HEALTH RECORDS PRIVACY: CONTEMPORARY ISSUES, COMPLAINTS AND CLAIMS

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Holman Webb acted in *Sampson & Harnett*, which is reported under a pseudonym.

Health information can reflect a person's medical condition (including HIV status), mental health, lifestyle, sexual preference, personal history (in terms of sexual or other abuse), family and beliefs. This information can be valuable not only in terms of clinical care but also in relation to medical research, population planning, genetic profiling, personalised medicine, workers compensation, insurance profiles and, in cases dealing with paternity, custody and other disputes.

In the Australian Privacy Commissioner's *Pound Road Medical Centre – Own motion investigation report* of July 2014, the Commissioner states at page 5 that: '[the] Privacy Act affords sensitive information, such as health information, a higher level of privacy protection than other personal information. This is because inappropriate handling of sensitive information can have particular impacts on the individuals concerned. For example, some kinds of sensitive information, such as health information which identifies an individual's medical condition (a) may provide the basis for discrimination or other forms of harm; and (b) mishandling of this information may lead to humiliation or embarrassment, or undermine an individual's dignity.'

Australian privacy legislation relevant to health records

Australian privacy rights are regulated by Commonwealth and State legislation and the laws protecting confidential information under the common law, including the following:

- the *Privacy Act 1988 (Cth)* (Privacy Act);
- the *Healthcare Identifiers Act 2010 (Cth)*;
- the *Personally Controlled Electronic Health Records Act 2012 (Cth)*;
- the *Health Records (Privacy and Access) Act 1997 (ACT)*;
- the *Health Records and Information Privacy Act 2002 (NSW)*; and
- the *Health Records Act 2001 (Vic)*.

Snapshot

- The 'big data revolution' in healthcare has increased the demand for access to identifying health information without consent.
- In May 2015, the government released the *Electronic Health Records and Healthcare Identifiers: Legislation Discussion Paper*.
- Currently, the Personally Controlled Electronic Health Record (PCEHR) system is an opt-in system. The proposal is to trial an opt-out system. If this system is approved, every Australian with a Medicare number will have an electronic health record unless they opt out. The data revolution and the PCEHR discussion paper raise contemporary issues for discussion regarding privacy and health information.

The Commonwealth *Privacy Act* applies to 'organisations' such as Commonwealth agencies, private sector organisations with an annual turnover above $3 million, and private sector health service providers which collect health information except in an employment record (ss 6C and 6D). Penalties under the *Privacy Act* can amount to 2000 penalty units ($340,000) for individuals, or up to five times that for body corporates ($1.7 million) for serious and repeated offences.

Special provisions in relation to health information

Health information (such as medical records) is a subset of 'personal information' and 'sensitive information' and attracts additional protection.

The *Privacy Act* includes 'permitted health situations' in relation to the collection, use or disclosure of health information, for example, the collection of health information is necessary to provide a health service to the individual (s 16B(1)).

Other provisions with particular application to health records include:

- use and disclosure permitted if there is a serious and imminent threat to the health and safety of an individual or the public (s 16A);
- disclosures to individuals who are responsible for the person for compassionate reasons (s 16B(5));
- restrictions on access if providing direct access would pose a serious threat to the life or health of any individual (*Australian Privacy Principle* 12.3);
- the collection of family, social and medical histories (Public Interest Determination No 12A); and
- use and disclosure of genetic information to lessen or prevent a serious threat to a genetic relative (s 16B(4)).

Innovation, research, privacy and the big data revolution in health care

Section 16B(2) of the Act also provides that a 'permitted health situation' exists if:

(a) the collection of health information about an individual is necessary for any of the following purposes:
  (i) research relevant to public health and safety;
  (ii) the compilation or analysis of statistics relevant to public health or public safety;
  (iii) the management, funding or monitoring of a health service; and

(b) that purpose cannot be served by the collection of information about the individual that is de-identified information; and

(c) it is impracticable for the organisation to obtain the individual's consent to the collection; and

(d) any of the following apply:
  (i) the collection is required by or under an Australian law (other than the *Privacy Act*);
  (ii) the information is collected in accordance with rules established by competent health or medical bodies that deal with obligations of professional confidentiality which bind the organisation;

(iii) the information is collected in accordance with guidelines approved under s 95A for the purposes of subparagraph 16B(2).

Under the guidelines approved under s 95A of the *Privacy Act*, the approval of a human research ethics committee is required. With interest in the 'big data revolution' and increasing innovation in health and aged care, there is an increased interest in accessing identifiable health data held in large databases without consent for research and innovation purposes.

One such database is discussed in a 2013 report from McKinsey&Company, called *The 'big data' revolution in healthcare: Accelerating value and innovation*. Authors Groves, Kayyali, Knott and Kulken say, for example, that the company mHealthCoach 'supports patients on chronic care medication, providing education and promoting treatment adherence through an interactive system. The application leverages data from the [US] Healthcare Cost and Utilization Project, sponsored by the Agency for Healthcare Research and Quality, as well as results and warnings from clinical trials (taken from the US FDA's clinicaltrials.gov site). mHealthCoach can also be used by providers and payors to identify higher-risk patients and deliver targeted messages and reminders to them.' (p 10)

Sample cases in relation to health records

Pound Road Medical Centre

In July 2014, the Privacy Commissioner, in *Pound Road Medical Centre, own motion investigation report,* found Pound Road Medical Centre (PRMC) to be in breach of the *Privacy Act* by failing to take reasonable steps to secure sensitive medical records.

PRMC had stored medical records of approximately 960 patients in a locked garden shed at the rear of premises, which were no longer occupied or used by them. In November 2013, the shed was broken into and the security of the records was compromised. The garden shed door was locked with three padlocks.

The Commissioner noted the seriousness of the breach, as health information is sensitive information and requires a higher level of privacy. The Commissioner stated that the *Privacy Act* requires organisations to take reasonable steps to ensure the personal information of their customers is not inappropriately accessed, such as:

- monitoring the physical movement of files;
- regularly auditing (or stocktaking) the content of files, including when they are moved, to ensure knowledge of the contents and that any information that is no longer required can be securely disposed of or de-identified;
- implementing physical access controls, such as issuing a limited number of keys or passes to areas in which the information is stored;
- monitoring and guarding the location in which the information is stored; and
- using a secure means of storage, such as a safe, or a secure or locked room in monitored, guarded or staffed premises.

Further, the Commissioner did not consider there to be any circumstances in which it would be reasonable to store health records or any sensitive information in a temporary structure such as a garden shed. Most of the records held at the shed related to patients who had visited the centre prior to 2004. Since then, PRMC had moved to storing the medical records electronically, using software called 'Medical Director'. It had, however, failed to take reasonable steps to destroy or de-identify records it no longer used, which is a requirement of the *Privacy Act*.

The Privacy Commissioner found that PRMC failed to take reasonable steps to ensure the security of the personal information it held, and failed to take reasonable steps to destroy or permanently de-identify the personal information it held. PRMC agreed to undertake a risk assessment of the way it manages personal information, including reviewing its privacy policy, organising training for staff, and developing a data breach response plan.

Sampson & Harnett

Sampson & Hartnett [2014] FCCA 99 is indicative of the unique issues that arise in relation to health records. Healthcare providers have an interest in ensuring victims of sexual assault and domestic violence can seek medical and counselling services without compromising their health, safety and emotional wellbeing.

In *Sampson & Hartnett* a mother brought proceedings in the Federal Circuit Court seeking to vary parenting orders. As part of those proceedings, the father issued a subpoena seeking health and counselling records from the hospital, which had provided health services and counselling to the mother. A mandatory notification had been made to the Department of Family and Community Services by a staff member at the hospital following some matters disclosed in counselling. The hospital objected to producing the health service and counselling records, except for the records relating to the mandatory notification, provided that the name of the informant was redacted from the records. The *Evidence Act 1995* (Cth) applied to the proceedings.

In New South Wales, the *Evidence Act 1995* (NSW) provides specific protections for confidential communications, creating a form of privilege for such communications. These communications include counselling where this occurs in a professional capacity, including for domestic violence and sexual assault. There is also a protected confidences privilege under the *Criminal Procedure Act 1986* (NSW) relating to confidential sexual assault communications.

However these privileges do not exist in the Commonwealth *Evidence Act* and family law proceedings are commonly commenced in the Commonwealth jurisdiction.

In *Sampson & Hartnett*, the Court applied the general rule that evidence that is not relevant in a proceeding is not admissible. The Court upheld the hospital's objection to production of the mother's medical and counselling records on the basis that they were not relevant to the substantive issues in the parenting order proceedings. The sections of the records relating to a mandatory notification that were relevant were required to be produced, but the name of the informant was redacted in accordance with the confidentiality provisions in the *Children and Young Persons (Care and Protection) Act 1998* (NSW). The hospital had objected to the production of the mother's medical and counselling records on the basis of relevance and public policy grounds, in that disclosure of professional confidential records may deter future patients of the health service from attending or participating in counselling and other health services, and would undermine confidence in the health service.

Confidentiality of itself is not a ground for setting aside a subpoena or for objecting to production of documents. Under the Commonwealth Evidence Act, the key issue is that evidence which is not relevant to proceedings is not admissible. Deeper protections exist under the NSW Acts, which create a specific 'protected confidences' privilege. **LSJ**