



Hazards in Handling Health Records

Overview

The *Privacy Act 1988* (Cwth) was recently amended by the *Privacy Amendment (Private Sector) Act 2001* (“the Commonwealth Act”), which extended privacy principles to the private sector, with its National Privacy Principles (NPP’s). The *Information Privacy Act 2000* (Vic) basically mirrors the provisions of the Commonwealth Act, providing a set of Information Privacy Principles (IPP’s).

Since 1 July 2002, *The Health Records Act 2001* (Vic) (“the Victorian Act”) regulates the collection and handling of health information. The Act is designed to complement the *Information Privacy Act 2000* (Vic), and thereby fulfilling the need for specific protection for health records.

The Victorian Act establishes privacy principles to regulate the handling of health information.

It includes an access regime which is designed to protect privacy.

The key features of the Act are as follows:

- it gives individuals a legally enforceable right of access to health information about them that is contained in records held in Victoria by the private sector; and

- it establishes Health Privacy Principles (HPPs) that apply to health information collected and handled in Victoria by both the public and private sector.

The Victorian Act applies to the health, disability and aged care information handled by a variety of public and private sector organisations. These may include (for example) sole practitioners, dentists, public hospitals and local government agencies.

In the case of organisations that only partially provide health services, such as a company nurse or first aid officer, the organisation will be defined as a “health service provider” to the extent of those services.

The HPPs apply to the collection, use and handling of identifying personal information that is defined as “health information” under the Victorian Act. “Health information” includes:

- Information or opinion about the physical or mental health or disability of an individual;
- An individual’s expressed preferences about the future provision of health, disability or aged care services to him;
- Information about an individual collected in the course of providing a health, disability or aged care service to an individual;
- Personal information collected in connection with the donation of human tissue;
- Genetic information that is or could be used to predict an individual’s health or their descendants’ health.

Examples of health information include:

- Employee medical records;
- Drug testing results;
- Pre-employment medical examinations;
- Workers’ compensation claims;

- Superannuation / life insurance questionnaires.

Any organisation that handles or manages this kind of identifying health information is subject to the HPP's.

What is the situation with regards to health information located interstate, for example, personnel records held in an organisation's Brisbane office where the head office is in Melbourne? The Victorian Act states that records held interstate, but controlled by or in the possession of a Victorian organisation, come within the ambit of the Victorian Act.

One of the most important implications of the Victorian Act for organisations that handle health information is that individuals now have the right at common law to have access to their health records created in the private sector, as well as strengthening rights of access to their records held in the public sector.

It should be noted that individuals would not have an enforceable right of access to health records that were produced before this legislation came into effect.

Health Privacy Principles

1. Collection of health information

An individual's consent must be obtained and the collection must be necessary for the organisation's purposes. The individual must be informed of the identity of the organisation, and its contact details, their right of access, the reason for collecting the information and to whom it will be disclosed. The individual should also be informed of the consequences of not providing full information to the organisation.

2. Use and Disclosure

The organisation must only use or disclose health information for the primary purpose for which it was collected, or for a directly

related secondary purpose which would be reasonably expected by the individual.

Examples of use of health information which would come within the reasonable expectation of the employee, would include:

- Workers' compensation claims, and workcover prosecutions;
- Superannuation;
- Occupational health and safety audits; and
- Performance reviews.

3. Data quality

Organisations must ensure, to the best of its ability, that an individual's personal information which is collected, used or disclosed, is accurate and up-to-date.

4. Data security and retention

The organisation must ensure that the health information is accurate, up to date and relevant to its functions. One way that an organisation may ensure that the health information is up to date is to create a company policy of annually reviewing all health information about all employees. An organisation should also destroy or de-identify all old information, for instance, all health information about employees, which is over 7 years old.

The organisation should also safeguard the information against loss, unauthorised access or modification.

5. Openness

As with the NPPs, organisations are encouraged to create a Privacy Policy detailing their compliance with the privacy legislation. In order to ensure compliance with the Act, organisations should clearly set out in a Privacy Policy their policies on the management of health information

6. Access and correction

The Policy should also details the steps to be taken by individuals to obtain access to their health records.

7. Identifiers

Identifiers are codes which are allocated by another organisation or entity which identifies an individual without using his/her name. Identifiers used by other organisations should not be used or disclosed without the individual's consent.

8. Anonymity

Where possible, individuals should be able to transact anonymously with the organisation.

9. Transborder data flows

An individual's information cannot be transferred out of Victoria unless a similar privacy regime exists in the relevant jurisdiction.

10. Transfer or closure of practice of health service provider

The health service provider must advise the public by an advertisement in a newspaper stating that the provider is being closed or transferred and the way in which it intends to manage the health information that it holds about individuals.

11. Making information available to another health service provider

If an individual requests a health services provider to make his/her health information available to another organisation, the health services provider must comply with the individual's request.

Right of Access

Access by individuals to records created after the commencement of the Victorian Act (1 July 2002) can occur by:

- Inspection;
- Provision of a copy or a summary (if the individual agrees); or
- An opportunity to view the record, together with an explanation by the health service provider.

In circumstances where the health services provider agrees, an individual may have access to records created before 1 July 2002. In the absence of agreement, the individual is entitled to receive an accurate summary of the information. However, there is no right of access to "non-factual" information (such as practitioners' comments) contained in records created before 1 July 2002.

Access rights are limited by the following:

- If a health services provider believes on reasonable grounds that the granting of access would pose a serious threat to the life or health of the individual, or any other person; or
- Providing access would have an unreasonable impact on the privacy of other individuals; or
- The information was given in confidence by a third party (this limit is overcome with the consent of the third party); or
- If the request is unreasonable;
- If legal professional privilege applies;
- If the information is commercially sensitive;
- If providing the information would prejudice a law enforcement function of a law enforcement agency;
- A similar request has been refused before and there are no reasonable grounds to grant the request again;
- If the refusal is authorised by law; or
- If the request is frivolous or vexatious.

Breach

If an individual believes that his/her privacy has been compromised, a complaint may be made to the Victorian Health Services Commissioner. If the complaint is dismissed, the complainant may take no further action. However, if the Commissioner refuses to hear a complaint the matter may be referred to the Victorian Civil and Administrative Claims Tribunal.

The Commissioner may also decide to serve a compliance notice on organisations which, in his view, have breached an HPP in a serious manner, or if there have been repeated breaches over 2 years. Non-compliance with the notice is an indictable offence. However, it should be noted that the Commissioner has no general powers to monitor or audit an agency that holds health information, without initial concerns that a serious privacy breach has occurred.

Comparison with NPPs

Unlike the Commonwealth Act, the HPPs apply to all organisations regardless of size. There is no “small business” exemption.

The Commonwealth legislation is silent on the implications of obtaining personal information from a third party, such as a referee. One could conceive of a situation whereby the individual has not consented to the disclosure of his/her personal information by the third party to the organisation, thereby breaching NPP 2.1, which allows the disclosure of an individual’s personal information only in certain circumstances.

However, section 27 of the Victorian Act provides that access to health information should not be given where the health information was originally given in confidence, and on the understanding that it would not be provided to the individual about whom it relates. Organisations are required to comply with HPP 1.7 in this situation.

The Commonwealth Act exempts health information contained in records of current or former employees. The Victorian Act does not mirror this exemption. This has real implications for organisations defined as coming within the ambit of the Victorian Act.

Other key differences are as follows:

The Victorian Act applies to the records of deceased persons who have been dead for 30 years or less, whilst the Commonwealth Act does not address this issues.

MPs and other political figures are not exempt from the provisions of the Victorian Act, whilst they are exempt from the effect of the Commonwealth Act.

Transfer or sale of business

As noted above, HPP 10 regulates how an organisation deals with its health records when the health services provider is sold, transferred, amalgamated or closed down.

In these circumstances, HPP 10.2(a) states that an organisation must publish a notice in a newspaper setting out the details of the change in ownership, and what the organisation intends to do with the health information held by the practice or business.

The organisation may elect to retain or transfer the health information to the entity which has taken over the business, or to the individual, or to a new practitioner nominated by the individual.

In the case of a sale of a business or practice, the transfer of health

information in an original record to the buyer of the business in accordance with HPP 10 will not contravene the other HPPs. Accordingly, the Victorian Act does not require consent of individuals for such a transfer.

The Victorian Act is not intended to stop health services providers from taking any steps that they feel appropriate, in relation to the needs of their patients, regarding the sale, transfer or closure of a practice or business.

Conclusion

The Commonwealth privacy regime states that its provisions do not affect the operation of a State law concerning the management of personal information, and will exist concurrently with a State system. However, if there is an inconsistency between the regimes, the Commonwealth provisions will apply. Practically, this will have a confusing outcome for health care providers as well as individuals.

However, the main purpose of the Victorian Act is to regulate the management of health information, and in particular, to allow both increased access to and protection of records. If these aims are achieved, one would deem the operation of the Victorian Act a success, despite the creation of several "grey" areas with regards to potential inconsistencies with the Commonwealth Act.

The law is current as at March 2007.

Please note that this paper is a summary of the law only and is not a substitute for legal advice.

Holley Nethercote is able to assist companies in meeting their obligations in this area by providing practical and prompt legal advice. Training and creation of compliance programs are also available via an associated business, Compact- Compliance and Corporate Training. We invite you to contact Holley Nethercote:

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