

4. Statutory duties

The board has been given the authority to run the health service. So too is it given legal responsibility for its functioning. All directors should ensure that they individually and collectively comply with all relevant legal obligations. These obligations exist under the respective Enabling Acts, relevant Victorian Government administration acts, subordinate legislation and broader legislation and include topics from employer/employee rights, health & safety, and privacy laws.

Questions that directors of health services should ask

- Do I have a good working knowledge of my Enabling Act and the laws and regulations relevant to the health service?
- How well do I understand my director responsibilities under broader regulations relevant to public sector directors, such as the PAA and FMA?
- Do I know who the key regulators are for Victorian health services and public sector organisations and our responsibilities to them?
- How does the board ensure its directors are compliant with all the relevant obligations?
- Do I understand the regulatory framework in which the health service operates?
- Does the board receive reports from management about material changes to laws and regulations and the impacts this may have on the health service?
- Am I clear as to where the health service stands in terms of its compliance to quality and safety standards? Is the board?
- Have I, and other board directors, received/participated in the appropriate training to enable us to effectively challenge the evidence presented by management?
- Am I aware of the health service's by-laws and the legal obligations they contain?

Red flags

- Directors do not fully understand all their legal obligations and responsibilities under the Enabling Acts and other legislation mentioned in this chapter.
- Obligations such as development of the health service's by-laws, maintaining clinical standards of care and meeting privacy requirements are not known or well understood by directors of the board.
- The board fails to identify or ignores a solvency problem and allows the health service to continue operating or fails to seek further information in relation to the accounts when a reasonable director would do so, thereby breaching the requirements of the FMA.
- The health service has difficulties achieving accreditation and meeting and improving on safety and quality of care performance standards.
- Directors do not fully understand or have not received appropriate information and training on their health and safety obligations and responsibilities.
- Directors passively rely on other director's expertise and/or do not participate in training.

Introduction to the chapter

Holding a director position on a health service board is a great privilege that comes with significant personal and professional obligations and liabilities. This chapter looks at:

- the Victorian and Commonwealth legislation that supports the provision of health care services within Victoria, including the Enabling Acts
- an overview of other relevant acts that make up this framework

more detailed discussion of work, health and safety legislation and the responsibilities for directors.

Director legal duties and obligations

Directorship comes with a significant amount of professional and legal accountabilities. As discussed in the previous chapter, a director’s fiduciary obligation to ‘act in the best interests on the organisation’ extends beyond the *Directors’ Code of Conduct*. Critically, this obligation is also enshrined in legislation – for directors of both private and public sector entities.

The VPSC *Director’s Code of Conduct*, the Enabling Acts and various other acts outline the legal and financial obligations of Victorian public sector entities. In addition, there are broader legal obligations under federal and state laws, such as work health and safety, and privacy laws. Figure 8 below provides a summary of the main relevant acts.

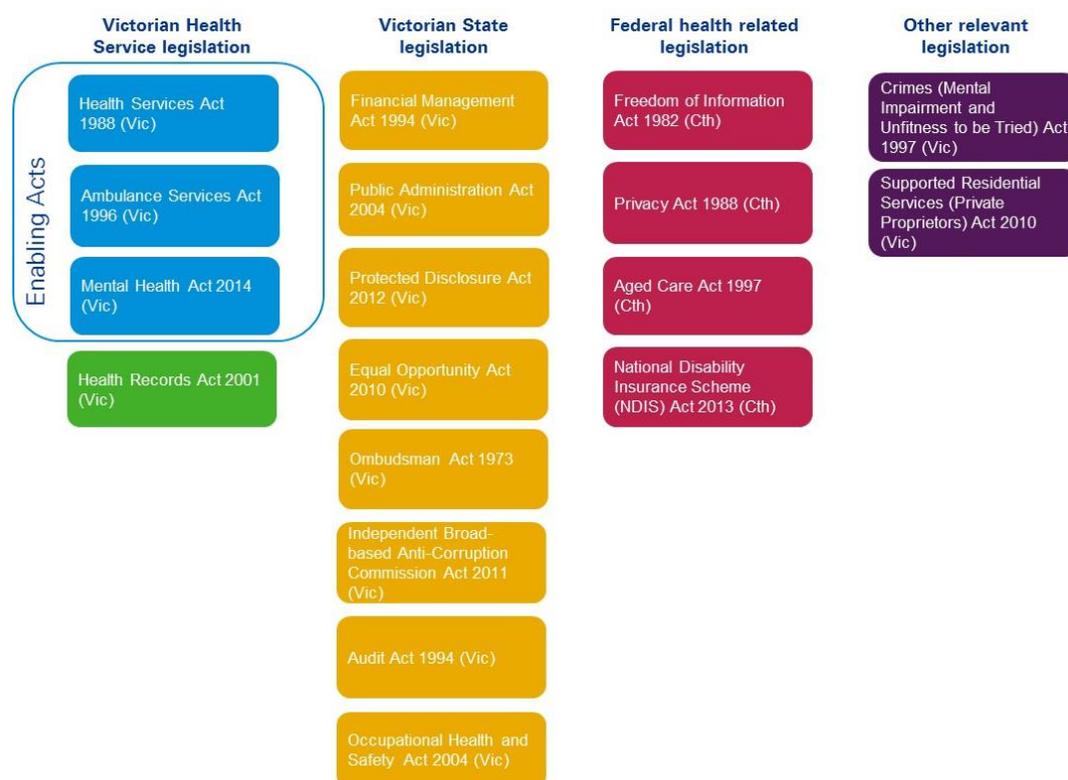


Figure 4-1 Legislation relevant to Victorian public health services

Please note, the above illustration is not exhaustive. Each director should understand and be aware of all applicable duties (both fiduciary and statute).

In the corporate sector, governance and financial management obligations are set out in the *Corporations Act 2001* (Cth). This statute can be thought of as the enabling act for companies, including most not-for-profit entities and charities.⁴⁶ The *Corporations Act 2001* (Cth) does not apply to directors of Victorian health services, however, the principles within this Act are based on the fiduciary duties and concepts discussed in the previous chapter. As such, ideas and training relating to the governance public companies or incorporated associations will broadly apply to health services also.

Enabling Acts

All Victorian public entities, including health services, are established under an act, referred to as its enabling act. Each enabling act outlines how the entity is established, the purpose of the entity and the overarching governance mechanisms to support its operations. It is a requirement for all directors of public sector entities to be familiar with the enabling act relevant to their entity, so as to ensure they fulfil their duties.

The primary piece of enabling legislation for Victorian health services is the HSA. The HSA enables the establishment of legal entities that govern the delivery of health services across the state under various categories or names, namely:

- **public health services** - comprising metropolitan health services and major regional health services
- **public hospitals** - comprising local health services and smaller rural health services
- **multi-purpose services** - comprising integrated health and aged care services provided by several of the smaller rural health services
- **early parenting centres** – a type of public hospital, comprising early intervention and prevention health services
- **other** – including denominational services (which operate like public health services but do not have boards appointed by the Minister) and Health Purchasing Victoria.

AV has metropolitan and regional ambulance services, each with its own board established under the ASA.

Victorian approved mental health services are provided by a range of services located throughout the state established under the MHA.

For governance purposes each of these types of service or agency are treated the same.

Most other public entities in Victoria are incorporated by:

- Specific statute (e.g. *Assisted Reproductive Treatment Act 2008* established the Victorian Assisted Reproductive Treatment Authority)
- *Associations Incorporation Reform Act 2012* – a state based incorporation mechanism (each state has their own equivalent) regulated by Consumer Affairs Victoria. These entities will usually have the suffix 'Inc' at the end of their name to denote they are incorporated.
- *Corporations Act 2001* (Cth) – for public (including companies limited by guarantee⁴⁷ and companies listed on the stock exchange) and private companies, regulated by ASIC and the ACNC. These entities will usually have the suffix 'Ltd' (referring to their limited liability) or, if a

⁴⁶ Another common enabling statute for incorporated entities is the Associations Incorporation Act, which is a state based statute. An entity can easily transition from an incorporated association to a company.

⁴⁷ See <http://www.asic.gov.au/regulatory-resources/financial-reporting-and-audit/preparers-of-financial-reports/companies-limited-by-guarantee/>

private company, 'Pty Ltd' (referring to being proprietary limited liability).

Other models that businesses use to trade include:

- being a sole trader⁴⁸
- a co-operative (also regulated by Consumer Affairs Victoria)
- a partnership
- an unincorporated association (many small clubs operate this way)⁴⁹
- a corporation registered under the *Corporations (Aboriginal and Torres Strait Islander) Act 2006* (Cth).

More information about incorporation types is available on the ASIC and the Consumer Affairs websites (refer to references at the end of this chapter).

Other legal obligations

The board is responsible for ensuring the health service is compliant with all relevant legislative law. For health services, the board's responsibilities are primarily derived from the HSA, relevant common law principles and other legislative and regulatory regimes, which include* legislation aimed at:

- **improving administration and privacy** e.g. *Health Records Act 2001* (Vic), *Public Administration Act 2004* (Vic), *Privacy and Data Protection Act 2014* (Vic), *Public Records Act 1973* (Vic)
- **emphasising financial stewardship** e.g. *Financial Management Act 1994* (Vic) and its corresponding Standing Directors of the Minister for Finance, *Audit Act 1994* (Vic), *National Health Reform Act 2011* (Cth)
- **emphasising accountability and transparency** e.g. *Protected Disclosure Act 2012* (Vic), *Health Complaints Act 2016* (Vic), *Mental Health Act 2014* (Vic), *Ombudsman Act 1973* (Vic), *Audit Act 1994* (Vic), *Freedom of Information Act 1982* (Vic), *Parliamentary Budget Officer Act 2017* (Vic)
- **improving safety and protecting rights of employees** e.g. *Equal Opportunity Act 2010* (Vic), *Occupational Health & Safety Act 2004* (Vic), *Charter of Human Rights and Responsibilities Act 2006* (Vic), *Fair Work Act 2009* (Cth), *Safe Patient Care (Nurse to Patient and Midwife to Patient Ratios) Act 2015* (Vic), *Health Practitioner Regulation National Law Act 2009* (Cth) and the corresponding *Health Practitioner Regulation National Law (Victoria) Act 2009* (Vic)⁵⁰
- **preventing criminal activities within Government entities** e.g. *Independent Broad-based and Anti-corruption Commission Act 2011* (Vic), *Crimes Act 1958* (Vic), *Summary Offences Act 1966* (Vic)
- **specific regulated activities and obligations** e.g. *Public Health and Wellbeing Act 2008* (Vic); *Drugs, Poisons and Controlled Substances Act 1981* (Vic); *Assisted Reproductive Treatment Act 2008* (Vic), *Human Tissue Act 1982* (Vic), *Crimes (Mental Impairment and Unfitness to be Tried) Act 1997* (Vic).

⁴⁸ Refer to ASIC's website for the difference between a sole trader and a company - <https://www.business.gov.au/Info/Plan-and-Start/Start-your-business/Business-structure/Change-business-structure/Sole-trader-to-a-company/Checklist-Key-differences-between-sole-traders-and-companies>

⁴⁹ Refer to Consumer Affairs Victoria's website for information about incorporating or not <https://www.consumer.vic.gov.au/clubs-and-fundraising/incorporated-associations/become-an-incorporated-association/should-your-club-incorporate>

⁵⁰ Visit the Australian Health Practitioner Regulation Agency to see the various statutes regarding registered clinicians <https://www.ahpra.gov.au/about-ahpra/what-we-do/legislation.aspx>

Additional legislation, standards and regulations also exist with respect to the provision of service for the disabled, children (e.g. child safety), youth, family and aged care, including (but not limited to):

- Child Wellbeing and Safety Act 2005 (Vic),
- Children, Youth and Families Act 2005 (Vic);
- Aged Care Act 1997 (Cth);
- Supported Residential Services (Private Proprietors) Act 2010 (Vic);
- Disability Act 2006 (Vic)
- National Disability Insurance Scheme Act 2013 (Cth)

These are not exhaustive lists, however, key statutes for health service directors are discussed below.

Where can I find statutes?

Victorian acts, regulations and bills are available from www.legislation.vic.gov.au. For current acts, look at 'Victorian Law Today'. For Bills, look under 'Parliamentary Documents'. Commonwealth acts are available from <https://www.legislation.gov.au/> While websites like Australasian Legal Information Institute (Austlii) can be useful, they are not recommended for relying upon for legal compliance as they are not always up to date with the current law.

Directors are also subject to a range of legal obligations, including common law and those under various Commonwealth and State/Territory laws such as tax and revenue laws, workers' compensation laws, consumer protection laws, consumer credit laws, environmental laws and industrial agreements. Directors can be held personally liable under many of these laws and should seek legal advice if unsure of their obligations.

Key legislation and obligations are briefly detailed below.

Financial Management Act 1994 (Vic)

Applicable to all Victorian public sector entities, the FMA is the governing legislation relating to the accounting and reporting of public money and public property. It is administered by DTF.

The FMA applies to all health services, and requires the CEO, as the accountable person, to appoint a CFO. The FMA requires health services to do a number of things, including:

- keeping proper accounts and records of financial transactions (s 44)
- providing the Minister for Finance with any information requested (s 44A)
- maintaining a register of assets (s 44B)
- preparing an annual report of operations and financial statements (s 45).

Standing Directions of the Minister for Finance

In addition to provisions in the FMA, the Minister for Finance issues Standing Directions under the FMA that impose additional requirements on health services. The directions supplement the FMA by prescribing mandatory procedures for financial management controls that must be complied with.

The mandatory procedures are high-level requirements that allow agencies to tailor arrangements to suit their circumstances. DTF has developed the *Financial management compliance framework* to help public sector agencies comply with the Standing Directions.⁵¹ The Standing Directions cover three areas:

- financial management governance and oversight, including requirements to implement and maintain a financial code of practice and establish an audit committee
- financial management structure, systems, policies and procedures
- financial management reporting, including information to be included in the annual report required under the FMA (s 45).

Instructions and Guidance

Instructions are issued by DTF and are mandatory. The Instructions provide more detailed mandatory requirements, in specific areas of risk and are linked to specific Directions through corresponding numbering.

Guidance is issued by DTF and is non-mandatory. The Guidance provides supporting information in relation to the interpretation and implementation of the Directions and Instructions. The Guidance is linked to specific Directions through corresponding numbering.

While the guidance issued with the standing directions and instructions is not mandatory, it is very useful in determining how to best comply with the FMA, standing directions and instructions. For example, the guidance provides more detail regarding the appropriate composition, skills and qualifications required on the audit committee.

The Audit Committee

Standing Direction 3.2.1 specifically requires that all public entities have an Audit Committee. An exemption can be obtained from this requirement, however, the board then takes on the full accountability of that committee.

Standing Direction 3.2.1 and its accompanying Instructions and Guidance detail the functions, obligations, composition and skills required for the Audit Committee. In addition, the Standing Directions often refer to the Audit Committee as the health service, CEO and CFO (and others, like internal audit) have specific accountabilities to the Audit Committee.

When the internal audit function is co-sourced or outsourced, it is expected that the Committee would provide input to the statement of requirements developed as part of an appointment or tender process. In particular, the Audit Committee needs to ensure the independence of the function is not compromised and consider potential relationships with the external provider that may impair the independence of the assurance process internal audit provides.

For health services, the composition of the Audit Committee must be made up of a majority of independent members (who are generally board directors). An employee of the health service can be a member of the Audit Committee, however, they are not considered an 'independent' member. Members of the executive management team (e.g. CEO, CFO) cannot be members of the Audit Committee.

The Chair of the Audit Committee should be one of the directors of the board with the time and capacity to manage the duties and functions of such a critical committee.

The Audit Committee must have appropriate expertise in financial accounting or auditing, which would

⁵¹ This framework, as well as the directions and other related material, is available in the Budget and Financial Management section of the DTF website. Available from: www.dtf.vic.gov.au.

include any of the following:

- a thorough knowledge of Australian accounting standards and financial statements;
- experience in applying the Australian accounting standards in connection with financial reporting and public financial statements;
- experience in preparing or auditing general purpose financial statements;
- an understanding of the accounting issues within the specific industry;
- a thorough knowledge of Australian auditing standards; or
- experience with internal controls and procedures for financial reporting.

A health service may look beyond their own board to appoint an external Audit Committee member should no member of their board be able to provide the appropriate expertise in financial accounting or auditing, or to meet the requirement for a majority of independent members.

For further guidance regarding best practice for Audit Committees, refer to the VAGO report on *Audit Committee Governance* (August 2016).⁵²

Sample Audit Committee charters are available on the VPSC or the Australian National Audit Office⁵³ websites.

Audit Act 1994 (Vic)

VAGO conducts financial statement audits of all Victorian public sector health services annually, in accordance with the *Audit Act 1994* (Vic) (Audit Act). VAGO may also conduct performance audits of any health service program area of quality of care or administrative aspect, such as emergency care, safety or waiting list data. The purpose of this is to evaluate whether a health service is achieving its objectives effectively and in compliance with all relevant legislation.

The VPSC recommends that boards maintain a constructive relationship with VAGO, and provide prompt consideration and feedback on any audit opinion or report affecting the health service. An audit often provides opportunities to identify issues within the health service and resolve and improve them.

To ensure compliance with the Audit Act, the VPSC also recommends that the board's audit and risk committee, and the health service's internal auditors maintain a constructive relationship with VAGO, and the health service administers a well-targeted program of internal financial and compliance audits preceding VAGO's audit.

The Standing Directions, Instructions and Guidance also detail audit requirements, including for internal audit, internal controls, reporting and the audit committee.

Public Administration Act 2004 (Vic)

The *Public Administration Act 2004* (Vic) (PAA) establishes the VPSC and creates the role of the Victorian Public Sector Commissioner. The key compliance obligations of health services under the PAA involve the adherence to public sector service standards and adoption of good governance standards, which the VPSC supports through the development of governance guidance tools.⁵⁴ These tools apply to all public sector entities and act as a useful reference regarding the expected standards of conduct, performance and accountability. The Enabling Acts and this Toolkit provide more tailored guidance

⁵² VAGO report and advice available here: www.audit.vic.gov.au/report/audit-committee-governance

⁵³ Resources and advice available here www.anao.gov.au

⁵⁴ Various tools are available from: www.vpsc.vic.gov.au.

regarding expectations of governance within the health sector.

The VPSC also administer the People Matter Survey. The People Matter Survey gives public sector employees (including those that work in health services) the opportunity to express their views on how the public sector values and employment principles are demonstrated within their organisations by colleagues, managers and senior leaders.

Survey anonymity is a priority to the VPSC. Responses from individual employees are kept confidential and strict rules are in place to safeguard this at every stage of the survey process. VPSC is committed to responsible privacy practices and is subject to the *Privacy and Data Protection Act 2014* and the *Health Records Act 2001*.

The VPSC also produce the *State of the Public Sector in Victoria*⁵⁵ annual publication. It reports on the employees of the Victorian public sector and their actions to support the Victorian Government and serve the people of the state of Victoria. The report is invaluable when seeking comprehensive information on the composition, workforce and activities of the Victorian public sector.

Independent Broad-based and Anti-corruption Commission Act 2011 (Vic)

The *Independent Broad-based and Anti-Corruption Commission Act 2011 (Vic)* (**IBAC Act**) establishes the IBAC, which is responsible for supporting the reporting of public sector corruption, the investigation of reported incidents and the development of preventative measures. IBAC is an independent body with the authority to prosecute acts of corruption within the public sector. IBAC is part of the Victorian integrity system, which means that they are able to share information with Victoria Police and VAGO, to uphold the integrity of the Victorian public sector.

Health service directors have access to the protections of IBAC in identifying and reporting corruption, and are also subject to its powers of investigation and prosecution.

Recent IBAC reports that are relevant to health services include:

- Operation Tone: Special report concerning drug use and associated corrupt conduct involving Ambulance Victoria paramedics (September 2017)⁵⁶
- Operation Liverpool: An investigation into the conduct of two officers of Bendigo Health, Adam Hardinge and John Mulder (March 2017)⁵⁷
- Corruption risks associated with the public health sector (October 2017)⁵⁸

Who can health service directors and/or staff make protected disclosures to?

The VPSC has a quick reference guide⁵⁹ for making protected disclosures per the *Protected Disclosure Act 2012*.

⁵⁵ Available here: <https://vpsc.vic.gov.au/resources/state-of-the-public-sector-in-victoria/>

⁵⁶ Available here: <http://www.ibac.vic.gov.au/publications-and-resources/article/operation-tone>

⁵⁷ Available here: <http://www.ibac.vic.gov.au/publications-and-resources/article/liverpool-special-report>

⁵⁸ Available here: <http://www.ibac.vic.gov.au/publications-and-resources/article/corruption-risks-associated-with-the-public-health-sector>

⁵⁹ Available here: <https://vpsc.vic.gov.au/about-vpsc/protected-disclosures-procedures/>

Protected Disclosure Coordinator

Victorian Public Sector Commission (VPSC)

3 Treasury Place

Melbourne VIC 3002

Telephone: (03) 9651 0835

Email: protected.disclosure@vpsc.vic.gov.au

Independent Broad-based Anti-corruption Commission (IBAC)

GPO Box 24234

Melbourne, VIC 3001

Telephone: 1300 735 135

Website: www.ibac.vic.gov.au

Fair Work Act 2009 (Cth)

The *Fair Work Act 2009* (Cth) contains national workplace relations laws, the National Employment Standards, protection against unfair treatment and discrimination, and grievance handling mechanisms – all of which are also applicable to health services in Victoria. The *Fair Work Act 2009* (Cth) allows an employee who reasonably believes they have been bullied at work can apply to the Fair Work Commission for an order to stop the bullying.

The *Equal Opportunity Act 2010* (Vic) contains provisions in regards to equal opportunity and protection against discrimination, sexual harassment and victimisation.

The sustainability of our health system, the quality of care provided and patient outcomes are dependent on high-functioning teams and a positive workplace culture.

Work health and safety governance

Health services are also employers and as a result have a duty of care to ensure any person affected by the health service's undertakings remains safe at all times and their work activities are not prejudicial to their health.

Having a strong health and safety culture, and an embedded, effective health and safety management system by which management and employees demonstrate accountability, can result in significant benefits for a health service. The failure of organisations to effectively manage health and safety risks has both human and business costs and, as such, should receive the same priority by directors as all other risks.

Health and safety governance is as important as any other aspect of governance and is core to a health service's overall risk management function, as well as a key responsibility of directors.

Boards are responsible for the occupational health and safety of their employees and consequently, determining the health services' high-level health and safety strategy and policy, which management are required to implement. This strategy and policy should also include consideration of all persons impacted by the health services' activities, not just employees (e.g. contractors and visitors). However, board responsibilities should go beyond the issuing of strategy and policy, to also ensure that the implementation of the health and safety policy is effective, by holding management to account through processes of policy and planning, delivery, monitoring and review.

All health services are accountable to the Minister for fulfilling their responsibility to maintain a duty of care and commitment as employers to provide and maintain, so far as reasonably practicable, a working environment that is safe and without risks to health

All directors legally required to ensure their health service remains compliant with relevant health and safety legislation. Health service boards are ultimately accountable for providing a safe workplace and Victorian legislation places obligations on the responsible parties to manage these risks, which includes workplace bullying and harassment.

Work health and safety obligations are one of the most significant legal obligations of any director, (public or private) with significant penalties for individual directors and organisations as a whole, should work health and safety requirements not be met.

In Victoria, the key governing legislation is the *Occupational Health and Safety Act 2004* (OHS Act), which states an employer must:

- provide and maintain a working environment that is safe and without risks to health, so far as is reasonably practical. This includes identifying and eliminating, controlling or reducing risks to health and safety
- take reasonable care for their own health and safety, and have regard for the health and safety of others.

Presentations and resources on **Leading a Safe and Ethical Workplace Culture in Health** can be found on the Health Services Governance website⁶⁰, including videos from key speakers on leading indicators (vis lagging indicators) and how to inject positive culture into your workplace.

Director roles and responsibilities

All directors should have a clear understanding of the key health and safety issues for their health service and be continually developing their skills, knowledge and understanding in this area.

All directors should understand their legal responsibilities and their role in governing health and safety matters for their health service. Their roles should be supported by formal individual terms of reference, covering, at a minimum, the oversight of health and safety strategy development, policy setting standards, performance monitoring and oversight of an internal controls framework.

Most commonly, a committee of the board (such as the quality and safety committee or equivalent) should have the role of overseeing and challenging the health and safety governance process.

Complaints regarding director conduct

⁶⁰ Available here <https://www2.health.vic.gov.au/hospitals-and-health-services/boards-and-governance/board-education-events>

Directors also have obligations regarding their conduct when engaging with fellow directors, management, staff and guests of the health service. Statutes, OH&S policies and other laws (such as the 'undue influence' doctrine in contract law) have arisen to protect employees from their supervisor and/or other employees or workplace hazards. Nevertheless, directors must remember that they are in positions of power, so a staff member may not feel equipped or able to speak up.

All boards should have a clear policy and procedures for if a complaints, including:

- A complaint against fellow director within the context of board meetings
- A complaint against fellow director by a director
- A complaint against a director by health service staff
- A complaint against a director by a visitor or consumer of the health service
- A complaint against the chair (by a director, staff member or consumer/visitor)
- A complaint against the CEO (by a director, staff member or consumer/visitor).

Health and safety can be greatly improved through early intervention, appropriate training and education for managers in responding to inappropriate behaviour, and improved management of formal complaints.

Ultimately, **the board must drive these behaviours and measures** throughout the health service.

Strategic implications

The board is responsible for driving the health and safety agenda. They have oversight and an understanding of the risks and opportunities associated with health and safety, including any market pressures which might compromise the values and standards – ultimately establishing a strategy to respond.

Performance management

The board should ensure they retain oversight of the key objectives and targets for health and safety management, and create an incentive structure for senior executives which drives good health and safety performance, balancing both lead and lag indicators (discussed below), and capturing both tangible and intangible factors. Non-executives (through the remuneration committee) should be involved in establishing the appropriate incentive schemes.

Internal controls

The board should ensure health and safety risks are managed and controlled adequately and that a framework, to ensure compliance with the core standards, is established. It is important governance structures enable management systems, actions and levels of performance to be challenged. This process should utilise, where possible, existing internal control and audit structures and be reviewed by the audit committee, or other suitable committee or board directors, where necessary.

Bullying and harassment

Employee safety and wellbeing is paramount, which includes the risk posed by bullying and harassment in the workplace. Effective board governance and oversight is needed to eradicate this serious workplace issue.

Culture is a topic discussed throughout this Toolkit and it is the board's duty to set the tone with respect to positive and 'just' workplace culture. Part of this duty is ensure the health service has the right strategic direction and policies in place regarding workplace bullying and harassment, which are underpinned by robust systems, processes and people.

What is workplace bullying?

Although there is no agreed national or international definition of bullying, the definition used by the VPSC in its People Matter survey is consistent with that used by WorkSafe Victoria.⁶¹ For the purpose of consistency, and in line with the recommendation from the Victorian Taskforce on Violence in Nursing, this is the definition that has been adopted for this online directory.

Workplace bullying is repeated, unreasonable behaviour directed to an employee or a group of employees that creates a risk to health and safety. It should be noted that workplace bullying is not the legitimate and reasonable management of a performance-related matter, a disciplinary process or work allocation issues.

There are a number of other negative behaviours that can occur in workplaces that are not necessarily labelled as bullying but have virtually the same impact on the 'victim' and the broader community (in this case, the healthcare setting). Behaviour that is uncivil, unkind, unpleasant, discourteous or nasty can also be damaging to an individual and the people around them. As a consequence, bullying and other negative behaviours that occur within a healthcare setting can significantly impact on patient care.⁶²

Harassment

Harassment can be against the law when a person is treated less favourably on the basis of certain personal characteristics, such as race, sex, pregnancy, marital status, breastfeeding, age, disability, sexual orientation, gender identity or intersex status.

Sexual harassment is a distinct category of harassment that is prohibited specifically under anti-discrimination laws. Sexual harassment is unwelcome sexual behaviour, which could be expected to make a person feel offended, humiliated or intimidated. Sexual harassment can be physical, verbal or written.⁶³

There were clear lessons to be learned for all of the health sector from the *Expert Advisory Group on discrimination, bullying and sexual harassment Advising the Royal Australasian College of Surgeons (RACS) Report* (September 2015).⁶⁴ RACS has since published an *Action Plan, Building Respect, Improving Patient Safety* (November 2015) that include goals, training and resources that can be of use to all health services.

Eliminating bullying and harassment in healthcare

In April 2016 DHHS released its strategy *Our pathway to change: eliminating bullying and harassment in healthcare*.⁶⁵ *Our pathway to change* promotes and drives a consistent approach to facilitating culture change, ensuring equity and diversity, addressing bullying and harassment and promoting the safety of

Bullying and other negative behaviours occurring within health services can significantly impact on patient care

⁶¹ See, for e.g., <https://www.worksafe.vic.gov.au/pages/safety-and-prevention/health-and-safety-topics/workplace-bullying>

⁶² Refer to VAGO, *Bullying and Harassment in the Health Sector* (March 2016). Available here: www.audit.vic.gov.au/report/bullying-and-harassment-health-sector

⁶³ Victorian Equal Opportunity and Human Rights Commission, www.humanrightscommission.vic.gov.au (February 2016).

⁶⁴ Available here: <https://www.surgeons.org/about-respect/what-we-have-done/building-respect,-improving-patient-safety/expert-advisory-group/reporting/>

⁶⁵ Available here: <https://www2.health.vic.gov.au/about/publications/policiesandguidelines/eliminating-bullying-harassment-healthcare>

staff and patients. It recognises the importance of actively driving culture change from a system perspective as well as at the local service level.

The strategy is underpinned by three pillars:

- Leadership and accountability - Leaders understand the risk of bullying, harassment and negative workplace cultures, and their responsibility to apply strategies that improve culture and reduce risks will be important to shift organisational responses.
- Capability building - Information is critical to ascertain the true prevalence of the problem and target actions and initiatives to address common issues from a system-wide perspective. Building capability to better collect and use information is a key enabler of the change we need. Actions will be taken that advance knowledge and support systems that enable the department, health service leaders and staff to act appropriately and learn and develop.
- Environment - Giving consideration to the environment to support initiatives in leadership and capability development is essential for culture change to occur.

As system manager, the department is leading a large program of work to deliver key projects outlined in the strategy. Shifting deeply ingrained cultural and behavioural norms across diverse organisations in the health system will require coordinated and sustained effort.

Occupational violence

An employer must, so far as is reasonably practicable, provide and maintain a safe and healthy work environment for their employees (employees include independent contractors engaged by an employer and any employees of the independent contractor).

Occupational or work-related violence involves incidents in which a person is abused, threatened or assaulted in circumstances relating to their work. This definition covers a broad range of actions and behaviours that can create a risk to the health and safety of employees.

Examples of work-related violence can include:

- biting, spitting, scratching, hitting, kicking, pushing, shoving, tripping, grabbing
- throwing objects
- verbal threats with or without a weapon
- sexual assault.

Reducing occupational violence and aggression in Victorian health services

Everyone has the right to feel safe at work. DHHS is taking action to address occupational violence and aggression in Victorian health services. The Government and DHHS are committed to ensuring the safety of staff and patients in our health services and is implementing a number of initiatives to address this complex and multifaceted issue.

Reducing occupational violence in Victorian hospitals (June 2016)⁶⁶ outlines DHHS' strategic objectives to prevent and reduce occupational violence and aggression in Victorian health services. It is based on a culture change approach, with strong themes of prevention, early intervention and post-incident response. The strategic objectives and initiatives to achieve them are focussed on raising awareness, building knowledge and capability among the workforce and leadership teams, and embedding systems and processes at the individual, service and system level.

⁶⁶ Available here <https://www2.health.vic.gov.au/health-workforce/worker-health-wellbeing/occupational-violence-aggression/strategy>.

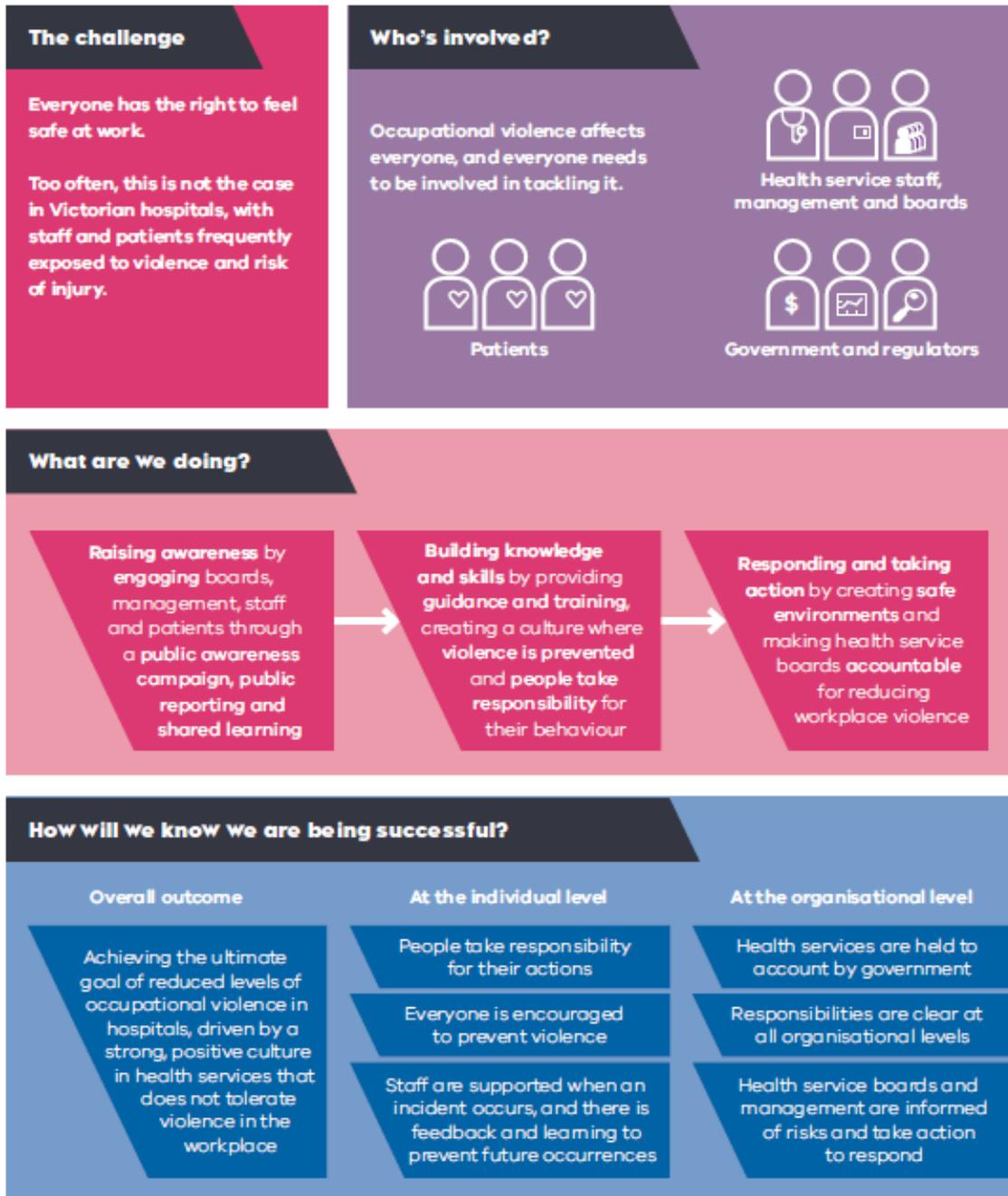


Figure 4-2 Reducing Occupational Violence in Victorian Hospitals Infographic (Source: DHHS, 2016)

Preventing and managing occupational violence

The *Framework for preventing and managing occupational violence and aggression*⁶⁷ (2017) was developed by DHHS to guide health services on how to prevent and respond to the risk of occupational

⁶⁷ Available here: <https://www2.health.vic.gov.au/about/publications/policiesandguidelines/occupational-violence-aggression-healthcare-framework-2017>

violence and aggression from an organisation-wide perspective. The framework covers six domains: governance, prevention, training, response, reporting and investigation.

- Environmental design is a key consideration in addressing occupational violence and aggression in Victorian health services. This might include:
- Behavioural assessment rooms in emergency departments
- Installing alarms, CCTV, access control doors, lighting and security systems
- Consideration of the design of waiting areas, including where staff, patients and guests can move about
- Trialling new equipment such as body worn cameras.

To help health services identify, assess and control occupational violence hazards and risks in the workplace, the Victorian Government has established the Health Service Violence Prevention Fund. The fund is part of the Victorian Government's commitment to address occupational violence and aggression in healthcare settings and is being used to remediate risks, with minor capital works targeted at improving the safety of staff in public healthcare services.

DHHS has also developed a *Guide for violence and aggression training in Victorian health services*⁶⁸ provides training principles based on a tiered approach for different staff groups. These best-practice training principles will support consistency in training across the state.

The guide was developed using literature reviews of standards for developing occupational violence and aggression training in emergency and mental health, as well as consultation with sector representatives in the Violence in Healthcare Reference Group.

Sharing best practice is a key strategy for the health services to better understand what has worked or not in the variety of settings health services experience. Health services can access a range of resources to learn from one another and previous partnerships.⁶⁹ A number of health services have shared their own training resources on responding to occupational violence and aggression.⁷⁰

Example: Body-worn cameras

One of the actions being considered by many health services is the introduction of more extensive audio and visual surveillance to discourage occupational violence and document it when it occurs. Studies have suggested that people moderate their behaviour when they are aware that they are being subject to surveillance. Audio visual footage can also be used as an evidentiary tool to assist with prosecuting perpetrators of occupational violence.

Body-worn camera technology has become increasingly mainstream in recent years. Body-worn cameras have been rolled-out in Victoria and other states in a number of different work contexts including police, parking inspectors, paramedics and security guard.

A policy template for health services is available on the DHHS website (refer to the references at the end of this chapter).

⁶⁸ Available here: <https://www2.health.vic.gov.au/about/publications/policiesandguidelines/violence-aggression-training-guide-health-services>

⁶⁹ See, for e.g., DHHS, *High-impact interventions for occupational violence: Building better partnerships between police and health services* (2013). Available here: <https://www2.health.vic.gov.au/about/publications/researchandreports/high-impact-interventions-occupational-violence>

⁷⁰ Available here: <https://www2.health.vic.gov.au/health-workforce/worker-health-wellbeing/occupational-violence-aggression/practice/projects>

Resources

To access a range of resources for your health service relating to mitigating occupational violence and aggression, DHHS has a dedicated resource hub⁷¹ that includes information on:

- Resources
- Awareness
- Code Grey and Code Black
- Training
- Sharing best practice
- Post-incident response
- Incident reporting
- Security
- Facility design



Figure 4-3 Worksafe campaign 'Its never OK' Available here: <https://www.worksafe.vic.gov.au/campaigns/itsneverok>

Refer to the references at the end of this chapter for more references and resources on OH&S; bullying and harassment; and occupational violence and aggression.



Figure 4-4 Worksafe campaign 'Its never OK' Available here: <https://www.worksafe.vic.gov.au/campaigns/itsneverok>

Performance indicators

As part of the health service's strategic direction, directors should consider and challenge the key performance indicators that the health services' strategy is linked to. For example, safety performance (particularly numbers of/nature of incidents) is often reported by management, however, if this is done with little to no explanation of the impacts (e.g. on mental and physical wellness), then the board will not be able to fully understand the impact on the business. As such, it is critical to provide both the number/nature of the incident and the impacts.

Lost time injury (LTI) rates have become the cornerstone of mainstream injury/incident reporting and the benchmark against which organisational, industry and national comparisons are made. Although LTI rates are being applied to inform an ever growing range of health and safety problems and decisions, they also have a number of important limitations, such as a poor correlation with both the human and

⁷¹ Go to <https://www2.health.vic.gov.au/health-workforce/worker-health-wellbeing/occupational-violence-aggression>

financial consequences of work related injury and illness. There are also considerable variations in the definition of 'lost time' across health services, thereby making performance benchmarking comparisons difficult.

- **'Lag' indicators** (e.g. LTI, WorkCover claims) measure outcomes, however, may not provide sufficient information for successful management (and treatment of causes) nor provide appropriate information for due diligence purposes. For example, lag indicators may provide information too late for management to respond effectively.
- **'Lead' indicators** (e.g. training sessions held, waning job satisfaction) in contrast to lag indicators, provide valuable information that helps the user respond to changing circumstances and take actions to achieve desired outcomes or avoid unwanted circumstances. These indicators play an important role in motivating continuous improvement, with a focus on areas that have the potential to cause an incident, before the incident itself is realised.

What health and safety information should be provided to the board?

Directors should ensure the appropriate level of information is being reported by management to the board. These reports should be inclusive of lead and lag indicators, and have sufficient information to support the board's decision-making. This should be supported by independent and objective assurance - bringing a systematic, disciplined approach to health and safety risk management, control and governance processes.

For lead performance indicators to be successful, they need to be selected carefully, for example, targeting the right/material issues and setting sufficient challenges. Setting a lead performance indicator and getting a good score does not automatically improve performance. It is not the numbers that are important, but the quality and application of the gathered information that makes a difference.

A presentation on workplace lead indicators is available on the governance website.⁷²

Integrated approaches to worker health and safety

An Integrated approach brings together worker health and wellbeing, as well as on-the-job safety to prevent injury and illness and advance health in the workplace.

Evidence tells us that a happy and healthy worker is a more productive worker. We also know that better alignment of safety, health promotion and human resources programs can create greater efficiencies for workplaces, by maximising the impact of interventions and reducing duplication of effort.

There are a range of resources available from DHHS,⁷³ Worksafe⁷⁴ and other health and safety focused organisations to support health services to improve the health and safety of their workplace.

⁷² Available here: <https://www2.health.vic.gov.au/hospitals-and-health-services/boards-and-governance/board-education-events>

⁷³ See, for e.g., <https://www2.health.vic.gov.au/health-workforce/working-in-health/promoting-safety-in-the-workplace/workplace-bullying/further-reading-on-workplace-bullying>

⁷⁴ See, for e.g., <https://www.worksafe.vic.gov.au/pages/safety-and-prevention/health-and-wellbeing/integrated-approaches-to-worker-health,-safety-and-wellbeing>

Directors' indemnities and insurance

The Enabling Acts contain provisions that stipulate all board directors of health services are not personally liable for anything done or omitted to be done in good faith when carrying out their duties. Instead, any liability resulting from an act or omission is attached to the health service.

The VMIA provides risk advice and issues insurance services and policies for Victorian Government entities, which includes the corporate liability of health services. The VMIA also provides risk training for health service board directors and executives.

This cover extends to liability arising from negligent medical treatment, which includes individual liability of full and part-time employed doctors and nurses (including private practice work that is specifically covered by the insurance – this will be specific to the particular insurance policy), and contracted visiting medical officers undertaking public work (again, per the policy). Sum insured limits apply and are usually set out in the prescribed schedule of the relevant policy.

The nature and extent of indemnity is dependent upon the circumstances involved and board directors should seek independent legal advice concerning whether to take out additional insurance to cover themselves in all circumstances.

The VPSC provide a summary of liabilities, indemnity and insurance on their website, including implications for former directors and duties that endure after a director has ceased holding office.⁷⁵

Other regulatory bodies

A variety of external bodies provide additional regulatory and oversight roles over specific aspects of the health service's operations, including HCC, MHCC, AHPRA, the Ombudsman, VAGO, the Coroner's Court of Victoria, the Aged Care Complaints Investigation Scheme and a number of accreditation systems.

In Victoria, consumers have a right to make complaints about health service providers and to access their health records. The HCC (or MHCC)

When might the indemnifying provisions of the Enabling Act not apply to a director?

Compliance with fiduciary duties is a good indicator that the indemnification provided by the Enabling Acts will apply to you.

If a director does (or omits to do something)

- in the absence of good faith, or
- in knowing misuse of their position, or
- with willing blindness

the director may be personally liable for any consequences to the health service.

For example, if you as a director make a decision knowing that it was not in the health services best interest (for example, hiding something that was embarrassing for you personally; or knowingly going against DHHS policy, instructions or specific advice).

As such, a good guide to knowing if the Enabling Act will identify you as a director, is to first ask whether you were complying with your fiduciary duties.

These duties are discussed in **Chapter 3: Conduct, ethics and fiduciary duties**

⁷⁵ Available here: <https://vpvc.vic.gov.au/governance/board-directors/liabilities-indemnity-and-insurance/>

receives, investigates and resolves complaints from users of health services to support health services in providing quality healthcare and to assist them in resolving complaints. If a complaint involves the professional conduct or performance of a registered health practitioner, the commissioner liaises with AHPRA about its handling and resolution.

The role of the Victorian Ombudsman is to investigate administrative actions taken by a Victorian Government or public statutory body, including public health services. These may arise from individual complaints about the administrative actions or through disclosures of serious improper conduct under the Protected Disclosure Act 2012 (Vic). Protected disclosures can also be made to, and handled by, IBAC.

The role of **VAGO** is largely centred on resource management in the public sector. VAGO's responsibilities include auditing all public sector organisations, including the department and public service entities. VAGO has complete discretion in deciding whether and how to conduct an audit, and how to prioritise any particular matters.

Coroners investigate unexplained natural deaths, and deaths suspected to be from direct or indirect trauma. Coroners also investigate deaths that occur in health services from time to time, which can lead to a greater understanding of risks and hazards in the community, increased awareness of how the incident could or should be prevented, and improvements in public health and safety.

Some Victorian public sector health services are approved providers of residential aged care services. Therefore, the role of the **Aged Care Complaints Commissioner** is to receive complaints or reports of incidents or allegations of physical and sexual assault of residents and unexplained absences of residents from Commonwealth Government-funded aged care services.

DHHS requires all Victorian public health services to be accredited, as it forms a part of achieving the policy objective of continuous improvement of the safety and quality of healthcare. While **accreditation against standards** alone does not ensure the safety and quality of healthcare provided to consumers, it is effective as part of an improvement system because it can verify actions are being taken, that system data and information are being used to inform the analysis of issues and program solutions, and that safety and quality improvement is being achieved.⁷⁶ Similarly, accreditation for residential aged care services is also important as it sets a minimum standard for care and services and promotes continuous improvement.

These other agencies are described further in **Chapter 1: Victoria's Health service governance model** and in **Appendix 3: Regulatory bodies**.

⁷⁶ Refer to The Australian Commission on Safety and Quality in Health Care website www.safetyandquality.gov.au

Making protected disclosures

If, as a director a Victorian health service, you are unsure of who to make a disclosure to, contact the Health Services Governance team at board.appointments@dhhs.vic.gov.au for guidance. This can include reporting concerns about behaviours of fellow directors where the conduct does not necessarily reach the thresholds covered by protected disclosures. Where appropriate, a director should first consult their board chair for guidance, as the behaviour of a fellow director may require performance management from the board chair.

The VPSC has a quick reference guide⁷⁷ for making protected disclosures per the PDA. Protected disclosures can be made to:

- Protected Disclosure Coordinator
Victorian Public Sector Commission (VPSC)
Telephone: (03) 9651 0835
Email: protected.disclosure@vpsc.vic.gov.au
- Independent Broad-based Anti-corruption Commission (IBAC)
Telephone: 1300 735 135

⁷⁷ Available here: <https://vpsc.vic.gov.au/about-vpsc/protected-disclosures-procedures/>

Useful references

Governance and legal duties resources

- Baxt B. *Duties and responsibilities of directors and officers*. 20th edition. 2012. Australian Institute of Company Directors (AICD).
- Australian Government Comcare. Guidance for officers in exercising due diligence. https://www.comcare.gov.au/Forms_and_Publications/publications/services/safety_and_prevention/safety_and_prevention/duel_diligence
- ASIC's Corporate Governance guidance and resources www.asic.gov.au/regulatory-resources/corporate-governance/
- ASX Corporate Governance Principles and Recommendations 3rd Edition. Available here: www.asx.com.au/documents/asx-compliance/cgc-principles-and-recommendations-3rd-edn.pdf
- Governance Institute of Australia's resources on public sector governance and legal duties. Available here: www.governanceinstitute.com.au/knowledge-resources/public-sector-governance
- The Institute of Internal Auditors Audit Committees: www.iaa.org.au
- Victorian Legislation and Parliamentary Documents www.legislation.vic.gov.au
- Australian Federal Register of Legislation www.legislation.gov.au
- *Corporations Act 2001* (Cth) – for an understanding of some of the private director duties.

OH&S references and resources

- DHHS resources for worker health and wellbeing in Victorian health services <https://www2.health.vic.gov.au/health-workforce/worker-health-wellbeing>
- DHHS, *Reducing occupational violence and aggression in Victorian health services* (including the infographic at Figure 4.2), (2016), DHHS, Victoria. Available here: <https://www2.health.vic.gov.au/health-workforce/worker-health-wellbeing/occupational-violence-aggression/strategy>
- DHHS, *Our pathway to change: Eliminating bullying and harassment in healthcare*, (April 2016), DHHS, Victoria. Available here: <https://www2.health.vic.gov.au/about/publications/policiesandguidelines/eliminating-bullying-harassment-healthcare>
- DHHS, *Body-worn cameras policy template*, (June 2017), DHHS, Victoria. Available here: <https://www2.health.vic.gov.au/about/publications/formsandtemplates/body-worn-cameras-policy-template>
- WorkSafe's website - www.worksafe.vic.gov.au/
- WorkSafe, *Prevention and management of aggression in health services - A toolkit for workplaces*, (April 2010), Worksafe, Victoria. Available here: <http://www.worksafe.vic.gov.au/pages/forms-and-publications/forms-and-publications/prevention-and-management-of-aggression-in-health-services-a-toolkit-for-workplaces>
- VAGO, *Bullying and Harassment in the Health Sector* (March 2016) www.audit.vic.gov.au/report/bullying-and-harassment-health-sector
- 'Anti-bullying' is a set of resources developed by the Fair Work Commission to provide information on what bullying is at work and what is reasonable action for management to take

www.fwc.gov.au/disputes-at-work/anti-bullying

- Safework Australia, *Guide for preventing and responding to workplace bullying* (August 2016) www.safeworkaustralia.gov.au/doc/guide-preventing-and-responding-workplace-bullying
- Safe Work Australia, *Issues in the measurement and reporting of work health and safety: A review*, (November 2013). Available from Safe Work Australia here: <http://www.safeworkaustralia.gov.au/sites/SWA/about/Publications/Documents/834/Issues-Measurement-Reporting-WHS-Performance.pdf>
- Australian Nursing and midwifery Federation, *Occupational violence and aggression: A 10 point plan to end violence and aggression*, (September 2014), ANMF, Victoria. Available from the ANMF here: <http://anmf.org.au/campaign/entry/occupational-violence-and-aggression>
- Australasian Health Infrastructure Alliance, *Australasian health facility guidelines on environmental design to reduce occupational violence and aggression and increase staff and patient safety* (March 2016), AHIA. Available from the AHIA here: <https://aushfg-prod-com-au.s3.amazonaws.com/Part%20C%20Whole%205%200.pdf>
- Royal Australasian College of Surgeons (RACS), *Discrimination, bullying and sexual harassment Action Plan*, (November 2015). Available here: <https://www.surgeons.org/about-respect/what-we-have-done/building-respect,-improving-patient-safety/>
- Royal Australasian College of Surgeons (RACS), *Bullying, discrimination and sexual harassment: fact sheet*. Available here: https://www.surgeons.org/media/25495730/2017-08-22_gdl_fes-crm-003_unacceptable_behaviours_factsheet.pdf

References and resources relating to other forms of incorporation:

These sites (most of whom are regulators) have a range of resources available that will be broadly applicable to the boards and directors of health services by the nature of their incorporated status.

- Consumer Affairs Victoria (CAV) regulates incorporated associations and co-operatives www.consumer.vic.gov.au
- Australia Securities and Investments Commission (ASIC) regulates all companies, private or public www.asic.gov.au
- The Registrar of Indigenous Corporations has a range of resources available for all incorporated entities and specific training for designed for directors, members and key staff from Aboriginal and Torres Strait Islander corporations www.oric.gov.au
- Australian Charities and Not-for-profits Commission (ACNC) regulates all charities and benevolent entities www.acnc.gov.au
- Not for profit Law (Justice Connect) has guidance material on becoming an incorporated association or a company limited by guarantee. [www.nfplaw.org.au/sites/default/files/Incorporated association or company limited by guarantee 1 0.pdf](http://www.nfplaw.org.au/sites/default/files/Incorporated%20association%20or%20company%20limited%20by%20guarantee%201%200.pdf)
- business.gov.au is an online government resource for the Australian business community. business.gov.au that offers simple and convenient access to all of the government information, assistance, forms and services www.business.gov.au