms X refused the Board access to her medical records, so in mid-2003 the Board obtained a search warrant from the Magistrates Court to seize the records and lodge them with the court.

In May 2004, the Hospital argued in the Magistrates Court that the documents should not be delivered to the Board on three grounds:

1. s28(2) of the *Evidence Act* 1958 (Vic), which precludes a doctor divulging without the consent of the patient any information acquired while attending a patient 'in any civil suit or proceeding';
2. s141(2) of the *Health Services Act* 1988 (Vic), which precludes any information that could identify a patient being given to any other person; and
3. that the records were subject to a public interest immunity.

The magistrate found against the Hospital on all three grounds and the Hospital appealed to the Supreme Court. The case was heard by Justice Gillard.

EVIDENCE ACT

The Hospital argued that an investigation by the Board fell into the category of a proceeding. However, Justice Gillard agreed with the magistrate that the section was intended to apply only to court proceedings.

HEALTH SERVICES ACT

Section 141(2) of the *Health Services Act* 1988 provides an exception for information 'expressly authorised, permitted or required' to be given under 'this or any other act'. He found that the Hospital was bound by law to deliver the documents and therefore the exception applied.

PUBLIC INTEREST IMMUNITY

The magistrate found that the public interest immunity applied only to information concerning departments or organs of central government and that medical records did not fall within this category.

However, Justice Gillard held that public interest immunity could apply to medical records. The public interest in the proper investigation and determination of complaints made against medical practitioners must be weighed against the public interest in protecting the confidentiality of medical records.

The Hospital submitted that if patients knew that their records could be disclosed they may not seek medical advice, or may not be open and frank with their doctors.

Gillard J did not accept this submission, maintaining that '[p]regnant women will seek treatment if it becomes necessary, they will approach a public hospital if necessary, and will reveal all that is necessary to enable their treatment to be properly and carefully performed. The exigencies of the occasion will ensure this is so.'¹

He held that public interest immunity did not apply.

COURT OF APPEAL

The Hospital appealed to the Court of Appeal only on the public interest immunity point. Chief Justice Warren, Justice Maxwell and Justice Charles unanimously dismissed the appeal. They held that public interest immunity is intended to protect government at the highest levels and does not apply to medical records. They did not consider that there was any need to undertake a balancing exercise.

The Court of Appeal did not share Justice Gillard's sanguine view that the exigencies of pregnancy would ensure women sought appropriate and timely medical treatment. However, because the Board is subject to the privacy regime imposed by the *Health Records Act* 2001 (Vic), disclosure of the medical records to the Board would not result in public disclosure of those records, nor in identification of Ms X. ■

Note: 1 *Royal Women's Hospital v Medical Practitioners Board* [2005] VSC 225 at 134.

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