Access to private HEALTH RECORDS

A right to access records of private health service providers is included in the amendments to the Privacy Act 1988 (Cth) which will commence in 21 December 2001. This article is a review of the current law on access to health records, discussion of some arguments surrounding broader access, and a practical summary of relevant provisions from the amending Act.

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The push toward control by the individual over personal information collected and stored by others about them seems to be gathering momentum. The topic is really quite vast and this article is intended only to examine access to health records. On 21 December 2000 the *Privacy (Private Sector) Amendment Act 2000* (Cth) received Royal Assent. ***The sections relevant to health records will commence on 21 December 2001.***

The Pre-Existing Framework

In 1982 the Commonwealth enacted legislation governing access to records held by public bodies, including health records.[1] Each State and Territory implemented similar legislation.[2] New South Wales also implemented legislation for access to health records created by private hospitals and nursing homes.[3]

It is difficult to justify a distinction between records of health services provided in the public and private setting. From a consumer viewpoint there would be no difference between the nature of the service and the impact of privacy and access laws in the public or private health care setting. The Senate Committee Report on Access to Medical Records commented upon this apparent anomoly.[4]

In 1996 the High Court made it plain that medical records were owned by private practitioners and there was no right to access private health records. The situation with regard to radiology films can be different.[5]

Prior to the amendments to the Privacy Act 1988 (Cth) the only jurisdiction to provide a general right of access to health records was the ACT. The *Health Records (Privacy and Access) Act 1997* (ACT) provides a fairly detailed and specific framework for access to all health records. It includes privacy principles drafted with reference to the principles set out in the *Privacy Act 1988* (Cth). The drafting was intended to provide some consistency in the responsibilities for holding and dealing with personal information. Further, it addresses issues concerning the method for an access request, timeframes for response by the practitioner, payment for release of the record or time taken for explanations required. There is also a detailed regime for notation of corrections or comments near to the relevant health record. Interestingly, in the ACT, a very common complaint concerns the failure to provide access to records between practitioners. Release of records between practitioners was provided for specifically in the ACT when practitioners professed this was their preferred method for ensuring continuity of treatment when patients moved between practitioners. Due to practice breakdowns, problems have been experienced with agreement to access medical records for patients.

Victoria is presently considering detailed specific privacy and access legislation for health records. ***The States and the Commonwealth continue to consider specific health records legislation, mostly in the context of electronic records.***

Arguments Regarding Access to Health Records

Health care providers have argued strongly that there is no need for legislation requiring access to records. They state that the issue is communication and that teaching young doctors how to talk to their patients is what is required.[6] They also argue that in the 'real world' the public do not require access to their records, or if they do, it is accommodated by the doctors. A 1996 survey of GP's found that 76% did not wish to change the present law preventing access to medical records.[7] The Senate Committee hearings regarding Access to Records resulted in a Report which commented, "A substantial amount of evidence presented to the Committee revealed that there are a number of real problems to be fixed in the 'real world' ... the greatest problem is presented by the medical profession's fundamental opposition to a legislative right of access... Refusal of access to medical records will continue whilst there is a failure to act to ensure equality of access for health consumers in public health arena. This is the problem to be fixed".[8]

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Fear of litigation following release of health records is a reality for doctors.[9] An argument is also mounted that knowledge of all the facts and risks associated with medical care and treatment might result in a loss of confidence in health care providers.

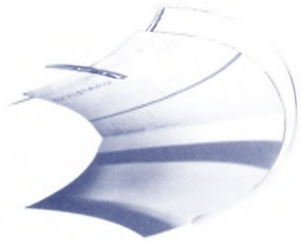
If the care revealed in health records is reasonably competent, there should be no increase in claims. Perhaps a fear of litigation surrounding release of records arises, at least in part, from a failure to understand investigation and prosecution of claims. If full records are not available, expensive claims are more likely to be commenced in court, not less likely. Most 'negligence' cases are run by firms who take claims on the basis that the firm will only be paid if the claim is successful. It is unlikely those firms will survive unless they take a fairly pragmatic approach concerning the quality of cases they are willing to run. The vigorous representation provided by medical defence organisations in Australia supplies protection for the medical service providers. The distress which accompanies investigations and claims cannot, unfortunately, be avoided for any professional whose actions have significant consequences for others.

Investigation of concerns raised by new clients is the point at which the type and quality of information available can assist lawyers in ensuring only cases where compensible negligence is likely to be proved will proceed. Early access to records, during the investigation phase of any potential negligence action, should provide for more accurate and balanced briefs to medical experts reviewing cases. A medical negligence ▶

case cannot be commenced without an expert medical report stating that the plaintiff did not receive reasonably competent care from the defendant in all the circumstances of the particular case.

Another area of concern expressed by those who oppose general access to health records is that people accessing the records may not be able to understand them because they were only ever expected to be an *aide memoir* for the record-keeper. This is a position which might engender empathy in some solicitors, given our own reputation for unreadable files! It is said that the records will be useless without explanation by the record-keeper, and that such explanation places an unreasonable burden on record keepers. Perhaps the continued push toward the computer age will help to alleviate this problem in years to come. In the meantime, it seems that the change from reliance by patients on a lifetime relationship with one local doctor, to a much more mobile lifestyle, and an attitude of self-determination in health choices, should cause a reassessment by health service providers of the use to which their notes may be put. An abiding aversion by patients to questioning busy practitioners, coupled with a strong wish to understand their health care, results in frustration for many people. The time available to the patient when reading a record provides a totally different prospect for understanding the care provided, and a more equal relationship between health service providers and their patients.

A problem which can flow from access and 'alteration' rights may be the unreasonable and unrealistic wish by some patients to record many (and often minor) alterations to their own records. This is unlikely to be a large problem, although use of the provisions for recording comments on or corrections to the records to achieve a particular outcome requires monitoring.



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Privacy Amendment (Private Sector) Act 2000 (Cth)

Sections 6A & 6B state that an act breaches a National Privacy Principle, or approved code, if it is contrary to or inconsistent with the Principle or code.

Section 13A provides that an *organisation* interferes with the privacy of an individual if it breaches a National Privacy Principle, or an approved privacy code. Sharing of information between related corporations and with new partners is not a breach.

Section 16A states that an organisation must not do an act, or engage in a practice, that breaches an approved privacy code that binds that organisation, or breaches a National Privacy Principle.

Organisation means an individual, body corporate, unincorporated association or trust that is not a *small business* operator, a registered political party ...."

Section 6D provides that a health service provider is *not a small business*.

Subsections 8(3), (4) and (5) make clear that acts or communications by one person in an organisation bind the organisation.

Privacy Code - A privacy code must incorporate all the National Privacy Principles or set out obligations which are at least equivalent to those in the Principles. If the code sets out procedures for dealing with complaints those procedures must meet any prescribed standards or guidelines set out by the Privacy Commissioner. Provision for public comment on the proposed code is required. A code must be approved by the Privacy Commissioner and any code must satisfy specific criteria set out in Part III of the Act.

Complaints Concerning Breach of the Principles or a Code: A complaints mechanism concerning compliance with an approved code or the National Privacy Principles is set out in the legislation. It provides for an adjudicator, or the Privacy Commissioner, to deal with the complaint.

Section 40(1)(1A) states that a complaint must first be made to the respondent, except where the Commissioner considers it was not appropriate to do so.

Section 52 of the Act sets out the orders which may be made by the Privacy Commissioner after determination of the complaint. The Commissioner may declare that the respondent has interfered with the privacy of an individual and should not repeat or continue the conduct. Provision is made for compensation and performance of actions to redress any damage. Section 52 (3B) states that a determination may include an order that a correction, deletion or addition be made to a record, or a Statement provided by the complainant making the correction be attached to the record.

Section 55A states that an order may be enforced by application to the Federal Court or Federal Magistrates Court.

National Privacy Principles

Access and Amendment to Records - National Privacy Principle 6

To ensure the usefulness of this article, this particular Principle is substantially reproduced below.

6.1 If an organisation holds personal information about an individual, it must provide the individual with access to that information on request by the individual, except to the extent that:

(b) in the case of health information – providing access would pose a serious threat to the life or health of any individual; or

(c) providing access would have an unreasonable impact upon the

privacy of other individuals; or

(d) the request for access is frivolous or vexatious; or

(e) the information relates to existing or anticipated legal proceedings between the organisation and the individual, and the information would not be accessible by the process of discovery in those proceedings; or

(f) providing access would reveal the intentions of the organisation in relation to negotiations with the individual in such as way as to prejudice those negotiations; or

(g) providing access would be unlawful; or

(h) denying access is required or authorised by or under law; or

(i) to (k) cover cases involving illegal activity and the like.

6.3 If the organisation is not required to provide the individual with access to the information because of one or more of paragraphs 6.1(a) to (k) (inclusive), the use of mutually agreed intermediaries must be considered.

6.4 Charges for access must be reasonable. No charges may apply to a request for access.

6.5 Where an individual can establish information is not accurate, complete and up-to-date, the organisation must take reasonable steps to correct the information.

6.6 Where the individual and the health service provider cannot agree on the accuracy of the material, the individual can ask for a statement setting out the inaccuracy to be attached to the record

6.7 An organisation must provide reasons for denial of access or refusal to correct personal information.

Set out below is a summary of the other National Privacy Principles which are most likely to be relevant in the health care setting:

1.3 When an organisation collects information it must ensure the individual is aware of a number of issues including the identity of the organisation, the fact that access to the information may be obtained, the purpose of the collection, the organisations to which the information is usually disclosed, consequences of failure to provide the information, etc...

1.4 If it is reasonable and practicable to do so, personal information about an individual must be collected only from the individual

1.5 If an organisation collects the personal information from someone else, it must take 'reasonable steps' to ensure that the individual is or has been made aware of the matters listed at 1.3, except where to do so would pose a serious threat to the life or health of the person.

2.1 Information must not be disclosed for a purpose other than the primary purpose of collection unless the secondary purpose is related to the primary purpose and the person would expect use or disclosure for ▶

the secondary purpose, or consent has been given. Research and statistics exception provided.

2.2 Disclosure may be made to persons responsible for persons physically or legally incapable of consent to the disclosure, and the disclosure is necessary for care and treatment, or for compassionate reasons, and disclosure is not contrary to a wish of the individual.

3 An organisation must take reasonable steps to ensure the information it collects, uses or discloses is accurate, complete and up to date.

5.1 An organisation must set out a policy document concerning management of personal information.

5.2 Upon request the organisation must take reasonable steps to let the person know generally what sort of information it holds, why, and how it collects, holds, uses and discloses the information.

10.1 Covers collection of sensitive information only with consent, under legal requirement, to prevent harm, for a non-profit organisation, or "the collection is necessary for the establishment, exercise or defence of a legal or equitable claim".

10.2 Despite 10.1, health information may be collected if it is necessary to provide a health service, collected as required by law or rules established by professional bodies

10.3 & 10.4 Cover health information collected for research or statistical purposes.

Health information means information or opinion about a persons health or disability, expressed wishes for future health services, or a health service provided, or to be provided to a person that is personal information or other personal information collected in providing a health service or in connection with organ donation.

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 person performing it:

(i) to assess, record, maintain or improve the individual's health; or

(ii) to diagnose the individual's illness or disability; or

(iii) to treat the individual's illness or disability or suspected illness or disability; or

(b) the dispensing on prescription of a drug or medicinal preparation by a pharmacist.

Sensitive information includes health information about an individual.

Information collected Prior to the Commencement of the Act:

Section 16C(3) states that National Privacy Principle 6 applies in relation to personal information collected after the commencement of the section. The Principle also applies to information collected prior to commencement, and used or disclosed after commencement, except where compliance would be an unreasonable administrative or financial burden.

Section 16C states that National Privacy Principles 1, 2, 3, 8 & 10 apply only to personal information collected, used, disclosed, or transactions entered into, after the commencement of Section 16C of the Act. National Privacy Principles 4, 5, 7 and 9 apply whenever the information was collected..

Is the New Regime Adequate?

The amended *Privacy Act 1988* (Cth) intends to regulate the "collection, holding, use, correction, disclosure or transfer of personal information". The legislation covers all types of personal information. The idea of regulating privacy and access to health records along with all other records containing personal information has caused some concern. For example, the production of a Privacy Code for an industry where the participants are large and few is much easier than where there are hundreds of thousands of individual operators, such as in the health industry. The very specific arrangements for explanations of health records, timeframe for response to a request, access to certain records by members of a treating team, etc. have not been accommodated in the more general Privacy legislation. A Health Industry Code is likely to be extremely difficult to prepare given the large number of representative organisations for health care providers.

The amendments to the *Privacy Act 1998* (Cth) are certainly a step in the right direction, but at present they m create more complaints than they solve For example, the exceptions to relea of records collected prior to commen ment of the Act are likely to be fr grounds for refusal to release re and subsequent complaints to Privacy Commissioner. The burden the time and cost for explanation records, and the payments reques for such explanations, is also likely be a an area for complaint. The fai to provide in detail for simple matt such as the time within which reco should be released, or written reaso for refusal provided, can be expected provide fertile ground for dispute.

The States and the Commonwealth should be encouraged to continue consideration of specific legislation for privacy and access in relation to health records. This could be done in conjunction with issues surrounding use of electronic health records. PL

Footnotes:

1 *Freedom of Information Act 1982* (Cth)

2 For example, *Freedom of Information Act 1989* (NSW) and *Freedom of Informat Act 1982* (Vic)

3 *Private Hospitals Regulation 1996* (N *Day Procedures Regulation 1996* (NS *Nursing Homes Registration 1996* (NS

4 The Parliament of the Commonwealt of Australia. *Access to Medical Records.* Report of the Senate Community Affa Reference Committee June 1997. pp 2-3

5 *Breen v Williams* (1995-1996) 186 C

6 RACGP Evidence at The Parliament the Commonwealth of Australia, Se Committee Hearings, concerning Acce *to Medical Records*, Transcript of Eviden p 63

7 RACGP Membership Survey October-December 1996, p 7.

8 The Parliament of the Commonwealth of Australia. *Access to Medical Records.* Report of the Senate Community Affairs Reference Committee June 1997. p 23.

9 Ibid. pp 13-14.